Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S270326

FAMILY HEALTH CENTERS OF SAN DIEGO,
Plaintiff and Appellant,

v.

STATE DEPARTMENT OF HEALTH CARE SERVICES,
Defendant and Respondent.

Court of Appeal of California
Third District
No. C089555

Superior Court of California
Sacramento County
No. 34201880002953CUWMGDS
The Hon. Steven M. Gevercer

REPLY TO ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

COVER PAGE 1

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

REPLY TO ANSWER TO PETITION FOR REVIEW 4

I. IN ITS ANSWER, THE DEPARTMENT DOES NOT DISPUTE THAT THE SPECIFIC BASIS FOR THE APPELLATE COURT'S PUBLISHED DECISION IS ERRONEOUS..................... 4

II. THE DEPARTMENT'S NEW ARGUMENT, CONFLATING ALLOWABILITY OF COSTS AND RECEIPT OF GRANTS, IS A RED HERRING....... 5

III. THIS CASE MEETS AND EXCEEDS THE THRESHOLD FOR IMMEDIATE REVIEW BY THIS HONORABLE COURT. 7

IV. CONCLUSION 8

CERTIFICATE OF COMPLIANCE 10

PROOF OF SERVICE 11

TABLE OF AUTHORITIES

Page

Cases:

Battle Creek Health Sys. v. Leavitt
(6th Cir. 2007) 498 F.3d 401 4

Catholic Health Initiatives v. Sebelius
(D.C. Cir. 2010) 617 F.3d 490 4

Court Rules:

Cal. Rules of Court, rule 8.500 8

Other:

Provider Reimbursement Manual, § 2136.2 .... 4, 6

Reply to Answer to Petition for Review

I. IN ITS ANSWER, THE DEPARTMENT DOES NOT DISPUTE THAT THE SPECIFIC BASIS FOR THE APPELLATE COURT'S PUBLISHED DECISION IS ERRONEOUS.

The published appellate decision in this case is premised on a misreading and misapplication of section 2136.2 of the Provider Reimbursement Manual ("PRM")[1], which provides, in pertinent part:

> "Costs of ***advertising to the general public*** which seek to increase patient utilization of the provider's facilities are not allowable." (AA 1405; emphasis added.)

Citing that provision, the appellate court concluded it was not an abuse of discretion for the trial court to find that the costs for Family Health's outreach activities were not allowable because those activities had the purpose and effect of increasing utilization of its facilities, making them "akin to advertising." Petitioner argues, as it has throughout, that because its outreach efforts are not anything like advertising to the general public the

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[1] The PRM consists of guidelines and interpretative rules promulgated by the U.S. Department of Health and Human Services to assist providers and intermediaries in the implementation of the Medicare regulations. (See, *Battle Creek Health Sys. v. Leavitt* (6th Cir. 2007) 498 F.3d 401, 404; *Catholic Health Initiatives v. Sebelius* (D.C. Cir. 2010) 617 F.3d 490, 491) The entire PRM can be found online at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021929.

cost of such outreach is not made unallowable under PRM 2136.2. Accordingly, the published appellate decision is wrongly reasoned and wrongly decided. Instead of refuting Petitioner's argument that the appellate' court's underlying analysis is incorrect, the Department argues for the first time, and without any support in the record, that outreach costs should not be allowable because federally qualified health centers ("FQHC") receive grant money for outreach. This new proposition was not presented to or adopted by the appellate court, or even the trial court or administrative appeals forum before it.

In effect, the Department is conceding that the analytical predicate of the appellate decision for which it requested publication is unsupportable. Interpersonal interactions between an outreach worker and a homeless person, for example, about that person's healthcare needs is not in any way comparable to advertising to the general public, and the Department implicitly recognizes that by failing to address that issue head on. Although it seems obvious that a one-on-one, private conversation is not comparable to advertising to the general public, the published appellate decision is based on that untenable proposition.

II. THE DEPARTMENT'S NEW ARGUMENT, CONFLATING ALLOWABILITY OF COSTS AND RECEIPT OF GRANTS, IS A RED HERRING.

Aside from the fact that the "grant" argument made in the Department's Answer to Petition for Review was not previously asserted and has nothing to do with the basis for the appellate court's decision, it confuses two distinct concepts to reach an erroneous conclusion. The Answer equates grant revenue with

reimbursable costs, asserting, with no supporting authority or reference to the record, that since clinics are already "paid" for outreach via grant funding, the costs of outreach are not permitted to be claimed in the cost report. Grants constitute funding for specific new or expanded programs, a process which is entirely distinct from the question at issue here of whether outreach costs are properly included in an FQHC's Medi-Cal cost report for purposes of calculating its rate per visit for providing covered medical services to Medi-Cal beneficiaries. Grant funding is just that, funding for specified FQHC programs, and bears no relationship to the determination of what constitutes an allowable cost in an FQHC's Medi-Cal cost report, which is the issue here.

The PRM, Part 1, Chapter 6, titled "Grants, Gifts, and Income from Endowments" provides in section 600:

> "For cost reporting periods beginning on or after October 1, 1983, *grants* … whether or not the donor restricts the use for a specific purpose, *are not deducted from a provider's operating costs in computing reimbursable cost.* For periods beginning prior to October 1, 1983, restricted grants, gifts, or endowment income designated by a donor for paying specific operating costs were deducted from the particular operating cost or group of costs." (Italics added.)

Thus, according to the PRM itself, even if grant funds had been available for the particular outreach efforts at issue (which was never established in this case), that would not have been a proper

basis for the Department to determine that outreach was not an allowable cost and the Department never asserted that as a basis for disallowing the outreach costs at issue in this case.

Although the Department's Answer states that "[t]he effect of the Court of Appeal's decision is simply to deny FQHCs *additional payment*, via Medi-Cal reimbursement, for these outreach costs that are already funded through a separate federal grant" (p. 12), the Department offers no support in the record or otherwise that any portion of the outreach costs at issue were funded through any federal grant. (Italics in original.) Apparently, the Department is attempting to make a "no harm, no foul" pitch to the effect that even if the appellate decision was wrongly decided, not many people will be hurt by it because FQHCs will have grants available for conducting outreach. But again, there is no support in the record or applicable law that grants will fill the gap if outreach costs are not allowed for reimbursement. Indeed, if that were the case, why did not the Department make that argument during administrative proceedings or in opposing the petition for writ of mandate in the Superior Court or on appeal? The Department's discussion of grant funding in this context is nothing more than a red herring.

III. THIS CASE MEETS AND EXCEEDS THE THRESHOLD FOR IMMEDIATE REVIEW BY THIS HONORABLE COURT.

If the published Court of Appeal decision stands and outreach costs are not allowed for reimbursement, there will be less outreach conducted. If less outreach is conducted, many indigent and otherwise at-risk members of society will not receive critical

health services. In all likelihood, a number of those will get very sick, and some will die. Hence, the legal question of whether outreach costs are "allowable" necessarily presents "an important question of law" for purposes of rule 8.500 (b) (1) of the California Rules of Court. The question of law presented in this petition is literally a matter of life and death. Tragic outcomes for the needy among us can be avoided only if this Court intervenes to grant review at this time. Certainly, this case meets and exceeds the criteria for Supreme Court review.

IV. CONCLUSION

The Department does not dispute in its Answer that a private conversation between an outreach worker and an indigent person about healthcare is not "advertising to the general public" for purposes of PRM 2136.2. Yet, that erroneous view was the basis for the appellate decision at issue, which the Department requested to be published.

Petitioner and various amici have explained to this Court that the appellate decision will have severe, adverse consequences for medically at-risk California residents because it will result in outreach efforts being curtailed. In response, the Department proposes for the first time in its Answer to Petition for Review that FQHCs can find some unspecified grant money to cover the cost of outreach. However, there is no basis in the record to support that assertion and the Department cites no specific authority that FQHCs like Family Health would receive grant funds sufficient to make up the loss.

This Court's immediate intervention is urgently needed. It is respectfully requested that this Honorable Court grant the Petition for Review and entertain briefing on the merits.

Respectfully submitted,

Dated: September 8, 2021 By: /s/ George Murphy

Attorney for Plaintiff and Appellant
Family Health Centers of San Diego

CERTIFICATE OF COMPLIANCE

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Dated: September 8, 2021 By: /s/ George Murphy

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California Court of Appeal, Third Appellate District

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S270326**
Lower Court Case Number: **C089555**

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Date

/s/George Murphy
Signature

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