

1986

# Weber Memorial Care Center v. Utah Department of Health : Reply Brief

Utah Court of Appeals

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DOCKET NO. 860342-CA UTAH COURT OF APPEALS

WEBER MEMORIAL CARE CENTER,  
INC. and CHARTHAM MANAGEMENT,  
INC.,

Plaintiffs/Appellants

vs

UTAH DEPARTMENT OF HEALTH,  
DIVISION OF HEALTH CARE  
FINANCING,

Defendant/Respondent.

Case No. 860342 - CA

\* \* \* \* \*

REPLY BRIEF OF APPELLANTS  
WEBER MEMORIAL CARE CENTER, INC., and CHARTHAM MANAGEMENT, INC.

\* \* \* \* \*

Appeal from the Third Judicial District Court  
of the State of Utah in and for the County of Salt Lake

\* \* \* \* \*

THE HONORABLE SCOTT DANIELS, District Judge

\* \* \* \* \*

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Priority Classification: 14.1a.

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Court of Appeals

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Appellee, Utah Department of Health, Division of Health Care Financing, having filed its Brief, Appellants now submit their Reply Brief.

# I

## THE UTAH STATE MEDICAID PLAN IS DEFECTIVE IN THAT IT FAILS TO COMPLY WITH THE SUBSTANTIVE LIMITATIONS OF THE FEDERAL STATUTE.

In its responsive brief, as it did throughout the lengthy proceedings below, the State Department of Health continues a familiar theme. Its ideal world is one in which it is never bothered by providers about rates, insulated by the impenetrable wall, the flat rate, and its apparently sincere belief the flat rate is not subject to judicial review, much less that the Department should be subjected to the annoying task of listening to a provider's evidence concerning costs and efficiencies.

If the Department's view of the law holds true, then indeed providers are truly at the mercy of the government, having virtually no opportunity to be heard regarding the application of the rates to them. The State's answer to providers who have complaints about the application of the rate is essentially, "be satisfied with the rates or get out." While this may certainly be a convenient way for the Department to deal with this problem, it hardly comports with ordinary notions of due process, much less the plain language of the statute and regulations.

Appellant does not argue with the proposition that the statute 42 U.S.C. § 1396(a)(13)(A), the so-called "Boren Amendment," was intended to give the states greater flexibility in administering their Medicaid programs. However, it must be kept in mind at all times, that the Medicaid program is indeed a federal program, determined by federal statutes and regulations, and given the massive federal outlay for this program,<sup>1</sup> it can hardly be said that it was Congress' intent to give the states totally free and unfettered discretion in which to conduct their Medicaid programs. Clearly, while states do have some flexibility in the implementation of their individual Medicaid programs, each state, like it or not, is tethered to the federal requirements beyond which they might not go. Harris v. McCray, 448 U.S. 297 (1980). There is a responsibility which comes with the federal match, and when there is a question as to whether that state responsibility has been violated, can the states be heard to say that the flexibility granted the states by Congress leaves the Courts powerless to decide such a question? Apparently, the Department wishes to confuse flexibility and discretion with license. They refuse to accept the fact that Congress,

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<sup>1</sup> Under current law, the federal government and the various state governments are expected to spend \$25.9 billion and \$21.3 billion respectively in 1987 to finance health care for indigent Americans. Office of Management and Budget, Executive Office of the President, Budget of the United States Government, at 5-102 (Fiscal Year 1987).

by virtue of the statute itself and its plain language, placed certain "substantive limitations" upon state Medicaid plans and rates. Thomas v. Johnston, 557 F.Supp. 879 (W.D.Tex. 1983); Nebraska Health Care Association v. Dunning, 778 F.2d. 1291 (8th Cir. 1985). The very essence of Appellants' claim is that the State has exceeded or ignored those substantive limitations. In the Senate Report quoted by the Appellee in its brief, the Committee, while noting the increased flexibility of the new statute, still recognized the underlying federal law.

The Committee Bill deletes the present language . . . and substitutes language which gives the states flexibility and discretion, subject to the statutory requirements of this section to formulate their own methods and standards of payment.

Senate Report No. 96-471, 96 Congress, 2nd Session, reprinted in 4 CCH Medicaid and Medicare Guide, paragraph 24,407 at H780-81 (1981), quoted in Brief of Appellee at 9. At all times, then, whatever payment system is developed by a state, that system is indeed subject to the "statutory requirements." As already pointed out in the opening brief at length, the statutory requirement is that rates be "reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities." 42 U.S.C. § 1396a(a)(13)(A).

In its brief, the state makes much of the fact that the nursing home industry apparently did not voice great opposition

to the proposed flat rate system at the time it was being considered. Of course, the nursing home industry has no lawmaking authority. Additionally, aside from the nursing home industry's position being generally irrelevant as to the issue of whether the plan adopted meets the statutory requirements, it is particularly irrelevant as applied to the Appellants here. First, Appellants were not the owners of Weber Memorial at the time the flat-rate system was adopted. Secondly, as the record will reflect, the industry, upon threat of moving to a much less desirable, almost punitive, reimbursement method, acceded to the flat-rate idea. The State would posit, in essence, that the providers were virtually uniform and vigorous in their support for a wonderful new system, the "flat rate." The State seems to be asserting some type of estoppel defense here. However, Mr. McFall points out that there was a very real threat being made by Mr. Mason, the Executive Director of the Department of Health, that a 51st percentile system would be adopted if the providers did not agree to something else. Many of the providers, wishing to avoid the percentile system, then, were persuaded to support the flat rate plan. Transcript at 160.

The State maintains that "the Federal Government has permitted States to define efficiency and economy in terms of the rate itself." Brief of Appellee at 14-15. It cites the preamble to the regulations composed by the federal agency from the Federal Register, wherein it is stated that:

We have also decided not to mandate that the states' plans specifically provide a definition of 'efficiently and economically operated facility.' The reason for this is that the states methods and standards implicitly act as the states' definition of an efficiently and economically operated facility and no explicit definition is necessary.

Federal Register, p. 56049 (1983). It should be emphasized that the comments from the Federal Register do not appear in the regulations themselves, nor do they refer to a flat-rate reimbursement system. Further, even if this statement is taken as a correct statement of the law, which Appellants do not concede, it still requires that the underlying rates are developed through "methods and standards which meet Federal requirements." It is this circuitous statement from the federal agency which apparently lies at the heart of the hearing officer's decision, (Addendum to Brief of Appellant at 10-11), as well as the District Court's finding. As was pointed out previously, acceptance of the notion that the rate acts as the definition of "efficiently and economically operated" for purposes of testing compliance with the statute, essentially leaves us without a standard at all.

The State describes at length the history of the previous statutes as compared to the current statute, yet is never able to explain away the fact that Congress set a substantive standard as mentioned above. Either Congress meant what it said or it did not. Appellants argue that it did, Appellees argue

that it did not. The words of a statute should be "interpreted strictly as they are plainly written." Board of Education of Granite School District v. Salt Lake City, 659 P.2d 1030, 1035 (Utah 1983). See also, Maine v. Thiboutot, 448 U.S. 1 (1980); Grant v. Utah State Land Board, 485 P.2d 1035 (Utah 1971).

The Appellee cites Mary Washington Hospital, Inc. v. Fisher, 635 F.Supp. 891 (E.D.Va. 1985), for the proposition that it need not make written findings. While this is a rather tenuous proposition in itself, even if assumed to be an accurate statement of law, the State fails to point out where its "unwritten" findings are.

Also cited is Coalition of Michigan Nursing Homes, Inc. v. Dempsey, 537 F.Supp. 451 (D.C.Mich. 1982), in support of Appellee's argument concerning the definition of "economically and efficiently operated." Appellee refers to the decision as a rejection of the idea that "federal regulations require a review of all facilities on an individual basis to determine the impact of the [rate]." Brief of Appellee at 16. However, the decision should be read in context. First, it should be kept in mind that the case was a preliminary injunction action, and the standard is somewhat different. Secondly, with respect to the Plaintiff's claim that "the rates as a whole do not reflect provider's costs," Id. at 463, the Court merely held that the provider had not "provided sufficient facts, nor framed the issue of this motion in a manner which allows the Court to address the much

broader question." Additionally, the quoted portion of the case, See Brief of Appellee at 16, refers to 42 C.F.R. § 447.255, a regulation which required that "quantified estimates" be submitted when the state made a "significant change in its methods and standards for determining the rates." Id. The Court simply found that the particular rate change in question was not a "significant change" in the state's methods and standards. Keep in mind that the rate change in Michigan was a relatively modest amendment to the existing state plan and was not a major change in reimbursement methodology, contrary to the case in Utah when the state converted from the pre-Boren Amendment reimbursement system to the flat rate system. Therefore, the portion of the Dempsey case referred to by the Appellee has no application here.

The State next argues that "there is nothing in the record to indicate that the rate was set arbitrarily or capriciously." Brief of Appellee at 17. However, to the contrary, the record demonstrates that the rate setting process itself was conducted in an arbitrary manner. The State admits that it never conducted any examination of any facility at the time it formulated the flat rate. See e.g., Depositions of F. Roy Dunn, Sharon Wasek; Transcript at 690-92. The State acknowledges, that it has no real knowledge of the actual operations of any facility. Transcript at 26; 32; 154.

As pointed out in some length in Appellant's opening brief, the "findings" and "assurances" requirements of the federal regulations are not merely surplusage. That is, they are intended to require the states to conduct some type of "objective analysis" which will provide a basis for the assurances to the federal government that the rates are reasonable and adequate to meet the cost of economically and efficiently operated facilities. Nebraska Health Care Association, supra; and Thomas v. Johnston, supra. Apparently because the flat rate was unanimously adopted, and then approved and certified by the Department of Health and Human Services, the State feels it is insulated from any inquiry as to the underlying basis of those findings and assurances. However, for the Appeal provisions cited earlier to have any meaning at all, the provider must have this opportunity. Certainly a fact-finder may disagree with Weber Memorial's contention that it is efficiently and economically operated under the circumstances, but it must have the opportunity to make that showing. Otherwise, the appeals process is obviously not meaningful. Mary Washington Hospital, Inc., supra.

## II

### THE EVIDENTIARY RULING

The Appellee steadfastly defends the ruling below in which proffered evidence of Weber Memorial's costs and efficiencies was found inadmissible. Brief of Appellee at 25-31. The Appellee maintains this evidence is totally irrelevant. Because it is no longer constrained by the pre-Boren Amendment, "reasonable costs" standard, Appellee takes the position that it no longer need be bothered by any concern for costs. However, the Appellee does concede that costs may be considered in a rate appeal which concerns "the needs of medicaid recipients." Brief of Appellee at 27-28.

The simplest answer to the Appellee's position is that it is directly contrary to the applicable regulations. 42 C.F.R. § 447.253 states that:

The Medicaid agency must provide an appeals or exception procedure that allows individual providers an opportunity to submit additional evidence and receive administrative review ... of payment rates.

(Emphasis added). Appellee brushes aside the import of the regulation by indicating that the regulation "allows maximum state discretion in establishing such appeals or exception process." Because the rate acts as the definition of "efficiently and economically operated facility," the State maintains, all providers are lumped together, and presumably, the reference to "individual providers" and the "opportunity to submit additional

evidence" has no meaning. Brief of Appellee at 37. However, the federal agency responsible for administering and regulating the Medicaid program clearly had much more in mind when it drafted the appeals procedure requirement.

In general the September 30, 1981 interim final regulations implemented these statutes [42 U.S.C. § 1396a(a)(13)(a)] by providing for:

\* \* \*

A requirement that States develop appeals procedures that will give individual facilities an opportunity to seek administrative review of their payment rates.

(Emphasis added). 48 Fed. Reg. 56,046-47 (Dec. 19, 1983).

Further, the agency pointed out that:

In response to the concern regarding a State explanation as to why a provider is not considered an efficiently and economically operated facility, we would note that HCFA regulations at 42 CFR § 447.258 include a requirement that the State agency must provide an appeal procedure to address the expressed concern of those individual facilities who believe they are efficient and economical but are being adversely affected by a State's payment rate.

(Emphasis added). 48 Fed. Reg. 56,050 (Dec. 19, 1983). The agency also stated that, "We believe that fair and reasonable adjustments are implicit in an appeals process. . . ." Id. at 56,052. See also, Mary Washington Hospital, Inc. v. Fisher, 635 F.Supp. 891, 906 (E.D.Va. 1985). It doesn't seem that the message could be any plainer: the appeals process must permit "individual facilities" the opportunity to seek administrative

review of "their payment rates" and to address their concerns that they are efficiently and economically operated and are yet not having their costs met, and that, if the agency is thusly convinced, to seek "fair and reasonable adjustments" to the rates paid them.

If an individual provider is to obtain a rate adjustment, it seems obvious that the "additional evidence" which the agency must hear includes evidence regarding the provider's costs and efficiencies.

Even if it is accepted arguendo that the general rates set by Utah are not in violation of federal law, those rates may still not be in compliance with the law when applied in a particular case. As the Court in Mary Washington Hospital, supra, stated:

While the Court has determined that the general rates Virginia has set for hospital reimbursement are not in conflict with the governing federal law, this conclusion does not mean, however, that those general rates will be adequate in every case. For a variety of reasons, reasonable general rates may not be reasonable and adequate in particular cases to assure reasonable access and to cover the costs of efficiently and economically running a hospital. This may be due to some special fact about a hospital or group of hospitals that the state did not take into account in setting the general rate. Or, although a general rate may originally have been adequate for a given hospital, it may become inadequate when technology or other circumstances necessitate a change in the service being provided.

Whatever the reason, the appropriate way to deal with this problem . . . is through some form of appeals or exception process. In fact, the more general the rate-setting system is, [such as Utah's statewide rate system], the stronger the need for some appropriate method of accommodating particular situations that the general rules do not adequately address. . . . If, at the other extreme, a state fixed a single reimbursement rate across the state, there would almost certainly be a need for a broader form of appeal or exception process that would allow individual hospitals relief from the general rule.

(Emphasis added in part). Id. at 903.

Weber's appeal hardly raises the specter referred to by the State, in which "bitter disputes" will rage "over whether snowmobiles could be considered a 'reasonable expense' related to patient care." Brief of Appellee at 30. Weber Memorial has been attempting for almost four years now to make a simple point: that the general rate set by the State, given the special historical circumstances of Weber Memorial, including the transition from a public to a private facility, its special mix of patients requiring extraordinary care and services, etc., in Weber Memorial's particular case, is not reasonable and adequate to meet its costs. Additionally, Weber Memorial has been prepared for all these years to demonstrate that, under the circumstances, it is indeed an efficiently and economically operated facility. To date, no-one has been willing to listen to evidence of this nature.

The other interesting point made by Appellee in this regard is that rate appeals are apparently acceptable if they concern "patient care," but not if they affect only the provider. Brief of Appellee at 26. How it is possible to neatly separate the interests of the providers and patients is not explained. As one Court recently held:

Private health-care providers caring for Medicaid patients . . . also have a direct financial interest in the availability of Medicaid reimbursement. In several cases, courts have permitted providers to bring actions to enforce the Medicaid statutes. California Hosp. Ass'n v. Obledo, 602 F.2d 1357 (9th Cir. 1979); Massachusetts Gen. Hosp. v. Weiner, 569 F.2d 1156 (1st Cir. 1978); California Ass'n. of Bioanalysts v. Rank, 577 F.Supp. 1342, 1347 n. 6 (C.D. Cal. 1983). These cases have recognized that Medicaid patients and health-care providers have parallel interests with respect to Medicaid funding and reimbursement.

(Emphasis added). Coos Bay Care Center v. State of Oregon, Department of Human Resources, 803 F.2d 1060, 1063 (9th Cir. 1986). In reality, almost every rate appeal case will affect the "parallel interests" of the patients and providers. In fact, in many respects, the provider has a more direct interest. It is certainly the provider, not the patient, that must "incur costs" in providing care in conformance with federal and state laws and regulations. It is the provider which must conduct his operations in an "efficient and economic" manner so as to be eligible for reimbursement. It is the provider that has the economic

stake in making certain that state Medicaid plans, at least their reimbursement aspects, are conducted in accordance with the federal statute and regulations.

At one point Appellee states that, "[i]f Weber Memorial had come to the hearing offering evidence that it cared for a patient group with specialized needs, such evidence would have been admissible," (Brief of Appellee at 28), and later asserts that Weber's concerns and evidence concerning the misclassification of a large number of patients is "even less substantial than the previous arguments." Id. at 31. Not only is the position self-contradictory, but apparently fails to recognize that there is a connection between the misclassification and the failure of the rates to meet the "reasonable and adequate" standard. In Thomas v. Johnston, 557 F.Supp. 879, 893 (W.D. Tex. 1983), the Court found it "highly relevant," in determining whether the rates were reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities, that some providers "are responsible for the care of a greater proportion of persons whose needs are greater, and therefore whose care is more costly than other providers." Id. This is precisely the point Appellant has raised throughout the proceedings below, but which fell upon deaf ears. See, e.g., Brief In Support of Retention for Judicial Review at 27-28; Hearing Transcript at 463-66.

### III

#### STANDARD OF REVIEW

The State misperceives Appellant's point with respect to the standard of review. Appellant does not disagree that the statutory standard, U.C.A. § 26-23-2, would apply to findings of fact. However, an appellate court need not apply that deferential standard to questions of law. This is clearly pointed out in the Salt Lake City Corporation v. Department of Employment case, and is axiomatic. There would really be no purpose for appellate courts if they were always required to defer to the legal conclusions of lower courts. Appellee has pointed to no exceptions to the rule that as to questions of law, the "review is plenary with no deference accorded the administrative determination." Salt Lake City Corporation v. Department of Employment, 657 P.2d 1312, 1316 (Utah 1982).

Not only would the State have itself insulated from judicial scrutiny by its proposition that the State agency has total discretion with regard to findings and assurances and its contention that it does not have to hear evidence from an individual facility regarding costs and efficiencies, but also in its contention that the standard of review is such that an appellate court must apply the extremely deferential standard to conclusions of law as well as to findings of fact. It is submitted that this is simply not the standard in Utah or any other jurisdiction.


#### IV

#### CONCLUSION


Based upon the arguments submitted herein and in Appellant's previous brief, Weber Memorial would again respectfully request that the Court rule that the flat rate system is in violation of federal law. Alternatively, Appellant requests the opportunity to submit evidence to the District Court or a hearing office, with the opportunity to demonstrate that it is an efficiently and economically operated facility within the meaning of federal law, yet is not having its costs met within the flat rate. Additionally, Weber Memorial also seeks a reversal of the previous rulings concerning the classification of patients.

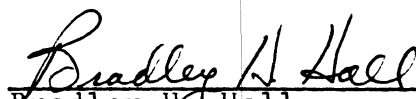
DATED this 11 day of June, 1987.

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CERTIFICATE OF MAILING

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