8087

RICHARD S. COHEN
ATTORNEY GENERAL

STEPHEN L. DIAMOND
JOHN S. GLEASON
JOHN M. R. PATERSON
ROBERT J. STOLT
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 13, 1980

Peter Mills, Sr., Chairman
Governor's Task Force on
Long-Term Care for Adults
c/o Department of Human Services
State House, Station 11
Augusta, Maine 04333

Dear Mr. Mills:

This letter is in response to your request of March 18, 1980, on behalf of the Governor's Task Force on Long-Term Care for Adults, for a legal opinion from this office on questions pertaining to reimbursement to long-term care facilities under the Medicaid Program administered by the Department of Human Services (hereinafter Department).1/

The questions raised focus on the effect on prices and patient admissions resulting from the role of the Department as the sole agency which establishes standards for long-term health care facilities, licenses them, and pays, pursuant to its own regulations, for the care for approximately 85% of the State's long-term health care clients. While we believe many of the issues raised by the Task Force to be policy matters which must be addressed by the Legislature or administrative officials, we shall endeavor to clarify the legal framework within which such issues may be examined.

1. Statutory and regulatory background of long-term health care. Title XIX of the Social Security Act (42 U.S.C. § 1396, et seq.) authorizes the Department of Health, Education and Welfare (now Department of Health and Human Resources) to

---

1/ Since the Medicaid Program covers nursing home care and not boarding home care, this letter addresses your questions only insofar as they pertain to nursing home reimbursement.

provide substantial funding to states which have approved plans for medical assistance programs. 42 U.S.C. § 1396a(a) specifically details the elements required in order for a state medical assistance program to be approved by HEW. The program must be in effect state-wide, 42 U.S.C. § 1396a(a)(1), and a single state agency must administer or supervise its administration. 42 U.S.C. § 1396a(a)(5). The plan must also provide that the state health agency establish and maintain standards for institutions providing care to Medicaid recipients. 42 U.S.C. § 1396a(a)(9). Payment for long-term care facilities is required to be made by the State Medicaid Agency "on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary [of HEW]." 42 U.S.C. § 1396a(a)(13)(E) and 42 CFR § 447.273. The plan, moreover, must specify items of expense which are allowable costs. 42 CFR § 447.278.

At the State level, 22 M.R.S.A. § 3173 designates and authorizes the Department as the agency administering the medical assistance program. This section, as well as 22 M.R.S.A. § 42(1), empowers the Department to promulgate all necessary and proper rules for the administration of a medical assistance program. 22 M.R.S.A. § 1708(2) mandates that nursing home reimbursement by the Department be on a cost-related basis in accordance with accounting and auditing standards and procedures established by the Department. The Department is also mandated to be the licensing agency for long-term care facilities pursuant to 22 M.R.S.A. § 1811, et seq.

2. Regulation of price by State. You have raised general concerns, first of all, in regard to the situation created by the reimbursement for nursing home services by the Department at rates established pursuant to agency regulation when this purchase of services accounts for approximately 85% of the market. While recognizing that the current reimbursement methodology utilized by the Department has been approved by HEW, you question whether the overall process is legally infirm, particularly in regard to the effect on competition.

Four major statutes, two federal and two state, prohibit anticompetitive practices. 15 U.S.C. § 1 and 10 M.R.S.A. § 1101 prohibit contracts, combinations and conspiracies in restraint of trade. 15 U.S.C. § 45, et seq. and 5 M.R.S.A. § 206, et seq. prohibit unfair methods of competition. While the question of whether the Department's reimbursement scheme involves unlawful, anticompetitive practices raises factual issues which cannot be resolved in the context of this opinion, we shall set out the legal framework in which such a question would have to be considered.

A fundamental issue underlying your inquiry is whether the antitrust laws apply to conduct of the State or State officials. For many years following the United States Supreme Court decision in Parker v. Brown, 317 U.S. 371 (1943), it was commonly believed that a State or State official would not be held liable for violation of the antitrust laws, although a private person acting pursuant to a State policy of non-competition could, under certain circumstances, be held liable. Recent cases lend support to the proposition that action by the State or by a State official may at least be nullified as violative of the antitrust laws if such action promotes an uncompetitive policy which has not been clearly articulated and affirmatively expressed by the State Legislature. Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal. 3rd 431, 579 P.2d 479 (1976). It is even clearer that a private person acting pursuant to State policy will not be immune from application of the antitrust law unless that policy is both "clearly articulated" by the State acting as sovereign and is "actively supervised by the State itself." California Liquor Dealers v. Midcal Aluminum, 48 USLW 4238, U.S. , (1980). Therefore, it may be argued that a policy of noncompetition adopted by a State official or department as a discretionary exercise of general duties does not confer immunity from the antitrust laws, but rather that a specific policy of noncompetition must first be adopted by clear, unambiguous legislative action.

However, any claim that the Department's reimbursement practices violate antitrust law would encounter significant hurdles. First, it would have to be established that the antitrust laws with their statutorily prescribed remedies will be directly applied to the State or State officials as they are currently applied to private individuals. Second, anticompetitive practices would have to be factually demonstrated. Third, it would have to be shown that such practices were not contemplated by state or federal laws governing the reimbursement of nursing homes by the Department. In the final analysis, then, while factual questions preclude us from definitively resolving this issue, we believe that an antitrust claim predicated on the Department's reimbursement scheme would be difficult to sustain.

A further issue raised is whether there is any conflict of interest generated by the various functions performed by the Department. The common law in Maine holds that "perfect fidelity" in the exercise of their powers and duties is required of public officials. Lesieur v. The Inhabitants of Rumford, 113 Me. 317, 93 A. 838 (1915). However, we see no violation of that doctrine here, where all the functions performed by Department officials are those which are within their powers and duties as mandated by state law in furtherance of federal requirements.

3. Effect on private patients. Secondly, you have raised more specific concerns regarding the impact of the present Medicaid nursing home reimbursement methods on private pay patients. One issue focuses on the absence of direct control by the state over rates charged to non-Medicaid patients.

The Legislature may distinguish between classifications if it is not done arbitrarily and is based upon a proper distinction. Prudential Insurance Company of America v. Insurance Commissioner, 293 A.2d 529 (Me. 1972). Inequality of treatment is not forbidden if it rests upon an actual difference bearing some relation to a proper public purpose which is sought to be accomplished by such discrimination. State v. National Advertising Company, 387 A.2d 745 (Me. 1978). Here, the Legislature has authorized the Department to promulgate rules necessary to carry out the Medicaid Program. As noted above, federal law requires that such regulation include a reimbursement system for facilities providing nursing home care to program recipients. The Department lacks authority to regulate prices for non-Medicaid patients since this control is not a necessary element of the Medicaid Program and the Legislature has not otherwise delegated such authority to the Department. It is the view of this office that the setting of prices for Medicaid patients in the absence of comparable regulation for non-Medicaid patients is rationally related to the administration of a medical assistance program as well as to the goal of achieving compliance with federal requirements, thereby securing the funding necessary to maintain a program of medical assistance for the needy.

The second issue relative to private pay patients is the potential for private pay patients having to absorb some of the costs of Medicaid patients' care. In our view, the problem, if a reality, is primarily a policy matter for the Congress and for the State Legislature. 2/ We would note that the requirement under federal law that nursing homes be reimbursed on a reasonable cost related basis was enacted with the intent, in part, that underpayments resulting from the former flat rate payments system be obviated and that non-Medicaid patients not be obliged to absorb the cost of Medicaid patients' care. See 41 FED. REG. 27300 (July 1, 1976). However, federal law does not require

---

2/ To the extent that it might give rise to a legal claim, that claim would be grounded in the antitrust laws. The difficulties of successfully bringing such a claim are discussed in the previous section.

states to pay all costs of nursing home care rendered to Medicaid recipients and, indeed, places a number of limitations on reimbursement. See, e.g., 42 CFR §§ 447.35, 447.284, 447.316. Moreover, states are accorded great latitude in dispensing available welfare funds. Dandridge v. Williams, 397 U.S. 471 (1969).

4. Effect on Medicaid patients. Finally, you raised concerns pertaining to the impact of the present system on admission policies of certain nursing homes relative to Medicaid eligible individuals. You have correctly noted that the State would be in non-compliance with federal law if its fee structure were insufficient to enlist an adequate number of providers to participate in the Medicaid Program. See 42 CFR § 447.204. The question of compliance with § 447.204 is also a factual question which cannot be resolved in the context of an Attorney General's opinion.

If exclusion of Medicaid patients is in fact occurring, whether or not at a level indicative of non-compliance with 42 CFR § 447.204, or if homes are requiring residents to be private paying residents for certain periods of time, there may be remedies other than increasing Medicaid payment rates. For example, the Commonwealth of Massachusetts has successfully pursued court action under its consumer protection laws and has restrained nursing homes from engaging in such practices. Moreover, providers who join together to boycott, or to threaten to boycott, the Medicaid Program in order to secure higher reimbursement may be liable for violations of antitrust law.

In summary,we see no basis for concluding, given the information presently available to us, that the current nursing home reimbursement system under the Medicaid Program is violative of any laws. Rather, in the absence of any inconsistency with state or federal law, the particular reimbursement methodology chosen by the Department is a matter of policy. It should be noted that both federal Medicaid regulations (42 CFR § 447.205) and the Maine Administrative Procedure Act (5 M.R.S.A. § 8001, et seq.) provide facilities with the opportunity to review and to comment on reimbursement policies.

I hope this information is helpful. Please feel free to call on me if I can be of any further service.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC/ec