80-106

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

June 20, 1980

Honorable Richard H. Pierce
42 Roosevelt Avenue
Waterville, Maine 04901

Dear Senator Pierce:

You have posed to this Office a number of questions relating to the application to the Maine Veterans Home of Principle 3032.1 of the Maine Department of Human Services' ("the Department") Principles of Reimbursement for Long-Term Care Facilities.[1] While you have raised a number of specific questions, we discern two general issues underlying those questions. First, there is the issue of whether the Legislature's enactment in 1980 of Chapter 724 giving the Board of Trusteees of the Veterans Home a broad power to borrow funds for "capital, operational and maintenance purposes" has the effect of negating as to the Veterans Home the application of the Department's Principle of Reimbursement 3032.1, as interpreted by the Department, limiting reimbursement for current indebtedness to loans of one year or less. We answer this question in the negative. The second issue raised by your request is whether the Department of Human Services has the power to promulgate a different and separate Principle addressing reimbursement for interest on working capital loans to cover entities like the Veterans Home or to interpret Principle 3032.1 differently as to such entities. While we have serious doubts whether a different interpretation of this same Principle would be permissible, we believe that the Department could adopt a different Principle for entities like the Veterans Home assuming the criteria set out in this opinion were satisfied.

On the first issue, it is apparently argued that, when the Legislature empowered the Board of Trustees of the Veterans Home to borrow money to provide for start-up costs, it also implicitly intended to remove any obstacles which proved to undercut the effectiveness of this power. It is suggested that the

---

1 The facts underlying your opinion request may be simply summarized. Principle 3032.1, as interpreted by the Department, permits reimbursement for interest payments on working capital loans as long as the duration of those loans does not exceed one year. The Veterans Home seeks to enter into a six-year loan for working capital and start-up costs and further seeks Medicaid reimbursement for its interest payments on that loan.

power to borrow granted to the Home will have little, if any, practical effect if the interest incurred as a result of its exercise is not reimbursable, since Medicaid reimbursement for its patients is projected to be the sole source of the Home's income.

We cannot read the statute, however, to achieve this result for a number of reasons. First, there is no suggestion from the specific language empowering the Trustees of the Home to borrow that the legislation was intended to do more than to expand the powers of the Home. On its face, the statute creates no ambiguity or conflict with the Principles of Reimbursement. They can very simply be read together to provide that the Board of Trustees has the power to borrow but that that power is subject to the Principles of Reimbursement. We see only the most attenuated conflict or ambiguity in this situation. It is of course a well-settled principle of statutory construction that two statutes in apparent conflict must, if possible, be read together so as to give each effect. See, e.g., State v. Taplin, 247 A.2d 919 (Me. 1968) (implied repeal disfavored). In our view, this rule is equally applicable here where the purported conflict is between a statute and an administrative rule authorized by statute and the statute is one which creates an entity which would, under ordinary circumstances, be subject to the administrative rule in question.

There are additional compelling reasons to reach this result. P.L. 1979, c. 724 also amended 37-A M.R.S.A., Section 1409 to provide as follows:

> The Department of Human Services shall not modify its principles of reimbursement for long-term care facilities, to specifically exclude reimbursement for the depreciation of the assets created with federal or state grants.
>
> 37 M.R.S.A., Section 1409, as amended by P.L. 1979, c. 724, Section 3.

The specific reference to this Principle of Reimbursement in the statute is strong evidence that the Legislature was aware of the general application of the Principles to the Veterans Home and strongly and negatively implies that it chose not to alter the effect of Principle 3032.1 on the Home. The legislative debate surrounding this particular issue is supportive of this interpretation. It clearly evidences the Legislature's reluctance to alter the application of the Principles of Reimbursement for a single case. The comments of Senator Najarian are instructive:

> I think that this is a very undesirable precedent that we are setting, because

> we are putting . . .into the statutes for the first time, what is reimbursable and what is not.
>
> * * * *
>
> . . . As a continuing thing I would think that it would be very bad for this legislature to even accept bills, which deal with reimbursement principals(sic). It is a one time exemption and should not be intended to establish a precedent.
>
> 1980 Me. Leg. Rec. 642-43 (remarks of Sen. Najarian)

It is quite clear from these remarks that the Legislature intended to make no further changes in the Principles of Reimbursement by statute to address the Veterans Home's financial situation. To conclude that Section 1407-A, standing alone, negates the effect of Principle 3032.1, as interpreted by the Department, would clearly violate the Legislature's intent on this issue.

It may be argued that Principle 3032.1 must be held to be impliedly amended or negated as to the Veterans Home because its application to the Home's borrowing power would render that power unusable and would have the ultimate effect of rendering the Home financially unfeasible. Since the Home was approved by referendum, the argument goes, it must ultimately be built, see, e.g., id at 609 (remarks of Sen. Conley), and the Principle must therefore yield.

This argument fails for at least two reasons. While we do not reach the specific question, there is doubt that the authorization of a bond issue for a certain project by referendum has the effect of requiring that the project ultimately be built. See Jones v. Maine State Highway Commission, 238 A.2d 226 (Me. 1968) (bond issue approved by referendum may be repealed without referendum); Opinion of the Attorney General #80-12 (Jan. 22, 1980) (unissued bonds may be deauthorized by repeal of authorizing statute without referendum). Certainly, the language of the Veterans Home referendum resolution does no more than authorize a bond issue for the establishment of the Home, P.L. 1977, c. 562, Section 2(11).

In any event, it is clear that the authorization of a particular project by referendum does not have the effect of impliedly suspending or amending any and all statutes or regulations which prove to be impediments to the completion of the project. The referendum authorization is a statute which must, if possible, be read in a manner consistent with other statutes and regulations promulgated under statutory authority. The suggested argument cannot therefore form the basis for the conclusion that Chapter 724 impliedly amended or repealed Principle 3032.1.

The second issue is whether the Department has the power to promulgate a separate Principle addressing the issue of reimbursement for interest expenses on working capital loans to cover entities like the Veterans Home or to interpret Principle 3032.1 differently as to such entities.

It is well settled that state agencies administering the Medicaid Program have great latitude in establishing reimbursement rates for providers of medical care. See 42 U.S.C. § 1396a (13)(E); 41 Fed. Reg. 27303 (July 1, 1976); Briarcliff Haven, Inc. v. Dept. of Human Resources of Georgia, 403 F. Supp. 1355 (N.D. Ga. 1975). Generally speaking a Medicaid reimbursement plan will receive approval if payment is made on a "reasonable cost related basis" that is "consistent with efficiency, economy, and quality of care." See 42 U.S.C. § 1396a(13)(E) and (30). In establishing reimbursement rates a state may choose to establish different rates for different classes of nursing home facilities. The pertinent regulation states:

> "If payment rates are determined for a class of facilities, the plan must set forth reasonable criteria for the class and the methods and standards for determining the rate of payment for the class." 42 C.F.R. § 447.305.

The regulation by its terms permits reimbursement to be set at different levels provided there is a substantial and identifiable difference justifying the reimbursement differential. A recent federal case, Unicare Health Facilities, Inc. v. Miller, 481 F. Supp. 496 (N.D. Ill. 1979) is illustrative of a valid classification scheme. In that case an Illinois Medicaid reimbursement plan was upheld which separately classified governmentally-owned and privately-owned intermediate care facilities for the mentally retarded. A privately-owned facility brought suit alleging that there were no important

differences between its facility and the governmentally-owned one that justified the latter's higher rate of reimbursement. The Court upheld the classification scheme because it found substantial differences between the services provided in each facility. First, the governmentally-owned home had, on the average, a greater percentage of severely retarded and physically handicapped patients than its private counterparts. Second, it provided medical care for its patients of a type that was provided by outside physicians (separately reimbursed) in the privately-owned nursing homes. Here the Court had little difficulty in upholding the scheme since the higher rate of reimbursement was clearly justified by the additional services provided by the governmentally-owned nursing home.

The standard embodied in the regulation and applied by the Court resembles the traditional equal protection test:

> "Our Court has made clear that a classification must not be arbitrary. It must be based upon actual differences bearing a substantial relation to the public purpose sought to be advanced by such discrimination. If a classification, although discriminatory, is based upon such differences, it is not a violation of equal protection guarantees." Portland Pipe Line Corp. v. Environmental Imp. Com'n., 307 A.2d 1, 22 (Me 1973).

Thus a classification should be upheld whenever it rests on a real and substantial difference or distinction which bears a reasonable relation to the purpose of the classification.

In the case at hand a separate classification could be created for the Veterans Home by the Department of Human Services if it could be concluded that there were substantial differences between the Veterans Home and its private counterparts warranting a difference in reimbursement. We express no view on whether such differences do in fact exist since we lack the in-depth knowledge of the nursing home industry to make such a judgment. If it were the view of the Department of Human Services that such a classification were warranted[2] and the Department chose to establish a separate

2/ While the Office of the Attorney General does not have the factual expertise to determine whether significant differences exist between the Veterans Home and private nursing care facilities, we would of course be in a position to review the legality of any classification upon which the Department wanted to rely.

classification, the objective of providing more reimbursement could be accomplished by the promulgation of one or more new Principles of Reimbursement tailored to meet the needs of those homes falling within the new classification.3/

Finally, we should point out that there are three legal requirements imposed by the Medicaid Act and implementing federal regulations which would also have to be satisfied before a different Principle of Reimbursement could be created for entities like the Veterans Home. A determination of whether these requriements are satisfied is a decision for the United States Department of Health and Human Services. First, the criteria upon which the classification is based are subject to federal review and approval. See 42 C.F.R. §§ 447.20 and 442.272-442.316. Second, the reimbursement methodology arising from a new Principle of Reimbursement must rest upon "a reasonable cost related basis" that is "consistent with efficiency, econony, and quality of care." See 42 U.S.C. § 1396a(13)(E) and (30); 42 C.F.R. §§ 447.200-447.201. Third, a new Principle of Reimbursement could not provide for payments in excess of the upper limits of reimbursement. 42 C.F.R. §§ 447.315-447.316. Thus even if the State Department of Human Services concluded that a new classification and Principle were warranted, any proposal it advanced would require federal review and approval as outlined above.

To summarize, we conclude that the enactment of P.L. 1979, c. 724 does not render Principle 3032.1, as interpreted by the Department of Human Services, inapplicable to the Maine Veterans Home. We further conclude, however, that if the criteria set forth in this opinion could be satisfied, it would be within the Department's authority to adopt different Principles which would permit reimbursement to the Veterans

---

3/ As a conceptual matter, it could be argued that this same "rational classification" test could be used to justify giving Principle 3032.1 a more liberal interpretation for entities like the Veterans Home. We have serious doubts about the validity of this approach for the following reasons. First, the Principle appears on its face to establish a single rule for all nursing homes. Second, we believe that a far clearer justification would be required to give the same language a different interpretation, particularly where the resulting disparity of treatment would be great. Third, apart from any differences which might exist between the Veterans Home and other nursing care facilities, it might be difficult to successfully argue under accepted accounting principles that a six-year loan can fairly be characterized as "current" or "relatively short term" indebtedness. See AICPA Professional Standards, Current Assets and Current Liabilities, Section 2031 (1953).

Home and other similarly situated nursing care facilities for interest payments on working capital loans extending beyond a one-year period.

I hope this information is helpful. Please feel free to contact this Office if we can be of any further service.

Sincerely,

Stephen L. Diamond

STEPHEN L. DIAMOND
Deputy Attorney General

SLD:mfe