

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

Rio Grande Community Health Center, Inc., et al., )  
)  
Plaintiffs, )  
)  
v. ) Civil No.03-1640(JAG)(GAG)  
)  
Johnny Rullan, Secretary, Department of Health, )  
)  
Defendant. )  
\_\_\_\_\_ )

**SECOND SUPPLEMENTAL MEMORANDUM**

The evidentiary hearing on March 15, 2004 was focused on an emergency payment to Concilio de Salud Integral de Loiza (“Loiza”) in view of the Loiza health center’s urgent need for a payment from the Department of Health (“DOH”) under the Commonwealth’s Medicaid program. The hearing was extremely helpful in making it clear that injunctive relief on Loiza’s behalf is warranted, as well as what that specific relief should be.

ARGUMENT

1. Commonwealth Non-Compliance with FQHC Payment Responsibilities

Although the Medicaid statute since January 1, 2001 has required a supplemental or wraparound payment to be made quarterly to every Federally-qualified health center (“FQHC”) in Puerto Rico’s Medicaid program (42 U.S.C. §1396a(bb)(1), (2), (3) and (5)), no such payment has yet been made to any Puerto Rico FQHC, including plaintiffs. Transcript of March 15, 2004 Evidentiary Hearing (“Tr.”) 124 (lines 14 and 15). To

make matters worse, the methodology created by Mr. Ramon Manero Rosado, the auditor engaged by DOH to compute the sums owed to each FQHC, differs materially from the methodology required by the Medicaid statute. Under 42 U.S.C. §1396a(bb)(2) and (3), payments to FQHCs must be “calculated on a *per visit basis*...” (emphasis added).

DOH’s auditor admitted, however, that the methodology he developed to calculate the FQHC payments (as displayed in defendant’s Exhibit A) failed to employ the statutorily required per visit approach.

Q . . . you could not produce a per-visit rate, is that correct?

A I could not do it because I don’t have the per visit information.  
That’s primarily why we did it [another] way.

Tr. 104 (lines 22-25).

## 2. Temporary Utilization of Parts of Auditor’s Methodology

Loiza now desperately needs a sufficient payment to allow it to survive. In view of the failure of DOH’s auditor (and DOH) to calculate properly the sums the FQHCs are owed, much less pay them as legally required, this Court has the responsibility of fashioning emergency payment relief. Because of Eleventh Amendment concerns, we focus on defendant’s counsel’s concession that the prospective relief this Court may order for Loiza “is the one for this quarter that will end in April” (Tr. 137 (lines 9-10), *see also* Tr. 139 (lines 14-17)), even though we do not admit that the Court’s jurisdiction under Eleventh Amendment case law is as restricted as defendant’s counsel indicated.

### a. What the Medicaid Statute Requires

DOH’s counsel also suggested that Loiza’s payment for the first quarter of 2004 could be based on Exhibit A. Tr. 140 (lines 9-12). Since, as explained below, a portion of Exhibit A’s (the auditor’s) methodology parallels what the law requires, it makes sense

for the Court to rely on that portion. To understand which part of the auditor's methodology now should be employed, some background will be helpful.

Under the law (42 U.S.C. §1396a (bb) (1)-(3)) to compute FQHC payments due after January 1, 2001, a State first calculates an amount "equal to 100 percent of the average of the cost of the particular [FQHC] of furnishing [FQHC] services during *fiscal years 1999 and 2000 . . .*" (emphasis added). The foregoing calculation is to be made "on a per visit basis." *Id* at §1396(a)(bb)(2) and (3). Thus, for example, if a particular FQHC's two year average cost of providing FQHC services equals \$100 and the FQHC had an average of ten visits per year during that two year period, the FQHC's average cost per visit for the two fiscal years would be \$10.

Under the same statutory provisions, on or after January 1, 2001 that FQHC would be paid that \$10 per visit cost as its fixed rate for each Medicaid patient visit. Beginning with fiscal year 2002, that fixed per visit rate has to be "increased by the percentage increase in the MEI . . ."<sup>1</sup> 42 U.S.C. §1396(a)(bb)(3). Accordingly, with respect to the hypothetical FQHC's \$10 per visit rate previously calculated, if the MEI is 10 percent in FY 2001, the rate the FQHC would be paid for each Medicaid visit during FY 2002 would be \$11 (\$10 plus 10 percent of \$10).

In Puerto Rico, as the Court is aware, managed care entities (hired by ASES) arrange and pay for all Medicaid services, including those provided by FQHCs. From these entities, FQHCs receive payment for the services they render to Medicaid patients. The Medicaid statute provides that where the FQHC services are furnished in such a manner, "payment to the [FQHC] by the State" is to be in the form of "a supplemental

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<sup>1</sup> The MEI is an inflation index calculated for the Medicare program.

payment equal to the amount (if any) by which” payment to the FQHC based on its per visit rate exceeds the amount of payments provided by the managed care entity during the period in question. 42 U.S.C. §1396a(bb)(5)(A).<sup>2</sup>

Thus, for our hypothetical Puerto Rico FQHC whose per visit rate is at \$10, its quarterly payment due from the Commonwealth would be computed as follows:

1. Ascertain number of Medicaid patient visits during the quarter. For purposes of this example, we assume 10 visits.
2. Compute total amount due the FQHC for the quarter. Multiply 10 visits x \$10 per visit = \$100.
3. Subtract payments made during the quarter to the FQHC by the managed care entity. Again for purposes of this example, assume the FQHC received \$50 in such entity payments. The computation then would be \$100 (total sum owed for the quarter) minus \$50 paid by the managed care entity = \$50 for the quarterly payment owed by the State to the FQHC.

b. Conforming Auditor’s Methodology to Statutory Requirements to Maximum Possible Extent

The auditor’s methodology (expressed in Exhibit A) begins by paralleling the above-described statutorily required payment methodology. Instead of calculating the FQHCs’ average fiscal year 1999 and 2000 *per visit* costs as the law requires, the auditor calculated an annual average cost for each “purely Medicaid”<sup>3</sup> patient. Tr. 102 (line 13).

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<sup>2</sup> That period is the “payment schedule agreed to by the State and the [FQHC], but in no case less frequently than every 4 months.” 42 U.S.C. § 1396a(bb)(5)(B).

<sup>3</sup> Plaintiffs believe that this purely Medicaid category may have been unlawfully restrictive. Typically, when States such as the Commonwealth received statutory waivers

For purposes of making quarterly payments to FQHCs, accordingly, to the extent the auditor's (mistaken) approach is used, instead of an FQHC invoicing Puerto Rico for the difference between what it receives from managed care entities and its total Medicaid patient visits multiplied by its per-visit rate, it would invoice the State the difference between what it receives from managed care entities and one fourth of the annual per-Medicaid patient cost calculated by the auditor.<sup>4</sup> For Loiza's first quarter of 2004, that calculation would be made in the following way:

1. Have ASES provide a count of Loiza's "purely Medicaid" patients during the first quarter of 2004. Note: if such a count is not readily available, the purely Medicaid population already reported by ASES for Loiza for the 1999-2000 period (8,009; *see* Tr. 105 (line 11)) should be used instead.

2. Multiply the foregoing count by one fourth of the DOH auditor's average annual per Medicaid patient cost of \$644.49 in the 1999-2000 period (Tr. 102 (line 12)). (Note:  $\$644.49 \div 4 = \$161.12$ ).

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(under Section 1115 of the Social Security Act) to conduct managed care programs rather than a traditional fee for service approach, States were required to add additional eligible people to their Medicaid populations and treat those people as well as pay for them in exactly the same way as any other Medicaid eligible patient. Thus, there are likely to be other Medicaid patient categories for whom the FQHCs are entitled to receive the FQHC rate. This issue is reserved for later proceedings.

<sup>4</sup> Notably, there was no MEI increase attached to, or calculated for, this per-Medicaid patient cost, despite the statutory requirement for an MEI. Moreover, the annual per Medicaid patient cost is a far less accurate figure than the per-visit basis the statute requires. Even assuming *arguendo* that the ASES estimate of the number of managed care-assigned patients that are purely Medicaid is only 56 percent of the total patients assigned to FQHCs by managed care entities (as the auditor was advised), because they are disproportionately in need of care, that 56 percent easily could comprise 90 percent of an FQHC's visits and, hence, effectively 90 percent of professional staff time and effort, and cost. The annual per-Medicaid patient cost calculated by the auditor is not only violative of what the law requires but also is a far less accurate measurement of an

3. Subtract any payments made during the quarter to Loiza by a managed care entity.

4. Pay Loiza the difference.

Consistent with the foregoing, a proposed Order for the Court regarding emergency relief for Loiza is filed with this Supplemental Memorandum.

3. Unlawful Portions of Exhibit A

The Court will note that the foregoing payment approach differs from that proposed by defendant's counsel at the end of the evidentiary hearing. Her proposal, simply stated, was to pay Loiza one fourth of the total estimated sum to which Loiza was admittedly entitled (\$776,628) under Exhibit A. Tr. 139-140. Her "generous" offer was in actuality an attempt to pull the wool over the Court's eyes. As the Court will recall, Exhibit A reflected the following steps:

1. The auditor calculated each FQHCs' average per year total Medicaid patient cost for the 1999-2000 period (*i.e.* the statutory period for calculation of each FQHC's per visit rate to be paid on and after January 1, 2001). Loiza's average annual total per Medicaid patient cost, as reflected on the lowest horizontal column of Exhibit A, was \$9,158,685.

2. From this figure, the auditor deducted his so-called "unallowable" costs. The result, \$9,136,426, is also shown on the same Exhibit A column.

3. He then divided that total by the percentage of purely Medicaid patients treated by the FQHCs under their managed care contracts, as reported by ASES. The number of such patients was calculated to be 56.5% of the total. Tr. 105 (line 17). The result of this

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FQHC's costs in serving Medicaid patients.

calculation, reflected on the same horizontal column of Exhibit A, is \$5,161,720 of annual costs for Loiza in serving Medicaid patients.

4. To bring the foregoing \$5,161,720 cost for all Medicaid patients down to the \$778,628 in the far right bottom column of Exhibit A, the auditor took two additional (and unlawful) steps. First, he deducted from the \$5,161,720 the sums that Loiza was paid by the managed care entity in the 1999-2000 period. The sums Loiza was paid in that period are obviously not relevant to a computation of what Loiza would be due after January 1, 2002, especially for the first quarter of 2004, four years later. Put otherwise, the statutorily required deduction for a managed care entity payment applicable to the first quarter of 2004 must be the actual amount Loiza is paid during that quarter, not the payment (or payments) Loiza received four years ago.

The second (unlawful) Exhibit A adjustment made by the auditor, admitted in his testimony (Tr. 113 (lines 21-24)), was to deduct from the \$5,161,720 all Section 330 Public Health Service (PHS) Act grant funds received by Loiza during that 1999-2000 period. Even were such a deduction to be a permissible part of the computation of FQHC payments, the amount of that deduction for first quarter 2004 purposes would not be the amount Loiza received in 1999-2000, but the amount it actually received in the first quarter of 2004. Far more importantly, however, the deduction of grant funds (as previously determined by the State court) is unlawful.

The original enactment creating the FQHCs' special payment requirement under Medicaid was that the FQHCs had to be paid "100 percent" of their reasonable costs. 42 U.S.C. § 1396a(a)(13)(E), later reclassified at 42 U.S.C. § 1396a(a)(13)(C)). The 100 percent language employed in this first enactment is identical to the language in 42

U.S.C. §1396a(bb)(2) for calculating each FQHC's reasonable costs in the 1999-2000 period and translating those costs into the fixed per visit rate to be paid beginning January 1, 2001. Congress' goal in requiring such reasonable cost reimbursement was made clear in the accompanying Report of the House Budget Committee that accompanied the original enactment.

The Subcommittee on Health and the Environment heard testimony that, on average, Medicaid payment levels to Federally funded health centers cover less than 20 percent of the costs incurred by the centers in serving Medicaid patients. The role of [health centers] . . . is to deliver comprehensive primary care services to underserved populations or areas without regard to ability to pay. *To the extent that the Medicaid program is not covering the cost of treating its own beneficiaries, it is comprising the ability of the centers to meet the primary care needs of those without any public or private coverage whatsoever.*

\* \* \*

To ensure that Federal PHS Act grant funds are not used to *subsidize health center or program services to Medicaid beneficiaries*, States would be required to make payment for these [FQHC] services at 100 percent of the costs which are reasonable and related to the cost of furnishing these services. (Emphasis added.)

H.R. Rep. No. 101-247, at 392-93, *reprinted in* 1989 U.S.C.C.A.N. 2118-19.

Obviously, by deducting PHS Act grant funds from the Medicaid payment due Loiza and the other FQHCs, DOH's auditor was doing exactly the opposite of what Congress intended in passing the FQHC legislation at issue here, since his deduction, if permitted to stand, would cause a direct subsidization of Puerto Rico's Medicaid costs with PHS Act grant funds. As the foregoing history makes clear, Medicaid programs cannot use those grant funds to replace the costs FQHCs incur in treating Medicaid

patients. Clearly, therefore, the auditor's deduction of such funds in calculating FQHC costs is unlawful.

3. Conclusion

Loiza is in urgent need of the FQHC payments to which the law entitles it. Despite Eleventh Amendment concerns, and the Commonwealth's failure even to calculate the proper amount of those payments, the Court can safely order a first quarter 2004 payment to Loiza in the manner outlined above (and reflected in the proposed Order filed herewith). To prevent the collapse of an essential provider of health care to Puerto Rico's needy, the Court should issue Plaintiffs' proposed Order as soon as practicable.

Respectfully submitted,

Date: March 26, 2004

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