

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

NOTICE OF FINAL DECISION

Kari Hartwig,

Complainant

against

Docket #FIC 2005-025

Commissioner, State of Connecticut,
Department of Social Services,

Respondent

December 21, 2005

TO: Attorney Daniel J. Klau, for the complainant; Assistant Attorneys General Hugh Barber and Patrick Kwanashie, for the respondent; Attorney Sheldon V. Toubman, for New Haven Legal Assistance Association, Inc.; Attorneys Sheila Huddleston and Vaughan Finn, for Community Health Network of Connecticut, Inc.; Attorneys Linda L. Morkan and Bradford S. Babbitt, for Health Net of Connecticut, Inc. and WellCare of Connecticut, Inc./FirstChoice Health Plans of Connecticut, Inc.; Attorney Steven M. Barry, for Anthem Health Plans, Inc.; Attorney Victoria Veltri, for Greater Hartford Legal Aid, Inc.; and Attorney Randi Faith Mezzy, for Connecticut Legal Services, Inc.

This will serve as notice of the Final Decision of the Freedom of Information Commission in the above matter as provided by §4-183(c), G.S. The Commission adopted the Final Decision in the above-captioned case at its regular meeting of December 14, 2005.

By Order of the Freedom of
Information Commission



Petrea A. Jones
Acting Clerk of the Commission

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The above-captioned matter was heard as a contested case on May 24, September 21, and October 19, 2005, at which times the complainant and the respondent appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. This matter was consolidated for hearing with docket #FIC 2005-284, Barbara Hunt and Marisol Pratts v. Commissioner, State of Connecticut, Department of Social Services. At the May 24, 2005 hearing, New Haven Legal Assistance Association was granted intervenor status pursuant to Regulations of Connecticut State Agencies §1-21j-31. Following the May 24, 2005 hearing, Anthem Health Plans, Inc., Community Health Network of Connecticut, Inc., Health Net of Connecticut, Inc., and Well Care of Connecticut, Inc., were each granted party status, pursuant to Regulations of Connecticut State Agencies §1-21j-30(b), and the hearing was reopened for the purpose of permitting these additional parties to cross-examine witnesses who had previously testified, and to offer additional evidence and argument.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondent is a public agency within the meaning of §1-200(1), G.S.
2. By letter of complaint filed January 21, 2005, the complainant appealed to the Commission, alleging that the respondent violated the Freedom of Information ("FOI") Act by denying her request for copies of records pertaining to reimbursement rates by in-state health insurance providers in connection with the State's Medicaid and SAGA (State Administered General Assistance) programs.
3. It is found that the complainant made a request dated November 11, 2004 to the respondent for copies of "any documents relating to current cardiology and

gastroenterology provider reimbursement rates under managed care contracts for Medicaid and SAGA enrollees." The complainant specified:

Included in this request are any documents relating to provider reimbursement rates for the following CPT codes: 99202, 99203, 99204, 99205, 99212, 99213, 99214, 99215, 99241, 99242, 99243, 99244, and 99245. This request applies to those rates paid by Health Net of the Northeast, Anthem Blue Cross, Well Care (First Choice), Preferred One, and Community Health Network under their Medicaid managed care contracts with your agency and by Community Health Network under its SAGA contract with your agency. This request also extends to documents relating to the fees paid for these services which are solely in the possession of these entities with which your agency contracts, to the extent that they receive more than \$2.5 million per year in state contracts, as required to be produced under Conn. Gen. Stat. §§1-200(11) and 1-218, since these contractors are performing a government function.

4. It is found that the complainant also requested a waiver of all fees for her request, pursuant to §1-212(d), G.S., asserting that the information was sought for public education purposes, and was likely to contribute significantly to public understanding of the operations or activities of the government and was not sought for any commercial purpose. (The complainant is an Assistant Clinical Professor at the Department of Epidemiology and Public Health at the Yale University School of Medicine, and seeks to investigate, among other things, whether low reimbursement rates paid to medical providers under Medicaid has the effect of denying services to poor families and children. As the respondent has elsewhere acknowledged, "[t]here is no obligation on the Medicaid agency to ensure that every recipient of assistance who wants or needs to receive covered services will be able to locate an enrolled provider who will undertake to provide the service and to accept Medicaid payment as payment in full." Defendant's August 8, 2003 Memorandum in Support of Motion for Summary Judgment, Mary Carr v. Patricia Wilson-Coker, Civil Action No. 3:00CV1050(AWT), United States District Court, District of Connecticut.)

5. It is found that the respondent denied the complainant's request by letter dated December 23, 2004, on the grounds that the respondent did not have the requested documents in its possession, that the managed care organizations ("MCOs") in possession of the documents did not perform a government function as defined in §1-200(11), G.S., and that, accordingly, the respondent was not entitled to receive a copy of them by law or contract under §1-218, G.S.

6. It is found that, subsequent to the filing of the complaint in this matter, and subsequent to the first hearing, the respondent requested certain records from the

managed care organizations in connection with the complainant's request, the MCOs provided certain records to the respondent, and the respondent in turn provided certain records that it received from the MCOs to the complainant.

7. The respondent now contends that the complaint is moot because the requested records have been provided to the complainant.

8. However, Health Net of Connecticut, Well Care of Connecticut, and Community Health Network stipulated at the October 19, 2005 hearing that they have additional records in their possession that are generally responsive to the complainant's request, although they contend that the request was too general to be responded to without clarification.

9. It is found that complainant's request may reasonably be construed to request more records than were provided by the respondent. Additionally, it is found that the complainant's request may reasonably be construed to request more records than the respondent sought from the MCOs. While clarification of the request may have reduced its scope, it is found that the respondent never sought any clarification from the complainant.

10. The respondent's motion to dismiss is therefore denied.

11. The respondent also moved on September 21, 2005 for an order in limine that evidence related to the governmental function issue was no longer relevant, based upon the respondent's assertion that records responsive to the complainant's request had been produced by the MCOs and were in the respondent's possession.

12. The respondent's motion for an order in limine was based on the same premise as its motion to dismiss: that the respondent was in possession of the only records that continued to be responsive to the complainant's request. See, however, paragraphs 8 and 9 of the findings, above.

13. The respondent's motion in limine was therefore denied at the commencement of the September 21, 2005 hearing.

14. The threshold issue then presented is whether the managed care organizations perform a governmental function pursuant to §§1-200(11) and 1-218, G.S.

15. Section 1-200(11), G.S., provides:

"Governmental function" means the administration or management of a program of a public agency, which program has been authorized by law to be administered or managed by a person, where (A) the person receives funding from the public agency for administering or managing the program, (B) the public agency is involved in

or regulates to a significant extent such person's administration or management of the program, whether or not such involvement or regulation is direct, pervasive, continuous or day-to-day, and (C) the person participates in the formulation of governmental policies or decisions in connection with the administration or management of the program and such policies or decisions bind the public agency. "Governmental function" shall not include the mere provision of goods or services to a public agency without the delegated responsibility to administer or manage a program of a public agency.

16. Section 1-218, G.S., provides:

Each contract in excess of two million five hundred thousand dollars between a public agency and a person for the performance of a governmental function shall (1) provide that the public agency is entitled to receive a copy of records and files related to the performance of the governmental function, and (2) indicate that such records and files are subject to the Freedom of Information Act and may be disclosed by the public agency pursuant to the Freedom of Information Act. No request to inspect or copy such records or files shall be valid unless the request is made to the public agency in accordance with the Freedom of Information Act. Any complaint by a person who is denied the right to inspect or copy such records or files shall be brought to the Freedom of Information Commission in accordance with the provisions of sections 1-205 and 1-206.

17. The Commission takes administrative notice of the following facts: Medicaid is a program of publicly-funded health insurance for the poor, that was established under the Social Security Amendments of 1965. Medicaid is administered by the individual states, with a combination of state and federal funding. The Connecticut Medicaid program does not provide medical services itself. Rather, the benefit it provides is "medical assistance," in the form of payment for covered services. See 42 U.S.C. §1396d(a). The state Medicaid program is therefore a statutory health insurance program.

18. It is found that a state that chooses to participate in the Medicaid program must designate a "single state agency" that is responsible for administering the state Medicaid plan. To qualify as the state's single state agency for Medicaid purposes, the agency "must not delegate, to other than its own officials, authority to (i) Exercise administrative discretion in the administration or supervision of the plan, or (ii) Issue policies, rules, and regulations on program matters." 42 C.F. R. §431.10(e)(1). The

Department of Social Services ("DSS") is the single state agency in Connecticut with responsibility for administering the state's Medicaid program. Clearly, DSS cannot, under federal law, delegate authority to administer the totality of the Medicaid plan in Connecticut. At issue in this case, however, is whether the MCOs' operation of a very large portion of the Medicaid program constitutes the performance of a governmental function within the meaning of §§1-200(11) and 1-218, G.S.

19. Nonetheless, the respondent and Health Net contend that DSS is prohibited by 42 CFR §431.10(e) from delegating any power to administer or manage even a portion of the Medicaid program, and that therefore the MCOs cannot be performing a governmental function.

20. The Commission disagrees as a matter of law. It is concluded that the 1979 regulation contained at 42 C.F.R. §431.10 predates the federal Medicaid agency's grant of a broad waiver in 1995 to DSS, authorizing it to waive certain federal Medicaid requirements in contracting with the MCOs to administer the HUSKY A program. It also predates the adoption of 42 C.F.R. Part 438, which contains detailed provisions governing Medicaid managed care and specifically authorizing, but regulating, the delegation to the MCOs of a variety of decisions, including, for example, subcontracting, which otherwise would be made by the state Medicaid agency. See 42 C.F.R. 438.230. In any event, the Commission observes that the question of whether DSS has delegated the power to administer or manage a portion of the Medicaid program is a question of fact, not law.

21. It is found that all of Connecticut's Medicaid program was initially administered directly by DSS, contracting with and paying providers, performing utilization reviews, issuing notices of action when requested services were denied, and setting rates to pay its providers.

22. It is found that DSS continues to administer the program directly for the approximately 90,000 Medicaid recipients who qualify for Medicaid because they are either elderly or disabled adults. It is additionally found that DSS administers this portion of the program in a "fee for service" arrangement, although DSS utilizes a third party fiscal administrator, Electronic Data Systems, that is charged with administrative responsibilities that includes claims processing.

23. It is found that, in 1995, the state obtained a federal waiver of certain Medicaid requirements that permitted it to begin contracting with private health care organizations to take over the administration of the Medicaid program for the approximately 310,000 recipients, or approximately three-fourths of the Medicaid population, who qualified for Medicaid based on their being children or in families with minor children. This Medicaid program is known as "HUSKY [Healthcare for Uninsured Kids and Youths] Part A" or "HUSKY A."

24. It is found that a state that chooses to mandate enrollment in Medicaid managed care plans must permit individuals to choose among plans. 42 U.S.C. §1396u-

2(a)(3). Therefore, no single MCO is permitted to provide all the managed care services for Connecticut's Medicaid managed care program.

25. It is found that DSS and each of the four MCOs (Anthem Health Plans, Inc., Community Health Network of Connecticut, Inc., Health Net of Connecticut, Inc., and Well Care of Connecticut, Inc.) have executed contracts that provide for payments by DSS far in excess of two million five hundred thousand dollars to each of the individual MCOs. (It is also found, for purposes of historical comparison and scale, that the contracts between DSS and the MCOs total approximately \$625 million, and that the smallest of the four contracts between DSS and the individual MCOs is more than twice the size of the \$25 million contract between the Department of Motor Vehicles and Envirotest. Envirotest v. FOIC, 59 Conn. App. 753, 756 (2000).)

26. It is found that the MCOs are generally required by their contracts with DSS to provide all the services that would otherwise be covered by DSS's fee for service program.

27. It is found that the contracts between DSS and each of the MCOs provide for the administration or management, or both, by the MCOs of the "HUSKY A" Medicaid program.

28. Health Net and Well Care contend, however, that the provision of medical insurance is not a traditional governmental function, like fire prevention, police protection, sanitation, public health, and parks and recreation.

29. It is found, however, that the state and federal governments, in 1965, unequivocally made the provision of medical insurance to low income families and children a government function. See paragraph 17 of the findings, above. See also Domestic Violence Services v. FOIC, 47 Conn. App. 466, 474 (1998) (under common law test for government function under Woodstock Academy v. FOIC, 181 Conn. 544 (1980), government's interest in domestic violence and in providing services for victims of such violence has evolved into a governmental function, even though government's providing services to victims of domestic violence is a recent phenomena with no historical antecedent). Moreover, it is concluded that the plain language of §1-200(11), G.S., does not restrict the statutory definition of "governmental function" to what are sometimes called "traditional governmental functions" in the common law test for governmental function.

30. The respondent and the MCOs further contend that HUSKY A is not a "program of a public agency" within the meaning of §1-200(11), G.S., because it is only one part of the Medicaid program.

31. Specifically, the respondent and the MCOs argue that the legislative history of P.A. 01-169 demonstrates that the legislature intended to limit the application of the governmental function test to situations where a public agency has turned a large program over to a contractor in a "wholesale" manner. For example, CHNC cites the

remarks of Mitchell Pearlman before the Government Administration and Elections Committee:

For example, if somebody's building a highway for the State and they just—you know, they got the contract to build the highway. That does not apply here. If they ran the Department of Transportation, then it would apply.

Joint Standing Committee Hearings, Government Administration & Elections, Pt. 2, 2001 Sess., p. 26.

32. Similarly, in the debate in the General Assembly, Representative Ward and Representative Knopp commented that a group home that received substantial payment from the State to provide services for the mentally retarded would not be subject to §1-200(11), but that if the state decided to privatize all of the care in the State for mental retardation, such a program would be subject to §1-200(11), G.S. 44 H.R. Proc., Pt. 9, 2001 Sess., pp. 33-34.

33. While the examples cited above illustrate some contracts that would meet the governmental function test, and some that would not, the Commission does not agree with the respondent and the MCOs that anything short of contracting out the entire operations of an entire department of the state falls short of the governmental function test. Clearly, the Department of Motor Vehicles contracted out only one of its programs to Envirotest, and Envirotest was unquestionably the type of contractor to which P.A. 01-169 was intended to apply.

34. It is therefore concluded that the fact that DSS has not contracted out its entire function, or even the entire Medicaid program, to the MCOs does not in itself mean that the MCOs are not performing a governmental function.

35. The question still remains, however, whether the HUSKY A program, as administered by the MCOs, is a program of a public agency within the meaning of §1-210(11), G.S.

36. The term "program of a public agency" is not defined in the FOI Act.

37. Webster's Third New International Dictionary defines "program" to mean: "a definite course or methods of action selected (as by a government, institution, group, or individual) from among alternatives and in light of given conditions to guide and usually determine present and future decisions," or "a specific decision or set of decisions designed to carry out such a chosen course of action."

38. It is found that the administration of the HUSKY A program by the MCOs is a course of action selected by the government from among alternative methods of providing statutory health insurance and in light of given economic conditions.

39. It is also found that the contracts between DSS and each of the MCOs repeatedly refer to HUSKY A as a "program."

40. It is additionally found that the legislative history of P.A. 01-169 repeatedly refers to the application of §1-200(11), G.S., to "large" programs, or "major state functions" such as Envirotech and the privatization of the state computer program. According to Representative Knopp, who became the bill's chief proponent in the house, P.A. 01-169 was "a very narrowly drawn provision designed to get at those few contracts like Envirotech or EDS [Electronic Data Systems Corporation] in which there's an enormous public interest and make sure that accountability is preserved" 44 H.R. Proc., Pt. 9, 2001 Sess., p. 16. Knopp further emphasized: "The purpose of the amendment is to narrowly target those few instances in which a private entity by law actually takes over and manages or administers a governmental function" *Id.* at p. 19. "Very few contracts will be affected, but they will be important ones in which a great deal of money is involved." *Id.* at p. 21. The Commission notes that DSS's contracts with the MCOs are similarly important ones with enormous public interest in which a great deal of money is involved, consistent with Senator Knopp's remarks.

41. Notwithstanding the legislative history cited above, however, the MCOs and the respondent contend that one portion of the legislative history of P.A. 01-169 conclusively demonstrates that HUSKY A is not the kind of "program" to which §1-200(11), G.S., was intended to apply. Specifically, the MCOs and the respondent refer to the remarks of Senator Fonfara on the floor of the senate:

SENATOR RORABACK:

And finally, Madam President, one more question, through you, if I may, Madam President, the state does have contracts with a number of Medicaid managed care providers and through you, Madam President, would the provision of insurance services through the Medicaid managed care program fall within the ambit of those services which this bill makes subject to the Freedom of Information laws, Thank you, Madam President.

SENATOR FONFARA:

Thank you, Madam President. Through you, specifically related to Medicaid managed care, the answer is no. Although every case has to be determined on its facts and these plans are not a governmental function and all information pertaining to individuals which would be, of course, would be exempt from disclosure under FOI laws.

42. While persuasive, the remarks of Senator Fonfara do not, taken by themselves, conclusively demonstrate that §1-200(11), G.S., was not intended to apply to MCOs administering the state's Medicaid program. First, the remarks are only a small portion of the legislative record. Second, there was no debate on the issue of Medicaid MCOs, only this single and unelaborated answer to a question. Third, the question posed by Senator Roraback is somewhat misleading, suggesting that Medicaid managed care organizations are engaged merely in the provision of goods and services that are exempted from the definition of governmental function in §1-200(11), G.S. Fourth, Senator Fonfara correctly observes that "every case has to be determined on its facts," which is the very purpose of hearing and deciding the complaint in this matter. Finally, Senator Fonfara ultimately concludes that "all information pertaining to individuals ... would be exempt from disclosure," suggesting that his remarks were limited to the issue of disclosure of personal medical information.

43. Perhaps more significantly, the extensive legislative history of P.A. 01-169 clearly demonstrates that the overarching goal of P.A. 01-169 was to reverse Envirotest Systems Inc. v. FOIC, 59 Conn. App. 753 (2000), cert. denied, 254 Conn. 951 (2000), and make large private contractors that receive significant public funds to administer "a major state function" subject to the disclosure requirements of the FOI Act. See, e.g. the remarks of Representative Ward: "Again, the underlying intent of the bill wishes to say that when a *major State function* is contracted out, I don't have a problem with making those public." 44 H.R. Proc., Pt. 9, 2001 Sess., p. 42 [emphasis added].

44. The Commission acknowledges that the state has not privatized "all of the care in the state for Medicaid insurance services." It is found, however, that privatization of HUSKY A is much closer, by analogy, to the transfer of one of DMV's programs of vehicle inspection than it is to a contract with a private entity to run a single group home, or a contractor to build a bridge.

45. It is also found that one "program of a public agency," such as HUSKY A, exists within a larger or umbrella "program of a public agency," such as the entire Medicaid program; and that denominating the larger a "program" does not mean that the smaller is not also a "program" of a public agency.

46. It is concluded that HUSKY A is a "program of a public agency" within the meaning of §1-200(11), G.S.

47. Anthem Health Plans contends that since four different and independent MCOs have contracts with DSS for the administration of the HUSKY A Medicaid program, no single MCO administers the entire program, and therefore no single MCO is performing a governmental function.

48. It is concluded that if Anthem's argument were correct, then a public agency could avoid the requirements of §§1-200(11) and 1-218, G.S., by simply contracting out a large program, such as all of the state's child protection services, to two contractors with

identical contracts. Such an arrangement would be directly contrary to the legislative intent of P.A. 01-169.

49. It is found that, while no single MCO administers or manages the entire HUSKY A program, each administers or manages, or both, a discrete portion of the program. Each has its own set of clients or members, its own network of providers, its own authorized services and drugs, and so forth. Each also, as noted above, has a separate contract with DSS well in excess of \$2.5 million, and the terms of each contract are identical.

50. It is therefore found that each portion of the HUSKY A program administered or managed, or both, by each MCO is itself a "program of a public agency" within the meaning of §1-200(11), G. S.

51. With respect to the additional requirements of §1-200(11), G.S., it is found that the HUSKY A program has been authorized by law to be administered or managed, or both, by the MCOs. See §17b-28(a) and (c), G.S.

52. It is found that DSS is involved in or regulates to a significant extent each MCO's administration or management, or both, of its portion of the HUSKY A program.

53. Indeed, it is found that the regulation of MCOs that contract with state Medicaid agencies is so extensive that courts that have considered the question have found that the standard of "state action" which subjects the MCOs' conduct to suit in federal court for violations of the Medicaid Act, is satisfied by MCOs administering the Medicaid program. See, e.g., Perry v. Chen, 985 F. Supp. 1197, 1201-1202 (D. Ariz. 1996) (because Medicaid MCOs "have assumed the obligations of the State to provide Arizona's version of Medicaid benefits to the needy," "any action[s] to deny or terminate covered services are state actions which trigger federally mandated notice and hearing due process procedures"); J.K. v. Dillenberg, 836 F. Supp. 694, 698 (D. Ariz. 1993). See also Catanzano v. Wing, 103 F.3d 223, 228-30 (2d Cir. 1996) (private agencies administering only home health services for state Medicaid agency are state actors); Catanzano v. Dowling, 60 F.3d 113, 118-120 (2d Cir. 1995) (same); Healey v. Shalala, 2000 WL 303439 (D. Conn. Feb. 11, 2000) (Smith, Magistrate J.), aff'd 2000 WL 236618 (D. Conn. Mar. 1, 2000) (Squatrito, J.) (home health agencies administering home health services under Medicare are state actors).

54. The final prong of §1-200(11), G.S., is subsection (C): that is, whether the MCOs participate in the formulation of governmental policies or decisions in connection with the administration or management of the HUSKY A program, and whether such policies or decisions bind the public agency.

55. It is found that, pursuant to §17b-28(a) and (b), G.S., the MCOs "sit at the table" with DSS through the legislatively-mandated Medicaid Managed Care Council.

56. CHNC contends that the role of MCOs on the Advisory Council on Medicaid Managed Care does not rise to the level of participation in policy-making and decision-making, because the Advisory Council includes representatives of all constituencies affected by the Medicaid managed care program.

57. While it may well be true that the MCOs have no greater policy-making role on the Medicaid Managed Care Council than advocates for other constituencies, that fact alone does not negate the MCO's participation in the formulation of governmental policies and decisions.

58. It is also found that the contract between DSS and the MCOs expressly provides that the "management of the benefit is at the discretion of the health plan."

59. The respondent contends, however, that, pursuant to DSS's contract with the MCOs, the MCOs are obligated to follow state policies established by DSS, that DSS retains the authority to establish new policies under the contract, and that the MCOs do not make or participate in the making of these policies.

60. The respondent also contends in its brief that the third prong of the "governmental function" test requires that a contractor must be "taking part in making policy and setting standards for the government as opposed to just implementing policies or standards set by the government." The respondent argues that, "because the MCOs do not set standards that are binding on the state, they do not participate in formulating binding governmental policies or decisions."

61. The Commission disagrees as a matter of law. The plain language of the statute requires only that the contractor "participates in the formulation of governmental policies or decisions in connection with the administration or management of the program and such policies or decisions bind the public agency." [Emphasis added.] Whether the contractor sets standards generally applicable to the state is simply not part of the statutory criteria.

62. The respondent and the MCOs contend that the phrase "governmental policies or decisions in connection with the administration or management of the program" should be construed to be limited to the highest levels of policy-making, such as setting financial eligibility and coverage criteria, which decisions and policies DSS reserves exclusively to itself.

63. Community Health Network of Connecticut (CHNC) specifically points to statements of Senator Fonfara in the legislative history, in response to a question from Senator Cook as to whether services for people with mental retardation, which are sometimes provided directly by the government and sometimes by contractors, would be deemed to be performing a governmental function:

If Senator Cook would look at in lines 102 through 108
there is the well, more specifically lines 102 through lines

105 specifically that the person, the entity participating in the formulation of governmental policies or decisions in connection with the administration or the management of the program. That's a *high level of decision making* that is a condition of the definition of governmental function.

3281. [Emphasis added.]

44 H.R. Proc., Pt. 11, p. 93.

64. However, Senator Fonfara's remarks on their face simply reflect that to participate in the formulation of governmental policies or decisions is to engage in a high level of decision making. The Commission does not interpret Senator Fonfara's remarks to mean that only governmental policies and decisions that are at the highest level are to be considered in construing §1-200(11), G.S. Such an interpretation would be contrary to the unambiguous plain meaning of the statute, which only requires participation in governmental policies and decisions, not the highest level governmental policies and decisions.

65. Moreover, the remarks of Senator Jepsen that follow soon after Senator Fonfara's demonstrate, in Senator Jepsen's words, that the formulation of governmental policies and decisions was to be distinguished from "a road contractor who might have a \$5 million bridge repair job." 44 H.R. Proc., Pt. 11, p. 95. The Commission does not consider that a road contractor's repair decisions are comparable to an MCO's decisions regarding the establishment of a provider network, the establishment of rates paid to providers, the establishment of a drug formulary, or any of the other decisions and policies described in paragraphs 71 through 78 of the findings, below.

66. The respondent nonetheless contends that any policies and decisions made by the MCOs are not governmental, because the MCOs decisions must comply with higher level policies, standards and laws set by Congress, the state legislature, and DSS. In essence, the respondent contends that any policies or decisions made by the MCOs, even if almost identical to the policies and decisions made now or formerly by DSS in the fee-for-service area, are not at a high enough level to qualify as governmental.

67. In distinction to the high level policies implemented by the state and federal governments, the respondent and the MCOs contend that the decisions made by the MCOs in the administration or management of the HUSKY A program are merely "operational," and that the MCOs merely perform "administrative or managerial services."

68. The Commission takes administrative notice of the fact that many governmental decisions, when performed by public agencies, might be deemed "operational," "administrative," or "managerial." For example, in the operation of the Commission, decisions as to how and when to conduct hearings, the forms of notices and decisions, the assignment of staff to perform different functions at hearings, the review of draft proposed decisions, the decision whether to expedite certain cases, the monitoring

of cases, all may reasonably be described as "operational" yet all are found to be "governmental decisions" made by a public agency in connection with the administration and management of the Commission's contested case program.

69. It is therefore concluded that the designation of a decision as "operational" is not useful in distinguishing governmental policies and decisions from non-governmental policies and decisions.

70. The complainant contends that many of the decisions and policies made by the MCOs are virtually identical to governmental decisions and policies made by DSS in the administration of the fee-for-services portion of the state Medicaid program.

71. It is found that, with respect to DSS's administration of the fee-for-service Medicaid program, DSS's decisions whether to subcontract services, which services to subcontract, the methodology for paying for subcontracted services, and the amount to pay for subcontracted services, are all governmental decisions or policies. See 42 C.F.R. §434.1(b) et seq., which allows for subcontracting by a state Medicaid agency. The Commission notes that DSS's decision to subcontract services is analogous to its decision to enter into contracts with MCOs for the provision of insurance services, which latter decision is undeniably a governmental decision and policy.

72. It is found that, with respect to the HUSKY A Medicaid program, the same decisions about subcontracting are delegated to the MCOs, and that DSS cannot prohibit the MCOs from entering into subcontracts.

73. It is found that, with respect to DSS's administration of the fee-for-service Medicaid program, DSS's decisions about which providers may participate in the program, and what criteria must be met by providers for participation in the program, are governmental decisions or policies.

74. It is found that, with respect to the HUSKY A Medicaid program, the MCOs' decisions concerning what providers the MCOs include in their networks are similarly governmental decisions or policies delegated by DSS to the MCOs, and that DSS is prohibited from overruling those decisions.

75. It is found that, with respect to DSS's administration of the fee-for-service Medicaid program, DSS's decisions about the setting of rates paid to providers, whether the rates are sufficient to attract providers, and the methodology for paying those rates, are governmental decisions or policies that Congress directs DSS to make in 42 U.S.C. §1396a(a)(30)(A).

76. It is found that, with respect to the HUSKY A Medicaid program, the MCOs' decisions about the setting of rates paid to providers, and the methodology for paying those rates, are similarly governmental decisions or policies delegated by DSS to the MCOs, and that DSS is prohibited from interfering with the MCOs rate-setting or methodology for payment.

77. It is found that, with respect to DSS's administration of the fee-for-service Medicaid program, DSS's decision whether to use a preferred drug list ("PDL"), which requires prior authorization for all non-listed drugs, is a governmental policy decision debated at extensive hearings and high-level meetings with legislators and the Governor's office.

78. It is found that, with respect to the HUSKY A Medicaid program, the MCOs' decisions about the implementation of a PDL with prior authorization is similarly a governmental policy decision delegated by DSS to the MCOs, and that DSS is, under its contacts with the MCOs, prohibited from overriding the MCOs' prior authorization policies.

79. It is concluded that decisions made and policies implemented by MCOs are so similar to those made and implemented by DSS that the MCOs' policies and decisions must necessarily be concluded to be governmental policies and decisions within the meaning of §1-200(11), G.S.

80. It is also concluded that the governmental policies and decisions described in paragraphs 71 through 78 of the findings, above, are, to the extent that they may not be overridden by DSS, "binding" on DSS within the meaning of §1-200(11), G.S.

81. DSS and the MCOs nonetheless contend that some of the policies and decisions implemented and decisions made by the MCOs, even if governmental, are not binding on DSS because DSS has the power to override them.

82. It is found that DSS has the power to override some, but not all, of the decisions made by MCOs. For example, it is found that DSS has delegated to the MCOs the power initially to decide all Medicaid managed care enrollees' requests for authorization of services (to the extent that the MCOs have themselves decided to impose prior authorization on specific services). It is also found that the enrollee may appeal a denial of authorization, and the enrollee's appeal is subsequently and ultimately decided by DSS, which may reverse the MCO's denial of authorization.

83. The respondent therefore contends that, since it may reverse an MCO's denial of authorization, that an MCO's decision to deny authorization is not binding on DSS.

84. For a variety of reasons, the Commission does not find this argument persuasive, particularly as applied to the totality of the MCOs' decisions and policies.

85. First, the ability of DSS sometimes to reverse an MCO decision does not differ materially from DMV's past ability to reverse or approve certain of Envirotest's decisions. As CHNC points out in its brief, Envirotest had proposed a modification of the DMV emissions testing form, and DMV had approved the modification. The form was on DMV stationary, and the state had the power to approve or disapprove the form—just as DSS has the power to approve or disapprove certain MCO decisions. But once

approved, Envirotest's use of the form, just as the use of procedures by MCOs, was binding on the state.

86. Second, it is found that, in general, the ability to reverse a decision does not necessarily, or even customarily, mean that the decision is not binding. For example, in employment law, a superior's directive to an employee may be binding, even though the employee may appeal that directive through a grievance process, and the directive may ultimately be reversed. Nonetheless, such a directive is binding unless and until it is reversed.

87. In addition, although DSS may indeed reverse an MCO's denial of authorization, DSS may also, in the fee-for-service area, reverse its own denial of, for example, a prior authorization for durable medical equipment. Presumably, DSS would not argue that its own decisions were not "binding" simply because it retained the ability to change them. Rather, just as with the MCOs, the decisions are "binding" on DSS unless and until DSS changes them.

88. Finally, only some of the MCOs' decisions may be reversed by DSS. Other decisions, such as the decision to subcontract services, clearly may not. Indeed, even a denial of authorization is binding on DSS *unless* the enrollee appeals the denial. In any event, the fact that the state can reject or override decisions made by the MCO is simply a reflection of the relationship between a public agency, such as DSS, and the private entity it contracts with to perform a governmental function. Necessarily, as part of its ultimate responsibility for Medicaid in Connecticut, DSS retains rights to disapprove or even reject certain of the MCOs' decisions or policies. If the ability to reject an MCO's actions were evidence that the MCO's decisions were not binding on DSS, then no decisions made by a contractor performing a governmental function would ever be binding on a public agency, because every agency could reserve the right to reject certain decisions of the contractor. The power to approve or disapprove is not evidence that the contractor's decisions are not binding, but simply a reflection of the fact that the state retains a position of higher authority and higher policy-making ability. It cannot be that a public agency must "relinquish complete managerial and decision-making authority over an entire program to a private entity" in order to satisfy §1-200(11), as the respondent argues in his brief. To do so would be to abrogate totally an agency's responsibility to the citizens of the state. Ultimately, it is the obligation of DSS to provide adequate Medicaid services. If the MCOs fail to do so under their contracts, that failure is "binding" on DSS.

89. With regard to the binding effect of MCO decisions on the state, the Commission notes that 42 U.S.C. §1396b(m)(5)(A)(i) authorizes the Secretary of Human Health and Resources to take specified enforcement actions, independently of any action that may be taken by a state, if the Secretary determines that "an entity with a contract [i.e., an MCO] ... fails substantially to provide medically necessary items and services that are required ... to be provided to an individual covered under the contract [between the state and the MCO]." Specifically, 42 U.S.C. §1396b(m)(5)(B)(ii) provides that the

remedies that may be taken by the secretary include “denial of payment *to the state* for medical assistance furnished under the contract.” [Emphasis added.]

90. Further, as discussed in paragraph 53 of the findings, above, the respondent does not contest that the MCOs can be said to be *acting as the state* in denying or terminating covered services so as to be subject to due process notice and hearing requirements. It is therefore difficult for the Commission logically to reconcile the respondent’s positions that the MCOs are acting *as the state*, while nonetheless contending that these very same decisions by MCOs are not “binding” on the state.

91. It is therefore concluded that the governmental policies and decisions implemented by the MCOs in the administration or management, or both, of the HUSKY A program “bind the public agency” within the meaning of §1-200(11), G.S.

92. However, the respondent and the MCOs contend that, even if subsections (A) through (C) of §1-200(11), G.S., are satisfied, the final sentence of §1-200(11), G.S., nonetheless provides that “[g]overnmental function’ shall not include the mere provision of goods or services to a public agency without the delegated responsibility to administer or manage a program of a public agency.”

93. It is found, however, that the MCOs do not merely provide goods or services to DSS without the delegated responsibility to administer or manage a program of a public agency. First, it is clear that DSS has delegated to the MCOs the responsibility to administer or manage the HUSKY A program. Second, the MCOs do not so much provide goods or services to DSS as provide statutory health insurance services directly to the state’s Medicaid recipients. Providing these services to state residents is itself the essence of the governmental service.

94. It is concluded that there is a logical distinction, consistent with the language of §1-200(11), G.S., between the mere provision of goods or services *to the agency*, and the provision of a governmental service directly to the citizens that agency serves.

95. It is therefore concluded that the MCOs perform a governmental function within the meaning of §1-200(11), G.S.

96. Having concluded that the MCOs perform a governmental function within the meaning of §1-200(11), G.S., the question remains as to the respondent’s compliance with §§1-210(a), 1-218, and 1-200(5), G.S.

97. Section 1-200(5), G.S., provides:

“Public records or files” means any recorded data or information relating to the conduct of the public’s business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such

data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

98. Section 1-210(a), G.S., provides in relevant part:

Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. ... Each such agency shall keep and maintain all public records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the public records pertaining to such agency shall be kept in the office of the clerk of the political subdivision in which such public agency is located or of the Secretary of the State, as the case may be.

99. The respondent, Health Net of Connecticut, and Well Care of Connecticut, all contend that the records sought by the complainant are not public records within the meaning of §§1-200(5) and 1-218, G.S., because the contract between DSS and the MCOs does not contain a provision entitling DSS to copies of all records related to the performance of the governmental function.

100. It is found that the contract between DSS and the MCOs does not contain the provisions mandated by §1-218, G.S.

101. The respondent additionally contends that §1-218, G.S., entitles private contractors to notice that their records will be subject to the FOI Act and an opportunity to consider that cost in negotiating the terms of and deciding to enter into the contract with DSS. The respondent contends that the MCOs did not have that notice and opportunity in this case, and the terms of the contract did not apprise them that all their records pertaining to their performance of a governmental function would be accessible to the public.

102. The Commission notes that the MCOs are deemed to have notice of the requirements of §§1-200(11) and 1-218, G.S.

103. It is concluded that the plain language of §1-200(5), G.S., provides that the term "public records" includes records "to which a public agency is entitled to receive a copy by law or contract under section 1-218." [Emphasis added.] Therefore, regardless

of whether the contracts between DSS and the MCOs comply with §-218, G.S., DSS is entitled to receive a copy by law under §1-218, G.S., and the records pertaining to the performance of a governmental function by the MCOs are therefore public records within the meaning of §1-200(5), G.S.

104. Health Net and Well Care further contend that the absence of any contractual language concerning §1-218, G.S., indicates that none of the parties intended that any of the MCOs records were to be subject to §§1-200(11) and 1-218, G.S.

105. It is concluded, however, that §1-218, G.S., is by its express language mandatory for all contracts in excess of \$2.5 million for the performance of a governmental function, and that the Commission is not bound by the parties' interpretation of what constitutes a governmental function pursuant to §1-200(11), G.S. The Commission additionally notes that DSS may not contract away its express statutory obligations under the FOI Act. See, e.g., Lieberman v. State Board of Labor Relations, 215 Conn. 253 (1990).

106. It is concluded that the respondent violated §1-218, G.S., by failing to include the required provision in its contracts with the MCOs.

107. It is also concluded that, notwithstanding the respondent's omission of the required contractual language, the requested records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

108. The respondent maintains that the request was unclear, and that DSS did its best to clarify it.

109. It is found that the complainant's request may reasonably be described as broad, but that it is also clear on its face.

110. It is also found that the respondent made no attempt to contact the complainant for clarification, even though the MCOs indicated that they required it, and even though DSS has done so with other requesters.

111. It is found that the respondent obtained some records from the MCOs that are responsive to the complainant's request, and provided them to the complainant shortly before the final hearing in this matter.

112. However, it is also found that the MCOs are in possession of many other documents responsive to the complainant's request.

113. It is concluded that the respondent violated §§1-210 and 1-218, G.S., by failing to obtain the requested records from the MCOs and provide them to the complainant.

114. The Commission notes that the parties and the intervenor agreed that any claims of exemption for additional records were not to be decided in this case, but reserved to proceedings in a future case, should one arise.

115. As to the question of remedies, §1-206(b)(2), G.S., provides in relevant part:

In any appeal to the Freedom of Information Commission under subdivision (1) of this subsection or subsection (c) of this section, the commission may confirm the action of the agency or order the agency to provide relief that the commission, in its discretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act.

116. The Commission believes that the relief appropriate to rectify the denial of the complainant's rights in this case consists of three parts: (1) requiring the respondent to obtain from the MCOs, and provide to the complainant, any records responsive to her request; (2) requiring the respondent to provide the records to the complainant at no cost, in consideration of the extensive delay in providing records pertinent to an ongoing public policy debate; and (3) requiring the respondent to amend its contract with each MCO to include the language contained in §1-218, G.S.

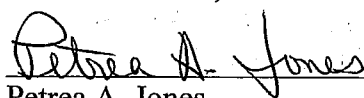
The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The respondent shall forthwith obtain from the MCOs and provide to the complainant, at no cost to the complainant, copies of any records responsive to the complainant's request. The Commission highly recommends that the respondent, if it seeks clarification or narrowing of the complainant's request, contact the complainant directly.

2. The respondent shall forthwith amend its contract with each MCO to include the language mandated by §1-218, G.S.

3. Henceforth the respondent shall strictly comply with the requirements contained in §§1-200(5), 1-200(11), 1-210(a), and 1-218, G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of December 14, 2005.



Petrea A. Jones

Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

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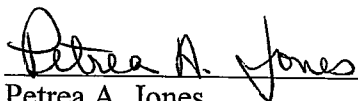
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