

STATE OF TENNESSEE

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April 27, 2004

Opinion No. 04-078

Commission on Aging — Determining the Unit Costs for Services
Provided to the Aging and Disabled Under Tenn. Code Ann. § 71-5-1408

QUESTION

Whether the Commission on Aging and Disability's determination of unit costs for services complies with Tenn. Code Ann. § 71-5-1408(e)?

OPINION

While Tenn. Code Ann. § 71-5-1408(e) is susceptible to more than one interpretation, it may be interpreted as the Commission has read the law. A court could find that the Commission's determination of unit costs complies with Tenn. Code Ann. § 71-5-1408(e).

ANALYSIS

The State¹ has an operational plan and budget for home-based and community-based services to elderly and disabled individuals. Tenn. Code Ann. § 71-5-1408(a). The plan sets limits to services based on available fiscal resources, and the plan specifies services in a way that permits flexibility for providers to meet the needs of eligible individuals in a cost-effective manner. Tenn. Code Ann. § 71-5-1408(b). The Commission on Aging and Disability (Commission) administers the allocation of the plan funding. Tenn. Code Ann. § 71-5-1408(d). The Commission also must set rates for services, guided by statutory criteria. Tenn. Code Ann. § 71-5-1408(e) states as follows:

[T]he commission on aging and disability shall establish an average maximum statewide unit cost for service provided to elderly and disabled individuals in need of assistance who do not qualify for long-term care services pursuant to [Tenn. Code Ann. §§ 71-1-101, *et seq.*]. In developing the rate, the commission shall take into account the unit of service rate permitted for such service under any federal waiver for providing assistance under this chapter if such service is also provided under the federal waiver and in no case can

¹The Commission provided the factual context we use in this opinion. We have also drawn information from a recent audit report by the Comptroller.

it [the rate] be more than twenty percent (20%) above the average statewide unit cost for that specific service.

We have found no case law construing this statutory provision.

Both the Commission and the Comptroller of the Treasury (Comptroller) have responsibilities related to rates for services delivered under Tenn. Code Ann. §§ 71-5-1401, *et seq.* As noted above, under Tenn. Code Ann. § 71-5-1408(e), the Commission is responsible for equitably allocating funding resources and establishing an average maximum statewide unit cost for these services. Among other duties, the Comptroller has the authority to audit and evaluate the funding of these services. Tenn. Code Ann. § 71-5-1406. The Commission and the Comptroller hold different views on the interpretation and application of this statutory provision.²

The Commission on Aging interprets Tenn. Code Ann. § 71-5-1408(e) to mean that the average cost of all contracts within an area agency³ should not exceed one hundred twenty percent (120%) of the federal waiver unit cost for the same service. Thus, the Commission requires that the unit cost rate for a specific service, as contained in all contracts in a particular planning and service area, not exceed by more than twenty percent (20%) the average statewide Medicaid unit cost for the same service. In computing rates for services, the Commission uses a “straight” average. Comptroller’s Report, *Servicing the Aging and Disabled: Progress and Issues* (December 2003) (*Report*), p. 17. Under this interpretation, the contract unit cost for some providers may exceed the average statewide Medicaid unit cost by more than twenty percent (20%), so long as rates negotiated with other providers within the same planning and service area are lower and the contract rates averaged together do not exceed the average Medicaid waiver rate by more than twenty percent (20%). Using this calculation method, the Commission does not exceed the statutory twenty percent (20%) cap. *Report*, pp. 17-18.

On the other hand, the Comptroller’s Office interprets the statute to mean that no individual provider may be paid more than twenty percent (20%) above the average statewide Medicaid unit cost for the same service. In its *Report*, the Comptroller used a weighted average⁴ approach to determine whether individual providers receive more than one hundred twenty percent (120%) of the average statewide Medicaid unit cost for the same service. In other words, the Comptroller’s

²The Comptroller suggested that the Commission ask for an Attorney General’s opinion on whether the Commission’s actions were in compliance with Tenn. Code Ann. § 71-5-1408(e). *Report*, p. 26.

³The Commission administers, through nine regional area agencies, state general revenue funded home and community based services long-term program for adults with disabilities. Each area agency contracts with multiple provider agencies for each service. The area agency negotiates a unit cost reimbursement rate with each provider. When a consumer needs a service, the consumer chooses the provider he prefers.

⁴ A weighted average” takes into account the proportional relevance of each component, rather than treating each component equally. See *The American Heritage® Dictionary of the English Language* (Fourth Edition 2000) (definition for “weighted”).

Office looked at the amount actually paid to the individual provider as the critical measure of statutory compliance. The Commission, on the other hand, uses the average cost of providing the same service within a service area as the critical measure. The statute does not specify a methodology to be used. *Report*, p. 17.

In his *Report*, the Comptroller questioned the method the Commission uses to determine the unit reimbursement cost for services.⁵ The Comptroller's concern was that, by using a straight average, the Commission may ultimately pay some providers more than one hundred twenty percent (120%) of the unit cost. Using a weighted average method, the Comptroller concluded that the Commission may be exceeding the twenty percent (20%) cap. *Report*, pp. 18-19.

The statute is susceptible to either interpretation. The word "average" is not defined in the statute. As the Comptroller points out, the statute does not require the Commission to use a particular mathematical method when determining unit costs. *Report*, p. 26. As a general rule, the interpretation of the agency administering the law will be given deference by the courts. Courts may defer to the decisions of administrative agencies when the agencies are acting within their area of specialized knowledge, experience, and expertise. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn.App.1988) ("Courts defer to the decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise."); *see also Illinois Cent. Gulf Ry. Co. v. Tennessee Pub. Ser. Comm'n*, 736 S.W.2d 112, 117 (Tenn.App.1987) ("This principle applies . . . when the agency has consistently interpreted its position and when the interpretation is not inconsistent with the language, goals, or operation of the statutes in question."). Moreover, a review of the legislative history of the statute does not provide any clear guidance concerning legislative intent on this issue.

This Office is not in a position to determine whether one calculation methodology is preferable to another or, put another way, to determine what mathematical measure should be used to assess the Commission's implementation of its statutory duties. Because the Commission administers the funding, however, its interpretation could receive deference by the courts.

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⁵The Comptroller observed in his *Report*, p. 17:

Some area agencies may pay . . . providers rates higher than allowed by law, which may result in fewer funds available and fewer clients served The area agencies use a "straight" average to calculate unit rates to determine if providers exceed the statutory limit However, a weighted average illustrates the amount the state actually pays because it includes the quantity of each type of service rendered by providers and the total state expenditures for each service in its formula. The Office of Research staff calculated the weighted average This calculation reveals that the area agencies are collectively awarding contracts higher than the 120 percent standard.

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