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# State of Connecticut

RICHARD BLUMENTHAL  
ATTORNEY GENERAL



Hartford  
January 26, 2007

The Honorable Michael Starkowski  
Commissioner  
Department of Social Services  
25 Sigourney St.  
Hartford, CT 06106-5033

Dear Commissioner Starkowski:

Congratulations on your appointment and nomination as Commissioner of Social Services.

I am writing to clarify my position in response to Commissioner Wilson-Coker's letter dated November 20, 2006, which responded to my letter to Governor Rell dated November 8, 2006. In my letter, I pointed out troubling evidence that the Medicaid managed care organizations ("MCOs") administering the State's HUSKY A program may be applying unauthorized and unduly restrictive medical necessity criteria in determining whether to authorize treatments and drugs. I urged the Governor and the Department of Social Service ("DSS") to employ the state's unfettered contractual audit rights to ensure that the MCOs are applying the correct medical necessity criteria. I am frankly puzzled and disappointed by the response, which indicates a continuing unwillingness to hold the MCOs to account on this important issue, despite the Department's clear and unfettered contractual right to do so.

My letter urged the Governor to demand information from the MCOs specifically and exclusively under Section 3-35(e) of the MCOs' contracts with DSS. I did not suggest that the request for such information be made pursuant to the Freedom of Information Act ("FOIA"). As you know, Section 3-35(e) of the MCOs' contracts provides that:

[t]he MCO, for purposes of audit or investigation, shall provide the State of Connecticut, the Secretary of HHS and his/her designated agent, and any other legally authorized governmental entity or their authorized agents access to all the MCOs' materials and information pertinent to the services provided under this contract, at any time, until the expiration of three (3) years from the completion date of this contract as extended

The letter indicates that DSS erroneously views its contractual entitlement to information concerning the MCOs medical necessity criteria as somehow restricted or governed by the

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Freedom of Information Act, Conn. Gen. Stat. § 1-200 *et seq.*, and, more particularly, by the resolution of the MCOs' appeals of rulings of the Freedom of Information Commission ("FOIC") that the MCOs perform governmental functions for purposes of the records disclosure requirements of FOIA.

The letter states:

On one hand, we are responsible for administering a critical health care program covering over 300,000 lives. On the other hand, we are responsible for facilitating release of information contested by program contractors themselves as they press a court appeal. It is safe to say that all parties are awaiting the Court's decision on the contractors' appeal – and expected legal clarification of whether they are subject to the FOIA – with eager anticipation so these issues can be resolved once and for all.

Indeed, my understanding is that one or more of the MCOs have flatly refused to provide DSS information concerning their medical necessity criteria because they perceive the request as motivated by a FOIA request from a third party. This refusal is a clear violation of their contracts, which require the production of documents requested by DSS for purposes of audit and investigation regardless of the perceived motivation for the request. Inexplicably, DSS appears to have simply acquiesced to this clearly erroneous position.

The Superior Court dismissed the MCOs' appeals, confirming that the MCOs perform governmental functions and that the records relating to the performance of those functions are subject to FOIA. This ruling is an important victory for public accountability in the administration of large state contracts affecting hundreds of thousands of lives and involving hundreds of millions of dollars of public funds. While records relating to medical necessity criteria were not specifically at issue in the appeal, no good faith argument can be made that the Court's ruling and reasoning would not also apply to such records.

Even without this decision, the Department's right to access the MCOs' records concerning medical necessity criteria is absolute. Let me be very clear: the FOIA appeals in now way control, relate to or diminish DSS's absolute contractual right to obtain information under the contract. Nor would a stay of the court's ruling in any way prevent DSS from enforcing its contractual audit and investigation rights. DSS's right to obtain information under Section 3.35(e) of the contracts for purposes of auditing or investigating the MCOs' performance is unqualified, *regardless of what motivates the request or whether there is a pending FOIA request on the same or related topic*. The MCOs simply have no right under the contracts to pass judgment on the reasons for DSS's request, but rather must provide any information that DSS requests for purposes of audit or investigation.

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In the interest of the 300,000 Connecticut residents who rely on the HUSKY A program for medical services, I urge you to demand that the MCOs produce to DSS documents relating to their selection and use of medical necessity criteria. You should make very clear to the MCOs that your demand is solely and exclusively pursuant to Section 3-35(e) of the contracts and is not in any way based on FOIA. You should also make clear that any failure to fully and promptly comply with your demand will be considered a breach of contract. I reiterate my offer to seek any and all appropriate contractual or judicial remedies if the MCOs continue to refuse to comply with your demand.

I hope that this letter clarifies this issue. I commend you on your willingness to require greater accountability from the MCOs. If you need further information or assistance, please do not hesitate to contact me

Very truly yours,



RICHARD BLUMENTHAL

RB/pas

c: The Honorable M Jodi Rell, Governor