



Ohio Elections Commission
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January 30, 1987

ADVISORY OPINION NO. 87-2

Syllabus: Divisions (I) and (J) of Revised Code section 3517.13 are not applicable to provider agreements entered into by the Ohio Department of Health's Bureau of Crippled Children's Services, Communicative and Sensory Disorders Unit, and Women, Infants and Children Coupon Merchants Program so long as the department continues to administer these programs by entering into provider agreements with all qualified provider applicants.

TO: Thomas J. Halpin, M.D., M.P.H., Director, Ohio Department of Health:

You have requested an opinion on the following question:

Are divisions (I) and (J) of Revised Code section 3517.13 applicable to provider agreements entered into by the Ohio Department of Health's Bureau of Crippled Children's Services (BCCS), Communicative and Sensory Disorders Unit (CSDU) and the Women, Infants and Children (WIC) Coupon Merchants Program?

The federal government has established a Crippled Children's Services program under Title V of the Social Security Act, 42 U.S.C. section 701 (1981), as amended. The State of Ohio, in its administration of this program, established the BCCS under Revised Code section 3701.023(A). The BCCS enters into provider agreements with hospitals, physicians, and other professional medical groups to provide quality general medical care to handicapped children. The handicapped child or his parents or guardian pay only that part of the expenses of such medical care as they are required to pay, as determined by public health council rule. R.C. section 3701.021(A)(1). After these required payments are made, third party payments for the child's expenses must be applied to the costs incurred. R.C. section 3701.023(H). To the extent such third parties do not cover all costs, the department will then pay the difference. R.C. section 3701.023(G).

The Department of Health, through the BCCS, shall, "In accordance with standards set forth in rules adopted by the Public Health Council . . . review the applications of professional personnel, hospitals, medical equipment suppliers, and other individuals, groups, or agencies that make application to become providers." R.C. section 3701.023(D). Pursuant to R.C. section 3701.021(A)(2), the public health council is authorized to adopt rules to establish "standards to be used by the Department of Health in determining the eligibility of providers of services for medically handicapped children," and so, has set out BCCS standards in Ohio Administrative Code Chapter 3701-43. These standards are viewed as even more stringent than those established under the Medicaid program since BCCS standards require certification or experience

in a specialized field dealing in the care of crippled children. Thus, in order for a party to be enrolled in a provider agreement, it must "comply with all applicable requirements for providers established by sections 3701.022 to 3701.025 of the Ohio Revised Code, Chapter 3701-43 of the Ohio Administrative Code, and any pertinent federal statutes and regulations . . .". State of Ohio Department of Health, Bureau of Crippled Children's Services Provider Agreement, section 1(D)1.

Participation in the BCCS provider agreements is strictly voluntary in nature. The Department of Health does not solicit participation. Applicants come to the BCCS and if they meet the qualifications and standards for participation as they are set out in the Ohio Administrative Code, the Ohio Revised Code and the provider agreement, they will be enrolled in provider agreements. "The department shall enter into a written agreement with each applicant who is determined to be eligible to be a provider in accordance with the provider agreement required by the medical assistance program established under section 5111.02 of the Revised Code." R.C. section 3701.023(D). Thus, the Ohio Department of Health does not exercise any discretion in entering into provider agreements with qualified applicants. In addition, the Ohio Department of Health does not limit the number of provider agreements that will be made with qualified applicants.

The CSDU is a part of the division of Maternal and Child Health established under Revised Code section 3701.023(A), and operates in conjunction with school programs established under R.C. section 3313.69. It enters into contracts with physicians and other medical professionals for diagnostic services rendered to children, often BCCS clients, in local transient clinics that treat eye, ear, and speech problems. Unlike BCCS, CSDU has a limited number of positions to fill. However, historically and even today, the CSDU faces a chronic shortage of medical professionals willing to participate in the program since payment for participation is minimal and covers only their expenses. Faced with this shortage, the department recruits participation in the program by use of direct mail, professional organization solicitation, and local health agency referral. Before a party will be enrolled in a CSDU agreement, it must be board certified and licensed in a specialty and, in addition, must meet all BCCS provider agreement standards for enrollment, when applicable. To date the CSDU has given every applicant who meets the professional standards a provider agreement.

The WIC Coupon Merchants Program is a federal program administered by state governments. In Ohio, this program was placed in the Department of Health by executive order of the Governor and it operates out of the division of Maternal and Child Health, under Revised Code section 3701.023(A). The program is entirely federally funded and operates under federal laws, including Section 17 of the Child Nutrition Act of 1966, as amended and 7 C.F.R. Part 246, as amended. Local agencies, empowered by the Ohio Department of Health, enter into provider agreements with local retailers to provide food to participants in the WIC program. Participation in the WIC Coupon Merchants Program provider agreements is strictly voluntary in nature. Participation is, in fact, a product of demand and it tends to increase as the number of WIC customers increases.

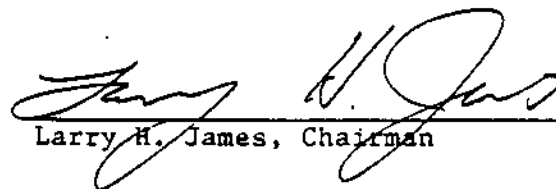
The Ohio Department of Health is authorized to limit the number of providers in administering the federal program. "The state agency shall authorize an appropriate number and distribution of food vendors in order to assure adequate participant convenience and access and to assure that state or local officials can effectively manage review of authorized food vendors in their jurisdiction. The state agency may establish criteria to limit the number of authorized food vendors in its jurisdiction," 7 C.F.R. Part 246.12(E)(2). In addition, "The state agency is encouraged to consider the impact of authorization decisions on small businesses." 7 C.F.R. Part 246.12(E)(3). However, to date, the department has never used its discretion to limit enrollment of qualified applicants. According to the Ohio WIC Program Retail Vendor Memorandum of Agreement for Fiscal Years 1987-1988, section A. 19, a retailer must "comply with all federal and state laws, rules, and regulations governing the WIC program including Section 17 of the Child Nutrition Act of 1966, as amended, and the pertinent federal regulations for the WIC Program (7 C.F.R. Part 246), as amended, and with all procedures and requirements of which the retailer receives notification from the local agency or state WIC agency." If retailers meet these qualifications and standards, they will be enrolled in provider agreements.

In Advisory Opinion No. 86-3 this Commission stated that:

Divisions (I) and (J) of R.C. 3517.13 apply to contracts that are "awarded" by the state or a political subdivision. The choice of the word award by the General Assembly would seem to imply that some deliberative process is involved or that at a minimum the agency or department has the discretion on whether to enter the contract. The word "award" is defined as to give or assign after careful consideration. Black's Law Dictionary (5th ed. 1979); Webster's Third new International Dictionary (unabridged, 1971).

As discussed in this opinion, the state lacks discretion on whether to enter into a provider agreement in the BCCS program. While discretion may be used to limit enrollment in both the CSDU and WIC programs, the state of Ohio, through the Department of Health, has chosen not to do so to date and does not foresee doing so in the future.

For the reasons stated herein, it is the opinion of the Ohio Elections Commission that divisions (I) and (J) of Revised Code section 3517.13 are not applicable to provider agreements entered into by the Ohio Department of Health's Bureau of Crippled Children's Services, Communicative and Sensory Disorders Unit and Women, Infants and Children Coupon Merchants Program so long as the department continues to administer these programs by entering into provider agreements with all qualified provider applicants.



Larry H. James, Chairman