

**OPINION NO. 81-064****Syllabus:**

Section 8(B)(4) of Am. Sub. H.B. 176 (eff. March 27, 1980) is properly construed as requiring that provider agreements include all beds of a nursing home facility which are certifiable—that is, all beds which meet standards for certification of compliance with federal and state laws and rules for participation in Ohio's Medicaid program. In light of this construction, all certifiable beds in a nursing home facility participating in Ohio's Medicaid program must be certified in order to assure compliance with 42 C.F.R. §442.12(a) (1970).

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**To: Kenneth B. Creasy, Director, Department of Public Welfare, Columbus, Ohio**  
**By: William J. Brown, Attorney General, October 29, 1981**

I have before me your request for my opinion interpreting certain language contained in Am. Sub. H.B. 176 (eff. March 27, 1980), which was enacted by the 113th Ohio General Assembly in 1980 and, as you have described it, "mandates comprehensive revisions in Medicaid reimbursement and provider agreement policies relating to long-term care facilities" (i.e., relating to nursing homes).

While this new Act encompasses many changes, I understand from your request and from conversations had between this office and yours that your concern focuses upon the "certification" of nursing homes and the manner in which that certification interrelates with "provider agreements" during fiscal years 1981 and 1982.

In order to develop the issue you have raised by your request, it is appropriate to first outline some of the basic operating principles that relate to nursing home licensure, to nursing home "certification," and to Ohio's Medicaid program, under which a nursing home may operate as a provider of services to Medicaid patients pursuant to a "provider agreement." At that point, one can examine how the new Act discourages discrimination against Medicaid recipients (a) by changing the approach of the Ohio Department of Public Welfare (hereafter ODPW) regarding provider agreements, and (b) by controlling practices of nursing home providers. The issue you have raised concerns both aspects of the Act.

Ohio law requires that a person or entity desiring to operate a nursing home first obtain appropriate licensure from the Ohio Department of Health (hereafter ODH). R.C. 3721.05(A). In considering a nursing home licensure matter, ODH has the duties and responsibilities, and follows the mandates, set out in R.C. Chapter 3721, and it has promulgated regulations thereunder. When a nursing home measures up to the standards of that Chapter and those regulations, the home will receive a license to operate a nursing home of a certain designated bed capacity. Beyond licensure, however, are requirements relating to Medicaid if a home elects to become a provider of services to individuals who are qualified Medicaid recipients.

Under the Medicaid program, a nursing home that has been "certified" by ODH may enter into a contractual agreement with ODPW known as a "provider agreement." Under such an arrangement, the nursing home agrees to provide services to qualified Medicaid recipients in return for which the home receives moneys to reimburse it for the reasonable cost, within certain limitations, of the services provided. See R.C. 5111.23.

The Medicaid program in Ohio, as in other states, can be characterized as a program which is controlled in detail by federal regulations even though funded by both state and federal moneys. The program is federally controlled in its substance because it has, as its statutory beginning point, Title XIX of the Social Security Act §620, 42 U.S.C. §301 (1974), as amended, rather than state law. Compare R.C. 5111.02. Further, the federal regulations promulgated thereunder are specific in detail as to the types of care to be provided and the types of physical facilities in which they are to be provided. See 42 C.F.R. Part 440 (1979) (regarding services); 42 C.F.R. Part 447 (1979) (regarding payments for services); 42 C.F.R. 456 (1979) (regarding utilization control).

The federal regulations, however, are also particularly designed to permit the Medicaid program in a state to be fiscally administered and substantively regulated at the state level. The federal regulations contemplate that one single state agency be designated to administer the Medicaid program—that is, to deal with such things as provider agreements and reimbursement payments, 42 C.F.R. §431.10 (1979)—while another be designated the state survey agency to provide "certification" of each home's compliance with the applicable federal and state laws and rules for participation in the program, 42 C.F.R. §442.12 (1979). In Ohio, it is ODPW which has been designated by the Ohio General Assembly as the single agency to administer the program, and it is ODH which, as survey agency, provides for nursing home certification after appropriate inspection and review of each home.

In order for a nursing home to participate in the Medicaid program, the federal regulations require that the home, after being licensed and certified, enter into a provider agreement with ODPW as the administering state agency. 42 C.F.R. §431.107(b) (1979) provides in pertinent part: "A state plan must provide for

an agreement between the Medicaid agency and each provider furnishing services under the plan. . . ." The federal regulations are very explicit in requiring that provider agreements address only those beds which have been certified. 42 C.F.R. §442.12(a) (1979) provides in pertinent part: "A Medicaid agency may not execute a provider agreement with a facility for SNF [Skilled Nursing Facility] or ICF [Intermediate Care Facility] services nor make Medicaid payments to a facility for those services unless. . .the State survey agency has certified the facility under this part to provide those services." On the other hand, nothing within the federal regulations requires that provider agreements include every licensed and certified bed. That is, under the federal regulations, a home of 100 licensed beds may have all of them certified, but include only 50 beds in the provider agreement. Alternatively, under the federal regulations, a home of 100 licensed beds may (by its own election or otherwise) have only 50 of those beds certified, with all, or just part, of those 50 beds included in the provider agreement.

By way of brief summary, then, a nursing home may be reimbursed under the Medicaid system for certain costs to the extent that it provides services to Medicaid patients in licensed, certified beds which are covered by a provider agreement entered into by the home and ODPW. On the other hand, it should be noted that a home licensed by the state is not required to have any of its beds certified for Medicaid purposes. Nor does Ohio law require a nursing home to operate under a provider agreement as a condition precedent to licensure. A home may, and some do, provide services only to private-paying patients. See R.C. 3721.19. The questions you have raised, however, are concerned with homes which elect to qualify as Medicaid providers and, more particularly, the degree to which the beds of such homes are made available to Medicaid patients.

With these basic operating principles in mind, it is next necessary to consider the factual backdrop against which Am. Sub. H.B. 176 originated before turning to a discussion of the specific provision of that statute which you have asked me to construe. It is my understanding that, in the past, most nursing home providers have operated by choosing to allow some but not all of their licensed beds to be occupied by Medicaid patients. Such partial participation in the Medicaid program was accomplished in two ways. Some homes would request ODH certification of all licensed beds, but elect not to enter into provider agreements with ODPW for more than the number of beds such homes specified to ODPW. The result was a "limited bed agreement" where the home set the number of beds to be included under the provider agreement. Other homes used "distinct part certification" as a method of limiting the extent of their Medicaid involvement. Under the distinct part approach, a home would voluntarily limit the number of licensed beds for which it requested Medicaid certification from ODH. The result, again, was that of having the homes in effect set the number of beds to ultimately be included under the provider agreement. Both of these practices were accepted by ODPW, which pursued a voluntary participation concept, and those practices were allowable under applicable federal regulations.

The concept of permitting profit-making nursing home owners to voluntarily control (by limited bed agreements, distinct part certifications, or otherwise) the extent to which their beds are made available to Medicaid patients has permitted a distinct discrimination against Medicaid patients and in favor of private-paying patients. Simply stated, the "limited bed" and "partial certification" provider agreements would allow Medicaid certified nursing homes to accept Medicaid patients only when and to the extent that they could not fill their beds with more lucrative private-pay patients. This resulted in Medicaid patients gravitating towards nursing homes whose quality was not sufficient to attract private-pay patients. That, coupled with a decreasing availability of nursing home beds and other problems, led to legislative study of Ohio's nursing home industry and Ohio's Medicaid program. In 1977, the Ohio General Assembly focused its attention on Ohio's nursing home industry and the state's Medicaid program by initiating a legislative study that, in 1979, resulted in the release of A Program In Crisis: Blueprint For Action as the final report of Ohio's Nursing Home Commission. The

Commission's study, as reflected in that report, led to the development of Am. Sub. H.B. 176 in its original form.

The 1979 report discusses the problem of discrimination at some length. The point is made that "[o]ne of the most serious problems with Ohio's nursing home program is the rampant discrimination against many elderly and disabled individuals." Ohio Nursing Home Comm'n, *supra*, at 194. The report states the obvious reason for the discrimination: "private pay patients are more lucrative for providers." *Id.* at 198. The report also explains what the consequences of discrimination have been:

The simple fact is that the Medicaid program, and the ability of Medicaid certified providers to discriminate against Medicaid patients perpetuates the existence of . . . low quality nursing homes. This discrimination, forcing Medicaid patients into the only beds available—too often those in low quality homes—keeps these substandard homes almost fully occupied and makes them financially viable.

. . . .

. . . By continuing discrimination, homes offering high quality care can continue to seek the most profitable patients for their operation—the private-pay and easy-to-care-for. These high quality homes can use Medicaid patients as a form of insurance—they will accept only the number of Medicaid patients they need to ensure that an optimal number of their beds are always full. The low quality homes can continue with relatively full occupancy, specializing in accepting Medicaid patients and providing poor care to people whose only alternative is death.

Id. at 199-203.

Of particular importance, the 1979 report pointedly recommended the adoption of statutory prohibitions against nursing home provider discrimination. Indeed, the report referred to then Sub. H.B. 176 as a bill incorporating the Commission's recommendations, and it specifically supported provisions to ensure that all parts of a nursing home meeting certification standards be included in provider agreements.

Your request for my opinion deals with a provision of Am. Sub. H.B. 176 which appears in uncodified language at Section 8(B)(4) and reads as follows: "[E]very provider agreement with a home shall . . . include any part of the home that meets standards for certification of compliance with federal and state laws and rules for participation in the medical assistance program. . . ." (emphasis added). With respect to this provision, you raise the following questions:

1. Does the provision require the department to enter into a provider agreement with a facility for only those beds actually certified by the Ohio Department of Health as being in compliance with federal and state laws and rules for participation? . . . OR
2. Does the provision require the department to enter into a provider agreement for the number of beds that could be certified (i.e., "that meet the standards for compliance") but which are not certified?

It is a general rule of statutory construction that words are to be given their natural and normal meaning. R.C. 1.42. The plain meaning of the above-quoted provision appears to be that provider agreements must include all beds that are certifiable ("[meet] standards for certification of compliance"), even though such beds may not in fact be certified by ODH. This construction implicitly requires

making a determination of the certification status of all beds within nursing homes which desire to be Medicaid providers. Although you indicate that the certification process has historically been limited to the number of beds which a nursing home has requested be certified, I can see no legal basis for so limiting it. As the designated survey agency, it is the responsibility of ODH to determine for ODPW if institutions meet the requirements for participation in the Medicaid program (42 C.F.R. 431.610(e)(1)); the regulations do not specify that the survey agency may determine the certification status of only beds for which a nursing home has requested certification. Moreover, pursuant to 42 C.F.R. 431.610(f) the Medicaid agency and survey agency are required to enter into a written agreement covering the activities of the survey agency in carrying out its responsibilities. In the context of that agreement, ODPW could specify that ODH determine the certifiability of all beds in a nursing home which desires to participate in the Medicaid program. ODH is already authorized by state law to conduct annual inspections of all nursing homes. R.C. 3721.02. I can see no legal objection to ODH determining the certifiability of beds within a nursing home in conjunction with those inspections. In fact, R.C. 5111.22(B)(4) expressly mandates that a provider must agree to "open its premises for inspection by the department, the department of health, or other local authority having authority to inspect."

Inasmuch as I have construed Section 8(B)(4) of Am. Sub. H.B. 176 as requiring the inclusion of all certifiable beds in provider agreements, I conclude that all certifiable beds in a nursing home facility participating in Ohio's Medicaid program must be certified in order to assure compliance with federal law. 42 C.F.R. §442.12(a) (1970), quoted earlier, prohibits a Medicaid agency from making a provider agreement with a facility for services except to the extent that the facility has been certified for those services. It is apparent from R.C. 5111.02(A) that it is the legislature's intent that Ohio's Medicaid program operate within the bounds of the federal law. R.C. 5111.02(A) in pertinent part provides:

The department of public welfare may provide medical assistance under Title XIX of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended, as long as federal funds are provided for such assistance. . . .

Moreover, having elected to participate in the federal medical assistance program under Title XIX and receive federal funds, the State of Ohio is obligated to administer its program in a manner consistent with federal law. Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F.Supp. 529 (S.D. Ohio 1979); Fuzie v. Manor Care, Inc., 461 F.Supp. 689 (N.D. Ohio 1977). Inasmuch as it is clearly the duty as well as the intent of the legislature to comply with the requirements of Title XIX, Section 8(B)(4) of Am. Sub. H.B. 176 should be read in tandem with the Social Security Act and the federal regulations promulgated thereunder. Consistency with federal law mandates that all beds included in a provider agreement be certified. If all certifiable beds must be included in such an agreement, then all certifiable beds must also be certified. In this way, all beds which meet certification standards may be included in a provider agreement as required under state law by Section 8(B)(4) of Am. Sub. H.B. 176 without violating the provision under federal law specifying that provider agreements may include only certified beds.

It is, then, my opinion, and you are so advised, that Section 8(B)(4) of Am. Sub. H.B. 176 (eff. March 27, 1980) is properly construed as requiring that provider agreements include all beds of a nursing home facility which are certifiable—that is, all beds which meet standards for certification of compliance with federal and state laws and rules for participation in Ohio's Medicaid program. In light of this construction, all certifiable beds in a nursing home facility participating in Ohio's Medicaid program must be certified in order to assure compliance with 42 C.F.R. §442.12(a) (1970).