

IN THE SUPREME COURT OF OHIO

STATE OF OHIO <i>EX REL.</i>)	CASE NO.
)	
LEADINGAGE OHIO)	
2233 North Bank Drive)	<u>ORIGINAL ACTION IN</u>
Columbus, Ohio 43220,)	<u>MANDAMUS</u>
)	
and)	
)	
OHIO HEALTH CARE ASSOCIATION)	ORAL ARGUMENT REQUESTED
9200 Worthington Road, Suite 110)	
Westerville, Ohio 43082,)	
)	
and)	
)	
THE ACADEMY OF SENIOR HEALTH)	
SCIENCES, INC.)	
17 S High St., #770)	
Columbus, OH 43215,)	
)	
Plaintiffs/Relators,)	
)	
v.)	
)	
THE OHIO DEPARTMENT OF)	
MEDICAID)	
50 West Town Street, Suite 400)	
Columbus, Ohio 43215)	
)	
and)	
)	
MAUREEN M. CORCORAN,)	
in her official capacity as the Director of the)	
Ohio Department of Medicaid,)	
50 West Town Street, Suite 400)	
Columbus, Ohio 43215,)	
)	
Defendants/Respondents.)	

VERIFIED PETITION FOR WRIT OF MANDAMUS

BARNES & THORNBURG LLP

Counsel of Record:

David Paragas (0043908)
41 S. High Street Suite 3300
Columbus, Ohio 43215
Phone: (614)628-1407
David.Paragas@btlaw.com

Kian Hudson (*pro hac vice* application forthcoming)

11 S. Meridian Street
Indianapolis, Indiana 46204
Phone: (317) 229-3111
Kian.Hudson@btlaw.com

ROLF GOFFMAN MARTIN LANG LLP

Aric D. Martin (0065765)
Joseph F. Petros III (0088363)
31105 Bainbridge Road, Suite 4
Cleveland, Ohio 44139
Phone: (216) 514-1100
Fax: (216) 626-7623
Martin@RolfLaw.com
Petros@RolfLaw.com

Attorneys for Relators

OHIO ATTORNEY GENERAL

Counsel of Record:

David A. Yost
30 E. Broad Street, Floor 16
Columbus, Ohio 43215
Phone: (614) 728-5458
Attorney for Respondents

INTRODUCTION

1. Relators LeadingAge Ohio (“LeadingAge”), The Ohio Health Care Association (“OHCA”), and the Academy of Senior Health Sciences (the “Academy”) (collectively, “Relators”) submit this petition for a writ of mandamus on behalf of the State of Ohio to compel Respondents, the Ohio Department of Medicaid (“ODM”) and Director Maureen M. Corcoran, in her official capacity, (collectively, “Respondents”), to comply with unambiguous directives in House Bill 33 (the budget legislation for state fiscal years 2024-2025; hereinafter, the “Budget Legislation”) regarding the calculation of Medicaid rates paid to Ohio’s nursing facilities.

2. The Budget Legislation sets forth a mandatory calculation formula that requires ODM to allocate 60% of this year’s statutorily determined increase in nursing home Medicaid reimbursement toward “quality incentive” payments awarded to the state’s highest quality nursing homes, and only 40% toward the “base rate” paid to all eligible nursing homes.

3. However, in calculating the “quality incentive” component under the statute, ODM openly and erroneously conflated two defined statutory terms, causing the quality incentive payments to be much lower than they should be. Crucially (and curiously), ODM did not make this same mistake when applying the same defined statutory terms for purposes of calculating the “base rate.”

4. Thus, while ODM correctly calculated the increase in the “base rate,” it significantly shortchanged the increase in the “quality incentive” payment rate, causing the “quality incentive” increase to be *much smaller* than the “base rate” increase. This is the opposite of what the Budget Legislation requires.

5. Because the “quality incentive” component is being shortchanged, the aggregate increase in Medicaid reimbursement for nursing home care is much lower than it should be under the statute.

6. The calculation formula used by Respondents is directly contrary to the clear and unambiguous language of the Budget Legislation.

7. A writ of mandamus is necessary to compel Respondents to comply with their duty under the clear language of the Budget Legislation.

PARTIES

8. Relator Ohio Health Care Association (“OHCA”) is a 501(c)(3) non-profit association existing under the laws of the State of Ohio. OHCA represents more than 1,200 non-profit, for-profit, and governmental nursing facilities, assisted living communities, providers of services for individuals with intellectual and developmental disabilities, home healthcare providers and hospice agencies. OHCA’s mission is to educate, advocate and meet the needs of its members. OHCA submits this petition on behalf of its member nursing facilities. OHCA’s members include nursing facilities in the top 75% of nursing facilities in Ohio that qualify for the statutory quality incentive, pursuant to the metrics set forth under Revised Code section 5165.26(C).

9. Relator The Academy of Senior Health Sciences, Inc. (the “Academy”) is a non-profit 501(c)(4) association existing under the laws of the State of Ohio. The Academy seeks to provide public education and awareness initiatives to the long-term care community in Ohio. The Academy’s membership consists of nursing facilities and other long-term care providers and support organizations in Ohio. The Academy submits this petition on behalf of its member nursing facilities. The Academy’s members include nursing facilities in the top 75% of nursing facilities in Ohio that qualify for the statutory quality incentive, pursuant to the metric set forth under Revised Code section 5165.26(C).

10. Relator LeadingAge Ohio (“LeadingAge”) is a 501(c)(3) non-profit association existing under the laws of the State of Ohio. LeadingAge Ohio’s members include non-profit,

mission-driven, values-based organizations that provide long term care services and supports to an estimated 400,000 elderly Ohioans annually. LeadingAge submits this petition on behalf of its member nursing facilities. LeadingAge’s members include nursing facilities in the top 75% of nursing facilities in Ohio that qualify for the statutory quality incentive, pursuant to the metric set forth under Revised Code section 5165.26(C).

11. Respondent ODM is the single state agency charged with the administration of the Medical Assistance Program (“Medicaid”) set forth in Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* See R.C. 5162.03.

12. Respondent Maureen M. Corcoran is the Director of ODM.

13. Relators OHCA, the Academy, and LeadingAge are “beneficially interested” in this case and have standing to bring this petition as trade associations on behalf of their nursing facility members.

14. Relators’ members include nursing facilities that have received—and absent this Court’s action, will continue to receive—quality incentive payments that are lower than the Budget Legislation requires under Revised Code section 5165.26. Accordingly, their members would have standing to sue in their own right.

15. The interests Relators seek to protect in this lawsuit are also germane to their organizations’ purposes, which include advocating for the interests of their member nursing facilities and the populations they serve.

16. Neither the claim asserted nor the relief requested in this lawsuit requires the participation of each individual member, given that ODM’s error concerns the calculation of the statewide “total amount to be spent on quality incentive payments.”

JURISDICTION AND VENUE

17. This Court has original jurisdiction over this petition, and venue is proper, pursuant to Article IV, Section 2(B)(1)(b) of the Ohio Constitution and Revised Code section 2731.02.

MEDICAID REIMBURSEMENT FOR OHIO NURSING FACILITY SERVICES

18. There are approximately nine hundred and twenty-six (926) Medicaid-certified nursing facilities in Ohio furnishing medical and personal care to around sixty-six thousand (66,000) mostly elderly individuals who require the level of services provided by a nursing facility because of post-acute or chronic conditions or disabilities.

19. Medicaid is a joint federal-state program that pays for health care services for individuals who do not have the means to pay for the services themselves. Pursuant to federal law, nursing facility care is a mandatory Medicaid-covered service for Medicaid beneficiaries who qualify by virtue of meeting level-of-care standards prescribed in OAC 5160-3-08. These standards codify levels of disability that entitle a person who also meets financial eligibility standards to Medicaid coverage of their nursing facility care.

20. ODM is required to implement the Medicaid program in accordance with state law under Ohio Revised Code 5162.05 (E).

21. The General Assembly appropriates to ODM an overall amount for the entire Medicaid program. It does not make any specifically designated appropriation for nursing facility reimbursement.

22. ODM is required to pay eligible nursing facility providers for services provided to Medicaid beneficiaries in accordance with the calculations set forth in Chapter 5165. *See* Ohio Revised Code 5165.07(B).

23. Under this statutory scheme, the calculation of Medicaid reimbursement for Ohio nursing facilities is not left to the discretion of ODM or to administrative regulation.

24. Instead, Medicaid reimbursement rates for Ohio nursing facilities are specifically set by statute, as codified in Revised Code chapter 5165.

25. Medicaid pays for the care of approximately sixty-five percent (65%) of all residents in Ohio nursing facilities through a daily (per diem) payment rate for each day of care a resident receives in a facility.

26. Medicaid rates for nursing facilities are made up of two components: a “base rate” and a “quality incentive payment rate.” R.C. 5165.15, R.C. 5165.26.

27. The “base rate” is received by all eligible Medicaid nursing facility providers based on the cost of providing care and is not dependent on facilities’ performance on quality metrics. *Id.*

28. The “quality incentive payment rate” is received only by providers who achieve certain quantifiable quality standards and is calculated pursuant to Revised Code section 5165.26. It is directly dependent upon nursing facilities’ occupancy and quality of care as determined based upon metrics from the U.S. Centers for Medicare and Medicaid Services (“CMS”) nursing facility five-star quality rating system.

29. The statutory methodology for calculating both the base rate and the quality incentive payment rate includes several cost-related components, each based on aggregated cost data for expenses incurred in caring for nursing facility residents.

30. Because facilities’ costs change over time, ODM is required every few years to update its data regarding nursing facilities’ costs of providing care through a process called “rebasings.” R.C. 5165.36, 5165.19, 5165.01(SS)(3). Increased costs reflected in rebasing serve as the basis for increases in the Medicaid reimbursement rates Ohio pays to nursing facilities.

BUDGET LEGISLATION AMENDMENTS TO NURSING FACILITY REIMBURSEMENT

31. Every two years, in budget legislation, and sometimes more frequently, the General Assembly adjusts the statutory formula to reflect its current judgment on the appropriate way to set Medicaid rates for nursing facilities.

32. Intending to create incentives for high-quality care to Ohio's elderly and disabled citizens, the legislature first enacted a quality incentive payment requirement in 2005 and has modified it extensively over time to align Medicaid rates more closely with nursing facilities' performance on statutorily specified quality measures.

33. This increased focus on quality was a key factor in the most recent Budget Legislation, which sought to incentivize nursing facilities to improve quality by substantially increasing the rewards for facilities that meet quality criteria specified by the legislature.

34. In an effort to boost the incentive to provide high-quality care, the Budget Legislation purposefully shifts total Medicaid reimbursement for nursing facilities more toward the quality incentive payment rate by mandating that 60% of the increase in funding from this year's "rebasings" be allocated toward the quality incentive payment rate, while 40% of the increase be allocated toward the base rate.

35. The Budget Legislation amends the formula for determining the "total amount to be spent on quality incentive payments" that is contained in Revised Code Section 5165.26(E) as follows:

(E) The total amount to be spent on quality incentive payments ...
for a fiscal year shall be determined as follows:

(1) Determine the following amount for each nursing facility:

(a) The amount that is five and two-tenths per cent of the nursing facility's base rate for nursing facility services provided on the first day of the state fiscal year plus one dollar and seventy-nine cents **plus sixty per cent of the per**

diem amount by which the nursing facility's rate for direct care costs determined for the fiscal year under section 5165.19 of the Revised Code changed as a result of the rebasing conducted under section 5165.36 of the Revised Code.

(b) Multiply the amount determined under division (E)(1)(a) of this section by the number of the nursing facility's medicaid days for the calendar year preceding the fiscal year for which the rate is determined.

(2) Determine the sum of the products determined under division (E)(1)(b) of this section for all nursing facilities for which the product was determined for the state fiscal year.

(3) To the sum determined under division (E)(2) of this section, add one hundred twenty-five million dollars.

R.C. 5165.26(E) (emphasis added).

36. The methodology for calculating the quality incentive payment rate set forth in Revised Code section 5165.26 is mandatory. Division (B) of section 5165.26 provides:

For state fiscal year 2022 and state fiscal year 2023, and subject to divisions (D), (E), and (F), and except as provided in division (G) of this section, the department of medicaid *shall* determine each nursing facility's per medicaid day quality incentive payment rate as follows....

(Emphasis added).

37. Correspondingly, as to the base rate, Section 333.300 of the Budget Legislation specifies:

For fiscal years 2024 and 2025, the Department of Medicaid shall include in each nursing facility's base rate only forty per cent of the increase in its *rate for direct care costs* due to the rebasing conducted pursuant to section 5165.36 of the Revised Code.

38. Taken together, these two statutory provisions make clear that the amount by which each nursing facility's "**rate for direct care costs**" increased by virtue of the rebasing is to be allocated 60% toward the quality incentive rate and 40% toward the base rate.

39. Critically, the same term—“**rate for direct care costs**”—is used in both R.C. 5165.26(E)(1)(a) and Section 333.300 of the Budget Legislation.

40. The “rate for direct care costs” is calculated for each nursing facility by multiplying the facility’s semiannual “case-mix score” by the “cost per case-mix unit” (commonly referred to as the “price”) for the facility’s peer group. R.C. 5165.19(A).

41. Specifically, the statute provides that the “department of medicaid shall determine each nursing facility’s per medicaid day payment rate for direct care costs by **multiplying** the facility’s semiannual **case-mix score** ... by the **cost per case-mix unit** ... for the facility’s peer group.” R.C. 5165.19(A)(1) (emphasis added).

42. A nursing facility’s “case-mix score” is the result of an individualized calculation ODM makes for each facility that reflects the clinical acuity of the facility’s residents (and by extension, the cost of providing care to that facility’s residents). *See* R.C. 5165.192. As the statute itself puts it, the “case-mix score” is “a measure ... of the relative direct care resources needed to provide care and habilitation to a nursing facility resident.” R.C. 5165.01(H).

43. The “cost per case-mix unit” (*i.e.*, the “price”) is a dollar figure representing the cost of providing direct care services to a single hypothetical nursing facility resident in a certain geographic area of the state. *See* R.C. 5165.19(C). The statute directs ODM to calculate this figure for each of three different geographic “peer groups” that are organized by county; within each group, all facilities have the same “price.” *See* R.C. 5165.19(B)–(C).

RESPONDENTS’ ERRONEOUS CALCULATION

44. ODM has adopted an incorrect calculation formula that significantly shortchanges the increase in the quality incentive payment rate.

45. In calculating the “total amount to be spent on quality incentive payments,” ODM did not take 60% of the amount by which each nursing facility’s “**rate for direct care costs**”

changed due to rebasing, as required under R.C. 5165.26(E). Instead, ODM merely took 60% of the amount by which each peer group's "**price**" changed as a result of rebasing.

46. The change in the "rate for direct care costs" is not the same as the change in the "price" because the "price" is only one factor used in calculating the "rate for direct care costs." Specifically, the "rate for direct care costs" is the product of the "price" multiplied by a nursing facility's "case mix score."

47. As a result of ODM's error, the amount of the increase in quality incentive payments is much smaller than it is supposed to be under the statute.

48. Notably, while Respondents made this error in their calculation of the quality incentive payment rate, they did not make the same error in their calculation of the base rate.

49. For the base rate, Respondents correctly took 40% of the change in each nursing facility's "rate for direct care costs"—*i.e.*, 40% of the product of each nursing facility's "case mix score" multiplied by its peer group's "price."

50. The upshot of this erroneous inconsistency is that a much greater proportion of the resulting funding increase is going toward the base rate than is going toward the quality incentive rate.

51. Furthermore, because the quality incentive component is being shortchanged, ODM is depriving Ohio's nursing facilities—and thus the vulnerable residents of those facilities—of Medicaid funding that the legislature has specifically *required* ODM to spend.

RELATORS' RATE RECONSIDERATION REQUEST

52. Relators have exhausted all avenues for remedying ODM's mistake.

53. Pursuant to Revised Code section 5165.38 and Administrative Code section 5160-3-24, Relators timely submitted a rate reconsideration request to Respondents, a copy of which is attached hereto as *Exhibit A*.

54. On October 4, 2023, Respondents issued a letter denying Relators' reconsideration request, a copy of which is attached hereto as *Exhibit B*.

55. Relators do not have any further administrative remedy or remedy at law, pursuant to division (B) of Administrative Code section 5160-3-24, which provides:

ODM's decision at the conclusion of the rate reconsideration process is final and shall not be subject to any administrative proceedings under Chapter 119. or any other provision of the Revised Code or Administrative Code.

RELATORS' ENTITLEMENT TO A WRIT OF MANDAMUS

56. A writ of mandamus is proper upon demonstration of (1) a clear legal right to the requested relief, (2) a corresponding clear legal duty on the part of the defendant/respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Lane v. Pickerington*, 130 Ohio St.3d 225, 2011-Ohio-5454, 957 N.E.2d 29, ¶ 10 (2011).

57. Relators have a clear legal right to have their members' quality incentive payment rates calculated as statutorily mandated under Revised Code section 5165.26.

58. Respondents have a clear legal duty to calculate nursing facility quality incentive payment rates as statutorily mandated under Revised Code section 5165.26.

59. Specifically, Respondents have a clear legal duty to perform the calculation under division (E)(1)(a) of section 5165.26 pursuant to that division's plain and unambiguous language, using the "rate for direct care costs" rather than the "direct care price."

60. Relators have exhausted their administrative remedies by filing a rate reconsideration request, which was denied, and have no further adequate remedy in the ordinary course of the law.

61. The position Respondents have taken in this matter is not substantially justified.

REQUEST FOR RELIEF

WHEREFORE, Relators request that this Court issue a writ of mandamus ordering Respondents to calculate and pay provider incentive reimbursement rates as required pursuant to the plain, unambiguous language of Revised Code section 5165.26 as amended by the Budget Legislation, and specifically to use the “rate for direct care costs,” rather than the “price,” in performing the calculation under division (E)(1)(a) of section 5165.26 for the July 1, 2023 rate-setting and any subsequent rate-setting, as required by the plain and unambiguous language of that division. Relators further request an award of their costs, expenses, and reasonable attorneys’ fees incurred in this action, and any other relief the Court deems just and equitable.

Respectfully submitted,

BARNES & THORNBURG LLP

s/ David Paragas

David Paragas (0043908)
41 S. High Street Suite 3300,
Columbus, Ohio 43215
Phone: (614) 628-1407
David.Paragas@btlaw.com

Kian Hudson (*pro hac vice* application
forthcoming)
11 South Meridian Street
Indianapolis, Indiana 46204
Phone: (317) 229-3111
Kian.Hudson@btlaw.com

ROLF GOFFMAN MARTIN LANG LLP

s/ Aric D. Martin

Aric D. Martin (0065765)
Joseph F. Petros III (0088363)
31105 Bainbridge Road, Suite 4
Cleveland, Ohio 44139
Phone: (216) 514-1100
Fax: (216) 626-7623
Martin@RolfLaw.com
Petros@RolfLaw.com

Attorneys for Relators

$$\left. \begin{array}{l}) \\) \\) \end{array} \right\} \text{SS}$$

COUNTY OF FRANKLIN

Susan Wallace

SWORN TO BEFORE ME, and subscribed in my presence, this 12 day of February, 2024.

Bill

VERIFICATION

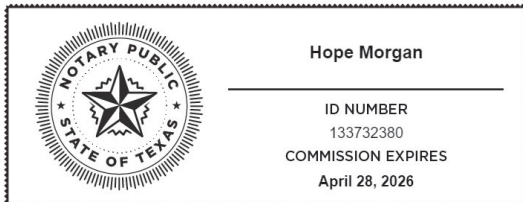
STATE OF OHIO)
) ss
COUNTY OF FRANKLIN)

NOW COMES Peter VanRunkle, being first sworn according to law, and hereby certifies that he has read the foregoing Petition and that the averments contained therein are true to the best of his knowledge and belief.

peter vanrunkle

Peter VanRunkle
Executive Director, Ohio Health Care Association

SWORN TO BEFORE ME, and subscribed in my presence, this 12th day of February, 2024.



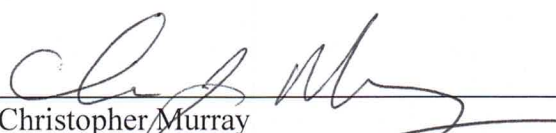
Hope Morgan
NOTARY PUBLIC

Electronically signed and notarized online using the Proof platform.

VERIFICATION

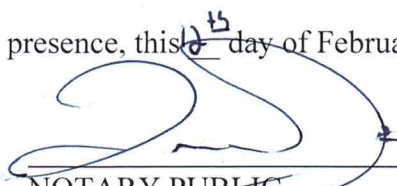
STATE OF OHIO)
) ss
COUNTY OF FRANKLIN)

NOW COMES Christopher Murray, being first sworn according to law, and hereby certifies that he has read the foregoing Petition and that the averments contained therein are true to the best of his knowledge and belief.


Christopher Murray
CEO, Academy of Senior Health Sciences, Inc.

SWORN TO BEFORE ME, and subscribed in my presence, this ¹⁵~~10~~ day of February, 2024.




NOTARY PUBLIC
Exp: 06-11-2028