

2014 WL 10250716 (Ky.App.) (Appellate Brief)  
Court of Appeals of Kentucky.

KENTUCKY SPIRIT HEALTH PLAN, INC., Appellant,

v.

COMMONWEALTH OF KENTUCKY, Finance and Administration Cabinet, et al., Appellees.

No. 2013-CA-1003.

June 6, 2014.

On Appeal From Franklin Circuit Court

Civil Action No. 13-CI-86

**Brief for Appellant, Kentucky Spirit Health Plan, Inc.**

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**\*i INTRODUCTION**

This appeal concerns whether the circuit court erroneously ruled that Kentucky's Medicaid Program authorizes payment for all Preventive Health Services provided in a school setting by registered nurses (“RNs”) employed by local health departments. This Court should reverse the circuit court's erroneous ruling below because: (1) the Kentucky Medicaid regulations, federally-approved Medicaid State Plan (“State Plan”), and managed care contract provide Medicaid coverage only for Early Periodic Screening, Diagnosis and Treatment (“EPSDT”) services provided to disabled children as specified in each child's Individualized Education Plan (“IEP”); (2) Medicaid does not otherwise cover services provided by RNs in a school setting; and (3) even if that were not the case, any covered Medicaid services provided by local health department RNs in schools must be within their scope of practice.

**\*1 STATEMENT OF THE CASE**

**A. Summary**

Kentucky Spirit entered into a contract with the Commonwealth to provide Medicaid managed care services. (The “Contract,” relevant portions of which are attached as Exhibit 2; the entire Contract is located at AR 581-947.) The Contract, the Kentucky regulations it incorporates by reference, and the State Plan<sup>1</sup> define the scope of services for which Kentucky Spirit would be **financially** responsible and for which Medicaid funds are authorized. They provide that the only Preventive Health Services provided in schools that are covered by Medicaid are EPSDT services provided to a disabled child “in accordance with an Individualized Education Program (IEP) or an Individual Family Service Plan (IFSP).”<sup>2</sup> Medicaid funds cannot be used to pay for other **\*2** Preventive Health Services provided by RNs in schools because they are outside of the scope of the Contract; rather, those services must be reimbursed using other state monies (such as education funding).

Despite the Contract's unambiguous terms, the applicable regulations, and the State Plan limiting Medicaid coverage for school-based services to EPSDT services provided in a disabled child's IEP, the circuit court held that the Contract covered *all preventive health services* provided in school settings by RNs. This Court should reverse the circuit court's erroneous and overly broad reading of the regulations, State Plan, and Contract. The circuit court's erroneous ruling was based on its misapplication of the rules of contract construction to an unambiguous contract, misapplication of the contemporaneous construction doctrine, improper deference to the facially incorrect interpretation of the regulations by the Department for Medicaid Services (“DMS”), disregard of the State Plan, and misapprehension of the legislature's intent in adopting Medicaid managed care.

**B. Statement of the Facts**

**1. Background**

The Commonwealth provides Medicaid services to the poor, **elderly**, and disabled in accordance with both the federally-approved State Plan and state regulations. See [KRS 205.510](#), *et seq.* In 2011, the Commonwealth transitioned from a fee-for-service \*3 Medicaid program in which the Commonwealth pays providers directly for each service provided to a Medicaid member, to “managed care,” in which the Commonwealth pays health plans like Kentucky Spirit a fixed per-member-per-month amount to cover the costs of covered services (as specified in the regulations, the State Plan, and the parties' contract) provided to a member during a given month. (Complaint, AR 1, ¶ 20.)

On July 6, 2011, Kentucky Spirit and the Commonwealth entered into the Contract, which sets forth the scope of covered services for which Kentucky Spirit must provide reimbursement. (Complaint, AR 1, ¶ 21; Contract, Appendix I, Item Z, AR 793.) Kentucky Spirit also entered into an Ancillary Services Provider Agreement (“ASPA”) with the Department for Public Health (“DPH”), acting on behalf of various local health departments throughout the Commonwealth. (ASPA, AR 74-105.) The ASPA entitled local health departments to reimbursement from Kentucky Spirit for providing covered services under the Medicaid managed care program. (*Id.*)

The Contract incorporates by reference Title 907 of the Kentucky Administrative Regulations. Title 907 provides detailed information about the scope of the covered services under the Contract, including [907 KAR 1:360](#), which lists the types of services covered as “Preventive Health Services,” including EPSDT services “provided by the Department of Public Health directly or indirectly through its subcontractors.” [907 KAR 1:360](#), Section 3. The State Plan also provides guidance and limitations on the scope of services and the circumstances under which Medicaid reimbursement is authorized.

In November 2011, Kentucky Spirit began to administer the Medicaid managed care program. (Complaint, AR 1, ¶ 21.) DPH, however, failed to submit any claims for services from local health departments to Kentucky Spirit until after Kentucky Spirit had \*4 made several changes to its claims processing and billing systems at DPH's request. (*Id.* at ¶¶ 23-28, 34.) In the meantime, DPH demanded that Kentucky Spirit advance it more than \$6.7 million dollars as a provisional reimbursement for the unsubmitted claims. (*Id.* at ¶¶ 29-30.) At DMS's direction, Kentucky Spirit advanced the funds to DPH subject to Kentucky Spirit's right to recoup payment for any unsupported claims or claims for non-covered services. (*Id.* at ¶¶ 31-33.)

In May 2012, DPH submitted more than 175,000 claims *en masse* to Kentucky Spirit for adjudication, the vast majority of which sought reimbursement for services rendered in schools by RNs and licensed practical nurses (“LPNs”) employed by local health departments. (*Id.* at ¶¶ 34-36.) Upon initial review, Kentucky Spirit determined that many of the services for which reimbursement was requested were clearly outside the scope of the Contract and therefore not eligible for payment under the Kentucky Medicaid regulations or State Plan, as well as outside the scope of practice for RNs and LPNs. (*Id.* at ¶¶ 37, 49-53, 56.) The Commonwealth disagreed. (*Id.* at ¶¶ 57-60.)

In accordance with the Contract's dispute resolution procedures, Kentucky Spirit submitted the reimbursement dispute first to the Cabinet for Health and Family Services (“CHFS”) and then to the **Finance** and Administration Cabinet (“FAC”). (*Id.* at ¶¶ 62, 67-69.) Both CHFS and FAC erroneously concluded that the Contract covered claims for Preventive Health Services provided in schools by RNs, although CHFS did concede that services provided by LPNs are not covered under the Contract. (August 28, 2012 Determination by CHFS, AR 1024-33; January 3, 2013 Determination by FAC, AR 1107-13.)

## \*5 2. Procedural History

On January 25, 2013, pursuant to [KRS 45A.245](#), Kentucky Spirit filed an original action in Franklin Circuit Court seeking both declaratory and injunctive relief stating that the Kentucky Medicaid regulations, the State Plan, and the Contract limit the scope of school-based services covered by Medicaid to EPSDT services provided to disabled children as specified in the child's IEP. Kentucky Spirit further sought a declaration that claims for services specified in an IEP rendered by RNs in school settings are covered only to the extent they have been provided within the scope of practice for RNs and under the supervision of a physician. (Complaint, AR 1.)

The parties filed cross-motions for summary judgment. On May 28, 2013, the circuit court granted summary judgment in favor of the Commonwealth, erroneously ruling that all Preventive Health Sendees provided by RNs in a school setting are covered under the Medicaid managed care program. (Opinion, attached as Exhibit 1, AR 1374-82.)

Notwithstanding this ongoing litigation, the local health departments have been paid \$7,953,453.09, the amount in dispute, using funds the Commonwealth withheld from payments owed to Kentucky Spirit under the Contract. *See* Record in Commonwealth's cross-appeal at 18-88.

## STATEMENT CONCERNING ORAL ARGUMENT

Oral argument would be helpful to the disposition of this appeal. This case presents important questions concerning the interpretation of state regulations, the State Plan, and a contract entered into between a private party and the Commonwealth of Kentucky (collectively with the other defendants/appellees, the "Commonwealth").

### \*6 STANDARD OF REVIEW

This case presents straightforward questions regarding the proper interpretation of state regulations and a private contract.<sup>3</sup>

Review of a circuit court's ruling on an agency's interpretation of a regulation is a question of law subject to *de novo* review. *Com., Cabinet for Health Servs. v. Family Home Health Care, Inc.*, 98 S.W.3d 524, 527 (Ky. App. 2003) (citing *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998)). Although an administrative agency's interpretation of its own regulations ordinarily is afforded deference, "[a]n agency's interpretation of a regulation is valid, however, only if the interpretation complies with the actual language of the regulation." *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991) (citations omitted). Kentucky law "prohibits an administrative body from modifying an administrative regulation by internal policy or another form of action." *Id.* (citing KRS 13A. 130). Because questions of law are "for the ultimate determination of the court," a "court may substitute its judgment for the agency's ruling especially if that ruling was based on an incorrect view of the law." *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 266 (Ky. App. 1990) (citations omitted).

The "interpretation of a contract, including questions regarding ambiguity, are pure questions of law to be decided by the court," and the "standard of review is *de \*7 novo*" *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2000) (citations omitted).

## ARGUMENT

### A. The Unambiguous Contract Must Be Interpreted According to its Plain Terms.

#### 1. The Contract does not cover school-based Preventive Health Services.

Courts must strictly enforce contracts according to their terms. *Bryan v. Massey-Ferguson, Inc.*, 413 S.W.2d 891, 893 (Ky. 1966) ("In the absence of ambiguity a written instrument will be enforced strictly according to its terms."). There "is no room" to apply rules of construction to an unambiguous contract. *Frear v. PTA Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003) (quoting 17A AM. JUR. 2D, *Contracts* § 337 (1991)). Despite these well-settled principles, the circuit court erroneously ignored the Contract and relied instead on improper parol evidence and inapplicable rules of construction to support its conclusion that Kentucky Spirit must pay for the disputed services because the Commonwealth paid for them previously. (Opinion at 4-5.) The plain language of the Contract, however, states that school-based Preventive Health Services are not covered unless they are EPSDT services provided under an IEP.

First, Section 28.7 of the Contract requires Kentucky Spirit to cover Preventive Health Services “pursuant to 907 KAR 1:360.” Accordingly, if a service is not a “Preventive Health Service” as defined in 907 KAR 1:360, it is not a covered Medicaid benefit.

907 KAR 1:360, in turn, outlines the *types* of services that qualify for coverage as a Preventive Health Service, including EPSDT services. It does not, however, specify *where* Preventive Health Services must be provided in order to be covered. Instead, this \*8 question is answered by 907 KAR 1:715(1)(30),<sup>4</sup> which states that a *school-based* health service is covered by Medicaid *only* if it is an EPSDT service necessary under an IEP developed for a disabled child under the IDEA.<sup>5</sup> In addition, on October 28, 2011, CHFS adopted 907 KAR 17:005, which states that “[a]n MCO shall not be responsible for the provision or costs of ... a school-based health service,” 907 KAR 17:005(29)(3)(e) (2011) (now codified at 907 KAR 17:020(3)(e)), with the exception of EPSDT services specified in a disabled child’s IEP. 907 KAR 17:005(29)(3)(e); 907 KAR 17:020(3)(e); 907 KAR 11:034.

Thus, under the Contract’s unambiguous terms and the regulations that prescribe the boundaries of authorized coverage, the only school-based Preventive Health Services covered by Medicaid are EPSDT services rendered pursuant to a disabled child’s IEP. Claims for other school-based services are not reimbursable using Medicaid funds.

Second, the State Plan echoes the Kentucky Medicaid regulations. Under the State Plan, “Medicaid services provided in schools” is defined to include only school-based services provided “in accordance with an Individualized Education Program (IEP), or an Individual Family Service Plan (IFSP).” (State Plan Attachment 4.19-B, p. 20.37, AR 1115.) Federal Medicaid funding is available only for services expressly covered by a state’s Medicaid Plan. 42 U.S.C. §§ 1396-1 (providing that federal funds “shall be used \*9 for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance”). Accordingly, school-based health services, preventive or otherwise, that are not EPSDT services provided in accordance with an IEP are not covered under the State Plan.

Third, Section 32.8 of the Contract states:

[t]he Contractor shall establish procedures to coordinate care for children receiving *school-based health services* and early intervention services, in a manner that prevents duplication of Contractor provided services .... Services provided under these programs are authorized under the Federal Individuals with Disabilities Education Act, but typically excluded from Contractor coverage, except in situations where a child’s course of treatment is interrupted due to school breaks, after school hours or summer months.

(Contract, Section 32.8 (emphasis added).) This language shows that the parties’ agreement mirrors the Kentucky regulations limiting school-based health services to those authorized under the IDEA - namely, EPSDT services in an eligible child’s IEP.

Finally, the third paragraph of Section 32.8 of the Contract, which states that “School-Based Services provided by public health departments are included in Contractor coverage,” tracks the language of Kentucky regulations promulgated in 2011 to govern the relationship between MCOs and schools.<sup>6</sup> That language states that “a school-based health service provided by a local health department shall be covered by an MCO” and defines “school-based health service” to include *only* EPSDT services specified in a disabled child’s IEP. 907 KAR 1:715(1)(30).

The Commonwealth argued below that the Contract’s use of the phrase “School-Based Services” instead of the phrase “school-based health services” used in the \*10 regulation means that the parties intended to expand Medicaid coverage to *all* school-based Preventive Health Services. (Commonwealth’s Response to Kentucky Spirit’s Motion for Summary Judgment, AR 1168, at 13-16.) This argument fails because it attempts to manufacture ambiguity where none exists. The use of the adjective “health” in the contractual language was not necessary because the only services available under Medicaid are “health services.” Further, the term “school-based services” historically has been used by the Commonwealth to refer to school-based health services as defined by 907 KAR 1:715(1)(30). Indeed, an April 2, 2007 DMS user manual for school-based services indicates that the only school-based services covered are EPSDT services in an eligible child’s IEP, consistent with 907 KAR 1:715(1)(30).

See Commonwealth of Kentucky KyHealth Choices User Manual for School Based Services, Ver. 1.0, April 2, 2007, AR 1280-1304, at 12 (“You must enter “YES” in the IEP” field.”).

Moreover, the Commonwealth's interpretation of the Contract language would require the parties to violate the law. The Kentucky Medicaid regulations and State Plan authorize Medicaid coverage only for school-based EPSDT services provided in accordance with an IEP. (State Plan Attachment 4.19-B, p. 20.37, AR 1115); [907 KAR 1:715\(1\)\(30\)](#); [907 KAR 17:005\(29\)\(3\)\(e\) \(2011\)](#).<sup>7</sup> Should the Commonwealth's position prevail, federal Medicaid funds would be used for services that are not covered under the State Plan in violation of both federal law and Kentucky Spirit's obligation under the Contract to “strictly adhere” to all applicable regulations. When two parties offer different interpretations of a contract, the Court should not accept one that would force a party to violate the law. \***11** *Chesapeake & O.R. Co. v. City of Morehead*, 4 S.W.2d 726, 728 (Ky. 1928) (If a contract “is susceptible to two meanings the one legal and other not, that interpretation will be put upon it which will make it support it and give it operation.”) (citations omitted).

## 2. The circuit court improperly relied on parol evidence to construe the Contract.

Despite the Contract's lack of ambiguity, the circuit court relied on a purported “historical record” of Medicaid reimbursements for school-based services to interpret the Contract in a manner inconsistent with its provisions, the regulations, and the State Plan. (Opinion at 7.) The circuit court erred in doing so for several reasons.

First, parol evidence may not be used to interpret an unambiguous contract. *Gibson v. Sellars*, 252 S.W.2d 911, 913 (Ky. 1952); *J. Walter Wright Lumber Co. v. Red Bird Timber Corp.*, 379 S.W.2d 721, 723 (Ky. 1964). If a contract is unambiguous, then a court must confine its interpretation of the contract to the four corners of the document. *While Log Jellico Coal Co., Inc. v. Zipp*, 32 S.W.3d 92, 94 (Ky. App. 2000) (“Parole evidence is inadmissible unless the language of the document is ambiguous, thereby leaving the parties' intentions susceptible of more than one interpretation.”). Here, both parties argued that the Contract was clear and unambiguous.<sup>8</sup> Moreover, the circuit court did not identify any ambiguity in the Contract.

\***12** Second, even assuming for the sake of argument that the circuit court could properly rely on parol evidence, there is no record evidence that supports the Commonwealth's position. The Commonwealth switched from a fee-for-service system to a managed care system in 2011. As part of this transition, the Commonwealth promulgated new regulations such as [907 KAR 17:005](#), which states that “[a]n MCO shall not be responsible for the provision or costs of ... a school-based health service,” [907 KAR 17:005\(29\)\(3\)\(e\) \(2011\)](#) (now codified at [907 KAR 17:020\(3\)\(e\)](#)), with the exception of EPSDT services specified in a disabled child's IEP. [907 KAR 715\(1\)\(30\)](#); [907 KAR 1:034](#), recodified as [907 KAR 11:034](#). Thus, the purported “historical record” of reimbursements for Preventive Health Services under the Commonwealth's previous fee-for-service system is irrelevant to an interpretation of the Contract under the existing *managed care* system.

Third, the circuit court's understanding of the “historical record” is inaccurate. The circuit court held that Kentucky Spirit has “a long history of operating in the State of Kentucky” and assumed Kentucky Spirit was aware of the Commonwealth's previous payment practices for school-based services. (Opinion at 7.) To the contrary, Kentucky Spirit only filed for corporate citizenship in Kentucky in 2011, and its only experience in Kentucky commenced on November 1, 2011, when Contract performance began.<sup>9</sup> Furthermore, there is no record evidence that supports the conclusion Kentucky Spirit \***13** knew or could have known of the Commonwealth's alleged prior improper reimbursement practices for school-based health services.

Finally, even if Kentucky Spirit had known of the Commonwealth's past reimbursement practices (a purported fact not supported by the record), its knowledge would be irrelevant. As an MCO and under the Contract, Kentucky Spirit is obligated to abide by the Commonwealth's managed care regulations and State Plan. (Contract Section 6.2); [907 KAR Chapter 17](#) (regulating the provision of Medicaid managed care). The regulations and State Plan both provide that school-based services are not covered unless provided under a disabled child's IEP. [907 KAR 17:005](#); (State Plan Attachment 4.19-B, p. 20.37, AR 1115). Furthermore, under the managed care system, “school-based health services” are defined to include only EPSDT services specified in a

disabled child's IEP. [907 KAR 1:715](#) (originally adopted in 1996 when Kentucky operated under a fee-for-service system). The circuit court thus erred in relying on an unsupported “historical record” that contradicts the express terms of the regulations with which Kentucky Spirit was obligated to comply.

### **B. The Contemporaneous Construction Doctrine Does Not Apply.**

The court below erred in applying the contemporaneous construction doctrine to Kentucky Spirit, which is not a public agency. (Opinion at 6.) Under Kentucky law, the contemporaneous construction doctrine applies to prevent an agency from changing its longstanding interpretation of an ambiguous statute. [GTE v. Revenue Cabinet, Commonwealth of Ky.](#), 889 S.W.2d 788, 792 (Ky. 1994) (superseded by statute on other grounds). In order for the doctrine to apply: (1) an agency must have (2) a longstanding interpretation of (3) an ambiguous regulation. [Dayton Power and Light Co. v. Dep't of Revenue, Fin. and Admin. Cabinet, Com.](#), 405 S.W.3d 527, 530 (Ky. App. 2012) \*14 (contemporaneous construction doctrine applies only where statute is ambiguous and there is evidence that agency in question has longstanding policy by which it interpreted the ambiguous statute) (citing [GTE](#), 889 S.W.2d at 792). Because none of these requirements are met here, the circuit court's reliance on the doctrine was misplaced.

First, the contemporaneous construction doctrine applies only to an *agency's* interpretation of a regulation. [Dayton Power and Light](#), 405 S.W.3d at 530. The doctrine's intent is to prevent an agency from changing its longstanding interpretation of a regulation to the detriment of a private party who relied on that longstanding interpretation. [Revenue Cabinet, Com. v. Lazarus, Inc.](#), 49 S.W.3d 172, 174 (Ky. 2001) (“The doctrine of contemporaneous construction precludes the use of internal policy changes by administrators to reverse and overturn long-standing interpretations that have, overtime, become part and parcel of the fabric of the law being administered.”). It does not prevent a *private party* from arguing that an agency's interpretation of a regulation is incorrect.

Second, the doctrine applies only to a *longstanding* interpretation. *Id.*; [Grantz v. Grauman](#), 302 S.W.2d 364, 367 (Ky. 1957) (“Practical construction of an ambiguous law by administrative officers continued without interruption for a very long period is entitled to controlling weight.”) (citations omitted). Given that the Commonwealth only moved to a managed care system in 2011 and this dispute arose when claims for school-based health services were first submitted in 2012, there is no “longstanding interpretation” of Medicaid managed care regulations that could apply to the Contract. [St. Luke Hosps., Inc. v. Cabinet for Health & Family Servs.](#), 186 S.W.3d 746, 751 (Ky. App. 2005) (holding that seven-year-old interpretation was not “longstanding”). Moreover, in 2011, \*15 CHFS adopted [907 KAR 17:005](#), which states that “an MCO shall not be responsible for the provision or costs of... a school-based health service,” with the exception of EPSDT services specified in a disabled child's IEP. The court below improperly relied on interpretations of outdated and inapposite fee-for-service regulations rather than relying on current managed care regulations, such as [907 KAR 17:005](#), that apply to Kentucky Spirit under the Contract.

Third, the contemporaneous construction doctrine applies only to *ambiguous* regulations. [Sewell v. Bennett](#), 187 Ky. 626, 220 S.W. 517, 522 (1920) (“[W]hen the meaning of the statute is clear and its language free from ambiguity ..., no amount of contemporaneous construction will be allowed to give the statute a meaning or purpose inconsistent with the intention and meaning of the law ....”). The circuit court did not identify any ambiguity in the Kentucky Medicaid regulations. Moreover, as discussed above, [907 KAR 1:715](#) unambiguously states that a school-based health service is covered by Medicaid *only* if it is an EPSDT service necessary under an IEP developed for a disabled child under the IDEA. Thus, the circuit court's reliance on the doctrine of contemporaneous construction to contradict an unambiguous regulation was erroneous.

Finally, even if the Court were to find that prior agency interpretations of the Medicaid fee-for-service regulations were longstanding and apply to this dispute, courts have held that the contemporaneous construction doctrine does not apply if the agency's interpretation of the regulation is erroneous. [Delta Air Lines, Inc. v. Com., Revenue Cabinet, Ky.](#), 689 S.W.2d 14, 19-20 (Ky. 1985) (holding that contemporaneous construction doctrine cannot be used to ratify agency's longstanding but erroneous interpretation); [Lazarus](#), 49 S.W.3d at 174 (“contemporaneous construction cannot be \*16 founded upon an administrative agency's failure to correctly apply the law”); [Reeves v. Louisville Gas & Elec. Co.](#), 290 Ky. 25, 160 S.W.2d 391, 395 (1942) (“no contemporaneous construction by administrative officers can be allowed to defeat the plain purpose and language of a statute”).



Any prior agency interpretation that failed to circumscribe coverage of school-based health services to EPSDT services under an IEP is erroneous because it contradicts the Kentucky Medicaid regulations and State Plan, and therefore cannot support the application of the contemporaneous construction doctrine.

*Lazarus*, 49 S.W.3d at 174.

### C. DMS's Wrongful Interpretation of the Regulations is Not Entitled to Deference.

The circuit court also erroneously held that Kentucky Spirit's interpretation of the Medicaid regulations, State Plan, and Contract “must fail here based on agency deference.” (Opinion at 6.) Although an agency's interpretation of its own statutes or regulations may be entitled to deference in some circumstances, it does not follow that a court must defer to an agency's interpretation of a contract to which the agency is a party. *Peterson v. B.C. Lottery & Charitable Games Control Bd*, 673 A.2d 664, 667-68 (D.C. 1996) (holding that although case law may give controlling weight to agency's reasonable interpretation of its own regulations, “neither the language nor the reasoning of those cases suggests they require similar deference to the agency's interpretation of a contract that it makes with an outside party”) (quoting *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601, 605 (1st Cir. 1991) (Breyer, J.)); see also *id.* at 604 (holding that it “would seem surprising and unfair” for a contract to bind a private individual, but leave an agency “free to interpret those same terms as it wishes”).

\*17 While the Contract incorporates the Kentucky Medicaid regulations, it also contains express provisions that support Kentucky Spirit's position that not all school-based services provided by RNs are covered under the Contract. For example, the language of Section 32.8, which states that school-based health services are limited to those EPSDT services authorized under the IDEA, reflects the parties’ understanding that Medicaid coverage of school-based services is limited to services authorized under the IDEA (consistent with the Kentucky Medicaid regulations and State Plan). (Contract at Section 32.8.) The circuit court erred in setting aside the plain meaning of this contractual language on the grounds of “agency deference.”

In any event, a court owes no deference to an agency's erroneous interpretation of its regulations. *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991) (“An agency must be bound by the regulations it promulgates .... An agency's interpretation of a regulation is valid, however, only if the interpretation complies with the actual language of the regulation.”). The Commonwealth's position fails to restrict coverage of school-based health services to those provided under the IDEA and contradicts Kentucky's Medicaid regulations, the State Plan, and the Contract. It is therefore not entitled to any deference. *Comprehensive Home Health Sen's, Inc. v. Prof'l Home Health Care Agency, Inc.*, No. 2012-SC-90-DG, 2013 WL 5763247, at \*8 (Ky. Oct. 24, 2013, “To Be Published”) (rejecting agency's erroneous interpretation of its own regulation). And, to the extent the Commonwealth's interpretation of the Medicaid regulations rationalizes its prior practice during the fee-for-service program of improperly shifting funds from DMS to DPH to cover the costs of services that are outside the scope of the Medicaid regulations and State Plan (and therefore ineligible for federal funding under 42 C.F.R. § 430.10), the \*18 Court should not endorse this self-serving and erroneous interpretation. *National Fuel Gas Supply Corp. v. F.E.R.C.*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) (“[I]f the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract”).

### D. The Circuit Court Improperly Relied Upon and Misconstrued Legislative Intent.

The circuit court also held that CHFS's construction of the Medicaid regulations was correct because it was “consistent with legislative intent.” (Opinion at 8.) A court, however, may only use legislative intent to aid in interpreting an ambiguous law. *Overbite Tramp. Co. v. Gaddis*, 793 S.W.2d 129, 131 (Ky. App. 1990) (“Although the legislative intent is the all-important or controlling factor in the interpretation of statutes, the statute is generally open to construction only where the language used requires interpretation or may be reasonably considered ambiguous.”). Here, the circuit court's resort to legislative intent was improper because neither the parties nor the court identified any ambiguity in the statutes or regulations at issue. The circuit

court then compounded its error by basing its analysis on unsupported statements and a misinterpretation of Kentucky law and the State Plan.

First, the circuit court cited to [KRS 205.560\(1\)](#) in holding that Medicaid regulations are “required to insure ‘the greatest amount of medical care as defined in [KRS 205.510](#) consonant with funds available.’” (Opinion at 8.) The first sentence of [KRS 205.560\(1\)](#), however, states that “the scope of medical care for which the Cabinet for Health and Family Services undertakes to pay shall be designated and *limited by* regulations promulgated by the cabinet.” (emphasis added). This statement clarifies that \*19 the legislature intended for CHFS to *limit* Medicaid coverage through regulations that ensure that funds are available to pay for all lawfully covered services, as set forth in those regulations and the State Plan. One such limitation is [907 KAR 1:715](#), which restricts coverage of “school-based health services” to EPSDT services specified in a disabled child’s IEP. Thus, the circuit court erred in relying on legislative intent to expand Medicaid coverage beyond what is permitted by the Kentucky Medicaid regulations and State Plan. *JP Morgan Chase Bank, N.A. v. Longmeyer*, 275 S.W.3d 697, 702 (Ky. 2009) (“It is ... improper for a court to depart from the plain language of the statute by reading into it exceptions, limitations, or conditions which conflict with a clearly expressed legislative intent.”); see also *State v. Wean*, 206 A.2d 765, 769 (N.J. Super. Ct. App. Div. 1965) (“The legislative intent is to be discerned from the language of the statute and courts cannot arbitrarily expand its scope beyond the plainly expressed legislative intent.”).

Second, the circuit court held that “[t]he intent of the Kentucky legislature in the switch from fee-for-service to managed care Medicaid services was meant neither to expand coverage nor restrict it.” (Opinion at 8.) The court’s sole support for this holding was a statement made by the Commonwealth’s counsel at oral argument on the parties’ summary judgment motions. See *id.* (citing CHFS Oral Argument, *Kentucky Spirit v. CHFS*, Franklin Circuit Court, May 6, 2013). A statement by a party’s counsel is not admissible evidence. *Jim Walter Homes, Inc. v. Spraggins*, 853 So.2d 913, 917 (Ala. 2002) (“statements of counsel do not constitute admissible evidence”); see also *Jones v. Modine Mfg. Co.*, No. 03S01-9703-CV-00028, 1998 WL 75280, at \*2 (Tenn. Feb. 18, 1998) (“statements of counsel in the argument stage of a trial do not constitute \*20 evidence”). The statement is also irrelevant because it cannot alter the clear language of regulations designed to limit coverage for school-based health services.

Third, the circuit court pointed to the fact that the ASPA requires local health departments to “make necessary and appropriate arrangements to assure the availability of Covered Services to Covered Persons.” (Opinion at 8-9.) But the State Plan also defines school-based health services as only those “provided in accordance with an IEP or IFSP.” (State Plan Attachment 4.19-B, p. 20.37, AR 1115.) A general directive to make services more available cannot trump the specific definition of the school-based services actually covered under Medicaid. *Longmeyer*, 275 S.W.3d at 702; see also *Wean*, 206 A.2d at 769.

#### **E. The Circuit Court Improperly Expanded RNs’ Scope of Practice.**

Under the State Plan, reimbursement for covered services is available only to the extent that the services have been rendered by providers acting within the proper scope of their practice. (State Plan Amendment TN No. 03-021 Attachment 3.1-A, AR 1051, at 7.6.1 (requiring that services are provided by “qualified providers, licensed in accordance with applicable state laws and regulations”). The State Plan expressly provides that for Medicaid services provided in schools, an RN cannot provide any service *unless* it is medically necessary, provided in accordance with an IEP or IFSP, *and is* contained in “a written plan of care based on a physician, physician assistant or nurse practitioner’s written order.”<sup>10</sup>

\*21 The circuit court erred in ruling that RNs providing services in schools without a physician present (or without a physician’s orders for a particular child) are acting within the scope of their practice. The circuit court explained its ruling by stating that “local health departments incur many of the same direct and indirect costs for these Preventive Health Services regardless of the location of the physical site on which the services are rendered.” (Opinion at 8.) The scope of practice for RNs, however, is limited to the carrying out of orders and treatment plans prescribed by physicians, and thus requires a nexus between the diagnosis and development of a treatment plan by a provider licensed to practice medicine and the care provided by an RN.<sup>11</sup>

Unlike nursing, the “practice of medicine” incorporates the elements of diagnosis and treatment of diseases and injuries.<sup>12</sup> Since the diagnosis of diseases and injuries is outside an RN's scope of practice, a physician or other provider licensed to practice medicine must diagnose or proscribe the treatment plan for each child covered by Medicaid. But there is no evidence in the record that a physician is on-site at the schools or has diagnosed or prescribed treatment plans for any children otherwise eligible for Medicaid for the services in question.

**\*22** The Commonwealth nevertheless relies upon Kentucky Board of Nursing Advisory Opinion Statement #14, Patient Care Orders (“AOS #14”) to argue that RNs providing services in a school with no physician (or other autonomous practitioner) on-site is sufficient because the local health departments' detailed patient protocols constitutes the kind of supervision necessary to permit RNs' services to be considered qualified for purposes of the State Plan coverage guidelines. (Commonwealth's Response to Kentucky Spirit's Supplemental Memo, AR 1310, at 5-9.) AOS #14, however, merely streamlines the treatment of specifically identified *existing patients of licensed providers* by not requiring a nurse to receive an order in person from a physician; it does not address the protocols an RN should apply to a child who is not an existing patient of the licensed provider or where no evidence of such a provider/patient relationship exists. Protocols cannot shoehorn any and all services rendered by RNs in schools within the ambit of a “qualified provider” under the State Plan; were it otherwise, the restrictions on an RN's scope of practice would have no meaning.<sup>13</sup>

The circuit court justified its ruling by explaining that “local health departments incur many of the same direct and indirect costs for these Preventive Health Services regardless of the location of the physical site on which the services are rendered.” (Opinion at 8.) The cost to local health departments, however, is not relevant to the legal issues of the proper scope of RNs' practice and whether services provided by RNs are within the scope of covered services under the Contract. The circuit court's justification **\*23** also overlooks the strict limitations on the use of Medicaid funds, and has the perverse effect of potentially diverting children from qualified providers who can diagnose and treat them under Kentucky law to RNs who are following impersonal and abstract protocols divorced from the practice of medicine with respect to specific patients.<sup>14</sup>

## CONCLUSION

The Kentucky Medicaid regulations, State Plan, and Contract all make clear that Medicaid is not a bottomless source of funding to be used for any purpose. Rather, Medicaid dollars may be used only for services that are reimbursable in accordance with applicable regulations, have been approved by CMS as part of the State Plan, and, in the case of managed care, are consistent with the terms of the managed care contract. Here, the Commonwealth improperly diverted Medicaid dollars to pay for services outside the scope of the Kentucky Medicaid regulations, State Plan, and Contract, each of which provides that the only school-based Preventive Health Services covered by Medicaid are EPSDT services specified in a disabled child's IEP. Accordingly, this Court should reverse the circuit court and hold that Medicaid coverage for school-based services is limited to EPSDT services specified in a disabled child's IEP.

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#### Footnotes

- 1 The State Plan “is the officially recognized statement describing the nature and scope of Kentucky’s Medicaid program.” State Plan under Title XIX of the Social Security Act, Kentucky Department for Medicaid Services website, <http://chfs.ky.gov/dms/state.htm>. Each state submits its State Plan to the Centers for Medicare and Medicaid Services (“CMS”) for approval, which must include the mandatory elements and services required by Medicaid and also may include optional services permitted by Medicaid. [42 U.S.C. §§ 1396-1396v](#); [42 C.F.R. § 430.12](#). Once adopted and approved by CMS, the State Plan sets the boundaries for eligible recipients and covered services and enables states to receive federal Medicaid funding for approved services. The federal government will not fund services that are not identified in a CMS-approved State Plan. *See* [42 C.F.R. § 420.10](#); *California Ass’n of Rural Health Clinics v. Maxwell-Jolly*, No. Civ. S-10-759, 2010 U.S. Dist. LEXIS 111788, at \*12 (E.D. Cal. October 20, 2010) (“To be a covered service, the service must be included in the State Plan.”).
- 2 The Contract specifies that covered services include “Preventive Health Services, including those currently provided in Public Health Departments ...” (Contract, Appendix I, Item Z, AR 793). “Preventive Health Services” are defined by regulation as: (1) a chronic disease service; (2) a communicable disease service; (3) an EPSDT service; (4) a family planning service; (5) a maternity service; or (6) a pediatric service. [907 KAR 1:360\(3\)](#). The regulations and State Plan further specify that the only services provided in schools that are covered by Medicaid are EPSDT services necessary under an IEP developed for a disabled child. [907 KAR 1:715](#); State Plan Attachment 4.19-B, p. 20.37, AR 1115. IEPs are plans developed pursuant to the Individuals with Disabilities Education Act (“IDEA”), [20 U.S.C. § 1400 et. seq.](#), and designed to assist disabled students ages three and older in achieving their educational goals. [20 U.S.C. § 1414\(d\)](#). As such, IEPs specify services in a school-based setting. In contrast, Individual Family Service Plans (“IFSPs”), developed for eligible children with developmental delays ages zero to three, focus on the family setting and assist with the child’s development. [20 U.S.C. § 1436](#).
- 3 The circuit court’s errors in interpreting the Kentucky Medicaid regulations, State Plan, and Contract and granting summary judgment for the Commonwealth are preserved for review through Kentucky Spirit’s motion for summary judgment and memoranda in the trial court. (AR 551, AR 1241, 1267.)
- 4 [907 KAR 1:715](#) is relevant to the scope of covered services under the Contract because Section 6.2 of the Contract requires Kentucky Spirit to “strictly adhere to all applicable ... regulations and standards.” (Contract, Section 6.2.)

- 5 By way of explanation, 907 KAR 1:715(1)(30) defines “SBHS” or “School-based health services” as “medically-necessary health services: (a) Provided for in 907 KAR 1:034; and (b) Specified in an individualized education program for a child determined to be eligible under the provisions of the Individuals with Disabilities Education Act, 20 U.S.C. Chapter 33, and 707 KAR Chapter 1.” 907 KAR 1:034, recodified as 907 KAR 11:034, defines EPSDT services and refers to IEPs.
- 6 38 Ky. Admin. Reg. 1093 (Oct. 2011), now codified at 907 KAR 17:005-17:030.
- 7 Now codified at 907 KAR 17:020(3)(e).
- 8 See Commonwealth's Reply in Support of Their Motion for Summary Judgment Affirming Administrative Determination, AR 1225, at 11 n. 13 (arguing that parol evidence should not be used because the Contract is “unambiguous”); Commonwealth's Response to Plaintiff's Motion for Summary Judgment, AR 1168, at 10 (stating that “Section 32.8 [of the Contract] *unambiguously* establishes that Preventive Health Services performed by local health departments in a ‘school-based setting’ are covered”) (emphasis added); Kentucky Spirit's Memorandum in Opposition to the Commonwealth's Motion for Judgment “Affirming” an “Administrative Determination” and Dismissing the Complaint, AR 1188, at 16 (“The language of the Contract and the regulations are clear and unambiguous.”).
- 9 Kentucky Secretary of State website, [https://app.sos.ky.gov/ftshow/\(S\(cuzanvz4ijsar3mhiuddrond\)\)/default.aspx?path=ftsearch&id=0788269&ct=09&cs=99999](https://app.sos.ky.gov/ftshow/(S(cuzanvz4ijsar3mhiuddrond))/default.aspx?path=ftsearch&id=0788269&ct=09&cs=99999) (last visited June 3, 2014). The Court may take judicial notice of the Secretary of State's website. *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004) (“A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet.”).
- 10 State Plan, Attachment 3.1-A, AR 1120, at 7.1.7(d). “Nursing Services: Sendees must be medically necessary. The services may be provided in accordance with an Individualized Education Program or an Individual Family Service Plan. Nursing services must be those services that are in a written plan of care based on a physician, physician assistant or nurse practitioner's written order.”
- 11 KRS 314.011(6) (defining the “registered practice of nursing” to mean “the performance of acts requiring substantial specialized knowledge, judgment, and nursing skill based upon the principles of psychological, biological, physical, and social sciences in the application of the nursing process in ... [t]he administration of medication and treatment *as prescribed by a physician*, physician assistant, dentist, or advanced practice registered nurse and as further authorized or limited by the board, and which are consistent either with American Nurses' Association Standards of Practice or with Standards of Practice established by nationally accepted organizations of registered nurses.”) (emphasis added).
- 12 See KRS 311.550(10) (defining the “practice of medicine” to include the elements of diagnosis and treatment of diseases and injuries).
- 13 State Plan Amendment TN No. 03-021, Attachment 3.1-A, AR 1051, Page 7.6.1 (providing coverage for “Diagnostic, screening, preventive, and rehabilitative services are covered only when provided *by mental health centers, primary care centers, and other qualified providers, licensed in accordance with applicable state laws and regulations.*” (emphasis added)).
- 14 The primary distinction between “nursing” and “medical” practice is that the latter incorporates the elements of the diagnosis and treatment of diseases and injuries. See KRS 311.550(10).