COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Linda Manor Extended Care,
Petitioner,

v.

Executive Office of Health and Human Services,
Respondent.

Nos. RS-00-490, RS-01-340, RS-02-1218

Dated: June 5, 2024

Appearances:
For Petitioner: Jason B. Curtin, Esq.
For Respondent: Michael A. Capuano, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

EOHHS disallowed the petitioner nursing facility's claimed "indirect therapy costs" on the theory that such costs were required to be substantiated by "indirect therapy logs." That theory was unsupported by the applicable regulation, 114.2 C.M.R. § 6.06(2)(b) (1998). The petitioner's challenge to EOHHS's interpretative position is within the scope of DALA's appellate authority under G.L. c. 118E, § 13E.

DECISION

Petitioner Linda Manor Extended Care appeals from rates of payment established by a predecessor to the Executive Office of Health and Human Services under a precursor to G.L. c. 118E, § 13C. The appeals were consolidated and submitted on the papers. I admit into evidence an affidavit of John McKenna (Linda Manor's accountant), an affidavit of Pavel Terpelets (an EOHHS employee), and exhibits marked 1-6, 1A, and 1B.

Findings of Fact

I find the following facts.

1. Linda Manor is a skilled nursing facility. Along with other facilities, it is owned and operated by Berkshire Health Systems. (Exhibit 4; McKenna Aff. ¶¶ 1, 9.)

2. EOHHS is responsible for establishing rates of payment to skilled nursing facilities. Its process for establishing such rates relies on detailed cost reports filed by the facilities at regular intervals. (Exhibits 1A, 1B.)

3. EOHHS used Linda Manor's cost report for 1998 to compute the facility's rates of payment for 2000, 2001, and the first half of 2002. During 2003, EOHHS engaged a private accounting firm to audit the 1998 cost report on its behalf. (McKenna Aff. ¶¶ 2, 15.)

4. The 1998 cost report included Linda Manor's costs for "direct restorative therapy" (direct therapy). Direct therapy was defined by an applicable regulation as the combination of physical, occupational, and speech/language therapy. (Exhibits 1A, 4; McKenna Aff. ¶ 9; Terpelets Aff. ¶ 3.)

5. Linda Manor's documentation in support of its direct therapy costs included logs of the therapy sessions conducted by the facility's contract therapists. The logs provided information along the lines of the type of each therapy session, its duration, and the recipient patient. The auditors were satisfied. (McKenna Aff. ¶ 9; Terpelets Aff. ¶ 3.)

6. The 1998 cost report also stated Linda Manor's costs for "indirect restorative therapy" (indirect therapy). Indirect therapy was defined by an applicable regulation as certain types of non-therapy services from physical, occupational, and speech/language therapists, namely "orientation programs for aides and assistants, in-service training to staff, and consultation and planning for continuing care after discharge." (Exhibits 1A, 4.)

7. Linda Manor did not maintain detailed logs of its contract therapists' indirect therapy services. Instead, as support for its indirect therapy costs, Linda Manor juxtaposed its *direct* therapy logs with documents about its *total* therapy expenditures and the nature of its indirect therapy services. The documents included: the facility's agreement with its contract

therapy vendor; invoices from that vendor; records identifying the total amounts of time that each type of therapist spent inside the facility; and records identifying the indirect services that the various types of therapists provided. (Exhibit 4; McKenna Aff. ¶ 9.)

8. The method by which Linda Manor accounted for its indirect therapy costs was a familiar approach in the industry. A letter from the Massachusetts Extended Care Federation dated in August 1998 described discussions between that organization and certain federal agencies to the effect that: "[N]ursing facilities will be able to [document] indirect therapy costs . . . by obtaining a current letter from their . . . contract therapy company specifying which indirect functions were provided by their contract therapists . . . . [Certain auditors] will no longer require as the only acceptable documentation a detailed . . . indirect therapy log specifying the indirect therapy functions and the exact minutes per day spent on each function." (Exhibit 4; McKenna Aff. ¶ 8.)

9. EOHHS's contract auditors recommended a disallowance of Linda Manor's indirect therapy costs, stating: "Need indirect logs." EOHHS adopted the auditors' recommendation, disallowing approximately $307,000 in indirect therapy costs. The resulting revisions to Linda Manor's rates for 2000-2002 reduced the facility's total payments by approximately $134,000. (Exhibits 3, 6; McKenna Aff. ¶ 15; Terpelets Aff. ¶¶ 3, 5.)

10. Linda Manor filed timely appeals from its three revised rates. Until recently, the appeals sat mostly idle. (Administrative record.)

Analysis

I. Outline

EOHHS is statutorily responsible for establishing "rates of payment for health care services." G.L. c. 118E, § 13C. "[EOHHS] performs this duty by annually promulgating, after public hearing, a general and comprehensive regulation which sets forth the rate-setting formula.

It then calculates a rate of payment for each individual provider by applying the formula to the provider's reported cost information." *Perkins Sch. for Blind v. Rate Setting Comm'n*, 383 Mass. 825, 828 (1981). A facility aggrieved by an EOHHS rate may appeal to DALA, where "the rate determined for any provider . . . shall be adequate, fair and reasonable for such provider, based upon[] the costs of such provider, but not limited thereto." G.L. c. 118E, § 13E.

EOHHS's calculations in this matter rely in part on a provision of the 1998 rate-setting regulations concerning "documentation of reported costs." 114.2 C.M.R. § 6.06(2)(b). The provision stated: "Providers must maintain accurate, detailed and original financial records to substantiate reported costs for a period of at least five years . . . ." *Id.* The approach developed by the auditors and adopted by EOHHS was that § 6.06(2)(b) required indirect therapy costs to be substantiated by a specific type of document, i.e., indirect therapy logs.

Linda Manor's appeal challenges EOHHS's chosen approach. EOHHS responds on jurisdictional, substantive, and procedural grounds.

II. Jurisdiction

The courts have described DALA's authority to hear rate-setting appeals as circumscribed by a "jurisdictional test." A regularly cited articulation of that test appears in *Salisbury Nursing & Rehab. Ctr., Inc. v. Division of Admin. L. Appeals*, 448 Mass. 365 (2007). The Supreme Judicial Court stated there:

> DALA may properly hear challenges to specific rate calculations, but it may not entertain substantive attacks on the rate regulations themselves. . . . [T]he DALA jurisdictional test . . . asks two questions. First, were there special circumstances making application of the rate to a particular provider different from its application to all others? Second, were those circumstances the result of something other than voluntary business decisions?

Id. at 375.

EOHHS characterizes these appeals as challenges to its unpublished but industry-wide interpretation of 114.2 C.M.R. § 6.06(2)(b).[1] Building on that premise, EOHHS theorizes that disagreements with its industry-wide interpretations of rate-setting regulations are among the "attacks on the rate regulations themselves," *Salisbury*, 448 Mass. at 375, that DALA is not authorized to entertain. *See Guilford Health Mgmt., Inc. v. EOHHS*, No. RS-99-104, 2024 WL 1253869 (DALA Mar. 8, 2024).

On balance, the *Salisbury* rule does not extend beyond the "regulations themselves" to EOHHS's interpretations of those regulations. To see why, it is useful to revisit the concerns that generated *Salisbury* and its predecessor opinions.

It is a well-settled principle of Massachusetts administrative law that administrative adjudicatory bodies must obediently implement all duly promulgated regulations. *See Pepin v. Division of Fisheries & Wildlife*, 467 Mass. 210, 214 (2014); *Doe v. Sex Offender Registry Bd.*, 459 Mass. 603, 629 (2011); *Baker v. Director of Div. of Unemployment Assistance*, 83 Mass. App. Ct. 1105 (2013) (unpublished memorandum opinion). As a general matter, that principle holds true in the context of rate-setting for healthcare facilities: DALA cannot invalidate EOHHS's "regulations of general applicability." *Beth Israel Hosp., Inc. v. Rate Setting Comm'n*, 24 Mass. App. Ct. 495, 502 (1987). *See Medi-Cab of Massachusetts Bay, Inc. v. Rate Setting Comm'n*, 401 Mass. 357, 367 n.14 (1987).

An unusual feature of the rate-setting context is that DALA is required to examine not only whether an appellant facility's rates are lawful—i.e., compliant with the applicable statutes and regulations—but also whether those rate are "adequate, fair and reasonable." G.L. c. 118E,

[1] The assertion that EOHHS required the entire industry to substantiate indirect therapy costs with indirect therapy logs is not established by the affidavit of EOHHS's affiant. But that assertion does not appear to be disputed.

§ 13E. Otherwise stated, an appellant facility is entitled to adequate, fair, reasonable rates "regardless of the actual language of the regulation[s]." *Bottomley v. Div. of Admin. L. Appeals*, 22 Mass. App. Ct. 652, 657, 658 (1986).

If facilities were permitted to challenge the adequacy, fairness, and reasonableness of their rates on the basis of considerations shared by many other facilities, the practical result could be a backdoor invalidation of the pertinent EOHHS regulations. That is the impermissible outcome that the *Salisbury* rule seeks to prevent. It does so by restricting any claim against the adequacy, fairness, and reasonableness of a duly promulgated regulation to arguments from "special circumstances." *Salisbury*, 448 Mass. at 375. *See also Rate Setting Comm'n v. Baystate Med. Ctr.*, 422 Mass. 744, 747-52 (1996); *Rate Setting Comm'n v. Division of Hearings Officers*, 401 Mass. 542, 544 (1988); *Massachusetts State Pharm. Ass'n v. Rate Setting Comm'n*, 387 Mass. 122, 139-40 (1982).

No parallel concerns call for a similar approach toward EOHHS's interpretative positions. An agency's interpretations do command "considerable deference," *Ten Loc. Citizen Grp. v. New England Wind, LLC*, 457 Mass. 222, 228 (2010), but they do not carry the force of law. *See Global NAPs, Inc. v. Awiszus*, 457 Mass. 489, 496-97 (2010); *Rent Control Bd. of Cambridge v. Cambridge Tower Corp.*, 394 Mass. 809, 814 (1985); *Rudow v. Commissioner of Div. of Med. Assistance*, 429 Mass. 218, 228 (1999). The general principle that an adjudicatory body must obey all on-the-books regulations is not offended when such a body takes up a challenge to the promulgating agency's interpretive views. *See Massachusetts Teachers' Ret. Syst. v. Contributory Ret. Appeal Bd.*, 466 Mass. 292, 296-97 (2013).[2]

[2] As *Guilford* points out, 2024 WL 1253869, at *6, there might be practical benefits to a rule that requires all attacks on agency interpretations to be presented through Superior Court actions for declaratory relief. On the other hand, such relief is discretionary, and therefore may

The courts have been enforcing the *Salisbury* framework for forty years or so. They have never suggested that, within that framework, EOHHS's interpretative positions count as "the rate regulations themselves." *Salisbury*, 448 Mass. at 375. What the courts *have* made clear is that DALA "has the final authority at the agency level to determine questions of law relating to the rate of payment to a provider of health care services." *Cliff House Nursing Home, Inc. v. Rate Setting Comm'n*, 378 Mass. 190 (1979). That authority extends to "the interpretation of [EOHHS's] regulations." *Id.* at 192. When rate-setting interpretive questions have come up through DALA to the courts, the courts have not indicated that those questions were unique to the appellant facilities; they also have not suggested that the disputes should have been presented to the Superior Court in the first instance. *See id.*; *Bottomley*, 22 Mass. App. Ct. at 652, 655.

In summary, the *Salisbury* jurisdictional test ensures that DALA will not indirectly invalidate regulations carrying the force of law. The test is not concerned with disagreements over the proper construction of such regulations. The interpretive dispute presented here is thus within the scope of DALA's authority under G.L. c. 118E, § 13E.

III. Interpretive Merits

The essential interpretive question is whether 114.2 C.M.R. § 6.06(2)(b)'s demand for "accurate, detailed and original financial records to substantiate reported costs" required all indirect therapy costs to be supported specifically by indirect therapy logs.

The answer presented by the plain text of the regulation is no. *See DeCosmo v. Blue Tarp Redevelopment, LLC*, 487 Mass. 690, 695-96 (2021). As long as a facility's substantiating records were "accurate, detailed, and original," § 6.06(2)(b) did not require those records to take

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not vindicate the rights of all wrongfully injured parties. *See* G.L. c. 231A, § 1; *Bates v. Superior Ct.*, 432 Mass. 1021, 1022 n.3 (2000).

any particular form. *Cf. Medi-Cab*, 401 Mass. at 369. The regulation's only reference to specific types of records appeared in an adjacent passage, which catalogued documents that a facility was required to maintain: "books, invoices, bank statements, canceled checks, payroll records, governmental filings, and any other records necessary to document . . . reported costs." *Id.* Indirect therapy logs were not named on the list.

The meaning of § 6.06(2)(b)'s text becomes even clearer by comparison to the prior year's regulations. The prior version included an instruction that "Indirect Restorative Therapy services are reimbursable provided that such service is documented . . . in the form of a consultant log book for each discipline . . . ." 114.2 C.M.R § 5.04(8)(b)(7). The 1989 regulations dropped that requirement. *See Fernandes v. Attleboro Housing Authority*, 470 Mass. 117, 129 (2014).

To round out the interpretive analysis, a flexible rule about the types of documents that may support a facility's claimed costs suits the regulatory scheme's overarching purpose. *See Friends & Fishers of Edgartown Great Pond, Inc. v. Department of Envtl. Prot.*, 446 Mass. 830, 837 (2006). The Legislature meant for providers to be paid at rates that fairly cover their costs. *See* G.L. c. 118E, § 13E. On the whole, that goal is advanced by a rate-setting process that accounts for costs substantiated by any accurate, detailed, original documents.

Again, EOHHS's interpretive views merit considerable deference. *Bottomley*, 22 Mass. App. Ct. at 655. But that deference arises specifically in the case of genuine interpretive questions. "If the regulation is plain and unambiguous, it should be interpreted according to its terms." *DeCosmo*, 487 Mass. at 699. "To defer to an agency's interpretation when the regulation itself is unambiguous would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Jose v. Wells Fargo Bank, N.A.*, 89 Mass. App.

Ct. 772, 776 (2016) (citation omitted). *See Finkelstein v. Board of Registration in Optometry*, 370 Mass. 476, 478 (1976). It is also hard to gauge how much agency expertise EOHHS's interpretation here reflects. *See DeCosmo*, 487 Mass. at 702. EOHHS states candidly in its brief that it "cannot . . . explain why the auditors recommended that [indirect therapy] logs be used."

EOHHS is responsible not only for promulgating rate-setting regulations but also for implementing them. It was EOHHS's prerogative in the first instance to determine whether Linda Manor's records were sufficiently "accurate, detailed and original" to satisfy § 6.06(2)(b). But EOHHS has not challenged the measures of accuracy, detail, and originality presented by the collection of documents through which Linda Manor sought to substantiate its costs. Any logical reasons for the auditors' specific insistence on indirect therapy logs do not appear either in EOHHS's brief or in the record evidence.

IV. Failure to Prosecute

EOHHS's final contention is that, given the history of these appeals, they should be dismissed for failure to prosecute. *See* 801 C.M.R. § 1.01(7)(g)(2). DALA magistrates have rejected the same argument in similarly positioned appeals. *See, e.g.*, *Guilford*, 2024 WL 1253869, at *9; *Bridgewater Nursing Home v. EOHHS*, No. RS-00-668, 2023 WL 7278112 (DALA Sept. 12, 2023). In essence, it is difficult to view Linda Manor's course of conduct as a punishable failure to prosecute where the facility complied with each applicable regulation and order. Those directives would not have indicated to a reasonable party that it would forfeit its timely claims by failing to implore DALA and EOHHS for progress on a regular basis.

It also is not clear that the lengthy history of the appeals meaningfully prejudiced EOHHS. *See Ahern v. Warner*, 16 Mass. App. Ct. 223, 227-28 (1983). Any important EOHHS documents were supposed to have been retained by the agency throughout the appeals' lifespans. *See Keene v. Brigham & Women's Hosp., Inc.*, 439 Mass. 223, 234 (2003). While EOHHS's

personnel may have turned over, EOHHS does not suggest that it has attempted to collect testimony from any former employees. The fact that EOHHS first expressed dissatisfaction with the appeals' lack of progress only when they were ready to be decided also weighs against a finding of prejudice. *See Massachusetts Broken Stone Co. v. Planning Bd. of Weston*, 45 Mass. App. Ct. 738, 741 (1998).

Conclusion and Order

The disallowances at issue in these appeals are REVERSED. The matter is remanded to EOHHS for a final determination of the amount that Linda Manor is owed. EOHHS shall promptly either adopt the calculation appearing in Linda Manor's papers or confer with Linda Manor in an effort to agree on a revised figure. In the event that such discussions should prove fruitless, EOHHS may promptly file a post-decision motion for clarification. Any appeal from this decision must be brought in the Superior Court within thirty days. *See* G.L. c. 30A, § 14.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate