Notify

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2014-2102-BLS-1

NOTICE IN HAND
21.13.15
K.+B.
T.S.L.
MASS.A.G.
J.T.H.

MASSACHUSETTS COUNCIL OF HUMAN SERVICE PROVIDERS, INC., and others,[1]

vs.

(LAT)

SECRETARY OF THE EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

MEMORANDUM OF DECSION AND ORDER ON PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

The plaintiff organizations filed this action on behalf of themselves and their members against the defendant Secretary of the Executive Office of Health and Human Services (EOHHS or the Secretary) on June 30, 2014 in response to the Secretary's alleged failure to establish payment rates for social service programs by the dates directed by the Legislature in Chapter 257 of the Acts of 2008, §§ 16-18 (Chapter 257) and Chapter 9 of the Acts of 2011, §§27-29 (Chapter 9) and his failure to pay these providers for services provided at such properly and timely established rates. Their Complaint sought declaratory and injunctive relief, including an order that "EOHHS . . . set and pay as of the dates required by Chapter 257 rates for social services programs; [and] enjoining EOHHS from violating Chapter 257." The Secretary filed his

[1] Association for Behavioral Healthcare, Inc., Association of Developmental Disabilities Providers, and Children's League of Massachusetts

answer on July 29, 2014. While the Secretary denied various of the plaintiffs' factual allegations, he admitted that "he has not promulgated all new rates contemplated by Chapter 257 on or before the final statutory deadline of January 1, 2014," and "has not timely met all of the benchmarks/deadlines prescribed by Chapter 257 for the payment of newly promulgated rates." See Answer at par. 15 and 16. The case is now before the court on the plaintiffs' motion for judgment on the pleadings.

FACTS

While not strictly speaking relevant to a consideration of the issues raised by this motion for judgment on the pleadings, the court notes that the plaintiffs submitted a copy of a March 14, 2008 letter written by several State Representatives to the Speaker of the House in support of "S. 65, an Act Relative to Rates for Human and Social Service Programs."[2] It is the court's understanding that this bill became Chapter 257. In the letter the Representatives comment that: "Under the current human services purchasing system, there are no safeguards to ensure rate adequacy, no appeal rights against unfair prices and no ways to prevent unfunded mandates. . . . S. 65 . . . sets a standard of rate adequacy and confers on social service providers the same appeal rights as are accorded to other providers whose rates are set by [the Division of Health Care Finance and Policy]."

Sections 4 and 5 of Chapter 257 contain the substantive statutory provisions at issue in this case. They were originally codified as G.L. c. 118G, §2A and §7, but are now codified in G.L. c. 118E, §13C, paragraph 2 and §13D. Section 4gives the Secretary "the responsibility for establishing rates of payment for social service programs which are reasonable and adequate to

[2] It is not clear that this letter constitutes part of the legislative history of Chapter 257 or that it informs an interpretation of any part of the legislation that is not clear from the words of the statue itself.

meet the costs which are incurred by efficiently and economically operated social service program providers . . . ." It then goes on to describe the factors to be considered in setting those rates. Section 5 extends previously existing ratemaking requirements and procedures in place for health care providers to social service providers. Of import to this case, Chapter 257 therefore mandates that payment rates for social service providers be determined at least biennially and after a public hearing. The rates have to be established on a prospective basis, subject to rules and regulations promulgated by EOHHS, and a provider aggrieved by any rate determination is to be given the right to appeal under G.L. c. 118E, §13E, which in turn sets out the means to perfect and prosecute an appeal before the Division of Administrative Law Appeals.

Chapter 257, §§15-18 provide a timeline for the implementation of this new rate setting process: by October 1, 2009 a prospective rate setting process shall have been implemented and rates shall have been set for not less than 10 percent of the contracts with social service providers by any governmental unit or political subdivision of the EOHHS; 40 percent by October 1, 2010; 70 percent by October 1, 2011; and full implementation by October 1, 2012. The latter three deadlines were amended by Chapter 9 and revised to January 1, 2012, January 1, 2013, and January 1, 2014. [3] Chapter 9 also required that " . . . a governmental unit shall not procure a new contract or extend an existing contract for a social service program [subject to this rate setting process] until after the rate has been set in accordance with the dates [set out above]. After that rate has been set, the rate shall apply to any contract or contract extension that becomes effective on or after the following July, 1 . . . ."

[3] It appears that these percentages were to be based on a fraction the numerator of which was the gross amount of the monetary value of the last annual social service contracts covered by the new rates and the denominator of which was the total value of all such contracts.

As noted above, the Secretary's answer admits that some of the interim percentage compliance benchmarks for setting new rates were not achieved and not all rates had been set in accordance with G.L. c. 118E, §§ 13C and 13D by January 1, 2014; which rates had been set or not set and the extent to which any benchmarks had been missed is not established by the pleadings.

DISCUSSION

A *plaintiff's* motion for judgment on the pleadings is somewhat unusual: "Rule 12(c) is designed to cover the rare case where the answer admits all the material allegations of the complaint . . . so that no material issue of fact remains for adjudication." Any factual allegation not expressly admitted is deemed denied. See Mass.R.Civ.P 12(c), Reporter's Notes—1973. In this case, the Secretary admits that certain of the benchmark percentages were not achieved by the dates mandated by the Legislature, but more than that is not established by the answer, except that there are currently rates which are still not set even though the Chapter 9 deadline for completion of the rate setting process was January 1, 2014.

Although the plaintiffs' complaint is not expressly styled as a complaint for mandamus, to the extent that it requests an order that the Secretary perform a task directed of him by statute, that is the nature of the relief requested. "A complaint in the nature of mandamus is a call to a government official to perform a clear cut duty, and the remedy is limited to requiring action on the part of the government official." *Simmons v. Clerk-Magistrate of the Boston Div. of the Hous. Court Dep't,* 448 Mass. 57, 59-60 (2006). In this case, there was a clearly stated statutory duty to set rates for social service providers by a date certain and the Secretary has failed to complete that task. Compare *Boston Med.l Ctr. Corp. v. Secretary of the Executive Office of Health and Human Services*, 463 Mass. 447, 470 (2012) (holdingthat mandamus was not

appropriate because the Secretary had set the rate and the plaintiff was in effect seeking review of the manner in which the Secretary had performed his duty). It therefore appears that an order directing the Secretary to perform that duty is appropriate.

In response, the Secretary asserts "that he may be ordered immediately to complete the rate regulation process contemplated by Chapter 257 only to the extent that his legal duty to do so is clear, non-discretionary, and non-contingent (emphasis supplied [emphasis added])." He then argues that, "while the Secretary's duties under Chapter 257 are not expressly made subject to appropriation, the statute does strongly imply that the Secretary's duty to promulgate new rate regulations arises only upon the presence of adequate funding." The court disagrees. This statutory scheme does not implicate the limitations on the Legislature's authority to commit the Commonwealth to spend money described in *Town of Milton v. Commonwealth*, 416 Mass. 471 (1993).

Town of Milton addressed the practical effect of G.L. c. 41, § 108L, which provided that any city or town that accepted the provisions of that act and provided career incentive salary increases for police officer pursuant to its terms would be reimbursed by the Commonwealth for one half the cost of additional salary expense incurred by the cities or towns. The Legislature then failed to appropriate the funds necessary to make these payments to these cities and towns for several years, and they brought suit seeking reimbursement. The Supreme Judicial Court explained that: "Appropriations are made, not in the General Laws, but through the operation of the annual budget and appropriation process described in art. 63 of the Amendments to the Constitution of the Commonwealth." *Id.* at 473. "A general law *directing the payment* of funds but lacking the words 'subject to appropriation' has never been treated as an appropriation of

funds for the stated purpose, [and] one Legislature may not bind a successor Legislature (or even itself) *to make an appropriation* (emphasis supplied)." *Id.* at 474.

Chapter 257 does not direct the payment of funds nor does it bind the Legislature to make an appropriation. All that it does is specify the manner in which the price at which the Commonwealth may purchase certain services will be determined. Whether services will be purchased, what services will be purchased, and how many services will be purchased is left to the Secretary. Indeed, this process by which the Legislature determines the purchase price for goods and services has been in place for decades. See, *e.g., Perkins Sch.l for the Blind v. Rate Setting Comm'n*, 383 Mass. 825, 828 (1981) ("The regulatory scheme establishes a rate setting mechanism. It creates neither an obligation on the part of any governmental unit to pay any money, nor an obligation on the part of any provider to render any services. Such obligations arise only when a provider and a governmental purchaser reach an agreement relating to provision of services.")[4] The decision of how much to pay for certain services is a political one. It may be that the Legislature determines that quality providers can exist only if they receive certain minimum payment for services, even if that means that fewer services can be purchased. See n. 4, *supra.*

Both parties also argue about what inferences may be drawn from fact that the first paragraph of G.L. c. 118E, § 13C, which addresses rates of payment for health care services,

[4] The Secretary attempts to support its position by citing *Olmstead v. L.c. ex rel Zimring*, 119 S.Ct. 2176 (1999), apparently for the proposition that the Secretary is constrained to some extent by Federal law (the Americans with Disability Act of 1990, 42 U.S.C. 12132) in deciding which social services to purchase. The court does not find that such constraints, if they exist, change a rate setting statute into a direction to appropriate funds. Moreover, *Olmstead*, if relevant at all, seems to acknowledge that a state's approach to meeting Federal requirements may be informed by budgetary constraints: "It is of central importance then that courts apply today's decision with . . . appropriate deference to program funding decisions of state policymakers;" and "No State has unlimited resources, and each must make hard decisions on how much to allocate to treatment of diseases and disabilities." *Id.* at 2192 and 2193 (Kennedy, J. concurring).

includes as a factor to be considered in setting rates that rates be "within the financial capacity of the commonwealth," while such language is absent from paragraph 2 of that section which, as noted above, addresses rate setting for social services programs. If the inclusion and omission of that language from these two paragraphs has special significance, and this court offers no opinion on whether it does, it is only with respect to the inputs involved in the rate setting act itself. The plaintiffs do not request in this case that the court set rates, but only that the court order the Secretary to fulfill his statutory duty and set them in the manner directed by §§ 13C and 13D.

Finally, the plaintiffs ask the court to order the Secretary retroactively to set rates for periods already past and then to pay for services already contracted for and provided at such rates. This request clearly goes beyond the proper exercise of the court's mandamus authority. Section 13D and the provisions of Chapter 9 cited above make clear that rates are to be set *prospectively*. Moreover, mandamus is both a discretionary and extraordinary remedy and appropriate only "to prevent a failure of justice in instances where there is no other adequate remedy." See *Massachusetts Redemption Coal., Inc. v. Secretary of the Executive Office of Envtl. Affairs*, 68 Mass. App. Ct. 67, 69 (2007). In this case, an order to retrospectively set rates for past periods would provide no useful relief, unless providers who had already provided services and been paid at other rates were seeking monetary relief. Chapter 257 does not create private rights of action to recover damages, but rather an administrative remedy.[5] The court offers no opinion on whether a provider who delivered services and was paid at prices below

[5] As noted above, G.L. 118E, § 13D gives providers aggrieved by any rate determination a right of appeal under § 13E. Section 13E, in turn, gives "any . . . party aggrieved by . . . a . . . rate established by [the Secretary] or by failure of [the Secretary] to set a rate or to take other action required by law and desiring a review thereof . . ." a right to file an appeal with the Division of Administrative Law Appeals.

those that would have obtained had the Secretary met all of the benchmarks has a cause of action for breach of contract or under some other theory. See, e.g., *Addison Gilbert Hosp. v. Rate Setting Comm'n*, 390 Mass. 17, 25 (1984). No such relief can be awarded on plaintiff motion for judgment on the pleadings.

ORDER

For the foregoing reasons, the plaintiffs' motion for judgment on the pleadings is ALLOWED to the following extent:

The Court ORDERS that the Secretary establish rates of payment for all social service programs covered by G.L. c. 118E, § 13C, paragraph 2, in accordance with the requirements of that paragraph within 90 days so that they will be in effect for services rendered on or after July 1, 2015.

The parties shall promptly contact the session clerk so that a hearing may be scheduled to determine if there remain any other claims for adjudication in this case and whether final judgment with respect to this Order shall enter.

M H Kaplan

Mitchell H. Kaplan
Justice of the Superior Court

Dated: January 12, 2015