Controlling Authority:
Why Ohio's Controlling Board Lacks the Authority to Approve Medicaid Expansion Funding

By Robert Alt and Nathaniel Stewart

In his continuing effort to expand Ohio's Medicaid program under the Affordable Care Act, more commonly known as "Obamacare," Governor Kasich is seeking to circumvent the legislative process and bypass Ohio's General Assembly. Unable to muster the votes he needed in the Republican-led legislature to expand the entitlement program earlier this year, the Governor's Department of Medicaid has asked the state's seven-member Controlling Board to approve spending over $2.5 billion in federal Medicaid funds at its meeting on October 21, 2013.[1] A review of state law, which defines and limits the authority of the Controlling Board, makes clear that the Board lacks the clear legal authority to approve the appropriation for Medicaid. Accordingly, any attempt to use the Controlling Board to circumvent the legislature's rejection of Medicaid expansion will undoubtedly give rise to a significant legal challenge.

Introduction

The Controlling Board is an oversight panel created by the Generally Assembly and comprised of members from the state's legislative and executive branches: the chair or vice-chair of both the House and Senate finance committees; one Republican and one Democrat from both the House and the Senate; and an employee from the governor's Office of Budget and Management. The Board convenes roughly every two weeks to consider spending and money-transfer requests from state agencies. Thus, Ohio's Medicaid Department—effectively on behalf of the Governor—requested the Board's permission to spend the additional federal Medicaid

[1] See Fund/Appropriation Requestion to the State of Ohio Controlling Board, (Oct. 21, 2013), available at http://www.healthtransformation.ohio.gov/LinkClick.aspx?fileticket=r97TYcF7mE8%3d&tabid=160.

dollars. If the Board approves it, the state could begin extending entitlement benefits as early as January 1.

Governor Kasich needs the Board's approval because the General Assembly did not appropriate or approve spending the additional federal money, and under Ohio law no state agency—such as the Medicaid Department—may spend any federal funds "unless such expenditures are made pursuant to specific appropriations of the [G]eneral [A]ssembly, are authorized by the [C]ontrolling [B]oard . . . or are authorized by an executive order issued in accordance" with specific statutory provisions.[2] Thus, in the absence of the General Assembly's appropriation, the Controlling Board may authorize a state agency to spend federal funds, which then constitutes authority for the agency to participate in the federal program providing the funds.[3]

Accordingly, rather than persuading both chambers of the state legislature to expand the Medicaid program, the Kasich Administration is opting for the potentially easier task of convincing just four of the seven members of the Controlling Board—one of whom is appointed by the Governor—to approve the spending request.

Hoping to side-step the legislature and avert some political obstacles to Medicaid expansion, the Governor's new course may face a legal one.

Legal Limit on Controlling Board Authority

There is significant reason to question whether the Controlling Board in fact has the legal authority to approve the Medicaid Department's spending request. Although the Board enjoys relatively broad authority to approve such requests, state law requires the Board "to carry out [the] legislative intent of the [G]eneral [A]ssembly" and expressly prohibits the Controlling Board from contravening the state legislature's intent.[4] Ohio Revised Code 127.17 limits the Board's authority: "The [C]ontrolling [B]oard shall take no action which does not carry out the legislative intent of the [G]eneral [A]ssembly regarding program goals and levels of support of state agencies as expressed in the prevailing appropriation acts of the [G]eneral [A]ssembly."[5]

The legal question presented then is whether the General Assembly "as expressed in the prevailing appropriation act[]" intended to extend the state's Medicaid program and participate in the Obamacare expansion—and a closer look at the history of the legislature's appropriation strongly suggests that it did not.

The final version of the relevant appropriation, Amended Substitute House Bill 59 ("House Bill 59"), ultimately passed by both chambers of the General Assembly contained an

[2] O.R.C. 131.35(A)(1).
[3] O.R.C. 131.35(A)(5).
[4] O.R.C. 127.17.
[5] O.R.C. 127.17.

express prohibition on expanding the Medicaid entitlement. Section 5163.04 of the legislation stated: "The [M]edicaid program shall not cover the group described in the 'Social Security Act,' section 1902(a)(10)(A)(i)(VIII), 42 U.S.C. 1396a(a)(10)(A)(i)(VIII)." That is, the legislature specifically refused to appropriate funds which would expand Medicaid to cover all individuals who are under 65 years old, not pregnant, not entitled to or enrolled for benefits under Medicare Part A or B, and whose income does not exceed 133 percent of the poverty line.

Using his line-item veto authority on June 30, 2013, Governor Kasich deleted this prohibition, so that the final enacted appropriation does not contain the Assembly's prohibition.[6] Nevertheless, the legal issue for assessing the Controlling Board's authority is the intent of the *General Assembly*, and that intent can be discerned without looking at a governor's veto.

In addition to the clear directive in the final enacted version of House Bill 59, it is also worth considering that when the appropriation was first introduced in the Assembly, the bill did not include this blanket prohibition. Instead, section 5163.04 originally stated that ". . . the [M]edicaid program may cover the group, or one or more subgroups of the group, described in the 'Social Security Act,' section 1902(a)(10)(A)(i)(VIII) . . ." subject to certain restrictions and conditions.[7] Thus, in the original version of the appropriation, at least some expansion of the state's Medicaid program was contemplated and permitted. But as both the House[8] and the Senate[9] took up the bill, that language was removed and replaced with the language expressly prohibiting the Obamacare expansion: "The [M]edicaid program shall not cover the group described in the 'Social Security Act,' section 1902(a)(10)(A)(i)(VIII), 42 U.S.C. 1396a(a)(10)(A)(i)(VIII)." Furthermore, in changing the original language, both the House and Senate versions remove section 5163.041 entirely since its limitations were no longer relevant in light of the full prohibition.

Both chambers first considered appropriations language that would have permitted expanding the Medicaid program, but then rejected that initial language and instead passed identical blanket prohibitions on such expansion. With this legislative timeline, it will be difficult, if not impossible, for the Controlling Board to approve the Governor's request for expanding the Medicaid program and also fulfill its statutory obligation to "take no action which

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[6] See Veto Messages, Item 10 (June 30, 2013), available at http://www.legislature.state.oh.us/BillText130/130_HB_59_VM.pdf

[7] See House Bill 59 "As Introduced," available at http://www.legislature.state.oh.us/BillText130/130_HB_59_I_Y.pdf ("Subject to section 5163.041 of the Revised Code, the medicaid program may cover the group, or one or more subgroups of the group, described in the 'Social Security Act,' section 1902(a)(10)(A)(i)(VIII), 42 U.S.C. 1396a(a)(10)(A)(i)(VIII), if the federal medical assistance percentage for expenditures for medicaid services provided to the group or subgroup is at least the amount specified in the 'Social Security Act,' section 1905(y), 42 U.S.C. 1396d(y), as of March 30, 2010.").

[8] See House Bill 59 "As Passed by the House," available at http://www.legislature.state.oh.us/BillText130/130_HB_59_PH_Y.pdf

[9] See House Bill 59 "Ass Passed by the Senate," available at http://www.legislature.state.oh.us/BillText130/130_HB_59_PS_Y.pdf

does not carry out the legislative intent of the general assembly."[10] And failure to meet that statutory requirement will expose the Board to a court challenge.[11]

At least two arguments might support the Controlling Board approving the Governor's request despite the General Assembly's express prohibition. Neither argument is persuasive.

First, supporters of the Governor's request might note that after the Governor's line-item veto,[12] the enrolled House Bill 59 no longer includes section 5163.04—the legislature's prohibition—and therefore the Controlling Board would be authorized to approve the spending request under the terms of sections 5163.03(C) and (D). Those sections provide:

> (C) The [M]edicaid program may cover any of the optional eligibility groups to which either of the following applies:
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> (1) State statutes expressly permit the [M]edicaid program to cover the optional eligibility group.
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> (2) State statutes do not address whether the [M]edicaid program may cover the optional eligibility group.
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> (D) The [M]edicaid program shall not cover any eligibility group that state statutes prohibit the [M]edicaid program from covering.

Under this reading of the enrolled statute, the Controlling Board may approve the spending because the Medicaid program *may* cover optional eligibility groups not otherwise addressed by *state statutes*. Thus, because the statute itself is now silent—after the line-item veto—on the question of expanding Medicaid coverage for "optional eligibility groups," the Controlling Board would be authorized to approve the Medicaid Department's funding request.

As an initial matter, of course, this reading of the enrolled bill does not address the intent of the *legislature* in passing it, since it was the Governor's pen and not the Assembly's that removed the express prohibition in section 5163.04. And for the purposes of determining the authority of the Controlling Board, it is the intent of the General Assembly that is dispositive, not the enrolled statutory text as modified by the Governor. For a court to rule otherwise would be to re-write the statute limiting the authority of the Controlling Board. If the State of Ohio had intended to limit the authority of the Controlling Board only to what was contained in final enrolled appropriations bills, it could have said so. It would have been arguably far cleaner for Ohio to state in its law that "the [C]ontrolling [B]oard shall take no action to contravene program

[10] O.R.C. 127.17.
[11] See Meshel v. Keip, 66 Ohio St.2d 379, 390 (1981) (holding that the Controlling Board's transfer of appropriated funds had violated the "express legislative intent" of the General Assembly).
[12] See Veto Messages, Item 10 (June 30, 2013), available at http://www.legislature.state.oh.us/BillText130/130_HB_59_VM.pdf

goals and levels of support of state agencies as expressed in the prevailing appropriation acts of the [G]eneral [A]ssembly," but that is *not* what the statute says. Rather, the law states that "[t]he [C]ontrolling [B]oard shall take no action which *does not carry out the legislative intent of the [G]eneral [A]ssembly* regarding program goals and levels of support of state agencies as expressed in the prevailing appropriation acts of the [G]eneral [A]ssembly."[13] Courts must give practical effect to every word in a statute, and avoid interpretations that would render words meaningless, or mere surplusage. To rely merely on the final language of the statute as modified by the Governor would render meaningless the operative phrase "the legislative intent of the [G]eneral [A]ssembly," and thereby would violate basic rules of statutory construction.

The version of House Bill 59 passed by both chambers, reported out of conference, and presented to the Governor shows that the General Assembly intended to limit the authority granted in section 5163.03 by the express limitations of section 5163.04.[14] Section 5163.03 begins: "(A) *Subject to sections 5163.04* and 5163.05 of the Revised Code, the [M]edicaid program shall cover all mandatory eligibility groups."[15] Thus, even in allowing for certain flexibility in appropriating funds for Medicaid programs under section 5163.03, the General Assembly intended to subject that flexibility and authority to the express bar on participating in the Obamacare expansion. Sections 5163.03 and 5163.04 were contemplated and passed together, with the former section expressly constrained by the latter, making it difficult to argue that the Governor's *ex post* removal of section 5163.04 somehow modifies the legislature's intent *ex ante*. The Governor's veto may have changed the enacted bill, but it did nothing to affect the legislature's clear intent in passing it.

Second, the Kasich Administration may argue that because the General Assembly did not override the Governor's line-item veto, the legislature must therefore have intended to participate in the Medicaid expansion. To override the Governor's veto, however, would have required a 3/5 super-majority in both the Senate and House of Representatives.[16] Thus, the only thing that may be inferred from the Assembly's failure to override the Governor's veto is that the Assembly did not have the 3/5 super-majority votes required to override the veto. But the intent of the legislature in passing bills and enacting laws is not measured by the outcome or absence of super-majority votes. Likewise, the intent of the General Assembly is not measured or assessed by the subsequent actions or intentions of the Governor.

[13] O.R.C. 127.17 (emphasis added).
[14] See House Bill 59 "As Enrolled," available at http://www.legislature.state.oh.us/BillText130/130_HB_59_EN_N.pdf
[15] O.R.C. 5163.03(A) (emphasis added).
[16] See Ohio Constitution, Art. II, § 16.

Under the Ohio Constitution, the General Assembly must pass bills by a simple majority in both the Senate and the House of Representatives.[17] It is by this simple majority that we know which bills the legislature passed and which goals and objectives the legislature sought. In this sense, the simple majority of each house indicates the legislative will and intention of the Assembly as a whole. To suggest that in this instance we can only discern the programmatic goals and objectives of a majority of the Assembly by the absence of a 3/5 super-majority is a *non sequitur*.

To be sure, in some cases deciphering the legislature's "intent" when it passed certain statutes may be more difficult—especially when the statute is ambiguous. In those cases, Ohio courts are instructed by law to consider a variety of matters when interpreting ambiguous provisions, including: "the object sought to be attained; the circumstances under which the statute was enacted; the legislative history; the common law or former statutory provisions, including laws upon the same or similar subjects; the consequences of a particular instruction; [and] the administrative construction of the statute."[18]

Of course, in the instant case, the legislature's language is not ambiguous, but is perfectly clear. Both the House and Senate passed identical language expressly prohibiting Medicaid expansion under Obamacare. The Governor's veto does not create legislative ambiguity. Furthermore, were a court to consider, for example, "the object sought to be attained" by the legislature and the legislative history—including the earlier versions of House Bill 59—the court would recognize that a majority of the General Assembly—and therefore the General Assembly itself—intended to prohibit expanding the state's Medicaid program. The mere fact that the Governor did not also so intend is irrelevant for purposes of discerning the intent of the General Assembly, which as a matter of law serves as the outer limits of the Controlling Board's authority.

Conclusion

Ohio's Controlling Board has relatively broad discretion to approve spending requests on a wide variety of issues and programs. But that discretion is not without limit, and must be exercised in accordance with the General Assembly's intention. The legislature's intent in the case of Medicaid expansion is clear on the face of the bill that it passed—the state's Medicaid program will not participate in the federal Obamacare program. Should the Controlling Board approve spending in contravention of the General Assembly's intended prohibition, such approval would likely face a stiff legal challenge.

[17] Ohio Constitution, Art. II, § 15(A) ("The general assembly shall enact no law except by bill, and no bill shall be passed without the concurrence of a majority of the members elected to each house. Bills may originate in either house, but may be altered, amended, or rejected in the other.").

[18] O.R.C. 1.49 "Determining legislative intent."

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