

RISE Delaware Litigation Update from Mary Graham

Hello Everyone,

Many of you have been asking about the status of the RISE litigation.

To review last fall's events:

RISE filed its Complaint on September 25, 2022 with claims that the SEBC had failed to follow open government and administrative procedure laws in adopting Medicare Advantage for State retirees.

On October 4, we filed an expedited Motion to Stay the SEBC's implementation of Medicare Advantage.

The Superior Court granted our Motion on October 19 and issued a decision and interim order that:

- (a) stays implementation of the Medicare Advantage plan and
- (b) requires the SEBC to continue our MedicFill.

The Court determined that:

- (a) Defendants failed to give proper, informative notice that Medicare Advantage would be voted on at the February 28, 2022 SEBC meeting and instead made it appear the SEBC was "selecting a carrier for Medicare coverage for retirees"; and
- (b) Defendants' conduct violated the law in adopting Medicare Advantage without following the appropriate procedures for adopting a regulation.

Further, the Court found that "the Medicare Advantage plan is substantially different from retirees current State-funded health insurance as the Medicare Advantage plan will require prior authorization for significantly more procedures and will require retirees to find in-network doctors to avoid paying out-of-pocket costs for care."

Since the Court's October 19 ruling:

The parties have agreed that the Court's October 19 interim ruling will constitute the Court's findings of fact and conclusions of law for the Final Judgment.

We filed a Petition for Attorneys' Fees on November 14 on three grounds: (1) statutory (based on the FOIA statute); (2) the common benefit achieved for State retirees; and (3) the conduct of certain individual Defendants in disseminating alternative facts to head off challenges to Medicare Advantage (MA) through legislative or judicial avenues.

Those disseminated alternative facts included: that MA was the same as MedicFill (only better); that retirees should have complained before MA was adopted because there

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were many "public meetings"; and that MA was a done deal enabling HighMark to sue the State if MA were not implemented. In fact, as the Court found, MA is "substantially different"; there were no true "public meetings" before the SEBC's adoption of MA and no notice of any kind to retirees for months after; and Highmark could have had no legal or equitable rights because no signed contract existed until September 28 - AFTER the litigation was filed.

The State has indicated it may appeal to the Delaware Supreme Court once Final Judgment is entered after the Petition for Attorneys' Fees is decided.

[Note:] You can read and review the court documents discussed in this Litigation Update on the RISE Delaware website at: <https://www.risede.com/RD-legal2.html>

What happens now:

At this point, there is no longer any urgency. The SEBC has extended MedicFill for 2023 and we are protected by the Court's October 19 ruling while it remains in place. The Judge will issue a ruling on our Petition for Fees in due course, depending on his schedule that needs to take into account the needs of all the litigants before him, including in his criminal cases. (Our judge was recently named the Criminal Administrative Judge for the Superior Court.) At that time, to determine our next steps, we will consider both the Court's ruling on fees and whatever steps the State may take.

So enjoy the respite from litigation while it lasts. I know I am!

Thank you for all your support.

Regards,
Mary Graham