



JOHN M. O'CONNOR
ATTORNEY GENERAL

ATTORNEY GENERAL OPINION
2022-8

Kevin Corbett, CEO
Oklahoma Health Care Authority
Oklahoma Secretary of Health and Mental Health
4345 N. Lincoln Blvd.
Oklahoma City, OK 73105

January 6, 2023

Dear Secretary Corbett:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

1. Under 63 O.S.2021, § 5007(C)(1), which grants the Oklahoma Health Care Authority Board ("Board") the power and duty to establish policies of the Oklahoma Health Care Authority ("Authority"), must the Board vote to approve operational decisions and changes to the delivery system of the Oklahoma Medicaid Program before such actions are carried out pursuant to the powers and duties of the Authority in 63 O.S.2021, §§ 5006, 5009–5010, and the Authority Administrator ("Administrator") in 63 O.S.2021, §§ 5003, 5008?
2. Does the Administrator have the exclusive authority to carry out the powers and duties under the Health Care Authority Act (the "Act"), 63 O.S.2021, § 5004 *et seq.*, except for those powers and duties that are expressly enumerated to the Board and require the Board's vote of approval?
3. Does the Act limit the Board's role to advisory in nature when the Act does not require the Board's vote of approval before a power or duty is carried out pursuant to the Act?
4. Does 63 O.S.2021, § 5008(B)(3), the provision requiring the Board's vote of approval as to the Authority's annual budget, require that the Administrator obtain the Board's vote of approval for contract(s) entered into pursuant to 63 O.S.2021, §§ 5003, 5006, and 5008(B)(5), in any aggregate amount, prior to the execution of said contract(s)?

I. BACKGROUND

The Legislature has tasked the Oklahoma Health Care Authority (“Authority”) with administering the State Medicaid Program. 63 O.S.2021, § 5009(B). The Administrator of the Authority is the chief executive officer (“Administrator”), who “act[s] for the Authority in all matters except as may be otherwise provided by law.” 63 O.S.2021, §§ 5005(1), 5008(B). Certain powers and duties relating to the Authority are delegated by law to the Oklahoma Health Care Authority Board (“Board”).

In 2019, the Legislature restructured the composition of the Board and revised the appointment and removal process of the Administrator. Before the legislative change, the Board had the power to appoint the Administrator, who served at the pleasure of the Board. 63 O.S.Supp.2019, §§ 5007(F)(2), 5008(A). The Board was comprised of seven members—three members appointed by the Governor, two members appointed by the Speaker of the House of Representatives, and two members appointed by the President Pro Tempore of the Senate. 63 O.S.Supp.2019, § 5007(A).

In 2019, Senate Bill 456 amended Title 63 and expanded the makeup of the Board to include nine members—five members appointed by the Governor, two members appointed by the Speaker of the House of Representatives, and two members appointed by the President Pro Tempore of the Senate. 63 O.S.2021, § 5007(A); 2019 Okla. Sess. Laws ch. 9, § 1. Additionally, the Administrator is now appointed by the Governor with the advice and consent of the Senate. 63 O.S.2021, § 5008(A). The Administrator serves at the pleasure of the Governor and may be removed by the Governor or by two-thirds vote from each chamber of the Legislature. 63 O.S.2021, § 5008(A). While the composition of the Board changed and the appointment power of the Administrator transferred to the Governor, no other powers and duties of the Board were changed. *See* 2019 Okla. Sess. Laws, ch. 9, § 2.

II. DISCUSSION

You ask four questions, all of which address the authority, duties and powers of the Board and Administrator relative to each other. We first address whether the Board must approve operational decisions and changes to the Medicaid delivery system, then address questions two and three together, and conclude our analysis with the response to your question four.

A. Policy Decisions Require Board Approval While Operational Decisions Do Not.

You first ask whether the Board must approve operational decisions and changes to the delivery system of the Oklahoma Medicaid Program before the Administrator is authorized to execute operational decisions and make such changes. Although the Legislature granted the Administrator broad power to “act for the Authority in all matters *except as may be otherwise provided by law*,” the Legislature vested the Board with wide-ranging powers and duties. 63 O.S.2021, § 5008(B) (emphasis added).

The Board has the exclusive authority to (1) establish policies of the Authority, (2) promulgate rules necessary for the Authority to carry out its duties and responsibilities, (3) adopt, publish, and submit appropriate administrative policies for the Authority, (4) adopt, publish, and submit an annual business plan for the Authority, and (5) review and approve the annual budget for the Authority prepared by the Administrator. 63 O.S.2021, §§ 5007(C)(1–3), 5008(B)(3). The Board is also directed to submit the administrative policies and the business plan each year to the Governor, President Pro Tempore of the Senate, and the Speaker of the House of Representatives. 63 O.S.2021, § 5007(C)(3).

“The primary goal of statutory construction is to ascertain and to apply the intent of the Legislature that enacted the statute.” *McIntosh v. Watkins*, 2019 OK 6, ¶ 4, 441 P.3d 1094, 1096. It is presumed the intent of the Legislature is expressed in the statutory text, and the Legislature intended what it expressed. *Signature Leasing, LLC v. Buyer’s Grp., LLC*, 2020 OK 50, ¶ 18, 466 P.3d 544, 549. When legislative intent is plainly expressed in a statute, the intent “must be followed without further inquiry.” *In re Hamm Production Company*, 1983 OK 92, ¶ 12, 671 P.2d 50, 52.

i. Operational Decisions

Neither the Act nor the Authority’s promulgated administrative rules (Title 317 of the Oklahoma Administrative Rules) define “operational decision.” The phrase *operational decision* is, however, found in three Oklahoma statutes unrelated the Authority; none define it. One reference designates the State Board of Health as an advisory board but only uses the term narrowly to identify required experience for at least 2 of the board members. *See* 63 O.S.2021, § 1-103(A)(3). The other two statutory references direct that charter schools provide for a governing body that is responsible for the operational decisions of the school. 70 O.S.2021, §§ 3-136(A)(8) and 3-145.3(F).

Oklahoma courts have provided guidance with respect to the meaning of the phrase *operational decision* in the context of the discretionary function exemption in the Oklahoma Government Tort Claims Act. The Court stated,

Under the discretionary function exemption, initial policy level or planning decisions are considered discretionary and the government is immune from liability with respect to those decisions. On the other hand, operational level decisions made in performance of policy are considered ministerial and the government is not exempt from liability with respect to operational decisions. Under this approach, the government is subject to liability for routine decisions and daily implementation of policy or planning level decisions, but it retains immunity with respect to formulation of policy.

Gilmore v. Bd. of Comm’rs of Logan County, 2006 OK CIV APP 125, ¶11, 147 P.3d 296, 300 (citing *Nguyen v. State*, 1990 OK 21, 788 P.2d 962).

In *Gilmore*, the Court of Civil Appeals held that the County Commissioners were exempt from liability in a negligence suit involving a fatal vehicle collision, finding that the board’s decisions to maintain the road as a gravel road, not treat the gravel road with a dust-reducing agent, and not install signs warning of dust were discretionary decisions. Following this decision, would indicate

that operational decisions are routine decisions and daily decisions implementing policies and plans. Whether a decision is an operational decision turns on specific facts and circumstances.¹

The Board has the authority and duty to establish policies, adopt and promulgate rules, adopt administrative policies and a yearly business plan, and review and approve the annual budget. 63 O.S.2021, §§ 5007(C) and 5008(B)(3). If a decision involves rulemaking, policymaking, planning or budgeting, then it is soundly within the authority and duties of the Board and is not an operational decision.

ii. Policy Decisions and Policymaking

The Board has the authority to establish policies for the Authority, but the Act does not define “establish,” so we must give the term its plain and ordinary meaning. *See Heath v. Guardian Interlock Network, Inc.*, 2016 OK 18, ¶ 14, 369 P.3d 374, 379 (“In the absence of a contrary definition used in a legislative act,” it is assumed the legislature intended for the term “to have the same meaning as that attributed to [it] in ordinary and usual parlance.”). In doing so, we turn to the dictionary, wherein “establish” is defined as “[t]o bring about; generate or effect.” *Establish*, The American Heritage Dictionary of the English language (4th Ed. 2001).

By granting the Board the authority to establish—or bring about or effect—a policy on behalf of the Authority, it is apparent that the intent of the Legislature was to give the Board ultimate authority to make policies for the Authority. *See Signature Leasing, LLC*, 2020 OK 50, ¶ 18, 466 P.3d at 549 (noting the presumption that legislative intent is expressed in statutory text). Notwithstanding, to the extent that the Board has sole authority as to policymaking, § 5008(B) plainly and clearly grants the Administrator broad powers to act for the Authority except as law may provide otherwise.

Notably, the Authority’s enabling legislation does not explicitly require the Board to adopt its policies in any particular shape or form. We recognize that the Board may implement its policies, substantive or administrative, through the promulgation of an administrative rule.

An administrative rule is “any agency statement or group of related statements of general applicability and future effect that *implements, interprets or prescribes law or policy*, or describes the procedure or practice requirements of the agency” (emphasis added). 75 O.S.2021, § 250.3(19). Conversely, an administrative rule is not a “statement[] and memoranda concerning only the internal management of an agency and not affecting private rights or procedures available to the public[.]” *Id.*

Therefore, to the extent an operational decision may or could be construed a statement implementing, interpreting, or prescribing law or policy, or describing the procedure or practice of the Authority, then the “decision” must be adopted and promulgated by the Board through the rulemaking process. 63 O.S.2021, § 5007(C)(2). However, if an operational decision concerns only the “internal management” of the Authority, or is “ministerial” in nature, and it has no bearing on

¹ Fact questions fall outside the scope or purview of Attorney General opinions, which must only address questions of law. 75 O.S.2021, § 18b(A)(5).

“private rights or procedures available to the public,” then the “decision” is not appropriate for the rulemaking process. 75 O.S.2021, § 250.3(19).

Under Oklahoma law, not all “policy decisions” are required to be implemented by rulemaking. In *City of Sand Springs v. Dep’t of Pub. Welfare*, the Court determined that the proposed action of establishing a maximum-security facility to house juveniles did not meet the definition of a “rule” because it represented “the internal management of [the] agency.” 1980 OK 36, ¶¶ 29–31 608 P.2d 1139, 1152–53. In short, the Department’s decision in *City of Sand Springs* was not rulemaking. *Id.* at ¶ 31, 608 P.2d at 1153.

More recently in *Bd. of County Commissioners of Texas Cnty. v. State ex. rel. Office of Juvenile Affairs*, the Court of Civil Appeals, citing *City of Sand Springs*, determined that the Office of Juvenile Affairs Board’s vote to amend the state plan for detention services constituted neither an individual proceeding nor rulemaking under the Administrative Procedures Act. 2021 OK CIV APP 40, ¶¶ 22, 24, 502 P.3d 188, 193–94. Instead, the Court described the decision as “an operational decision.” *Id.*

Whether a policy decision or operational decision should be a rule is a fact-specific question as to whether it is “concerning only the internal management of an agency and not affecting private rights or procedures available to the public,” which cannot be answered here.² 75 O.S.2021, § 250.3(19). Moreover, duties and responsibilities of the Board may be implicated when an operational decision is at issue.

For instance, the Board must adopt “appropriate administrative policies and the business plan for that year” before submitting such information to the Governor, President Pro Tempore of the Senate, and the Speaker of the House of Representatives. 63 O.S.2021, § 5007(C)(3). Additionally, the Board is responsible for approving the annual budget for the Authority. 63 O.S.2021, § 5008(B)(3). Therefore, to the extent an operational decision would be part of the Authority’s annual business plan or annual budget, the decision would require Board approval prior to the change being carried out. 63 O.S.2021, §§ 5007(C)(3), 5008(B)(3).

iii. Changes to the Medicaid Delivery System

We now turn to whether Board approval is needed before a change is made to the delivery of the Oklahoma Medicaid Program. The Authority currently delivers the program through two delivery systems: (1) a fee-for-service reimbursement program, where “individuals or entities providing services submit[] claims directly to the state for payment,” and (2) SoonerCare Choice, a partially capitated managed care model. *Okla. State Med. Ass’n v. Corbett*, 2021 OK 30, ¶¶ 4, 7, 489 P.3d 1005, 1009; 63 O.S.2021, §§ 5003, 5009, 5010.

The Oklahoma Supreme Court in 2021 found the Authority lacked the power to implement a wholly new capitated managed care program, a change in the delivery of the Oklahoma Medicaid Program, without legislative mandate and the promulgation of rules prior thereto. *Id.* 2021 OK 30,

² Fact questions fall outside the scope or purview of Attorney General opinions which only address questions of law. 74 O.S.2021, § 18b(A)(5).

¶ 22, 489 P.3d at 1016. The Legislature and the Board have subsequently acted: the Legislature amended the Ensuring Access to Medicaid Act; and the Board adopted Managed Care rules. *See* 2021 Okla. Sess. Laws c. 542; 2022 Okla. Sess. Laws c. 395; 2022 Okla. Sess. Laws c. 309; 2022 Okla. Sess. Laws c. 334; and OAC 317:55.

The Legislature tasked the Administrator with the responsibility of “formulation and recommendation of rules for approval or rejection by the [Board] and enforcement of rules and standards promulgated by the Board[.]” 63 O.S.2021, § 5008. But the final authority to approve or disapprove a proposed rule rests with the Board. 63 O.S.2021, § 5007(C)(2).

Therefore, it appears that the Legislature intended that the Board have final approval as to rules necessary for the Authority to carry out its duties and responsibilities. Since a change in the delivery program requires the promulgation of rules and the Board possesses the rulemaking authority, it follows that Board approval of the change in the delivery system is necessary at the rulemaking phase.

A change in the delivery program would also require a change in Authority policy, which rests within the sole power of the Board. 63 O.S.2021, § 5003(C)(1). Moreover, a change in the delivery system may be part of the Authority’s annual business plan and annual budget, both of which require Board approval. 63 O.S.2021, §§ 5007(C)(3), 5008(B)(3). To the extent a change in the delivery of the Oklahoma Medicaid Program falls within the Board’s duties and powers, the Board must approve the change before the Administrator implements it.

B. The Board and Administrator are Delegated Separate and Distinct Powers and Duties.

Your second and third questions will be addressed together as they contemplate the roles of the Administrator and Board. You ask whether the Administrator has exclusive authority to perform functions of the Authority not delegated to the Board or requiring the Board’s approval. You also ask whether the Board’s role is advisory in nature as to the duties or powers not enumerated to the Board or requiring the Board’s vote of approval.

The Legislature granted the Administrator and Board separate and distinct statutory functions, powers, and duties. As set forth previously, the powers and duties of the Board include establishing policies and reviewing and approving the annual business plan and the annual budget. 63 O.S.2021, § 5007(C) (1–3). The powers and duties of the Administrator include acting for the Authority “in all matters except as may be otherwise provided by law,” and the Administrator’s powers and duties are not “limited to” the ones specifically listed. 63 O.S.2021, § 5008(B).

From a plain reading of the Act, it is apparent the Legislature intended that the Administrator exclusively perform certain functions and responsibilities. *See e.g.*, 63 O.S.2021, § 5008(B)(1) (supervising activities of the Authority); 63 O.S.2021, § 5008(B)(3) (employing staff for the Authority). However, the Legislature also made clear that the Administrator does not have unchecked authority to make all decisions for the Authority and must obtain Board approval for certain decisions like the annual budget. 63 O.S.2021, § 5008(B)(3).

Therefore, where the Legislature has authorized the Administrator to act exclusively, the Administrator may do so. But where the Legislature granted authority to the Board, the Administrator must obtain Board approval or allow the Board to perform its authorized function.

Furthermore, nowhere in the Act is the Board expressly designated as an advisory body. The Act does not require the Board to advise or make recommendations to the Administrator. Instead, as we have discussed above, the Legislature has granted the Board with a wide array of powers, including establishing policies, an annual business plan, a budget, and the adoption of administrative policies.

In contrast, the Legislature removed the powers of the Oklahoma Board of Health and vested them with the Commissioner of Health, and then explicitly reconstituted the Board of Health as advisory. *See* 63 O.S.2021, § 1-103(A)(1), 2018 Okla. Sess. Laws ch. 183, § 1. This substantially differs from the Health Care Authority Board which, as discussed previously, lost only one duty—the duty to appoint the Administrator—in the 2019 amendments and lost it to the Governor, not the Administrator.

C. The Board Has Authority to Promulgate Rules Related to Contract Approval.

Your final question asks whether the Administrator must obtain Board approval to execute a contract in any amount because the Board has the power and duty to review and approve the Authority’s annual budget as set forth in 63 O.S.2021, § 5008(B)(3). You appear to ask whether the Board has statutory authority to promulgate OAC 317:10-1-16. This rule requires the Administrator to obtain Board approval for contracts exceeding certain dollar amounts.

“It is . . . necessary and proper for administrative agencies to adopt rules of procedure as to matters coming under its jurisdiction.” *Nw. Datsun v. Okla. Motor Vehicle Comm’n*, 1987 OK 31, 736 P.2d 516, 520. As noted above, a rule may “describe[] the procedure or practice requirements of the agency.” 75 O.S.2021, § 250.3(19). Within the Authority’s jurisdiction is the power and duty to “[p]urchase health care benefits for Medicaid recipients[,]” and “enter into contracts for the delivery of state-purchased health care[.]” 63 O.S.2021, § 5006(A)(1–2).

The Legislature did not expressly or implicitly grant the Administrator unilateral authority to execute contracts or otherwise expend Authority funds. Rather, the Legislature delegated rulemaking authority to the Board “to carry out the duties and responsibilities of the Authority.” 63 O.S.2021, § 5007(C)(2). “[E]nter[ing] into contracts for the delivery of state-purchased health care” is a duty and responsibility of the Authority that the Board is tasked with promulgating rules to carry out. 63 O.S.2021, §§ 5006(A)(2) and 5007(C)(2).

By promulgating OAC 317:10-1-16, the Board exercised its rulemaking authority to describe the procedure and practice for the acquisition of goods and services on behalf of the Authority. In doing so, the Board delegated to the Administrator unilateral authority to approve acquisitions under \$1,000,000.” OAC 317:10-1-16(1). However, the Administrator must obtain Board approval for acquisitions over \$1,000,000 and must obtain Board prior approval for significant increases

from the original contract acquisition amount.³ Board approval is not required for interagency and intergovernmental agreements. OAC 317:10-1-16(3).

The Board's authority to adopt and promulgate OAC 317:10-1-16 falls within the Board's rulemaking authority delegated by the Legislature to the Board to carry out the duties and powers of the Authority. 63 O.S.2021, § 5007(C)(3). The Authority's delegation of authority regarding acquisitions and contracts, OAC 317:10-1-16, has not been disapproved by the Legislature. The Legislature has the power to disapprove agency rules. 75 O.S.2021, § 308. This lack of disapproval is indicative of legislative consent. *Cox v. State ex rel. Dep't of Human Serv.*, 2004 OK 17, ¶ 24, 87 P.3d 607, 616.

Additionally, the Administrative Procedures Act dictates that "[e]xcept as otherwise provided by law, rules shall be prima facie evidence of the proper interpretation of the matter to which they refer." 75 O.S.2021, § 308.2(C). While the rule remains in effect the Authority is bound to follow it, until amended or revised, or determined invalid by a court of competent jurisdiction. 75 O.S.2021, § 308.2.

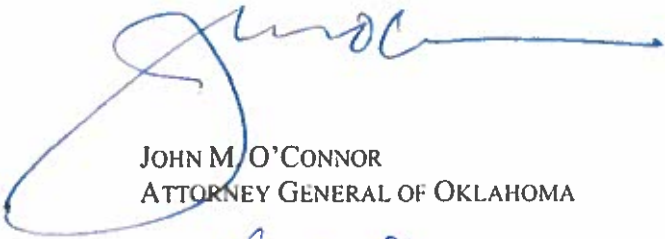
It is, therefore, the official Opinion of the Attorney General that:

- 1. The Oklahoma Health Care Authority Board must approve policy decisions and changes to the delivery system of the Oklahoma Medicaid Program before the Oklahoma Health Care Authority and Authority Administrator carry out these actions pursuant to their respective powers and duties in 63 O.S.2021, §§ 5003, 5006, 5008–5010. Whether a decision is an *operational* or a *policy* decision depends in each instance on the facts relative to the decision. We have provided guidance on this issue in this opinion from the legislature and courts.**
- 2. The Oklahoma Health Care Authority Act, 63 O.S.2021, §§ 5004–5016, delegates to the Administrator certain powers and duties which are not enumerated to the Board and do not require Board approval. The Act empowers the Administrator to act on the Authority's behalf "in all matters except as may be otherwise provided by law." 63 O.S.2021, § 5008(B). To the extent that an operational decision relates to "internal management" or is "ministerial," then the Administrator is authorized to make such decisions without prior Board approval. But whether a decision is operational turns on specific facts and circumstances.**

³ The Board must approve any single supply, non-professional service acquisition, and professional service contracts over \$1,00,000. OAC 317:10-1-16(1–2). The Board must give prior approval for a contract amendment that would increase the total original contract acquisition cost to an amount that equals or exceeds \$1,000,000, for a supply or non-professional service contract amendment that would result in a 10% or greater increase in the total acquisition cost originally approved, and for a professional service contract amendment that would result in a 25% or greater increase or a \$1,000,000 or greater increase to the total acquisition cost originally approved. OAC 317:10-1-16(1–2).

3. **The Oklahoma Health Care Authority Act, 63 O.S.2021, §§ 5004–5016, prescribes separate and distinct powers and duties to the Administrator and Board, and no law designates the Board as advisory.**

4. **The Oklahoma Health Care Authority Board is authorized pursuant to 63 O.S.2021, § 5007(C)(2) to adopt and promulgate rules necessary for the Authority to carry out its duties and responsibilities and, thus, the Board has statutory authority to promulgate an administrative rule requiring Board approval for contracts entered by the Authority over a certain amount.**



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