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NEW YORK STATE OF OPPORTUNITY. Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Acting Commissioner

MEGAN E. BALDWIN
Acting Executive Deputy Commissioner

April 3, 2023

CERTIFIED MAIL/RETURN RECEIPT

Ricja Rice-Ghyll, Esq.
NYS – OMIG
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Albany, New York 12204

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575 Madison Avenue
New York, New York 10022

RE: In the Matter of the Appeals of
Elmhurst Hospital Center and Kings County Hospital Center

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matters.

If the appellant did not win this hearing, the appellant may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the appellant wishes to appeal this decision, the appellant may wish to seek advice from the legal resources available (e.g. the appellant's attorney, the County Bar Association, Legal Aid, OEO groups, etc.). Such an appeal must be commenced within four (4) months after the determination to be reviewed becomes final and binding.

Sincerely,

Natalie J. Bordeaux

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB:nm
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

In the Matter of the Appeals of	COPY
Elmhurst Hospital Center, **Kings County Hospital Center,**	**DECISION**
Appellants	
from determinations by the NYS Office of the Medicaid Inspector General to recover Medicaid Program overpayments.	Audit #: 2016Z60-006T 2016Z60-009W

Decision pursuant to 18 NYCRR § 519.23

Administrative Law Judge: James F. Horan

Parties:

New York State Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204
By: Ricja Rice-Ghyll, Esq.

Elmhurst Hospital Center
Kings County Hospital Center
By: Joseph V. Willey, Esq.
Katten Muchin Rosenman LLP
575 Madison Avenue
New York, New York 10022

BACKGROUND

Elmhurst Hospital Center and Kings County Hospital Center (Appellants) requested hearings pursuant to Social Services Law § 145-a and Department of Social Services regulations at 18 NYCRR § 519.4 to appeal determinations by the Office of the Medicaid Inspector General (OMIG) to recover Medicaid Program overpayments based upon findings set forth in an April 6, 2017 final audit report for Audit # 2016Z60-006T, and an April 13, 2017 final audit report for Audit # 2016Z60-009W.

The audits reviewed partial hospitalization Medicaid claims paid from January 1, 2011 through December 31, 2015. The audits identified overpayments of $33,544.97 to Elmhurst Hospital Center and $26,693.07 to Kings County Hospital Center, resulting from claims for partial hospitalization exceeding six calendar weeks that were inappropriately billed to, and paid by, the Medicaid Program. By separate letters dated May 1, 2017, the Appellants requested hearings to contest the overpayment determinations. Hearings scheduled for July 12 and July 19, 2017 were adjourned by Administrative Law Judge James F. Horan, who directed the parties to schedule consecutive hearing dates during the period September 12-15, 2017.

By letter dated August 23, 2017, the Appellants requested a decision without a hearing for both audits, contending that they are only challenging the OMIG's application of 14 NYCRR § 588.9(a)(2), the regulatory provision cited as the basis for the overpayment findings. The OMIG submitted its response to the Appellants' request for a decision without a hearing on October 25, 2017.

APPLICABLE LAW

Either party may request that an appeal from an OMIG determination be decided without a hearing when no unresolved material issue of fact is involved in the case and the only questions

presented are questions of the OMIG's application of the law or its regulations, whether the OMIG failed to perform a duty required by law or whether the OMIG's determination was arbitrary and capricious or an abuse of discretion as to any sanction imposed. A request for a decision without a hearing must be accompanied by sufficient information to permit a determination of whether any unresolved material issue of fact exists and should contain a full and clear statement of the issue and the party's position on the issue. 18 NYCRR § 519.23(a).

A partial hospitalization program offers services in a clinic setting for individuals with a mental illness diagnosis which has resulted in dysfunction due to acute symptomatology. The purpose of the program is to stabilize and ameliorate acute symptoms, and serves as an alternative to inpatient hospitalization or, at minimum, reduces the length of a hospital stay within a medically supervised program. 14 NYCRR §§ 587.12(a)-(b).

Admission to a partial hospitalization program shall occur within the first three face-to-face interactions between a recipient, recipient's significant other, or a member of the recipient's family or household, and clinical staff in which one or more services required or approved by the Office of Mental Health are rendered. 14 NYCRR § 587.4(a)(3), § 587.12(i), § 588.4(a). A screening and admission note shall be written upon a decision to admit which shall include the following: (1) a reason for referral; (2) primary clinical and service-related needs and services to meet those needs; and (3) admission diagnosis. 14 NYCRR § 587.12(i).

Partial hospitalization is a carved-out service that is not included in the benefit package of a managed care provider, other than a duly authorized managed special care provider, and which is reimbursed on a fee-for service basis. 14 NYCRR § 587.4(c)(4)(iv). Reimbursement for partial hospitalization shall be limited to no more than 180 hours per course of treatment per recipient within a partial hospitalization program. A course of treatment shall not exceed six

calendar weeks, unless, during the course of treatment, the recipient is admitted to an inpatient psychiatric facility. Such course of treatment may be extended to include the number of days of inpatient treatment, up to a maximum of 30 days. Each course of treatment is a new admission. 14 NYCRR § 588.9(a)(2). However, reimbursement is limited to 360 hours per calendar year per recipient. 14 NYCRR § 588.9(a)(3).

DISCUSSION

Appellants' Request for a Decision Without a Hearing

In their request for a decision without a hearing, the Appellants dispute only the OMIG's application of the law with respect to the OMIG's method of determining the overpayment, arguing that 14 NYCRR § 588.9(a)(2), the applicable regulatory provision, does not limit provision of partial hospitalization services to 42 days, or six calendar weeks. They affirm that the final audit reports "should be deemed factually accurate for purposes of these appeals." The Appellants assert that "[i]t appears that OMIG may want witness testimony as to matters on which the provider *does not disagree*, rather than present the merits as a matter of law" as the Appellants do. (Appellants' Brief, pp. 1, 3.)

The OMIG claims in opposition to the request for a decision without a hearing that the parties have not stipulated to specific facts involved in the audit. It maintains that a hearing is necessary to obtain testimony from the OMIG auditors to explain the basis for disallowance determinations, specifically, the date when treatment under the partial hospitalization program was deemed to have commenced, and why the auditors determined that the reimbursement threshold was exceeded in specific instances. The OMIG cites fact-related contentions raised in the Appellants' responses to the draft audit reports as justification for a hearing, during which

auditors would testify as to how they applied the six calendar week reimbursement limitation. (OMIG's Brief, p. 5.)

The Appellants, however, have elected to forgo their prior arguments and pursue only their disagreement with the OMIG's application of the regulatory reimbursement limit on partial hospitalization services. Their request for a decision without a hearing states that they are "currently challenging OMIG's application of the Regulation on one ground (and not pursuing, for purposes of this request, several other grounds that had been raised in the Responses)." (Appellants' Brief, page 3.) They concede the accuracy of the facts set forth in the audit reports, which specify both when each course of treatment commenced and the date of service for each disallowed claim.

Given the Appellants' representations, no material facts are in dispute and their requests for appeals will be decided herein pursuant to 18 NYCRR § 519.23(a). The Appellants' submission in support of their request for this decision without a hearing has failed to meet their burden of proving that the OMIG's determinations were incorrect and that the disallowed claims were payable. 18 NYCRR 519.18(d)(1).

The Overpayment Determinations

In both audits, the OMIG disallowed claims for services provided after the six-week service period determined applicable by the OMIG. In some instances, the OMIG corrected the end date of the service period to extend it to more than six works after the first date of service. In no instance did the OMIG disallow services for dates less than six weeks after the first date of service. (Final audit reports, attachment 1.)

The OMIG did not create this limitation – it is explicitly stated in 14 NYCRR § 588.9(a)(2). Simple math (7 days per week x 6 weeks) yields a general limit of 42 days, unless

the provider can establish that a recipient was admitted to an inpatient psychiatric facility during the course of treatment. Id. The OMIG's submission includes explanations from the Office of Mental Health regarding reimbursement limitations in response to questions posed by the Department of Health. Most pertinent to this decision, the Office of Mental Health explained that counting, for purposes of determining the six-week limitation, commences on the day of a recipient's admission to the program and ends six calendar weeks later, unless the 180-hour reimbursement ceiling is reached before the end of the six-week period. (OMIG Exhibit 2.)

The Appellants contend that the OMIG incorrectly applied the reimbursement standards in 14 NYCRR § 588.9(a)(2). According to the Appellants, the six-week course of treatment limitation on reimbursement did not require consecutive weeks. (Appellants' Brief, p. 7.) However, the regulation implicitly considers treatment as necessitating consecutive weeks. In the very same sentence indicating a six calendar week limit for each course of treatment, it notes that reimbursement may be extended if treatment is interrupted by a recipient's inpatient admission to a psychiatric facility for up to 30 days. 14 NYCRR § 588.9(a)(2). An interruption in a course of treatment is only possible, and an exception for hospital treatment is only necessary, if treatment is otherwise continuous, i.e. involving consecutive weeks. The OMIG correctly applied this requirement to its claims review, pursuant to, rather than in contravention of, guidance from the Office of Mental Health. *See* OMIG Exhibit 2.

Relying upon the Miriam-Webster's Dictionary, the Appellants also assert that a calendar week means a week that begins with Sunday and ends with Saturday. (Appellants' Brief, p. 6.) As the OMIG points out, there is no such set definition of "calendar week" in the law. Black's Law Dictionary, a resource particularly relevant to legal analysis, offers different definitions,

while Duhaime's Law Dictionary notes that the meaning of the term depends upon the context. (OMIG's Brief, p. 9.)

Case law offered by the parties shows no absolute, unequivocal definition of what constitutes a calendar week applicable to any and all situations. Nor do the Appellants explain why or how a case law holding regarding entirely different and irrelevant legal requirements supersedes the counting method employed by the OMIG, based upon guidance received from the Office of Mental Health that the first calendar week begins on the first treatment date.

The Appellants cite *Syversen v. Saffer*, a Nassau County Supreme Court decision citing *Matter of Wright's Will*, which defined "calendar week" as a definite period of time, commencing on Sunday and ending on Saturday. However, the court in *Syversen* also noted that one day in each weekly period (and not necessarily the same day each week) was sufficient to meet a requirement requiring publication for a number of successive weeks. *Syversen v. Saffer*, 140 N.Y.S.2d 774, 778 (Sup. Ct. 1955), *affirmed*, 150 N.Y.S.2d 551 (App. Div. 2d Dep't 1956). The OMIG points to *Russomano v. Leon Decorating Co.*, 306 N.Y. 521 (1954), in which the Court of Appeals determined that a Workers' Compensation claimant who worked four days in one calendar week was deemed to have worked a calendar week, and that court deemed a calendar week as commencing on a Monday, likely for practical considerations regarding work schedules.

The Appellants assert that a patient who is admitted to the program on a Wednesday should not be deemed to have commenced treatment for reimbursement limitation purposes until the following Sunday. (Appellants' Brief, p. 6.) The Appellants argue that this scenario would allow reimbursement for partial hospitalization treatment commencing on Wednesday onward, with a limitation on reimbursement that takes effect six Sundays later, for a course of treatment

totaling six-and-a-half weeks. (OMIG's Brief, p. 8.) The Appellants have offered no persuasive or even intelligible reason for this assertion that a regulation authorizing a six calendar week course of treatment should be read as authorizing six-and-a-half weeks. The regulation allows a six-week course of treatment, not six-and-up-to-seven weeks, depending on what day of the week admission happened to have occurred.

Indeed, the Appellants' reasoning, and even the very authority they cite, *Syversen v. Saffer*, actually suggest an application of the regulation that might well lead to a shortening of the six-week period, which they presumably deem unacceptable - that counting of the six weeks (rather than specific days) should commence the Sunday *before* treatment commenced because Wednesday would fall within that "calendar week". This method would result in reimbursement for only five-and-a-half weeks, which as the Appellants complain, "eliminates the mandatory 'six calendar weeks' period in favor of five-and-a-half calendar weeks." (Appellants' Brief, p. 6.)

The OMIG's counting of calendar weeks starting on the first date of treatment, pursuant to guidance from the Office of Mental Health, offers an accurate and consistent measure of every recipient's treatment in the partial hospitalization program that is entirely reasonable and completely consistent with the plain intent of the regulation not to authorize a course of treatment that exceeds six weeks without a new admission to a new course of treatment.

The Appellants argue that the OMIG's Audit Protocol for OMH [Office of Mental Health] Partial Hospitalization "does not mention calendar weeks or any requirement that treatment sessions be on consecutive days." (Appellants' Brief, p. 6.) To the contrary, the Audit Protocol explicitly cites 14 NYCRR § 588.9(a)(2), the regulation specifying that "a course of

treatment shall not exceed six calendar weeks."[1] The first page of the Audit Protocol also specifically advises providers that protocols are intended solely as guidance, and are not a substitute for a review of applicable law. Providers are further advised that audit protocols do not limit or diminish the OMIG's authority to recover improperly expended Medicaid funds. In short, audit protocols, while instructive, are not exhaustive. (Appellants' Exhibit K.)

The Appellants accurately point out that the regulation authorizes more than six weeks or 42 days in situations where a course of treatment is terminated by discharge, and then a new course of treatment is established by readmitting the patient. Citing an explanation from the Office of Mental Health that the six calendar week limitation does not preclude providers from discharging and readmitting patients for multiple courses of treatment, the Appellants argue that the six-week limitation, as set forth in the regulation, is "utterly arbitrary and leads to absurd, prejudicial disparities." (Appellants' Brief, pp. 7-8.)

The outer reimbursement limit for recipients admitted to the partial hospitalization program is 180 hours per course of treatment, but 360 hours per calendar year. This provision plainly and necessarily recognizes the possibility of more than one course of treatment in a year. The regulation itself refers to each course of treatment as a new admission, thereby implicitly contemplating discharge and readmission as the manner in which this can be accomplished. The additional explanation from the Office of Mental Health cited by the Appellants offers no additional insight necessary to understand the plain language of 14 NYCRR §§ 588.9(a)(2)&(3).

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[1] The Audit Protocol also cites 14 NYCRR § 588.12(f), which provides:

> ... if a provider of service seeks reimbursement in excess of the limits imposed in sections 588.9(a)(2) and (3), 588.10(a)(2) and (3) and 588.13(a)(3)(i), (ii) and (iii) of this Part, the provider shall be presumed to have knowingly and intentionally violated the provisions of this Part, whereupon the Office of Mental Health shall notify the Department of Social Services in order that the Department of Social Services may exercise its authority to recover such overpayments as may have occurred.

While a patient may be admitted and discharged from a partial hospitalization program more than once during a calendar year, those determinations must be documented and are subject to review by the Office of Mental Health. Those determinations must consider the recipient's history, diagnosis, prognosis, progress, or lack thereof; and whether the recipient requires services at that level of care, or would be more appropriately discharged or referred to another program. 14 NYCRR §§ 588.9(c)&(d). Treatment plans must also identify specific objectives and services necessary to accomplish treatment goals, and must include criteria for discharge planning. 14 NYCRR § 587.12(c); §§ 587.16(b)&(e). Any determination that a recipient requires continued treatment is subject to the same criteria, which must be documented, and treatment plans reviewed, every two weeks. 14 NYCRR §§ 588.9(c)&(d).

The Appellants do not claim that they documented, as required by these regulations and by 14 NYCRR § 587.12(i), that any readmissions for a new course of treatment occurred for any of the audited recipients. They do not allege a single instance in which discharge and readmission is claimed to have occurred, nor is any such conclusion suggested by what the Appellants concede are the "factually accurate" audit reports. Instead, they simply dismiss the readmission requirements as a "gotcha [that] cannot be intent of the Regulation, and would by the very definition of arbitrary and capricious action." (Appellants' Brief, p. 8.)

The readmission requirements are not arbitrary and were not capriciously applied. It is hardly "technical trickery and secret policies," as the Appellants also claim (Appellants' Brief, p. 8), for the regulations to require a provider to evaluate and document the medical need to readmit a patient for a new course of treatment when the six-week course of treatment authorized by the regulation ends. The OMIG's determinations in both audits are consistent with and reflect adherence to those clear regulatory requirements. The Appellants themselves maintain that the

six-week reimbursement limitation "can be easily avoided by simple paperwork" (Appellants' Brief, p. 8), but do not claim to have prepared or maintained such paperwork. What they dismiss as insignificant "paperwork" is an entirely reasonable and rational regulatory requirement to comply with the obvious regulatory intent that providers document a medical need in order to establish entitlement to continue fee-for-service billing for partial hospitalization services for more than a six-week course of treatment.

The Appellants also claim "the only relevant timeframe is that a course of treatment not exceed *180 or 360 hours*, irrespective of weeks of days. (Appellants' Brief, p. 8.) This argument that the second sentence of 14 NYCRR § 588.9(a)(2), which provides that "[a] course of treatment shall not exceed six calendar weeks" should be ignored, and that the OMIG should instead determine compliance only in accordance with the first sentence, is rejected. The Appellants' attempt to disregard the six-week limitation and focus on what they deem "the only relevant timeframe" while convenient for a provider, is not an accurate reading of 14 NYCRR §§ 588.9(a)(2)&(3), provisions that are clear on their face.

The Appellants have failed to establish that the OMIG's determinations to disallow payments made for partial hospitalization treatment exceeding six calendar weeks was not correct.

DECISION

The OMIG's determination to recover overpayments from Elmhurst Hospital Center in the amount of $33,544.97 pursuant to the April 6, 2017 final audit report was correct and is affirmed.

The OMIG's determination to recover overpayments from Kings County Hospital Center in the amount of $26,693.07 pursuant to the April 13, 2017 final audit report was correct and is affirmed.

Dated: April 3, 2023
Menands, New York

Natalie J. Bordeaux
Administrative Law Judge