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NEW YORK STATE OF OPPORTUNITY. Department of Health

KATHY HOCHUL
Governor

MARY T. BASSETT, M.D., M.P.H.
Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

September 6, 2022

CERTIFIED MAIL/RETURN RECEIPT

Michael J. Derevlany, Esq.
NYS Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204

Travis Hill, Esq.
Nixon Peabody LLP
55 W. 46th Street
New York, New York 10036

RE: In the Matter of Smile New York Outreach, LLC

Dear Parties:

Enclosed please find the Decision on Request in the above referenced matter.

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,

Sean D. O'Brien

Sean D. O'Brien
Acting Chief Administrative Law Judge
Bureau of Adjudication

SDO: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

In the Matter of

SMILE NEW YORK OUTREACH, LLC
Provider ID: 03377893

Appellant,

from a determination by the NYS Office of the Medicaid Inspector General (OMIG) to recover Medicaid Program overpayments.

DECISION
Audit No. #20-7559

Before: Jean T. Carney
Administrative Law Judge

Held at: On Submissions

Parties: New York State Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204
By: Michael J. Derevlany, Esq.

Smile New York Outreach, LLC
33533 W 12 Mile Road Ste 150
Farmington Hills, MI 48331
By: Travis Hill, Esq.
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55 W. 46th Street
New York, New York 10036

JURISDICTION

The New York State Department of Health (Department or DOH) acts as the single state agency to supervise the administration of the Medical Assistance (Medicaid) Program in New York. (Public Health Law [PHL] § 201[1][v]; Social Services Law [SSL] § 363-a). The New York State Office of the Medicaid Inspector General (OMIG), an independent office within the DOH, is authorized to investigate and pursue administrative enforcement actions to recover improperly expended Medicaid funds. (PHL §§ 31-32).

The OMIG determined to recover Medicaid Program overpayments from Smile New York Outreach, LLC (Appellant) for the period from November 6, 2013 through June 25, 2018. The Appellant requested a decision without hearing pursuant to 18 NYCRR § 519.23(a), to review the OMIG's determination.

RECORD

The parties submitted legal briefs with supporting documents (OMIG Exhs 1-13) and (Appellant Exhs A-D); and reply briefs. The record closed on March 10, 2022.

APPLICABLE LAW

Medicaid providers are required, as a condition of their enrollment, to prepare and maintain contemporaneous records demonstrating their right to receive payment from the Medicaid Program, fully disclosing the nature and extent of the care, services, and supplies they provide; and to furnish such records to the Department upon request. Additionally, providers agree to comply with the rules, regulations, and official directives of the department. All information regarding claims for payment is subject to audit for six years. (18 NYCRR §§ 504.3, 504.8, 517[b], 540.7[a][8]).

When the Department has determined that claims for medical services have been submitted for which payment should not have been made, it may require repayment of the amount determined to have been overpaid. (18 NYCRR §§ 504.8 and 518.1[b]). An overpayment includes any amount not authorized to be paid under the Medicaid

Program, whether paid as the result of inaccurate or improper cost reporting, improper claiming, unacceptable practices, fraud, abuse or mistake. (18 NYCRR § 518.1[c]).

A Medicaid provider may request a decision without hearing to review the OMIG's final determination requiring repayment of any overpayments if there are no issues of fact to be resolved. (18 NYCRR § 519.23). The burden lies with the Appellant to prove by substantial evidence that the OMIG's determination is incorrect. (18 NYCRR § 519.18[d] and 18 NYCRR § 519.18[h]; New York State Administrative Act (SAPA) § 306[1]). Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or fact; less than preponderance of evidence, but more than mere surmise, conjecture, or speculation, and constituting a rational basis for decision. (*Stoker v. Tarantino*, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3rd Dept. 1984], *appeal dismissed* 63 N.Y.2d 649 [1984]).

The issues and documentation are limited to issues directly related to the OMIG's final determination. An Appellant may not raise issues regarding the methodology used to determine any rate of payment or fee, nor raise any new matter not considered by the Department upon submission of objections to a draft audit report. (18 NYCRR 519.18[a]). Computer generated documents prepared by the Department or its fiscal agent to show the nature and amount of payments made under the Medicaid Program will be presumed, in the absence of direct evidence to the contrary, to constitute an accurate itemization of the payments made to a provider. (18 NYCRR § 519.18[f]).

ISSUE

Has the Appellant shown that the OMIG erred in determining the Appellant improperly billed for dental claims?

STIPULATED FACTS

1. The Appellant is a provider of dental services and participant in the Medicaid program under provider number 03377873.

2. The OMIG, through its contracted agent Health Management Systems, Inc. (HMS), conducted a review of the Appellant's Medicaid reimbursement for dental service codes D1206, D1208, and D0145 from November 6, 2013 through June 25, 2018.

3. On March 9, 2021, the OMIG issued a draft audit report detailing its preliminary findings and calculating an estimated Medicaid overpayment of $576,851.25 for claims submitted under dental service code D1206. There were no findings related to codes D1208 or D0145.

4. On May 7, 2021, The Appellant submitted its response to the draft audit report, objecting to the OMIG's findings.

5. After reviewing the Appellant's submission, the OMIG issued its final audit report on October 8, 2021, reducing the overpayments to $397,604.08.

6. The Dental Policy and Procedure Manual (Manual) is an official directive issued by the Department, and is periodically modified and updated. The Manual in effect at the start of the audit defines dental service code D1206 as topical application of fluoride varnish, and is reimbursable four times per year for children up to and including six years of age. The Manual in effect at the end of the audit allowed reimbursement for certain individuals over six years of age, with specific exemption codes. The Manual was amended again, effective on July 1, 2021, to include all individuals between six months and 20 years of age.

7. According to the Manual, dental service code D1208, topical application of fluoride, is approved for individuals under 21 years of age, and certain individuals over 21 with specific conditions. Dental service code D0145 concerns diagnostic services for children under the age of three.

DISCUSSION

The Appellant failed to meet its burden of proving that the OMIG erred in determining to recover overpayments to Medicaid for improper billing for dental services. The audit found that the Appellant submitted claims to Medicaid for topical

application of fluoride varnish on individuals over six years of age. At the time the services were rendered, this procedure was only reimbursable for individuals under six years of age, or individuals over six with specific exemptions. There was no evidence presented indicating that any of the individuals over six that the Appellant treated were exempt. Therefore, those services were not eligible for reimbursement, resulting in overpayments.

There is no issue here of either fraud or abuse. The issue concerns whether Medicaid is entitled to be reimbursed for claims paid to the Appellant for applying topical fluoride varnish to individuals over six years of age. An overpayment includes any amount not authorized to be paid "as a result of inaccurate or improper cost reporting, or improper claiming" (18 NYCRR 518.1[c]). There is no dispute that during the audit period, commencing on November 6, 2013 and ending on June 25, 2018, the Appellant applied topical fluoride varnish to children over six years of age. (Exhibit 2 @ p. 3; Exhibit 3). There is also no dispute that from January 1, 2013 until November 1, 2016, the Manual limited reimbursement for this procedure to children under six years of age. (Exhibit 5 @ p. 29). From November 1, 2016 until November 12, 2018, the Manual extended such service to individuals over six years of age if they had certain exception codes; including traumatic brain injury, managed care exemptions or compromised salivary gland function. (Exhibits 6 @ p. 31, 7 @ p. 31, and 8 @ p. 32). The Appellant submitted claims to Medicaid for these services rendered, and was reimbursed in the amount of $397,851.08. There is no dispute that of these claims, none included children over six with traumatic brain injury, managed care exemptions or compromised salivary gland function. The Appellant was not entitled to reimbursement for those claims because they were not allowed pursuant to the Manual. Medicaid is entitled to recover the overpayments.

The Appellant argues that applying fluoride varnish is preferred over the alternate method of gel application. In support of its argument, the Appellant points to the change in the Manual that went into effect in 2021, allowing for reimbursement for this

application in children over the age of six. Whether applying fluoride varnish is better than applying gel is not relevant. What is relevant is that the claims were submitted to Medicaid before they were considered reimbursable, and therefore constitutes overpayments.

The Appellant also argues that there is no additional cost to the Medicaid Program for the Appellant's claims because the allowable reimbursable amount for applying varnish is the same as applying gel. Topical application of fluoride gel was allowable for children over the age of six during the audit period. However, the Appellant did not apply gel, it applied varnish, and cannot claim for services not provided. The overpayment here lies in the fact that a service was provided for which Medicaid reimbursement was not allowed at the time it was provided.

Finally, the Appellant contends that "New York State was aware of and did not object to Smile's use of fluoride varnish for children ages 7-18." (Appellant's brief @ p. 4). In support of this contention, the Appellant submitted reports from program reviews conducted by IPRO[1], an organization the New York State Department of Health contracts with to conduct on-site monitoring reviews. (Exhibit 2). Here, the Appellant confuses the monitoring review with an OMIG audit. Monitoring reviews look at program records, including medical records, personnel records and are conducted by the Department of Health or one of its agents. The OMIG is a separate and independent entity within the Department of Health whose purpose is to conduct financial audits. In this case, the audit was limited to claims submitted for reimbursement for specific services. The audit found that claims were submitted for services not allowed by the Medicaid program, resulting overpayments.

[1] The record does not reflect what "IPRO" stands for.

DECISION

The OMIG's determination to recover Medicaid Program overpayments in the amount of $397,604.08 for improperly billed Medicaid claims are affirmed.

This Decision is made pursuant to the designation by the Commissioner of Health of the State of New York to render final decisions in hearings involving Medicaid provider audits.

DATED: September 6, 2022
Albany, New York

JEAN T. CARNEY
Administrative Law Judge