

In the Matter of the Request of

Dr. Rony Mashihi/Brooklyn Dental (Appellant)

Audit # 16-4833
Provider # 02729422

For a hearing pursuant to Part 519 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York (18 NYCRR) to review a Determination under 18 NYCRR parts 517 and 518 to recover \$21,250.00 in Medicaid Overpayments.

Before: James F. Horan, Administrative Law Judge

Held at: New York State Department of Health
90 Church Street
New York, NY 10007
February 2, 2018

Parties: Office of the Medicaid Inspector General (OMIG)
Office of Counsel
217 Broadway, 8th Floor
New York, NY 10007
BY: Mara Pandolfo, Esq. and Harry Glick, Esq.

Rony Mashihi, D.D.S.
Brooklyn Dental, P.C.
70 Bay 28th Street
Brooklyn, NY 11214
BY: *Pro Se*

The Appellant received \$21,500.00 from the Medicaid Program as an incentive to adopt or upgrade to an electronic health records (EHR) system. The OMIG now seeks to recoup that amount on grounds that the Appellant failed to meet the criteria to receive the incentive payment. The Appellant argued that he adopted a non-approved system and found it too onerous to switch over to an approved system. After a hearing, the ALJ finds the Appellant failed to meet the criteria to receive the incentive payment and affirms the Determination by the OMIG to recover \$ 21,500.00.

Background

The OMIG issued a Final Audit Report on March 16, 2018 that sought recoupment of the \$21,250.00 incentive payment for failure to adopt, implement or upgrade to a certified EHR System in the year for which the Appellant attested to adoption/upgrade [Hearing Exhibit 10]. The Appellant then requested this hearing. The ALJ conducted the hearing in this matter pursuant to New York Social Services Law (SSL) Articles 1 and 5 (McKinney Supp. 2018), New York Public Health Law (PHL) Article 1 (McKinney Supp. 2018), New York State Administrative Procedure Act (SAPA) Articles 3-5 (McKinney 2018), Title 18 NYCRR Parts 504, 517, 518, 519 & 540 and Title 42 CFR Part 495. The OMIG presented two witnesses: Courtney Olsen and Kelly McCarville. Ms. Olsen works as a program manager with the New York State Technology Enterprise Corporation (NYSTEC), which contracts with OMIG to audit the EHR Incentive Program. Ms. McCarville works as an auditor with OMIG. Both witnesses testified under oath and subject to cross-examination. The Appellant spoke on his own behalf, but offered no testimony. The OMIG offered 25 exhibits into evidence that the ALJ received into the record:

- Exhibit 1. Audit Notification Letter 11/3/16,
- Exhibit 2. Draft Audit Report 1/19/17,
- Exhibit 3. Certified Mail Receipt for Draft Audit Report,
- Exhibit 4. Memorandum 2/6/16,
- Exhibit 5. Final Audit Report,
- Exhibit 6. Certified Mail Receipt for Final Audit Report,
- Exhibit 7. Appellant's Request For Hearing,
- Exhibit 8. E-mail Correspondence McCarville to DellaPietra,
- Exhibit 9. E-Mail Correspondence McCarville to Brooklyn Dental, P.C.,
- Exhibit 10. Medicaid EHR Incentive Program Attestation,
- Exhibit 11. Provider Enrollment Screen Shot,
- Exhibit 12. New York State Office of the Professions License Search,
- Exhibit 13. Fraud Activity Comprehensive Tracking System,
- Exhibit 14. New York State Department of Health MEIPASS,

- Exhibit 15. Certified Health IT Product List,
- Exhibit 16. Patient Volume Inquiry,
- Exhibit 17. Incentive Program Post-Payment Audit Checklist,
- Exhibit 18. Payment History eMedNY,
- Exhibit 19. Notice Of Hearing,
- Exhibit 20. Certified Mailing Receipt For Notice Of Hearing,
- Exhibit 21. Pre-Hearing Conference Documents,
- Exhibit 22. Supplemental Disclosure Statement,
- Exhibit 23. Certified Mail Receipt For Disclosure Statement,
- Exhibit 24. Statutes and Regulations,
- Exhibit 25. Contact Log OMIG.

The Appellant offered no exhibits into the record. The record also contained the hearing transcript pages 1-106.

Under SAPA § 306(2), all evidence, including records and documents in an agency's possession of which an agency wishes to avail itself, shall be offered and made a part of the record of a hearing. Under Title 18 NYCRR § 519.18(f), computer generated documents prepared by the Department or its fiscal agent to show the nature and amounts of payments made under the 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. In addition to testimony and documents in evidence, and pursuant to SAPA § 306(4), an ALJ may take Official Notice of any matter for which Judicial Notice may be taken.

Under SAPA § 306(1), the burden of proof in a hearing falls on the party which initiated the proceeding. Title 18 NYCRR § 519.18(d) provides that the Appellant bears the burden to show a determination of the Department was incorrect and that all claims submitted were due and payable. Title 18 NYCRR 519.18(h) and SAPA § 306(1) provide that a decision after hearing must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or fact; less than a 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. The substantial evidence standard demands only that a given inference is reasonable and plausible, not necessarily the most probable, Ridge Road Fire District v. Schiano, 16 N.Y.3d 494 (2011).

Findings of Fact

The ALJ made the following findings of fact (FF) after affording the parties an opportunity to be heard and after considering the evidence. The items in brackets that follow the findings represent documents in evidence [Ex], testimony from the record [T] and matters under Official Notice [ON] on which the ALJ relied in making the findings. In instances in which conflicting evidence appears in the record, the ALJ considered and rejected that other evidence.

1. The New York State Department of Health (Department) is the single state agency responsible for administering the Medicaid Program in New York State [ON SSL § 363-a, PHL § 201.1(v)].
2. The OMIG is an independent office within the Department with the responsibility for investigating, detecting and preventing Medicaid fraud, waste and abuse and for recouping improper Medicaid payments [ON PHL § 30].
3. The American Recovery and Reinvestment Act of 2009 authorized incentive payments to eligible professionals participating in the Medicaid and Medicare Programs to adopt and demonstrate meaningful use of EHR technologies [T 30].
4. To qualify for the incentive payment, a provider with a Medicaid patient volume of 30% or more of provider's practice, must purchase an EHR System that the Office of National Coordinator has certified and that appears on the Certified Health List IT product list [T 30].
5. The Appellant is a dental provider in the Medicaid Program who practices currently at an office called "Brooklyn Dental, P.C." [T 3; Ex 7].

6. The Appellant signed an Attestation on October 30, 2013 that he has adopted an EHR system and that his practice had a Medicaid Volume Threshold at 63.38% [Ex 10].
7. In October 2013, the Appellant worked for Andrew DellaPietra, D.D.S. at Neighborhood Dental [T 88].
8. The Appellant received the \$21,500.00 incentive payment in December 2013 [T 75].
9. The Appellant left Neighborhood Dental in February 2014 and began his current practice [T 88-89].
10. The OMIG issued a Notice of Audit Letter to the Appellant on November 3, 2016, but mailed the letter to Neighborhood Dental, because that was the address on the Appellant's October 30, 2013 Attestation [T 52].
11. Dr. DellaPietra informed Ms. McCarville that Neighborhood Dental did not upgrade to an acceptable EHR system during the 2013 audit period [T 54].
12. Ms. McCarville spoke to the Appellant in December 2016 at the Appellant's current practice and offered the Appellant the opportunity to submit documentation to OMIG on EHR implementation and Medicaid patient volume [T 54].
13. The Appellant submitted no documentation on either implementation or patient volume [T 50].
14. The OMIG issued a Draft Audit Report seeking the recoupment to the Appellant at Brooklyn Dental, P.C. on January 16, 2017 [Ex 2].
15. The Appellant provided no response to the Draft Audit Report [T 40].

Controlling Regulations

Title 18 NYCRR § 518.1(c) defines overpayment as any amount not authorized to be paid under the medical assistance program, whether paid as a result of improper claiming, unacceptable practices, fraud, abuse or mistake. Under Title 18 NYCRR §504.3(e), by enrolling

in the Medicaid Program, a provider agrees to submit claims for payment only for services actually furnished and which are medically necessary or otherwise authorized. Title 18 NYCRR § 504.3(h) states that a provider agrees to provide true, accurate and complete information in relation to any claim. Title 18 NYCRR §504.3(i) provides that by enrolling, a provider agrees to comply with the rules, regulations and official directives of the Department. Pursuant to Title 18 NYCRR §§ 517.1 – 517.17, OMIG may conduct fiscal reviews of a provider’s claims, books, records, reports or other available documentation. The standards for the Incentive Payment Program appear at Title 42 USC Part 495.

Discussion and Conclusions

The ALJ concludes that the Appellant received legally sufficient notice concerning the issues in the hearing and that the Appellant received the opportunity to present a defense to the actions to recoup payment.

The Appellant complained at hearing that he never received an explanation about what it meant to adopt an EHR system. He stated that he purchased the most advanced dental software, Dentrix, but that system does not sync with any of the acceptable EHR systems. He indicated that he would have had to transfer information from one system to another manually and that he would have had no time to perform his dental practice if he had tried the manual transfer. The Appellant indicated that, under his practice agreement with Dr. DellaPietra, he had to turn over a certain percentage of the reimbursement he received at Neighborhood Dental to Dr. DellaPietra. Under that agreement, the Appellant transferred \$8,375.00 to Dr. DellPietra from the \$21,500.00 incentive payment, but the OMIG was now seeking to recover the full \$21,500.00 from the

Appellant. The Appellant called the recoupment unfair. At the conclusion of the hearing, the Appellant conceded that he did not adopt accepted software and he did not meet the criteria for receiving the incentive payment [T 98-100].

The Appellant accepted a \$21,500.00 incentive payment to adopt and implement an accepted EHR system in 2013. The evidence at the hearing demonstrated that the Appellant failed to adopt or implement an accepted EHR system in 2013. Although he had to share part of the incentive payment under the practice agreement with Dr. DellaPietra, the Appellant signed the Attestation and received the incentive payment, so he bears responsibility to pay the recoupment pursuant to 18 NYCRR § 518(3)(a). The ALJ concludes that the OMIG acted appropriately in directing the Appellant to repay the \$21,500.00 incentive payment.

Administrative Law Judge James F. Horan renders this decision 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: May 14, 2018
Menands, New York

James F. Horan
Administrative Law Judge

To:

Mara Pandolfo, Esq.
Office of the Medicaid Inspector General
217 Broadway, 8th Floor
New York, NY 10007

Rony Mashihi, D.D.S.
Brooklyn Dental, P.C.
70 Bay 28th Street
Brooklyn, NY 11214