

# Medicaid Fraud and Compliance Issues

## An Update

Medicaid providers are coming under increased scrutiny by state inspectors. A provider's best defense is to avoid becoming a target.

Jennifer Kirschenbaum, J.D.

If you are one of the many dental professionals in New York State who participates with or who orders services reimbursed by Medicaid, there is a high likelihood that changes in the Medicaid system will have an impact on your practice. One such major change is increased oversight. Another is mandatory compliance requirements. Both will be discussed below.

### INCREASED MEDICAID OVERSIGHT

Approximately one year ago, the Office of Medicaid Inspector General (OMIG) announced the creation of the Dental Fraud Unit, formed within the Medicaid Provider Investigations Unit to identify dental practitioners delivering a quality of care that: "(i) fails to meet recognized professional standards; (ii) includes unnecessary services; or (iii) who are defrauding the Medicaid program." To achieve its mission, the Dental Fraud Unit implemented the following initiatives during 2011:

- **Dental Investigations**—The Dental Fraud Unit used clinical and forensic investigators to review and evaluate dental services provided to Medicaid recipients. Pre-payment review, a review of proposed services prior to any such services being rendered, was used to deny payments prior to the issuing of such payments. Also, as a result of prepayment reviews, OMIG has reported the exclusion of Medicaid providers and the issuance of warning letters to providers for submitting improper claims.
- **Enrollment and Reinstatement Investigations**—Enrollment and reinstatement investigations were utilized to identify unqualified, fraudulent or abusive practitioners, as well as providers whose lack of quality of care would present a danger to Medicaid recipients. As part of each enrollment/reinstatement investigation, a site visit, a review of ownership changes of rate-based providers and checks for individuals listed on applications who may have been sanctioned were conducted. As a result of its findings, the Dental Fraud Unit denied enrollment or reinstatement to certain providers.
- **Dental Reviews**—OMIG developed, and the Dental Fraud Unit utilized, software to identify dental professionals with expired licenses, disenrolled professionals receiving benefits, inappropriate dental services for edentulous patients, consultation procedures without referring provider information and dentist services billed fee-for-service for recipients living in skilled nursing facilities, where such services are included in the facility rate.
- **Corporate Integrity Agreements**—Under a Corporate Integrity Agreement, a provider consents to implement specific compliance structures, processes and activities aimed at building preventative integrity in providing and billing for care, services or supplies. Most Corporate Integrity Agreements include a provision requiring that the provider engage an independent review organization responsible for monitoring provider compliance. OMIG has reported that in

2010, one such Corporate Integrity Agreement was made between OMIG and a dental provider who failed to meet OMIG's compliance obligations but whose removal from the Medicaid program would have had a negative impact on access to necessary services.<sup>1</sup>

Practices targeted by OMIG, regardless of whether they are targeted by chance or because that practice has been reported by a patient, colleague or competitor, or "found out," more often than not find themselves in an arduous review process. A typical OMIG review may include requests for documentation, including medical records, site visits, and the accompanying aggravation and strain of being under review. A frequent comment heard from practices under review is the stretch of manpower the practice feels having to allocate resources to respond to OMIG's inquiries.

A major change in the OMIG review process occurred recently. Now, being targeted for a random audit is one of the less likely ways to wind up on OMIG's radar. Instead, OMIG has adopted mandatory compliance requirements that if not met, and if not affirmatively certified, may garner you and your practice with some unwanted OMIG attention.

### MANDATORY COMPLIANCE REQUIREMENTS

New York State law now requires that providers who receive or order more than \$500,000 in any consecutive 12-month period from Medicaid have a written compliance plan in place at their practice.<sup>2</sup> Importantly, the \$500,000 threshold includes straight Medicaid and Medicaid HMO monies. But the amount of "ordered" services, not just monies received by a practice, are also included in the tally,<sup>3</sup> capturing a wide array of practices into the compliance requirement that might otherwise have been immune.

OMIG is referring to providers that fall within the definition of needing a compliance plan as "required providers." Required providers are responsible for adopting written compliance plans that address with specificity, among other things, billing, payments, medical necessity and quality of care, as well as governance and training at the practice. They must also designate a compliance officer.<sup>4</sup> (See 18 NYCRR § 521.3 for additional requirements.) Additionally, OMIG mandates that all required providers affirmatively certify annually, by Dec. 31, online on OMIG's website ([www.omig.ny.gov/data/](http://www.omig.ny.gov/data/)) that a compliance program has been adopted.

In conversations with our firm, OMIG has relayed that its enforcement actions against dental practices are likely to begin the simplest way possible—a list will be tabulated of the dental practices in New York State and OMIG will check whether each required provider has adopted and certified that a plan is in place. Should the commissioner of health or OMIG find that a required provider does not have a satisfactory compliance program,<sup>5</sup> or no pro-

gram at all, applicable law states that "the required provider may be subject to any sanctions or penalties permitted by federal or state laws and regulations, including revocation of the provider's agreement to participate in the medical assistance program."<sup>6</sup> Further, OMIG has intimated that it will be using the compliance program requirement as a window into practices.

Should your practice appear on OMIG's radar as a potentially noncompliant practice, you run the risk of being targeted by OMIG for a retrospective review of claims or of being placed on prepayment review, which requires that you send in patient records prior to receiving reimbursement for any services. Either process—retrospective review or prepayment review—creates dire ramifications for many practices, requiring legal representation, diminished reimbursement and the potential to have to pay back monies received or anticipated to be received by the practice.

### PREPARING YOUR PRACTICE

The reality is that failing to implement a compliance plan and being called to task by OMIG for such failure is easily preventable. Adopting a compliance plan does not have to be a complex or costly process, and, in fact, may likely result in your implementing a way of operating that will greatly benefit your practice's operations and potentially increase your reimbursement. For information on the customized compliance program our firm offers for your practice, as well as available training options, visit: [www.kirschenbaumesq.com/healthcareorder.htm](http://www.kirschenbaumesq.com/healthcareorder.htm).

In addition, when addressing OMIG activity, it is important to draw attention to OMIG's authority, which is broad. In fact, due to abuse by OMIG, legislation has been passed re-casting practitioner rights. Regardless of those protections in place for practitioners, be advised that you will not be on a level playing field in an OMIG review. Be sure to protect your rights and your practice. One of the biggest mistakes practitioners make when targeted by OMIG or other authority is to embark on the review/investigation process without competent healthcare counsel.

### CONCLUSION

With the increased OMIG oversight and compliance requirements you may be required to abide by, the time is now to take preventative measures for your practice, to make sure that you adopt and certify your compliance plan, and to request assistance getting your house in order, when and where necessary. ☞

*Ms. Kirschenbaum manages Kirschenbaum & Kirschenbaum's healthcare department, which specializes in representing healthcare practitioners in regulatory compliance, audit defense, licensure and transactional matters. Ms. Kirschenbaum is a member of the NYSDA Legal Services Panel. She can be reached at Jennifer@Kirschenbaumesq.com; (516) 747-6700, ext. 302; or online at [www.nyhealthcareattorneys.com](http://www.nyhealthcareattorneys.com).*

1. Data for 2011 Corporate Integrity Agreement use was unavailable at the time this article was drafted.  
2. 18 NYCRR § 521.1  
3. 18 NYCRR § 521.2  
4. 18 NYCRR § 521.3  
5. 18 NYCRR § 521.4

6. Id.