

Compliance Matters

Update on the Activities of the Payment Police

By **David R. Ross, Esq.**

Senior Partner, O'Connell and Aronowitz, P.C.

Albany, New York

The Arc of New York Compliance Conference

May 7, 2019

1

DISCLAIMER

- This is offered for educational and informational purposes only
- This is not legal advice or guidance
- This is not intended to be legal advice or guidance
- If you wish to obtain legal advice or guidance please consult with your own attorney

2

David R. Ross, Esq.

- Formerly Acting Medicaid Inspector General of New York State
 - Director of OMIG Audits and Investigations
 - General Counsel of the OMIG
- Now an attorney in private practice
Medicaid compliance is the largest part of my practice

3

The Payment Police

- New York State (OMIG, OPWDD, AG MFCU, OSC)
- Federal (US HHS/OIG, FBI, United States Attorney's Office)
- Counties
- Private contractors
- We will cover two of these today:
 - OMIG
 - OPWDD

4

OMIG audits

- Review the OMIG Audit Protocols for your program type
- Available on the OMIG website
- These will serve as the blueprint for the audit
- Great tools for self-auditing for your compliance programs
- There should not be any surprises in an OMIG audit
- Forewarned is forearmed

5

OMIG audit process

- Engagement letter
- Entrance conference
- Claims review on site or off site
- Exit Conference Summary report issued, Exit Conference
- Draft Audit Report issued
- Final Audit Report issued

6

OMIG audits cont'd

- Medicare EOB project (Article 16 clinics and others)-need proof of denial of Medicare coverage
 - How often? Every instance? Occasionally?
 - Gembala e-mail
 - Absence of clear rule that requires enrollment in Medicare by individuals
 - Futility of billing Medicare
 - *Jimmo* I and II: so called "improvement standard"
 - Services must be skilled services; Medicare doesn't pay for unskilled services even if provided by a licensed professional
- Spillover into private third party insurance, Medicare EOB needed

7

OMIG statistical sampling and extrapolation

Various issues before DOH ALJ to decide:

- Failure to properly document and retain the seed
- Consequences of an insufficient sample size
- Invalid nonrandom sample
 - Pseudorandom numbers explained
- Biased sample-impact on the estimate
- Central Limit Theorem requires normality (bell shaped curve)
- OMIG approach is contrary to standard practices

8

Medicaid payments that have constituent parts

- Fee for service billing and payment but in some instances payments contain components
 - Capital costs
 - Food
 - Utilities-heat, hot water, air conditioning, electricity
 - Transportation
 - Supplies
 - Salaryall in addition to the payment for the specific service rendered

How much to disallow? All of it or the service provision component?

9

OPWDD Waiver Services audits

- The concept of “Beneficiary Month” and what it means
- Audit all waiver services provided to a consumer in one month
- Stratification (think of this as involving different silos of claims)
- Could be valid if done correctly
- Medicare uses this audit technique
- Is it being done correctly?
 - Dr. Karl Heiner of the OMIG generating the samples for review

10

OPWDD Waiver Services audits cont'd

- To date only a relative handful are known
- Repayment amounts tend to be on the lower side
- Not litigated or challenged

11

OPWDD Waiver Services audits cont'd

Examples of some recent findings:

- Missing or inadequate Individual Service Plan
- Elements missing
- Inadequate review of ISP
- Missing or inadequate Habilitation Plan
- Inadequate review of Habilitation Plan
- No forwarding of Habilitation Plan to MSC

12

Additional audit items

- Improper billing
- Missing documentation
- Missing required elements
- Incorrect service units billed
- Documentation not contemporaneous
- Services not provided by qualified staff

13

Self disclosures

- Systemic issues need sampling
- Sampling can be beneficial
- Obtain OMIG's permission
- Audit sample
- Report results
- Use of lower confidence interval dollar amount no longer permitted

14

Questions

- Ask them now
- or
- Contact me at your convenience

15

Contact information

- **David R. Ross, Esq.**
- Senior Partner, O'Connell and Aronowitz, P.C.
- dross@oalaw.com
- (518) 462-5601 office
- (518) 312-0167 cell

16