BARCLAY DAMON LLP

Michael P. Scott-Kristansen
Special Counsel

June 8, 2023

Lauri Cole
Executive Director
New York State Council for Community Behavioral Healthcare
911 Central Avenue, PO Box 152

Albany, NY 12206

Dear Lauri:

Please allow this to serve as our response on the question of whether the proposed bill (A6813, Paulin), which provides for revisions to PHL §§ 30-a and 32 and adds new PHL §§37 and 38 to create uniform audit standards for audits of payments to Medicaid providers in New York State, would prevent the New York State Office of the Medicaid Inspector General ("OMIG") from auditing and recouping for fraud and abuse. The proposed bill text does not ratify, excuse, or permit fraud and abuse by Medicaid providers to any degree or in any amount. The bill merely ensures that extrapolation is used responsibly and fairly, such as where there is actual fraud and abuse.

Under the proposed new PHL § 37(5)(a), the bill would permit the OMIG to continue to use extrapolation in its audit process as well as to collect any Medicaid overpayments that are actually identified. There is also nothing in the bill that prohibits OMIG from collecting overpayments resulting from fraud and abuse or from sanctioning a provider for fraud and abuse under existing law, including but not limited to 18 NYCRR Part 515, the remedies for which include recoupment (§ 515.9).

The bill merely places a reasonable limit on when extrapolation may be used as a tool to estimate overpayments to situations where there is a "sustained or high level of payment error." This is the same requirement and standard the Centers for Medicare and Medicaid Services ("CMS"), the federal agency that oversees state Medicaid programs, has imposed on its own audit contractors and payment integrity contractors (*CMS Medicare Program Integrity Manual, Ch. 8, § 8.4.1.2*). CMS states that it uses this standard to ensure that extrapolation is only used where it is likely to yield a "valid estimate of an overpayment" (*id.* at *§ 8.4.1.1*).

To limit ambiguity from the interpretation of "sustained or high level of payment error" and to make it clear that OMIG retains the ability to not only collect overpayments, but also to use extrapolation where there are circumstances indicating potential fraud and abuse, the proposed bill, under new PHL 37(5)(b), specifically allows extrapolation wherever there is a payment error rate of 50% or greater (§37[5][b][i]) and in other circumstances that may indicate fraud and abuse.

For instance, extrapolation is permitted where the provider had identical findings in a prior audit (§ 37[5][b][ii]), where the provider was previously sanctioned for such errors (§ 37[5][b][iii]), or where the provider was subject to prior educational intervention and failed to correct such errors (§ 37[5][a]). There is also a specific exception that permits extrapolation where the provider was previously found to have engaged in fraud or abuse of Medicaid, or other federal or state payment programs (§ 37[5][b][iv]). This is also directly in line with CMS' own standards under its Program Integrity Manual (*CMS Medicare Program Integrity Manual, Ch. 8, 8.4.1.4*).

Further, the bill peels back the other provider protections in cases of fraud, abuse, or deceit. Under the proposed bill, the definition of "overpayment" specifically includes any instance of noncompliance where payment was obtained by fraud or deceit (PHL § 30-a[6]), the limitations on OMIG's ability to withhold payment pending a hearing determination do not apply where there is a credible allegation of fraud (PHL § 37[2]), and providers lose the ability to correct any claims where there was fraud or intent to falsify (PHL § 37[4][a]). Accordingly, the bill meaningfully protects the OMIG's authority to recoup in cases of fraud and abuse without regard for the rate of payment error.

Very truly yours,

/s/ Michael Scott-Kristansen

Michael P. Scott-Kristansen

MPS
cc: Linda J. Clark,
Partner, Barclay Damon LLP
lclark@barclaydamon.com
(518) 427-3498)