



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



[We redact certain identifying information and certain potentially privileged, confidential, or proprietary information associated with the individual or entity, unless otherwise approved by the requestor.]

Issued: October 8, 2013

Posted: October 15, 2013

[Name and address redacted]

Re: OIG Advisory Opinion No. 13-13

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding a non-profit community health services organization's proposal to begin billing Medicaid for dental services provided to its patients, while continuing to provide free dental services to uninsured and underinsured financially needy children (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for permissive exclusion under the exclusion authority at section 1128(b)(6)(A) of the Social Security Act (the "Act"), under the civil monetary penalty provision prohibiting inducements to beneficiaries, section 1128A(a)(5) of the Act, or under the exclusion authority at section 1128(b)(7) of the Act, or the civil monetary penalty provision at section 1128(a)(7) of the Act, as those sections related to the commission of acts described in section 1128B(b) of the Act, the Federal anti-kickback statute.

You have certified that all of the information provided in your request, including all supplemental submissions, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties.

In issuing this opinion, we have relied solely on the facts and information presented to us. We have not undertaken an independent investigation of such information. This opinion is limited to the facts presented. If material facts have not been disclosed or have been misrepresented, this opinion is without force and effect.

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that: (i) the Proposed Arrangement would not constitute grounds for permissive exclusion under section 1128(b)(6)(A) of the Act; (ii) the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (iii) the Proposed Arrangement would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the Office of Inspector General (“OIG”) would not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Proposed Arrangement. This opinion is limited to the Proposed Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

This opinion may not be relied on by any persons other than [name redacted], the requestor of this opinion, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

[Name redacted] (the “Requestor”) is a non-profit community health services organization that provides health services to financially needy children in [city, state redacted]. The Requestor is a wholly owned subsidiary of [name redacted], a nationwide health care system.

The Requestor currently provides medically necessary preventive and restorative dental services to financially needy children through its [name redacted] program (the “Program”).¹ The Requestor provides services on mobile dental buses that are specially designed to provide pediatric dental services. Each child receives oral health education, a comprehensive dental exam and cleaning and, as needed, fluoride varnish, sealants, and necessary restorative work (e.g., fillings, caps, crowns, and extractions). For children to participate in the Program, their families must qualify as low-income under the Requestor’s financial eligibility criteria. The Requestor certified that almost all of its patients are either Medicaid beneficiaries or uninsured. Although the services it provides under the Program are covered by Medicaid, the Requestor currently does not bill any Federal health care program, and all items and services are provided for free.

¹ Families are made aware of the Program through the county school systems; community non-profit charities, and other community organizations serving low-income children and their families; community advertisements; and their local primary care physicians.

Under the Proposed Arrangement, the Requestor would bill Medicaid for items and services provided to Medicaid beneficiaries.² For financially needy children who are uninsured or underinsured (*i.e.*, whose health insurance does not provide coverage for the types of dental services provided under the Program), the Requestor would continue to provide items and services under the Proposed Arrangement at no charge.

Because the Requestor would receive payment from Medicaid for services provided to Medicaid beneficiaries under the Proposed Arrangement, the Requestor would no longer provide free services to Medicaid beneficiaries. Although the Requestor is unable to certify that no services would ever be provided to beneficiaries of other Federal health care programs, such as Tricare, it certified that it would not bill any Federal health care program other than Medicaid for any service it provides.

II. LEGAL ANALYSIS

A. Law

Section 1128(b)(6) of the Act permits the Secretary of the Department of Health and Human Services (the “Secretary”) to exclude any individual or entity that the Secretary determines has submitted or caused to be submitted bills or requests for payment to Medicare or a State health care program (*e.g.*, Medicaid) containing charges for items or services furnished substantially in excess of such individual’s or entity’s usual charges (or, in applicable cases, substantially in excess of such individual’s or entity’s costs) for such items or services, unless the Secretary finds there is good cause for such bills or requests containing such charges or costs.

Section 1128A(a)(5) of the Act provides for the imposition of civil monetary penalties against any person who offers or transfers remuneration to a Medicare or State health care program (including Medicaid) beneficiary that the benefactor knows or should know is likely to influence the beneficiary’s selection of a particular provider, practitioner, or supplier of any item or service for which payment may be made, in whole or in part, by Medicare or a State health care program (including Medicaid). The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs. Section 1128A(i)(6) of the Act defines “remuneration” for purposes of section 1128A(a)(5) as including “transfers of items or services for free or for other than fair market value.”

The anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program. See section 1128B(b) of the Act. Where

² Children under the age of 18 who are Medicaid beneficiaries are not subject to copays or deductibles. See section 1916(a)(2)(A) of the Act.

remuneration is paid purposefully to induce or reward referrals of items or services payable by a Federal health care program, the anti-kickback statute is violated. By its terms, the statute ascribes criminal liability to parties on both sides of an impermissible “kickback” transaction. For purposes of the anti-kickback statute, “remuneration” includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

The statute has been interpreted to cover any arrangement where one purpose of the remuneration was to obtain money for the referral of services or to induce further referrals. See, e.g., United States v. Borrasi, 639 F.3d 774 (7th Cir. 2011); United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000); United States v. Davis, 132 F.3d 1092 (5th Cir. 1998); United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir. 1985), cert. denied, 474 U.S. 988 (1985). Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both. Conviction will also lead to automatic exclusion from Federal health care programs, including Medicare and Medicaid. Where a party commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative proceedings to impose civil monetary penalties on such party under section 1128A(a)(7) of the Act. The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs under section 1128(b)(7) of the Act.

B. Analysis

Under the Proposed Arrangement, the Requestor would bill Medicaid for dental items and services provided to children who are Medicaid beneficiaries but would provide those same services for free to financially needy uninsured and underinsured children. Because Medicaid would be charged for services that the Requestor would provide for free to uninsured and underinsured children, it seeks guidance on whether its bills to Medicaid under the Proposed Arrangement would be “substantially in excess” of its “usual charges.” Section 1128(b)(6)(A) of the Act permits—but does not require—the OIG to exclude from participation in the Federal health care programs any provider or supplier that submits bills or requests for payment to Medicare or Medicaid for amounts that are substantially more than the provider’s or supplier’s usual charges. The statute is intended to protect both taxpayers and the Medicare and Medicaid programs from providers and suppliers that routinely charge the programs substantially more than other customers.

The OIG has never excluded or attempted to exclude any provider or supplier that provides discounts or free services to uninsured or underinsured patients. It is OIG’s enforcement policy that, when calculating their “usual charges” for purposes of section 1128(b)(6)(A), providers and suppliers do not need to consider free or substantially reduced charges to uninsured or underinsured patients who are responsible for the

charges for items or services furnished to them.³ Based on this enforcement policy, we would not seek to exclude the Requestor from participating in Federal health care programs for charging Medicaid for dental items and services provided to Medicaid beneficiaries, while also providing the same dental items and services for free under the Proposed Arrangement to financially needy uninsured or underinsured children whose families would otherwise be responsible for payment for these services.

The Requestor inquired as to whether it would be subject to sanctions under the anti-kickback statute as a result of the Proposed Arrangement. Because the Requestor would not provide free services to Medicaid beneficiaries, nor would it bill other Federal health care programs, no remuneration would be provided to patients who would receive items and services payable by Federal health care programs. The anti-kickback statute therefore is not implicated. For the same reason, the civil monetary penalty provision prohibiting inducements to beneficiaries, section 1128A(a)(5) of the Act, is not implicated.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that: (i) the Proposed Arrangement would not constitute grounds for permissive exclusion under the exclusion authority at section 1128(b)(6)(A) of the Act; (ii) the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (iii) the Proposed Arrangement would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the OIG would not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Proposed Arrangement. This opinion is limited to the Proposed Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

³ See “Hospital Discounts Offered to Patients Who Cannot Pay Their Hospital Bills,” (February 2004), available at <https://oig.hhs.gov/fraud/docs/alertsandbulletins/2004/FA021904hospitaldiscounts.pdf>; see also “Addendum to ‘Hospital Discounts Offered to Patients Who Cannot Pay Their Hospital Bills,’” (June 2007), available at http://oig.hhs.gov/fraud/docs/alertsandbulletins/2007/revised%20addendum%20to%20uninsured%20guidance%20_4_%20_2_%20_2_.pdf.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [name redacted], the requestor of this opinion. This advisory opinion has no application to, and cannot be relied upon by, any other individual or entity.
- This advisory opinion may not be introduced into evidence by a person or entity other than [name redacted] to prove that the person or entity did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.
- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is expressed or implied herein with respect to the application of any other Federal, state, or local statute, rule, regulation, ordinance, or other law that may be applicable to the Proposed Arrangement, including, without limitation, the physician self-referral law, section 1877 of the Act (or that provision's application to the Medicaid program at section 1903(s) of the Act).
- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.
- This advisory opinion is limited in scope to the specific arrangement described in this letter and has no applicability to other arrangements, even those which appear similar in nature or scope.
- No opinion is expressed herein regarding the liability of any party under the False Claims Act or other legal authorities for any improper billing, claims submission, cost reporting, or related conduct.

This opinion is also subject to any additional limitations set forth at 42 C.F.R. Part 1008. The OIG will not proceed against [name redacted] with respect to any action that is part of the Proposed Arrangement taken in good faith reliance upon this advisory opinion, as long as all of the material facts have been fully, completely, and accurately presented, and the Proposed Arrangement in practice comports with the information provided. The OIG reserves the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, to rescind, modify, or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against [name redacted] with respect to any action that is part of the Proposed Arrangement taken in good faith reliance upon this advisory opinion, where all

of the relevant facts were fully, completely, and accurately presented and where such action was promptly discontinued upon notification of the modification or termination of this advisory opinion. An advisory opinion may be rescinded only if the relevant and material facts have not been fully, completely, and accurately disclosed to the OIG.

Sincerely,

/Gregory E. Demske/

Gregory E. Demske
Chief Counsel to the Inspector General