**STATE OF NEW YORK**
**DEPARTMENT OF HEALTH**

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| In the Matter of the Appeal of<br><br>**ASHU SACHDEV**<br>Medicaid ID: 02531033<br><br>from a determination by the NYS Office of the Medicaid Inspector General to recover Medicaid Program overpayments. | **DECISION AFTER HEARING**<br><br>Audit Number: 20-4899 |

Before: Natalie J. Bordeaux
Administrative Law Judge

Hearing Date: June 10, 2022

Held via: WebEx videoconference

Parties: New York State Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204
By: Debra Collura, Esq.

Dr. Ashu Sachdev
[redacted]
By: [redacted]

## JURISDICTION

The New York State Office of the Medicaid Inspector General (OMIG) determined to seek restitution of a payment made under the Medicaid Electronic Health Records (EHR) Technology Incentive Program to Dr. Ashu Sachdev (Appellant). The Appellant requested a hearing pursuant to Social Services Law § 145-a and Department of Social Services (DSS) regulations at 18 NYCRR § 519.4 to review the determination.

## HEARING RECORD

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| OMIG witnesses: | Staci McGowan, Program Manager, EHR Incentive Program, New York State Technology Enterprise Corporation (NYSTEC)<br>Salvatore Ingalls, Auditor, NYSTEC |
| OMIG exhibits: | 1-36 |
| Appellant witnesses: | Dr. Ashu Sachdev, Appellant<br>[redacted], Appellant's [redacted] |
| Appellant exhibits: | A |

A transcript of the hearing was made. (T 1-161.)

## FINDINGS OF FACT

1. The Appellant is enrolled as a provider in the New York State Medicaid Program who procured a certified EHR system to qualify for an initial payment from the EHR Technology Incentive Program for the year 2016. (Exhibit 17.)

2. On October 14, 2018, the Appellant submitted an application for payment under the EHR Technology Incentive Program for the 2017 payment year certifying to having met meaningful use objectives required for obtaining a payment in a year subsequent to the year of initial payment. (Exhibit 16.)

3. The Appellant's attestation certified that during the 90-day period of September 1 through November 29, 2017 (EHR reporting period), she took required steps to protect electronic health information created or maintained by the certified EHR technology. These actions included conducting a security risk analysis, implementing security updates as necessary, and correcting identified security deficiencies as part of the Appellant's risk management process. The Appellant entered a security risk analysis completion date of August 31, 2017. (Exhibit 16.)

4. The Appellant attested to meeting clinical decision support objectives by implementing five clinical decision support interventions related to four or more clinical quality measures at a relevant point in patient care for the entire EHR reporting period. (Exhibit 16.)

5. The Appellant attested that she was entitled to an exclusion from the computerized provider order entry objective for radiology because she wrote fewer than 100 radiology orders during the EHR reporting period. (Exhibit 16.)

6. The Appellant also attested that she was entitled to an exclusion from the patient-specific education and secure electronic messaging objectives because she had had no office visits during the EHR reporting period. (Exhibit 16.)

7. The Appellant received a second year EHR incentive payment for the year 2017 in the amount of $8,500. (Exhibit 17.)

8. By letter dated December 10, 2020, the OMIG advised the Appellant of its intent to audit the Appellant's documentation supporting her receipt of an EHR incentive payment for the year 2017 and requested documentation regarding the certified EHR system used by her practice, along with documentation to substantiate the Appellant's

attestation that her practice met criteria for exclusions to meaningful use objectives and patient volume encounter information for the EHR reporting period. (Exhibit 1.)

9. On May 28, 2021, the Appellant submitted documentation to the OMIG in response to the December 10, 2020 letter. (Exhibit 3.)

10. By email dated July 12, 2021, the OMIG advised the Appellant that she was required to provide an explanation for the exclusions to meaningful use measures cited in her attestation for the 2017 EHR incentive payment by July 19, 2021. (Exhibit 4.)

11. By email dated August 5, 2021, the OMIG again advised the Appellant that she was required to provide an explanation for the exclusions to meaningful use measures cited in her attestation for the 2017 EHR incentive payment and extended the response deadline to August 12, 2021. (Exhibit 4.)

12. By draft audit report dated October 14, 2021, the OMIG notified the Appellant that it had determined to seek restitution of the 2017 EHR incentive payment in the amount of $8,500 on the grounds that the Appellant failed to qualify as a meaningful EHR user and failed to support 10 meaningful use objectives or measures. (Exhibit 5.)

13. On November 14, 2021, the Appellant submitted a response to the draft audit report. (Exhibit 7.)

14. On November 29, 2021, the OMIG requested additional information from the Appellant regarding her responses to the draft audit report. (Exhibit 8.)

15. On December 17, 2021, and January 15, 2022, the Appellant submitted additional information in response to the draft audit report findings. (Exhibits 9, 11.)

16. By final audit report dated February 17, 2022, the OMIG advised the Appellant of its determination to seek restitution of the 2017 EHR incentive payment of $8,500 on the grounds that the Appellant's documentation failed to establish that her practice met the following meaningful use measures/objectives to which she attested: (1) protect electronic health information; (2) clinical decision support; (3) computerized/provider order entry; (4) patient-specific education resources; and (5) secure electronic messaging. (Exhibit 13.)

## ISSUE

Was the OMIG's determination to recover the Appellant's EHR Incentive Program payment for the year 2017 correct?

## APPLICABLE LAW

By enrolling in the Medicaid Program, providers agree to prepare and to maintain contemporaneous records demonstrating the right to receive payment under the Medicaid Program and to furnish such records and information, upon request, to the Department. Such records must be maintained for at least six years from the date of service. 18 NYCRR § 504.3(a). Medicaid providers agree to permit audits by the Department of all books and records or, in the Department's discretion, a sample thereof, relating to services furnished and payments received under the Medicaid Program, including patient histories, case files and patient-specific data. 18 NYCRR § 504.3(g), § 517.3(b), § 540.7(a)(8). In addition, Medicaid providers must comply with the rules, regulations, and official directives of the Department. 18 NYCRR § 504.3(i).

The OMIG is an independent office within the Department with the authority to pursue civil and administrative enforcement actions against any individual or entity that

engages in fraud, abuse, or illegal or improper acts or unacceptable practices perpetrated within the Medicaid Program. Such actions may include the recovery of improperly expended Medicaid funds. PHL §§ 30-32.

The EHR Technology Incentive Program was authorized by the American Reinvestment and Recovery Act of 2009 and implemented by Federal regulations at 42 CFR Part 495. The program authorizes states to provide incentive payments for Medicaid providers for adopting, implementing or upgrading certified EHR technology, or for meaningful use of such technology. 42 CFR § 495.300. Dentists are Medicaid professionals eligible for EHR incentive payments. 42 CFR §§ 495.304(a)(1)&(b)(2).

To be eligible for an initial incentive payment, a Medicaid eligible professional (EP) must "acquire, purchase or secure access to certified EHR technology." 42 CFR §§ 495.2, 495.302. The first year of payment is intended to offset the costs associated with the initial adoption, implementation or upgrade of the technology. Incentives for subsequent payment years are intended to offset maintenance and operation of the technology. 42 CFR § 495.310.

Eligibility for the incentive in subsequent payment years is contingent on an EP's satisfaction of meaningful use objectives and corresponding measures. For the years 2015 through 2018, the objectives are: (1) protecting patient health information; (2) clinical decision support; (3) computerized provider order entry; (4) electronic prescribing; (5) health information exchange; (6) patient specific education; (7) medication reconciliation; (8) patient electronic access; (9) secure messaging; and (10) public health reporting. 42 CFR § 495.22(e). An EP may exclude a particular objective if an option is available for the EP to attest that the objective is not applicable; the EP

meets the criteria in the applicable objective that would permit the attestation to the exclusion; and the EP attests to the exclusion. 42 CFR § 495.22(b)(2).

Eligibility for the EHR incentive payment is also contingent upon the EP having a minimum of 30 percent patient volume attributable to individuals receiving Medicaid, calculated by selecting a representative 90-day period during the preceding calendar year, and dividing total Medicaid patient encounters by total patient encounters in that period. 42 CFR § 495.304(c)(1) and § 495.306(c)(1).

## DISCUSSION

The Audit Findings

The auditors determined that because the Appellant failed to produce documentation to support her October 14, 2018 attestation that she met all meaningful use objectives/measures, she was not eligible to receive an incentive payment for the 2017 payment year. The Appellant failed to satisfy the following objectives/measures:

Protect Electronic Health Information

An EP is required to protect electronic protected health information (ePHI) created or maintained by the certified EHR technology through the implementation of appropriate technical capabilities. In order to meet this objective, an EP must conduct or review a security risk analysis in accordance with 45 CFR § 164.308(a)(1), including addressing the security (to include encryption) of electronic protected health information created or maintained by the certified EHR technology and implementing security updates as necessary and correct identified security deficiencies as part of the EP's risk management process. 42 CFR § 495.22(e)(1). An eligible provider is required to conduct a security risk analysis at least once each year in which an EHR incentive

payment is applied for, or sooner if changes to the practice or electronic systems occur. Any security updates and deficiencies that are identified in the review should be included in the provider's risk management process and implemented or corrected as dictated by that process. The provider must document the risk analysis, including risk levels based upon the likelihood and impact of a threat occurrence, and remediation or mitigation of identified risks based upon the severity of their impact on a provider's patients and practice. https://www.cms.gov/regulations-and-guidance/legislation/ehrincentiveprograms/downloads/2016_securityriskanalysis.pdf.

In her New York Medicaid EHR Incentive Program Attestation dated October 14, 2018, the Appellant certified that she had met the "Protect Health Information" objective and corresponding measure, and to having completed a security risk analysis on August 30, 2017. (Exhibit 16.) Salvatore Ingalls, the auditor assigned to review the Appellant's satisfaction of meaningful use objectives and measures, directed the Appellant to guidance from the Centers for Medicare and Medicaid Services (CMS) regarding compliance with program requirements, including conducting and documenting a security risk analysis. (Exhibit 8.)

The Appellant provided no documentation to support her affirmation that she conducted a security risk analysis despite being repeatedly asked to do so. (T 87, 90.) Instead, the Appellant asserted that her office has protected electronic information by using certified EHR technology software to encrypt information, taking measures to safeguard log in information, installing security cameras and an alarm system in the office, and updating software. (Exhibit 9; Exhibit A; T 87-88, 119-20.)

The security risk analysis requires an EP to take very specific steps and document all of them. The Appellant's described process and lack of corresponding documentation fail to satisfy the requirements of this objective.

Clinical Decision Support

An EP must use clinical decision support to improve performance on high-priority health conditions, as measured by implementing five clinical decision support interventions related to four or more clinical quality measures at a relevant point in patient care for the entire EHR reporting period. Absent four clinical quality measures related to an EP's scope of practice or patient population, the clinical decision support interventions must be related to high-priority health conditions. Meeting this objective also requires enabling and implementing the functionality for drug-drug and drug-allergy interaction checks for the entire EHR reporting period. 42 CFR §§ 495.22(e)(2)(i)&(ii)(A)(1). Although the Appellant attested to having met this measure (measure 1,) she provided no supporting documentation. (Exhibit 16; T 93.)

Clinical quality measures are patient-specific, as they are based upon each patient's health. The auditors would have accepted a letter from the Appellant's EHR software vendor identifying five clinical decision support interventions enabled during the reporting period or screen shots showing the five clinical decision support interventions that were enabled during the EHR reporting period. Other dental providers were able to submit that documentation when asked to do so. (T 93.)

The Appellant explained that her clinical decisions are largely based on digital x-rays and visual inspections, from which a treatment plan is devised, and that those items are all stored in the EHR software. (Exhibit 9; T 121-22.) These actions are insufficient

to establish that the Appellant has implemented five clinical decision support interventions specific to individual patients, each of whom present with unique medical histories. The Appellant did not meet the requirements for measure 1 of the Clinical Decision Support objective.

Computerized Provider Order Entry

An EP is required to use computerized provider order entry for medication, laboratory, and radiology orders. This objective is met by three measures: (1) more than 60 percent of medication orders created by the EP during the EHR reporting period are recorded using computerized provider order entry; (2) more than 30 percent of laboratory orders created by the EP during the EHR reporting period are recorded using computerized provider order entry; and (3) more than 30 percent of radiology orders created by the EP during the EHR reporting period are recorded using computerized provider order entry. 42 CFR §§ 495.22(e)(3)(i)&(ii)(A). An EP may obtain an exclusion from meeting this objective, including all three measures, if the provider writes fewer than 100 medication orders, 100 laboratory orders, and 100 radiology orders during the EHR reporting period. 42 CFR § 495.22(3)(ii)(B). The Appellant attested to qualifying for exclusion from this objective, including all three measures. (Exhibit 16.)

The OMIG determined that the Appellant did not qualify for an exclusion from measure 3 with respect to radiology orders. On reviewing the Appellant's meaningful use dashboard for the EHR reporting period, as provided by the Appellant's EHR software vendor, the auditors noted that the Appellant ordered radiology services for patients 562 times, none of which were entered into the EHR software. (Exhibit 18; T 54, 96-98.) The Appellant asserted that she performs all radiology services in-house,

using her own equipment. For that reason, she believed that this measure was inapplicable. (Exhibit 9; Exhibit A; T 122-23, 144.)

Although applicable regulations offer certain exclusions for meeting the EHR Technology Incentive Program's meaningful use objectives and measures, providers performing radiology procedures themselves are not exempt from entering more than 30% of radiology orders using computerized provider order entry included in the certified EHR software. The Appellant did not qualify for an exclusion to measure 3 of this objective.

Patient-Specific Education Resources

An EP is required to use clinically relevant information from certified EHR technology to identify patient-specific education resources and provide those resources to the patient. 42 CFR § 495.22(e)(6)(i). In order to meet this objective, an EP must provide patient-specific education resources identified by certified EHR technology to more than 10 percent of all unique patients with office visits seen by the EP during the EHR reporting period. 42 CFR § 495.22(e)(6)(ii)(A). An EP who has no office visits during the EHR reporting period is excluded from meeting this objective. 42 CFR § 495.22(e)(6)(ii)(B). The Appellant attested to being excluded from meeting this objective because she had no office visits during the EHR reporting period. (Exhibit 16.) However, the data provided on the EHR software dashboard revealed that she saw 273 unique patients during that period. (Exhibit 18; T 102-03.)

In her response to the auditors, the Appellant contended that she has met this measure by making flyers available at her office and posting information on her website. In addition, she provides postoperative instructions, and obtains patient consent for

procedures, both of which are uploaded onto the certified EHR technology system. (Exhibit 9.) That explanation contradicts her attestation to having had no office visits during the EHR reporting period. (T 103-04.)

At the hearing, the Appellant claimed exemption from meeting this objective because, as a dentist, she only provides patients with treatment, not consultations. (T 129-31.) That interpretation is not supported by applicable law. Meaningful use of EHR technology applies to all professional services rendered by an eligible professional for which payment is made. Social Security Act § 1848(k)(3)&(o); 42 CFR § 495.2(a). No exclusion from meaningful use requirements is available for treatment of a patient, nor does an exclusion hinge on whether a patient sits in an office chair rather than an examination chair.

Secure Electronic Messaging

An EP must use secure electronic messaging to communicate with patients on relevant health information. 42 CFR § 495.22(e)(9)(i). For the year 2017, this objective is met when a secure message is sent using the electronic messaging function of the certified EHR technology to, or in response to a secure message sent by, more than five percent of unique patients or their authorized representatives. 42 CFR § 495.22(e)(9)(ii)(A)(3). An EP may exclude from the measure if he or she has no office visits during the EHR reporting period. 42 CFR § 495.22(e)(9)(ii)(B). The Appellant attested to an exclusion to the objective and corresponding measure on the grounds that she had no office visits during the EHR reporting period. (Exhibit 16.) The EHR software dashboard revealed that she saw 273 unique patients during the EHR reporting period. (Exhibit 18.)

Although the Appellant conceded at the hearing that this exclusion was not quite accurate, she sought an exemption from this measure. Certifying that she had had no office visits was her only way of averting what was otherwise required. (T 129.) In addition to her belief that dental patient appointments do not constitute office visits (addressed above), the Appellant explained that she sought exclusion from this measure because she only communicates with patients in-person. The Appellant does not believe that electronic communications further her practice. (Exhibit 9; T 133.)

The Appellant elected to participate in, and received payment from, the EHR Technology Incentive Program, the very purpose of which was to encourage providers to improve the quality of patient care through the electronic exchange of health care information. Social Security Act § 1848(o)(2). Payment was predicated on the Appellant having satisfied all requirements, including secure electronic messaging with more than five percent of her patients. The arguments raised by and on behalf of the Appellant do not establish an error in the OMIG's determination that she did not qualify for an exclusion from this measure.

The Appellant's Overall Objection to the Audit Findings

The Appellant contends that she has used the certified EHR technology to its utmost capacity for a dental practice, and that, therefore, the Appellant has satisfied all meaningful use objectives and measures to the extent possible for a dental practice. (Exhibit 14; T 22.)

The OMIG has selected 180 dental providers as part of its review of enrolled providers' compliance with meaningful use objectives and measures, and nearly 100 of those dental providers have already passed their audits. (T 58, 106-07.) These numbers

demonstrate that dental providers are indeed capable of satisfying and showing that they have meaningfully used certified EHR software in accordance with federal requirements.

It is evident that the Appellant strives to provide what she believes to be effective and excellent patient care. She remains free to operate her practice as she sees fit. However, she cannot attest to having met requirements for the EHR Technology Incentive Program and retain payment of government funds for her certified compliance with program requirements, without establishing compliance with those requirements. She has not shown that she satisfied all meaningful use objectives and measures for the 2017 payment year.

As a mitigating factor, the Appellant has asked that any overpayment be pro-rated to account for the Appellant's satisfaction of multiple meaningful use objectives and measures. (Exhibit A; T 119.) Enrolled providers must meet all criteria in order to obtain the incentive payment. The Appellant attested to having satisfied all meaningful use requirements as a condition of receiving that payment. Applicable regulations do not offer an apportionment of the incentive payment. The OMIG's decision is therefore upheld.

## DECISION

The OMIG's determination to recover the Appellant's EHR Incentive Program payment for the year 2017 was correct and is affirmed.

Dated: July 18, 2022
Menands, New York

Natalie Bordeaux

Natalie J. Bordeaux
Administrative Law Judge