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NEW YORK STATE OF OPPORTUNITY. Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Commissioner

JOHANNE E. MORNE, M.S.
Executive Deputy Commissioner

May 6, 2024

CERTIFIED MAIL/RETURN RECEIPT

Michael S. Joseph, Esq.
NYS - OMIG
800 North Pearl Street
Albany, New York 12205

National Seating & Mobility Inc.
5959 Shallowford Road, Suite 443
Chattanooga, Tennessee 37421

Yulian Shtern, Esq.
Benesh, Friedlander, Coplan & Aronoff LLP
1155 Avenue of the Americas, Floor 26
New York, New York 10036

RE: In the Matter of National Seating & Mobility Inc.

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter.

If the appellant did not win this hearing, the appellant may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the appellant wishes to appeal this decision, the appellant may wish to seek advice from the legal resources available (e.g. the appellant's attorney, the County Bar Association, Legal Aid, OEO groups, etc.). Such an appeal must be commenced within four (4) months after the determination to be reviewed becomes final and binding.

Sincerely,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB:nm
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

In the Matter of the Appeal of **National Seating & Mobility Inc.** Medicaid ID # 03841967 from a determination by the NYS Office of the Medicaid Inspector General to recover Medicaid Program overpayments.	**Decision After Hearing** #20-6666

Before: John Harris Terepka
Administrative Law Judge

Hearing date: January 30, 2024
By videoconference
Record closed April 19, 2024

Parties: New York State Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12205
By: Michael S. Joseph, Esq.
michael.joseph@omig.ny.gov

National Seating & Mobility Inc.
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JURISDICTION

The Department of Health (the Department) acts as the single state agency to supervise the administration of the Medicaid Program in New York State. 42 USC 1396a; Public Health Law (PHL) 201(1)(v); Social Services Law (SSL) 363-a. The Office of the Medicaid Inspector General (OMIG), an independent office within the Department, has the authority to pursue administrative enforcement actions against any individual or entity that engages in fraud, abuse or unacceptable practices in the Medicaid Program, and to recover improperly expended Medicaid funds. PHL 30, 31 and 32.

The OMIG determined to seek restitution of payments made under the Medicaid Program to National Seating & Mobility Inc. (the Appellant). The Appellant requested a hearing pursuant to SSL 145-a and New York State regulations at 18 NYCRR 519.4 to review the determination.

HEARING RECORD

OMIG witnesses:	Sarah Kulzer, Medicaid Integrity Specialist
OMIG exhibits:	1-25
Appellant witnesses:	None
Appellant exhibits:	A, B

A transcript of the hearing was made. (Transcript, pages 1-96.) The Appellant submitted one and the OMIG two post hearing briefs. The record closed on April 19, 2024.

SUMMARY OF FACTS

1. Appellant National Seating & Mobility Inc., in Chattanooga, Tennessee, is a provider of durable medical equipment (DME) and medical/surgical supplies as defined at 18 NYCRR 505.5(a), and is enrolled as a provider in the New York State Medicaid Program.

2. In December 2020 the OMIG initiated a review of the Appellant's Medicaid claims for the calendar years 2015 through 2017, to determine whether they complied with Medicaid Program requirements. (Exhibit 1.)

3. During the period January 1, 2015 through December 31, 2017, the Appellant was paid $388,828.61 by the Medicaid Program for 1,586 claims for DME provided to Medicaid recipients. The OMIG reviewed a random sample of 160 of those claims, paid in the total amount of $185,831.55. (Exhibits 17, 22.)

4. After reviewing the Appellant's documentation in support of its claims for Medicaid reimbursement for the 160 services in the sample, OMIG auditors identified one or more violations of Medicaid Program requirements in the submission of 113 of the claims and disallowed payments in the total amount of $142,645.64. (Exhibit 17.)

5. The OMIG issued a final audit report dated December 1, 2022, which listed every disallowed claim and payment, set forth reasons for each disallowance, and notified the Appellant that it had determined to seek restitution of Medicaid Program overpayments in the amount of $270,804. (Exhibit 17.)

6. The restitution claim includes an extrapolation utilizing a statistical sampling method in which the value of the disallowances found among the sample of 160 claims was projected to the total of 1,586 claims paid by the Medicaid Program during the audit period. (Exhibits 17, 22, 23.)

7. The final audit report set forth findings and disallowances in five categories. Disallowance category 1 is the only category in dispute. (Transcript, pages 21-22.)

1. Original signed follow up order not received within 30 calendar days. 110 claims, disallowances in the total amount of $141,130.09. In 110

instances pertaining to 64 patients, an original signed follow up order to a non-serialized official prescription form for a telephoned or faxed order was not received within 30 calendar days. (Exhibit 17, Bates page 570.)

ISSUE

Was the OMIG's determination to recover Medicaid Program overpayments from the Appellant for failing to comply with its obligation to obtain signed fiscal orders for DME correct?

APPLICABLE LAW

Medicaid providers are required, as a condition of their voluntary enrollment in the program, to prepare and to maintain contemporaneous records demonstrating their right to receive payment from the Medicaid Program and fully disclosing the nature and extent of the care, services and supplies they provide; and to furnish such records, upon request, to the Department. The information provided in relation to any claim must be true, accurate and complete. All records necessary to disclose the nature and extent of services furnished, including any fiscal order for services or supplies billed to the Medicaid Program, must be kept by the provider and are subject to audit for six years. 18 NYCRR 504.3(a)&(h), 517.3(b), 540.7(a)(8). Notification to the provider of the Department's intent to audit shall toll the six-year period for record retention and audit. 18 NYCRR 517.3(c).

When the Department has determined that claims for medical services have been submitted for which payment should not have been made, it may require repayment of the amount determined to have been overpaid. 18 NYCRR 518.1(b). An overpayment includes any amount not authorized to be paid under the Medicaid Program, whether paid as the result of inaccurate or improper cost reporting, improper claiming, unacceptable practices, fraud, abuse or mistake. 18 NYCRR 518.1(c).

A person is entitled to a hearing to have the Department's determination reviewed if the Department requires repayment of an overpayment. 18 NYCRR 519.4. At the hearing, the Appellant has the burden of showing that the determination of the Department was incorrect and that all claims submitted and denied were due and payable under the Medicaid Program. 18 NYCRR 519.18(d).

Department regulations most pertinent to this hearing decision are at 18 NYCRR Parts 505 (medical care, in particular section 505.5 regarding DME), 517 (provider audits), 518 (recovery and withholding of payments or overpayments) and 519 (provider hearings).

The New York State Medicaid Program issues provider manuals, including the Durable Medical Equipment Manual, which are available to all providers and include, among other things, billing policies, procedures, codes and instructions. www.emedny.org. Providers are obligated to comply with these official directives. 18 NYCRR 504.3(i); Lock v. NYS Department of Social Services, 220 A.D.2d 825, 632 N.Y.S.2d 300 (3rd Dept. 1995); PSSNY v. Pataki, 58 A.D.3d 924, 870 N.Y.S.2d 633 (3rd Dept. 2009).

With regard to the 18 NYCRR 517.3(b)(1) requirement that providers keep fiscal orders, NYS Medicaid Program Durable Medical Equipment Manual Policy Guidelines effective July 2016 provide:

> A fiscal order from a practitioner is required by Medicaid to provide supplies, durable medical equipment, prosthetic and orthotic appliances and orthopedic footwear for which prescriptions may not be required by law or regulation. A fiscal order may be a signed written order, or electronically transmitted fiscal order.
>
> A fiscal order written for DMEPOS on an Official NYS Serialized Prescription Form and faxed to the DMEPOS provider will be considered an original order.

> When an order for DMEPOS not written on the serialized official prescription form has been telephoned or faxed to the provider, **it is the DME or Pharmacy provider's responsibility to obtain the original signed fiscal order from the ordering practitioner within 30 calendar days.** *[emphasis in original]*
>
> An electronically transmitted fiscal order for DMEPOS will be considered an original fiscal order when the following requirements are met:
> - The order must originate from the practitioner's computer and must be directly transmitted to the Pharmacy or DME provider's computer or fax.
> - The provider is responsible to make a good faith effort to verify the validity of the order and the practitioner's identity.
> - Providers are required to maintain and retrieve all electronically transmitted fiscal orders for a period of six (6) years from date of payment.
> - Electronic Fiscal Orders are considered Electronic Protected Health Information (EPHI). Covered entities must develop and implement policies and procedures for authorizing EPHI access, storing and its transmission in accordance with the HIPAA Security Rule at §164.308(a)(4) and the HIPAA Privacy Rule at §164.508. It is important that only those workforce members who have been trained and have proper authorization are granted access to EPHI.
>
> NYS Medicaid Program Durable Medical Equipment Manual Policy Guidelines, Version 2016-1 (7/1/2016). (Exhibit 6, Bates page 12.)

From 2013 until July 2016, the manual did not include the provision allowing electronically transmitted fiscal orders. (Exhibit 24.) A DME provider communication issued by eMedNY in 2009, however, did authorize electronically transmitted fiscal orders, defined as in the 2016 Provider Manual, and the OMIG applied this provision to the entire audit. (Transcript, page 75; DME Provider Communication dated 9/1/2009 (www.emedny.org/ProviderManuals/DME/PDFS/electronic_fiscal_orders_for_dmepos/pdf).)

DISCUSSION

I. The Appellant's argument that the audit "was untimely and prejudicial" to it (Appellant brief, pages 16-17; Exhibit 15, Bates page 412) is without merit. The audit was timely commenced by notification letter dated December 3, 2020, within six years of the claims under review. (Exhibit 1.) At that point the time period for record retention

and for conducting the audit was tolled. 18 NYCRR 517.3(c). An entrance conference was held on December 21, 2020. (Exhibit 3.) Additional meetings took place in October 2021, and the audit closing conference was held in February 2022. (Exhibits 4, 5, 12.) A draft audit report was issued June 30, to which the Appellant responded on August 3, 2022. The final audit report was issued December 1, 2022. (Exhibits 14, 17.) This hearing was timely requested on January 12 and scheduled to begin on March 30, 2023. (Exhibits 18, 19.) Three postponements before the hearing commenced on January 30, 2024 were requested by the Appellant, and two more were on mutual consent of both parties. The OMIG fully complied with all timeliness requirements applicable to this audit. 18 NYCRR 517.3(b)-(f), 517.5, 517.6. The Appellant, which appeared at this hearing only by its counsel, has failed to present any credible evidence that it has been prejudiced by any unreasonable delay.

II. The Appellant argues that the final audit report is "facially deficient" because it did not discuss the electronically transmitted fiscal order policy. (Appellant brief, page 13.) The Appellant was obviously aware of this policy which it claims to have relied on in submitting claims. It was discussed during the audit in October 2021 meetings the Appellant had with the auditors, and explicitly raised by the Appellant again in its response to the draft audit report. (Exhibits 4, 5; Exhibit 15, Bates page 410.) The final audit report, which cites the DME Manual Policy Guidelines regarding fiscal order requirements, was issued only after the OMIG reviewed that response.

The Appellant's disagreement with the final audit report's rejection of arguments it made in response to the draft hardly establishes, as the Appellant claims, an OMIG "failure to consider... the objections raised by the provider to a draft audit report."

(Appellant brief, page 14.) OMIG audit supervisor Kulzer credibly testified and the final audit report explicitly stated that the OMIG did consider the objections. (Exhibit 17, Bates page 563; Transcript, pages 37, 50.) The final audit report complies with the 18 NYCRR 517.6 obligation to advise the Appellant of the basis for the audit findings.

III. The Appellant claims the OMIG cannot recover restitution of payments for "mere documentary issues" in connection with services that were actually provided. (Appellant brief, page 17.) That is precisely what the OMIG is authorized to do when a provider has failed to maintain and produce for audit contemporaneous records demonstrating its entitlement to payment. 18 NYCRR 504.3(a), 517.3(b), 518.1(c); A.R.E.B.A Casriel v. Novello, 298 A.D.2d 134, 748 N.Y.S.2d 547 (1st. Dept 2002), *lv. den.* 100 N.Y.2d 506, 763 N.Y.S.2d 812 (2003); Gignac/Saratoga Pharmacy (DOH hearing decision #07-4427&06-6710, December 19, 2008), *confirmed as* Gignac v. Paterson, 70 A.D.3d 1310, 894 N.Y.S.2d 801 (4th Dept. 2010), *lv. den.* 14 N.Y.3d 714, 905 N.Y.S.2d 128 (2010). The audit report does not allege that the documentation fails to establish DME was provided nor is that required to be alleged or proved to establish 18 NYCRR Part 517 provider audit overpayments.

A Medicaid provider agrees to comply with all program requirements as a prerequisite to payment and continued participation in the program. The provider certifies both at the time of enrollment and when submitting claims that it will comply or has complied with its responsibilities. 18 NYCRR 504.3, 540.7(a)(8). Provider compliance with contractual documentation and recordkeeping obligations is critical to the administration of the Medicaid Program, enabling it to employ a pay-first-and-audit-later system to ensure that providers are paid promptly. In return, however, all claims

remain subject to post-payment audit to determine if they are supported by complete and accurate documentation of entitlement to payment. 18 NYCRR 504.3, 540.7(a)(8).

Contrary to the Appellant's suggestion in its brief, Statewide Ambulette (DOH hearing decision #13-F2317, October 28, 2015), a Part 515 sanction case that nowhere mentions Part 517 provider audits, does not hold that the provision of a service entitles a Medicaid provider to payment or that payments for improperly documented services cannot be recovered in an audit such as this. The OMIG has not charged unacceptable practices or proposed to sanction the Appellant in this case.

IV. The Appellant was paid by the Medicaid Program for DME it provided to Medicaid recipients on the authority of practitioners' signed fiscal orders for it. Department regulations require providers to keep fiscal orders for six years. 18 NYCRR 517.3(b)(1). The Medicaid provider manual applicable to this audit required DME providers to maintain and produce for audit an original signed fiscal order, a faxed order written on an official NYS Serialized Prescription form, or an "electronically transmitted fiscal order." (Exhibit 6, Bates page 12.)

None of the disallowed orders was documented by an original signed fiscal order from the ordering practitioner. None was written on a serialized prescription form such as was used and allowed, for example, in sample 30. (Exhibit 7, Bates page 127). Remaining at issue in this hearing is the Appellant's contention that the disallowed orders met the requirements set forth in the manual for an "electronically transmitted fiscal order." (Appellant brief, pages 8-9.)

The Appellant's initial claim, made in response to the draft audit report, was:

> [The Appellant] produced valid original signed fiscal orders received from the ordering providers... Generally, the ordering practitioners created these orders on

> their computers and, after signing the same (whether electronically or via scanned signature) transmitted these orders to [the Appellant]. (Exhibit 15, Bates page 411.)

These claims are not accurate or consistent with the evidence, nor are they even consistent with the Appellant's own account at this hearing. The orders it produced were not original signed orders, were not created by the ordering practitioners on their computers and were not signed "electronically or via scanned signature." In most of these instances, an order "template" had been generated by the Appellant and sent to the practitioner. (Exhibit 5; Transcript, pages 31-32.) A valid order was only created when it was printed out by the practitioner, then signed and dated by hand. The Appellant's suggestion that "these signatures were scanned into a computer and superimposed by that computer" (Transcript, page 50) is not consistent with any of the evidence.

The Appellant conceded during the audit that the documentation it produced for these orders documented precisely what it appears to document. The Appellant faxed, or "efaxed," an order "template" outlining requested DME to the ordering practitioner to be signed, dated and returned. The ordering practitioner printed, signed and dated the order, in many instances[1] adding significant additional handwritten comments, correction or notations to it. The ordering practitioner did this not electronically but by hand on a printed paper copy. The hand signed and dated paper order was then faxed or, the Appellant claims, scanned and transmitted by "efax" back to the Appellant. (Exhibits 4, 5; Transcript, pages 31-32.) The Appellant did not subsequently obtain the original paper orders that had been signed, dated and often further annotated by the ordering practitioners.

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[1] *e.g.* samples 6, 12, 13, 18, 19, 24, 28, 36, 37, 41, 47, 53, 59, 67, 78, 79, 80, 92, 94, 96, 97, 102, 110, 114, 121, 122, 141, 147, 155. (Exhibits 7-11.)

OMIG audit supervisor Sarah Kulzer testified that the fiscal orders for all 110 of the disallowed claims were documented in this way. (Transcript, pages 45-54.) None of the disallowed orders was signed electronically rather than by hand on paper, and none shows any indication that it was transmitted to the Appellant by the ordering practitioner by any means other than fax. (*see* Exhibits 7-11.) Kulzer also testified that early in the audit, when she explained to the Appellant that faxed orders were not acceptable, the Appellant advised her it would reach out to obtain the original signed written orders. (Transcript, page 27.) No original signed orders were produced.

V. The Appellant now maintains that a paper order that is printed, signed, scanned, and then "efaxed" constitutes an "electronically transmitted fiscal order" for DME under the July 1, 2016 version of the Provider Manual. (Exhibit 6; Transcript, pages 69-71.) According to the Appellant, such an order does "originate from the practitioner's computer" because it was scanned into the practitioner's computer before being transmitted to the Appellant.

The Appellant claimed in its brief:

> Ms. Kulzer subsequently acknowledged that there are circumstances in which a printed, hand signed and scanned order can be considered compliant with the electronically transmitted order policy. For instance, a hand signed order that was scanned into an ordering practitioner's electronic health record software before being transmitted to the DME provider would meet the requirements of electronically transmitted order policy. (R. 58.) (Appellant brief, page 7.)

Ms. Kulzer did not, nor does the DME manual, say this. To the contrary, her cited testimony was that in a compliant order the signature would have to be affixed electronically by the EHR system. (Transcript, page 58.) She clearly and consistently testified that a paper order that had been printed, hand signed and then scanned was not compliant. (Transcript, pages 50, 53, 56-60, 83-84.)

The Appellant argues:

> Although the email-to-fax system converts the e-mails sent by ordering practitioners into fax transmissions, the orders attached to those emails are nonetheless electronically transmitted fiscal orders since they were generated from the practitioner's computer and were sent directly to NSM's computer or fax. (Appellant brief, page 10.)

As an initial matter, it is noted that the Appellant presented no evidence to support its claim that "the ordering practitioners were not sending these orders through a traditional fax machine" (Exhibit 15, Bates page 411) but instead sent them as attachments to an email. What the Appellant offered was a description of its own digital, or "efaxing" system that transmitted and received faxes through a computer. (Exhibit A.) It offered no evidence to show that any of the various ordering practitioners used any such system, and not a fax machine, to transmit the signed orders back to the Appellant.

It is not at all apparent, as the OMIG points out (OMIG brief, page 12), that after these fiscal orders were signed they were scanned into a computer and "efaxed" rather than simply faxed. The Appellant failed to produce a single email to substantiate this claim; the distinction it attempts to make is not apparent on any of the documents it did present; and it presented no witnesses at this hearing to testify that the signed orders were transmitted by email and not by fax. The orders all bear fax headers and none shows any distinguishable indication of having been emailed rather than sent via fax machine. (Exhibits 7-11.)

An even more fundamental problem with the Appellant's argument is that even if a paper order is signed by hand, then scanned and sent as an attachment to an email rather than through a fax machine, it is still not an "electronically transmitted fiscal order." The Appellant repeatedly attempts to characterize the issue as whether these orders were

transmitted by fax or by email. (Appellant brief, page 11.) The issue is not whether the orders were sent from the ordering practitioners to the Appellant by fax machine or were instead scanned and emailed. The issue is how they were originated, maintained and retrieved.

The Appellant claims that its "e-mail-to-fax system allowed an ordering practitioner to generate an order for DME and send the order to [the Appellant] by email." (Appellant brief, page 2.) The DME manual specifies:

> • Electronic Fiscal Orders are considered Electronic Protected Health Information (EPHI). Covered entities must develop and implement policies and procedures for authorizing EPHI access, storing and its transmission in accordance with the HIPAA Security Rule at §164.308(a)(4) and the HIPAA Privacy Rule at §164.508. It is important that only those workforce members who have been trained and have proper authorization are granted access to EPHI.

The Appellant's evidence did not establish that its "email-to-fax" system complied with this requirement. (Exhibit A.)

More importantly, an electronically transmitted fiscal order must "originate" on the ordering practitioner's computer, not the DME provider's. (Exhibit 6, page 12.) None of the disallowed orders are consistent with the claim that they were "electronically transmitted fiscal orders since they were generated from the practitioner's computer." (Appellant brief, page 10.) To the contrary, most of them bear headers confirming that they were initially "generated" by the Appellant, then transmitted to the practitioners before the dates on which they were signed. All of them bear headers indicating they were faxed back to the Appellant only after they were printed out and hand signed by the practitioners. The Appellant offered no evidence that any of the ordering practitioners were using any "email-to-fax system," let alone an electronic health records (EHR) system compliant with the EPHI requirements.

These orders came into being only after a hard copy was printed out and signed by the ordering practitioner. A fiscal order that is hand signed by the practitioner in hard copy and then scanned into and transmitted by computer no more "originates" on the computer than a faxed paper order "originates" on the fax machine. Such an order cannot reasonably be characterized to "originate from the practitioner's computer" or, indeed, any computer.

The Appellant claims that the meaning of "originating from the ordering practitioner's computer" is unclear. (Appellant brief, pages 12-13.) It argues it could reasonably understand the words "originate from" to include fiscal orders sent to it "from" the practitioner's computer by "efax." According to the Appellant, then, "originate" does not mean an order has to be created on the practitioner's computer to be an electronically transmitted fiscal order. It simply has to be transmitted electronically from that computer to the Appellant.

The DME Manual's description of an electronically transmitted order plainly means what the OMIG, not the Appellant, claims it means. To be valid, an order must be signed by a practitioner. A paper order signed before being scanned into a computer simply passes through and no more "originates" from the computer than a paper order fed into and transmitted by a fax machine "originates" in the fax machine. (Transcript, page 89.) "Originate from the practitioner's computer" means created and signed on the practitioner's computer with an electronic or facsimile signature added on the computer, for which no paper copy is necessary nor does a paper copy ever even exist to be produced for audit. This was not the case with any of these orders.

VI. The evidence does not substantiate the Appellant's assertion that a consistent standard was not applied by the auditors. The Appellant claims the OMIG's decision to allow the order in samples 27 and 68 with the header "Athena," but not orders with "the name of the ordering practitioner or the name of the facility in which the ordering practitioner works in the fax headers" was inconsistent. (Transcript, page 20; Appellant brief, pages 11-12, 14.)

The OMIG allowed the sample 27 and 68 claims because, as OMIG audit supervisor Kulzer testified, auditors found upon researching the matter that "Athena" was an electronic health records (EHR) system. An electronically signed order transmitted to the Appellant by this system was accepted as an electronically transmitted order. (Transcript, page 65.) The order in samples 27 and 68 was clearly identified on the header as having been transmitted by an EHR system, and the signature and date on the order were clearly affixed electronically by the EHR computer. (Transcript, pages 83-84.)[2]

The fax headers for orders in samples disallowed in this audit[3] are not "substantially similar to the orders for samples 27 and 68." (Appellant brief, pages 14-16.) The issue is not "confirming the identity of the ordering practitioner from the headers and footers." (Appellant brief, page 16.) It is the nature of the order transmitted from the ordering practitioner to the Appellant. (Transcript, pages 64-66.) None of the headers on these disallowed orders bears signs of having been transmitted on an EHR

[2] *See* order in samples 27 and 68, copy attached to Appellant's brief. These documents were not offered into evidence at the hearing but the OMIG made no objection to their submission by the Appellant with its March 22 post hearing brief. It is presumed, furthermore, that they did exist in the OMIG's audit file.

[3] The Appellant specifies the orders in samples 1, 2, 3, 5, 9, 12, 17, 20, 34, 42, 58, 72, 120, 148, 149. (Appellant brief, page 15.)

system, and all were clearly signed on paper by hand, not on the computer with an electronic signature. The documentation of the disallowed claims showed the orders had been signed in hard copy, then scanned and "efaxed" back to the Appellant by the ordering practitioners. This was not the case for the order in samples 27 and 68.

Audit supervisor Kulzer explained that the OMIG auditors did find electronically signed orders in the audit sample, such as samples 27 and 68, for which "we cannot be a hundred percent confident that there was a paper original." The OMIG agreed that these could qualify as electronically transmitted original orders, and allowed them. (Transcript, pages 58-61.) They were clearly marked as having been signed and transmitted electronically and showed no indications of having been printed and hand signed. Instead of a fax header, they bore marks showing they were sent on an EHR system with no indication that any paper copy existed. (Transcript, pages 62-66.) The documentation was demonstrably different and reflects consistency, not inconsistency, in the audit findings.

VII. The Appellant argues that the OMIG should not be permitted to claim restitution in this audit because applicable policy guidelines have been modified since the audit period. (Appellant brief, pages 9, 18.) It appears that what the Appellant did in these instances, whether the ordering practitioners transmitted these orders through their computers by "efax" or through a fax machine (which of these methods is not, as auditor Kulzer pointed out, at all apparent from the documentation), may now be allowable under certain circumstances. In 2023, the DME Manual authorized the practice of transmitting signed paper orders by fax when the order can be validated. NYS Medicaid Program

Durable Medical Equipment Manual Policy Guidelines, Version 2023-1 (4/01/2023), page 6.

While the 2023 manual revision may allow faxes that can be validated as provided in the manual, it still does not recognize a fax or an "efax," as was argued by the Appellant during this audit and in this hearing, to be an "electronically transmitted fiscal order" with its quite different requirements, specifically that it "originate from the practitioner's computer." The DME Manual change was not made with retroactive effect and the Appellant is not entitled to rely on a version that did not exist during the audit period or indeed until well after the final audit report in this case had been issued.

The OMIG's insistence on full restitution for all 113 claims in this case invites the criticism that it has been unnecessarily heavy-handed in the exercise of its discretion to require restitution. The final audit report disallowed 110 of 160 claims for failure to produce an original fiscal order. Only 4 of the 160 claims the OMIG audited were criticized for any other reason. The OMIG has chosen to demand restitution of over two-thirds of the Appellant's Medicaid reimbursement during the audit period for DME it apparently did provide, almost entirely for practices the Department itself apparently might now accept.

The OMIG's application of explicit, written Medicaid policy on the regulatory requirement to maintain and produce fiscal orders is, however, straightforward and clear. It is entitled to enforce the DME fiscal order policy as a rational and reasonable application of the 18 NYCRR 505.5(b) regulation providing that DME "may be furnished only upon a written order of a practitioner."

Medicaid providers "must prepare and maintain contemporaneous records demonstrating their right to receive payment." 18 NYCRR 504.3(a), 517.3(b)(1). The Appellant plainly ignored conditions of entitlement to reimbursement in effect at the time it submitted its claims. The OMIG is not obligated to overlook this extensive disregard of the obligations entered into when it voluntarily enrolled in the Medicaid Program. The Appellant has not met its burden of proving entitlement to payment on these claims, and the OMIG is within its regulatory authority to recover the resulting overpayments.

The Medicaid Program overpayment

The Appellant failed to meet its burden of establishing entitlement to the payments disallowed in category 1, and the disallowances are affirmed. The Appellant did not challenge the disallowed payments in categories 2 through 5 and they are also affirmed.

Computer generated documents prepared by the Department or its fiscal agent to show the nature and amount of payments made under the Medicaid Program will be presumed, in the absence of direct evidence to the contrary, to constitute an accurate itemization of the payments made to a provider. 18 NYCRR 519.18(f). An extrapolation based upon an audit utilizing a statistical sampling method certified as valid will also be presumed, in the absence of expert testimony and evidence to the contrary, to be an accurate determination of the total overpayments made. 18 NYCRR 519.18(g). The OMIG submitted the required certification in the form of affidavits from Dr. Karl W. Heiner, the statistical consultant who designed the sampling and estimation methodology, and Theresa A. Gulum, the OMIG employee who relied on the Department's computer

payment records to establish the audit frame and select the random sample. (Exhibits 22, 23.) The Appellant does not challenge the extrapolation. (Transcript, page 91.)

The overpayments in the sample are affirmed in this hearing decision in the total amount of $142,645.64. Dr. Heiner's certification, and the final audit report, set forth how the extrapolation was done. Application of the estimation procedure set forth in the audit report and in Dr. Heiner's certification yields an overpayment (rounded to the nearest dollar) in the total amount of $270,804. A restitution claim in that amount is authorized pursuant to 18 NYCRR 518.1 and 518.3.

DECISION: The OMIG's determination to recover Medicaid Program overpayments from the Appellant for failing to comply with its obligation to obtain signed fiscal orders for DME is affirmed.

This decision is made by John Harris Terepka, who has been designated to make such decisions.

DATED: Rochester, New York
May 6, 2024

John Harris Terepka
Bureau of Adjudication