

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

In the Matter of the Appeal of

Dental Specialty Associates, P.C.,

Dr. Kamran Foroughi

Dr. Norman Gold

Dr. Wayne Martin Maurer

Dr. Bahn Yah Moon

Dr. Sylwia Katarzyna Rostkowski

Dr. Michael Thomas Capozzi

Dr. Lydia Gardner

Dr. Bahram Elaahi,

Appellants,

from determinations by the NYS Office of the
Medicaid Inspector General to recover Medicaid
Program overpayments.

**Decision
After
Hearing**

#18-8163

18-8164

18-8166

18-8168

18-8169

18-8170

18-8172

18-8173

Before: John Harris Terepka
Administrative Law Judge

Held at: New York State Department of Health
90 Church Street
New York, New York 10007
January 24, 2020
Record closed May 12, 2020

Parties: NYS Office of the Medicaid Inspector General
90 Church Street, 14th floor
New York, New York 10007
By: Shelby Grynberg, Esq.

Dental Specialty Associates, P.C. et. al.
Paul Cohen, owner
225 Broadway Suite 105
New York, New York 10007
By: Marc R. Leffler, Esq.
Rawle & Henderson LLP
135 West 29th Street, Suite 801
New York, New York 10001

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 to recover improperly expended Medicaid funds. PHL 30, 31 and 32.

The OMIG determined to seek restitution of payments made under the Medicaid Electronic Health Records (EHR) Technology Incentive Program to eight Medicaid providers, all practicing at Dental Specialty Associates, P.C. (the Appellants). The Appellants requested a hearing pursuant to SSL 22 and former Department of Social Services (DSS) regulations at 18 NYCRR 519.4 to review the determination.

HEARING RECORD

OMIG witness: Kelly Ryan, audit supervisor

OMIG exhibits: 1-27

Appellant witness: none

Appellant exhibits: none

A transcript of the hearing was made. (Transcript, pages 1-118.) The parties each submitted two post hearing briefs.

SUMMARY OF FACTS

1. The Appellants are enrolled as providers in the New York State Medicaid Program and practiced dentistry in New York City at Dental Specialty Associates, P.C. (Exhibit 9.) In June 2015 Appellants Foroughi, Gold, Maurer, Moon, Rostkowski, Gardner and Elaahi signed and submitted attestations in support of applications for payment under the Medicaid EHR Technology Incentive Program for a first payment

year of 2014. Appellant Capozzi signed and submitted an attestation in August 2015. (Exhibit 8.)

2. The Appellants' attestations each certified to the adoption, in 2014, of a certified EHR technology on the approved list of technology products eligible for the EHR incentive payment. The specific EHR products identified on the attestations were:

Appellants Foroughi, Gold, Maurer, Moon, Rostkowski, Gardner, Elaahi:
Amazing Charts (version 8.0)
CMS EHR Certification ID #1314E01P08UREAL

Appellant Capozzi:
DentiMax EHR (version 6)
CMS EHR Certification ID #1314E01PQBWXEAN

(Exhibits 8, 10; Transcript, pages 36-38.)

3. The Appellants' attestations all designated Dental Specialty Associates as the payee for the incentive payments. (Exhibit 8; Transcript, page 53.) In November and December, 2015, first year EHR incentive payments for the year 2014 in the total amount of \$170,000 were paid to Dental Specialty Associates, representing \$21,250 for each of the eight Appellant attestations. (Exhibit 12; Transcript, pages 55-56.)

4. By notices dated September 27, 2018, the OMIG advised the Appellants it would conduct a review of their 2014 EHR Incentive Program payments. (Exhibit 1.)

5. By draft audit reports issued in 2019, the OMIG notified the Appellants that it had determined to seek restitution of the Medicaid EHR incentive payments. Pursuant to 18 NYCRR 517.5(b)&(c), the draft audit reports advised the Appellants that they were entitled to object to the proposed determinations and to submit documents in response to them. (Exhibit 2.) On June 26 and July 16, 2019, the Appellants submitted responses to the draft audit reports. (Exhibits 14, 15.)

6. After reviewing the Appellants' responses to the draft audit reports, the OMIG notified the Appellants by final audit reports, all dated September 5, 2019, that its determinations to seek restitution of Medicaid Program overpayments in the amount of \$21,250 from each Appellant were unchanged. (Exhibit 3.)

7. The OMIG determinations resulted from findings that the Appellants failed to demonstrate that during the year 2014 they adopted, implemented or upgraded certified EHR technology as defined in 42 CFR Part 495. (Exhibit 3.)

8. The Appellants did not adopt, implement or upgrade to the certified EHR technology specified on their attestations, nor did they adopt, implement or upgrade to, or make meaningful use of, any other certified EHR technology in 2014. (Exhibit 27.)

ISSUE

Have the Appellants met their burden of proving entitlement to EHR Incentive Program payments for the year 2014?

APPLICABLE LAW

Medicaid providers are required, as a condition of their enrollment in the program, to comply with the rules, regulations and official directives of the Department. All information regarding claims for payment is subject to audit for six years. 18 NYCRR 504.3(a),(h)&(i). Providers will be required to reimburse the Department for overpayments discovered by an audit. 18 NYCRR 504.8(a), 518.1(b). 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. 18 NYCRR 519.18(d).

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 authorized states to provide incentive payments to Medicaid providers for adopting, implementing or upgrading certified EHR technology, or for meaningful use of such technology. 42 CFR 495.300. Medicaid eligible professionals (EPs) eligible for the incentive payment include dentists. 42 CFR 495.304(b)(2).

The first year of payment is intended to offset the costs associated with initial adoption, implementation or upgrade of certified EHR technology. 42 CFR 495.308. The maximum first year payment is \$21,250, while subsequent year payments for meaningful use are significantly lower. 42 CFR 495.310.

In order to be eligible to receive an EHR incentive payment in the first payment year, an eligible professional (EP) must demonstrate that during the payment year it has adopted, implemented or upgraded certified EHR technology, or is a meaningful user of certified EHR technology. 42 CFR 495.314(a).

Pursuant to 42 CFR 495.4, certified EHR technology has the same definition as this term is defined at 45 CFR 170.102 which provides, in pertinent part:

Certified EHR Technology means:

- (1) For any Federal fiscal year (FY) or calendar year (CY) up to and including 2014:
 - (i) A Complete EHR that meets the requirements included in the definition of a Qualified EHR and has been tested and certified in accordance with the certification program established by the National Coordinator as having met all applicable certification criteria adopted by the Secretary [of Health and Human Services]... or...
- (2) For FY and CY 2014 and subsequent years, the following: EHR technology certified under the ONC HIT Certification Program to the 2014 Edition EHR certification criteria... (*emphasis added*).

EHR technologies that have been tested and certified by the Office of the National Coordinator for Health Information Technology (ONC HIT) have been identified by the Centers for Medicare and Medicaid Services (CMS) and that information is available to providers who apply for an incentive payment. www.cms.gov. (Transcript, page 31.)

A Certification ID number assigned by the ONC HIT to a specific EHR technology product must be entered onto a provider's signed attestation in order for its application for an EHR incentive payment to be submitted and processed. (Exhibits 7, 8; Exhibit 24, Bates page 0892; Transcript, pages 49, 75-76.) EHR Certification ID numbers can be obtained from the ONC HIT. <https://chpl.healthit.gov/#!/search>. (Exhibit 10; Exhibit 24, Bates pages 0825-0826; Transcript, pages 39-40.) See An Introduction to the Medicaid EHR Incentive Program for Eligible Professionals (CMS 2014). (Exhibit 24, Bates pages 0811-0901.)

DISCUSSION

The Appellants argue that this audit is time barred by a three-year statute of limitations set forth in federal law and the CPLR for negligence actions, and that the six-year limitation period for contract actions is inapplicable. (Appellant brief, pages 2-4; Exhibit 15, Bates page 0546; Transcript, pages 23-25.) These arguments are without merit. "Negligence" is not alleged nor is it at issue in this audit. The issue is overpayments of Medicaid Program funds.

Enrollment in the Medicaid Program is a contractual relationship. Schaubman v. Blum, 49 N.Y.2nd 375, 426 N.Y.S.2nd 230 (1980). A provider's interest in Medicaid payments it receives through that relationship is provisional in nature. Cortlandt Nursing Home v. Axelrod, 66 N.Y.2nd 169, 495 N.Y.S.2nd 927 (1985). It is a condition of the

contractual relationship and of participation in the Medicaid Program that the provider create, maintain and produce for audit, records demonstrating entitlement to payments received. 18 NYCRR 504.3. A six-year time period for initiating an audit is authorized under 18 NYCRR Parts 504 and 517, and the Department may require repayment of overpayments identified in an audit. 18 NYCRR 518.1&3. This audit, initiated in 2018 and completed in 2019, of Medicaid EHR incentive payments applied for and received in 2015, was timely conducted and the Department is authorized to recover the identified overpayments.

In order to apply for the EHR incentive, the Appellants completed applications that required them to specify their adopted EHR technology by an ONC HIT assigned EHR Certification ID number. (Exhibits 7, 8; Transcript, pages 49, 51.) The EHR Certification ID numbers they entered on their attestations were for technologies they admittedly did not adopt in 2014 or at any other time. Seven of the attestations represented that in 2014 they adopted a certified EHR technology identified as Amazing Charts version 8.0. The eighth attestation was to the adoption of DentiMax EHR version 6. Neither of these EHR technologies was ever adopted or used by any of the Appellants. (Exhibits 22, 23.)

Nor did any of the Appellants adopt any other certified EHR technology in 2014. (Exhibit 27.) During the audit, and in response to the draft audit findings, the Appellants produced evidence of engagement with various EHR vendors about other EHR products. The auditors contacted the vendors in an effort to confirm whether any of the products identified would enable the Appellants to qualify for the EHR incentive. The vendors confirmed that such dealings as they had with the Appellants did not result in the

Appellants' adoption of any certified EHR technology. (Exhibits 13, 21, 22, 23; Transcript, pages 59-66.) The Appellants did not adopt a certified EHR technology (Dentrix Enterprise version 7) until 2017, a year for which they did not attest and for which first year incentive payments are not available. (Exhibits 17, 18, 21; Transcript, pages 47, 83, 87-90.)

Conceding they did not adopt the EHR technology identified on their attestations, or any other EHR technology certified by the ONC HIT, the Appellants argue that they are entitled to the EHR incentive payments because they substantially complied with the intent of the EHR Incentive Program with the technology that they did have in 2014. In response to the draft audit reports and at the hearing, the Appellants argued that the Dentrix Enterprise version 5 EHR technology they used in 2014 substantially met the requirements for certified EHR technology and is the "functional equivalent" of Dentrix Enterprise version 7, which is a certified EHR technology. (Exhibit 15, Bates pages 0544-0545; Transcript, pages 21, 73.) According to the Appellants:

[T]here is no difference between versions 5 and 7 except for the fact that version 7 carries the title "certified", despite that the two systems are identical twins in function. (Appellant brief, pages 4-5.)

It is not the Appellants' prerogative to self-certify by deciding "the only relevant query in this regard is whether there was any real difference between Enterprise 5 and Enterprise 7." (Exhibit 15, Bates page 0544.) Nor is it the function of this proceeding to decide whether an uncertified EHR technology of the Appellants' choosing is close enough to, or substantially complies with, the certification criteria and so is good enough to qualify for an incentive payment. The requirement is to adopt a certified EHR technology. Certified technology is defined as EHR technology that has been tested and

certified in accordance with the ONC HIT certification program. 45 CFR 170.102. This is hardly what the Appellants call a “form overriding substance and intent” issue. (Exhibit 14, Bates page 0496; Transcript, page 21; Appellant brief, page 5.)

The Appellants misrepresented OMIG audit supervisor Kelly Ryan’s testimony by claiming she denied 45 CFR 170.102 applies to dentists. (Appellant brief, page 6, *citing* Transcript, pages 100&102.) She did not so testify. Pursuant to 42 CFR 495.300, 495.304(b)(1) and 495.4, the definition of certified EHR technology set forth at 45 CFR 170.102 clearly does apply to any Medicaid EP, including dentists. The inaccuracies in the Appellants’ account of Ms. Ryan’s testimony also included confusing the 45 CFR 170.102 definition of “Base EHR” with its definition of “Certified EHR Technology,” and confusing “adopt, implement or upgrade” with “meaningful use of” EHR technology. (Transcript, pages 98-102; Appellant brief, pages 5-6.)

It is further noted that the Appellants presented no persuasive or even intelligible evidence or reason for concluding, contrary to Ms. Ryan’s very clear testimony (Transcript, pages 73, 81, 111-12), that Dentrix Enterprise 5 and Enterprise 7 are “identical twins in function.” According to the Appellants:

OMIG must be required to establish that the system employed by DSA, for which it received EHRI payments, was, in fact, different from the system claimed by OMIG to have entitled it to such payments. (Appellant brief, page 5.)

This assertion inaccurately characterizes the burden of proof, which is on the Appellants in this audit and in this hearing. 18 NYCRR 504.3(a), 519.18(d); SAPA 306(1).

The Appellants’ claim in their brief that “Ms. Ryan was unable to speak to a single difference between DSA’s Enterprise 5 and Enterprise 7 (Tr. At 112:17-20)” completely misrepresents her testimony in which she did identify significant differences.

(Appellant brief, page 5; Transcript, pages 111-12.) As Ms. Ryan pointed out, a certified EHR system is more than a practice management system, and only some versions of any EHR product meet the certification requirements. (Transcript, pages 32, 44.) Dentrix Enterprise 7 is a certified EHR technology, but Dentrix Enterprise 5 is a practice management system and is not a certified EHR technology. (Transcript, pages 73-74, 77, 81, 111-12.) The Dentrix vendor itself confirmed to OMIG auditors that until 2017 the Appellants only had a practice management system that did not qualify for an EHR incentive payment. (Exhibit 21.)

The Appellants' further argument that they are entitled to the incentive payments because they were "meaningful users" of EHR technology in 2014 is irrelevant because the e-prescribing and Dentrix dental records systems of which they claim to have been "meaningful users" were not certified EHR technology. (Exhibit 14, Bates pages 0491, 0495-0496.) As Ms. Ryan repeatedly pointed out, the question of meaningful use is not even reached if a certified EHR technology has not been acquired to begin with. (Transcript, pages 32-33, 70, 72, 101, 108-109.)

The Appellants submitted their attestations in June 2015. They were well aware from their correspondence with vendors in November 2014 and January 2015 (Exhibit 13, Bates pages 0478-0479) that neither Amazing Charts nor Dentimax would integrate with Dental Specialty Associates' existing billing software, and they had not purchased either of those systems. (Exhibits 22, 23.) They did not explain why they nevertheless specified the Certification ID numbers for Amazing Charts version 8.0 and DentiMax EHR version 6 on their attestations, instead of whatever EHR technology they had that they believe entitled them to an incentive payment.

The obvious explanation is that a valid ONC HIT assigned EHR Certification ID number had to be entered on the attestations in order to obtain or even to apply for the incentive payments. (Transcript, pages 49, 75-76.) The Appellants had not adopted nor were they using any EHR system that had such a Certification ID number. They instead entered the Certification ID numbers for the Amazing Charts and Dentimax technologies.¹

It is a condition of a provider's participation in the Medicaid Program that the information provided in relation to any claim for payment shall be true, accurate and complete. 18 NYCRR 504.3(h). The need to make representations on their attestations that they knew were inaccurate should have suggested some concerns, but there is no evidence the Appellants had any. There is, instead, evidence that they did not heed cautions from vendors and consultants about eligibility for the incentive. (Exhibits 13, 22; Transcript, pages 60-61, 63.)

As late as their June 26, 2019 response to the draft audit reports, the Appellants continued to misrepresent their acquisition of EHR technology in 2014, this time regarding their use of Dentrix Enterprise products, claiming:

Notably, in CY 2014, DSA and MDA [the Appellants] *had* purchased and acquired Dentrix practice management software, an electronic health records system. (See Dentrix Enterprise 8.0.1: Client installation Guide (2014) ("2014 Dentrix Manual"), attached hereto as Exhibit B.) (Exhibit 14, Bates page 0490.)

The Appellants did not acquire Dentrix Enterprise version 8 until 2015. (Exhibit 17.) In a July 16, 2019 follow-up letter to the auditors, the Appellants then claimed:

¹ Oddly, the Appellants also argue in their brief that because the website (<https://chpl.healthit.gov>) from which Certification ID numbers are obtained is "from a *federal* agency... one could not realistically expect that even the most diligent potential users of a *state* program would look to *federal* agencies for guidance." (Appellant brief, pages 6-7.)

[A]s of January 20, 2015, a matter of days after the time period at issue, [Appellants] fully incorporated Dentrix Enterprise 8, an EHR system even surpassing Enterprise 7, into their practices. (Exhibit 15, Bates page 0545.)

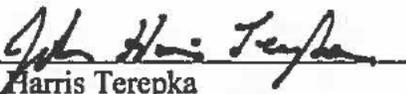
The Appellants did not explain in what manner Dentrix Enterprise version 8 is an EHR system “even surpassing Enterprise 7.” In any event Enterprise 8, unlike Enterprise 7, is not a certified EHR technology unless it is bundled with a separate Dentrix Meaningful Use product that the Appellants did not acquire. (Exhibit 21; Transcript, pages 77-78, 80, 89-90.)

The Appellants may have allowed themselves to be misled or accept questionable guidance from an EHR consultant who assisted them in preparing the attestations. It is the consultant’s email address, not that of any Appellant or of Dental Specialty Associates, that appears on the second page contact information for each attestation. (Exhibit 8; Transcript, pages 93-94.) Even if they were misled by a sales representative, it is nevertheless the Appellants who applied for, and their designee that received, payments to which they were not entitled. The OMIG is authorized to recover the overpayments.

DECISION: The OMIG’s determinations to recover EHR Technology Incentive Program payments for the year 2014 are affirmed.

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

DATED: Rochester, New York
May 14, 2020


John Harris Terepka
Administrative Law Judge