NEW YORK STATE OF OPPORTUNITY. Department of Health

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February 10, 2015

Mr. John Buyce
Audit Director
New York State Office of the State Comptroller
110 State Street, 11th Floor
Albany, New York 12236

Dear Mr. Buyce:

Pursuant to the provisions of Section 170 of New York State Executive Law, I hereby transmit to you a copy of the New York State Department of Health's comments related to the Office of the State Comptroller's final audit report 2013-S-51 entitled, "Excessive Medicaid Payments to Federally Qualified Health Centers for Group Therapy Services."

Please feel free to contact Ms. Amy Nickson, Office of Governmental and External Affairs at (518) 473-1124 with any questions.

Sincerely,

Howard Zucker M.D.

Howard A. Zucker, M.D., J.D.
Acting Commissioner of Health

Enclosure

cc: Ms. Nickson

Department of Health
Comments on the
Office of the State Comptroller's
Final Audit Report 2013-S-51 entitled,
"Excessive Medicaid Payments to Federally Qualified Health Centers for Group Therapy Services"

The following are the Department of Health's (Department) comments in response to the Office of the State Comptroller's (OSC) Final Audit Report 2013-S-51 entitled, "Excessive Medicaid Payments to Federally Qualified Health Centers for Group Therapy Services."

General Comments:

Background

A. Rate setting authority.

The Department administers New York State's Medicaid program. As the single state agency for Medicaid rates, the Department is charged with developing reimbursement methodologies for Medicaid services. Prior to May, 2013, this responsibility was exercised concurrently with the several offices that assist the Department.

The Department has, historically, been responsible for the oversight of facilities licensed under Article 28 of the health law. This includes hospitals, nursing homes, diagnostic and treatment facilities and other such facilities.

The Department has, historically, delegated oversight of facilities licensed under the Mental Hygiene Law (MHL). Facilities licensed under the MHL include substance abuse disorder and mental health facilities that are administered by the Office for Alcoholism and Substance Abuse Services (OASAS), the Office of Mental Health (OMH) and the Office for People with Developmental Disabilities (OPWDD).

These historic practices are exercised pursuant to New York State's "State Plan" for Medicaid Services. The State Plan and its numerous amendments are negotiated with the Centers for Medicare and Medicaid Services (CMS) and set the general parameters of the Medicaid services to be reimbursed by the State. The authority of the Department and the several Offices to set rates are derived from statute, and in addition, the State Plan.

The oversight responsibilities of the Department and such Offices include rate-setting authority for the reimbursement of Medicaid services. Thus, prior to 2013, the Department held general rate-setting authority, but the Offices exercised rate-setting authority for the Medicaid services administered by such Office.

Since May, 2013, the Department and the Offices have been engaged in the consolidation of rate-setting authority solely within the Department.

B. Reimbursement for Federally Qualified Health Centers.

Federally Qualified Health Centers (FQHCs), are licensed under federal law and thus governed by federal regulations. FQHCs are eligible for enhanced reimbursement rates and are subject to different requirements than facilities licensed under state law. FQHCs may hold dual licensure under Articles 28 and 32.

FQHCs are reimbursed according to a prospective payment system (PPS). A PPS rate is a method of reimbursement whereby payment is made based on a predetermined, fixed amount. The payment amount for a particular service is derived based on the classification system of that service.

i. Reimbursement under Article 28.

Prior to January 1, 2008, the Department reimbursed FQHCs pursuant to a threshold rate described below. Subsequent to such time, the Department has reimbursed Article 28 services pursuant to a new payment methodology, the Ambulatory Patient Group (APGs). APGs is a service specific reimbursement methodology. That is to say, the rate paid under APGs are specific to a diagnosis code and refer to the service provided. APGs have been phased in by the Department across provider groups.

One notable exception to APGs have been FQHCs. Prior to January 1, 2014, FQHCs had discretion to opt into the APG system or continue with the PPS rate. The facilities at issue all declined to opt into APGs.

ii. Reimbursement under Article 32.

Prior to January 1, 2014, FQHCs licensed under Article 32 received a "threshold rate," as their PPS rate, which is a single, fixed rate for any services provided per patient per visit. Such rate is called a "threshold rate" because, once a patient crosses the threshold of an FQHC for any service or group of services, the FQHC is eligible to receive the fixed reimbursement amount per patient. A threshold rate represents an average across services. That is to say, the threshold rate is not a rate based on the reimbursement of any particular service, but rather, represents total service costs divided by total patient visits.

Subsequent to January 1, 2014, FQHCs licensed under Article 32 of the Mental Hygiene Law will receive rates derived from the APG methodology currently in place for FQHCs licensed under Article 28 of the Public Health Law.

iii. Reimbursement for group therapy services.

Prior to 2008, the Department did not reimburse Article 28 facilities for group therapy. CMS objected to Department policy, at least with regard to FQHCs. CMS insisted that the Department develop a rate for group therapy services. The Department, which, at this time (pre-2008) was reimbursing FQHCs pursuant to a threshold rate, objected to paying the threshold for all of the individuals within a group therapy session. The Department submitted that it should not reimburse a single service (group therapy) with multiple payments (for each individual in the group therapy session). Ultimately, CMS agreed and negotiated a lesser reimbursement rate for group therapy

services. As discussed, the Department subsequently developed a different methodology for reimbursement of FQHCs.

Prior to 2008, OASAS did, in fact, reimburse Article 32 facilities for group therapy. As discussed, OASAS utilized a threshold rate for FQHC reimbursement. Thus, FQHCs licensed under Article 32 received their threshold rate for group therapy services.

Issue

At issue is the reimbursement of FQHCs. Specifically, such FQHCs that are dually licensed under Article 28 and Article 32.

Recommendation #1

Review and recover, as warranted, the Medicaid overpayments totaling $7.7 million for group therapy services provided by the four FQHCs we identified.

Response #1

The OSC is of the opinion that Medicaid overpaid dually licensed FQHCs approximately $7.7 million from June 1, 2008 to May 31, 2014 because the FQHCs billed the wrong reimbursement rate for group therapy services. The OSC states, in its report, "Medicaid should have paid the FQHCs a rate of $35.16, not a rate of approximately $200 per person."

Within the OSC's analysis, the Department's negotiated rate with CMS is referenced ($35.16), as well as the threshold rate reimbursed by OASAS (approximately $200). According to the OSC, the Department's negotiated rate for group therapy services was in effect as of June 1, 2008 and such rate should have applied to all group therapy services, regardless of the classification of such service (i.e., whether such service was provided in an Article 28 or Article 32 context).

The OSC recommends recoupment of $7.7 million from such providers.

The Department disagrees based on the facts presented below.

Department Response to OSC Concerns

As discussed above, prior to 2013, rates for services reimbursed by the Department and the offices were effectively "siloed." That is to say, although rates were developed by the Department, and the Department assisted in the calculation of the rates and the technical implementation of such rates, each Office made the policy decisions that would determine what services would be reimbursed and the acceptable level of reimbursement for such services. This historic practice is the crux of OSC's position.

When OASAS policy makers determined that group therapy services would be a reimbursable service, such service was subject to the reimbursement methodology chosen by OASAS, in this case, threshold rates.

A. The actual issue is with the threshold rate methodology.

The OSC objects to different rates provided for the same service under different reimbursement methodologies. As discussed, both the Department and OASAS were required, by separate statutory regimes (i.e., Public Health and Mental Hygiene, respectively) to develop methodologies for reimbursement.

The Department, beginning in 2008, transitioned to a service specific methodology called APGs. OASAS utilized a different methodology, called a threshold rate, which was not service specific, but instead was an average across services. Threshold rates, because they are an average across all services provided, may sometimes distort the reimbursement of a single specific service.

In this case, the OSC believes that the threshold rate was too high for group therapy services, and instead the services should have been reimbursed at the Department's negotiated rate.

However, the Department's rate was not available to Article 32 services. Services reimbursed under the FQHC reimbursement regime are to be paid under the classification of such service. In this case, the only reimbursement rate available for services provided to a patient with a substance abuse diagnosis was the threshold rate.

As noted previously, the OSC objects to the threshold rate as being too high for the services rendered. However, this objection is actually an objection to the threshold methodology, which, due to being an average across services, resulted in a higher reimbursement for group therapy services.

B. The billing codes were valid and appropriate.

Threshold rates are valid CMS approved rates, derived according to a CMS approved methodology. The non-Ambulatory Patient Group (APG) rate code (4275) for Article 32 services should be brought to the $35 level for (FQHCs) at the time other non-FQHC providers are at the full APG rate payment. At APG implementation for Article 32 services, the APG rate was calculated using a phase-in by blending the existing payment rate with the APG payment rate. This phase-in calculation was effective from the implementation date through December 31, 2013.

As discussed above, services under Article 32 were reimbursed under a different system than those services provided under Article 28. In order to receive a threshold rate, the patient being treated is required to have a diagnosis of chemical or substance abuse. That is to say, the diagnosis of the patient drives the services provided to such patient. In the instance where a patient suffers from chemical dependence, treatment at an Article 32 licensed FQHC where chemical and substance abuse services are available is appropriate. This is true even if the FQHC in question is also licensed under Article 28.

C. Group therapy services provided under article 32 are different than those provided under Article 28.

Article 32 clinics and Article 28 clinics are separate and distinct entities, even where a clinic is licensed to provide services under both regulatory regimes.

Group therapy services provided in an Article 28 setting may or may not be appropriate for a person with a chemical dependence.

Further, different counselors and level of care are required for services under the two regulatory regimes.

Given the difference between such services, it is no surprise that some services that are provided to Article 32 patients are not reimbursable in the Article 28 setting.

For example, art therapy is not a recognized therapy in the Article 28 setting, yet can be utilized and may be reimbursed for Article 32 services.

Thus, although the OSC has taken the stance that group therapy is a service that must be reimbursed at the same level across all clinics, it is not true that the services are the same, nor that the reimbursement for such services should necessarily be the same.

D. The implementation date of January 1, 2014 is consistent with Department policy across other industries

Consistent with the adoption of APGs in other settings, the Department has recommended a January 1, 2014 implementation date for the negotiated reimbursement rate of $35.16. As discussed in the OSC's draft report, FQHCs have had the option of opting into APGs. As of January 1, 2014, that option is no longer available and all FQHCs are subject to the APG methodology.

Providers receiving the new APG rates received reimbursement based on a blend of the existing non-APG rates with the new APG rates during a transition period that ended December 31, 2013. As noted above, APGs are service specific reimbursement.

The lower rate for group therapy services provided by FQHCs, that was developed for Article 28 group therapy services, and paid using rate code 4011, should be paid for Article 32 group therapy services, however, the Department disagrees with the OSC implementation date of the rate change and the $7.7 million recoupment. The OSC is adjusting the rate retroactively back to August 1, 2008, however, the Department is implementing this rate change for rate code 4275 effective January 1, 2014.

As of January 1, 2014, providers will receive the full APG rate payment and the blending will no longer occur. FQHCs are to receive an enhanced rate and, since the non-FQHCs are receiving the benefit of the higher 4275 rate due to the phase-in period, FQHCs should still receive the benefit of the higher rate. Once the non-FQHCs are no longer receiving a benefit of the higher rate due to the phase-in period ending and the prior existing payment rate has been completely eliminated from their payment, then the FQHCs should no longer receive the higher rate. Based on the phase-

in schedule for APGs, FQHC providers for Article 32 group therapy services should receive the lower group therapy rate effective January 1, 2014. The impact has been calculated as ($131,390).

Rate codes 4273 and 4274 have also been updated in our analysis of the FQHC rate in effect on October 1, 2013 as FQHC rates are required to be increased every year on October 1st by the Medicare Economic Index (MEI). However, the group therapy 4275 rate is not affected by the MEI since this rate is a price that has been approved by CMS and will not be updated.

The Department believes that because FQHCs were not required to adopt the reimbursement methodology until January 1, 2014, such date should control any potential recoupment.

E. Recoupment for the period recommended would expose the Department to an unacceptable litigation risk.

Regardless of the Department's objections to the findings by the OSC, the OSC's recommended course of action would expose the Department to an unacceptable litigation risk.

Were the Department to move forward and recoup the $7.7 million alleged overpayment, there exists a high likelihood of potential lawsuits. The outcome of such litigation is uncertain and the Department may, in fact, expose itself to further fees and costs associated with litigation.

Conclusion

The Department respectfully disagrees with the findings made by the OSC. The Department believes that, at all times, facilities were reimbursed appropriately, according to their licensure. The Department will decline to recover such alleged overpayments, provided, however, that any such reimbursements made subsequent to January 1, 2014 may be subject to recoupment.

Based on this information, the Office of the Medicaid Inspector General (OMIG) may review and recover, after determination by the Department and OASAS, as to appropriateness of claims cited in error by OSC.

Recommendation #2

For the FQHCs we identified, clarify how to properly bill Medicaid for group therapy services. Ensure all FQHCs bill the proper Medicaid reimbursement rate for group therapy services.

Response #2

OASAS and the Department agree that communication and clarification to the remaining two OASAS FQHC providers is necessary. ACCESS Community Health Care, formally AHRC, Inc. and Project Renewal, Inc., were notified by OASAS in a direct communication dated April 24, 2014.

Lutheran Medical Center, Provider Numbers 02996078 and 00243729 have opted into APGs; they are no longer affected by this issue since they do not bill the FQHC rate codes.

OSC's Comments on the Draft Report and the Department's Responses:

OSC Comment #1:

We agree FQHCs are licensed under federal law and are thus governed by federal regulations. Therefore, FQHCs are subject to different requirements than facilities licensed solely under State law. Further, federal law generally supersedes State law. Accordingly, the facilities' federal FQHC designation took precedent over Article 28-Health or Article 32-OASAS designations under State law.

During the State Medicaid Plan (Plan) amendment process, the Department objected to Medicaid paying approximately $200 for each person in a group therapy session, and CMS agreed. As a result, using a CMS-approved methodology, the Department set a reimbursement rate of $35.16 (per person) for FQHC group therapy services effective June 1, 2008. Further, the Plan and Medicaid regulations confirm the approved rate of about $35 for FQHC group therapy services and the corresponding effective date of June 1, 2008 – regardless of an FQHC's certification status under either Article 28 or Article 32 of the applicable State laws. Nevertheless, it was not until August 5, 2014 (after the completion of our audit fieldwork) that the Department actually reduced the rate, from approximately $200 to $35.16.

OSC Comment #2:

As stated on page 7 of our report, FQHCs (including those not the subject of our audit) that were certified by OASAS, OMH and /or the Department from 2008 to now received non-threshold reimbursement rates of $35.16 (per person) for FQHC group therapy services. Thus, the $35.16 rate was available for all FQHCs, including those provided in an Article 32 setting, for billing group therapy services.

Department Response to Comment #1 and #2:

The OSC has failed to distinguish in the audit that the claims they are in contention with are for Article 32 group therapy services. The providers that they have stated have "improperly billed Medicaid for group therapy services" have appropriately billed Article 28 Federally Qualified Health Center (FQHC) group therapy services. The claims in question are solely Article 32 group therapy claims which is an important distinction due to the payment methods and rate codes used for the different licensing. For each service, providers submit a claim to the eMedNY payment system using a rate code that has been assigned a rate that was calculated for the service. It is inappropriate for a facility to use a rate code on a claim for a service that it is not intended. The FQHC group therapy rate that was developed based on the Plan and noticed in the Medicaid Update described by OSC was developed and utilized for Article 28 group therapy services and reimbursed using rate code 4011. The Article 32 rate code for group therapy services is rate code 4275. OSC has stated that the reduced rate was available for the provider to use for their claims, however, that would have entailed the provider use the 4011 Article 28 rate code for Article 32 group therapy claims, which would have been inappropriate.

At the time the Article 28 FQHC group therapy services rate was developed, as the Department did have the authority to establish rates, the OASAS, as the oversight agency, was intimately involved in determining the policy under which the rates were set. Thus, although the Department assisted in calculating the rates and the technical implementation of such rates, OASAS made the policy decisions that impacted the reimbursement of services.

During the Plan amendment process for the development of the Article 28 FQHC group therapy rate, the Department did object to paying approximately $200 for each person in a group for Article 28 group therapy sessions. The Department **did not previously reimburse** for group therapy sessions to which CMS insisted that the Department develop a reimbursement rate and provide payment for group therapy services for FQHCs. The rate developed in the Plan was implemented for Article 28 group therapy services and loaded to the eMedNY payment system using Article 28 rate code 4011 for providers to use for claims effective beginning June 1, 2008. All FQHC providers with Article 28 services were provided this rate and the providers that OSC has listed in this audit used the Article 28 rate code 4011 and rates appropriately for Article 28 group therapy services. The Medicaid Update that OSC refers specifically lists the Article 28 rate codes and rates as stated in the Department's State Plan.

However, prior to 2008, OASAS **did reimburse** Article 32 facilities for group therapy services using the Article 32 rate code 4275. When the threshold rate was calculated for Article 32 services, group therapy was included. Thus, FQHCs licensed under Article 32 received their threshold rate for group therapy services using the Article 32 rate code 4275. In addition, this threshold rate method was implemented consistently statewide for all facilities providing Article 32 group therapy services and not used solely for FQHCs. Further, due to the threshold rate method developing an average rate to be paid for all services (total allowable costs divided by total visits), the threshold rate may be too high for some services however, it may also be too low for other services.

Effective July 1, 2011, Article 32 providers implemented the APG payment methodology for all OASAS clinics, including freestanding clinics, replacing the threshold rate method. However, the APG method was phased-in from July 1, 2011 thru December 31, 2013. The phase-in method developed an Article 32 group therapy services rate that was a percent of the existing threshold rate plus a percent of the new APG rate (result of percent allocation being 100 percent). Since non-FQHCs were receiving the benefit of the higher threshold rate during the phase-in period, it was determined that the appropriate date for the FQHC rate adjustment for OASAS FQHCs would be after the phase-in period. Therefore, effective January 1, 2014, all providers (FQHC and non-FQHC) are no longer receiving the benefit of the threshold rate and the threshold rate has been eliminated for Article 32 group therapy services consistently statewide. In April 2014, effective January 1, 2014, the reduced rate was loaded to rate code 4275 for OASAS FQHC providers that have not elected to use the APG reimbursement method replacing the threshold rate for Article 32 group therapy services.

OSC Comment #3:

The Department asserts that the CMS-approved rate of $35 for group therapy applied to FQHCs certified under Article 28-Health, but not those certified under Article 32-OASAS. We disagree.

In fact, neither the amended Plan nor the amended regulations distinguish between FQHCs certified under Article 28 or Article 32. Moreover, the Department sent each FQHC included in our audit a letter specifically stating that the $35.16 rate should be billed by the FQHCs for their group therapy services, effective June 1, 2008 (see footnote 1) – regardless of whether or not the FQHC was certified under Article 28 or Article 32.

Department Response to Comment #3:

The providers were all sent a letter, however, the letter specifically addressed the Article 28 services (rate code 4011). The letter did not address the Article 32 group therapy services (rate code 4275).

OSC Comment #4:

The Department's citation for OASAS rate-setting authority is misleading. The Department states OASAS was mandated by law to set its reimbursement rates and methodology, but then cites a section of MHL pertaining to rates for inpatient chemical dependency services. Our audit, however, did not address inpatient services. Rather, we addressed outpatient (group therapy) services. Moreover, OASAS officials informed us that the Department (and not OASAS) calculated the reimbursement rates for outpatient services (including group therapy) performed in Article 32-certified facilities. As stated in our report and State Comptroller's Comment 1, the Department set a Medicaid reimbursement rate of $35.16 for FQHC group therapy services effective June 1, 2008.

Department Response to Comment #4:

OSC is correct that the citation stated in the draft response number one was in error and was for inpatient services; it has subsequently been removed.

OSC Comment #5:

The Department's statements are contradictory. Officials state "the only reimbursement rate available for services provided to a patient with a substance abuse diagnosis was the threshold rate." However, officials also indicated that FQHCs had the discretion to opt into the APG system and receive an APG rate (instead of the threshold rate) at that time. APG implementation for Article 32 services began in July 2011.

Further, according to the Department, January 1, 2014 was chosen as the effective date of the rate reduction due, at least in part, to the implementation of APGs in Article 32 facilities. According to Department officials, the FQHC providers identified in our audit should be brought to the $35.16 level at the same time non-FQHC providers were brought to the full APG rate payment. However, the adoption of APGs is irrelevant to our findings. In fact, the facilities in question declined to opt into APGs and chose to be paid predetermined fixed rates established specifically for FQHCs. Furthermore, the Department's assertion is inconsistent with its position that FQHCs are an exception to the APG methodology, and it is also inconsistent with the manner in which other

FQHC providers (certified by OASAS, OMH, and/or the Department) were paid for group therapy during our audit period.

Department Response to Comment #5:

FQHCs do have the option to be reimbursed using the APG method of payment for services or continue utilizing their current rates. For Article 32 group therapy services, beginning July 1, 2011, the provider could have chosen to utilize the APG method of payment, however, this option is under the discretion of the facility. If a facility does not choose to be reimbursed using the APG method of payment, their current threshold rate continues to be paid. The providers that OSC has included in this audit did not opt to use the APG reimbursement method and, therefore, their threshold rate continued. As stated in response labeled "1 and 2" above, the APG implementation date is relevant as the elimination of the Article 32 group therapy services threshold rate was consistently applied statewide utilizing the APG full implementation date.

OSC Comment #6:

The Department notes a rate change for individual therapy services (codes 4273 and 4274). However, our audit did not address the propriety of those rates. Rather, our audit focused on group therapy services.

Department Response to Comment #6:

The rate codes 4273 and 4274 were addressed in the audit by the Department since these rate codes should be updated to reflect the Department's October 1, 2013 FQHC rate. FQHC rates are required by Statute and the Medicaid State Plan to be updated by the Medicare Economic Index every October 1st. As the Department is revising the 4275 Article 32 group therapy rate to reflect the reduced rate, it is only appropriate to also adjust the Article 32 individual therapy rates to reflect the latest FQHC rates. The Department provided this information since the rate increase to the individual therapy rates would negate a portion of the impact that was calculated for the rate reduction.

OSC Comment #7:

We are pleased that the Department acknowledges that the FQHC providers should receive $35.16 per person for Article 32 group therapy services and that overpayments totaling $131,390 should be recovered. However, we are concerned that the Department will apparently forego recoveries of nearly $7.6 million in excessive payments. The Department provides no clear rationale why taxpayers should have paid nearly $200 for the service in question prior to January 1, 2014 when the very same service costs $35.16 after that date. As such, we encourage Department officials to reassess our audit findings and take the appropriate actions to implement our recommendation to recover all excessive payments.

Department Response to Comment #7:

As stated in response labeled "1 and 2," the Article 32 group therapy rate was calculated using an average rate method (total allowable costs divided by total visits). This average rate is used for payment for all services, not just group therapy. As it is used for payment for all services, the threshold rate may be too high for some services, however, it may also be too low for other services.