

## P5408 COMPLIANCE WITH MEDICAID BILLING REQUIREMENTS

### BOARD POLICY:

**All Medicaid billing for services shall be done in compliance with all federal and state requirements. In compliance with Section 6032 of the Deficit Reduction Act of 2005, this policy also provides the following information that shall be made available to all employees and contractors.**

Administrative Implemental Procedures:

1. Summary of the False Claims Act, 31 U.S.C. § 3729-3733
  - a. The False Claims Act (“FCA”), 31 U.S.C. § 3729, provides, in pertinent part, that:
    - (a) Any person who (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government;...or (7) knowingly makes, uses or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, . . . is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person ....
    - (b) Under the FCA, the terms “knowing” and “knowingly” mean that a person, with respect to information (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.
  - b. While the False Claims Act imposes liability only when the claimant acts knowingly, it does not require that the person submitting the claim have actual knowledge that the claim is false. A person who acts in reckless disregard or in deliberate ignorance of the truth or falsity of the information can be found liable under the Act. 31 U.S.C. §3729(b).
  - c. In sum, the False Claims Act imposes liability on any person who submits a claim to the federal government that they know (or should know) is false. An example may be a provider who submits a bill to Medicaid for services he knows he has not provided. The False Claims Act also imposes liability on an individual who may knowingly submit a false record in order to obtain payment from the government. An example of this may include a government contractor who submits records that he knows (or should know) are false and that indicated compliance with certain contractual or regulatory requirements. The third area of liability includes those instances in which someone may obtain money from the federal government to which he may not be entitled, and then uses false statements or records in order to retain the money. An example of this so-called “reverse false claim” may include a hospital that obtains interim payments from Medicare throughout the year, and then knowingly files a false cost report at the end of the year to avoid making a refund to the Medicare program.
  - d. The FCA provides that private parties may bring an action on behalf of the United States. 31 U.S.C. §3730(b). These private parties, known as “*qui tam* relators,” may share in a percentage of the proceeds from an FCA action or settlement. The FCA provides, with some exceptions, that a *qui tam* relator, when the Government has intervened in the lawsuit, shall receive at least 15 percent but not more than 25 percent of the proceeds of the FCA

action depending upon the extent to which the relator substantially contributed to the prosecution of the action. When the Government does not intervene, the FCA provides that the relator shall receive an amount that the court decides is reasonable and shall be not less than 25 percent and not more than 30 percent. 31 U.S.C. §3730(d).

2. Administrative Remedies for False Claims and Statements

a. In addition to the above, federal law also provides for administrative remedies and liability against any person making false claims and statements. Specifically, federal law, 31 U.S.C. § 3802(a), sets forth the potential liability as follows:

(1) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know (A) is false, fictitious, or fraudulent; (B) includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent; (C) includes or is supported by any written statement that (i) omits a material fact, (ii) is false, fictitious, or fraudulent as a result of such omission, and (iii) is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; or (D) is for payment for the provision of property or services which the person has not provided as claimed shall be subject to a civil penalty of not more than \$5,000 for each such claim. Unless the Government has not made payment on the claim, such person shall also be subject to an assessment of not more than twice the amount of such claim, or the portion of such claim, which is determined to be in violation.

(2) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a written statement that (A) the person knows or has reason to know (i) asserts a material fact which is false, fictitious, or fraudulent; or (ii) omits a material fact, and is false, fictitious or fraudulent as a result of such omission and the person making, presenting, or submitting such statement has a duty to include such material fact; and (B) contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject to a civil penalty of not more than \$5,000 for each such statement.

b. A determination that a person is liable for these penalties may lead to the filing of any other administrative or other legal action that is authorized by law. 31 U.S.C. §3802(b).

3. State Laws Regarding Medicare Fraud & Abuse & Penalties for False Claims & Statements

a. Certain state laws may also impose civil and criminal penalties for Medicaid fraud and abuse. The Kansas Medicaid Fraud Control Act, K.S.A. 21-3844 et seq., imposes criminal penalties for all of the following illegal activities:

(1) Making a false claim to the Medicaid program – This is defined as knowingly and with intent to defraud, engaging in a pattern of making, presenting, submitting, offering or causing to be made, presented, submitted or offered, regardless of whether the claim is allowed or allowable: (A) any false or fraudulent claim for payment for any goods, service, item, facility, accommodation; (B) any false or fraudulent statement or representation for use in determining payments which may be made; (C) any false or fraudulent report or filing which is or may be used in computing or determining a rate of payment for any goods, service item, facility or accommodation; (D) any false or fraudulent statement or representation made in connection with any report or filing which is or may be used in computing or determining a rate of payment for any goods, service, item, facility or accommodation; (E) any statement or representation for use by another in obtaining any goods, service, item, facility or accommodation under the

Medicaid program, knowing the statement or representation to be false, by commission or omission; (F) any claim for payment, for any goods, service, item, facility, or accommodation, which is not medically necessary; (G) any wholly or partially false or fraudulent book, record, document, data or instrument, which is kept as documentation for any goods, service, item facility or accommodation or of any cost or expense claimed for reimbursement for any goods, service, item facility or accommodation for which payment is, has been, or can be sought under the Medicaid program; (H) any wholly or partially false or fraudulent book, record, documents, data or instrument to any properly identified law enforcement officer, employee or authorized representative of the attorney general, or employee or agent of the Kansas Department for Children and Families, or its fiscal agent, in connection with any audit or investigation involving any claim for payment or rate of payment for any goods, services, item, facility or accommodation payable under the Medicaid program; or (I) any false or fraudulent statement or representation made with the intent to influence any acts or decision of any official, employee or agent of a state or federal agency having regulatory or administrative authority over the Kansas Medicaid program.

Any false claims, statements or representations described in subparagraphs (A)–(G) where the aggregate amount of payments totals at least \$1,000 is a felony. For aggregate payments of less than \$1,000, it is a misdemeanor offense. The actions described in subparagraphs (H) and (I) are felonies. K.S.A. 21-3846.

- (2) Knowingly and intentionally soliciting or receiving any remuneration, including but not limited to any kickback, bribe or rebate, directly or indirectly, overtly or covertly, in cash or in kind: (a) in return for referring or refraining from referring an individual to a person for the furnishing of any goods, service, item facility or accommodation under the Medicaid program; or (b) in return for purchasing, leasing, ordering or arranging for or recommending purchasing, leasing or ordering any goods, service, item, facility or accommodation under the Medicaid program. Such conduct is considered a felony. K.S.A. 21-3847(a)(i).
- (3) Knowingly and intentionally offering or paying any remuneration, including any kickback, bribe or rebate, directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person: (a) to refer or refrain from referring an individual to a person for the furnishing or arranging for the furnishing of any goods, services, item, facility or accommodation under the Medicaid program; or (b) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any goods, service, item, facility or accommodation under the Medicaid program. Such conduct is a felony. K.S.A. 21-3847(a)(2).
- (4) Knowingly dividing or sharing any funds illegally obtained from the Medicaid program. Any such conduct is considered a felony. K.S.A. 21-3847(a)(3).
- (5) Knowingly and intentionally trading a medicaid number for money or other remuneration, signing for services that are not received by the medicaid recipient or selling or exchanging for value goods purchased or provided under the Medicaid program. Any such conduct is considered a felony. K.S.A. 21-3847(b).
- (6) Negligently failing to maintain such records as are necessary to disclose fully the nature of the goods, services, items, facilities or accommodations for which a claim was submitted or payment was received under the Medicaid program or such records as are necessary to disclose fully all income and expenditures upon which rates of payment

were based for the Medicaid program. Such records must be maintained for 5 years. Failure to do so is a misdemeanor. K.S.A. 21-3848.

- (7) Intentionally destroying or concealing records necessary to disclose fully the nature of the goods, services, items, facilities or accommodations for which a claim was submitted or payment was received under the Medicaid program, or records necessary to disclose fully all income or expenditures upon which rates of payment were based under the Medicaid program. Destruction or concealment of such records within 5 years after the date payment was received (or the date the claim was submitted if no payment was received) is a felony. K.S.A. 21-3849.
  - (8) Knowingly and intentionally obstructing a Medicaid fraud investigation by falsifying, concealing or covering up a material fact by any trick, misstatement, scheme or device; or making or causing to be made any materially false writing or document knowing that such writing or document contains any false, fictitious or fraudulent statement or entry. Such conduct is a felony. K.S.A. 21-3856.
- b. In addition to any other criminal penalties that may be imposed, any person convicted of any of the above illegal acts may be liable for (1) payment of full restitution of the amount of the excess payments, (2) payment of interest on the amount of any excess payments at the maximum legal rate in effect on the date the payment was made to the person for the period from the date upon which payment was made to the date upon which repayment is made; and (3) payment of all reasonable expenses that have been necessarily incurred in the enforcement of this act, including, but not limited to, the costs of the investigation, litigation and attorney fees. K.S.A. 21-3851.
  - c. Making false statements to the Medicaid program may be considered perjury under state law, a felony offense. K.S.A. 21-3805. Perjury is intentionally, knowingly and falsely: (1) swearing, testifying, affirming, declaring or subscribing to any material fact upon any oath or affirmation legally administered in any cause, matter or proceeding before any court, tribunal, public body, notary public or other officer authorized to administer oaths; or (2) subscribing as true and correct under penalty of perjury any material matter in any declaration, verification, certificate or statement notarized and signed under penalty of perjury as permitted pursuant to K.S.A. 53-601. K.S.A. 21-3805.
4. Whistleblower Protections under State and Federal Law
    - a. The FCA provides certain whistleblower protections for employees. Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment as a result of lawful acts done by the employee in furtherance of a claim made under the FCA shall be entitled to all relief necessary to make the employee whole. Specifically, such relief shall include reinstatement with the same seniority status that the employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. 31 U.S.C. § 3730(h).
    - b. Kansas law recognizes a cause of action for employees who have been terminated in retaliation for whistleblowing activity. In order to prove such a claim, the employee must show that (1) a reasonably prudent person would have concluded the employee's co-worker or employer was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare; (2) the employer had knowledge of the employee's reporting of such violation prior to the discharge of the employee; and

(3) the employee was discharged in retaliation for making the report. The employee must also prove that any whistleblowing was done in good faith based on a concern regarding the wrongful activity rather than for malice, spite, or personal gain.

5. Internal Procedures for Detecting and Preventing Fraud, Waste & Abuse

- a. All employees who provide services that may be billed to Medicaid have been required to keep written documentation, signed by the employee, for all school years prior to the 2007-2008 school year.
- b. Effective the 2007-2008 school year, all employees providing services that may be billed to Medicaid are required to use a standardized electronic log to document such services. The electronic log may only be accessed by employees that provide services billed to Medicaid, *i.e.* physical therapists, occupational therapists, speech therapists, and nurses. No other employees may access the electronic logs, except as necessary for billing, auditing, and oversight purposes.
- c. Each student's IEP shall determine what services the student will receive, the frequency with which the services are received, and the amount of time provided in each session.
- d. Random audits shall be conducted to determine that the services provided to the students match the services listed on the IEP.
- e. Before billing Medicaid, any irregularities in the log entries will be questioned. This could include a review of the amount of services provided by each employee each day to determine whether the employee has billed for services in excess of the hours worked by such employee and a review of the description of services provided to the student.
- f. The credentials of each employee providing services that may be billed to Medicaid will be reviewed annually to ensure that each such employee has maintained the appropriate licensure or certification.
- g. Any employee who is aware that another employee is submitting false or fraudulent information in the electronic log for billing to Medicaid is required to report such activity to the Assistant Superintendent of Student Support Services for investigation.
  - (1) All such complaints shall be promptly and thoroughly investigated, and appropriate corrective action will be taken.
  - (2) The District will not retaliate in any way against an employee, or others, who, in good faith, makes a complaint that false or fraudulent information has been submitted to Medicaid or participates in the investigation of such a complaint. Retaliation against any individual who has made such a report in good faith or cooperated in the investigation of such a report will not be tolerated and will lead to appropriate disciplinary action, up to and including termination, against the individual engaging in retaliation.
  - (3) False complaints will result in appropriate disciplinary action, up to and including termination, for the individual making the false report.
- h. If, after investigation, the District has determined that false or fraudulent information has been submitted to Medicaid, the District shall report the submission of such information to the appropriate individuals within the Medicaid program and shall cooperate in any investigation conducted by state and/or federal officials regarding the same.

Administrative Responsibility: Student Support Services

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