School Law Matters

May 2012

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Route to: Board ❑ Personnel ❑ Instruction ❑ PPS ❑ Business ❑ Other: _____

Hot Topics

Avoiding Potential Liability for Medicaid Billing and Documentation Mistakes

Pursuant to the 2009 State Plan Amendment entered into by the State of New York and the Federal government, the State Office of the Medicaid Inspector General (OMIG) has been conducting regular audits of school districts to ensure compliance with State and Federal Medicaid billing and documentation requirements. In these financially difficult times, adhering to these requirements is essential to securing the reimbursements to which districts are entitled and avoiding potential liability for the submission of claims that cannot be substantiated.

Since the U.S. Department of Health and Human Services first began investigating the submission of Medicaid claims in New York in the early 2000s, the State Education Department has issued a substantial number of guidance documents on this subject. Unfortunately, the proliferation of these documents, coupled with the terms of the State Plan Amendment, has created some confusion among school officials regarding the procedures for Medicaid billing and compliance with OMIG audits.

Chief among these confusions appears to be the effect of Medicaid Claiming/Billing Handbook # 6, which was published by NYSED for the purpose of assisting school districts in submitting claims for Medicaid reimbursements. The Handbook was first released in 2005 and updated in 2007, prior to the implementation of the State Plan Amendment; consequently, much of the information it contains is outdated. Unfortunately, Handbook # 7 has not yet been completed, and many school officials have been relying on Handbook # 6 in submitting claims to Medicaid.

The Department of Health and the State Education Department are in the process of developing Medicaid Claiming/Billing Handbook # 7, which will incorporate the requirements for Medicaid billing as contained in the State Plan Amendment and Federal law and policy. In the meantime, NYSED has issued a series of up-to-date guidance documents available at http://www.oms.nysed.gov/medicaid/.

School officials should be cautious in relying on the information provided in pre-2009 guidance, the changing landscape of Medicaid billing in New York State can create confusion. One area wherein problems may arise is audits of claims submitted for the 2008-2009 school year. Many administrators assume that having complied with guidance from NYSED in effect at that time insulates them from any adverse determinations. This is incorrect. The State Plan Amendment and the guidance that has been issued since its implementation reflect

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Attorney Spotlight

Colleen W. Heinrich graduated *magna cum laude* from Siena College in 1990 and received her law degree from Albany Law School in 1993. She is a member of the American Association of Trial Lawyers, the New York State Bar Association, the Women's Bar Association of the State of New York, and the Central New York Woman's Bar Association (President 2001-2002). Ms. Heinrich has performed pro bono work for the Central New York Women's Bar Association Domestic Violence Divorce Project and the Vera House. She has lectured on School Law for the National Business Institute (1998, 2003, 2005) and on Civil Litigation for the New York State Bar Association (1999). Ms. Heinrich was formerly on the Board of Directors of Legal Services of Central New York and has served as an Impartial Hearing Officer for State of New York Office of Special Education Services since 1996. Her other areas of practice include: municipal and education law and related civil litigation.

In This Issue …

Hot Topics

Avoiding Potential Liability for Medicaid Billing and Documentation Mistakes (cont'd)

Federal laws, regulations, and policies that have long been controlling. School districts in New York have always had to meet the more demanding documentation requirements currently in place. We encourage districts to maintain all records that document services to support claims submitted for this period.

School districts must be vigilant in ensuring that current State and Federal requirements are being met when submitting claims for Medicaid reimbursement. This consists of not only relying on recent guidance, but also in maintaining the required documentation in district files and on district property. A failure to adhere to these mandates can result in the disallowance of claims or, in the case of pervasive irregularities, liability under the Federal False Claims Act.

One recent change districts should note involves the inclusion of National Provider Identifiers (NPIs) on claims submitted for Medicaid reimbursement. Prior to this year, only the billing provider's NPI was required for school supportive health service claims. Effective January 1, 2012, school supportive health service claims submitted to Medicaid must contain both the billing provider's NPI and the attending provider's NPI.

Under the school supportive health services program, the attending provider is the clinician who has overall responsibility for the student's care (e.g., physical therapists and speech-language pathologists), while the entity submitting bills for Medicaid reimbursement (i.e., the school district) is the billing provider. In addition, a servicing provider NPI is also required where the attending provider and the servicing provider are not the same individual, specifically, in those instances where the servicing provider works "under the direction of" or under the supervision of the attending provider. In a school setting this would apply to speech teachers who work under the direction of a speech language pathologist. Affiliated providers' NPI's must be registered with the NYS Medicaid Program and reported on Medicaid reimbursement claims.

Once again, the area of Medicaid billing continues to develop and we will take steps to update our clients as additional guidance becomes available. If you need assistance in ensuring compliance with billing and documentation requirements, or in preparing for an audit by the Office of the Medicaid Inspector General, please contact Colleen W. Heinrich, Esq., of our office.

Tenured Teacher Discipline

New Rules in Effect to Expedite Teacher Disciplinary Hearings

Beginning April 1, 2012, new rules went into effect which were meant to address the extraordinary length and expense associated with conducting tenured teacher disciplinary hearings. Parties are now prohibited from introducing evidence more than 125 days following the filing of disciplinary charges. Evidence will only be accepted beyond the 125 day period in cases of extraordinary circumstances beyond the parties' control. According to the State Education Department (SED), "extraordinary circumstances" are those in which evidence truly cannot be introduced in a timely manner. Hearing officers assigned to each case are expected to closely monitor the relevant dates to ensure hearings are completed within this time period.

These amendments to Education Law §3020-a also provide that if the district and the educator's representative fail to agree on a hearing officer within 15 days of receipt of the hearing officer list from the American Arbitration Association, the Commissioner will select a hearing officer from the list. The new provisions also limit the number of hours that can be paid to a hearing officer. SED will be establishing guidelines for hearing officer fees. All new hearing officer appointments will be contingent upon accepting the new maximum fee rates to be established. SED will also be creating a mechanism to monitor and investigate hearing officer compliance with the timelines set forth in the statute. As an incentive, any claims by hearing officers for reimbursement for cases filed after April 1, 2012 will be paid out first from funds appropriated for the 2012-13 fiscal year. As it currently stands, many hearing officers across the state have not been paid by SED for past discipline cases, some for a period in excess of two years. It is unclear at this point how many hearing officers will be willing to accept appointments under these new rules.

We are currently working with our client Districts to address these changes. Among other measures, we will advocate strongly in each case (when appropriate) for compliance with the 125 day timeline in order to expedite these matters. If you have any questions, please contact our office.

Civil Service Hearing Issues

Board Members Should Use Caution When Testifying in Section 75 Hearings

When disciplinary charges are brought against an employee under Section 75 of the Civil Service Law, the Board of Education may appoint a hearing officer. The hearing officer conducts the hearing and makes written findings of fact and recommendations to the Board regarding whether the employee is guilty of the charges, and if so, what the penalty should be. The Board then decides whether to accept, reject or modify the hearing officer's findings and recommendations. A recent decision by New York State's highest court is a warning that school districts must exercise caution when Board members go beyond that role and actually testify at the hearing. This case holds that, if a Board member's testimony is directly related to whether the employee is guilty or not guilty of the charges, the member should recuse himself or herself (abstain) from participating in the Board's decision.

The Superintendent brought charges against the Business Manager. Two of the five Board members testified at the hearing. (One was called as a witness by the district, and the other was called by the Business Manager.) The hearing officer recommended that the Business Manager be found guilty of the charges, and that his employment be terminated. The Board voted to adopt the hearing officer's findings and recommendations, and discharged the Business Manager.

The New York State Court of Appeals held that the Board members who testified should have disqualified themselves from participating in the decision. The court found that they were personally involved in the disciplinary process and that the purpose of their testimony was to prove whether or not the charges should be sustained. The court annulled the termination of the Business Manager, and sent the matter back to the Board, to decide the issue again without the participation of the two members who testified.

The court noted that neither of their votes were needed to take disciplinary action. That is, the three remaining Board members constituted a majority of the Board. The court said that disqualification would be inappropriate if the person's vote would be necessary in order to make a decision. (This is known as the "rule of necessity".)

This decision by the Court of Appeals was very close (4-3). The case was Baker v. Poughkeepsie City School District (March 22, 2012). Please contact us with any questions you may have about this decision.

Special Education Issues

REMEMBER: IEPs Must Be In Place By July 1

The Individuals with Disabilities Education Act ("IDEA") requires school districts to have an Individualized Education Plan ("IEP") in place for every child with a disability that is enrolled in the district at the beginning of the year. The timely implementation of an IEP is an important aspect of the District's responsibilities to disabled students.

Recent decisions from the New York State Review Officer ("SRO") have referred to section 2(15) of the Education Law in ruling that each school year begins on July 1. Therefore, IDEA's mandate to have an IEP in place for each child by the commencement of the school year thus requires that the IEP for each disabled student be finalized by July 1. While there is likely some leeway in this deadline for CSE referrals made during the summer and within 30 to 60 days of July 1, these rulings represent a significant change from previous decisions, where all that mattered was that the IEP be in place prior to the start of instruction in September.

Besides impacting the workload of CSEs and others responsible for implementing and maintaining IEPs, this tightened deadline has great significance in cases where

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Special Education Issues

REMEMBER: IEPs Must Be In Place By July 1 (cont'd)

tuition reimbursement is at issue. The SRO's recent rulings amount to a holding that, if the school district does not have an IEP in place for a student on July 1, it is tantamount to not having an IEP at all. This can preclude the school district from making the required showing that the IEP is appropriate for the student.

If you have any questions regarding IEPs or special education in general, please contact our office at 315-437-7600.

Upcoming Events

Attorney(s)	Date(s)	Event/Program/Location
Susan Johns	**5/17/12**	**Client In-Service Program on *Special Education Hot Topics***
Joseph Shields	**6/3/12**	**New York State Association of School Business Officials, Annual Conference 2012 - Charting a Course for the Future presenting *Managing a Capital Project from Voter Approval to Completion,* Saratoga Springs, NY**
Eric Wilson	**6/4/12**	**New York State Association of School Business Officials, Annual Conference 2012 - Charting a Course for the Future presenting *Legal Updates,* Saratoga Springs, NY**
Susan Johns	**6/15/12**	**Client In-Service Program on *Privacy Issues within the School Setting***
Colleen Heinrich	**6/22/12**	**Client In-Service Program on *Review of Legal and Professional Responsibility Regarding Student Safety***

Please note that "Client In-Service" programs are being provided to particular clients at their request. If you are interested in having us present a program for you, please contact us so we can schedule one to suit your needs.