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Alerts

California Appellate Court Rules That Federally Qualified Health Center Outreach Expenses Do Not Qualify For Cost-Based Reimbursement

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Health Care Alert

Family Health Centers of San Diego (Health Center) operates a federally qualified health center (FQHC) that has 49 locations throughout San Diego County, California, and provides a comprehensive range of primary and preventive services, as well as pharmacy, dental, behavioral, and vision services to its patients, most of whom are Medi-Cal beneficiaries. FQHCs qualify for special payments for health care services covered by Medi-Cal. State Medicaid programs generally reimburse FQHCs based on service costs. The Consolidated Appropriations Act of 2001 (P.L. 106-554) established a prospective payment methodology based on service costs in a base year and trended forward using the Medicare Economic Index (MEI). In California, FQHC Medi-Cal reimbursement is 100 percent of *reasonable and allowable costs* for Medi-Cal services rendered to Medi-Cal beneficiaries.

Many services provided by FQHCs are not covered by Medi-Cal, such as case management, translation, transportation, and other services (Supplemental Services). Under Section 330 of the Public Health Service Act, the Health Center may provide Supplemental Services, including (1) services designed to assist patients in establishing eligibility for and gaining access to federal and state assistance programs (such as Medi-Cal), (2) services that enable individuals to use the health center's services (including *outreach*, transportation, and interpreter services), and (3) education regarding the availability and proper use of health services. Health Center's outreach efforts involved going into public spaces such as on the street, at schools, business venues, beaches, and parks to attract new patients, provide counseling regarding eligibility for services, and make medical appointments for services. Such services benefit Health Center patients by increasing awareness of care available through the Health Center and making potential patients feel more comfortable seeking care. In addition, such outreach activities are required as part of the Health Center's role as an FQHC grant recipient.

In *Family Health Centers of San Diego vs. State Department of Health Care Services*, July 6, 2021, C089555) __CAL.APP.5TH.__ [2021 WL 3240274], the Health Center appealed a trial court's order denying its petition for writ of mandate seeking to compel the California Department of Health Care Services (DHCS) to reimburse the Health Center for money it expended for outreach services.

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Cost-Based Reimbursement

General Background. Section 330 of the Public Health Service Act authorizes grants to be made to FQHCs, and FQHCs may seek reimbursement under Medi-Cal for certain expenses, including reasonable costs directly or indirectly related to patient care. Pursuant to Medi-Cal, participating health care providers such as FQHCs receive reimbursement directly from the California Department of Health Care Services (DHCS) for providing medical care to Medi-Cal beneficiaries. FQHCs are reimbursed for their allowable costs, as determined under Medicare/Medicaid standards and principles of reimbursement set forth in the Code of Federal Regulations and the Medicare Provider Reimbursement Manual (PRM). To be reimbursable, claimed costs "must be based on the reasonable cost of [covered] services" and "related to the care of beneficiaries." (42 C.F.R. § 413.9(a) (2021 and PRM § 2100 (rev. 454, 09-12).

Reasonable Cost. Under the federal regulations, "[r]easonable cost includes all necessary and proper expenses incurred in furnishing services such as administrative costs, maintenance costs, and premium payments for employee health and pension plans. It includes both direct and indirect costs and normal standby costs. However, if the provider's operating costs include amounts not related to patient care, specifically not reimbursable under the program, or flowing from the provision of luxury items or services (that is, those items or services substantially in excess of or more expensive than those generally considered necessary for the provision of needed health services), such amounts will not be allowable." (42 C.F.R. § 413.9(c)(3) (2021).) The regulations define necessary and proper costs as "costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities. They are usually costs that are common and accepted occurrences in the field of the provider's activity." (42 C.F.R. § 413.9(b)(2) (2021).)

Advertising Costs. Advertising costs are allowable if they are "incurred in connection with the provider's public relations activities [and are] primarily concerned with the presentation of a good public image and directly or indirectly related to patient care." However, "[c]osts of advertising to the general public which seeks to increase patient utilization of the provider's facilities are not allowable. . . .general advertising to promote an increase in the patient utilization of services is not properly related to the care of patients." (PRM § 2136.2 (rev. 267, 09-82).)

Interim Payments and Cost Report Reconciliation. FQHCs receive interim estimated payments of Medi-Cal reimbursement during each fiscal year, with retroactive adjustments occurring at the end of each fiscal year when actual costs are known. Within four months of the end of each fiscal year, the FQHC submits a cost report based on actual costs, and DHCS makes a tentative settlement based on the FQHC's unaudited cost report, making additional payments to the FQHC if warranted. Interim payments (as adjusted during the interim reconciliation process) will again be reconciled to actual allowable costs after an audit of the cost report is completed. If, at the end of either the interim reconciliation or audit, it is determined that the FQHC has been overpaid, the FQHC is required to repay the Medi-Cal program, and DHCS will follow federal law and procedures for managing overpayments of federal Medi-Cal funds. If, at the end of either the interim reconciliation or audit, it is determined that the FQHC has been underpaid, the FQHC will receive an adjusted payment amount.

Family Health Centers Audit Report Settlement Appeal

The Family Health Center Cost Report Audit. In 2016, the DHCS audited the Health Center's 2013 cost report and reclassified $78,032 in salary and benefit expenses related to community outreach as non-reimbursable. The audit report noted (1) there was insufficient documentation demonstrating that the expenses were related to services and supplies incident to an FQHC visit, and (2) the expenses were not a covered benefit under Welfare and Institutions Code section 14132.100.

Right to Appeal. California laws and regulations establish detailed appeal procedures applicable to the FQHC cost report audit process, including an appeal from a final audit report. A FQHC may request a hearing regarding disputed audit findings by submitting a statement of disputed issues to the DHCS. (Cal. Code Regs., tit. 22, § 51016, 51017.) The Health Center appealed the DHCS determination in 2017, and the DHCS hearing officer upheld the disallowance of the costs for outreach services. The hearing officer reasoned that Welfare and Institutions Code section 14132.100 defines the FQHC covered benefits reimbursable under the Medi-Cal program as physician services and services and supplies that meet the definition of being incident to an FQHC visit; and that the Health Center failed to demonstrate that its outreach encounters

lead to an FQHC visit and a covered benefit under the Welfare and Institutions Code. The Health Center subsequently requested a formal hearing in 2018, and the administrative law judge (ALJ) issued a decision finding that the 'community outreach services' did not involve patient care and instead were efforts to attract new patients and increase patient utilization of the plaintiff's services. The ALJ noted that members of the plaintiff's outreach staff were "tasked to 'promote awareness of the health center's services and support entry into care of the new patients contacted." These tasks included "attempting to make new patients 'comfortable enough to seek care,' such as through repeated 'passes' of contact." The ALJ concluded that the evidence established that the disallowed amounts were spent for patient recruitment efforts not reimbursable with Medi-Cal funds. The ALJ decision relied on part 413 of title 42 of the Code of Federal Regulations for the proposition that, to be reimbursable, costs must be reasonable and related to the care of beneficiaries. (42 C.F.R. § 413.9.)

The California Court of Appeals Decision

The California Court of Appeals agreed with the ALJ and made a determination that the DHCS did not abuse its discretion in finding that the plaintiff's community outreach costs were non-reimbursable. An HRSA requirement for the Health Center to perform outreach services as an FQHC grant recipient does not automatically make the associated costs reimbursable under Medicare (or Medi-Cal), even if they provide a benefit for the recipient. The regulations exclude costs that the program defines as not allowable, and the PRM makes clear that advertising costs "seek[ing] to increase patient utilization of the provider's facilities are not allowable." (PRM § 2136.2; 42 C.F.R.§ 413.9(c)(3) (2021).) The evidence showed that the plaintiff performed its outreach activities to "get the word out" about its various services and "develop awareness of each clinic's presence, resources, cultural competence, and desire to serve among members of [plaintiff's] target populations." It was not an abuse of discretion to find that such activities had the purpose and effect of bringing in new patients and increasing utilization of the plaintiff's facilities, making them akin to advertising.

The appellate court rejected the Health Center's contention that the trial court and the DHCS improperly construed and applied applicable guidelines in the Centers for Medicare & Medi-Cal Services Publication 15-1, the PRM. The appellate court concluded that the monies spent by the plaintiff were not an allowable cost because they were akin to advertising to increase patient utilization of the plaintiff's services.

Key Takeaways for Federally Qualified Health Centers

Cost claimed for governmental payor reimbursement must be allowable and adequately documented. Inaccurate cost report submissions can trigger False Claims Act liability under federal and state laws, and can result in civil money penalties and/or exclusion from the Medicare or Medi-Cal programs. Thus proper cost reporting practices for FQHCs are essential to minimize liability risks and maintain program revenues and cash flow. Below are key takeaways for FQHCs from the Family Health Center case.

1. *Allowable Cost Applicable Laws*. The reimbursement methodology for cost-based entities outlined in Title 42 of the Code of Federal Regulations CFR Part 413—the Provider Reimbursement Manual (CMS Pub. 15-1)—establish the principles and standards for determining allowable costs and the methodology for allocating and apportioning those expense to the Medi-Cal program.
2. *Patient Visit Tie to Allowable Costs*. Allowable costs are limited to direct, ancillary, physician/non-physician practitioner and overhead costs which are within the Health Center's scope of services, AND are directly related to the provision of covered services to eligible Medi-Cal/Medicare beneficiaries in eligible facilities.
3. *General Advertising and Marketing Expenses*. General advertising and marketing to promote an increase in the patient utilization of services is not properly related to the care of patients and therefore is not reimbursable as an allocable cost.

Hinshaw health care law attorneys have significant experience in advising Federally Qualified Health Centers on licensure and federal qualification, nonprofit governance, federal grants, and procurement law, Section 330 Public Health Service Act compliance, the Section 340B pharmacy discount program, mergers, acquisitions, joint ventures, affiliations, tax-

exempt bond financing, tax-exempt organization regulation and policy, political activity and federal election campaign law, business transactions, general contracts and agreements, health care regulatory, fraud and abuse, data privacy and cyber security, reimbursement and operational issues.