PretiFlaherty

Portland, ME
Augusta, ME
Concord, NH
Boston, MA
Washington, DC

Charles F. Dingman
cdingman@preti.com

August 12, 2016

VIA HAND DELIVERY AND E-MAIL

Mary C. Mayhew, Commissioner
Department of Health and Human Services
11 State House Station
Augusta, ME 04333-0011

RE: Appeal and Request for Hearing by Planned Parenthood of Northern New England Regarding MaineCare Recoupment Decision Dated June 10, 2016 (NPI 1578529350; Historical IDs 431964905 and 431964906)

Dear Commissioner Mayhew:

I am writing to you on behalf of Planned Parenthood of Northern New England ("Planned Parenthood" or "PPNNE") to appeal the Final Informal Review Decision (the "FIRD"), dated June 10, 2016, issued by the Director of the Division of Audit and received by Planned Parenthood on June 15, 2016. The FIRD reflected review of a Notice of Violation ("NOV") dated October 7, 2015, issued by the Program Integrity unit of the Division of Audit ("PI"). The NOV was based on an audit of claims submitted by Planned Parenthood to MaineCare for services rendered between July 1, 2007 and October 7, 2015 (the "Review Period"). For the reasons discussed below, Planned Parenthood hereby appeals the FIRD and requests an administrative hearing pursuant to Chapter I, Section 1.21 of the MaineCare Benefits Manual ("MBM").

I. INCORPORATION BY REFERENCE OF ARGUMENTS SET FORTH IN REQUEST FOR INFORMAL REVIEW

The FIRD provides minimal analysis beyond general recitations of the reasoning set forth in the NOV. Accordingly, in making this appeal, Planned Parenthood incorporates by reference, in its entirety, its Request for Informal Review, dated December 11, 2015 (the "Request," attached as **Exhibit 1**). In the Request, Planned Parenthood set forth the relevant background and made several arguments, which are summarized below – with references to the FIRD – and are discussed in more detail in the Request:

A. PI exaggerated the error rate used in extrapolating from sampled records by deciding not to sample and extrapolate only with respect to one of the two Planned Parenthood Provider IDs examined in this audit (Request at p. 4); the FIRD rejects PPNNE's argument in its Request solely on the ground that the number of claims under the first ID was small enough that sampling was unnecessary, ignoring the unfairness of focusing solely on the higher error rate portion of the whole universe of claims when conducting the extrapolation.

B. PI did not adequately explain the sampling methodology by which it reached its recoupment calculation – methodology that is unclear and potentially erroneous (Request at p. 4). In the FIRD, the Division of Audit asserts that its sample was drawn from "the entire universe of claims submitted to MaineCare for the review period," but the dollar amounts used in calculating the recoupment are inconsistent with this assertion. These dollar values indicate that PI in fact *preselected* some "universe" other than all claims submitted, and no explanation of how or on what basis such preselections were made has been provided. Likewise, the FIRD states generally that "Excel's random sampling methodology" was employed, which does not explain what assumptions were made in sampling from the unexplained subset of all claims. The FIRD fails to establish that statistically valid random sampling was conducted or that extrapolation was carried out consistently with the sampling methods used.

C. Informal but official guidance from the Department throughout the Review Period supported coverage of the services at issue in this audit. (Request at pp. 5-6.) The FIRD (at pp. 2-3) implies that such guidance (documentation of which has now been discovered as a result of information requests of the Department[1]) cannot supersede applicable statutes and rules, but in fact this prior guidance was consistent with applicable law, and the Department's subsequent change in its interpretation of its own rules is not dispositive nor could it have been anticipated during the Review Period.

D. State and federal guidance do not support the findings in the NOV and the FIRD (Request at p. 5). The FIRD relies excessively on selected examples from applicable federal guidance instead of the general principle, clearly articulated in federal guidance, that services "associated" with a non-allowable abortion are *allowable* if they "would have been performed on a pregnant woman regardless of whether she was seeking an abortion," CMS Manual 45, ch. 4, § 4432(B)(2). The FIRD also fails to recognize the strong federal policies favoring nondiscriminatory coverage of family planning services by State Medicaid programs..[2]

---

[1] PPNNE is aware of email messages produced by the Department in response to Freedom of Access Act requests made by similarly situated providers. PPNNE understands that additional information yet to be produced may reveal additional evidence in this respect. PPNNE will itself request copies of pertinent Department records in support of this appeal.
[2] See, e.g., CMS, Dear State Health Official Letter SHO #16-008 (June 14, 2016)(stressing access to family planning services including, at p. 5, coverage of such services when delivered immediately following a surgical procedure); CMS, Dear State Medicaid Director Letter # 14-003 (Apr. 16, 2014) ("Contraceptive counseling is a family planning service"); CMS, State Medicaid Manual § 4270(B)(1) ("In general, FFP at the 90 percent matching rate is available for the costs of counseling services and patient education, examination and treatment by medical professionals in accordance with applicable State requirements, laboratory examinations and test, medically approved methods, procedures, pharmaceutical supplies and devices to prevent conception, and infertility services, including sterilization reversals"). *See also* recent federal guidance stressing that States may not discriminate against providers that deliver covered services because they also deliver non-covered services such as certain abortion procedures, CMS, Dear State Medicaid Director Letter # SMD-16-005 (April 19, 2016)(clarifying "Free Choice of Provider" requirements).

E. PI arbitrarily made coverage determinations based on patients' presumed intent with respect to proceeding with an abortion (Request at p. 6).

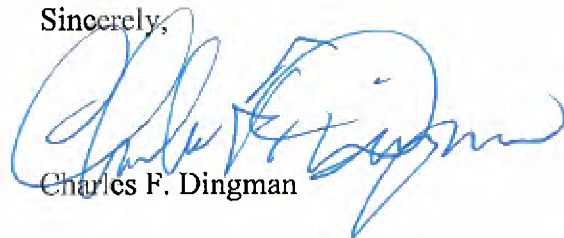
F. The FIRD implies that the timing of services in relation to abortion services is enough to make those other services "abortion related," yet neither Maine rules nor federal guidance support this conclusion (Request at pp. 5-6; see also footnote 2 to this appeal letter)

G. The NOV is based on constitutionally discriminatory policies (Request at p. 7).

II. CONCLUSION

For the reasons summarized above and further elaborated upon in the attached Request, Planned Parenthood respectfully requests an administrative appeal hearing and an ultimate decision that PI's recoupment demand be reduced to $411.90, the amount associated with claims for which no records were timely produced.[3]

Sincerely,



Charles F. Dingman

Enclosure
cc: Meaghan Gallagher, CEO
Heather Bushey, CFO
Nicole Clegg, Director of Public Affairs
Michael S. Smith (Preti Flaherty)

[3] Planned Parenthood is not appealing the recoupment demand with respect to the limited number of claims for which PI found no record support. (Request at p. 2 and footnotes 2 and 3.)

PPNNE
EXHIBIT 1
to Appeal and Request
for Hearing
August 12, 2016

Charles F. Dingman
cdingman@preti.com

December 11, 2015

VIA HAND DELIVERY AND E-MAIL

Herbert F. Downs, Director
Division of Audit
Department of Health and Human Services
11 State House Station
Augusta, ME 04333-0011

RE: Request for Informal Review of Notice of Violation issued to Planned Parenthood of Northern New England (NPI 1578529350; Historical IDs 431964905 and 431964906) Regarding Services Rendered Between July 1, 2007 and August 31, 2010

Dear Herb:

I am writing to you on behalf of Planned Parenthood of Northern New England ("Planned Parenthood" or "PPNNE") to request informal review of a Notice of Violation ("NOV") issued to it by the Program Integrity Unit ("PI"). The NOV, dated October 7, 2015, and received by PPNNE on October 13, 2015,[1] addressed billings for services during the period from July 1, 2007, through August 31, 2010 (the "Review Period"). For the reasons discussed below, Planned Parenthood respectfully requests an informal review and modification of the NOV's findings and sanctions pursuant to Chapter I, Section 1.21 of the MaineCare Benefits Manual ("MBM").

I. RESPONSE TO FINDINGS OF RECOUPMENT IN THE NOV

Planned Parenthood submits that, with the exception of a limited number of claims for which documentation cannot currently be retrieved, adequate support has been provided for payment of each claim reviewed by PI, and that PPNNE has not been overpaid with respect to any of the claims addressed in the NOV. PPNNE's position can be summarized as follows:

First, the apparently unorthodox sampling, error identification, and extrapolation methodologies applied by PI in this case would have produced an exaggerated calculation of the overpayment amount, even if PI were correct with regard to the errors found. The sparse information about these methodological issues makes it impossible for PPNNE to develop a detailed critique, and these concerns are subject to revision to the extent that your office can supplement the NOV with a meaningful explanation of PI's methods.

Second, with respect to the supposed errors that were not based on missing records, the NOV finds the associated claims to be erroneous because they coincide with the delivery of abortion services, which are not ordinarily covered by MaineCare. However, the ultrasounds and

[1] The date of receipt by PPNNE was confirmed in your email message to me dated October 26, 2015.

laboratory testing at issue were medically necessary reproductive healthcare services provided to pregnant women based on the clinical standard of care for such services and would have been provided *regardless* of whether the member ultimately did or did not undergo an abortion. Further, the contraception counseling/office visits at issue in the NOV are standard family planning medical care that is appropriately billable under MaineCare and has no connection to the provision of abortion services. Accordingly, these services were not "abortion-related services" and were therefore properly covered and paid by MaineCare. Viewing these services as medically necessary when considered independently, rather than as "related" to an abortion procedure or "ancillary" thereto merely because of the timing of their delivery, is in line with the Department's own interpretation and application of its rules during the Review Period, as shown by its representations to the providers of such services during that time.

Because it is not cost-effective for Planned Parenthood to undertake further research in closed, archived files to provide support for the claims for which PI found no record support, PPNNE concedes that the amounts paid *for those particular claims* should be repaid, and it is prepared to do so. However, because the sampling and extrapolation methods used in this audit appear to have been both unconventional and targeted, and because PPNNE believes that these services likely are supported by archived records rather than exposing a pattern of missing records, PPNNE does not agree that the error rate for these "no records" findings should be extrapolated to the larger universe of claims from which PI's sample was drawn.

II. BACKGROUND

A. The NOV

The NOV was purportedly based on an audit of Planned Parenthood's MaineCare billings covering the Review Period. Relying on the premise that "ancillary charges provided on the same day as . . . [non-covered] abortions are not considered covered services by MaineCare," the NOV concludes that Planned Parenthood must repay a total of $25,454.84. NOV at 1-2.

Specifically, with respect to Historical Medicaid ID #431964905 (the first spreadsheet attached to the NOV), PI determined that $556.30 of the $10,673.29 total claims reviewed were subject to recoupment because they were "related to services not covered by MaineCare . . . ." NOV at 2.[2] With respect to Historical Medicaid ID #431964906 (the second spreadsheet attached to the NOV), PI asserts that "[a] random sample was identified for the [Review Period] from a universe of $73,187.94 total claims paid," and that "[i]t was determined that $2,546.29 of the $7,485.08 total claims paid was related to services not covered by MaineCare."[3] NOV at 2. PI further asserts that this resulted in an error rate of 34.02% and an extrapolated $24,898.54 overpayment.

---

[2] Despite the language in the NOV, the spreadsheet cites "No Records – 100% Recoupment" with respect to $109.76 in alleged overpayments.
[3] Despite the language in the NOV, the spreadsheet cites "No Records – 100% Recoupment" with respect to $302.14 in alleged overpayments.

PI provides no explanation in the NOV regarding what methodology was used to isolate a "random" sample for its audit of the second ID #, either in terms of selecting a "universe" from which to draw that sample, or subsequently ensuring that the sample drawn was actually random. Nor does the NOV explain how PI determined the reasonableness of extrapolating errors found in multiple time periods, during which billing and clinical practices may have varied, to a universe of claims reflecting services throughout that multi-year period.

The narrative explanation in the NOV identifies as the sole basis for recoupment a finding that certain services reviewed were related to abortions not covered by MaineCare and thus also not covered pursuant to MBM ch. II, §§ 90.07 and 30.05. The "relationship" identified in the NOV is purely temporal, with no explanation of how the disallowed services, which are medically necessary on independent grounds, were viewed as "ancillary" merely because they were delivered "on the same day" that an abortion procedure is also provided.

The accompanying spreadsheets also identify certain instances where PI found "no records" to support the billing and payment that occurred.[4] In these instances, PI appears to have disallowed payment for that reason rather than solely because the service was delivered on the same day as an abortion.

B. Services at Issue

Ultrasounds and laboratory testing, which are among the services at issue in this matter, are medically necessary reproductive health services for any pregnant woman. The provision of an ultrasound serves to confirm the pregnancy, determine whether it is a continuing pregnancy (versus a miscarriage), and determine gestational age. Ultrasound and laboratory testing services provide information to the physician or nurse practitioner so that she or he can assess the status of the pregnancy and provide medical advice to the patient. The NOV also disallows payments for RhoGAM injections. This therapy is provided to a pregnant woman whenever indicated by an RH test, whether or not the woman will deliver or will choose to terminate her pregnancy through an abortion. Thus, like ultrasonography and laboratory testing, these injections are services that would be provided to a pregnant woman whether or not an abortion were performed. They are thus medically necessary prenatal treatment, under the circumstances indicated by RH testing, and are not ancillary to an abortion.

Contraception counseling, also at issue here, provides patients with information and methods to prevent unintended pregnancies and is provided to patients as part of Planned Parenthood's family planning services, which are covered by MaineCare and distinct from the abortion services that Planned Parenthood provides. With respect to patients who undergo abortions, it is Planned Parenthood's practice to provide contraceptive counseling on the same day as the abortion procedure, because patient care and outcomes are improved by providing that counseling while the patient is at the facility rather than requiring a follow-up appointment. The connection between the contraceptive counseling and the abortion procedure is solely temporal.

---

[4] See footnotes 2 and 3, *supra.*

While ultrasonography may not be provided in every instance in which a patient at Planned Parenthood is seeking advice and has not yet decided whether to terminate her pregnancy, it may well be offered to provide important information about the pregnancy. Beginning in 2009, Planned Parenthood discontinued routine billing of MaineCare for ultrasounds performed on the same day as an abortion. The precise reasons for making this decision – three years before MaineCare advised providers that it intended to disallow "same day" ultrasonography on the questionable ground that this timing caused it to be "ancillary" to the abortion – are unclear due to changes in provider personnel since that time. PPNNE's voluntary reduction in billing for ultrasounds does not in any sense change the characteristics of that service itself: it is a service routinely provided not only at family planning clinics such as those run by PPNNE but also by health care providers who are delivering prenatal care for women who have decided to continue their pregnancies. Thus, the service itself simply is not "abortion related" by any objective criterion.

III. ARGUMENT

A. PI Has Exaggerated the Overall Error Rate

The results of this audit are skewed by PI's decision not to extrapolate with regard to the first Provider ID but to do so for the second. PI offers no explanation for its conclusion that it should recoup only the actual dollar amount found to be in error with regard to the first ID number, whereas, with regard to the second ID number, it chose to extrapolate to some as-yet-unexplained larger universe of claims. Significantly, the error rate in the first instance is a much lower one. Why did PI choose only to extrapolate from the higher error rate found in the second instance? Looking at the two sites together, the combined error rate – even assuming that PI were correct in its erroneous findings – would be much lower. On informal review, this skewed approach to calculating error rates and extrapolating recoupment should be corrected, and the overall performance of the provider should be considered.

B. PI Has Not Explained its Sampling Methodology

The recoupment calculation method employed by PI is, at best, unclear and potentially erroneous. It appears that an error rate was computed on the ground that certain services reflected in a "random sample" were "related to" abortion services solely because of the date on which they were performed.[5] NOV at 2. The lack of information provided with respect to PI's sampling methodology gives rise to numerous crucial questions: How did PI choose the services and claims that were included in its sample set? What parameters did PI rely upon in defining the "universe" from which it drew the sample? Was the "random" sample statistically valid? What methods were undertaken to ensure the validity of the sample? What algorithm or computer program (if any) was used to conduct the sampling? The methodology is especially inscrutable in light of the absence of any definition of what constitutes a service that is

---

[5] Without elaboration, the NOV, relying on general language about services related to explicitly noncovered services, states: "Therefore, the ancillary charges provided on the same day as the abortions are not considered covered services by Maine Care."

"ancillary" to an abortion or any specific provision regarding non-coverage of "abortion related" services anywhere in the duly adopted rules of the Department.

C. State and Federal Guidance Do Not Support the NOV's Findings

During the Review Period, the MBM provided that MaineCare coverage was available for abortion services only when certain narrow criteria were met: "[R]eimbursement for abortion services will be made only if necessary to save the life of the mother, or if the pregnancy is the result of an act of rape or incest." MBM Chapter II, § 90.05-2(A). The NOV implicitly constructs and applies the concept of "abortion-related services" to assert that a variety of other services delivered to patients who also receive non-covered abortion services (*i.e.*, abortions not within the narrow criteria for coverage) are likewise not covered. This novel construct of what constitutes a service that is ancillary to an abortion is loosely based on MBM Chapter II, section 90.07, which states that "[w]hen MaineCare does not cover specific procedures . . . all services related to that procedure are not covered, including physician, facility, and anesthesia services."

This language by its terms supports the conclusion that when a non-covered abortion is administered, physician, facility, and anesthesia services "related to that procedure" are not covered. But there is nothing in the MBM to suggest that standard ultrasounds, laboratory tests, and contraception counseling/office visits – none of which are listed in the section 90.07 provision with regard to non-covered procedures, and all of which would be provided to a patient irrespective of whether she ultimately received an abortion – are "ancillary" to an abortion procedure.

Conversely, the Centers for Medicare and Medicaid Services State Medicaid Manual, CMS Paper-Based Manual 45, Chapter 4, § 4432(B)(2) (hereinafter "State Manual"), states that "FFP is also available for the costs of certain specific services associated with a non-Federally funded abortion *if those services would have been performed on a pregnant woman regardless of whether she was seeking an abortion.*" (Emphasis added.) It is without question that the provision of ultrasounds and laboratory tests are standard prenatal medical services, the provision of which is medically necessary under the standard of care for pregnancy regardless of the choices the patient ultimately makes concerning termination or continuation of the pregnancy. Likewise, contraception counseling/office visits constitute standard family planning medical services that are billable under MaineCare. Nevertheless, PI asserts that "[a]though federal regulations may allow for federal financial participation for reimbursement, MaineCare policy does not." NOV at 1.

To the contrary, not only is coverage of the services at issue here consistent with these federal provisions, but it also comports with the plain language of section 90.07 of the MBM. That provision specifically lists physician, facility, and anesthesia services "related to" a non-covered procedure such as abortion. Counseling with regard to the contraceptive options available to a woman, while a physician service, clearly bears no relationship to, and cannot be considered ancillary to, an abortion. The other services that PI now purports to treat as non-covered are not even mentioned in section 90.07, which only lists physician, facility, and anesthesia services. Ultrasounds and laboratory work are generally required to care for a

pregnant woman and thus plainly do not fall within the exclusion of coverage for certain abortions. These services are therefore eligible for FFP under federal law. Accordingly, there is no rational basis to read the relevant provisions of the MBM so as to deny coverage for the services addressed in the NOV.

Throughout the Review Period, the Department itself unequivocally interpreted the MBM to allow coverage of the services at issue in this appeal. Beth Ketch, Director of Customer Service at the Department, consistently advised providers of family planning services, including abortions, that the Department interpreted the MBM as providing coverage for medically necessary reproductive healthcare services provided to pregnant women based on the clinical standard of care for such services, regardless of whether they ultimately underwent an abortion procedure. This advice is consistent with the federal standard set forth in the State Manual.

The NOV implies that services must necessarily be "ancillary" to abortion services and for that reason non-covered under section 90.07 when they are "provided on the same day as the abortions." NOV at 1. But the mere fact that a member had an abortion does not establish that a given procedure provided on the same day was "ancillary" to that abortion, in the new parlance adopted in the NOV. Instead, consistent with federal guidance to the states regarding implementation of the congressionally mandated abortion restriction, in the State Manual cited and quoted above, FFP is available, and hence coverage is obviously not prohibited, for services that "would have been performed on a pregnant woman regardless of whether she was seeking an abortion." Because Maine's abortion restrictions are explicitly intended to implement the federal restrictions[6], the State Manual persuasively validates the coverage of ultrasound, laboratory, and contraception counseling services, and related office visits, whether or not they occurred in close temporal proximity to an abortion procedure.

To summarize: if the services themselves would have been provided to a pregnant woman regardless of her ultimate choice with respect to whether to terminate the pregnancy, there is nothing in the MBM or in federal guidance that establishes that such a service is not covered. This conclusion is reinforced by the fact that the Department did not treat these services as falling within the scope of section 90.07 until its recent publication of notices reversing the prior, longstanding interpretation that these services fell outside the abortion restriction. These reversals were not adopted as rule changes and were first published well after the end of the Review Period. Thus, they lack the force of law and certainly cannot be applied to periods before they were promulgated at all.

D. PI Arbitrarily Made Coverage Determinations Based on Patients' Presumed Intent

The errors identified in the NOV also appear to rest on arbitrary opinion concerning whether and to what extent the "intent" of a given patient was to proceed with an abortion. Until the abortion procedure is in fact performed, the choice remains with the patient, and services that would be provided whether or not an abortion is performed remain medically necessary and

---

[6] See the opening phrase of MBM ch. II, § 95.05(A), "In compliance with PL 103-112, the Health and Human Services Appropriations bill, ..."

therefore not subject to the federally mandated restriction on abortion services that is echoed in the MaineCare rules. Planned Parenthood respectfully submits that, consistent with applicable federal guidance, the NOV should not have presumed that an otherwise medically necessary, covered service should not have been billed, merely because of an inferred "intent" to receive a subsequent, non-covered service, whether or not that service was rendered on the same date.

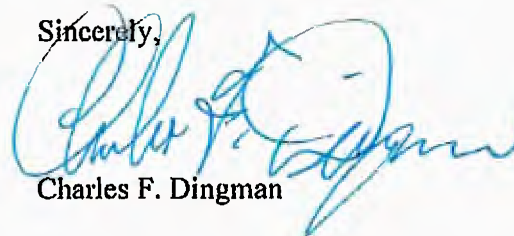
E. The NOV Is Based on Unconstitutionally Discriminatory Policies

Planned Parenthood believes that you can and should limit this recoupment to discrete instances of missing records, for all of the reasons stated above. If you do so, you need not reach the question of unconstitutional discrimination regarding ultrasound and similar services or the issue of unconstitutional restrictions on abortion itself. Nevertheless, for purposes of preserving the issue for appeal, Planned Parenthood further states that the Department's apparent policy of providing reimbursement for certain procedures for patients who initially planned to undergo an abortion but later decided against it, but not to patients who choose to proceed with an abortion, is discriminatory and in violation of the Maine and United States Constitutions. Furthermore, notwithstanding the Hyde Amendment, it is Planned Parenthood's position that there is no rational basis or compelling state interest to support the Department's decision to fund medical services for an indigent pregnant woman who elects to carry her pregnancy to term while refusing to fund medical services for an indigent pregnant woman who elects to terminate her pregnancy. For these reasons as well, all of the services billed and supported by the provider's records should be paid.

CONCLUSION

For the reasons discussed above, PI's retrospective reinterpretation of the MBM to prohibit coverage for services that were provided to patients who also may have received an abortion is inappropriate and without support in the MBM or related federal authority. Moreover, the sampling methods and extrapolation on which the NOV rests appear to be unreliable and skewed toward exaggerating the overpayment amount. Accordingly, Planned Parenthood respectfully requests a finding that the NOV was so affected by error that no recoupment should be made for the services addressed therein, except for the particular claims for which no records were retrieved and provided to PI.

Sincerely,



Charles F. Dingman

cc: Meagan Gallagher, CEO
Heather Bushey, CFO
Denise Osgood, Program Audit Manager, Program Integrity Unit, DHHS
Nicole Clegg, Director of Public Affairs
Michael S. Smith, Esq. (Preti Flaherty)