DIVISION CIRCULAR #54

DEPARTMENT OF HUMAN SERVICES
DIVISION OF DEVELOPMENTAL DISABILITIES

EFFECTIVE DATE: March 18, 2024

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(Rescinds Division Circular #54 issued on November 19, 2008)

I. TITLE: FEDERAL DEFICIT REDUCTION ACT OF 2005, Section 6032 Policy on Fraud, Waste and Abuse

II. PURPOSE: The purpose of this circular is to establish policies and procedures for all employees and contractors or agents in order to prevent and detect fraud, waste and abuse in Medicaid and other federally funded programs, and to provide detailed information about the federal and state laws on false claims; fraud, waste and abuse; and whistleblower protections.

III. SCOPE: This circular applies to the Division of Developmental Disabilities' developmental centers, Community Care Program, Supports Program, and all qualified or contracted providers of the Division of Developmental Disabilities (DDD) in their capacity as Medicaid providers.

IV. POLICY: Section 6032 of the Federal Deficit Reduction Act of 2005, codified at 42 U.S.C. 1396a(a)(68), requires certain governmental, for-profit and non-profit providers and other entities that receive Medicaid funding to take actions that will address fraud, waste and abuse in health care programs that receive federal funds. It is Division of Developmental Disabilities (DDD) policy to comply with the federal and state laws and regulations related to Section 6032 of the Deficit Reduction Act, including: the Federal False Claims Act; the Federal Program Fraud Civil Remedies Act; the New Jersey False Claims Act; the New Jersey Medical Assistance and Health Services Act; the New Jersey Health Care Claims Fraud Act; the New Jersey Conscientious Employee Protection Act; and the New Jersey Insurance Fraud Prevention Act.

V. GENERAL STANDARDS:

A. Section 6032 of the Deficit Reduction Act provides that:

1. Governmental, for-profit and non-profit providers and other entities that receive Medicaid funding are required to establish written policies for all employees and contractors or agents that provide detailed information about the federal and state laws on false claims; fraud, waste and abuse; whistleblower protections; and administrative remedies and penalties for false claims or statements;

2. Include as part of the written policies, detailed provisions regarding the entity's policies and procedures for detecting and preventing fraud, waste, and abuse, and;

3. Provide employees with information regarding their rights to be protected as whistleblowers.

4. Under Section 6032, DDD qualified and contracted providers must establish and make available to their employees, contractors and agents, policies that explain:

   a) the federal and New Jersey laws that deal with false claims in Medicaid, Medicare and other federally funded health care programs; and

   b) the policies and procedures that they have in place to detect and prevent fraud, waste and abuse in these programs.

5. The contractors and agents that do business with DDD qualified and contracted providers must adopt policies and make them available to their employees.

6. DDD components are required to post information on how employees may report Medicaid fraud, waste or abuse.

B. Definitions:

For purposes of this circular, the following terms are defined below:

"Claim" means any request or demand for money that is submitted to the federal or state government or its contractors.

"Contractor or agent" means any contractor, subcontractor, or agent, or other person who, on behalf of DDD, furnishes, or otherwise authorizes the furnishing of Medicaid health care items or services, including items or

services through the DDD Community Care Program, Supports Program, and/or developmental centers, performs billing or coding functions, or is involved in monitoring of health care provided by DDD.

"Knowing or knowingly" means that a person has actual knowledge of the information or acts in deliberate ignorance or reckless disregard of the truth or falsity of the information**.** Proof of specific intent to defraud is not required.

"Whistleblower" means a person, generally an employee, who provides information regarding fraud, waste, abuse or other illegal acts by an employer. Whistleblowers have certain rights and protections under the law.

C. Procedure for Reporting Fraud, Waste or Abuse:

1. If you are an employee at DDD, or an employee of a contractor or agent of DDD, and believe that there is fraud, waste or abuse in Medicaid, Medicare or any other health care program receiving federal or state funds, you may report:

   a. Directly to the DDD Compliance Officer, Division of Developmental Disabilities, P.O. Box 726, Trenton, NJ 08625, Phone: 800-626-6077 or report your concerns to your supervisor. Your supervisor will then report this to the DDD Compliance Officer for review and appropriate action. Your supervisor will keep your name confidential if you wish.

   b. For Medicaid, DDD Community Care or Supports Program, NJ FamilyCare, General Assistance or any other program for which the Division of Medical Assistance and Health Services (DMAHS) is responsible**,** in whole or in part**,** to the New Jersey Office of the State Comptroller Medicaid Fraud Division at 1-888-9FRAUD5 (1-888-937-2835 or online at: https://www.nj.gov/comptroller/about/work/medicaid/complaint.shtml. You may remain anonymous and may receive a reward if your complaint leads to a recovery.

   c. For Medicare, or any other health care program involving only federal funds, to the Federal Office of Inspector General in the U.S. Department of Health and Human Services at 1-800-HHS-TIPS (1-800-447-8477) or online at: https://oig.hhs.gov/fraud/report-fraud/. You may remain anonymous.

   d. For any other insurance program, to the New Jersey Insurance Fraud Prosecutor at 1-877-55-FRAUD (1-877-553-7283) or online

at https://www.njoag.gov/report-fraud/. You may remain anonymous and may receive a reward if your complaint leads to a recovery.

2. If you report fraud, waste or abuse, you are protected as a whistleblower from any punishment or other retaliation by your employer, under the New Jersey Conscientious Employee Protection Act**,** the New Jersey False Claims Act and the Federal False Claims Act.

   a. If you are a whistleblower, you may file a lawsuit called a "qui tam" action in federal court under the Federal False Claims Act**,** or in either federal or State court under the New Jersey False Claims Act. These laws also protect you from punishment or other retaliation by your employer, and if the lawsuit is successful, you may receive a share of the recovery. These laws are described in more detail below.

D. Information on Relevant Federal and State Statutes

The following information is for reference purposes only. Refer to the actual statute for additional information.

1. Federal False Claims Act, 31 U.S.C. 3729-3733

The Act establishes liability when any person or entity improperly receives payment from or avoids payment to the federal government. In summary, the Act prohibits:

a. Knowingly presenting or causing to be presented to the government a false claim for payment;
b. Knowingly making, using, or causing to be made or used, a false record or statement to get a false claim paid or approved by the government;
c. Conspiring to defraud the government by getting a false claim allowed or paid;
d. Falsely certifying the type or amount of property to be used by the government;
e. Certifying receipt of property on a document without completely knowing that the information is true;
f. Knowingly buying government property from an unauthorized officer of the government, and;
g. Knowingly making, using, or causing to be make or used a false record to avoid or decrease an obligation to pay or transmit property to the government.

Any individual or entity engaging in any of the prohibited actions, including the submission of false claims to federally funded health care programs, is liable for a civil penalty which as of January 30, 2023 is between $13,508 and $27,018 per false claim, plus three times the amount of damages sustained by the federal government. The amount of the false claims penalty is adjusted periodically for inflation in accordance with a federal formula. See 28 C.F.R. 85.5 for the current rate.

The U.S. Attorney General may bring an action under this law. In addition, the law provides that any whistleblower may bring an action under this act on their own behalf and for the United States Government. These actions, which must be filed in U.S. District Court, are known as "qui tam" actions. The Government, after reviewing the complaint and supporting evidence, may decide either to take over the action, or decline to do so, in which case the whistleblower may bring the action. If either the Government or the whistleblower is successful, the whistleblower is entitled to receive a percentage of the recovery. If prosecuted by the federal government, these qui tam actions are generally handled by the various U.S. Attorney's Offices, or by the U.S. Justice Department.

Whistleblower Protections:

Any employee who is subject to retaliation or discrimination by an employer in the terms and conditions of employment because the employee lawfully sought to take action or assist in taking action under this act "shall be entitled to all relief necessary to make the employee whole." This includes reinstatement with seniority restored, double the amount of back pay, interest on back pay, and compensation for any special damages sustained as a result of the employer's actions, including litigation costs and reasonable attorney's fees.

2. <u>Federal Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812</u>

This Act provides federal administrative remedies for false claims and statements, including those made to federally funded health care programs. As of January 30, 2023 civil penalties are $13,508 for each false claim or statement, and an assessment in lieu of damages sustained by the federal government of up to double damages for each false claim for which the government makes a payment. The amount of the false claims penalty is to be adjusted periodically for inflation in accordance with a federal formula. See 28 C.F.R. 85.5 for the current rate.

3. New Jersey False Claims Act, N.J.S.A. 2A:32C-1 et seq.

The New Jersey False Claims Act (NJFCA) has similar provisions and prohibited acts as the Federal False Claims Act. For example, the Attorney General may bring an action against an individual or entity that makes a false claim. In addition, the NJFCA allows individuals to bring a private action in the name of the State and individuals may be able to collect a portion of the penalty. The NJFCA also includes similar whistleblower protections to those under the Federal False Claims Act. The NJFCA provides that a person will be liable to the State for the same penalties as under the Federal False Claims Act.

4. New Jersey Medical Assistance and Health Services Act – Criminal Penalties, N.J.S.A. 30:4D-17(a)-(d)

This Act provides criminal penalties for individuals and entities engaging in fraud or other criminal violations relating to Title XIX-funded programs. They include:

a) fraudulent receipt of payments or benefits: crime of the third degree punishable by a fine of up to $15,000, imprisonment for up to 5 years, or both;
b) false claims, statements or omissions, or conversion of benefits or payments: crime of the third degree punishable by a fine of up to $15,000, imprisonment for up to 5 years, or both;
c) kickbacks, rebates and bribes: crime of the third degree punishable by a fine of up to $15,000, imprisonment for up to 5 years, or both; and
d) false statements or representations about conditions or operations of an institution or facility to qualify for payments: crime of the fourth degree punishable by a fine of up to $10,000, or imprisonment for up to 18 months, or both.

Authorized sentencing dispositions may be found at N.J.S.A. 2C:43-2 and 43-6.

Criminal prosecutions are handled by the Medicaid Fraud Control Unit within the Office of Insurance Fraud Prosecutor, in the Office of the Attorney General.

Civil Remedies, N.J.S.A. 30:4D-17(e)-(l); N.J.S.A. 30:4D-17.1.a

In addition to the criminal sanctions discussed above, violations of the New Jersey Medical Assistance and Health Services Act can also result in the following civil sanctions:

a) unintentional violations: recovery of overpayments and interest;
b) intentional violations: recovery of overpayments, interest, up to triple damages, a penalty not to exceed the amount of civil penalty under the Federal False Claims Act, and an additional penalty between $10,000 and $25,000.

Recovery actions are pursued administratively by the Medicaid Fraud Division in the New Jersey Office of the State Comptroller, and can be obtained against any individual or entity responsible for, in receipt of, or in possession of the incorrect payments.

In addition to recovery actions, violations can result in the exclusion of an individual or entity from participation in all health care programs funded in whole or in part by the Division of Medical Assistance and Health Services. Recovery and exclusion can also be obtained as part of a criminal prosecution by the Medicaid Fraud Control Unit within the Office of the Insurance Fraud Prosecutor, in the Office of the Attorney General.

5. New Jersey Health Care Claims Fraud Act, N.J.S.A. 2C:21-4.2- 4.3; N.J.S.A. 2C:51-5

This Act provides the following criminal penalties for health care claims fraud, including the submission of false claims to programs funded in whole or in part with state funds:

a. A practitioner who knowingly commits health care claims fraud in the course of providing professional services is guilty of a crime of the second degree, and is subject to a fine of up to 5 times the monetary benefits obtained or sought to be obtained and to permanent forfeiture of their license;

b. A practitioner who recklessly commits health care claims fraud in the course of providing professional services is guilty of a crime of the third degree, and is subject to a fine of up to 5 times the monetary benefits obtained or sought to be obtained and the suspension of their license at least 1 year;

c. A person who is not a practitioner who knowingly commits health care claims fraud is guilty of a crime of the third degree. Such a

person is guilty of a crime of the second degree if that person knowingly commits 5 or more acts of health care claims fraud, and the aggregate monetary benefit obtained or sought to be obtained is at least $1,000. In addition to all other criminal penalties allowed by law, such a person may be subject to a fine of up to 5 times the monetary benefit obtained or sought to be obtained;

d. A person who is not a practitioner is guilty of a crime of the fourth degree if that person recklessly commits health care claims fraud. In addition to all other criminal penalties allowed by law, such a person may be subject to a fine of up to 5 times the monetary benefit obtained or sought to be obtained.

6. <u>New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et. seq</u>

New Jersey law prohibits an employer from taking any retaliatory action against an employee because the employee does any of the following:

a. Discloses, or threatens to disclose, to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation issued under the law, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation issued under the law by the employer, or another employer, with whom there is a business relationship, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

c. Provides information involving deception of or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity.

d. Provides information regarding any perceived criminal or fraudulent activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer,

employee, former employee, retiree or pensioner of the employer or any governmental entity.

e. Objects to, or refuses to participate in, any activity, policy or practice which the employee reasonably believes:

   i. is in violation of a law, or a rule or regulation issued under the law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
   ii. is fraudulent or criminal; or
   iii. is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

The protection against retaliation, when a disclosure is made to a public body, does not apply unless the employee has brought the activity, policy or practice to the attention of a supervisor of the employee by written notice and given the employer a reasonable opportunity to correct the activity, policy or practice. However, disclosure is not required where the employee reasonably believes that the activity, policy or practice is known to one or more supervisors of the employer or where the employee fears physical harm as a result of the disclosure, provided that the situation is emergent in nature.

7. <u>New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1, et seq.</u>

The purpose of this law is to address insurance fraud in New Jersey by facilitating its detection, eliminating its occurrence and requiring restitution. A person or practitioner is in violation of the Act if they:

a. make false statements regarding an insurance claim;
b. conceal or fail to disclose events that affect a person's right to insurance benefits or payments;
c. make false statements on an insurance application in order to obtain a policy;
d. conspire with or urge any person or practitioner to violate the provisions of the Act; or
e. knowingly benefit from the violation of the Act.

The Commissioner of Banking and Insurance may bring civil actions or levy civil administrative penalties for violations of the Act, including:

1. a penalty of not more than $5,000 for the first violation, $10,000 for the second violation, and $15,000 for each subsequent violation;
2. court costs and attorney's fees;
3. restitution to an insurance company or any person suffering loss; and
4. a surcharge of $1,000, or if there is a settlement, a surcharge of 5% of the settlement payment. Surcharges fund fraud prevention programs.

Jonathan Seifried

Jonathan S. Seifried
Assistant Commissioner