

7448

2009-2010 Regular Sessions

I N   A S S E M B L Y

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Introduced by M. of A. SCHIMMINGER, BENEDETTO, COLTON, DeMONTE, FIELDS, GABRYSZAK, HEASTIE, JAFFEE, JOHN, SCHROEDER -- Multi-Sponsored by -- M. of A. CANESTRARI, CHRISTENSEN, GREENE, GUNTHER, HAWLEY, KOON, MAGEE, MAISEL, PHEFFER, REILLY -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to audits of Medicaid pharmacy providers

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. The public health law is amended by adding a new section  
2     32-a to read as follows:  
3     S 32-A. AUDITING STANDARDS. NOTWITHSTANDING ANY OTHER PROVISION OF  
4     LAW, AN AUDIT OF THE MEDICAID-RELATED RECORDS OF A PHARMACY PROVIDER  
5     SHALL BE CONDUCTED AS FOLLOWS:  
6     1. THE DEPARTMENT, THE OFFICE, OR ANY CONTRACT AUDITOR CONDUCTING AN  
7     AUDIT OF A PHARMACY PROVIDER'S MEDICAID OPERATIONS ON BEHALF OF THE  
8     DEPARTMENT SHALL PROVIDE APPROPRIATE INDIVIDUALS IN THE CENTRAL OFFICES  
9     OF THE PROVIDER'S OPERATIONS WITH NOTICE AT LEAST SEVEN BUSINESS DAYS  
10    PRIOR TO AN ON-SITE AUDIT. AN AUDIT MAY NOT BE SCHEDULED DURING THE  
11    FIRST FIVE BUSINESS DAYS OF ANY CALENDAR MONTH.  
12    2. THE DEPARTMENT, THE OFFICE, OR A CONTRACT AUDITOR SHALL ACCEPT  
13    ELECTRONIC RECORDS FOR AUDITING UNDER THE SAME TERMS AND CONDITIONS AND  
14    FOR THE SAME PURPOSES AS THE PAPER ANALOGS OF SUCH RECORDS, TO THE  
15    EXTENT SUCH RECORDS ARE OTHERWISE ACCEPTABLE AND LEGAL UNDER STATE AND  
16    FEDERAL PHARMACY, FOOD AND DRUG, AND MEDICAID LAWS. POINT OF SALE ELEC-  
17    TRONIC REGISTER DATA MAY QUALIFY AS PROOF OF DELIVERY TO THE MEDICAID  
18    RECIPIENT, AND ELECTRONIC BENEFICIARY SIGNATURE LOGS, ELECTRONIC TRACK-  
19    ING OF PRESCRIPTIONS, ELECTRONIC PRESCRIBER PRESCRIPTION TRANSMISSIONS,  
20    AND IMAGERY OF HARD COPY PRESCRIPTIONS SHALL BE ACCEPTABLE.  
21    3. IF AN AUDIT IS TO BE CONDUCTED BY A CONTRACT AUDITOR, THE CONTRACT  
22    AUDITOR'S PAYMENT FOR THE AUDIT MAY NOT BE BASED ON THE NUMBER OF CHAL-

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets [ ] is old law to be omitted.

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1 LENGED OR DENIED CLAIMS IDENTIFIED BY THE CONTRACT AUDITOR OR THE AMOUNT  
2 ALLEGED BY THE AUDITOR TO BE OWED.

3 4. EACH MEDICAID PHARMACY AUDIT SHALL BE CONDUCTED BY A FIELD AGENT  
4 WHO POSSESSES THE REQUISITE EXPERTISE IN THE RELEVANT PROVIDER PRACTICE.  
5 THE AUDITOR SHALL CONDUCT THE AUDIT:

6 (A) IN ACCORDANCE WITH GENERALLY ACCEPTED:

7 I. ACCOUNTING PRINCIPLES, STANDARDS, AND PROCEDURES; AND

8 II. AUDITING PRINCIPLES, STANDARDS, AND PROCEDURES; AND

9 (B) USING STANDARDS AND PARAMETERS ESTABLISHED BY FINAL REGULATION  
10 THAT ARE IDENTICAL FOR ALL AUDITS CONDUCTED.

11 5. ANY AUDIT INVOLVING THE REVIEW OF CLINICAL OR PROFESSIONAL JUDGMENT  
12 SHALL BE CONDUCTED BY OR IN CONSULTATION WITH THE STATE BOARD OF PHARMA-  
13 CY.

14 6. THE PERIOD COVERED BY AN AUDIT MAY NOT EXCEED ONE YEAR FROM THE  
15 DATE THE EARLIEST CLAIM WAS SUBMITTED TO THE DEPARTMENT FOR ADJUDI-  
16 CATION.

17 7. EACH PHARMACY PROVIDER SHALL BE AUDITED ACCORDING TO THE SAME STAN-  
18 DARDS, PARAMETERS, AND PROCEDURES AS OTHER SIMILAR AND SIMILARLY SITU-  
19 ATED PHARMACY PROVIDERS AUDITED BY THE DEPARTMENT, THE OFFICE, OR THE  
20 CONTRACT AUDITOR.

21 8. A CLERICAL OR RECORD-KEEPING ERROR SUCH AS A TYPOGRAPHICAL ERROR, A  
22 SCRIVENER'S ERROR, OR A COMPUTER ERROR IN A REQUIRED DOCUMENT OR RECORD  
23 SUBMITTED IN AN AUDIT MAY NOT BE DEEMED BY THE DEPARTMENT, THE OFFICE,  
24 OR THE CONTRACT AUDITOR TO CONSTITUTE A WILLFUL VIOLATION OF THE STATE  
25 MEDICAID LAW, AND MAY NOT BE SUBJECT TO CRIMINAL PENALTIES WITHOUT PROOF  
26 OF A WILLFUL INTENT TO COMMIT FRAUD.

27 9. A FINDING OF AN OVERPAYMENT OR UNDERPAYMENT MAY BE DETERMINED USING  
28 PROBABILITY SAMPLING OR EXTRAPOLATION BASED ON THE NUMBER OF PATIENTS  
29 SERVED HAVING A SIMILAR DIAGNOSIS, OR ON THE NUMBER OF SIMILAR ORDERS OR  
30 REFILLS OF SIMILAR DRUGS.

31 10. THE DEPARTMENT, THE OFFICE, OR A CONTRACT AUDITOR CONDUCTING AN  
32 AUDIT OF A MEDICAID PHARMACY MAY NOT USE PROBABILITY SAMPLING OR EXTRAP-  
33 OLATION TO DETERMINE OVERPAYMENT AMOUNTS DUE TO BE RECOVERED BY RECOUP-  
34 MENT, OFFSET, OR OTHERWISE FROM THE PHARMACY UNLESS THE DEPARTMENT AND  
35 THE AUDITING ENTITY DETERMINE THAT:

36 (A) THERE IS A PATTERN OF A HIGH LEVEL OF PAYMENT ERROR SUSTAINED BY  
37 THAT SPECIFIC PHARMACY PROVIDER THROUGHOUT THE AUDITED PERIOD;

38 (B) IF THE OVERPAYMENTS ARE THE RESULT OF CLERICAL OR RECORD-KEEPING  
39 ERRORS, THEY ARE WILLFUL;

40 (C) DOCUMENTED EDUCATIONAL INTERVENTION HAS FAILED TO CORRECT THAT  
41 SUSTAINED HIGH LEVEL OF PAYMENT ERROR;

42 (D) THE EXTRAPOLATION IS MADE FROM A STATISTICALLY VALID SAMPLE OF  
43 CLAIMS;

44 (E) THE LEVEL OF CONFIDENCE FROM EXTRAPOLATION IS PROJECTED BY AN  
45 INDEPENDENT STATISTICIAN NOT EMPLOYED BY OR CONNECTED TO THE AUDITING  
46 ENTITY TO BE NINETY-FIVE PERCENT OR GREATER; AND

47 (F) THE SAMPLE SIZE OF THE CLAIMS REVIEWED IS AT LEAST TEN PERCENT OF  
48 THE TOTAL CLAIMS FOR WHICH OVERPAYMENTS DUE ARE BEING EXTRAPOLATED.

49 11. AN EXTRAPOLATION MAY NOT BE BASED ON THE PRACTICE PATTERNS OF ANY  
50 PHARMACY PROVIDER OTHER THAN THE INDIVIDUAL PROVIDER BEING AUDITED.

51 12. ANY PROBABILITY SAMPLING AND EXTRAPOLATION PERFORMED BY THE  
52 DEPARTMENT, THE OFFICE, OR A CONTRACT AUDITOR IN THE COURSE OF AN AUDIT  
53 SHALL BE PERFORMED IN CONFORMITY WITH GENERALLY ACCEPTED STATISTICAL  
54 STANDARDS AND PROCEDURES, WHICH SHALL BE MADE AVAILABLE, UPON REQUEST,  
55 TO THE AUDITED PHARMACY.

1 13. AN AUDITED PHARMACY SHALL BE ALLOWED AT LEAST TEN BUSINESS DAYS TO  
2 PRODUCE DOCUMENTATION TO ADDRESS THE AUDITING ENTITY'S QUESTIONS ABOUT A  
3 DOCUMENT OR RECORD PRODUCED IN AN AUDIT.

4 14. A PHARMACY MAY USE THE RECORDS OR ORDER OF A PRESCRIBING PHYSI-  
5 CIAN, HOSPITAL, OR OTHER AUTHORIZED PRESCRIBER OF DRUGS OR SUPPLIES,  
6 WRITTEN OR TRANSMITTED BY ANY LEGAL AND ACCEPTABLE MEANS OF COMMUNI-  
7 CATION, TO VALIDATE A PHARMACY RECORD OF A PRESCRIPTION DRUG ORDER OR  
8 REFILL OF A LEGEND OR NARCOTIC DRUG.

9 15. THE DEPARTMENT, THE OFFICE, OR THE CONTRACT AUDITOR SHALL DELIVER  
10 TO RESPONSIBLE INDIVIDUALS IN THE CENTRAL OFFICES OF THE OPERATIONS OF  
11 THE AUDITED PHARMACY:

12 (A) A PRELIMINARY AUDIT REPORT, WITHIN NINETY CALENDAR DAYS AFTER THE  
13 CONCLUSION OF THE AUDIT.

14 (B) A FINAL AUDIT REPORT, WITHIN ONE HUNDRED EIGHTY CALENDAR DAYS  
15 AFTER THE LATER OF RECEIPT OF THE AUDIT REPORT BY THE PHARMACY OR THE  
16 ISSUANCE OF ANY FINAL DECISION IN AN ADMINISTRATIVE APPEAL OF THE  
17 PRELIMINARY AUDIT REPORT.

18 16. ABSENT FRAUD OR ABUSE BY THE AUDITED PHARMACY PROVIDER, THE  
19 DEPARTMENT OR THE OFFICE MAY NOT RECOUP ANY PART OF A CLAIM THAT WAS, IN  
20 WHOLE OR PART, PREVIOUSLY ADJUDICATED AS FULLY PAYABLE.

21 17. WHENEVER A FINAL DETERMINATION IS MADE THAT A RECOVERY FROM AN  
22 AUDITED PHARMACY PROVIDER IS WARRANTED, THE FUNDS MAY BE RECOVERED ONLY  
23 THROUGH THE FOLLOWING METHODS:

24 (A) THE DEPARTMENT OR THE OFFICE MAY RECOVER FUNDS BY CHECK IF THE  
25 PHARMACY PROVIDER IS NOTIFIED ON THE WRITTEN NOTIFICATION OF THE FINAL  
26 AUDIT DETERMINATION OF:

27 (I) ANY NECESSARY PAYEE INFORMATION;

28 (II) CLAIM DETAILS, INCLUDING THE AMOUNTS OF EACH CONFIRMED OVERPAID  
29 OR MISPAID CLAIM; AND

30 (III) TOTAL AMOUNT DUE.

31 (B) THE DEPARTMENT, THE OFFICE, OR A CONTRACT AUDITOR MAY RECOVER FROM  
32 A PHARMACY PROVIDER THROUGH ELECTRONIC REMITTANCE IN THE FEDERALLY-AP-  
33 PROVED FORMAT THAT IS IN PLACE AT THE TIME OF THE FUNDS RECOVERY, IF  
34 CLAIMS ARE DETAILED WITH THE APPROPRIATE NATIONAL COUNCIL OF  
35 PRESCRIPTION DRUG PROGRAMS ADJUSTMENT CODE INDICATING AUDIT. EACH CLAIM  
36 LEVEL ELECTRONIC REMITTANCE RECOVERY SHALL INCLUDE THE PROVIDER'S IDEN-  
37 TIFICATION NUMBER, THE PRESCRIPTION NUMBER FOR THE RECOVERED CLAIM, THE  
38 DATE OF SERVICE OF THE CLAIM TRANSACTION, AND THE RECOVERY AMOUNT FOR  
39 SUCH CLAIM.

40 18. THIS SECTION DOES NOT APPLY TO ANY INVESTIGATIVE AUDIT CONDUCTED  
41 BY THE DEPARTMENT, THE OFFICE, OR A CONTRACT AUDITOR WHEN THE DEPARTMENT  
42 HAS REASONABLE AND RELIABLE EVIDENCE THAT A CLAIM SUBMITTED TO THE  
43 DEPARTMENT FOR PAYMENT WAS SUBMITTED WITH A KNOWING AND WILLFUL INTENT  
44 TO DEFRAUD THE DEPARTMENT OR OTHERWISE KNOWINGLY AND WILLFULLY MISREPRE-  
45 SENT THE CLAIM.

46 19. THE AUDIT CRITERIA SET FORTH IN THIS SECTION SHALL APPLY ONLY TO  
47 AUDITS OF CLAIMS SUBMITTED FOR PAYMENT AFTER THE EFFECTIVE DATE OF THIS  
48 SECTION.

49 20. WITHIN ONE HUNDRED TEN DAYS OF THE EFFECTIVE DATE OF THIS SECTION,  
50 THE DEPARTMENT AND THE OFFICE SHALL ESTABLISH BY FINAL REGULATION A  
51 PROCESS UNDER WHICH AN AUDITED PHARMACY PROVIDER MAY FILE AN ADMINISTRA-  
52 TIVE APPEAL WITH THE DEPARTMENT IF THE PROVIDER IS UNABLE TO RESOLVE A  
53 PRELIMINARY AUDIT DETERMINATION SATISFACTORILY. IF AN ADMINISTRATIVE  
54 APPEAL IS REQUESTED, THE AUDITED PHARMACY PROVIDER MAY NOT BE REQUIRED  
55 TO OBTAIN FORMAL REPRESENTATION BY LEGAL COUNSEL.

21. AN ADMINISTRATIVE APPEAL SHALL BE CONDUCTED BY THE DEPARTMENT OR BY AN AD HOC PEER-REVIEW PANEL APPOINTED BY THE DEPARTMENT WHICH CONSISTS OF AT LEAST THREE PHARMACY PROVIDERS LICENSED IN THE STATE WHO ARE ACTIVELY ENGAGED IN THE PRACTICE OF PHARMACY IN THE STATE AND MUTUALLY AGREEABLE TO THE AUDITED PHARMACY AND THE DEPARTMENT.

22. IF, FOLLOWING AN ADMINISTRATIVE APPEAL, THE DEPARTMENT OR THE REVIEW PANEL FIND THAT AN UNFAVORABLE AUDIT REPORT IS UNSUBSTANTIATED, THE DEPARTMENT SHALL ISSUE A FINAL DISMISSAL OF THE FINDINGS OF THE AUDIT REPORT WITH PREJUDICE, WITHOUT THE NEED FOR FURTHER PROCEEDINGS OR PENALTY TO THE AUDITED PHARMACY.

23. THE AUDIT CRITERIA SET FORTH IN THIS SECTION SHALL APPLY ONLY TO AUDITS OF CLAIMS SUBMITTED FOR PAYMENT AFTER THE EFFECTIVE DATE OF THIS SECTION.

24. (A) ONLY THOSE INDIVIDUALS OR ENTITIES WHO HAVE BEEN EXCLUDED FROM PARTICIPATION AS PROVIDERS IN THE MEDICAL ASSISTANCE PROGRAM AND WHO HAVE BEEN AFFORDED PROPER AND ADEQUATE NOTICE AND AN OPPORTUNITY FOR A HEARING PURSUANT TO STATE AND FEDERAL REGULATIONS SHALL HAVE THEIR NAMES AND OTHER IDENTIFYING INFORMATION PUBLISHED AND OTHERWISE MADE AVAILABLE TO THE PUBLIC FOR THE PURPOSE OF IDENTIFYING SUCH INDIVIDUAL OR ENTITY.

(B) THE STATE MEDICAL ASSISTANCE AUDIT AGENCY SHALL NOT PUBLISH IDENTIFYING INFORMATION OF ANY PROVIDER IN THE MEDICAL ASSISTANCE PROGRAM WHO HAS BEEN THE SUBJECT OF AN AUDIT BY THE AGENCY UNTIL TWENTY DAYS AFTER ISSUANCE OF A FINAL WRITTEN REPORT BY THE AGENCY PROVIDED FURTHER THAT NO ADMINISTRATIVE HEARING OR PROCEEDING FOR JUDICIAL REVIEW IS PENDING AND THE TIME FOR INITIATING AN ADMINISTRATIVE HEARING OR JUDICIAL REVIEW HAS EXPIRED.

25. WHERE AUDIT FINDINGS BY THE STATE MEDICAL ASSISTANCE AUDIT AGENCY SEEKING RECOVERIES FROM A PHARMACY ARE BASED ON A MISSING PRESCRIPTION OR FISCAL ORDER REQUIRED TO SUPPORT A CLAIM FOR REIMBURSEMENT OR IS BASED ON AN ACCEPTANCE BY A PHARMACY OF A PRESCRIPTION OR FISCAL ORDER WHICH WAS NOT PROPERLY COMPLETED PURSUANT TO STATE LAW AND REGULATIONS, THE PHARMACY SHALL HAVE THE RIGHT TO SUBMIT COLLATERAL DOCUMENTATION TO DEMONSTRATE THE VALIDITY OF THE PRESCRIPTION OR FISCAL ORDER AND ITS RIGHT TO REIMBURSEMENT UNDER THE MEDICAL ASSISTANCE PROGRAM. THE AGENCY AND ANY OTHER REVIEWING ENTITY SHALL REVIEW SUCH DOCUMENTATION IN GOOD FAITH AND MAKE AN APPROPRIATE DETERMINATION.

26. WHERE A PROVIDER MAKES A GOOD FAITH EFFORT TO OBTAIN THE IDENTITY OF THE INDIVIDUAL OR ENTITY WHICH ORDERS MEDICAL SERVICES OR SUPPLIES FOR WHICH REIMBURSEMENT IS CLAIMED UNDER THE MEDICAL ASSISTANCE PROGRAM, NO AUDIT FINDING BY THE STATE AUDIT AGENCY SEEKING ANY RECOVERY OF MEDICAL ASSISTANCE REIMBURSEMENT SHALL BE MADE WHERE THE PROVIDER CAUSES TO BE MADE AN ERRONEOUS IDENTIFICATION OF THE ORDERER OF SUCH SERVICES OR SUPPLIES ON ANY CLAIM SUBMITTED TO THE PROGRAM.

S 2. This act shall take effect on the one hundred twentieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date is authorized and directed to be made and completed on or before such effective date.