



M E M O R A N D U M

TO: MICHELLE COHEN

CLIENT/MATTER: 999-00000

**FROM: KNICOLE EMANUEL AND RYAN
HARGRAVE**

DATE: NOVEMBER 7, 2022

Re: Analysis of issues regarding individuals operating under the 1915(c) waiver, who are not considered “Providers Of Services,” but are being charged and convicted criminally under 62 P.S. §1407.

ATTORNEY-CLIENT PRIVILEGED

Issue:

Individuals’ Representatives operating under the 1915(c) waiver that do not meet the criteria to be “Providers Of Service” are being charged and erroneously convicted criminally for Medicaid fraud.

The Social Security Act (“SSA”) defines “Provider Of Services” as “(u) The term “provider of services” means a hospital, critical access hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program, or, for purposes of section 1814(g) and section 1835(e), a fund.” Sec. 1861 [42 U.S.C. 1395x].

The definition of Individual’s Representative is “In this section, the term “individual’s representative” means, with respect to an individual, a parent, a family member, or a guardian of the individual, an advocate for the individual, or any other individual who is authorized to represent the individual.” *See* 1915c Waiver.

Unlike Providers Of Services, who are licensed and receive training in their respective fields, **Individual Representatives**, usually family members, operate under the 1915(c) waiver and do not receive training, are not licensed, and, therefore, cannot possess the knowledge and capability to “intentionally” violate the criminal Medicaid statute and regulations, which is a material element of the criminal statute as they do not possess the information and skill as that of a licensed Provider Of Services. Instead, Individuals must be afforded their administrative rights to appeal through the administrative process. Individuals must not be criminally liable, but civil.

Overview:

Currently, the State of Pennsylvania is bypassing the civil processes for Individual Representatives, beneficiaries, surrogates, direct care workers, common law employers without

single audits or Quality Management, providing Medicaid services to Medicaid recipients under the 1915(c) waiver, and not affording them the opportunity of a Corrective Action Plan (“CAP”), a plan that is afforded to traditional Providers Of Service bearing medical credentials, degrees, licenses, and training. Families and individuals are not considered “Providers Of Services” when filling out and operating under the 1915(c) waiver. Rather they are Individuals’ Representatives. However, Individuals’ Representatives providing care for loved ones under the 1915(c) waiver are being held to the higher standard as licensed providers when any issues or discrepancies occur.

In the State of Pennsylvania, Medicaid Fraud is governed by various statutes, regulations, and policies. The Federal False Claims Act, 31 U.S.C. §§ 3729, is in effect to protect the Government from being overcharged for services rendered. It states any person who:

- a. Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- b. Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- c. Conspires to commit a violation of subparagraph A, B, D, E, F, or G;
- d. Has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all that money or property,
- e. Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- f. Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
- g. Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government,

is liable to the United State Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461).”

18 U.S.C. § 287 titled False, Fictitious or Fraudulent Claims indicates: “whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.”

It is clear that the Federal statutes rely on the “knowing intent” component for False Claims to be deemed Criminal. The U.S. Office of Inspector General can be quoted to indicate:

“the civil FCA defines “knowing” to include not only actual knowledge but also instances in which the person acted in deliberate ignorance or reckless disregard of the truth or falsity of the information.” <https://oig.hhs.gov/compliance/physician-education/fraud-abuse-laws/#:~:text=False%20Claims%20Act%20%5B31%20U.S.C.&text=It%20is%20illegal%20to%20submit,plus%20%2411%2C000%20per%20claim%20filed.>

Applicable Pennsylvania Law for Medicare and Medicaid Anti-Fraud stems from 62 Penn. Stat. § 1407. The statute states that it shall be unlawful for any person to:

- a. (1) “*Knowingly or intentionally* present for allowance or payment any false or fraudulent claim or cost report for furnishing services or merchandise under medical assistance, or to knowingly present for allowance or payment any claim or cost report for medically unnecessary services or merchandise under medical assistance, or to knowingly submit false information, for the purpose of obtaining greater compensation than that to which he is legally entitled for furnishing services or merchandise under medical assistance, or to knowingly submit false information for the purpose of obtaining authorization for furnishing services or merchandise under medical assistance.”
- b. Section (b)(1) of 62 Penn. Stat. § 1407 indicates further that A person who violates any provision of subsection (a), excepting subsection (a)(11), is guilty of a felony of the third degree for each such violation with a maximum penalty of fifteen thousand dollars (\$15,000) and seven years imprisonment. A violation of subsection (a) shall be deemed to continue so long as the course of conduct or the defendant's complicity therein continues; the offense is committed when the course of conduct or complicity of the defendant therein is terminated in accordance with the provisions of 42 Pa.C.S. § 5552(d) (relating to other offenses). Whenever any person has been previously convicted in any state or Federal court of conduct that would constitute a violation of subsection (a), a subsequent allegation, indictment or information under subsection (a) shall be classified as a felony of the second degree with a maximum penalty of twenty-five thousand dollars (\$25,000) and ten years imprisonment.

Again, it is clear that the Pennsylvania statute relies on the knowing intent for Medicaid Fraud, following suit with Federal Laws. When the department determines that a provider has committed any prohibited act or has failed to satisfy any requirement under section 1407(a), it shall have the authority to immediately terminate, upon notice to the provider, the provider agreement and to institute a civil suit against each provider. Further, any action taken by the department against a provider pursuant to clauses (1) and (2) will be forwarded by the department to the Medicaid Fraud Control Unit. The Medicaid Fraud Control Unit investigates and makes the determination as to whether the case specifics meet the statute for criminal liability and pursuit of criminal charges.

62 P.S. § 1407 has a very clear element of “*specific criminal intent*” to be properly applied for proper application of the criminal statute. Specific Criminal Intent crimes are

committed with a specific purpose. The specific intent requirement includes not only the desire to intent the crime, but also the desire for a specific outcome. This requires the prosecution to prove beyond a reasonable doubt that the defendant acted with a specific motive, committing the act with a specific purpose, seeking a specific outcome. Most specific intent crimes include theft, larceny, embezzlement, and forgery. 62 P.S. § 1407 is a specific intent statute that has, clearly, been treated as a general intent statute. A general intent statute involves a crime that is committed for no other purpose than committing the act. No specific outcome is required for proper application of a general intent statute, unlike a specific intent statute.

Attorneys representing defendants operating under the 1915(c) waiver and charged under 62 P.S. § 1407, **should almost always file an immediate Motion to Dismiss** challenging the application of the statute. In trial, the defense attorney should focus on the lack of intent and move for a dismissal of the charges because the evidence, as far as the law is concerned, is not enough to justify a conviction as the intent element of the statute cannot be met due to the lack of knowledge of defendant. Every crime has elements: specific acts, knowledge or motivations that must be proven by the State beyond a reasonable doubt. When there is not enough evidence to prove that the defendant committed the specific act, with the specific intent to violate the statute, and the specific outcome of defrauding the state of Medicaid funds, the case should be dismissed.

Individuals operating under the 1915(c) waiver should not be treated as credentialed Medicaid providers. CMS has issued an *Overview of Home and Community-Based Services* which was established to reduce improper payments and eliminate waste in Federal Programs. One of the key terms discussed is the term “provider.” CMS defines “provider” to include physicians; nurse practitioners; registered nurse; licensed practical nurse; aide’ private or not-for-profit agency; case manager; State Medicaid agency or State sister agency; Medicaid durable medical equipment (DME), supplies, and device supplier; home modification business; or other providers of Home and Community-Based Services.

Gen. Stat. 18 P.S. § 1401 indicates that a “provider” is defined as: “any individual or medical facility which signs an agreement with the department to participate in the medical assistance program, including, but not limited to, licensed practitioners, pharmacies, hospitals, nursing homes, clinics, home health agencies and medical purveyors.”

Further, the Overview of Home and Community-Based Services defines “provider” as: “. . .physician; nurse practitioner; registered nurse; licensed practical nurse; aide; private or not-for-profit agency; case manager; State Medicaid agency or State sister agency; Medicaid durable medical equipment (DME), supplies, and devices supplier, home modification business; or other providers of HCBS; . . .”

Beneficiaries, often times, have family members who provide for them in the comfort of their own home pursuant HCBS. These family members are not health professionals, rather loving Individuals’ Representatives, who are being criminally indicted under these various statutes. The issue is that these Individuals’ Representatives lack the requisite education and training to be held to the standard of doctors, specialists, and other “providers.” This being the case, Individuals’ Representatives assisting Medicaid and Medicare beneficiaries, lacking the

requisite knowledge of the statutes, cannot be held to satisfy the specific intent of the criminal statute and held to the same level of scrutiny as that of professional, credentialed, healthcare Providers of Service.

Pennsylvania's process of Home and Community-Based Services has a shaky application. There is no clear distinction between Civil and Criminal processes pertaining to Home and Community-Based Services, which in turn, leads to the family members of beneficiaries being held to a much higher standard than that of a common layperson who could not encompass the *knowing intent* to purposefully disobey a statute.

The State of Pennsylvania must enact and adhere to required education and Corrective Action Processes rather than placing common laymen caring for loved ones in Federal Criminal prosecution. Education focusing on the proper processes and requirements for HCBS will alleviate many violations and prevent unnecessary, unjust, prosecution. Criminal prosecutions of individuals operating under the 1915(c) waiver should be afforded a dismissal of the criminal matters and evaluated under a civil procedure and offered an opportunity to rectify any potential discrepancies by way of a Corrective Action Plan.