

OFFICE OF ADMINISTRATIVE LAW

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ENDORSED FILED
IN THE OFFICE OF

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DEBRA M. CORNEZ
Assistant Chief Counsel/Acting Director

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: January 25, 2011
To: Timothy Blanchard
From: Chapter Two Compliance Unit
Subject: **2011 OAL DETERMINATION NO. 3(S)**
(CTU2010-1122-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Medi-Cal Amended First Written Warning Notice of Improper Billing issued by the Department of Health Care Services

On November 22, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a document titled "Medi-Cal Amended First Written Warning Notice of Improper Billing" (Notice) issued to the University of California Regents, Irvine, by the Department of Health Care Services constitutes an underground regulation. You specifically challenged the language in the section titled "Anesthesia Services—CPT Codes 00100-01999." The Notice is attached hereto at Exhibit A.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,¹ which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).² Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment.

On December 16, 2009, the Department of Health Care Services issued to the Regents of the University of California, Irvine, the First Written Warning Notice of Improper Billing Under Welfare & Institutions Code Section 14123.25(c). This Notice concerned billing for Medi-Cal. The language you challenge is:

¹ "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

² Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

<p><u>Anesthesia Services—CPT</u> <u>Codes 00100-01999</u></p> <p>3. You failed to document supervision of residents in all components of the anesthesia services rendered. Residents performed the follow-up visits unsupervised.</p>	<p>California Code of Regulations, Title 22, Section 51503(j)</p> <p>No professional fees are payable for services provided independently by residents or students in a teaching setting.</p>
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In your petition, you argued that the Notice interprets the “regulatory requirement that professional fee services not be ‘provided independently by residents’ in a manner” that creates an underground regulation. You argue that the Notice creates an onerous interpretation of an ambiguous regulation. You argue that the interpretation in the Notice is in conflict with federal Medi-Cal requirements.

California Code of Regulations, title 22, section 51503(j) states:

(j)The Medi-Cal program, through its intermediary, will pay allowable Medi-Cal rates for direct patient care services in a teaching setting when directly provided by teaching physicians only when such services are provided and billed in accordance with program policies and regulations of the Department of Health Services and when:

- (1) They are performed for necessary treatment of the patient;
- (2) They are not an exercise of teaching supervision without direct patient care services being provided;
- (3) They do not duplicate any medical services billed by any other provider; and
- (4) The teaching physician is not on salary or contract to the hospital for the direct patient care services provided.

No professional fees are payable for services provided independently by residents or students in a teaching setting.
(Emphasis added.)

The Notice restates the relevant language of California Code of Regulations, title 22, section 51503(j) and states that compliance with section 51503(j) has not been documented. Section 51503(j) prohibits the reimbursement of fees for services provided independently by residents in a teaching setting. The Notice states that you have not provided documentation establishing the supervision of the residents as required by section 51503(j) for the reimbursement of professional fees. The Notice does not further interpret, implement or make specific section 51503(j). It applies the regulatory requirement to your specific circumstances by distinguishing when professional fees are not covered pursuant to section 51503(j).

As noted in footnote 2, California Code of Regulations, title 1, section 250 defines an "underground regulation" as a rule that "has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA." California Code of Regulations, title 22, section 51503(j) was adopted pursuant to the APA and filed with the Secretary of State. It is a duly adopted regulation and cannot, therefore, be an underground regulation.

We note that statements in your petition concerned consistency of California Code of Regulations, title 22, section 51503(j) with federal law and the clarity of section 51503(j). These concerns are not relevant to OAL's determination of whether a challenged rule is an underground regulation; therefore, OAL did not address these issues in this summary disposition.

For the reasons discussed above, we find that the rule challenged by your petition is not an underground regulation.³

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.


DEBRA M. CORNEZ
Assistant Chief Counsel/Acting Director


Kathleen Eddy
Senior Counsel

Copy: David Maxwell-Jolly

³ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

(B) The challenged rule is contained in a California statute.

(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(D) The challenged rule has expired by its own terms.

(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)

Exhibit A



SANDRA SHEWRY
Director

State of California—Health and Human Services Agency
Department of Health Care Services

FILE



ARNOLD SCHWARZENEGGER
Governor

- AMENDED – Item 2 from the 10/14/08 letter was removed-

December 16, 2009

Jim Herron, Corp. Compliance and Privacy Officer
Regents of the University of California, Irvine
333 City Blvd. West, Suite 110
Orange, CA 92868

Dear Mr. Herron:

**FIRST WRITTEN WARNING NOTICE OF IMPROPER BILLING
UNDER WELFARE & INSTITUTIONS CODE SECTION 14123.25(c)**

PROVIDER NUMBER: GR0013290 CASE NUMBER: P-GR0013290-223-01

The Department of Health Care Services (DHCS) hereby serves notice to you that this is your **FIRST WRITTEN WARNING NOTICE OF IMPROPER BILLING**. This warning notice is provided in accordance with Welfare and Institutions Code, section (Wel. & Inst. Code §) 14123.25, subdivision (c).

IDENTIFICATION OF IMPROPER BILLING

A review of your paid claims by DHCS has demonstrated a pattern of improper billing as indicated below:

ITEM/SERVICE IMPROPERLY BILLED	STATUTE, REGULATION, OR RULE VIOLATED
<p><u>Anesthesia Services – GPT Codes 00100 - 01999</u></p> <p>1. You failed to maintain accurate anesthesia documentation within your medical records. Anesthesia start and end times as well as anesthesiologist in and out times were missing in 41% of the services reviewed.</p>	<p>California Code of Regulations, Title 22, Section 51476</p> <p>Records are to be made at or near the time the services are rendered and shall fully disclose the type and extent of services rendered. "At or near" does not include prior to when services are rendered.</p>

<p><u>Anesthesia Services – CPT Codes 00100 - 01999</u></p> <p>2. You failed to use modifiers to identify services performed by CRNAs or the supervision of CRNAs. None of the records reviewed had modifiers identifying that the services were performed by a CRNA.</p>	<p>California Code of Regulations, Title 22, Section 51503 (f)</p> <p>Physicians billing for anesthesia services performed by a nurse anesthetist shall indicate on the claim that such services were performed by a nurse anesthetist.</p>
<p><u>Anesthesia Services – CPT Codes 00100 - 01999</u></p> <p>3. You failed to document supervision of residents in all components of the anesthesia services rendered. Residents performed the follow-up visits unsupervised.</p>	<p>California Code of Regulations, Title 22, Section 51503 (j)</p> <p>No professional fees are payable for services provided independently by residents or students in a teaching setting.</p>

A Department representative met with you or your representatives on 9/23/08 to discuss these findings. The UCI anesthesia department stated that it was already taking measures to address the accuracy of anesthesia times by implementing an electronic time stamping system. This is a positive step since anesthesia services are billed in time increments and it is imperative that these times are documented accurately.

This warning notice applies to the provider number identified and to all provider numbers identified for or associated with your Medi-Cal practice.

OPPORTUNITY TO CONTEST WARNING NOTICE

You may contest this warning notice and explain to DHCS the correctness of your billing. You have 35 days (30 days plus 5 days for mailing) from the date of this warning notice to do so. Your contest must be received by DHCS within 35 days from the date of this letter. You will be notified whether your explanation is accepted or rejected by DHCS. If DHCS accepts your explanation, in whole or in part, no further action by DHCS relating to the notice or part of the notice that DHCS accepts as correct shall be taken against you. If DHCS fails to notify you whether your explanation is accepted or rejected, no further action by DHCS relating to the notice or part of the notice shall be taken.

Jim Herron
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To contest this warning notice, please submit your explanation, pertinent documents and all other relevant written evidence to:

Jan English, N.P., Chief
Medical Review Branch
Audits and Investigations
Department of Health Care Services
MS 2303
P.O. Box 997413
Sacramento, CA 95899-7413

FUTURE REPEAT VIOLATIONS

If you do not contest this warning notice or if you do contest this warning notice and your explanation is rejected by DHCS, and the same improper billing is repeated, you will be sent a Second Written Warning Notice of Improper Billing and imposition of future Civil Money Penalties (CMP) assessed in accordance with Wel. & Inst. Code § 14123.25(c) (2) (one hundred dollars (\$100) per claim, or up to two times the amount improperly claimed for each item or service, whichever is greater).

If the same improper billing is repeated a third time and you are sent a Third Written Warning Notice of Improper Billing, you will be subject to a CMP of one thousand dollars (\$1,000) per claim, or up to three times the amount improperly claimed for each item or service, whichever is greater.

Please note that claims reviewed for repeat violations will be those submitted under the provider numbers identified in the initial warning, as well as any other provider numbers you may have, including any new number that you may acquire.

Subsequent to the CMP decision to levy fines, you are allowed the right to a hearing pursuant to Health and Safety Code, section 100171.

Jim Herron
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December 16, 2009

Any questions regarding these actions should be directed to Donna Gray-Bowersox,
Chief, at (619) 688-6465.

Sincerely,



f Donna Gray-Bowersox, Chief
Medical Review Section – South III
Audits and Investigations

Enclosure

Certified # 7006 0810 0001 8696 4884
