



Legislative, Regulatory and Legal Update

Unless otherwise noted, for further information on any of these issues please contact Chief Operating Officer and General Counsel C. Scott Litch at (312) 337-2169 or slitch@aapd.org.

STATE NEWS

NEBRASKA LEGISLATURE APPROVES MEDICAID AUDIT REFORM LAW



The AAPD is delighted that the Nebraska Society of Pediatric Dentistry (NSPD) achieved legislative success this summer as the Medicaid audit reform bill was added to and approved under LB956¹ and signed into law by Governor Pete Ricketts on Aug. 21, 2020. Dr. Jessica Meeske (Hastings, Neb.), who is a member of the AAPD's Committee on Dental Benefit Programs and Medicaid and CHIP Advisory Committee (both under the Council on Government Affairs) plus current chair of ADA's Council on Access, Advocacy, and Prevention (CAAP) comments that:

“This bill was a great example of the powerful impact we can have when AAPD, ADA, and NDA, and the NSPD join forces to create meaningful legislation that helps to assure Medicaid audits are fair. Nearly all of Nebraska's pediatric dentists are significant providers of care for children with Medicaid. We hope this will be great model legislation for other states. In the end, without fair and valid audit processes, the dentists will quit the program, and then it's the kids who are the ultimate losers.”

The law requires that all program integrity contractors retained by the state Medicaid agency (SMA) when conducting a program integrity recovery audit, investigation, or review shall meet the following requirements:

- Review claims within four years from the date of the payment.
- Send a determination letter concluding an audit within 180 days after receipt of all requested material from a provider.
- If a service was provided and sufficiently documented but denied because it was determined by the department or the contractor that a different service should have been provided, the department or the contractor shall disallow the difference between the payment for the service that was provided and the payment for the service that should have been provided
- Utilize a licensed health care professional from the specialty area of practice being audited to establish relevant audit methodology consistent with state-issued Medicaid provider handbooks and established clinical practice

guidelines and acceptable standards of care established by professional or specialty organizations responsible for setting such standards of care.

- Work with the SMA the start of a recovery audit to review this section and section 68-973 and any other relevant state policies, procedures,



Nebraska pediatric dentists on the steps of the state Capitol after the bill signing.

Background

The AAPD, American Dental Association, Nebraska Society of Pediatric Dentistry and Nebraska Dental Association (NDA), troubled by the growing number of Medicaid pediatric dental audits in Nebraska that are harming children's access to oral care, wrote the state's Medicaid agency on Nov. 6, 2019, stating that the audits have led to "unfortunate outcomes detrimental to the program's goal of improving oral health access for children of low-income families." The organizations said they believe that dental auditors were not basing their reviews on AAPD's accepted clinical recommendations and were "second-guessing clinical decision-making by pediatric dentists absent appropriate peer review by a dentist with equivalent educational training." **The audits questioned the use of stainless steel crowns in children at high caries risk, many with signs of severe decay on multiple teeth, and requested significant refund of payments for alleged inappropriate treatment.** The letter asked the Nebraska Division of Medicaid and Long-Term Care to halt the audits and require all future Medicaid dental auditors to utilize dental profession clinical guidelines, best practices and policies of the appropriate specialty organization, and require contracted auditors to utilize licensed dentists of equivalent education and training as the dentists being audited and to have experience in treating Medicaid patients.

On Dec. 13, 2019, the Nebraska Legislature's Health and Human Services Committee held a hearing that included testimony on the Medicaid UPIC (Uniform Program Integrity Contractor) dental audits. The dental audit portion lasted for a little under an hour. The witnesses all did an outstanding job; these included pediatric dentists Drs. Marty Killeen (the first pediatric dentist impacted by these audits), Jill Wallen (head of pediatric dentistry at the University of Nebraska dental school), and Jessica Meeske (former AAPD NorthCentral Trustee and member of the AAPD's Committee on Dental Benefit Program and Pediatric Dental Medicaid and CHIP Advisory Committee), along with the mother of a special needs child. In a bit of great timing, coordinated between the Nebraska Society of Pediatric Dentistry and AAPD, there was a front page news story Friday morning of the hearing in the Omaha World-Herald and a subsequent editorial supporting the dental community's position.

A subsequent state legislative hearing was held in February 2020 with many of the same witnesses from the December hearing, along with NDA contact lobbyist Kim Robak. This was followed by the introduction of legislation, LB 1105, that expands the state's existing RAC audit law to require all Medicaid audits to have peer review by same specialists and follow the best practices and guidelines of national organizations.

- regulations, and guidelines regarding program integrity audits. The program integrity contractor shall comply with this section regarding audit procedures. A copy of the statutes, policies, and procedures shall be specifically maintained in the audit records to support the audit findings.
- Claims processed or paid through a capitated Medicaid managed care program shall be coordinated between the department, the contractor, and the managed care organization. All such audits shall be coordinated as to scope, method, and timing. The contractor and the department shall avoid duplication or simultaneous audits.
- Extrapolated overpayments are not allowed without evidence of a sustained pattern of error, excessively high error rate, or the agreement of the provider.
- Records requests made by a program integrity contractor in any 180 day period shall be limited to not more than 200 hundred records for the specific service being reviewed.
- Provider training and provider appeal rights under the Recovery Audit Contractor law are now applicable to all program integrity audits.

Dr. Holly Randone, Nebraska Public Policy Advocate, comments:

"It has been disheartening for the pediatric dentists of our state to go through these audits over the last several years, and while we know audits need to be done, I'm glad we now have a system in place to assure that they are being conducted in the correct manner. We have went through a rough patch over the last several years, but we have pulled together and fought for what is the right thing for our profession, and for our patients. I want to especially recognize Dr. Marty Killeen for being so courageous and open with telling his story throughout this process."

The AAPD believes this is a model law for all states to consider, especially those facing improper Medicaid dental audit challenges.

¹ <https://nebraskalegislature.gov/FloorDocs/106/PDF/AM/AM2827.pdf>

Access to Hospital Operating Rooms for General Anesthesia Cases: AAPD Pursues Multi-Pronged Strategy

The AAPD is aware that many pediatric dentists around the country have been experiencing difficulty in obtaining or maintaining hospital operating room time for dental cases requiring care under general anesthesia. This problem was identified by the AAPD state Public Policy Advocate (PPA) network in 2019 as an emerging issue of concern, and it has resumed as problem since pediatric dental practices have come back up to speed after COVID-19 practice limitations were lifted.

Earlier in the year, AAPD's Chief Policy Officer Dr. Paul Casamassimo initiated a survey of the AAPD PPA network on this issue. The PPA survey results indicate the problem is largely financial, particularly due to low facility fees for dental cases. This survey analysis has been accepted for publication in the *Pediatric Dentistry* journal and will be utilized in AAPD's advocacy efforts.

Last year, the AAPD engaged Powers law firm¹ in Washington, D.C., to provide an analysis of potential upgrades to facility fee coding for dental operating room cases, via CMS HCPCS codes and other venues.² This was included as one of the AAPD's 2020 federal regulatory priorities:

Access to Care Goal

1. Based on findings of a coding and reimbursement technical analysis, seek recommended changes in CMS Medicaid funding formula for facility fee charges in hospital dental general anesthesia cases, so that pediatric dentists do not lose hospital operating room access due to low facility fees for such cases.

This analysis was recently completed and the AAPD is moving ahead with an advocacy strategy. AAPD members should be aware that this is at least a two-step process. First, we will have to convince CMS to adopt new codes and mapping. Second, our PPA network working with state chapters will have to convince their state Medicaid agency (SMA) to adopt new codes. AAPD is coordinating advocacy efforts closely with the ADA, as noted in an *ADA News* story from Aug. 31, 2020.³

In some states such as Michigan, hospital systems are looking at immediate strategies to help alleviate the problem. Due to the timing issues discussed above related to code changes, the AAPD has encouraged the PPA network to pursue all such local efforts. Also, due to variance in SMA methodologies for determining facility fees, in some cases a direct appeal to the SMA to boost such fees for dental cases is possible. This was successfully pursued in Oklahoma in 2016 by pediatric dentist Dr. Wavel Wells.

Simultaneous with the above efforts, AAPD will provide additional CE and guidance for members regarding options for Ambulatory Surgery Center (ASC) usage. Recently released was a PEDOTEETH TALK podcast with moderator Dr. Joel Berg interviewing Dr. Roger Sanger regarding ASCs. AAPD also plans to engage Powers Law to prepare a White Paper analyzing ASC options for pediatric dentists, either as participants or co-owners. It is recognized that, financial issues aside, dental cases are often considered less urgent to hospital administrators in allocating operating room time as opposed to more serious medical conditions such as pediatric cardiac disease. However, the types of procedures typically performed in an ASC are generally on par with or much less serious than dental cases involving severe early childhood caries.

Finally, the in-office option for deep sedation/general anesthesia should also be considered, in states that allow it with involvement of a dental or medical anesthesiologist.⁴ Dental anesthesiology is now a recognized dental specialty and many dentist anesthesiologists provide services to pediatric dentists. Now that pediatric dentists are back in the practice, the AAPD is making an official rollout this fall of an endorsed sedation accreditation program with the American Association for Accreditation of Ambulatory Surgery Facilities (AAAASF).⁵ It is a voluntary program for pediatric dental practices to consider.

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¹ <https://www.powerslaw.com/> known as Powers Pyles Sutter & Verville PC.

² <https://www.cms.gov/Medicare/Coding/MedHCPCSGenInfo>

³ <https://www.ada.org/en/publications/ada-news/2020-archive/august/pediatric-dentists-sound-alarm-about-being-denied-or-access>

⁴ See this AAPD Best Practices document: https://www.aapd.org/globalassets/media/policies_guidelines/bp_anesthesiapersonnel.pdf

⁵ For more details see: <https://www.aaaasf.org/programs/outpatient-programs/outpatient-pediatric-dentistry-faqs/andpage20ofthisissue>.