

2012 WL 5207471 (E.D.N.Y.) (Trial Pleading)
United States District Court, E.D. New York.

UNITED STATES OF AMERICA, ex rel Dana Ohlmeyer, Plaintiff,
v.
NEW YORK CITY DEPARTMENT OF EDUCATION, Defendant.

No. CV-07-1517.
October 19, 2012.

Complaint in Intervention


Loretta E. Lynch, United States Attorney, Eastern District of New York, Attorney for the United States of America, 271 Cadman Plaza East, Brooklyn, New York 11021, Michael J. Goldberger, Assistant United States Attorney, (718) 254-6052.

Dearie, J.


UNDER SEAL

The United States of America, by its attorney, LORETTA E. LYNCH, United States Attorney for the Eastern District of New York, Michael J. Goldberger, United States Attorney, Of Counsel, for its complaint in intervention in this action, alleges:

INTRODUCTION

1. The United States of America hereby intervenes in this action against the New York City Department of Education (DOE) pursuant to the False Claims Act,  31 U.S.C. §§ 3729-33 (the FCA). As detailed below, between 2001 and 2004, DOE submitted claims to the Medicaid program in New York State for psychological counseling services it falsely claimed to have provided to public school children with special needs. As a result of DOE's conduct, the United States is entitled to recovery of treble damages and penalties under the FCA, as well as damages under the common law theory of unjust enrichment.

JURISDICTION AND VENUE

2. This action is brought by the United States under the FCA,  31 U.S.C. § 3729, *et seq.* and at common law.
3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345.
4. Venue is proper in this district pursuant to 31 U.S.C. § 3732(a). Many of the schools where defendant claimed it provided services were provided are located in this district.

PARTIES

5. Plaintiff is the United States of America.
6. Relator, Dana Ohlmeyer, is a social worker who has been employed by the DOE since 1992 as a Related Service Provider, Counseling Provider. She provides small-group and individual psychological services to emotionally disturbed elementary and junior high school students. Ms. Ohlmeyer commenced this action pursuant to the *qui tarn* provisions of the FCA. In her

complaint, she alleged that defendant improperly billed the Medicaid program for psychological counseling services to public school students in New York City School District 75.

7. Defendant DOE is an agency of the City of New York responsible for providing public education and related services to children in the City of New York, including those with special needs.

8. The United States filed its Notice of Intervention in this action on October 12, 2012.

BACKGROUND

9. Under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* (Title XIX), the United States shares with the fifty States the cost of medical services provided to indigent families with dependent children, and to aged, blind, and disabled individuals whose income and resources are insufficient to meet the cost of medical services.

10. Medicaid is a federally assisted grant program for the states. Medicaid enables the states to provide medical assistance and related services to needy individuals. The Centers for Medicare and Medicaid Services (CMS), a component of the United States Department of Health and Human Services (HHS), administers Medicaid on the federal level. The state directly pays providers, with the state obtaining the federal share of the payment from accounts which draw on funds of the United States Treasury. The federal share of each state's Medicaid program varies state by state. In New York, the federal share is 50%.

11. At all times relevant to this complaint, the United States provided funds to New York State through the Medicaid program pursuant to Title XIX. Providers enrolled in the Medicaid program, including defendant, agree to abide by the rules, regulations, policies and procedures governing reimbursement, and to keep and allow access to records and information as required by the Medicaid program.

12. Since 1988, the Medicaid program in New York State has paid for certain medical and other “related” services when the services are provided in a school or preschool setting. In the early 1990s, New York State developed the School Supportive Health Services (SSHS) Program, which authorized school districts to obtain Medicaid reimbursement for related services, including psychological counseling in the schools.

13. Pursuant to a longstanding agreement between the State of New York and CMS' predecessor, the Health Care Financing Administration (HCFA), the Medicaid program pays for school counseling services as a related service on a flat fee, rather than on a fee-for-service, basis. During the relevant period, from 2001-04, the Medicaid program paid \$223 per month for each student who received two or more services in the month. The federal share is half of that total, or \$111.50 per student per month.

14. Defendant submitted claims to the Medicaid program in New York State for psychological counseling services on a monthly basis. With each monthly claim for \$223, defendant represented that it had provided two or more services in the previous month.

FACTS

15. The New York City school system is divided into approximately thirty-one local school districts. These school districts oversee educational services to children between kindergarten and grade eight who reside within the boundaries of the school district.

16. One school district in New York City, District 75, is different than most others. District 75 does not have geographical boundaries. Instead, District 75 provides, on a citywide basis, educational, vocational, and behavior support programs for students who are on the autism spectrum, have significant cognitive delays, are severely emotionally challenged, sensory impaired and/or multiply disabled. Many of these students receive related services, including psychological counseling.

17. Psychological counselors employed by defendant generally provide both group and individual services to students in District 75, usually during the regular school day. Counselors are required to document when they provide counseling services to students.

18. For the school year 2001 -02 and the summer of 2002, defendant required counselors to document the services they provided by completing monthly computer-generated forms which listed all of the students on the counselors' caseload for that month. Counselors were required to fill in a bubble on the computer forms for each session they held with each student.

19. In the school years 2002-03 through 2003-04, defendant used a different system of documentation. Counselors maintained individual "attendance cards" for each student for the entire school year. Defendant required counselors to indicate on the attendance cards each time they provided a counseling session to each student, throughout the school year.

20. Between 2001 and 2004, approximately 7,957 students received psychological counseling services in District 75. Defendant submitted approximately 86,277 claims for reimbursement during the relevant time period. Each claim constituted a representation by defendant to the Medicaid program that a student in District 75 had received two or more counseling services in a particular month.

21. Defendant did not render two or more counseling services to individual students in a substantial number of the months for which it submitted claims for reimbursement.

22. For example, defendant submitted fifteen claims for psychological counseling to the Medicaid program for student S.U.,¹ between February 2001 and June 2002. However, according to the counselor's records, S.U. did not receive two or more counseling sessions in twelve of those months.

23. Defendant submitted seven claims for psychological counseling to the Medicaid program for student K.N. between January 2002 and April 2003. However, according to the counselor's records, K.N. received fewer than two counseling sessions in six out of seven of those months.

24. Defendant submitted seventeen claims for psychological counseling to the Medicaid program for student F.W. between November 2001 and June 2003. However, defendant was unable to produce any documentation to support that F.W. received two or more counseling sessions in all 17 of those months.

25. Defendant knowingly employed a billing system which resulted in its submission of false claims. It did not base its claims upon attendance records to ensure that it met the threshold of two services in a month for each student on the list. Rather, it submitted claims for reimbursement for all students in District 75 who were Medicaid eligible, regardless of what services it had actually provided.

26. In a report dated May 7, 2003, the New York City Comptroller found that defendant's system for submitting claims to the Medicaid program suffered from "poor controls over its [] system [which] resulted in the Board's billing for non-eligible services..." Further, the report stated that "our review of student records found that [defendant] did not ensure that [] students received the services required [] and did not always maintain adequate supporting documentation necessary to claim Medicaid reimbursement."

27. Defendant has acknowledged that it did not rely upon attendance records to support its claims for reimbursement. In a letter dated March 4, 2003 responding to the Comptroller's report, the Deputy Chancellor for Finance and Operations stated that "[o]ngoing attendance information is recorded manually at the school by related service providers on cards designed for that purpose ('service cards'). These service cards historically have been stored at the schools, which may have insufficient space and resources to preserve them for extended periods of time, much less to use them in any claiming process."

28. Defendant has admitted that its practices were inadequate. The March 4, 2003 letter also admitted that a study by defendant's own Offices of Legal Services and Auditor General (OAG) found that "for a percentage of claims, the documentation reflected an insufficient number of encounters to meet the two-visit-per-month threshold required under the state-approved formula for claiming."

29. As a result of defendant's conduct, in the school year 2001-02 alone, more than 12% of all claims for counseling services were for months in which the student received fewer than two services.

30. Defendant knew of these obvious deficiencies in its billing system in the 2001-02 school year. Nonetheless, defendant still did not develop an appropriate system in school years 2002-03 and 2003-04 to ensure that it billed only for months where two or more services were provided. Defendant continued in those years to submit claims for reimbursement without basing them upon the annual student "attendance cards," which were the only records of service provision.

FIRST CLAIM FOR RELIEF

31. The United States of America repeats and realleges the allegations contained in paragraphs 1- 30 as if fully set forth herein.

32. Defendant systematically submitted claims for reimbursement from the Medicaid program in months for counseling services in months where it failed to provide two or more services to the student at issue, in violation of the FCA.

33. Defendant knowingly made or presented, or caused to be made or presented to the United States these false claims for psychological counseling services. The defendant had actual knowledge that these claims were false, or was deliberately ignorant of or acted in reckless disregard of the fact that these claims were false.

34. By virtue of defendant's false claims submitted for psychological counseling, the United States has suffered damages in an amount to be determined, but no less than \$693,418.50 Pursuant to the False Claims Act, the United States is entitled to three times this amount, plus civil penalties of \$11,000 per false claim defendant presented or caused to be presented to the United States.

SECOND CLAIM FOR RELIEF

35. The United States of America repeats and realleges the allegations contained in paragraphs 1- 30 as if fully set forth herein.

36. By virtue of the conduct described above, defendant has been unjustly enriched in an amount to be determined, but no less than \$693,418.50.

WHEREFORE, the United States of America respectfully requests that this Court:

A. On the First Claim for Relief, order defendant New York City Department of Education to pay to the United States an amount to be determined, but no less than \$2,080,255.50, plus penalties and costs;

B. On the Second Claim for Relief, order defendant New York City Department of Education to pay to the United States an amount to be determined, but no less than \$693,418.50, plus fees and costs; and

C. Such other and further relief that is just and proper.

Dated: Brooklyn, New York October 12, 2012

LORETTA E. LYNCH

United States Attorney

Eastern District of New York

Attorney for the United States of America

271 Cadman Plaza East

Brooklyn, New York 11021

By: <<signature>>

Michael J. Goldberger

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Footnotes

- 1 Students' initials have been changed to maintain confidentiality.