



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Karen Schimke
Executive Deputy Commissioner

February 5, 1996

Dear

I am responding to your August 10, 1995 letter regarding the Health Care Practitioner Referrals Act. You asked the questions which are set forth and answered below.

Question 1

Are the MRI services of a radiologist furnished pursuant to a referral from a spouse-orthopedist prohibited by Public Health Law (PHL) §238-a(1)(a) under either of the following circumstances?

(a) The orthopedist refers his patient for an MRI scan to a radiologist with whom he has no financial or familial relationship. The patient chooses to go to the radiologist-spouse absent any advice or direction from the orthopedist but as a matter of convenience or preference.

(b) The orthopedist advises the patient that his spouse is a radiologist who performs MRI services in the area, and furnishes the name and telephone number of his spouse for the patient to make his/her own choice. The patient goes to the spouse.

Answer

In both instances, the services are performed pursuant to a prohibited referral.

Discussion

PHL §238-a(1)(a) prohibits an orthopedist from making a referral for MRI services to a provider with whom the orthopedist or an immediate family member has a financial relationship. Under your facts, the radiologist-spouse is the orthopedist's immediate family member with a financial interest in an MRI

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service. Therefore, the orthopedist may not refer to the radiologist for MRI services. You raise the issue of what constitutes a referral by the orthopedist to the radiologist.

PHL §238-a(6) defines a referral for MRI services as "the request by a practitioner for such services." The practitioner's request alone suffices to constitute a referral. So, for example, a physician who writes an order for MRI services is making a "request" for such services and has made a referral for those services whether or not a provider is named. Under the facts presented, the orthopedist makes a referral for MRI services by writing a request for those services.

The provider to whom the referral is made is the provider who in fact furnishes the services, regardless of whether the requesting practitioner has named or otherwise given direction as to who the provider should be. If the referred services are in fact furnished by a provider with whom the ordering practitioner has a financial relationship, then, independent of either party's intent, the referral was made to that provider. This interpretation is based on the legislative intent to impose strict liability on the ordering practitioner and the furnishing provider.

Under both your fact patterns the referral, or request for services, is made by the orthopedist. Since in both cases the referred services are furnished by the orthopedist's spouse who owns the MRI facility, the referral is made to the spouse and is prohibited. The intent of the ordering practitioner, the orthopedist, as with any strict liability statute, is not determinative.

Question 2

(a) Is the radiologist-spouse precluded from presenting a bill or claim to a third-party payor for MRI services ordered by the orthopedist regardless of whether the patient is directed by the orthopedist to the radiologist-spouse?

(b) Can a patient voluntarily choose a certain provider even though there is a financial relationship between the referring physician and that provider?

Answer

(a) Yes.

(b) The statute does not prohibit a patient from asking a provider to furnish services pursuant to a prohibited referral.

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Discussion

PHL §238-a(1)(b) prohibits a provider and a referring practitioner from presenting any demand for payment to a third-party payor for MRI services which are furnished pursuant to a prohibited referral. Whether the referral is prohibited must be determined in the first instance. As explained above, the intent of the ordering provider as expressed in his/her direction of the patient to a particular provider is not determinative. If the requested services are furnished by a financially related provider, the referral is prohibited and any demands for payment are not permissible.

PHL §238-a contains prohibitions which the referring practitioner and provider of services must follow. The statute imposes no duty, obligation or limitation directly on the patient. Nevertheless, we recognize that the patient's choice of provider may be affected by the refusal of the practitioner and provider to request or furnish services for which they will not be paid, and by the patient's own awareness that a prohibited referral will go uncompensated. The reason for the statute is to ensure that referrals are made based on medical necessity, quality of service and the patient's best interest, and not on the financial investment of the referring practitioner or an immediate family member. The statute reflects the legislative determination that the patient's interest is best served by the prohibition.

Question 3

With regard to the HMO/Managed Care exception set forth at PHL §238-a(2)(c), please clarify what is meant by a prepaid health services plan authorized by law.

Answer

A pre-paid health services plan authorized by law includes a special purpose health maintenance organization issued a special purpose certificate of authority under PHL §4403-a. There may be other such plans in the future.

Sincerely,


Henry M. Greenberg
General Counsel