

ATTORNEY GENERAL OF THE STATE OF NEW YORK

In the Matter of

New York Medical & Diagnostic Center, Inc.

Assurance No.: 12-028

**ASSURANCE OF DISCONTINUANCE
UNDER EXECUTIVE LAW
SECTION 63, SUBDIVISION 15**

As authorized by Article 22-A of the General Business Law and Executive Law § 63, Eric T. Schneiderman, Attorney General of the State of New York, conducted an investigation into the billing practices of New York Medical & Diagnostic Center, Inc. (NYMDC). Based upon that investigation, the Office of the Attorney General ("OAG") has made the following findings, and NYMDC has agreed to modify its practices, discontinue certain practices and assure its compliance with the following provisions of this Assurance of Discontinuance ("Assurance").

DEFINITIONS

1. The following definitions apply to the following terms as used throughout this Assurance:
 - a. "Managed Care Organization" or "MCO" shall mean a person, natural or corporate, or any groups of such persons, certified under New York Public Health Law Article 44.
 - b. "Health Plan" means a person, natural or corporate, or any group of persons, authorized to operate a health insurance business pursuant to the New York State Insurance Law who contracts with Participating Providers to provide health services to Members through agreements containing Hold Harmless provisions.

c. "Insurer" means 1) an insurance company licensed to issue health insurance under the New York State Insurance Law, a corporation licensed pursuant to Article 43, or an entity possessing a certificate of authority under Article 44 of the Public Health Law; and 2) that issues a financial risk transfer agreement as defined in 11 NYCRR § 101.3(c) to contract with its Participating Providers. Financial risk transfer agreements between the Insurer and the Participating Provider allow the Insurer to make contractually based prepayments to the Participating Provider based on a per member basis or a percentage of the premium.

d. "Hold Harmless Provision" means a provision in a Participating Provider contract that protects a Member of an MCO, Health Plan or Insurer against liability for costs of health care services that are provided pursuant to the Member's certificate of coverage with an MCO, Health Plan or Insurer.

e. "Member" means enrollees, covered persons, or subscribers of MCOs, Health Plans or Insurers.

f. "Participating Provider" means a person, including NYMDC and/or its health care providers, who has entered into a contract with an MCO, Health Plan or Insurer to provide health care services to Members.

ATTORNEY GENERAL'S INVESTIGATION

2. NYMDC is a multi-specialty health care provider -- with approximately twenty physicians and other health care providers specializing in internal medicine, gynecology, family medicine, chiropractic care, gastroenterology, and cardiology -- that provides care to about two hundred patients each day. NYMDC has a centralized billing department servicing all of its health care providers. NYMDC is located at 80-46 Kew Gardens Road, Kew Gardens, New York 11415.

3. The Health Care Bureau of the Office of the New York State Attorney General (OAG) received complaints from Members who were billed by NYMDC for the difference between NYMDC's charge and the claim payment by the Member's MCO, Health Plan or Insurer, despite the fact that NYMDC was a Participating Provider with the MCO, Health Plan or Insurer. This practice is known as "balance billing," and is specifically prohibited by New York law with respect to Insurers and MCOs, 11 NYCRR 101.4[a][2] and 10 NYCRR 98-1.5[b][6][iii] respectively, and is barred by contractual provisions between NYMDC and Health Plans.

4. For example, in 2010 a Member contacted the OAG after being billed by NYMDC for services rendered in 2005 and 2006. The Member had coverage for the particular services with a Health Plan ("covered services") that contracted with NYMDC. NYMDC submitted the claims for covered services to the Health Plan for payment, but the Health Plan denied the claims because of NYMDC's own billing errors. NYMDC's billing errors included submission of claims (i) under the incorrect provider name, (ii) without appropriate documentation, and/or (iii) in an untimely manner. When the Health Plan denied the improperly submitted claims, NYMDC billed the Member directly for the full cost of the services rendered, in violation of the terms of its contract with the Health Plan that forbid NYMDC from billing Members directly for covered services other than applicable co-pays, coinsurance and/or deductible.

5. The OAG's investigation revealed that NYMDC's claims and billing processes were disorganized, incomplete and replete with erroneous information. For example, notwithstanding that a Health Plan advised NYMDC *not* to bill a Member, NYMDC billed the Member different amounts at different times for the same service and provided no rationale for these variances. NYMDC was unable to provide the OAG documentation from the Health Plan

to support its bills to the Member, and NYMDC's billing staff was not readily available to discuss the billing issues. When staff could be reached, they provided inconsistent explanations as to the justification for billing the Member.

6. Moreover, NYMDC persisted in its practice of balance billing Members even after the OAG and health plans notified it that it was improper to do so.

STATUTORY AND REGULATORY VIOLATIONS

7. NYMDC's contracts with MCOs are subject to New York regulations and agency guidelines that prohibit balance-billing. Pursuant to 10 NYCRR 98-1.5[b][6][ii], contracts between an MCO and a Participating Provider must “include express conditions indicating that the provider shall hold MCO enrollees harmless from liability, and shall not bill enrollees under any circumstances for the costs of covered services rendered by the contracting provider, except that nothing herein shall prevent collection of applicable co-payments or co-insurance or permitted deductibles.” (10 NYCRR 98-1.5[b][6][ii])

8. New York State Department of Health guidelines applicable to MCOs incorporate this regulatory requirement by mandating that all Participating Provider contracts include a "Hold Harmless" provision that prohibits balance billing, as follows:

Enrollee Non-liability. Provider agrees that in no event, including, but not limited to, nonpayment by the MCO or IPA [Independent Practice Association], insolvency of the MCO or IPA, or breach of this Agreement, shall Provider bill, charge, collect a deposit from, seek compensation, remuneration or reimbursement from, or have any recourse against a subscriber, an enrollee or person (other than the MCO or IPA) acting on his/her/their behalf, for services provided pursuant to the subscriber contract or Medicaid Managed Care contract or Family Health Plus contract and this Agreement, for the period covered by the paid enrollee premium. . . . This provision shall not prohibit the provider, unless the MCO is a managed long term care plan designated as a Program of All-Inclusive Care for the Elderly (PACE), from collecting

copayments, coinsurance amounts, or permitted deductibles, as specifically provided in the evidence of coverage, or fees for uncovered services delivered on a fee-for-service basis to a covered person provided that Provider shall have advised the enrollee in writing that the service is uncovered and of the enrollee's liability therefore prior to providing the service. . . .

New York State Department of Health Standard Clauses for Managed Care Provider/IPA Contracts, Appendix, § C.1., revised March 1, 2011.

9. In its contracts with Insurers, NYMDC is also barred from balance billing. This requirement is found in the regulations that govern financial risk transfer agreements. New York regulations require all financial risk transfer agreements between an Insurer and Participating Provider to contain “a ‘Hold Harmless’ provision that prohibits a participating provider from collecting or attempting to collect from a subscriber [Member] any amounts owed to such participating provider for covered services, but excluding any amounts owed by the subscriber to the provider pursuant to the subscriber’s contract . . .” (11 NYCRR 101.4[a][2]).

10. Finally, in its contracts with Health Plans, which govern NYMDC reimbursement rates for various procedures and services, NYMDC is contractually barred from balance billing the member.

11. Other provisions of New York state law also prohibit NYMDC's improper billing and collection efforts. Specifically,

a. Article 22-A of the New York State General Business Law prohibits “deceptive acts and practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state . . .” (General Business Law § 349[a]);

b. Executive Law § 63(12) prohibits repeated fraudulent or illegal acts in the transaction of business; and

c. Article 29-H of the General Business Law prohibits any creditor or agent of a creditor from attempting or threatening to enforce a right with knowledge or reason to know that the right does not exist (General Business Law § 601[8]).

12. It is an improper billing practice under New York State regulations 10 NYCRR 98-1.5[b][6][ii]) (MCO Members) and 11 NYCRR 101.4[a][2] (Insurer Members); a deceptive and fraudulent business practice under General Business Law Article 22-A; a fraudulent and illegal act under Executive Law 63(12); and/or an improper collection practice under General Business Law Article 29-H for a Participating Provider to bill a Member of an MCO, Health Plan or Insurer (other than for applicable deductibles, co-insurance and amounts designated by the MCO, Health Plan or Insurer as the Member's responsibility in his or her subscriber contract or certificate of coverage) as long as coverage is in effect. Instead, the Participating Provider must seek payment for services solely from the MCO, Health Plan or Insurer (other than for applicable deductibles, co-insurance and amounts).

13. Based on the findings of the Attorney General's investigation, the Attorney General has determined that NYMDC's billing practices have resulted in violations of 10 NYCRR 98-1.5(b)(6)(ii), 11 NYCRR 101.4(a)(2), General Business Law Article 22-A, Executive Law 63(12), and General Business Law Article 29-H.

NOW, WHEREAS, NYMDC neither admits nor denies the Attorney General's findings in Paragraphs 1-13; and

WHEREAS, the Attorney General is willing to accept the terms of this Assurance under Executive Law § 63(15) and to discontinue his investigation; the parties each believe that the obligations imposed by this Assurance are prudent and appropriate; and the Attorney General has determined that this Assurance is in the public interest.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the parties that:

I. PROSPECTIVE RELIEF

1. NYMDC agrees not to bill a Member of an MCO, Health Plan or Insurer for covered services (other than for applicable deductibles, co-insurance and amounts designated by the MCO, Health Plan or Insurer as the Member's responsibility in his or her certificate of coverage) where (1) NYMDC is a Participating Provider with the Member's MCO, Health Plan or Insurer; and (2) the Member's coverage is in effect.

2. In any communications about fees (other than co-pays, coinsurance or deductibles) NYMDC makes to Members, it shall fully and accurately represent the Member's financial responsibility for services rendered by NYMDC and will clearly and conspicuously (in bold letters and in fourteen-point font or larger) state "THIS IS NOT A BILL" and "MAKE NO PAYMENT."

3. NYMDC agrees to modify its billing practices, procedures and policies to comply fully with all New York State laws and regulations and the requirements of this Assurance.

4. NYMDC agrees further to develop a training curriculum and train all staff to comply fully with these new practices, procedures and policies, and all New York State laws and regulations and the requirements of this Assurance.

II. CONSUMER RESTITUTION

5. NYMDC shall pay full restitution plus twelve (12) percent interest per annum to those Members of MCOs, Health Plans and Insurers that contract or contracted with NYMDC, and 1) who received covered services at any time from April 1, 2009 through the Effective Date

of this Assurance; and 2) who were billed by NYMDC and paid for services other than for applicable deductibles, co-insurance and amounts designated by the MCO, Health Plan or Insurer as the Member's responsibility in his or her subscriber contract or certificate of coverage. The Members who meet these three conditions will be called "Eligible Members."

6. In order to ensure that restitution is provided to all Eligible Members, NYMDC will hire an independent reviewer approved by the OAG, who has experience auditing medical billing and claims records and is certified and/or credentialed for reviewing medical claims. The auditor shall be retained within sixty days of the Effective Date of this Assurance. Within ninety days from the date the auditor is retained, the auditor shall complete its review of NYMDC records in order to determine all Eligible Members who meet the requirements set out in paragraph II.5. If the records do not provide sufficient information for the auditor to determine whether a Member shall be considered an Eligible Member, the auditor shall seek additional documentation in order to be able to make this determination, including but not limited to contacting Members for information.

7. Within sixty days from the date that all Eligible Members are identified by the auditor, NYMDC shall issue a restitution check to each Eligible Member, which shall reimburse Eligible Members the amount they were billed and paid for covered services, other than for applicable deductibles, co-insurance and amounts designated by the MCO, Health Plan or Insurer as the Member's responsibility in his or her certificate of coverage. The restitution check shall also include twelve (12) percent interest per annum from the date the Member made the first payment to the date restitution is issued.

8. NYMDC shall send by regular mail the restitution check to the last known address of the Eligible Member. NYMDC shall make reasonable efforts to ensure the restitution

checks are received, which shall include but not be limited to contacting the United States Post Office for a possible forwarding address if the check is returned.

9. The auditor shall also identify all Members who were billed for covered services rendered by NYMDC at any time from April 1, 2009 through the Effective Date of this Assurance, and whose accounts were sent to collection agencies. These Members will be identified as "Collection Members." For Collection Members, NYMDC shall 1) instruct the collection agency/agencies to cease all collection activity; 2) set the balance including all fees and interest to \$0 in both NYMDC's accounts and that of the collection agency/agencies; and 3) ensure that all major credit bureaus remove any derogatory information reported for the Collection Member.

10. In addition to the auditor's review and identification of Eligible Members and Collection Members, within thirty days from the date the auditor is retained, NYMDC shall send a notice in one cycle of its billing statements sent to patients. The notice will read, in at least 14-point type: "YOU MAY BE OWED MONEY FOR PAYMENTS YOU MADE THAT SHOULD HAVE BEEN COVERED BY YOUR INSURANCE. IF NYMDC IS A PARTICIPATING PROVIDER WITH YOUR HEALTH PLAN AND YOU PAID MORE THAN YOUR CO-PAY, CO-INSURANCE OR DEDUCTIBLE, PLEASE SUBMIT A WRITTEN CLAIM TO NYMDC AT [ADDRESS], ATTN: AUDITOR, IDENTIFYING THE DATE(S) OF SERVICE AND AMOUNT YOU BELIEVE YOU OVERPAID. AN INDEPENDENT REVIEWER WILL REVIEW YOUR CLAIM AND PROVIDE A REFUND IF DEEMED APPROPRIATE IN THE REVIEWER'S DISCRETION."

11. The auditor will review all written claims received from Members in response to the mailing, and issue further refunds as appropriate in accordance with Section II paragraphs 5-9.

12. The notice set forth in Section II paragraph 10 shall also be posted on the website and at NYMDC.

13. Within sixty days from the date all restitution checks are mailed, NYMDC shall submit to the OAG a restitution report that includes, for each claim: the identity of the Eligible Member, the identity of the provider(s) involved in the claim, the date(s) of service, the restitution amount with an explanation as to how it was calculated, the date restitution was issued, the address to which the restitution was sent, and whether the check was returned. In addition, the report shall (i) identify all accounts identified in paragraph II.9, including the identity of the Collection Member, the identity of the provider(s) involved in the claim, the date(s) of service, and the total balance including fees and interest; and (ii) contain a confirmation that collection activity has ceased and the account has been cleared, as well as a confirmation that major credit bureaus have removed any derogatory information reported for the Collection Member. Lastly, the report shall contain the number of notices that were sent to Members, whether a claim for restitution was made, and the outcome of that claim.

14. Eighteen months after the restitution and collection reports are submitted to the OAG, the auditor shall examine claims incurred since the Effective Date of the Assurance to ensure compliance with the terms of this Assurance. If the auditor identifies instances in which Members continue to be improperly balance billed, NYMDC shall pay full restitution to each Member so affected, and it shall also pay a penalty to the OAG of \$5,000 for each such balance billing violation, as well as be subject to further action as the OAG deems appropriate. In

addition, the auditor shall submit a report to the OAG, in the same format as the previous restitution and collection reports, identifying all instances of improper balance billing.

15. NYMDC shall continue to cooperate with the OAG and promptly resolve all consumer complaints that the OAG submits to NYMDC, or that otherwise come to the attention of NYMDC, which shall include issuing appropriate restitution to Members.

16. NYMDC shall bear all costs for the procedures set out in this section.

III. COSTS

17. Within thirty days of the Effective Date of this Assurance, NYMDC shall pay \$7,500 (seven thousand five hundred dollars) to the OAG for costs incurred during the investigation and monitoring of this matter. Such sum shall be payable in three equal monthly installment payments of \$2,500.

IV. CORRESPONDENCE AND PAYMENT

18. All notices, reports, requests, and other communications to any party pursuant to this Assurance shall be in writing and shall be directed as follows:

If to the OAG to:

Carol Hunt
Assistant Attorney General
Office of the Attorney General
Health Care Bureau
120 Broadway, 26th Floor
New York, New York 10271

If to NYMDC to:

19. All checks issued pursuant to this Assurance shall be made payable to "State of New York Department of Law."

20. All payments and correspondence related to this Assurance must reference "Assurance 12-028"

V. MISCELLANEOUS

Successors and Third Parties

21. This Assurance and all obligations imposed on or undertaken by NYMDC herein, will be binding upon and enforceable against NYMDC and its officers, directors, agents, employees and assignees, and any subsequent owner or operator (whether by merger, transfer of control, contractual arrangements or other means) of NYMDC.

NYMDC's Representations

22. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by NYMDC and its counsel and the OAG's own factual investigation. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

No Deprivation of the Public's Rights

23. Nothing herein shall be construed to deprive any person of any private right under law or equity.

**No Blanket Approval by the Attorney General
of NYMDC's Practices**

24. Acceptance of this Assurance by the OAG shall not be deemed or construed as approval by the OAG of any of NYMDC's acts or practices, and NYMDC shall make no representation to the contrary.

Monitoring by the OAG

25. To the extent not already provided under this Assurance, NYMDC shall, upon

request by the OAG, provide all documentation and information necessary for the OAG to verify compliance with this Assurance, at NYMDC's expense. This Assurance does not in any way limit the OAG's right to obtain, by subpoena or by any other means permitted by law, documents, testimony, or other information.

No Limitation on the Attorney General's Authority & NYMDC's Duty to Honor Investigation and Obligations

26. Nothing in this Assurance in any way limits the OAG's ability to investigate or take other action with respect to any non-compliance at any time by NYMDC with respect to this Assurance, or NYMDC's noncompliance with any applicable law with respect to any matters.

Nondisparagement of Assurance

27. NYMDC shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects NYMDC's (a) testimonial obligations or (b) right to take legal or factual positions in defense of litigation or other legal proceedings to which OAG is not a party.

Governing Law; Effect of Violation of Assurance of Discontinuance

28. Under Executive Law § 63(15), evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law in any action or proceeding thereafter commenced by the OAG.

29. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

30. If a court of competent jurisdiction determines that NYMDC has breached this Assurance, NYMDC shall pay to the OAG the cost, if any, of such determination and of

enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

31. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

32. Any failure by the OAG to enforce this entire Assurance or any provision thereof with respect to any deadline or any other provision herein shall not be construed a waiver of the OAG's right to enforce other deadlines and provisions of this Assurance.

Entire Agreement; Amendment

33. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by NYMDC in agreeing to this Assurance.

34. This Assurance contains an entire, complete, and integrated statement of each and every term and provision agreed to by and among the parties, and the Assurance is not subject to any condition not provided for herein. This Assurance supersedes any prior agreements or understandings, whether written or oral, between the OAG and NYMDC regarding the subject matter of this Assurance.

35. This Assurance may not be amended or modified except in an instrument in writing signed on behalf of all the parties to this Assurance.

36. The division of this Assurance into sections and subsections and the use of captions and headings in connection herewith are solely for convenience and shall have no legal effect in construing the provisions of this Assurance.

Binding Effect

37. This Assurance is binding on and inures to the benefit of the parties to this Assurance and their respective successors and assigns, provided that no party, other than the OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without prior written consent of the OAG. NYMDC represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized.

Effective Date

38. This Assurance is effective on the date that it is signed by the Attorney General or his authorized representative (the "Effective Date"), and the document may be executed in counterparts, which shall all be deemed an original for all purposes.

AGREED TO BY THE PARTIES:

Dated: _____, 2012

New York Medical and Diagnostic Center, Inc.

By: 

Jack K Sadigh

CONSENTED TO:

Dated: New York, New York

May 24, 2012

ERIC SCHNEIDERMAN
Attorney General of the State of New York

By: 

CAROL HUNT
Assistant Attorney General, Health Care Bureau