



# INVESTIGATIVE REPORT

Lori Torres, Inspector General

OFFICE: INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION (FSSA)

TITLE: COST REPORTS FOR NURSING FACILITIES

CASE ID: 2016-11-0241

DATE: July 26, 2019

*The Inspector General's Chief Legal Counsel, Tiffany Mulligan, after an investigation by Special Agent Chuck Coffin, reports as follows:*

The Indiana General Assembly charged the Office of Inspector General (OIG) with addressing fraud, waste, abuse and wrongdoing in agencies. IC 4-2-7-2(b). The OIG investigates criminal activity and ethics violations by state employees. IC 4-2-7-3(3). The OIG may recommend policies and carry out other activities designed to deter, detect and eradicate fraud, waste, abuse, mismanagement and misconduct in state government. IC 4-2-7-3(2). The OIG also may advise an agency on implementing policies and procedures to prevent and reduce the risk of wrongful acts within the agency. IC 4-2-7-3(8).

## **I. Background**

### **A. Complaint and Overview of Investigation**

On November 28, 2016, the OIG received a complaint alleging that nursing facilities were consistently submitting inaccurate Medicaid cost reports to the Indiana Family and Social Services Administration (FSSA). FSSA uses these cost reports to set Medicaid rates for nursing facilities in accordance with 405 IAC 1-14.6. The complaint alleged that the reports may have been overstating nursing facility costs, which inflated the Medicaid reimbursement rates for many of

Indiana's nursing facilities. The complaint detailed numerous alleged violations of policy and procedures, as well as improper practices and potential criminal activity by two specific preparers of nursing facility cost reports.

In January of 2017, the OIG enlisted the assistance of FSSA's Audit Services Division to review and assist in investigating the allegations. During the course of the investigation, the OIG and FSSA's Audit Services Division conducted several interviews with staff of FSSA and staff of the FSSA contractor (Contractor) that audits compliance of nursing facilities. The OIG and FSSA's Audit Services Division also reviewed documents, including cost reports and policy manuals.

The investigation took two distinct paths: first, the investigation reviewed allegations involving the two specific cost report preparers who were named in the original complaint, and second, the investigation reviewed the nursing facility cost report process as a whole to identify any opportunities to improve the process and reduce wasteful government spending.

## **B. Overview of Nursing Facility Cost Report Process**

During the course of the investigation, the OIG and FSSA's Audit Services Division received a high-level overview of the nursing facility cost report process. They learned that nursing facilities are required to submit cost reports to FSSA on an annual basis. Some nursing facilities prepare their own cost reports in-house, but many nursing facilities hire outside cost report preparers. The investigators learned that preparing a cost report is a complex process that requires compliance with FSSA's rules<sup>1</sup> and instructions from the Contractor on how to prepare the reports<sup>2</sup>. Those interviewed stated that the cost reports can affect the provider's Medicaid

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<sup>1</sup> FSSA's rules for Rate-Setting Criteria for Nursing Facilities can be found in [405 IAC 14.6](#).

<sup>2</sup> The Contractor's instructions for submitting cost reports can be found at: <https://www.mslc.com/Indiana/Resources/Documents.aspx>.

reimbursement rate, and if done incorrectly, may result in an overpayment of both federal and state funds.

Once the cost report preparer completes the cost report, the owner of the nursing facility certifies the cost report and submits it to the Contractor as part of the Medicaid rate-setting process. The Contractor then performs a desk review of the cost report and makes adjustments if the Contractor believes any costs are inappropriately classified. The nursing facility can request reconsideration and dispute the Contractor's adjustments within a certain time period. If the Contractor makes the adjustments after the reconsideration process, the nursing facility can then appeal the decision to FSSA. Administrative Law Judges (ALJs) within FSSA hear these appeals. FSSA often has a large number of pending appeals from nursing facilities who dispute the adjustments made by the Contractor.

Along with these desk reviews, the Contractor performs enhanced audits of about half of the nursing facilities each year. With the enhanced audits, the Contractor provides thirty-day notice to the nursing facility and then visits the nursing facility or their home office to conduct a more in-depth audit.

During their interview with the OIG and FSSA's Audit Services Division, staff of the Contractor stated that they have reported possible cost preparer fraud to FSSA's Office of Medicaid Policy and Planning (OMPP) possibly a dozen times since the Contractor took over compliance reviews in 2009. They stated that a majority of these reports resulted in meetings with the Indiana Office of Attorney General's Medicaid Fraud Control Unit (MFCU) to determine next steps. In some of these cases, OMPP and MFCU had the Contractor continue to work with the cost report preparer, and on other cases, OMPP asked the Contractor to stop work so that MFCU could investigate the matter further.

## **II. Investigation and Findings**

### **A. Individual Cost Report Preparers**

The OIG and FSSA's Audit Services Division reviewed allegations involving the two specific cost report preparers named in the original complaint. During the course of the investigation, they heard allegations that these preparers are aggressive and often get close to the line of what is acceptable to include in a cost report. For example, one individual interviewed stated that one of the preparers often presents multiple amendments to her reports that are drastically different than the original report she submitted. The witness stated concern that the preparer was submitting reports that she knew were wrong to get them in on time and then submitted multiple amendments to correct the reports.

The OIG and FSSA's Audit Services Division also heard allegations that the two specific cost report preparers tried to get the maximum reimbursement amount for their nursing facilities. They stated that these preparers, along with other preparers, look for and can sometimes find loopholes in Indiana law. Although these allegations raised concerns about inappropriate practices and opportunity for possible process improvements, the OIG and FSSA's Audit Services Division found no evidence of fraud on the part of either cost report preparer to report to the Indiana Office of Attorney General's MFCU. They also found no evidence of any other criminal wrongdoing on the part of either cost report preparer.

### **B. Nursing Facility Cost Report Process**

The OIG and FSSA's Audit Services Division also reviewed the nursing facility cost report process as a whole to identify opportunities to improve the process and reduce wasteful government spending. One individual interviewed explained that cost report preparers serve a vital purpose in the industry and part of their job is to advocate on behalf of their clients within the

realm of the regulations. Another person interviewed stated that some contractors are more aggressive than others. One individual noted that cost report preparers are partners with FSSA in the Medicaid rate-setting process.

Several individuals interviewed noted that cost report preparers have a strong voice in Indiana. They noted that several lobbying groups are able to influence laws, rules and policies for preparing cost reports and preparing Medicaid reimbursement rates. One individual stated that the Medicaid rate-setting process requires a constant process of clarifying and defining policies and that the rules have significantly changed over time.

During the course of the investigation, the OIG and FSSA's Audit Services Division asked those interviewed for any concerns they have as well as for ways to improve the cost report process. They also asked FSSA staff for a response to these concerns and suggestions for improvement. Below is a summary of some of the concerns noted during the course of the investigation, along with FSSA's responses.

## **1. Clarity of Medicaid Rules**

The reporting party and others expressed concerns regarding the lack of clarity or "gray areas" in some sections of Indiana's Medicaid rules. The reporting party stated that this could lead to savvy providers abusing the Medicaid rules.

The OIG and FSSA Audit Services Division learned that the gray areas in the Medicaid rules may be caused in part by the timing differences between when the U.S. Health and Human Services' Center for Medicare and Medicaid Services (CMS)<sup>3</sup> approves Indiana's Medicaid State

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<sup>3</sup> CMS is part of the U.S. Department of Health and Human Services.

Plan<sup>4</sup> and when FSSA promulgates rules in the Indiana Administrative Code to reflect the State Plan. FSSA staff explained that CMS usually takes about two months to approve a State Plan while the rule promulgation process outlined in state statute and policy generally takes twelve to eighteen months to complete.

The concern is that the inconsistencies between the State Plan and FSSA's Indiana Administrative Code rules allows providers to choose whichever rules they believe are more advantageous to their company. It also may increase the number of appeals due to the differing rules in place. FSSA staff explained that FSSA is required to comply with the State Plan, and by extension nursing facilities should comply with the State Plan as well, in order to draw down federal dollars. Nonetheless, those interviewed reported that having conflicting rules in place may add to confusion and gamesmanship in the cost report process.

## **2. Clarity of Cost Report Instructions**

The reporting party expressed concern regarding lack of clarity on the cost report preparation instructions. FSSA's Audit Services Division determined that the line-by-line preparation instructions on the Contractor's website do not cover several lines in the cost report and found that one line without instructions resulted in several audit findings, issues, reconsiderations and/or appeals by providers and preparers. FSSA staff agreed that there are no preparer instructions for several lines in the cost report. They indicated they would work with the Contractor to update instructions in the coming year to help eliminate potential issues.

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<sup>4</sup> A Medicaid State Plan is an agreement between a state and the federal government describing how the state will administer its Medicaid program. It provides assurance that the State will follow federal rules and allows the State to claim federal matching funds for its program activities.

### **3. Failure of Nursing Facilities to Submit Information**

Some individuals interviewed expressed concerns that the nursing facilities were not responsive to FSSA or the Contractor's requests for information. During onsite compliance audits, FSSA's Audit Services Division found that nursing facilities failed to provide several items or requested information in a timely manner. This caused delay for completion of the onsite compliance review and required a back and forth exchange of requests and information to complete the review.

FSSA staff noted that 405 IAC 1-14.6-3(c)(3) provides a penalty for failure to submit documents needed for a field audit by the deadline in the scheduling letter. Some individuals interviewed stated that this penalty should be used more frequently or FSSA should look for other methods to improve cooperation by the nursing facilities.

### **4. Problems with Signatures on Certification Statements**

The reporting party and others stated that the cost report preparers sometimes fail to sign the certification statement. The certification statement asserts the information submitted in the cost report is true and correct. At one time, an authorized representative of the facility was required to sign the report, but the preparer was not required to do so. This resulted in concerns that the cost report preparers were not held accountable for their work. The OIG and FSSA Audit Services Division also heard concerns regarding cost reports where cost report preparers included a disclaimer with the cost reports. An individual interviewed stated that the cost report preparers should have to verify that they asked the necessary questions and have the requisite knowledge to submit the report.

FSSA staff stated that they do not accept unsigned cost reports. They send the unsigned cost reports back to the nursing facilities as incomplete submissions. FSSA staff also stated that

in March of 2018, FSSA updated the Nursing Facility Cost Report Instructions to include separate certification statements for nursing facilities and cost-report preparers. This requires both the nursing facility and the cost report preparers to attest to the accuracy of the cost report.

## **5. Submission of Amended Cost Reports**

The reporting party and others involved in the cost report process noted that some cost report preparers amend and resubmit the cost reports after they have filed the original reports and before FSSA determines the Medicaid reimbursement rates. Both noted that sometimes these amended cost reports have significant changes from the original version submitted. Also both expressed concerns that the process of submitting amended cost reports may be costly to the State and there are no rules or guidance prohibiting this practice.

FSSA staff responded that they accept amended cost reports, but they require newly signed certification statements with each amended report.

## **6. Repeated Adjustments in Cost Reports**

Several individuals interviewed during the investigation noted that cost report preparers often fail to remove costs that the Contractor asked them to correct in previous years. As a result, the Contractor is making the same adjustments year after year. Those interviewed expressed concerns that this process results in the nursing facilities and cost report preparers following the same pattern each year of contesting the Contractor's determinations. One individual described this practice as "like groundhog's day" where no issue gets resolved from year to year.

One individual suggested that FSSA require nursing facilities to submit corrective action plans after the Contractor makes adjustments so that they have the opportunity to explain to FSSA how they will correct the issue going forward. The individual suggested that this might



reduce the numbers of appeals FSSA receives each year from nursing facilities who are disputing the adjustments made by the Contractor.

FSSA staff responded that an FSSA ALJ sets precedent for future cost reports once a nursing facility has appealed an issue. A nursing facility will bring repeated issues year after year until an ALJ has made a decision. FSSA has a backlog of appeals, which sometimes results in the nursing facility not having an ALJ decision on an issue until the next year's cost report is due.

FSSA staff noted that corrective action plans could be added to the rating setting or audit process if FSSA promulgated a rule with an attached penalty to ensure compliance by providers.

## **7. Upper Payment Limit (UPL) Program**

Investigators also learned of concerns regarding the Upper Payment Limit (UPL) program and "its explosion" of growth in recent years. The complaint suggested that the UPL program has very few limitations on it, it is costly to the State, and there is no guarantee that the payments are used to improve patient care.

Based on information obtained from FSSA staff, the UPL program is an agreement where Non-State Government entities, primarily county hospitals, buy and own the licensure for a nursing facility. The nursing facility then becomes a Non-State Government Owned entity (NSGO). The NSGO can then qualify for UPL payments, which are supplemental payments, in addition to the Medicaid daily rate the nursing facilities receive. Essentially the payments consist of the difference between the Medicaid rate and the Medicare rate for each facility that is a NSGO facility. As of May 2019, FSSA staff reported that Indiana had 26 NSGOs that owned 503 of the 529 nursing facilities statewide.

FSSA staff reported that the total UPL supplement payments for State Fiscal Year 2018 totaled one billion in state and federal funds; however, they disputed the claim that the program was costly to the State. They stated that the UPL program is run at no cost to the State outside of administrative costs. FSSA staff also stated that the UPL payments help cover Medicaid funding shortfalls for nursing facilities.

In response to the concern that UPL payments are not being used to improve patient care at nursing facilities, FSSA staff replied that UPL payments must be available for the NSGO nursing facility's operating use throughout the fiscal year. After the fiscal year, the owner of the NSGO's license may use the money at its discretion. At the time of this Report, FSSA's Audit Services Division has not audited the amount, the disposition or the use of unspent UPL payments; therefore, it is unclear what percentage of the UPL payments are not being used by the nursing facility within the fiscal year and what percentage is used for purposes other than the nursing facilities.

### **III. Conclusion and Recommendation**

Special Agent Coffin contacted the U.S. Department of Health and Human Services (HHS) Office of Inspector General to provide an overview of the case. The HHS OIG referred Special Agent Coffin to the HHS's CMS. After reviewing the complaint and information obtained in the investigation, CMS determined that Indiana's FSSA was in a better position to address the concerns outlined in the complaint.

The OIG agrees that FSSA is in the best position to evaluate the concerns raised in the complaint and during this investigation due to their expertise and knowledge of Medicaid policy and rules. The OIG declines to recommend specific action to FSSA as a result of this investigation but instead will rely on FSSA to carefully evaluate the concerns noted in this IG

Report, specifically those summarized in Section II. B., and to seek solutions to improving its processes.

Dated: July 26, 2019

A handwritten signature in cursive script that reads "Lori Torres".

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Lori Torres, Inspector General