

**M E M O R A N D U M**

**TO:** Center for Telemedicine Law; Telehealth Community

**FROM:** Robert J. Waters, General Counsel

**DATE:** July 12, 2004

**SUBJECT:** HHS OIG Opinion 04-07 Issued June 17, 2004

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The OIG's Recent Telemedicine Fraud and Abuse Opinion – Two Key Points

I wanted to update you on the recent telemedicine fraud and abuse Advisory Opinion, No. 04-07, issued on June 17, 2004 by the Department of Health and Human Services, Office of the Inspector General (OIG). This new opinion is available online at: <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2004/advopn04-07A.pdf>. This Opinion is a follow-up to Advisory Opinion No. 99-14, which I requested in 1999 on behalf of a client.

The OIG's Opinion is particularly noteworthy, because it indicates that there may be some limited circumstances where a health care delivery system can deploy telemedicine equipment to unrelated remote sites and not be subject to prosecution under the sweeping provisions of the federal anti-kickback statute (Section 1128 of the Social Security Act). In this case, telemedicine equipment was installed in schools for health screening programs conducted by an integrated health system. Neither the integrated health system nor the consulting providers received federal or state reimbursement for the telemedicine interactions. In addition, any referrals for follow-up care were made to the child's regular primary care provider or to a list of primary care providers in the community.

The OIG's previous opinion on telemedicine, Advisory Opinion No. 99-14, was issued in 1999 and approved an arrangement where a health system used federal grant funds provided by the Office for the Advancement of Telehealth and the Office of Rural Health Policy to pay for telemedicine equipment installed at spoke sites. This opinion is available online at: [http://oig.hhs.gov/fraud/docs/advisoryopinions/1999/ao99\\_14.htm](http://oig.hhs.gov/fraud/docs/advisoryopinions/1999/ao99_14.htm).

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While this Opinion is good news for telemedicine providers, a word of caution is in order as the OIG's interpretation only applies to the limited circumstances cited in the OIG's opinion. There are huge risks to telemedicine providers who casually ignore this area of the law. It is very important that health practitioners consult with counsel before paying to install telemedicine equipment at remote sites.

The basis for this advisory opinion rests in the OIG's interpretation of the anti-kickback statute, which makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a federal health program. The Stark Law (Section 1877 of the Social Security Act) prohibits physicians from making referrals to certain entities in which they have direct or indirect interests.

While a particular arrangement might violate both the anti-kickback statute and the Stark Law, two separate, but closely related laws, the OIG only has the authority to issue opinions regarding the anti-kickback statute, while Opinions about the Stark Law are issued by the Centers for Medicare and Medicaid Services (CMS).

If you have any questions about the advisory opinion or other issues related to telehealth, please contact me at 202-230-5152.

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