

American Assn. of Doctors of Optometry, Inc.
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May 24, 2016

Mr. Thomas Fessler, Esq.
General Counsel, Vision Service Plan
3333 Quality Drive
Rancho Cordova, CA 95670-7985

Re: Proposed VSP Frame Reimbursement Program

Dear Mr. Fessler,

Thank you for your letter dated May 18, 2016, receipt of which is hereby acknowledged. I note that, while you disagree with my conclusions, you have not identified misstatement of the facts upon which I base my analysis. That said, while I appreciate the rhetoric, the plain reality is that, as we all know, this change of VSP policy is to induce the sale of more VSP-owned frames by your network providers. It's that simple. VSP is saying, either sell VSP-owned frames, or we are going to lower your frame reimbursements and you will make less money.

Your suggestion that a *lower frame reimbursement rate* for selling non-VSP frames, or for failing to sell \$6,000 worth of Marchon and Altair frames, will have a net effect of *lowering costs to VSP members*, is quite far-fetched, to say the least. And the suggestion that paying a higher reimbursement rate for Marchon/Altair frames allows VSP members to benefit through reduced or discounted material costs is equally nonsensical. To the contrary, this plan will likely (almost certainly) lead to *higher* frame prices to both VSP members and non-members as providers are forced to recoup this new "cost" of doing business. This not only hurts VSP members, but it hurts independent optometry in this highly competitive environment. If VSP, indeed, wants to allow VSP members to benefit from lower material costs, it should increase, not decrease, frame (and all) reimbursement rates.¹ That would allow doctors to reduce their prices to your VSP members while maintaining their financial viability.

We all know that, while the patient does indeed make the final frame decision, the recommendations and selling process by the staff significantly influences those decisions. For instance, the staff may choose to show or recommend to the patient 5 or 6 Marchon or Altair frames before choosing to try or recommend a non-VSP frame, all-the-while telling the patient that this is a good frame for them. Indeed, it is this very kind of "subtle influence" that forms the foundation of court rulings and regulations prohibiting corporate control over any aspect of the practice of optometry. For instance, In National Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown ("National") (9th Cir. 2009) 567 F.3d 521, 526, the Court stated,

[I]t is the subtle pressure to conform to commercial desires that the statutes seek to avoid. These subtle pressures would be difficult to regulate as violations of professional or ethical standards. Thus, the California laws in this case are health regulations designed to prevent health care providers from being unduly affected by commercial interests.

¹ VSP could also reduce the oppressive "chargebacks" from the VSP lab and the associated lab expenses, and reduce the cost of obtaining materials through Plexus, VSP's mandatory supplier of materials for the in-office finishing (IOF) program, which notoriously charges 2-3x more than other suppliers of the same materials.

And, of course, some 26 years before National, in California Association of Dispensing Opticians v. Pearle Vision Center, Inc. (1983) 143 Cal.App.3d 419, 429, the California Court of Appeals stated,

The trial court's conclusion Pearle's franchise program is illegal rests upon the fundamental premise *that California has a strong long-standing public policy against permitting lay persons to practice any of the medical arts or to exercise control over decisions made by healing art practitioners.*

These decisions, and others like them, recognize the dangers (evils) of undue influence by lay corporations over doctors, including the "business" of being a doctor, and reflects California's strong public policy to prohibit those sources of potential influence, however subtle they may be. VSP's efforts to use frame reimbursement rates as a vehicle, or a means, to influence frame recommendations, in my opinion, falls squarely within these prohibitions.

With that in mind, let me address specifically VSP's proposed change to their policy you describe and which you say is to "avoid even the suggestion" VSP's program violates federal law. You propose to not reimburse 100% for the sale of VSP owned frames selected by a VSP member that is covered by a federal healthcare program. Providers would be reimbursed the same 80% in these situations, no matter whether the frame is a VSP frame or non-VSP frame This is obviously an effort to avoid application of the Federal anti-kickback statute to the transaction.

This fails to alleviate the illegality because it does not address the portion of the VSP scheme that provides that, if the doctor sells \$6,000 of VSP frames in the prior 12 months, the provider will receive 20% higher reimbursement for frames. This is because the revenue from the sale of frames to VSP members covered under federal health programs are counted toward reaching the \$6,000 threshold. Thus, there is still a direct reward (higher frame reimbursement) for selling a sufficient number of VSP-owned frames to VSP members covered by a federal health program, among others. Though the inducement is, in some cases, incrementally one-step removed, it is still there, front and center. The providers continue to be influenced and induced to sell Marchon and Altair frames to patients covered by federal healthcare programs in order to achieve the \$6,000 level and realize the immediate financial reward of higher reimbursement for doing so. (Note that the law prohibits both direct and indirect inducements.)

If VSP wants to reduce frame reimbursement across the board, that's VSP's prerogative. I can image that doing so would not be very popular with VSP providers, as it is a real, immediate, and meaningful, almost across-the-board, reduction in VSP reimbursement to VSP's contracted providers. No doubt that would give many doctors pause and lead them to reconsider if they wish to continue as a VSP provider and if it is financially worthwhile to do so, versus going out-of-network. Or, in the alternative, providers will raise their prices to compensate for VSP's reduced reimbursement. But it would not appear to be illegal because it does not selectively reward the sale of VSP-owned frames. However, any scheme by VSP to induce the selective sale of VSP-owned frames by manipulating frame reimbursement rates for selling them, either individually or in volume, almost certainly runs afoul of anti-kickback statutes. I believe State and Federal regulatory agencies, and the Courts, would likely agree.

I invite you to consider the foregoing and, again, consider whether VSP's new frame policy, even as changed, constitutes, a violation of the Federal anti-kickback statutes. I would like to think this is a matter that can be worked through without resort to judicial declaratory relief or State or Federal regulatory action.

Very truly yours,

Craig S Steinberg, O.D., J.D.
Executive Director, AADO

Cc: U.S. Dept. of Justice; California Dept. of Managed Care; Office of the California Attorney General; General Counsel, American Optometric Association