Advisory

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Hospice Payments to Nursing Homes

This Advisory addresses whether a hospice is permitted to pay a nursing home more than Medicaid pays to the hospice to cover room and board for nursing home residents electing hospice services.

BACKGROUND

The State of Connecticut has offered a Medicaid hospice benefit since 2009. When a Medicaid nursing home resident elects the Medicare or Medicaid hospice benefit, instead of paying the nursing home directly, the Department of Social Services ("DSS"), pays the hospice for nursing home room and board services, and the hospice, in turn, pays the nursing home. Federal law requires that a state pay a hospice at least 95% of the nursing home per diem rate for a beneficiary's room and board.

When the Connecticut Medicaid hospice benefit was originally established, DSS paid hospices 100% of the applicable nursing home Medicaid per diem rate. In December 2012, the Connecticut General Assembly, facing a budget crisis, imposed a 5% reduction in Medicaid rates paid through June 30, 2013 for Medicaid recipients receiving hospice services in nursing homes. During this year's legislative session, the General Assembly enacted legislation making the 5% rate reduction permanent. As a result, DSS now pays hospices 95% of a nursing home's per diem Medicaid rate for the facility's residents receiving hospice services.

QUESTIONS RAISED

Members who are hospice providers have contacted the Connecticut Association for Healthcare at Home with questions about the rate reduction. Some have asked whether a hospice may continue paying a nursing home 100% of the Medicaid per diem rate, or whether hospice payments to nursing homes are now capped at 95%, the amount the General Assembly authorized DSS to pay.

FEDERAL SPOTLIGHT ON THE HOSPICE NURSING HOME RELATIONSHIPS

For many years, the federal government has been studying the provision of hospice services in the nursing home setting, citing concerns about overlapping services and the need for better delineation of roles and responsibilities and improved coordination and communication. On June 27, 2013, the Centers for Medicare and Medicaid Services issued **final regulations** amending the requirements for long term care facilities participating in the Medicare and Medicaid programs to include a specific requirement that a nursing home enter into written agreements with each hospice providing services at the facility delineating roles and responsibilities of each entity. This requirement is similar to a parallel requirement added to Medicare **hospice conditions of participation** in 2008.

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OIG FRAUD ALERT AND GUIDANCE

The Office of Inspector General ("OIG") has long taken a special interest in hospice services provided in the nursing home setting. Starting in the late 1990's, the OIG warned nursing home and hospice providers to avoid arrangements in which the hospice provides items or services for no or reduced compensation in exchange for patient referrals, which would violate the federal Anti-Kickback Statute. In a March 1998 Special Fraud Alert, "**Fraud and Abuse in Nursing Home Arrangements with Hospices**," the OIG addressed these issues and provided examples of potential suspect practices. Noting that states pay hospices at least 95% of the nursing home Medicaid per diem rate when a patient receives Medicare hospice benefits in the nursing home, the OIG commented that:

In general, payments by a hospice to a nursing home for "room and board" provided to a Medicaid hospice patient should not exceed what the nursing home otherwise would have received if the patient had not been enrolled in hospice. Any additional payment must represent the fair market value of additional services actually provided to that patient that are not included in the Medicaid daily rate.

On the OIG's list of specific practices that are "suspected kickbacks" was the example of a hospice making "room and board" payments to a nursing home "in amounts in excess of what the nursing home would have received directly from Medicaid had the patient not been enrolled in hospice." In other words, the OIG indicated that accepting payments from a hospice greater than 100% of the Medicaid per diem rate would be a suspected kickback. Although not explicitly stated, the logical conclusion that could be drawn from this guidance is that accepting more than 95% and up to 100% of the Medicaid per diem rate from a hospice will not necessarily run afoul of the Anti-Kickback Statute. In the Special Fraud Alert, the OIG did point out that specific services included in daily rate payments made to a hospice for nursing home room and board are determined by a state's Medicaid program and may vary from state to state. Over the years, the OIG has reinforced the Special Fraud Alert's message through Compliance Program Guidance for both **hospice** and **nursing facilities**.

DEPARTMENT OF SOCIAL SERVICES

In order to determine what, if any, position DSS has taken, Mag Morelli, President, LeadingAge, Connecticut, and Maureen Weaver of Wiggin and Dana spoke with DSS representatives about whether a hospice could pay a nursing home more than 95% up to 100% of the Medicaid per diem rate, even though DSS's payments to the hospice are limited to 95%. DSS's representatives informed them that once DSS pays the 95% to the hospice, it is up to the hospice and nursing home to negotiate specific terms of payment under their agreement. DSS will not dictate whether 95% or 100% of the per diem rate is appropriate, since each situation will depend on the specific agreement.

CONCLUSIONS AND RECOMMENDATION

Based on federal guidance and the conversation with DSS representatives, it may be permissible in some cases for a hospice to pay a nursing home up to 100% of the per diem Medicaid rate. Any payment, however, should be made for the specific nursing home services set forth in the agreement. No payment should be offered, solicited or made in order to increase patient referrals or otherwise expand business for the hospice. For example, we are aware of one situation in which either a hospice offered to pay, or a nursing home demanded, 100% of the Medicaid per diem rate as a quid pro quo in exchange for the nursing home's agreement to enter into an exclusive agreement with the hospice. This type of offer would be considered a "suspected kickback" based on the OIG's Special Fraud Alert, which specifically cited exclusive or semi-exclusive arrangements as potentially leading to requests for offers of "illegal remuneration to influence a nursing home's decision to do business with a particular hospice." To the extent any additional payments are not tied to actual services provided, and instead are offered, solicited or made to influence a nursing home's decision to do business with a particular hospice, the Anti-kickback Statute could be implicated.

Given all of these factors, we strongly advise hospices to consult with their legal counsel when considering arrangements that involve payments to a nursing home in excess of 95% of the per diem rate.