



State of Utah

GARY R. HERBERT
Governor

GREG BELL
Lieutenant Governor

Utah Department of Health

W. David Patton, Ph.D.
Executive Director

Division of Medicaid and Health Financing


Michael Hales
Deputy Director, Utah Department of Health
Director, Division of Medicaid and Health Financing

Bureau of Managed Health Care

Emma Chacon
Director

July 6, 2012

TO: Broc Christensen, Audit Manager
Office of Inspector General for Medicaid Services

FROM: Emma Chacon,  Director
Bureau of Managed Health Care
Division of Medicaid and Health Financing

SUBJECT: Response to recommended changes to MCE contracts

This is the Bureau of Managed Health Care's response to your memo dated May 30, 2012. Attached to this memo is a document outlining each of your suggestions regarding the current managed care full risk contracts and our responses. We would like to thank you for your recommendations. We appreciate our ongoing dialogue on the topic of our ACO contracts

As you review the Bureau's responses, please note that the Bureau has determined that several of the provisions suggested by the OIG would grant the OIG powers that would exceed those powers granted to it by statute. Please understand that the Bureau cannot allow the OIG to use the Bureau's ACO contracts to extend the OIG's powers beyond those granted to it by statute.

In your memo you indicated that these suggestions were being provided as part of an on-going "audit" of the proposed ACO contract language, specifically, the Program Integrity language. Many of the "suggested" contract provisions are already found in the Bureau's model contract.



Finally, as you review the Bureau's response to the OIG's suggestions it is important to remember that the Department of Health is the single state agency tasked with administering the Medicaid program. As such, the Department is always appreciative of learning of when it is not in compliance with state or federal laws or of learning new ways that the program could be administered in a more efficient or cost-effective manner. It is our intent to work with the OIG in the future to accomplish such ends.

Cc: Michael Hales
Gail Rapp
Nate Checketts
Lee Wyckoff
Julie Ewing
Aaron Eliason

BUREAU'S RESPONSES TO OIG SUGGESTED ACO CONTRACT PROVISIONS

1. Audit Functions

OIG Suggestion:

MCO agrees to maintain, and require its Subcontractors to maintain, records, books, documents, and information (collectively "records") that are adequate to ensure that services are provided and payments are made in accordance with the requirements of this Contract, including applicable Federal and State requirements (e.g., 45 CFR §74.53). Such records must be retained by MCO or its Subcontractors for a period of five (5) years after the Contract Expiration Date or until the resolution of all litigation, claim, financial management review or audit pertaining to this Contract, whichever is longer.

Bureau's Response:

Language to this effect can be found in Article XIV Section D of Utah's managed care contract.

OIG Suggestion:

Section 9.02 Access to records, books, and documents.

- (a) Upon reasonable notice, MCO must provide, and cause its Subcontractors to provide, the officials and entities identified in this Section with prompt, reasonable, and adequate access to any records that are related to the scope of this Contract.
- (b) MCO and its Subcontractors must provide the access described in this Section upon HHSC's request. This request may be for, but is not limited to, the following purposes:
 - (1) Examination;
 - (2) Audit;
 - (3) Investigation;
 - (4) Contract administration; or
 - (5) The making of copies, excerpts, or transcripts.
- (c) The access required must be provided to the following officials and/or entities:
 - (1) The United States Department of Health and Human Services or its designee;
 - (2) The Comptroller General of the United States or its designee;
 - (3) MCO Program personnel from HHSC or its designee;
 - (4) The Office of Inspector General;
 - (5) The Medicaid Fraud Control Unit of the Texas Attorney General's Office or its designee;

(6) Any independent verification and validation contractor, audit firm, or quality assurance contractor acting on behalf of HHSC;

(7) The Office of the State Auditor of Texas or its designee;

(8) A State or Federal law enforcement agency;

(9) A special or general investigating committee of the Texas Legislature or its designee; and

(10) Any other state or federal entity identified by HHSC, or any other entity engaged by HHSC.

(d) MCO agrees to provide the access described wherever MCO maintains such books, records, and supporting documentation. MCO further agrees to provide such access in reasonable comfort and to provide any furnishings, equipment, and other conveniences deemed reasonably necessary to fulfill the purposes described in this Section. MCO will require its Subcontractors to provide comparable access and accommodations.

(e) Upon request, the MCO must provide copies of the information described in this Section free of charge to HHSC and the entities described in subsection (c).

(f) In accordance with Texas Government Code §533.012(e), any information submitted to HHSC or the Texas Attorney General's Office pursuant to Texas Government Code §533.012(a)(1) is confidential and is not subject to disclosure under the Texas Public Information Act.

(Please see this section in the TX Contract for more detail; NJ and TN also contain similar language).

Bureau's Response:

Article XV of Utah's contract discusses the Department's and the Federal Government's right to access the ACO's records for auditing and other purposes. The Bureau does not feel that its ACO model contract language needs to include an exhaustive list of all state or other entities which are allowed to access an ACO's records. Additionally, the right of the OIG to obtain access to an ACO's record is based on statute and a contract provision is not required.

2. Enforcement Costs

OIG Suggestion:

In the event of any litigation, appeal, or other legal action to enforce any provision of the Contract, MCO agrees to pay all reasonable expenses of such action, if HHSC is the prevailing Party.

Bureau's Response

The Bureau has no intention of adding this provision to its contracts as this would not constitute "best practice" for the Bureau or the State. The Bureau does not want the potential liability of paying an ACO's attorneys fees or costs if DOH is not the prevailing party. As a general rule, costs and attorney's fees are not awarded to a party unless such award is authorized by statute or agreed to in a contract between two parties. If a contract has a provision granting one party the right to collect attorney's fees or costs then, pursuant to Utah Code Ann §78B-5-826, the other party is also granted that right. The Bureau does not want the budgetary uncertainty involved in the event it becomes liable to an ACO for attorney's fees or costs if, after litigation, it is not the prevailing party.

3. Service Levels and Performance Measures

OIG Suggestion:

Satisfactory performance of this Contract will be measured by:

- (a) Adherence to this Contract, including all representations and warranties;
- (b) Delivery of the Services and Deliverables;
- (c) Results of audits performed by HHSC or its representatives in accordance with "Audit and Financial Compliance";
- (d) Timeliness, completeness, and accuracy of required reports; and
- (e) Achievement of performance measures developed by MCO and HHSC and as modified from time to time by written agreement during the term of this Contract.

Bureau's Response:

This "suggested" provision from the Texas Contract relates to the standards Texas uses when it is deciding to sanction an HMO. Article XV, Section E and Article XVII of the Utah Contract provide equivalent provisions.

4. Anti-Kickback, Debt/back taxes owed to UT, outstanding Medicaid Debt

OIG Suggestion:

Anti-kickback provision.

MCO certifies that it will comply with the Anti-Kickback Act of 1986, 41 U.S.C. §51-58 and Federal Acquisition Regulation 52.203-7, to the extent applicable.

Bureau's Response:

This provision is already contained in Attachment A, paragraph 11(d) of the Utah Contract.

OIG Suggestion:

Debt or back taxes owed to State of Texas.

In accordance with Section 403.055 of the Texas Government Code, MCO agrees that any payments due to MCO under the Contract will be first applied toward any debt and/or back taxes MCO owes State of Texas. MCO further agrees that payments will be so applied until such debts and back taxes are paid in full.

Bureau's Response:

This "suggested" provision from the Texas contract is very clearly based on a Texas statute. The Bureau is unaware of any corresponding Utah statute. Because there is no corresponding Utah Law, DOH does not feel it is appropriate to unilaterally set such a policy for the State.

OIG Suggestion:

Outstanding debts and judgments.

MCO certifies that it is not presently indebted to the State of Utah, and that MCO is not subject to an outstanding judgment in a suit by State of Texas against MCO for collection of the balance. For purposes of this Section, an indebtedness is any amount or sum of money that is due and owing to the State of Utah and is not currently under dispute. A false statement regarding MCO's status will be treated as a material breach of this Contract and may be grounds for termination at the option of UDOH or the OIG.

Bureau's Response:

The Bureau will consider adding in a provision stating that the ACO may not be indebted to the state. However, no provision will be added to the contract which gives the OIG the authority to terminate the contract. Although the OIG may advise the Department to terminate the Contract, the OIG has no statutory authority to terminate a Medicaid MCE contract. Further, it would unlawfully compromise DOH's role as the single state agency in charge of administering the Medicaid program to allow the OIG, which is a separate agency from DOH, to terminate any Medicaid MCE contract.

5. Waste, Fraud, and Abuse

OIG Suggestion (referencing pages 4-72 of the Texas Contract, the Tennessee Contract and the New Jersey Contract):

These are significantly long sections of contract language these are a must. They outline what and how to look for these issues.

Bureau's Response:

Pages 4-72 of the Texas Contract address many things beyond waste, fraud, and abuse. The New Jersey Contract's provisions for Fraud, Waste and Abuse are fairly unique for a Medicaid MCE contract insofar as they require the MCE to set up its own, independent Special Investigations Unit to conduct waste, fraud, and abuse investigations and to coordinate those investigations with the state. The Texas, New Jersey, and Tennessee contracts all contain waste, fraud and abuse provisions that Utah Contract both has and does not have. Absent any further clarification on what changes could be made to Utah's contract to make those provisions more cost effective or efficient, the Bureau is satisfied with its provisions that have been approved by CMS.

6. Quality Assurance

OIG Suggestion:

The CONTRACTOR shall have a written Quality Management/Quality Improvement (QM/QI) program that clearly defines its quality improvement structures and processes and assigns responsibility to appropriate individuals. This document shall include a separate section on CHOICES care coordination and must include all of the elements listed below. This QM/QI program shall use as a guideline the current NCQA Standards and Guidelines for the Accreditation of MCOs and shall include the CONTRACTOR's plan for improving patient safety.

Bureau's Response

Article XI of the Utah Contract addresses Quality Assurance. The above provision is vague and would not substantially add anything to the current Quality Assurance provisions.

OIG Suggestion:

The OIG shall take a statistically valid sample of encounter data and review those records for proper medical necessity and proper medical care. If the OIG determines that medical care was not to standard the CONTRACTOR will be subject to liquidated damages.

Bureau's Response:

The Bureau believes the language in the recommendation is not consistent the statutory authority granted to the OIG or the language in administrative rule. UAC R367-1-7 states

that "The Office shall determine medical necessity and appropriateness of inpatient admissions during utilization review by use of InterQual criteria published by McKesson Corporation or other suitable industry standard." The Bureau does not believe that the OIG has been granted authority by its authorizing statute or administrative rule to conduct a review records for proper medical care. In the event that the OIG believes it does have this statutory or regulatory authority it may exercise such authority without a Contract provision.

7. HEDIS and CAHPS

OIG Suggestion:

Beginning with HEDIS 2012, the CONTRACTOR shall utilize the Hybrid methodology (i.e., gathered from administrative and medical record data) as the data collection method for any Medicaid HEDIS measure containing Hybrid Specifications as identified by NCQA. (see rest of section for more details)

Bureau's Response:

Article XIV, Section B (5) of the Utah Contract already requires MCEs to report HEDIS measures.

8. Monitoring (Citing the Tennessee Contract Sections 2.25; 2.24.6)

UTAH MEDICIAD and the OIG, in its daily activities, shall monitor the CONTRACTOR for compliance with the provisions of this Agreement. (See rest of section for details)

Bureau's Response:

The Division, as the single state agency charged with administering the Medicaid program, monitors compliance with all Medicaid Contracts. The OIG has no statutory authority to monitor compliance with the Medicaid contracts. The Bureau cannot allow provisions to be placed in the contract which would grant the OIG power beyond that given to it in statute. If the OIG believes that it does have this statutory authority then it may exercise such authority by virtue of its statute and a contract provision would be unnecessary.

Of note, the Tennessee OIG is a separate state agency from TennCare which is the state agency responsible for administering Tennessee's Medicaid program. The actual language of the provision of the Tennessee contract cited above states, "TENNCARE, in its daily activities, shall monitor the CONTRACTOR for compliance with the provisions of this Agreement." There is no mention of the Tennessee OIG in this provision.

9. Availability of records and facilities

OIG Suggestion:

The CONTRACTOR shall maintain, and shall require contract providers and subcontractors to maintain, medical records (as defined in Section 1) in a manner that is current, detailed and organized, and which permits effective and confidential patient care and quality review, administrative, civil and/or criminal investigations and/or prosecutions. (See rest of section for more details.)

Bureau's Response:

Article XIV, Section A (4) of the Utah Contract addresses the maintenance of medical records by a provider.

OIG Suggestion:

OIG, CMS, or their representatives may conduct on-site inspections of all health facilities and service delivery sites to be utilized by the CONTRACTOR in fulfilling the obligations under this Agreement. Inspections may be made at any time during the Agreement period and without prior notice.

Bureau's Response:

Article XV, Section A (2) of the Utah Contract currently allows the Department and the federal government to inspect health facilities. State statutes grant the Health Facility Licensing, Certification, and Resident Assessment Bureau of the Department of Health the authority to conduct on-site inspection of health facilities and healthcare service delivery sites. It appears the OIG has no statutory authority to inspect health care facilities. The Bureau cannot allow provisions to be placed in the contract which grant the OIG power beyond that given to it in statute. If the OIG believes that it does have this statutory authority then it may exercise such authority by virtue of its statute and a contract provision would be unnecessary.

Also, of note, the Tennessee contract cited by the OIG does not allow the Tennessee OIG to conduct inspections.

10. Encounter Data

OIG Suggestion:

The contractor must submit encounter records at least monthly. The encounter records shall be enrollee and provider specific, listing all required data elements for each service provided. Encounter records will be used to create a database that can be used in a manner similar to fee-for-service history files to analyze service utilization, reimburse the contractor for supplemental

payments, and calculate capitation premiums. DMAHS will edit the encounter records to assure consistency and readability. If encounter records are not of an acceptable quality, are incomplete, or are not submitted timely, the contractor will not be considered in compliance with this contract requirement until acceptable data are submitted.

The contractor's system shall produce reports for analysis that focus on the review and assessment of quality of care given, the detection of over- and under-utilization, the development of user-defined criteria and standards of care, and the monitoring of corrective actions. (see rest of section for more details)

"The contractor shall collect, process, format, and submit electronic encounter records for all services delivered to an enrollee. This requirement excludes services reimbursed directly to service providers by the Division on a fee-for-service basis. The contractor shall capture all required encounter record elements using coding structures recognized by the Department. The contractor shall process the encounter records, integrating any manual or automated systems to validate the adjudicated encounter records. The contractor shall interface with any systems or modules within its organization to obtain the required encounter record elements. The contractor shall submit the encounter records to the Department's fiscal agent electronically according to specifications in the HMO Systems Guide, which may be periodically updated, and which is available at www.njmmis.com. The encounter data processing system shall have a data quality assurance plan to include timely data capture, accurate and complete encounter records, and internal data quality audit procedures. If DMAHS determines that changes to the encounter data processing system are required, the contractor shall be given advance notice and time to make the change according to the extent and nature of the required change."

Bureau's Response:

Article XIV (A) of the Utah Contract discusses encounter data. The Bureau will be adding more specific requirement regarding the submission of encounter data as well as pharmacy data in NCPDP format. The Bureau will share this language with the OIG when it is drafted.

11. External Review Organizations

The CONTRACTOR shall cooperate fully with Utah Medicaid's External Quality Review Organization (EQRO) which will conduct a periodic and/or an annual independent review of the CONTRACTOR. The CONTRACTOR shall cooperate fully with any evaluation of the Utah Medicaid program conducted by CMS.

Bureau's Response:

Language to this effect can be found in Article XV, Section D of the Utah Contract.

12. Exclusions

OIG Suggestion:

"Persons who belong to one of the eligible populations (defined in 5.2A) shall not be subject to mandatory enrollment if they meet one or more criteria defined in this Article. Persons who fall into an "excluded" category (Article 5.3.1A) or shall be excluded from the Auto Assignment process (5.3.1 B) shall not be eligible to enroll in the contractor's plan."

Bureau's Response:

The New Jersey Contract has different Enrollment requirements and different populations that are eligible for services. Such a provision would be inapplicable to the Utah Medicaid program.

13. Inspection Rights:

OIG Suggestion:

The contractor shall allow the New Jersey Department of Human Services, the US Department of Health and Human Services (DHHS), and other authorized State agencies, or their duly authorized representatives, to inspect or otherwise evaluate the quality, appropriateness, and timeliness of services performed under the contract, and to inspect, evaluate, and audit any and all books, records, financial records, and facilities maintained by the contractor and its providers and subcontractors, pertaining to such services, at any time during normal business hours (and after business hours when deemed necessary by DHS or DHHS) at a New Jersey site designated by the Contracting Officer. Pursuant to N.J.S.A. 10:49-9.8, inspections of contractors may be unannounced with or without cause, and inspections of providers and subcontractors may be unannounced for cause. Books and records include, but are not limited to, all physical records originated or prepared pursuant to the performance under this contract, including working papers, reports, financial records and books of account, medical records, dental records, prescription files, provider contracts and subcontracts, credentialing files, and any other documentation pertaining to medical, dental, and non-medical services to enrollees. Upon request, at any time during the period of this contract, the contractor shall furnish any such record, or copy thereof, to the Department or the Department's External Review Organization within thirty (30) days of the request. If the Department determines, however, that there is an

urgent need to obtain a record, the Department shall have the right to demand the record in less than thirty (30) days, but no less than twenty-four (24) hours.

Access shall be undertaken in such a manner as to not unduly delay the work of the contractor and/or its provider(s) or subcontractor(s). The right of access herein shall include onsite visits by authorized designees of the State.

The contractor shall also permit the State, at its sole discretion, to conduct onsite inspections of facilities maintained by the contractor, its providers and subcontractors, prior to approval of their use for providing services to enrollees.

Bureau's Response:

Language to this effect can be found in Article XV of the Utah Contract.

14. Appeals

OIG Suggestion:

The contractor shall have an adequate number of staff to receive and assist with enrollee grievances/appeals by phone, in person and by mail. All staff involved in the receipt, investigation and resolution of complaints shall be trained on the contractor's policies and procedures and shall treat all enrollees with dignity and respect.

Bureau Response:

Language to this effect can be found in Article III, Section D (2) (c) (16), Article VII, and Article VIII.

15. Sanctions

OIG Suggestion:

In the event DMAHS finds the contractor to be out-of-compliance with program standards, performance standards or the terms or conditions of this contract, the Department shall issue a written notice of deficiency, request a corrective action plan and/or specify the manner and timeframe in which the deficiency is to be cured. If the contractor fails to cure the deficiency as ordered, the Department shall have the right to exercise any of the administrative sanction options described below, in addition to any other rights and remedies that may be available to the Department. The type of action taken shall be in relation to the nature and severity of the deficiency:

- A. Suspend enrollment of beneficiaries in contractor's plan.
- B. Notify enrollees of contractor non-performance and permit enrollees to transfer to another MCO without cause.
- C. Reduce or eliminate marketing and/or community event participation.

- D. Terminate the contract, under the provisions of the preceding Article.
 - E. Cease auto-assignment of new enrollees.
 - F. Refuse to renew the contract.
 - G. Impose and maintain temporary management in accordance with §1932(e) (2) of the Social Security Act during the period in which improvements are made to correct violations.
 - H. In the case of inappropriate marketing activities, referral may also be made to the Department of Banking and Insurance for review and appropriate enforcement action.
 - I. Require special training or retraining of marketing representatives including, but not limited to, business ethics, marketing policies, effective sales practices, and State marketing policies and regulations, at the contractor's expense.
 - J. In the event the contractor becomes financially impaired to the point of threatening the ability of the State to obtain the services provided for under the contract, ceases to conduct business in the normal course, makes a general assignment for the benefit of creditors, or suffers or permits the appointment of a receiver for its business or its assets, the State may, at its option, immediately terminate this contract effective the close of business on the date specified.
 - K. Refuse to consider for future contracting a contractor that fails to submit encounter data on a timely and accurate basis.
 - L. Refer the matter to the US Department of Justice, the US Attorney's Office, the New Jersey Division of Criminal Justice, and/or the New Jersey Division of Law as warranted.
 - M. Refer the matter to the applicable federal agencies for civil money penalties.
 - N. Refer the matter to the New Jersey Division of Civil Rights where applicable.
 - O. Exclude the contractor from participation in the Medicaid program.
 - P. Refer the matter to the New Jersey Division of Consumer Affairs.
- The contractor may appeal the imposition of sanctions or damages in accordance with line 17.

Bureau's Response:

Article XV, Section E of the Utah Contract allows the Department to sanction an ACO by suspending capitation payments. Article XVI allows the Department to re-coup disallowed payments or overpayments. Additionally Article XVII allows the Department to impose civil monetary penalties in the amounts allowed by 42 CFR 438.704, impose temporary management over the ACO, grant enrollees the right to disenroll, suspend all new enrollment, and suspend all payments. Finally, Article XVII Section D allows the Department may sanction the ACO by terminating the contract. Absent some clearer direction from the OIG on how these provisions can be made more efficient or cost effective these sanctions and the sanction provisions will remain.

16. Incorporate Admin Rules, State Plan, Federal Regs, and Fed/State of Utah Statutes

OIG Suggestion:

None provided.

Bureau's Response:

The Bureau is not aware of any statute or regulation which is absent from the contract which should be in the contract. Accordingly, absent any further guidance from OIG, on what is missing, the Bureau is satisfied with its provisions of the contract.

17. Liquidated Damages

OIG Suggestion:

See Annex from TN for categories and different fines/ assessment for breach of contract. TN has the best table for assessing fines/damages for breach.

Bureau's Response:

The Bureau recognizes the need to include monetary penalties for non-compliance in its contracts and has been planning on adding such provisions to its contracts, particularly for the new ACO contracts intended to become effective on January 1, 2013. However, the Bureau does not believe that the Tennessee model is necessarily an appropriate model for the state of Utah. When initially implementing its liquidated damages provisions TennCare acknowledged that it needed to "monitor the frequency of assessments and the reason behind their application" to ensure that BHOs [Behavioral Health HMOs] were not dangerously financially impacted." See: http://www.comptroller1.state.tn.us/repository/RE/tn_0309.pdf Rather than simply use the Tennessee chart as provided by the OIG, the Bureau believes it important to structure any monetary penalty provision specific to the needs of the state of Utah and Utah ACOs.