

Memorandum

Re: Final Medicaid Managed Care Rules
Medicaid Managed Care Sanctions, Part 438, Subpart I
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Date: March 10, 2001

Below is a review of the changes contained in the sanctions provisions of the final with comment period regulations. This memo summarizes the proposed rules and notes the changes that have been made. It does not present a full discussion of the statute and proposed regulations. For fuller explanation of the proposed rules and NHELP's suggestions concerning each proposed rule, see Health Advocate No. 194 (Fall 1988); for similar discussions of the statute, see Health Advocate No. 190 (Fall 1997).

This subpart implements 42 U.S.C. § 1396u-2(e). The statute requires the state to establish intermediate sanctions before it enters into or renews a contract with a managed care organization (MCO) under 42 U.S.C. § 1396b(m). The acts or omissions for which an MCO may be sanctioned are: (1) failure substantially to provide medically necessary items and services required by the contract; (2) imposition of premiums or charges on enrollees in excess of the levels permissible under the Act; (3) discrimination among enrollees on the basis of their health status or engaging in any practice that would reasonably be expected to deny or discourage enrollment by eligible individuals whose condition or history indicates a need for substantial future medical services; (4) misrepresenting or falsifying information given to the state, HCFA or enrollees; (5) failure to comply with the requirements for physician incentive plans. Any managed care entity (MCE) may be sanctioned for distributing marketing materials that violate the Act. 42 U.S.C. § 1396u-2(e)(1)(A).

The sanctions authorized for MCO's are: (1) civil money penalties; (2) appointment of temporary management; (3) permitting individuals enrolled to terminate enrollment without cause; (4) suspension or default of all enrollment for failure to comply with the requirements of section 1396b(m) and (5) suspension of payment for individuals enrolled after a certain date. Sanctions (3) through (5) may be imposed upon any MCE. 42 U.S.C. § 1396u-2(e)(2). The statute

provides for specific upper limits on civil money penalties for different types of violations. 42 U.S.C. § 1396u-2(e)(2)(A). If an MCO repeatedly fails to meet the requirements of 42 U.S.C. § 1396b(m), the state is required to appoint temporary management and to permit individuals enrolled with the entity to terminate enrollment. 42 U.S.C. § 1396u-2(e)(3). A state must retain the authority to terminate a contract with an MCE that has failed to meet contractual requirements or requirements imposed by the Act, and to enroll that entity's enrollees with other MCE's. 42 U.S.C. § 1396u-2(e)(4). The state must provide an MCE with a hearing before termination, and may notify individuals enrolled with an MCE that is the subject of a hearing and allow them to disenroll immediately without cause. 42 U.S.C. § 1396u-2(e)(4)(B) and (C).

§ 438.700 Basis for imposition of sanctions

The final version of this section clarifies which types of MCE's may be sanctioned, and what sanctions may be imposed.

A new subsection (d) specifies that a state may impose intermediate sanctions upon an MCO that violates any requirement of section 1903(m) and its regulations, or upon an MCO or PCCM that violates any of the requirements of section 1932 of the Act and its regulations. Only the sanctions specified in 438.702(a)(4) (suspension of all new enrollment after the date of the sanction) and (a)(5) (suspension of payment for recipients enrolled after the effective date of sanction until HCFA or state is satisfied that the reason for sanction no longer exists and is unlikely to recur) may be imposed for the violations described in subsection (d).

The rule provides for sanctions if an entity fails to comply with requirements for physician incentive plans set forth in 42 CFR §422.208 (which contains the requirements for the contents of physician incentive plans) and .210 (which requires disclosure of physician incentive plans). The reference to 42 CFR § 422.210 with the specific requirement for plan disclosure is new, however, this addition is a clarification rather than an additional requirement, as the Act requires compliance with all of the requirements embodied in Section 422.208 and .210. [\(1\)](#)

Finally, the final version of the section adds a provision that state's determination of any of the violations listed in the section may be based on "findings from onsite survey, enrollee or other

complaints, financial status, or any other source." Section 438.700(a).

§ 438.702 Types of Intermediate Sanctions

In the final version, subsection (b) has been added, which includes a more explicit grant of power to impose sanctions. This subsection specifies that state agencies retain the authority to impose additional sanctions under any state statutes or regulations that address areas of noncompliance discussed in this section, and states explicitly that Subpart I does not prevent the state agencies from exercising their authority.

§ 438.704 Amounts of Civil Money Penalties

This section remains essentially unchanged, however, there is an added penalty option given to the states when excessive premiums or other charges are made. The state now has the option of charging not only double the amount of excess charges (the penalty specified in the proposed version), but now also has the alternative of imposing a \$25,000 penalty, whichever is greater.

§ 438.706 Special rules for temporary management

The final rule has a new provision that forbids the state from terminating temporary management until it determines that the MCO will ensure that the sanctioned behavior will not occur again. [\(2\)](#)

§ 435.708 Termination of an MCO or PCCM contract [\(3\)](#)

In the proposed rules, the issue of termination was addressed in proposed section 435.718. The substance of final section 435.708 is essentially the same as proposed section 435.718. However, in the proposed rule the state was given the authority to terminate an MCE's contract if it "failed substantially to carry out the terms of its contract." In the final version, the state is granted the authority when an MCO or PCCM has "failed to carry out substantive terms of its contract."

§ 435.710 Due process: notice of sanction and pre-termination hearing

The final version of section 435.710 is a consolidation of proposed sections 435.710 and .720.

HCFA has added a section requiring a state to give enrollees notice of the termination and information about their option to receive Medicaid services following termination when it issues a written decision to terminate a contract with an MCO or PCCM.

In the proposed rule addressing procedures for hearings on contract terminations (Proposed Section 435.720), time lines were established, requiring the state to give an MCE written notice of intent to terminate within 30 days of the state's decision, and providing that the state must have the hearing no fewer than 30 days and no more than 60 days after the notice. The final

version contains no time line.

The final version omits a requirement from the proposed rule forbidding the state from delaying imposition of temporary management during the time required for state due process procedures, which was contained in proposed section 438.710(c). Accordingly, states may now afford some due process protections to entities before assuming temporary management. However, the final version still contains the statutory requirement that that state may not delay imposition of temporary management to provide a hearing. Section 438.706(c).

§ 438.722 Disenrollment during termination hearing process

The final version of this section is unchanged.

Section 438.724 Public notice of sanction

In the proposed rules, a state was required to give HCFA written notice whenever it imposes or lifts a sanction. In the final version, public notice is required. The state must publish a notice that: (1) describes the intermediate sanction imposed, (2) explains the reasons for the sanction, and (3) specifies the amount of any civil penalty. The final version of the rule also provides that the notice must be published no later than 30 days after the state imposes the public sanction. The announcement must run in the newspaper of widest circulation in each city within the MCO's service area that has a population of 50,000 or more, or, if there is no city with a population of 50,000 or more, the newspaper of widest circulation in the MCO's service area.

§ 438.726 State Plan Requirement

This newly-added section requires a state to monitor for violations specified in Subpart I and to implement the provisions of Subpart I.

Although the section did not exist in the proposed rules, the substance of this rule was contained in proposed rule 438.730(g).

§ 438.730 Sanction by HCFA: Special rules for MCO's with risk contracts

This final version is, for the most part, unchanged from the proposed version, with two exceptions. First, as discussed above, the substance of former subsection (g) has been added to the final version of section 438.726. Second, the final version provides that the Office of the Inspector General (OIG) may consider penalties under section 1903(m)(5)(A) of the Act, in addition to those under 42 C.F.R. Part 1003. The proposed version did not provide for penalties under section 1903(m)(5)(A), and did provide for consideration of penalties under 42 C.F.R. part 1005. ⁽⁴⁾ The final version also specifies that, in accordance with the provisions of part 1003, the OIG may impose civil money penalties in addition to, or in place of, the sanctions that may be imposed under this section. 42 C.F.R. Part 1003 provides for the OIG to impose civil money penalties for certain violations in connection with federal health care programs, such as submitting prohibited claims, falsifying bills, seeking payments that violate Medicaid agreements or failing to report required information.

¹ The proposed version of section 438.700 provided for sanctions upon a general "failure to comply with the requirements for physician incentive plans," and referenced the requirements

set forth in Sec. 422.208. 42 U.S.C. § 1396b(m)(2)(A)(xi) requires that MCO's comply with all requirements described in section 1396mm(i)(8). Section 1396mm(i)(8) contains the requirements for physician incentive plans for HMO's under Medicare. One of the requirements provides for disclosure of the plans, as described in 42 CFR § 422.208.

² In the proposed version of this rule, a state could impose temporary management if it found that the MCO was engaging in behavior described in section 438.700 or 434.67(a). The final version no longer refers to § 434.67, which describes violations and sanctions that may be imposed upon HMO's with risk comprehensive contracts. The violations for which sanctions may be imposed under § 434.67 are essentially the same as those listed in §438.700, so the removal of the reference makes no substantive change.

³ The substance of proposed section 438.708 is embodied in section 438.706(b) of the final rules.

⁴ 42 C.F.R. part 1005 deals with appeals of civil money penalties, and does not actually provide for penalties .