



121 STATE STREET
ALBANY, NEW YORK 12207-1693
TEL: 518-436-0751
FAX: 518-436-4751

TO: MEMO DISTRIBUTION LIST

LeadingAge New York

FROM: Hinman Straub P.C.

**RE: Delivery System Reform Incentive Payment (“DSRIP”) Program – OMIG
Compliance Guidance**

DATE: August 6, 2015

NATURE OF THIS INFORMATION: This is general information you might find helpful or informative.

DATE FOR RESPONSE OR IMPLEMENTATION: None.

HINMAN STRAUB CONTACT PEOPLE: Sean Doolan, Meghan McNamara and Jonathan Gillerman.

THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:

Category:	#2 Providers and payments to them	Suggested Key Word(s):
	#3 Plan Management, operations and structure	
	#9 Medicaid and Medicare	

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As discussed in our [May 7, 2015 memorandum](#), the New York State Office of the Medicaid Inspector General (“OMIG”) has issued preliminary guidance for DSRIP Performing Provider Systems (“PPSs”) regarding their obligations as Medicaid providers to implement an effective compliance program under New York State law.¹ OMIG and the Department of Health have recently posted a new DSRIP compliance document for Performing Provider Systems entitled, “Frequently Asked Questions by Performing Provider System (PPS) Leads Relative to Compliance Programs” (DSRIP 2015-02). This document is [attached](#).

This memorandum provides:

- ✓ Background and overview of the OMIG Compliance Documents released thus far;
- ✓ Overview of the Joint OMIG and DOH FAQ Document 2015-02; and
- ✓ Analysis of PPS and Downstream Partner impact.

It is important to note at the outset that subsequent to the issuance of the first compliance document, in both a DOH webinar regarding DSRIP Funds Flow² and also referenced in the second guidance document (2015-02, discussed further below), it was noted that one of OMIG’s compliance considerations from the first guidance document³ reflected conflicting statements regarding the responsibilities of the PPS after payments are made to network providers. Specifically, “Element 6,” related to identification of risk areas, provides that the PPS should include a plan for “auditing/monitoring how network partners are utilizing DSRIP funds.” **DOH has subsequently indicated that PPS Leads are not responsible for monitoring use of payments once they are validly made to a downstream partner.** DOH is currently working with OMIG to resolve this inconsistency and provide updated guidance in a revised document.

I. Background

New York State’s Social Services Law §363-d and the accompanying regulations at 18 NYCRR Part 521 require that Medicaid providers develop, adopt and implement an effective compliance program aimed at detecting fraud, waste, and abuse in the Medicaid program. In particular, these regulations provide direction on how the mandatory compliance program must be operated. As individual Medicaid providers licensed by the State, DSRIP PPS lead entities and the majority of participating network providers are currently subject to compliance program requirements. **OMIG has taken the position that the PPS is also responsible for establishing an effective system-wide compliance program for its entire PPS that contains all of the necessary elements for a compliance plan.**

For 2015-16, OMIG plans to conduct compliance reviews of PPS leads. Thus, OMIG’s first two guidance documents are focused on the PPS’s responsibilities and obligations with respect to their compliance programs. OMIG will publish additional DSRIP guidance periodically on its

¹ NEW YORK SOCIAL SERVICES LAW § 363-D; 18 NYCRR 521.

² Greg Allen, N.Y. DEP’T OF HEALTH, *Funds Flow Guidance & NewCo FAQ*, HEALTH.NY.GOV, https://www.health.ny.gov/health_care/medicaid/redesign/dsrp/webinars_presentations.htm (last visited July 23, 2015) (webinar and slide presentation).

³ 2015-1: SPECIAL CONSIDERATIONS FOR PPS LEADS’ COMPLIANCE PROGRAMS, available at https://www.omig.ny.gov/images/stories/compliance_alerts/20150406_special_considerations_for_pps_leads.pdf

website, which should provide insight into how the State intends to apply Medicaid compliance laws and regulations to DSRIP providers, and importantly, an indication of likely audit targets within DSRIP. In addition, OMIG publishes a work plan every year that reflects the planned activities for the current year, which is expected to include direction regarding future OMIG focus areas for reviewing DSRIP compliance. In light of the \$6.4 billion in incentive funding that will be passed on to providers at varying levels, the DSRIP program and provider compliance could be key areas of OMIG focus over the next five years.

As we are currently in DSRIP Year 1's planning and implementation phase, where DSRIP incentive payments are process related, OMIG's initial compliance reviews will include items such as ensuring the PPS has provided Medicaid compliance and education training to its network, cross-checked its network against Federal excluded provider lists, and that the PPS's funds flow disbursements are made in accordance with the terms of the PPS disbursement agreements. Subsequent compliance activity of the OMIG, which will eventually include performance related validation, and will evolve along with the DSRIP.

Set forth below is a discussion of the second DSRIP compliance document released to date by OMIG, which provide helpful information to help providers prepare for compliance, but also includes important language to remind providers that OMIG guidance does not carry the same weight as law or regulation. As all OMIG guidance is subject to revision and interpretation, it is a best practice to review any DSRIP compliance questions with counsel.

II. 2015-2: Frequently Asked Questions by PPS Leads Relative to Compliance Programs

Guidance document, 2015-02 was jointly published by OMIG and DOH and contains six "FAQs" intended to clarify questions that had been raised about PPS compliance plan expectations. A summary of each FAQ is set forth below.

- PPS Expectations Related to Partner Use of DSRIP Funds. This FAQ includes an acknowledgement that language in the first guidance document, "2015-01," that relates to PPS monitoring of partner use of DSRIP funds, is being considered for revision. In addition, further clarification was provided that DOH expects PPSs to have a budget and funding plan in effect that matches what they described in their project application and implementation plans. Each PPS is required to submit quarterly reports to the Independent Assessor, that include, among other things, the actual incentive fund distributions that were made that are broken down into five distinct different categories: project implementation costs; costs for delivery of services not reimbursed or under-reimbursed by Medicaid; provider performance payments; compensate revenue loss, and "other", for administrative and other costs not included in previous categories.
- Training and Education: The PPS Lead is responsible to conduct a "reasonable analysis" to identify who is an "affected employee" and must receive compliance plan training. OMIG expects the training and education provided to evolve commensurate with the PPS's involvement in DSRIP.
- Checking for Excluded or Sanctioned Providers: OMIG indicates that PPS Leads and all providers should consider payments to excluded persons to be a risk area, and recommends

that PPS leads and “all providers” check the Federal OIG excluded provider list routinely, noting that OIG recommends that providers check the lists monthly. In order to mitigate risk, OMIG recommends that PPS leads consider incorporate an exclusion screening process in their compliance plan.

- Relative Responsibilities of OMIG, the Independent Assessor (IA), and DOH: This FAQ clarifies the relative responsibilities of each party as they relate to DSRIP oversight. The IA’s focus is ongoing monitoring of performance and reporting and will include annual on-site reviews. While the IA’s audit and review oversight is broad-based, it does not include a Medicaid compliance focus.
- Refunding Overpayments: The fifth and sixth FAQs discuss the issue of DSRIP overpayments and recoupment. PPS lead compliance programs must include a system for identifying and reporting overpayments of DSRIP funds (incentive payments only). The term “overpayment” includes “any DSRIP payments that are made based upon data that is later found to be incorrect or falsified, regardless of the reason.” This could include an incentive payment the IA later determines during an audit was not warranted based on performance measures or because of an otherwise benign reporting error. If this occurs, the DOH will deduct future DSRIP performance payments from that PPS until the full amount of the overpayment has been recouped.

III. Next Steps

For providers participating in DSRIP PPSs, we anticipate that you will be eventually receiving partnering provider agreements and compliance information from your PPS leads, which will likely include contractual language related to your participation in the PPS lead’s compliance program, as well as potential indemnification provisions relating to OMIG audits and recoveries. This is because OMIG recommends that PPSs incorporate compliance program requirements in their contracts with network partners. We strongly recommend that you review any information shared with you by your PPS with your internal compliance staff and with legal counsel before signing any agreement, and be sure to request copies of all policies for which contractual compliance is required.

Finally, as Medicaid providers participating in DSRIP, it is important to remember that providers will be participating in two concurrent compliance programs, your own as well as the compliance program of the PPS lead. As a result, it is important to abide by the policies and procedures and understand your reporting obligations under both programs.

Please let us know if you have any questions.



121 State Street
Albany, New York 12207-1693
Tel: 518-436-0751
Fax: 518-436-4751

TO: Memo Distribution List

LeadingAge New York

FROM: Hinman Straub P.C.

RE: Recent Guidance from the New York State Office of the Medicaid Inspector General on Provider Compliance Programs

DATE: May 7, 2015

NATURE OF THIS INFORMATION: This is information recently published or distributed which may be a useful resource to you.

DATE FOR RESPONSE OR IMPLEMENTATION: None – this is for your information.

HINMAN STRAUB CONTACT PEOPLE: Raymond Kolarsey and Jennie Shufelt

THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:

Category: #2 Providers and payments to them; and #9 Medicaid and Medicare
Suggested Key Word(s): OMIG

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Most New York Medicaid plans and providers are required by N.Y. Social Services Law § 363-d and 18 NYCRR Part 521 to have an effective compliance program in place. The New York State Office of the Medicaid Inspector General (“OMIG”) is responsible for overseeing and enforcing the compliance program requirement, and for educating providers about the compliance program requirement. To fulfill this charge, and to assist plans and providers in complying with the requirements of Social Services Law § 363-d, OMIG publishes periodic compliance guidance.

On March 30, 2015, OMIG published a new guidance document entitled “*Mandatory Compliance Program Requirement: Holding Company and Joint Venture Structures – Employee Vested with Responsibility for Day-to-Day Operation of the Compliance Program*,” which provides guidance to Medicaid providers in a holding company or joint venture structure about the compliance officer requirement. A copy of the March 30, 2015 guidance is attached (see [Attachment A](#)). In addition, on April 6, 2015, OMIG published new guidance for the Delivery System Reform Incentive Payment (DSRIP) Program entitled “*Special Considerations for Performing Provider System (PPS) Leads’ Compliance Programs*.” A copy of the April 6, 2015 guidance is also attached (see [Attachment B](#)). A summary of these new guidance documents is below.

New Guidance for Holding Companies and Joint Ventures

Pursuant to Element #2 of the compliance program requirement, set forth in 18 NYCRR § 521.3(c)(2), a provider must “designate an employee vested with responsibility for the day-to-day operation of the compliance program . . .” OMIG has emphasized in the past the requirement that this compliance officer be an employee of the Medicaid provider, which has prompted questions from Medicaid providers who are part of a larger holding company structure or who are part of a joint venture, about what constitutes an “employee” for purposes of satisfying this requirement. Specifically, these types of providers have raised questions about when, if ever, a person can serve as a compliance officer for more than one company in a holding company/joint venture structure. The March 30, 2015 guidance published by OMIG is intended to address some of these questions.

OMIG has previously indicated that subsidiaries may operate under the umbrella of the holding company parent’s enterprise-wide compliance program.¹ Based on this previous guidance, an employee of the parent organization can serve as the compliance officer for one or more wholly-owned subsidiaries. The new guidance clarifies, however, that (i) the enterprise level compliance program can be operated by a holding company that is not itself a Medicaid provider, and (ii) the holding company can coordinate the compliance resources of its subsidiaries, which individually may not satisfy all compliance program requirements so long as collectively the holding company and its subsidiary compliance obligations are being met.

The focus of the new guidance is on addressing when an employee of a subsidiary can serve as the compliance officer of a parent company that is required to have a Medicaid compliance program (i.e., the opposite of the previously-issued guidance addressing when an employee of a parent company can serve as the compliance officer of a subsidiary).

¹ See FAQ #5 at https://www.omig.ny.gov/images/stories/provider_compliance/ssl_faqs.pdf.

As set forth in the new guidance, an employee of a wholly-owned subsidiary can serve as the compliance officer of a parent company so long as the subsidiary employee:

- 1) is vested with responsibility for the day-to-day operation of the parent company's compliance program;
- (2) satisfactorily carries out the compliance responsibilities of the parent company;
- (3) reports directly to the chief executive officer or other senior administrator of the parent company; and
- (4) periodically reports directly to the governing body of the parent company.

The foregoing authority is limited to an employee of a wholly-owned subsidiary since, under these circumstances, OMIG deems the subsidiary employee to be an employee of the parent company based on the unity of ownership and control between the companies. OMIG's guidance does not address not-for-profit subsidiaries, where there is no "ownership" at issue. However, given that the underlying rationale to OMIG's position is that an employee of a subsidiary will be deemed an employee of the parent due to the unity of ownership and control between the entities, we believe it is reasonable to conclude that whether or not an employee of a not-for-profit subsidiary can be the compliance officer for the parent depends on whether the parent corporation controls the subsidiary through the ability to appoint all of the subsidiary's directors.

OMIG's new guidance also does not address whether an employee of one wholly-owned subsidiary can also serve as the compliance officer for another wholly-owned subsidiary (i.e., for a commonly owned sister corporation). However, based on the rationale offered by OMIG (i.e. that the critical issue is whether there is unity of ownership and control), there is no rational reason why an employee of one wholly-owned subsidiary cannot also serve as the compliance officer for another wholly-owned subsidiary, so long as there is unity of ownership and control of the sister companies.

The authority of a subsidiary employee to be the compliance officer of a parent company does not extend to employees of subsidiaries that are not wholly-owned by the parent (i.e., joint ventures) since, under these circumstances, there is no unity of ownership and control between the entities. For joint venture subsidiaries, to qualify as the compliance officer of both the parent and the joint venture subsidiary, the individual must separately qualify as an "employee" for each company.

OMIG offers some guidance for determining when an individual is considered an employee. In particular, OMIG states that it considers an employee to be anyone who qualifies as an employee for New York State or federal employment tax purposes, and notes that independent contractors, consultants and volunteers are not considered employees. Tests noted by OMIG include, without limitation, whether (i) the individual is a "W-2 employee," (ii) the Medicaid provider is required to cover the individual under unemployment or workers' compensation insurance, and (iii) the Medicaid provider is required to withhold payroll tax deductions. Notwithstanding this general guidance, however, given the complexities of determining employee status under New York and federal law, we recommend that counsel be consulted to confirm employee status if a multi-company compliance officer arrangement is contemplated.

DSRIP Program Guidance

The Delivery System Reform Incentive Payment Program (“DSRIP Program”) is a comprehensive reform program, announced in April of 2014, in which safety net providers collaborate to implement innovative projects that are focused on systems transformation, clinical improvement and health improvements, and reduction in avoidable hospital utilization, in which DSRIP funds are linked to performance and achievement of project milestones. A Performing Provider System (“PPS”) Lead is responsible for creating and implementing a DSRIP project. The Guidance published by OMIG on April 6, 2015 was intended to provide PPS Leads with guidance on how to satisfy the compliance program requirement in the context of a DSRIP. However, it also provides helpful information for providers participating in a DSRIP, particularly with respect to how they can expect their compliance functions to interact with the PPS Lead’s compliance program. Below is a summary of the key guidance provided by OMIG regarding compliance programs in the DSRIP.

1. **PPS Leads must establish their own compliance programs.** PPS Leads will be required to implement an effective compliance program, and dedicate resources to that program, that is focused on identifying and preventing fraud, waste and abuse in the distribution of Medicaid DSRIP program funds. As such, PPS Leads must have a compliance program that satisfies all eight elements of a compliance program set forth in SSL § 363-d, including a compliance officer who is an employee of the PPS Lead, and who reports directly to the PPS Lead’s chief executive officer or other senior administrator, and the PPS Lead’s governing body.
2. **Network providers subject to SSL § 363-d must have their own compliance programs.** If a provider participating in a DSRIP is subject to the SSL § 363-d compliance program requirement, they must still maintain their own compliance program. The compliance program operated by the PPS Lead does not satisfy this requirement. Conversely, PPS Leads are not responsible for network providers’ individual compliance programs.
3. **The PPS Lead’s compliance program must be accessible to network providers.** Although PPS Leads are not responsible for individual network providers’ own compliance programs, the PPS Lead’s compliance program must address and be made available to network providers. As such, PPS Leads’ compliance programs must:
 - a. include compliance policies and procedures that are distributed to and implemented by network providers that describe compliance expectations specifically related to the DSRIP, explain to network providers how to communicate DSRIP-related compliance issues to the PPS Lead’s compliance program, describe disciplinary policies and procedures, and establish a policy of non-intimidation and non-retaliation; and
 - b. provide training to performing providers within the PPS network (either directly or by supplying training materials to network providers and verifying completion of the training by the network provider) that describes compliance expectations related to the DSRIP program, the PPS Lead’s compliance policies and

procedures, performing providers' roles in DSRIP projects, and how to report compliance issues to the PPS Lead.

4. **Implement auditing, monitoring, and corrective action processes that address DSRIP issues.** As part of an effective compliance plan, PPS Leads must have auditing and monitoring processes in place, as well as a system for responding to compliance issues, implementing corrective actions, and reporting overpayments. These systems should be focused on DSRIP-related compliance risks, with particular attention paid to the misuse of DSRIP funds and false representations made to obtain DSRIP funds. In addition, these functions should incorporate, as appropriate, the Department of Health's established measures for measuring performance and reporting on the flow of funds set forth in the draft DSRIP Measure Specification and Reporting Manual available at https://www.health.ny.gov/health_care/medicaid/redesign/docs/dsrrip_measure_specification_and_reporting_manual_for_public_comment.pdf.

Please feel free to contact us if you have any questions.



Office of the
Medicaid Inspector
General

Mandatory Compliance Program Requirement: Holding Company and Joint Venture Structures

Employee Vested with Responsibility for Day- to-Day Operation of the Compliance Program

Compliance Guidance

2015-02

March 30, 2015

This *Compliance Guidance* should be considered to be a general guidance to assist those subject to the mandatory compliance program obligations set out in New York State Social Services Law Section 363-d (§ 363-d) and 18 NYCRR Part 521 (Part 521). It does not set out all points that the Office of the Medicaid Inspector General (OMIG) will consider or use when assessing if compliance programs meet statutory and regulatory requirements. OMIG reserves the right to recall or change this *Compliance Guidance* at any time.

This *Compliance Guidance* does not constitute rulemaking by OMIG and may not be relied on to create a substantive or procedural right or benefit enforceable, at law or in equity, by any person. Furthermore, nothing in this *Compliance Guidance* alters any statutory or regulatory requirement. In the event of a conflict between statutes and regulations applicable to the Medicaid provider and either OMIG audit protocols or this *Compliance Guidance*, the requirements of the statutes and regulations govern.

A provider's legal obligations are determined by applicable federal and state statutory and regulatory law. This *Compliance Guidance* is not a substitute for a review of statutory and regulatory law. OMIG cannot provide individual advice or counseling, whether medical, legal, or otherwise. If you are seeking specific advice or counseling, you should contact an attorney, a licensed practitioner or professional, a social services agency representative, or an organization in your local community.

MANDATORY COMPLIANCE PROGRAM REQUIREMENT:

HOLDING COMPANY AND JOINT VENTURE STRUCTURES

EMPLOYEE VESTED WITH RESPONSIBILITY FOR DAY-TO-DAY OPERATION OF THE COMPLIANCE PROGRAM

BACKGROUND

This *Compliance Guidance* focuses primarily on those situations where multiple corporate Medicaid providers, each with a mandatory compliance program obligation as set out in § 363-d and Part 521, are organized into a holding company system or structured as a joint venture. In many cases, the holding company's subsidiaries or the joint venture partners are the primary providers of Medicaid care, services, or supplies, but there is an enterprise¹ level compliance program that is intended to cover all Medicaid activities within the holding company or the joint venture.

The holding company may not provide any Medicaid care, services, or supplies, but it may operate the compliance program that is applicable throughout the enterprise, thus covering its subsidiaries. In the alternative, the holding company may coordinate the compliance resources of its subsidiaries, which individually may not completely cover all compliance program obligations, but collectively the holding company and its subsidiary compliance obligations are being met.

The joint venture structure may involve the combination of multiple Medicaid providers with the joint venture becoming subject to the mandatory compliance program obligation, as well as some or all of its joint venture partners being subject to the mandatory compliance program obligation. The joint venture may be a corporation, partnership or other business organization, but its operations are separate from the multiple Medicaid providers that created the joint venture, except for those operations that are intended to be covered by the joint venture.

Element #2² of the mandatory compliance program obligations set out in § 363-d and Part 521 requires that the compliance program designate an employee of the Medicaid provider who is "... vested with responsibility for the day-to-day operation of the compliance program" For purposes of this *Compliance Guidance*, that employee is referred to as the "compliance officer."³

¹ For purposes of this *Compliance Guidance*, the term enterprise should be considered to be the holding company and all subsidiaries and other operations being conducted by the holding company or its subsidiaries that provide Medicaid care, services, or supplies.

² OMIG refers to the compliance program requirement that is set out at § 363-d subd. 2(b) and 18 New York Code of Rules and Regulations § 521.3(c)(2) as "Element #2."

³ The use of the phrase "compliance officer" in this *Compliance Guidance* should not be considered a direction by OMIG that the person vested with responsibility for the day-to-day operation of the compliance program be given or assume that title. The phrase is used herein for convenience.

PURPOSE OF THIS *COMPLIANCE GUIDANCE*

The purpose of this *Compliance Guidance* is to provide direction on what qualifies as an employment relationship for a compliance officer under Element #2.

COMPLIANCE OFFICER AS EMPLOYEE OF MEDICAID PROVIDER

For purposes of Element #2, OMIG considers an employee to be anyone who qualifies as an employee for New York State or federal employment tax purposes. Independent contractors, consultants, volunteers, and the like are not considered employees.

Tests to determine whether a compliance officer is an employee of a Medicaid provider may include, but are not limited to: is the compliance officer a “W-2 employee;” is the Medicaid provider required to cover the compliance officer under unemployment or workers’ compensation insurance; or is the Medicaid provider required to withhold payroll tax deductions from the compliance officer’s earnings.

In the circumstance where a holding company and one or more of its wholly owned subsidiaries are subject to the mandatory compliance program obligations of § 363-d and Part 521, an employee of a wholly owned subsidiary can be the compliance officer of the holding company, if the subsidiary’s employee:

- a. is vested by the holding company with responsibility for the day-to-day operation of the holding company’s compliance program;
- b. satisfactorily carries out all of the compliance responsibilities;
- c. reports directly to the holding company’s chief executive officer or other senior administrator; and
- d. periodically reports directly to the holding company’s governing body on the activities of the holding company’s compliance program.

In the case of an employee of a wholly owned subsidiary, for purposes of Element #2, OMIG deems the subsidiary’s employee to be an employee of the holding company due to the unity of ownership and control between the holding company and the wholly owned subsidiary.

An employee of a subsidiary that is not wholly owned by a holding company would not qualify as the compliance officer under Element #2 for the holding company because there is no unity of ownership and control between the holding company and the subsidiary. In this event, the holding company must separately employ a compliance officer. The same person could be employed as the compliance officer for the holding company and for the subsidiary(ies), however, the compliance officer must have separate employment status for the holding company and for the subsidiary(ies).

The case of a joint venture is the same as the not wholly owned subsidiary scenario described above. The nature of a joint venture does not involve the same unity of ownership and control between and among the creators of the joint venture and the joint venture itself. A joint venture required to have a compliance program must have an employee who is vested with the day-to-day operation of the compliance program. Like

the not wholly owned holding company scenario, the same person could be employed as the compliance officer for the joint venture and for one of the joint venture participants. However, the compliance officer must have separate employment status for each.

As noted in “b.” above, Element #2 requires the compliance officer’s responsibilities to be satisfactorily carried out for each employer.

CONCLUSION

This *Compliance Guidance* only addresses one requirement in Element #2. Therefore, it should not be considered to cover all requirements in that element. Those subject to the mandatory compliance program requirements set out in § 363-d and Part 521 should consider all the requirements under each of the eight elements in order to determine if their compliance program is conforming to the statutory and regulatory requirements.

If you have any questions on this *Compliance Guidance*, or any compliance issue under New York State’s mandatory compliance program obligation, please contact the Office of the Medicaid Inspector General’s Bureau of Compliance at 518-408-0401 or by email at compliance@omig.ny.gov.



Delivery System Reform Incentive Payment (DSRIP) Program DSRIP Compliance Guidance 2015-01

Special Considerations for Performing Provider System (PPS) Leads' Compliance Programs

Introduction

This document is intended to highlight special considerations for PPS Leads as they develop their compliance programs. This document does not address all compliance program requirements. Please refer to New York Social Services Law Section 363-d (SSL 363-d) and Title 18 of the New York Codes Rules and Regulations at Part 521 (Part 521) for all compliance program requirements that are applicable to PPS Leads' Compliance Programs. The items listed below are limited to considerations as they relate to the phase of the DSRIP program as of the date of publication. It is expected that as the DSRIP program develops, PPS Leads' compliance programs will develop to include additional considerations.

Background

The legislative intent stated in SSL 363-d is, in part, to organize provider resources to resolve Medicaid payment discrepancies and to impose systematic checks and balances to prevent future occurrences.

During the DSRIP Demonstration Period, PPS Leads will be making Medicaid payments to their network partners in connection to DSRIP project implementation and performance. Therefore, PPS Leads must dedicate resources toward implementing a compliance program that will assist in preventing and identifying Medicaid payment discrepancies related to DSRIP payments.

Recommendations

Follow the money. As PPS Leads develop their compliance programs, they must consider where the DSRIP Medicaid payments are going. PPS Leads must dedicate resources and develop systems to take all reasonable steps to ensure the Medicaid

funds distributed as part of the DSRIP program are not connected with fraud, waste or abuse.

PPS Leads can focus their compliance program risk assessments on those risks specifically associated with the current phase of the DSRIP program and payments made pursuant to it. PPS Leads are not responsible for network providers' individual compliance programs that may be required in connection to their status as a servicing provider.

Special Considerations by Element

Element 1: PPS Leads must have policies and procedures that describe compliance expectations specifically related to the compliance issues involving DSRIP funds. The policies and procedures should identify how to communicate DSRIP related compliance issues identified by performing providers to the Compliance Officer at the PPS Lead. Reporting of compliance issues identified may be made directly to the PPS Lead's Compliance Officer or through compliance liaisons within the network.

Element 2: The Compliance Officer must be an employee of the PPS Lead. The Compliance Officer must report directly to the PPS Lead's chief executive or other senior administrator and shall periodically report directly to the PPS Lead's governing body on activities of the compliance program. The Office of the Medicaid Inspector General (OMIG) recommends that PPS Lead's Compliance Officer make reports to the governing body at least quarterly. The Compliance Officer should consider the distribution of DSRIP funds and the Department of Health's (DOH) requirements for DSRIP Measure Specification and Reporting https://www.health.ny.gov/health_care/medicaid/redesign/docs/dsrrip_measure_specification_and_reporting_manual_for_public_comment.pdf. Any compliance program issues identified in connection to the distribution and use of DSRIP funds must be reported by the Compliance Officer.

Element 3: The PPS Lead is responsible for training and education of all affected employees, persons associated with the provider (i.e., PPS Lead), its executives and its governing body members on compliance issues and expectations. "Persons associated with the provider" include performing providers within the PPS network who are or may be eligible to receive DSRIP funds. While the PPS Lead is responsible for the training and education on its compliance program, the PPS Lead is not required to provide the training and education itself. The training and educational materials may be supplied by the PPS Lead and distributed to performing providers throughout the network to implement. If the PPS Lead does not provide the training and education itself, the PPS Lead must have a process in place to confirm that the training and education was provided at each performing provider. Training and education materials should include

compliance expectations related to the DSRIP program, performing providers' roles in DSRIP projects, and how to report any fraud, waste, or abuse of DSRIP funds.

Element 4: The PPS Lead must establish a process of reporting compliance issues to its Compliance Officer which must include an anonymous and confidential method of reporting. As stated in Element 3 above, it is recommended that the process of reporting compliance issues be part of the training and education provided.

Element 5: The PPS Lead's policies and procedures must include disciplinary policies and procedures to encourage good faith participation in the compliance program by all affected individuals. "All affected individuals" includes performing providers within the PPS network. OMIG recommends that the policies and procedures be communicated as part of the training and education. OMIG recommends that the PPS Lead coordinate with their network performing providers to support implementation of the policies and procedures throughout the network.

Element 6: The PPS Lead must develop and implement a system for routine identification of compliance risk areas specific to their provider type (i.e., PPS Lead). Risks specific to PPS Leads during this phase of the DSRIP program include the distribution and use of DSRIP funds. The PPS Lead's system should include a plan for auditing/monitoring how network partners are utilizing DSRIP funds. This plan may coincide with DOH requirements for measuring performance and reporting on the flow of funds related to DSRIP projects.

Element 7: The PPS Lead must develop and implement a system for responding to compliance issues that are raised. PPS Leads should consider misuse of DSRIP funds and false representations to obtain DSRIP funds as examples of compliance issues. SSL 363-d and Part 521 require reporting compliance issues to DOH and OMIG. The PPS Lead's system must also include a method for prompt corrective action and refunding overpayments. PPS Leads will need to work with their network performing providers to support compliance with this requirement.

Element 8: PPS Leads must develop a policy of non-intimidation and non-retaliation for good faith participation in the compliance program. PPS Leads will also need to work with their network partners to support compliance with this requirement.

Conclusion

Since the PPS Lead is dependent upon the actions of their network partners for the compliance program to be fully implemented and effective, it is recommended that support of the compliance program requirements be incorporated into any contract the PPS Lead may have with network partners.

There are other compliance related resources that are not specific to the DSRIP program on OMIG's website www.omig.ny.gov. Many of the concepts in those resources can be related to the DSRIP program. OMIG recommends that PPS Leads and performing providers refer to those resources.

The recommendations outlined here may change at any time based upon reconsideration by OMIG and DOH.

DSRIP Compliance Guidance should be considered to be a general guidance to assist those involved in the DSRIP program that are subject to the mandatory compliance program obligations set out in SSL 363-d Part 521. It does not set out all points that OMIG will consider or use when assessing if compliance programs meet statutory and regulatory requirements. OMIG reserves the right to recall or change this *DSRIP Compliance Guidance* at any time.

This *DSRIP Compliance Guidance* does not constitute rulemaking by OMIG and may not be relied on to create a substantive or procedural right or benefit enforceable, at law or in equity, by any person. Furthermore, nothing in this *DSRIP Compliance Guidance* alters any statutory or regulatory requirement. In the event of a conflict between statutes and regulations applicable to the Medicaid provider and either OMIG audit protocols or this *DSRIP Compliance Guidance*, the requirements of the statutes and regulations govern.

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**Office of the
Medicaid Inspector
General**

**ANDREW M.
CUOMO**
Governor

DENNIS ROSEN
Medicaid Inspector
General



**Department
of Health**

**ANDREW M.
CUOMO**
Governor

**HOWARD A. ZUCKER,
M.D., J.D.**
Commissioner

Delivery System Reform Incentive Payment (DSRIP) Program DSRIP Compliance Guidance 2015-02

Frequently Asked Questions by Performing Provider System (PPS) Leads Relative to Compliance Programs

Introduction

This document is a joint publication issued by the New York State Office of the Medicaid Inspector General (OMIG) and the New York State Department of Health (DOH). It is intended to address questions posed to both OMIG and DOH relative to the mandatory compliance program obligations that exist for Performing Provider System Leads (PPS Leads) that are established under New York Social Services Law Section 363-d (SSL 363-d) and Title 18 of the New York Codes Rules and Regulations at Part 521 (Part 521). This document does not address all compliance program requirements. Please refer to SSL 363-d and Part 521 for all compliance program requirements that are applicable to PPS Leads' Compliance Programs.

Frequently Asked Questions

Q.1.: In connection to its compliance program, what does OMIG expect of PPS Leads relative to partners' use of DSRIP funds?

A.1.: OMIG will review a PPS Lead's compliance program to assess if the PPS Lead is meeting the substantive requirements of SSL 363-d and Part 521. 18 NYCRR 521.3(c)(6) (Element #6) requires a compliance program to include "a system for routine identification of compliance risk areas specific to the provider type...including but not limited to internal audits and as appropriate external audits."

DSRIP Compliance Guidance 2015-01 is currently being considered for revision and is expected to provide more detail on this issue once it is published.

DOH expects the PPS Lead to have a budget and funding distribution plan as submitted in its project application, and implementation plans that specify how

DSRIP funds are distributed among the participating providers to incentivize providers to reach DSRIP performance goals. The PPS Lead will need to provide a distribution methodology taking into account five different categories:

- Project implementation costs
- Costs for delivery of services not reimbursed or under-reimbursed by Medicaid
- Provider performance payments
- Compensate revenue loss
- Other for administrative and other costs not included in previous categories

Each PPS is required to submit, as part of its quarterly report to the Independent Assessor, the PPS Lead's actual distributions in the five categories which shall be subject to audit to confirm the distributions.

It should be noted that DOH direction is specific to DSRIP program guidance and OMIG's response is specific to compliance program requirements. It is the PPS Lead's responsibility to address both.

Q.2.: What does OMIG expect of PPS Leads relative to their obligation to provide training and education on its compliance program?

A.2.: 18 NYCRR 521.3(c)(3) (Element #3) requires "training and education of all affected employees and persons associated with the provider" on the compliance program. Those determined to be "affected employees and persons" may be different during different phases of DSRIP implementation. It is up to the PPS Lead to undertake a reasonable analysis to identify who is "affected" and provide training and education accordingly. OMIG expects that PPS Leads' training and education plans will need to evolve and be revised as the DSRIP program develops. It is recommended that PPS Leads consider this when they evaluate their compliance programs.

Q.3.: What is OMIG's expectation of PPS Leads in checking for excluded or sanctioned parties?

A.3.: 18 NYCRR 515.5 provides that no payment will be made for medical care, services or supplies furnished, ordered or prescribed by any person while that person is excluded. Therefore, PPS Leads and all providers should consider payments to excluded persons to be a risk area. To mitigate that risk, OMIG recommends that PPS Leads and all providers check the exclusion lists routinely. The U.S. Department of Health and Human Services, Office of the Inspector General recommends that to minimize the liability of civil monetary penalties, providers check the exclusion lists monthly. As the DSRIP program develops PPS Leads will need to consider payments to excluded persons as a risk area and consider an exclusion screening

process to mitigate that risk. OMIG expects PPS Leads will consider this when they evaluate their compliance programs.

Q.4.: What are the relative roles between DOH, OMIG and the Independent Assessor?

- A.4.: a. OMIG's role in the DSRIP program is consistent with its mission: to enhance the integrity of the New York State Medicaid program by preventing and detecting fraudulent, abusive, and wasteful practices within the Medicaid program and recovering improperly expended Medicaid funds while promoting high-quality patient care. OMIG activities related to the DSRIP program will vary during the different phases of the DSRIP program implementation. OMIG's work plans will reflect the current year's planned activities. In 2015-2016, OMIG plans to conduct compliance program reviews of PPS Leads.
- b. The Independent Assessor, a vendor contracted by the Department of Health, is responsible for conducting the ongoing monitoring of performance and reporting deliverables for the duration of the DSRIP program.

The ongoing monitoring of performance and reporting deliverables will be primarily focused on the review of the Quarterly Reports submitted by the PPS. The Quarterly Reports will be used by the PPS to demonstrate their progress to meeting defined organizational implementation milestones and project Implementation milestones. The Independent Assessor will review the Quarterly Reports to ensure that PPSs are making progress towards the successful implementation of organizational and project milestones to determine the award of performance payments on a semi-annual basis.

The Assessor will also be responsible for reviewing the required documentation to validate the successful implementation of the organizational and project milestones. Following the review process, the Independent Assessor will be assigning Achievement Values (AVs) to the PPS based on their progress towards and achievement of the milestones with the resulting AVs determining the portion of the available performance payment the PPS will receive in the applicable payment period.

The Independent Assessor will also be responsible for including the AVs associated with the claims based measures and non-claims based measures (Medical Record Reviews, CAHPS, UAS) to determine the performance payment to the PPS.

Throughout the quarterly review processes, the Independent Assessor will be identifying any PPS and projects that are 'at risk' based on missed

milestones or other non-performance indicators. The Independent Assessor will then work with the DOH to determine the necessary corrective action steps, including, but not limited to the creation of additional milestones or subjecting the PPS to specific 'enhanced oversight' requirements.

Lastly, the Independent Assessor will be conducting on-site reviews of each PPS at least one time per DSRIP year. The on-site visits will be used by the Independent Assessor to conduct additional validations of the progress being made by the PPS as communicated through the Quarterly Reports.

- c. DOH is the oversight agency for the DSRIP program and coordinates the regulatory and program requirements with other State agencies to optimize alignment of activities and policy as it pertains to DSRIP activities. The Independent Assessor's scope is defined above and is under the direction of DOH.

Q.5.: What are the compliance program obligations relative to refunding overpayments?

A.5.: 18 NYCRR 521.3(c)(7) requires compliance programs to include a system for "identifying and reporting compliance issues to the department [DOH] or the office of Medicaid inspector general; and refunding overpayments." Therefore, PPS Leads' compliance programs must include a system for identifying and reporting compliance issues, which includes identification and reporting of overpayments. OMIG considers "overpayments" to include DSRIP payments that are issued based upon data that is later found to be incorrect or falsified, regardless of the reason.

DSRIP payments are being made for performance and reporting, not for service delivery. Overpayments must be considered in the context of what the DSRIP payment is for, namely for activities associated with delivery system reform through the identified DSRIP projects that the PPS Lead has committed to DOH to advance. Since it is possible that DOH will release DSRIP funds to PPS Leads based upon the PPS Leads' periodic reporting of project progress that the IA may determine on a subsequent audit was not warranted, the excessive payment would be considered to be an overpayment during this DSRIP phase.

Q.6.: In those situations where a DSRIP payment to a PPS Lead is determined to be more than what it should have been, how will that be recovered by the State?

When a DSRIP overpayment has been identified, the DOH will initiate a recoupment process whereby the overpayment is deducted from future DSRIP performance payments until the full amount of the overpayment has been recouped.

For example: A PPS receives performance payments in DSRIP Year 3, Payment period 1, totaling \$12M, and it is later determined that they should have only received \$11M in performance payments for that period. The DOH would reduce the performance payment for the period following the identification of the overpayment by the \$1M difference.

Conclusion

There are other compliance related resources that are not specific to the DSRIP program on OMIG's website www.omig.ny.gov. However, many of the concepts they deal with can be related to the DSRIP program. OMIG recommends that PPS Leads and performing providers refer to those resources.

The recommendations outlined here may change at any time based upon reconsideration by OMIG and DOH.

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