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BULLETIN NO. 13-04

TO: **ALL HEALTH INSURANCE COMPANIES, HOSPITAL SERVICE CORPORATIONS, MEDICAL SERVICE CORPORATIONS, HEALTH SERVICE CORPORATIONS, AND HEALTH MAINTENANCE ORGANIZATIONS AUTHORIZED TO ISSUE HEALTH BENEFITS PLANS IN NEW JERSEY**

FROM: **KENNETH E. KOBYLOWSKI, COMMISSIONER**

RE: **ALTERNATIVE HEALTH CARE FINANCING AND DELIVERY MODELS**

The use of alternative methods for financing health care as replacements for traditional models of transaction-based reimbursement for health care services and supplies has been increasing in frequency. These include, but are not limited to, Accountable Care Organizations (ACOs) and Patient-Centered Medical Homes (PCMHs). While such innovation in the marketplace is welcome, the purpose of this Bulletin is to remind carriers and their health care provider partners that New Jersey has a regulatory system designed to ensure that delivery systems continue to provide adequate access and incentives for delivering appropriate care, and that entities that bear risk have adequate resources to support those financial promises. New arrangements should be reviewed to ensure compliance with all statutory and regulatory requirements.

An ACO can be broadly defined as an entity comprised of a wide range of collaborating providers within a geographic region who monitor care across many or all health care delivery settings, and who are accountable for the overall cost and quality of care for a defined population. They are generally characterized by an overarching structure for pairing health care delivery system reforms and new forms of provider reimbursement. Within that framework, a variety of financial arrangements and provider relationships are possible.

PCMHs are similar to ACOs in that they coordinate multiple levels of care for patients. However, a PCMH generally centers around a primary care practitioner leading the care delivery across the spectrum of providers. Key characteristics include designation of a personal physician, the provision of services for all of the individual's health care needs, care coordination and integration, and a focus on evidence-based medicine and outcomes measurement.

However designated, when an entity undertakes to act as an intermediary between a health insurance carrier and an ultimate provider of health care services, that relationship may trigger New Jersey's requirements for licensure or certification as an Organized Delivery System (ODS).

N.J.S.A. 17:48H-1 et seq. defines an ODS as

> [A]n organization with *defined governance* that:
>
> a. is organized for the purpose of and has the capability of *contracting with a carrier* to provide, or arrange to provide, under its own management substantially *all or a substantial portion* of the comprehensive health care services or benefits under the carrier's benefits plan on behalf of the carrier, which may or may not include the payment of hospital and ancillary benefits; or
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> b. is organized for the purpose of acting on behalf of a carrier to provide, or arrange to provide, *limited health care services* that the carrier elects to subcontract for as a separate category of benefits and services apart from its delivery of benefits under its comprehensive benefits plan, which limited services are provided on a separate contractual basis and under different terms and conditions than those governing the delivery of benefits and services under the carrier's comprehensive benefits plan.
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> An organized delivery system shall not include an entity otherwise authorized or licensed in this State to provide comprehensive or limited health care services on a prepayment or other basis in connection with a health benefits plan or a carrier. (emphasis added)

Pursuant to N.J.A.C. 11:22-4.2, an ODS does not include an entity organized under the Medical and Dental Education Act of 1970. It also does not include any professional corporation, professional association or independent practice association (IPA), provided such entity's shareholders are comprised solely of providers, and the entity performs no services beyond those for which its shareholders are otherwise licensed in this State.

The following examples help to clarify whether certain arrangements between carriers and entities with whom carriers might enter into an ACO contract meet the definition of an ODS:

1. A hospital system contracts with carriers to provide facility services and the services of health care professionals in the employ of the hospital system. The contract is directly between the carrier and the provider of care, and therefore does not render the hospital an ODS.

2. A hospital creates a separate entity to contract with payers to provide comprehensive services, including its own and those of other professionals with whom it has contracts. An entity was organized for the purpose of contracting with carriers to provide access to services, and therefore would be an ODS.

3. A doctors' group forms an IPA to contract with carriers for the services to be performed by the doctors in the group, and the IPA's shareholders are the doctors in the IPA. While the entity was formed for the purpose of contracting with carriers, it falls under the regulatory exception at N.J.A.C. 11:22-4.2, and therefore is not an ODS.

4. A doctors' group forms an independent practice association (IPA) to contract with carriers for the services to be performed by the doctors in the group, and with specialists with whom the group contracts. The entity contracts for services that go beyond those of the doctors who make up the IPA, and therefore would be an ODS.

In some cases providers may contract directly with both a carrier and with an intermediary. In cases in which the intermediary also contracts with the carrier with respect to some aspects of the delivery of care, the tasks to be undertaken by the intermediary and the impact on the financial arrangements between the provider and the carrier must be examined to determine whether such an intermediary is acting in the capacity of an ODS. The following examples help in making such a determination:

1. A carrier contracts directly with network providers. Those network contracts govern all interactions and obligations between the providers and the carrier, including the areas referred to in the ODS regulations such as credentialing, utilization management, quality improvement, complaints and appeals, and direct reimbursement. However, the carrier also contracts with an entity that was organized for the purpose of contracting with carriers to receive and distribute shared savings to some or all of the participating providers, if certain criteria are met for an identified patient population. In this case, the services are not provided on a separate contractual basis and under different terms and conditions than those governing the direct delivery of care. Therefore, the entity is not an ODS.

2. Same example as Example 1, but the entity is organized for the purpose of contracting with carriers for the providers' participation in financial risk for managing the health care of a defined population. In some cases, the entity may receive payments from the providers if certain financial and/or quality targets are not met, and return the payments to the carrier. The criteria and conditions for payment are described in the contract between the carrier and the intermediary rather than in the provider contract. In this case, the contract with the intermediary creates different terms and conditions, and may result in a reduction in the payments to providers, from those described in the providers' direct contract with the carrier. Therefore, the entity is an ODS.

All ODSs are required to be either licensed or certified by DOBI. An ODS that assumes financial risk is required to be licensed pursuant to N.J.A.C. 11:22-4; an ODS that does not assume financial risk is required to be certified pursuant to N.J.A.C. 11:24B.

N.J.A.C. 11:22-4.2 defines "financial risk" as "exposure to financial loss that is attributable to the liability of an organized delivery system for the payment of claims or other losses arising from covered benefits for treatment or services other than those performed directly by the person or organized delivery system liable for payment, including a loss sharing

arrangement. A payment method wherein a provider accepts reimbursement in the form of a capitation payment for which it undertakes to provide health care services on a prepayment basis shall not per se be considered financial risk." In addition, N.J.A.C. 11:22-4, Exhibit B contains a non-exhaustive list of examples of entities and arrangements determined to be either licensed or certified ODSs.

Medicaid ACOs

Pursuant to P.L. 2011, c. 114 (codified at N.J.S.A. 30:4D-8.1 et seq.), which established a Medicaid Accountable Care Organization Demonstration Project, a Medicaid ACO certified pursuant to that act is not required to obtain licensure or certification as an ODS while it is providing services to Medicaid recipients.

Effect of Federal Law

Under the Medicare Modernization Act of 2003 (Pub.L 108-173), state laws affecting Medicare Advantage plans are preempted, with the specific exceptions of state licensing and solvency laws. To the extent an ACO for a Medicare Advantage Plan is performing functions that would trigger New Jersey's ODS statute, the entity must obtain ODS certification or licensure as appropriate.

This position is supported by the Centers for Medicare and Medicaid Services (CMS), which stated in the final federal regulations on ACOs appearing in the November 2, 2011 Federal Register, "To clarify, we are not preempting any State laws or State law requirements in this final rule. To the extent that State law affects an ACO's operations, we expect the ACO to comply with those requirements as an entity authorized to conduct business in the State." (67816 Federal Register/Vol. 76, No. 212)

Information on ODS Requirements

Information on ODS licensure and certification requirements and the application process can be found on DOBI's webpage at
http://www.state.nj.us/dobi/division_insurance/managedcare/mcods.htm.

March 13, 2013
Date

Kenneth E. Kobylowski
Commissioner

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