

PUBLICATION

OIG Approves Hospice Payments to Nursing Facility for Dual Eligible Patients Under Medicaid Demonstration Project [Ober|Kaler]

August 12, 2016

On July 20, 2016, the Department of Health and Human Services, Office of Inspector General (OIG) issued a favorable Advisory Opinion (16-08) [PDF] regarding payments from a hospice to a nursing facility in which a dual eligible hospice patient resides.

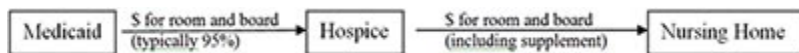
Importantly, the payments are made in the context of a state's Medicaid Demonstration Program to test a fully integrated care system that manages the continuum of benefits for dually eligible beneficiaries. Although the OIG found that the proposed payment could potentially generate prohibited remuneration under the anti-kickback statute, it ultimately concluded that it would not impose administrative sanctions.

Overview of Dual Eligible Hospice Patients in Nursing Facilities

The Medicare hospice benefit covers palliative care for individuals with terminal illnesses, meaning the individual's life expectancy is six months or less. When a Medicare beneficiary residing in a nursing facility elects hospice care, Medicare pays for the palliative care, but it does not pay the cost of room and board. Those costs fall on the patient or a third party payor.

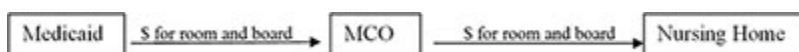
For dual eligible beneficiaries — individuals eligible for both Medicare and Medicaid — who reside in nursing facilities and who elect hospice care, Medicaid pays for the room and board expenses. Typically, Medicaid pays the hospice for the room and board, but by law, the program need only cover at least 95 percent of the state's Medicaid daily nursing facility rate. The hospice, in turn, pays the nursing facility for the room and board. In many instances, the hospice has negotiated with the nursing facility to pay slightly more than what Medicaid pays the hospice for room and board, but no more than what the nursing facility would have received from Medicaid for a non-hospice patient. In other words, the hospice will typically pay the nursing facility somewhere between 95 and 100 percent of the state's Medicaid daily nursing facility rate.

The standard flow of payment for room and board costs of a dual eligible hospice beneficiary living in a nursing facility is from Medicaid, to the hospice, and then to the nursing facility.

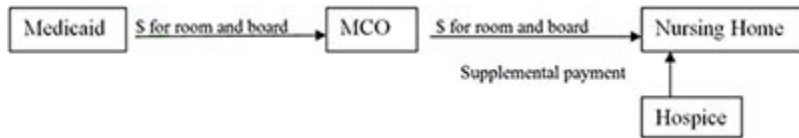


State Demonstration Project – Effect on Payment for Room and Board

In this Advisory Opinion, the Requestor outlined a state Medicaid Demonstration Project designed to test a fully integrated care system that manages the continuum of benefits for dually eligible beneficiaries. The practical effect of the Demonstration Project is that it alters the standard flow of payments. Under the Demonstration Project, the state Medicaid program contracts with several managed care organizations (MCOs) to manage the provision of services to dually eligible beneficiaries. The Demonstration Program gives the MCOs the flexibility to bypass the hospice and pay the nursing facility directly for room and board for dual eligible hospice beneficiaries:



The requestor, a hospice, has proposed making supplemental payments to nursing facilities for dual eligible beneficiaries who elect hospice care. The requestor proposes paying the nursing facility an additional amount which would put the nursing facility in the same position financially as if the patient had not elected hospice care. To ensure it is making an appropriate payment, the requestor would require the nursing facility to disclose the amounts the MCOs pay the nursing facility for room and board for patients who have (and have not) elected hospice.



OIG's Legal Analysis:

While the OIG found that the proposed supplemental payment from the hospice to the nursing facility was a transfer of remuneration to a potential referral source and could potentially generate prohibited remuneration under the anti-kickback statute, it determined it would not impose administrative sanctions. The OIG highlighted its [1998 Special Fraud Alert \[PDF\]](#) regarding arrangements between nursing facilities and hospices. In that Alert, the OIG offered tacit approval of hospices paying nursing facilities more than the Medicaid program had paid the hospices for room and board expenses so long as the total amounts paid did not exceed what the Medicaid program would have paid had the patient not elected hospice care. The OIG noted that the proposed supplemental payment by the hospice to the nursing facility would not result in the nursing facility receiving more than it would have for non-hospice patients. The OIG also noted that the total amount paid to the nursing facility by the MCO and the hospice would not exceed the Medicaid daily nursing facility rate.

Ober/Kaler's Comments

The OIG ultimately found that, similar to the situation described in the 1998 Special Fraud Alert, the supplemental payment by the hospice would help to ensure that the nursing facility did not have a financial incentive to provide a lower level of room and board services to Dually Eligible Hospice Patients or to discourage patients from electing hospice. It is also critical to stress that the OIG's favorable decision in Advisory Opinion 16-08 relies heavily on the fact that the arrangement is in the context of a state Medicaid Demonstration Project. The OIG expressly cautioned that it might “reach a different conclusion” if an individual or entity other than a hospice furnishing care to a Dually Eligible Hospice Patient under a Demonstration Program were to offer a standalone payment to nursing facility in which patients reside.