

HISCOCK & BARCLAY

Measuring the Effectiveness of a Compliance Program – Implementation Tips, Review Tools and Self-Disclosure Issues

May 10, 2011

Hiscock & Barclay, LLP

Melissa M. Zambri

mzambri@hblaw.com

Attorney Advertising

Overview of the Medicaid Program

- 60,000 active providers;
- 4 million recipients; and
- 350 million claims for payment annually.

Why Have a Compliance Plan?

- Heightened scrutiny by regulators;
- Avoid problems before they occur;
- Improved effectiveness of organization; and
- Because pursuant to the Deficit Reduction Act, and state legislation/final regulations, it is mandatory for most providers.

The Importance of Compliance

- Compliance provides stability in revenue.
- Compliance uncovers inadvertent errors which can be corrected before they create huge problems for the Agency.
- Compliance allows continued service to consumers because paybacks and penalties can impact the delivery of future services.
- Compliance leads to a better relationship with regulators and those who pay the Agency.

Compliance Programs Must Have Substance

We have a binder – we should be good to go . . .

We must evolve from this notion . . .

Compliance Programs Must Have Substance

- Fraud investigators may consider an ineffective or inactive program to be a bad faith attempt to circumvent, rather than enforce, compliance.
- OMIG will look to the effectiveness of your Plan. As compliance evolves, Plans will be put under the microscope more and more.

Social Services Law §363-d

“The legislature . . . declares that it is in the public interest that providers within the medical assistance program implement compliance programs The legislature determines that there are key components that must be included in every compliance program and such components should be required if a provider is to be a medical assistance program participant.”

OMIG States

Effective Compliance Programs will prevent and detect fraud and abuse. The goal is “to organize provider resources to resolve payment discrepancies and detect inaccurate billings, among other things, as quickly and efficiently as possible, and to impose systemic checks and balances to prevent future recurrences.”

Social Services Law § 363-d: Compliance Plan Regulations

Providers had until October 1, 2009 to implement a program. Sanctions for failure to implement such a program can include revocation of the provider's agreement to participate in the Medicaid program. Certification had to occur by December 31, 2009 and annually thereafter.

2010 Certification . What Did I Certify To?

“Provider certifies that the provider and its affiliates have adopted, implemented and maintain an effective compliance program that meets the requirements of NYS Social Services Law §363-d and 18 NYCRR Part 521. A provider who does not have an effective compliance program should not complete this form.”

18 NYCRR § 504.3 . So Much About the Records

By enrolling the provider agrees:

to prepare and to maintain contemporaneous records demonstrating its right to receive payment under the medical assistance program and to keep for a period of six years from the date the care, services or supplies were furnished, all records necessary to disclose the nature and extent of services furnished and all information regarding claims for payment submitted by, or on behalf of, the provider and to furnish such records and information, upon request, to the department . . .

Record Keeping in General

- How would a regulatory auditor view the records?
- Can we locate them?
- Are they in good condition? Well-organized? Current information included?
- Are they legible? Could someone outside of the Agency read them?
- Are they stereotype?
- Are they complete? Do they contain required elements?

Current OMRDD/OPWDD Compliance Issues

. Evolution of OMRDD/OPWDD Audits to OMIG

- New Guidances Regarding Level of Care Determinations
- OMIG Protocols – Residential Habilitation and MSC
- New Administrative Memoranda Addressing Billing Standards
- New MSC Standards

OMIG . Demonstrating an Effective Compliance Program

1. The Program meets the Statutory Requirements (Structurally)
 - a) 8 Elements
 - b) Risk Areas
 - c) Compliance Officer/Committee/Hotline
2. The Program Works (Operationally)
 - a) Culture
 - b) Process
 - c) Outcomes

Social Services Law § 363-d: Compliance Plan Elements

- Written policies and procedures;
- Compliance Officer;
- Training and education . . . including . . . governing body members;
- Communication lines to the Compliance Officer;
- Disciplinary policies;
- Internal audits and, as appropriate, external audits;
- Response and investigation; and
- Non-intimidation and non-retaliation policy.

Compliance Regulations

Risk areas that must be addressed:

- Billings
- Payments
- Medical Necessity & Quality of Care
- Governance – Meant to Raise Compliance Visibility
- Mandatory Reporting
- Credentialing
- Others Identified by Provider

Measuring the Effectiveness of Your Compliance Program . OMIG's Views

1. How does OMIG discuss effectiveness?
 - a) Effective within the law
 - b) Effective with communications
 - c) Effective in relation to measurable metrics
 - d) Effective at prevention
 - e) Effective at detection
2. OMIG will measure compliance outcomes, not just structure or process

Measuring the Effectiveness of Your Compliance Program . OMIG's Views

3. OMIG wants a systems approach to preventing health care fraud, abuse and improper payments
4. OMIG recommends less “fault-finding, more fixing”
5. OMIG speaks of a “culture of compliance” or a “culture of non-compliance”

Measuring the Effectiveness of Your Compliance Program . OMIG's Views

6. Are compliance and quality linked – is the Board involved in quality issues?
7. How is poor quality handled – appropriate reports filed, profits through ignoring, consumers/families lied to?
8. Awareness of program – what if someone was randomly asked – do you have a Plan? Who is the compliance officer?

Measuring the Effectiveness of Your Compliance Program - Techniques

1. Using compliance outcomes measures to focus and limit audits and investigations
2. Are behaviors inconsistent with established rules accepted and tolerated?
3. Balancing compliance, communication and enforcement in the most effective way

Awareness of Compliance Plan and Its Implementation

OMIG has indicated that in the coming year, significant emphasis will be placed on the cultural climate of compliance as evidenced by interviews with board members, senior leaders and front line staff. OMIG will look at “support, awareness and transparency.”

How Will OMIG Look at My Agency's Culture?

1. Policies and procedures – who created, how distributed/explained, how often?
2. Compliance Officer and Committee – who, how, resources/authority, other responsibilities, attendance/frequency?
3. Training and education – method, message, frequency?
4. Open lines of communication – tone at the top, recognition of challenges, follow-through?

How Will OMIG Look at My Agency's Culture?

5. Disciplinary policies – communicated, imposed, proportionate to offense?
6. Risk analysis/review – planned, completed, reported? Is there a work plan?
7. Responding to issues – timely, thorough, revisited?
8. Non-intimidation/non-retaliation

How Do We Change Behavior and Culture - Techniques

1. Change the probability of getting caught
2. Change the beliefs about average performance
3. Increase the awareness of standards and mindfulness at time of decision-making
4. Explain the financial impact
5. Put it in moral terms; put it in community terms

OMIGo\$ Comments

“It is the large group of middle managers who are the key to bridging the chasm between legal requirements and compliance.”

“The Road to Front Line Staff: 1) Demonstrated commitment by Board, Senior and General Management; 2) Continuous Education; 3) Departmental Monitoring Plans; 4) Integration into the Day-to-Day Fabric of the Organization’s Operations.”

How Will OMIG Measure Your Processes?

1. Has your organization identified risk areas?
2. Do you have internal/external audits?
3. Is there a mechanism to address conflicts of interest?
4. Do you take corrective action?
 - a) Prompt investigation
 - b) Proper mandatory reporting
 - c) Self-disclosures

Measuring the Effectiveness of Your Compliance Program - Techniques

1. Have there been improvements in your internal and external audits?
2. Have you been uncovering violations?
3. Have you been getting hotline calls or other reports?
4. Are you performing credentialing, background and exclusion/sanction checks?
5. Are you conducting risk assessments, audits, data analyses, and performing remedial measures?
6. Do you respond to issues raised in hotlines or by employees?
7. Do you pay money back?

Measuring the Effectiveness of Your Compliance Program . Could You Prove It?

1. Communications
2. Training
3. Investigations and Resolutions
4. Repayment of Funds
5. Consistent Discipline
6. Reports
7. Questions
8. An Active Compliance Officer
9. Board Involvement

If the Program Fails, OMIG Will Ask . What Happened?

1. How many failures?
2. What kind of failures?
3. What about efforts and accomplishments?
4. What about the effective performance of the organization's core mission?

Board Training and Involvement Is Critical

- The Office of Inspector General of the U.S. Department of Health and Human Services and American Health Lawyers Association publication Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors;
- The Office of Inspector General of the U.S. Department of Health and Human Services and American Health Lawyers Association publication Corporate Responsibility and Health Care Quality: A Resource for Health Care Boards of Directors;
- The New York State Attorney General's Office publication Right from the Start: Responsibilities of Directors and Officers of Not-for-Profit Corporations; and
- The New York State Attorney General's Office publication Internal Controls and Financial Accountability for Not-for-Profit Boards.

OMIG Frequently Asked Question

Do you find a lot of “lip service” from the top with regards to effective programs, and do board members know the components of their facilities’ compliance programs?

Answer: When OMIG’s Bureau of Compliance does effectiveness reviews of compliance programs, a key feature that is tested is “what is the tone from the top?” We expect that senior management play a leadership role on compliance issues and that the governing board is engaged with the compliance program, has an independent reporting relationship with the compliance officer or the compliance official and that compliance issues are addressed in a timely and effective manner at the senior management and governing board levels.

Recommendation . Complete the OMIG Effectiveness Review Tool Internally

- 1) Effectiveness tool available on OMIG website
- 2) Answer questions and show evidence of compliance with requirements
- 3) Make suggestions for improvements to the Plan and its implementation based upon the questions

Recommendation . Complete the OMIG Effectiveness Review Tool Internally

- 1) Do it annually
- 2) Share with Management and Board
- 3) You will find things that you could do better – common items:
 - 1) Keeping records that show discipline is consistent
 - 2) Publicity of Plan
 - 3) Getting the message out to contractors
 - 4) Ensuring a log or someplace where you can conveniently show all of your great work with the Plan
 - 5) Proof of training and retraining and is training revised?

Common Problems

- 1) Lack of Board training, adequate involvement
- 2) Failure to have a handle on conflict of interest
- 3) Leaving too much of the management of credentialing to the providers
- 4) Unconvinced or undedicated management
- 5) OMIG or other letters come in – people are afraid to tell anyone, try to handle themselves, don't know what to do
- 6) Blame gets in the way of compliance

Self-Disclosure

“The OMIG recognizes that situations which are subject to this guidance could vary significantly; therefore, this protocol is written in general terms to allow providers the flexibility to address the unique aspects of the matters disclosed.”

Self-Disclosure . OMIGs Listed Advantages

1. Forgiveness or reduction of interest payments (for up to two years)
2. Extended repayment terms
3. Waiver of penalties and/or sanctions
4. Timely resolution of the overpayment
5. Recognition of the effectiveness of the provider's compliance and a decrease in the likelihood of imposition of an OMIG Corporate Integrity Agreement
6. Possible preclusion of subsequently filed New York State False Claims Act qui tam actions based on the disclosed matters

Self-Disclosure - Criteria

Each incident must be considered on an individual basis. Factors to consider include the exact issue, the amount involved, any patterns or trends that the problem may demonstrate within the provider's system, the period of non-compliance, the circumstances that led to the non-compliance problem, the organization's history, and whether or not the organization has a corporate integrity agreement (CIA) in place.

Issues appropriate for disclosure may include, but are not limited to:

- Substantial routine errors
- Systematic errors
- Patterns of errors
- Potential violation of fraud and abuse laws.

OMIG Description

The repayment of simple, more routine occurrences of overpayment should continue through typical methods of resolution, which may include voiding or adjusting the amounts of claims. Providers should be aware that the OMIG monitors both the number of occurrences and dollar amounts of voids and/or adjustments, as well as any patterns of voids and/or adjustments. The OMIG highly discourages providers from attempting to avoid the self-disclosure process when circumstances in fact warrant its use.

New Provisions Under Federal Law

An overpayment must be reported and returned . . . the date which is 60 days after the date on which the overpayment was identified.

Identified means that the fact of an overpayment, not the amount of the overpayment has been identified, according to OMIG.

Under Federal law, language suggests that the provider has an opportunity to reconcile whether an overpayment occurred.

In either event, get your review done as quickly as possible and if you have overpayments, return them quickly.

Self-Disclosure - Reports

Make the decision with the assistance of counsel.

Counsel should make the disclosure.

Thank you for your time.

Questions?