

December 22, 1997

Karen W. Mulroe, Esq.
Attorney
Oxford Health Plans
800 Connecticut Avenue
Norwalk, Connecticut 06854

Re: Proposed Case Rate Agreement

Dear Ms. Mulroe:

We have reviewed the proposed IPA Case Rate Agreement submitted to this office under cover of your letter of November 7, 1997 to Florence Abrams of this office. As Ms. Abrams discussed with you briefly on the phone, this new agreement raises a number of legal issues in the areas of the corporate practice of medicine, anti-referral and professional misconduct as well as issues under Article 44 of the Public Health Law ("PHL"). A summary of the concept behind the proposed case rate agreement and a summary of the issues raised by this concept are set forth below.

Concept

The case rate agreement is designed to be an agreement between an IPA and a contractor. As you explained to Ms. Abrams, the IPA's function will be solely to identify "prime contractors" who or which can be physicians, management service organizations ("MSO's") or other persons or entities. The prime contractor, in turn, will be responsible for providing and/or arranging for the provision of a treatment package to members of a "health care plan" who require certain services from a specialist. Compensation for each case would be paid by the IPA to the prime contractor who, in turn, would pay all other providers rendering services as part of that case.

Under this agreement, therefore, the IPA would be subcontracting its obligation to arrange for the delivery of health care services to members of an HMO. In addition, the scope of the agreement is not limited to the provision of services on behalf of HMO's, but also includes the provision of services on behalf of indemnity insurers, worker's compensation carriers, preferred provider organizations, and self-insured plans.

Issues

1. Pursuant to 10 NYCRR § 98.5, the only type of legal entity authorized to arrange for the provision of health care services to members of an HMO is an IPA. Consequently, an entity that is not an approved IPA cannot perform such functions. The proposed case rate agreement, however, provides for IPA's to subcontract with non-approved entities or persons (referred to in the agreement as the "Contractor") to perform the services that the IPA itself is supposed to be performing. In addition, the authorized purposes of an IPA are confined to arranging for health care services for HMO members. 10 NYCRR § 98.5(b)(6)(iv)(a). The proposed case agreement, however, provides for the IPA to arrange for the provision of health care services to members of "health care plans," which are defined by the agreement as including not only HMO's but also indemnity insurers, worker's compensation carriers, preferred provider organizations, and self-insured plans. Case Rate Agreement, paragraph 1.5.
2. Even assuming arguendo that subcontracting by an IPA were permissible, arranging for the provision of health care services for HMO members by an MSO could be found to be in violation of Education Law § 6512 (Unauthorized practice a crime). That statute prohibits the unauthorized practice of any profession for which a license is required and is interpreted broadly by the New York State Education Department to include arranging for professional services by a person who or entity which does not possess the requisite professional license. IPA's are exempted from this provision pursuant to 10 NYCRR § 98.5 and the approval process set forth in that provision.
3. PHL § 4501 prohibits any person or entity from engaging in any business or service which includes the referral of persons to a physician, hospital, [or] health related facility . . . for any form of medical care or treatment of any ailment or physical condition. The acceptance of a fee for making such a referral creates a presumption that the business is engaged in for profit activities.
4. If the prime contractor is a physician, there could be possible violations of various provisions of section § 6530 of the Education Law, which governs professional misconduct by physicians. Education Law § 6530 (17) prohibits exercising undue influence on a patient for the financial gain of the licensee or a third party. Violations of this provision are possible since the physician would be promoting the services of particular providers. Education Law § 6530(18) prohibits a licensee from directly or indirectly receiving or giving any fee or other consideration from or to a third party for referral of a patient or in connection with the performance of professional services. Depending on the specific circumstances, the Contractor could be in violation of the fee-splitting prohibition in Education Law § 6530(18), particularly if the physician contracts with providers licensed to practice in other professions. If the prime contractor is a licensed professional other than a physician (or a physician assistant or specialist assistant), prohibitions similar to those in paragraphs (17), (18), and (19) of the above statute are set forth in 8 NYCRR Part 29 apply.

5. If the prime contractor refer members for certain types of services to entities in which he or she or a member of his or her family has a financial interest, the referral would violate the Health Care Practitioner Referrals Act. PHL §§ 238 et seq..

For the above reasons, we cannot approve an agreement of this nature although, with modifications, we could approve the proposed case rate reimbursement agreement between Oxford Health Plan New York, Inc. and an IPA.

Sincerely,

John Franzen
Associate Attorney

JEF:FEA:cmm