

PUBLICATION

OIG Approves Free Diapers and Playpen in Connection with Medicaid Program Promoting Pre- and Post-Natal Care [Ober|Kaler]

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On January 26, 2015, the U.S. Department of Health & Human Services, Office of Inspector General (OIG) issued an advisory opinion approving an entity's practice of advertising and providing free diapers and free portable playpen cribs (play yards) relating to the services it provides under a state's home visiting program for at-risk mothers and infants. In Advisory Opinion 15-01, the OIG concluded that this arrangement would not warrant the imposition of sanctions under the civil monetary prohibition against inducements to beneficiaries or the antikickback statute.

The Advisory Opinion's requestor is a privately owned, licensed provider in a state's Maternal Infant Health Program (Program). The state designed the Program to promote healthy pregnancies, positive birth outcomes, and infant health and development, with services intended to supplement prenatal and infant care. Program services are reimbursable under the state's Medicaid Program, and all Medicaid-eligible pregnant women and infants qualify for the Program. Program enrollees receive an initial assessment and up to nine follow-up visits, for a maximum of ten visits billable to Medicaid. Under the Program, licensed clinicians offer care coordination and intervention services to Program enrollees, helping pregnant women obtain prenatal care and make changes that will increase the likelihood that their infants will be healthy at birth. After a Program enrollee gives birth, the licensed clinicians continue providing supportive services to the mother and infant, such as encouraging the mother to have a medical care provider that she and her infant regularly see for well-child visits.

The state issued an Operations Guide for the Program (Guide) that requires Program providers to market their services to potential referral sources as well as demonstrate a capacity to conduct marketing and outreach activities to Program-eligible Medicaid beneficiaries and medical care providers in the geographical areas the Program providers serve. To incentivize Program-eligible Medicaid beneficiaries to participate in the Program, the Guide suggests outreach activities, such as providing free diapers for participating in the Program.

The requestor's advertising includes incentives, such as free packs of diapers and play yards, to Program-eligible Medicaid beneficiaries to encourage them to enroll in the Program. Program-eligible Medicaid beneficiaries may receive one free pack of diapers during their initial consultation; but they are not required to enroll in the Program or designate the requestor as their Program services provider to receive the diapers. Program-eligible Medicaid beneficiaries who enroll in the Program and choose the requestor may receive one additional free pack of diapers per billable visit. Each diaper pack is valued at less than \$5, and in the aggregate, Program enrollees receive no more than \$50 worth of free diapers. The free play yard, on the other hand, is provided only to Program-eligible Medicaid beneficiaries who enroll in the Program, select the requestor as their Program services provider, and complete all 10 visits.

Analysis under Civil Monetary Penalties (CMP) Law and Antikickback Statute

The OIG began by concluding that the arrangement implicated the CMP. Specifically, the OIG found that the requestor advertises free diapers and playpens to Program-eligible beneficiaries to induce them to enroll in the Program and select the requestor as their Program services provider. Although it found that the arrangement

implicated the CMP law, the OIG concluded that it would not impose sanctions under the CMP based on the facts of this particular arrangement.

With respect to the diapers, the OIG concluded they have nominal value and are not prohibited by the CMP because the value of the diapers falls within both the per item (\$10) and aggregate (\$50 per year) thresholds set by the OIG for incentives of nominal value. With respect to the playpens as well as the diapers, the OIG concluded the incentives satisfy the requirements of the Preventive Care Exception to the CMP, namely:

- The prenatal services and postnatal well-child visits provided by the requestor's licensed clinicians under the Program are among the services that the regulations interpreting the Preventive Care Exception identify when defining preventive care.
- The value of the diapers and playpens (either separately or in combination) is not disproportionately large in relationship to the value of the services under the Program.
- The Program's services are not directly or indirectly tied to the provision of care, and the Program's services are intended to supplement the medical care the Program's Medicaid beneficiaries receive.

For these same reasons, the OIG concluded that it would not impose sanctions under the antikickback statute based on the facts of this particular arrangement.

Ober|Kaler Comments

Advisory Opinion 15-01 is instructive as it is one of the few sources of guidance on the Preventive Care Exception to the CMP. It is also interesting that the OIG applied the CMP analysis to the antikickback statute despite the fact that there is no similar Preventive Care Exception to the CMP.