PUBLICATION

OIG Allows Free and Reduced-Cost Services to Strained Caregivers in Advisory Opinion 18-05

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In what is becoming a steady trend, the Office of Inspector General (OIG) published another favorable opinion for an arrangement seeking to implement programs that support and engage family members who are increasingly carrying the responsibilities of providing daily assistance and other forms of unpaid care to their adult relatives with chronic conditions. The OIG advised in this instance that the non-profit hospital's privately funded department to support caregivers in the community (the Center) did not meet requirements for any statutory exception concerning prohibited inducements. Nevertheless, the OIG found adequate safeguards in place with the hospital's arrangement to conclude it proposed a low risk to federal health care programs such that the OIG would not impose sanctions.

The Center would provide for or arrange for various services for caregivers within the community. Free services to caregivers may include educational materials and programs, support groups, onsite respite care during Center activities attended by caregivers, and equipment lending to try out certain assistive devices before deciding to purchase them elsewhere. Fee-based services may include stress-reducing activities for the caregiver, reduced-fee ride-sharing, and additional respite care resources. A team of volunteers will predominantly operate the Center and will be trained to properly direct caregivers to non-medical resources within their community.

Such offering or transfer of items and services for free or at reduced-cost creates the potential for prohibited inducement and undue influence as remuneration, which will implicate the Anti-Kickback Statute and beneficiary inducement civil monetary penalties (CMP) law. In addressing both these implications, the OIG started by examining two exceptions to the beneficiary inducement CMP law created by the Affordable Care Act: the Promotes Access to Care Exception and the Financial Need-Based Exception.

The OIG explained that the Promotes Access to Care Exception only applies to remuneration that improves the ability of the beneficiary (i.e., the person for whom the caregiver provides care) to obtain items and services payable by Medicare and Medicaid. In the arrangement under consideration, the OIG found that most of the benefits of the arrangement were directed to the caregiver, not the beneficiary. In fact, the OIG noted that the Center does not collect information about health care providers, does not provide medical services, and does not recommend particular health care providers.

Correspondingly, the OIG explained that the Financial Need-Based Exception requires the remuneration to be reasonably connected to the beneficiary's medical care. The OIG concluded that the Financial Need-Based Exception was not satisfied because while many of the services offered under the arrangement potentially contribute to the general health and well-being of the caregiver, the services are not connected to the medical care of either the caregiver or the beneficiary.

Despite the fact that the arrangement did not meet the requirements for either of the exceptions to the beneficiary inducement CMP, the OIG decided it would not impose sanctions. The OIG found that the following enumerated steps that the hospital certified it would implement would safeguard the arrangement from generating appreciable risk of prohibited inducement, undue influence, and increased cost to federal health care programs.

First, the Center requires caregivers to sign a consent that acknowledges it does not provide, recommend, or refer any medical services or any particular provider or supplier, health care or otherwise. Further, participation in the Center's programs is not tied to, or conditioned upon, any particular health care need of the caregivers. Thus, the services provided or arranged for by the Center have minimal, if any, relation to federally reimbursable services and pose a low risk of influencing a caregiver's choice of health care provider. Secondly, since the Center does not collect information on caregivers' or beneficiaries' providers or insurers (nor does it condition availability of its services on the same) and only furnishes financial assistance sought by caregivers based upon established objective criteria, it demonstrates that federal health care program status and the Center participants' utilization, if any, of the hospital's federally reimbursable services are not factored into account when the Center provides or arranges for services to caregivers.

Thirdly, the Center and hospital refrain from recommending the hospital for any item or service, regardless of whether a federal health care program reimburses that particular item or service. Information concerning the Center would be published on the hospital's website and printed in its brochures, but otherwise the hospital would not employ marketing services to promote the programs offered by the Center. Staff from the Center also are trained to redirect any requests concerning health care items, services, or providers to the requestor's own health care provider, and they provide the requestor a comprehensive list of known providers in the area for requests concerning non-medical items or services.

Finally, the OIG notes that Center operations and resources are funded by private sponsors and administered through a predominantly volunteer staff. This means the costs of implementing the proposed arrangement would likely have a neutral financial impact on federal health care programs and would not increase the fiscal burden of any particular program.

Baker Donelson Comments

Advisory Opinion 18-05 is notable as one of the first advisory opinions to discuss these two exceptions that were added to the beneficiary inducement CMP law through the Affordable Care Act. The OIG appears to be taking a very narrow view of the protections afforded by these exceptions. Yet, despite concluding that the exceptions did not offer protection, the OIG was willing to approve the arrangement.

From a broader perspective, recognition and support of the unpaid caregiver's role in today's health care delivery system has been displayed in other past OIG advisory opinions (09-01 and 11-16), in the focus of private interest groups like AARP (whose study was cited in this opinion), and in the efforts of governmental organizations such as the Administration for Community Living (formed by HHS in 2012). Associated public and private organizations are steadily increasing their attention and resources to care for those who care for others. The bipartisan Recognize, Assist, Include, Support and Engage Family Caregivers Act (the RAISE Act) signed into law this year is the latest acknowledgement of the important role these caregivers play. As the RAISE Act's public advisory council works over the next 18 months to develop actionable recommendations for HHS to create a national family caregiver strategy, we anticipate seeing additional ideas and innovative means to address caregiver well-being.