STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
MARGARET M. O'NEILL BUILDING
410 FEDERAL STREET, SUITE 1
DOVER, DE 19901

VOICE: (302) 739-3620
TTY/TDD: (302) 739-3699
FAX: (302) 739-6704

MEMORANDUM

DATE: October 28, 2011

TO: Ms. Sharon L. Summers, DMMA
Planning & Policy Development Unit

FROM: Wendy, Strauss, Vice-Chairperson
State Council for Persons with Disabilities

RE: 15 DE Reg. 448 [DMMA Proposed Payment Error Rate Measurement Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMAs) proposal to adopt a federal option in the context of analysis of excess Medicaid and CHIP payments. The regulation was published as 15 DE Reg. 448 in the October 1, 2011 issue of the Register of Regulations.

As background, under a Medicaid Eligibility Quality Control ("MEQC") program, states generally review samples of Medicaid cases to assess excess payment error rates. CMS is authorized to withhold payments to states based on the amount of improper payments which exceed a 3% threshold. See attached 75 Fed Reg. 48816 (August 11, 2010). A second, overlapping payment error system is also operating pursuant to another federal law. The second system is the "Payment Error Rate Measurement (PERM) Program. States have been critical of the overlapping systems based on perceived duplication of effort. See discussion at 15 DE Reg. 449.

In 2010, CMS issued a 36-page regulation [75 Fed Reg. 48816 (August 11, 2010)] offering states some relief, i.e., states may opt to substitute PERM reviews for the MEQC reviews every 3 years (conforming to the 3-year review cycle). Delaware DMMA is now proposing a Medicaid State Plan Amendment electing this option consistent with the federal regulatory amendments reflected in the attached 75 Fed Reg. 48847.

SCPD endorses the concept underlying the DMMA regulation since it should reduce administrative costs. Council's only concern is that the proposed revision to the State Plan is

somewhat vague and does not explicitly mention acceptance of the option to substitute PERM reviews for the MEQC reviews during Delaware's PERM review cycle. Perhaps CMS has provided states with a somewhat vague template and DMMA is simply adopting that template. SCPD respectfully requests clarification on this issue.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or position on the proposed regulation.

cc: Ms. Rosanne Mahaney
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

15reg448 dmma-payment error 10-28-11

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 431, 447, and 457

[CMS–6150–F]

RIN 0938–AP69

Medicaid Program and Children's Health Insurance Program (CHIP); Revisions to the Medicaid Eligibility Quality Control and Payment Error Rate Measurement Programs

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule implements provisions from the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) (Pub. L. 111–3) with regard to the Medicaid Eligibility Quality Control (MEQC) and Payment Error Rate Measurement (PERM) programs. This final rule also codifies several procedural aspects of the process for estimating improper payments in Medicaid and the Children's Health Insurance Program (CHIP).

DATES: *Effective Date:* These regulations are effective on September 10, 2010.

FOR FURTHER INFORMATION CONTACT: Elizabeth Lindner, (410) 786–7481. Jessica Woodard, (410) 786–9249.

SUPPLEMENTARY INFORMATION:

I. Background

A. Medicaid Eligibility Quality Control Program

The Medicaid Eligibility Quality Control (MEQC) program is set forth in section 1903(u) of the Social Security Act (the Act) and requires States to report to the Secretary the ratio of States' erroneous excess payments for medical assistance to total expenditures for medical assistance. Section 1903(u) of the Act also sets a 3-percent threshold for improper payments in any fiscal year and the Secretary may withhold payments to States based on the amount of improper payments that exceed the threshold. The traditional MEQC program is based on State reviews of Medicaid cases identified through a statistically reliable Statewide sample of cases selected from the State's eligibility files and excludes separate CHIP programs. These reviews are conducted to determine whether the sampled cases meet applicable Medicaid eligibility requirements.

B. The Improper Payments Information Act of 2002

The Improper Payments Information Act of 2002 (IPIA), (Pub. L. 107–300, enacted on November 26, 2002) requires the heads of Federal agencies to annually review programs they oversee to determine if they are susceptible to significant erroneous payments. If any programs are found to be susceptible to significant improper payments, then the agency must estimate the amount of improper payments, report those estimates to the Congress, and submit a report on actions the agency is taking to reduce erroneous expenditures. The IPIA directed the Office of Management and Budget (OMB) to provide guidance on implementation. OMB defines "significant erroneous payments" as annual erroneous payments in the program exceeding both 2.5 percent of program payments and $10 million (OMB M–06–23, Appendix C to OMB Circular A–123, August 10, 2006). For those programs found to be susceptible to significant erroneous payments, Federal agencies must provide the estimated amount of improper payments and report on what actions the agency is taking to reduce them, including setting targets for future erroneous payment levels and a timeline by which the targets will be reached.

The Medicaid program and the Children's Health Insurance Program (CHIP) were identified as programs at risk for significant erroneous payments. The Department of Health and Human Services (DHHS) reports the estimated error rates for the Medicaid and CHIP programs in its annual Agency Financial Report (AFR) to Congress.

C. Regulatory History

1. Medicaid Eligibility Quality Control Program

Sections 431.800 through 431.865 set forth the regulatory requirements for States to conduct the annual MEQC measurement. Currently, the MEQC program consists of the following:

- MEQC traditional—Operating MEQC under § 431.800 through § 431.865 and selecting a random sample of all Medicaid applicants and enrollees and reviewing them under guidance in the State Medicaid Manual.
- MEQC pilots—Operating MEQC under a special study or a target population and providing oversight to reduce and prevent errors and improve program administration.
- MEQC waivers—Operating MEQC as a part of a CMS approved section 1115 waiver and reviewing beneficiaries included in the research and demonstration project.

2. Payment Error Rate Measurement (PERM) Program

Section 1102(a) of the Act authorizes the Secretary to establish such rules and regulations as may be necessary for the efficient administration of the Medicaid and CHIP programs. The Medicaid statute at section 1902(a)(6) of the Act and the CHIP statute at section 2107(b)(1) of the Act require States to provide information that the Secretary finds necessary for the administration, evaluation, and verification of the States' programs. Also, section 1902(a)(27) of the Act (and § 457.950 of the regulations) requires providers to submit information regarding payments and claims as requested by the Secretary, State agency, or both. Under the authority of these provisions, we published a proposed rule in the August 27, 2004 **Federal Register** (69 FR 52620) to comply with the requirements of the IPIA and the OMB guidance. The proposed rule set forth provisions for all States to annually estimate improper payments in their Medicaid and CHIP programs and to report the State-specific error rates for purposes of our computing the national improper payment estimates for these programs.

In the October 5, 2005 **Federal Register** (70 FR 58260), we published an interim final rule with comment period (IFC). The IFC responded to public comments on the proposed rule, and informed the public of our national contracting strategy and of our plan to measure improper payments in a subset of States. Our State selection process ensures that a State is measured once, and only once, every 3 years for each program.

In response to the public comments from the October 5, 2005 IFC, we published a second IFC in the August 28, 2006 **Federal Register** (71 FR 51050). The IFC reiterated our national contracting strategy to estimate improper payments in both Medicaid and CHIP fee-for-service (FFS) and managed care, and set forth and invited further comments on State requirements for estimating improper payments due to errors in Medicaid and CHIP eligibility determinations. We also announced that a State's Medicaid and CHIP programs would be reviewed in the same year.

In the August 31, 2007 **Federal Register** (72 FR 50490), we published a final rule for the PERM program, which implements the IPIA requirements. The August 31, 2007 final rule responded to the public comments on the August 28, 2006 IFC and finalized State requirements for submitting claims to the Federal contactors that conduct FFS

recordkeeping requirements, Rural areas.

42 CFR Part 457

Administrative practice and procedure, Grant programs-health, Health insurance, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

■ 1. The authority for part 431 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act, (42 U.S.C. 1302).

Subpart P—Quality Control

■ 2. In § 431.636, amend the heading by removing the reference to "State Children's Health Insurance Program" an by inserting "Children's Health Insurance Program" in its place.

■ 3. Section 431.806 is amended by—

■ A. Redesignating paragraph (b) as paragraph (c).

■ B. Adding new paragraph (b).

The addition reads as follows:

§ 431.806 State plan requirements.

* * * * *

(b) *Use of PERM data.* A State plan must provide for operating a Medicaid eligibility quality control program that is in accordance with § 431.978 through § 431.988 of this part to meet the requirements of § 431.810 through § 431.822 of this subpart when a State is in their PERM year.

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■ 4. Section 431.812 is amended by—

■ A. In paragraph (a)(2)(i), removing the ";" and adding a "." in its place and in paragraph(a)(2)(ii), removing the "; and" and adding a "." in its place.

■ B. Adding new paragraphs (a)(2)(iv) and (f).

The additions read as follows:

§ 431.812 Review procedures.

(a) * * *

(2) * * *

(iv) Individuals whose eligibility was determined under a State's option under section 1902(e)(13) of the Act.

* * * * *

(f) *Substitution of PERM data.*

(1) A State in its Payment Error Rate Measurement (PERM) year may elect to substitute the random sample of selected cases, eligibility review findings, and payment review findings obtained through PERM reviews conducted in accordance with § 431.978 through § 431.988 of this part for data required in this section, if the only exclusions are those set forth in § 431.978(d)(1) of this part.

(2) PERM cases cited as undetermined may be dropped when calculating MEQC error rates if reasons for drops are acceptable reasons listed in the State Medicaid Manual.

■ 5. Section 431.814 is amended by revising paragraph (c)(4) to read as follows:

§ 431.814 Sampling plan and procedures.

* * * * *

(c) * * *

(4) States must exclude from the MEQC universe all of the following:

(i) SSI beneficiaries whose eligibility determinations were made exclusively by the Social Security Administration under an agreement under section 1634 of the Act.

(ii) Individuals in foster care or receiving adoption assistance whose eligibility is determined under Title IV–E of the Act.

(iii) Individuals receiving Medicaid under programs that are 100 percent Federally-funded.

(iv) Individuals whose eligibility was determined under a State's option for Express Lane Eligibility under section 1902(e)(13) of the Act.

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Subpart Q—Requirements for Estimating Improper Payments in Medicaid and CHIP

§ 431.950 [Amended]

■ 6. Amend § 431.950 by revising the reference to "State Children's Health Insurance Program" to read "Children's Health Insurance Program."

■ 7. Section § 431.954 is amended by revising paragraph (a) to read as follows:

§ 431.954 Basis and scope.

(a) *Basis.* The statutory bases for this subpart are as follows:

(1) Sections 1102, 1902(a)(6), and 2107(b)(1) of the Act, which contain the Secretary's general rulemaking authority and obligate States to provide information, as the Secretary may require, to monitor program performance.

(2) The Improper Payments Information Act of 2002 (Pub. L. 107–300), which requires Federal agencies to review and identify annually those programs and activities that may be susceptible to significant erroneous payments, estimate the amount of improper payments, report such estimates to the Congress, and submit a report on actions the agency is taking to reduce erroneous payments.

(3) Section 1902(a)(27)(B) of the Act requires States to require providers to agree to furnish the State Medicaid agencies and the Secretary with information regarding payments claimed by Medicaid providers for furnishing Medicaid services.

(4) Section 601 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) (Pub. L. 111–3) which requires that the new PERM regulations include the following: Clearly defined criteria for errors for both States and providers; Clearly defined processes for appealing error determinations; clearly defined responsibilities and deadlines for States in implementing any corrective action plans; requirements for State verification of an applicant's self-declaration or self-certification of eligibility for, and correct amount of, medical assistance under Medicaid or child health assistance under CHIP; and State-specific sample sizes for application of the PERM requirements.

* * * * *

■ 8. Section 431.958 is amended by—

■ A. Revising the definitions of the terms "Active fraud investigation," "Agency," and "Case."

■ B. Adding definitions of the terms "Annual sample size," "Children's Health Insurance Program (CHIP)", "Provider error," and "State error" in alphabetical order.

■ C. Removing the definition of "State Children's Health Insurance Program (SCHIP)".

The additions and revisions read as follows:

§ 431.958 Definitions and use of terms.

* * * * *

Active fraud investigation means a beneficiary or a provider has been referred to the State Medicaid Fraud Control Unit or similar Federal or State investigative entity including a Federal oversight agency and the unit is currently actively pursuing an investigation to determine whether the beneficiary or the provider committed health care fraud. This definition applies to both the claims and eligibility review for PERM.

Agency means, for purposes of the PERM eligibility reviews under this part, the entity that performs the Medicaid and CHIP eligibility reviews under PERM and excludes the State Medicaid or CHIP agency as defined in the regulation.

* * * * *

Annual sample size means the number of fee-for-service claims, managed care payments, or eligibility