



IHO Update

Bi-weekly News for Hospice Professionals in Iowa

August 31, 2007

IHO Gears Up for 2007 Fall Conference

Registration for Fall Conference

Registration forms are slated to hit your mailboxes and be available on the IHO Website (www.iowahospice.org) the week of Sept. 17.

The Education Line-Up

The IHO Education Committee has worked hard to bring you a great faculty for this year's conference including:

- **Judi Lund Person, vice president, Division of Quality End-of-Life Care, NHPCO** discussing "The 10 Components of Quality Care" and "Hospice Self-Assessment."
- **Peter Benjamin, Partner, The Huntington Consulting Group, Florida** will present, "Communication Skills: How Hospices Can Best Convey Their Message" and "How Hospice Fits: Key Trends in Health Care Impacting Hospices."
- **Ann Corley, MS, Owner, SageWorks Holistic Coaching and Consulting, Missouri**, will take participants through a session on "The Helping Relationship: Staying Healthy – Staying Balanced," and "Running on Empty: Everyday Ways to Fill Your Inner Well."
- **Lores Vlaminc, RN, BSN, MA, Lores Consulting, Minnesota** will examine "Compassion Fatigue" and "Many Faces of Grief."

These are just a few of the faculty set to present on Oct. 24-25 at The Scheman Building in Ames. Other sessions will focus on storytelling, leadership excellence, music at the end of life, methadone use and management of non-pain symptoms, hospice education, boundaries, and volunteer training.

Special Events

- **Volunteer Recognition Ceremony**

Thank you to everyone who submitted a nomination form to recognize a special volunteer from your agency at this year's ceremony. Nomination forms are currently being compiled. A confirmed list of all honored volunteers will be included in the next *IHO Update* on Sept. 14 and will also be listed on the IHO Web site by next Friday, Sept. 7. Please check these two sources. If you do not see the name of the volunteer you nominated, please call Natalie Wilson, IHO, at 515.243.1046.

- **Poster Presentations**

Monday, Sept. 1, is the deadline to submit a poster presentation application in celebration of IHO's 25th Anniversary. Remember these posters are to showcase how your hospice has changed throughout its history – milestones, special achievements, etc. We have about 15 posters and would love more to fill up the hallways of The Scheman Building. So, put your application in the mail today! Presentation applications are available on the IHO Web site at www.iowahospice.org under the “Calendar” Tab. *Please Note: Only the application is due on Sept. 1. The actual poster can be brought with you to the conference on Oct. 24-25.*

IHO Quality Benchmarking Project Update

- **Thanks** to the hospices that have completed the first monthly survey in our three-month project to determine the best measures of hospice quality for Iowa, focusing on pain management! We've had strong participation so far, but still need to hear from many of you.
- **The August survey will be available for completion at the end of the day today. Please enter as much data as you can by September 14th.** The July survey remains open for you to add new data, edit data already submitted, or respond to the feedback questions about individual measures. Participation in this online survey is free for all IHO member agencies.
- **For more information:** check out the IHO Web site Data and Surveys link, under IHO Quality Benchmarking Project.
- **If you have questions:** contact Frances Hoffman (hoffmanf@netconx.net; 641-380-0342) or the OCS QAPI Help Desk (QAPI@ocsys.com; 603-794-4802).

QAPI Snapshot Reports Now Available

For the more than two dozen IHO members participating in the IHO/OCS QAPI Snapshot survey note the second quarter reports can be accessed.

- **To review the reports,** login as you did to complete the survey.
- **You can go back to previous surveys at any time** to add new data or edit previously-submitted data.
- **If you have questions:** contact the OCS QAPI Help Desk (QAPI@ocsys.com; 603-794-4802).

IHO Nominating Committee Seeking Recommendations

The IHO Nominating Committee is seeking potential candidates to serve on the IHO Board. The committee is chaired by immediate past Board President Marvin Fagerlind, Executive Director of Cedar Valley Hospice in Waterloo. Also serving on the committee are current IHO Board President Leanne Burrack with Hospice of Mercy in Cedar Rapids as well as two past IHO Board Presidents: Maggie Elliott, Executive Director of Iowa City Hospice and Linda Todd, Director of Hospice of Siouxland in Sioux City. Jean Walker, Patient Care Coordinator at Middle River Hospice in Winterset, completes the committee.

IHO members are encouraged to suggest individuals for consideration by the Nominating Committee for vacancies on the IHO Board. Anyone wishing to make a recommendation is encouraged to forward the suggestion to any of the Committee members. While the Nominating Committee will consider all suggestions, the Committee must give consideration for representation from districts, representation of hospices by size and by ownership, as well as skill sets and experience.

Prior to nominating a candidate, please be sure the nominee is willing to serve and can fulfill the expected commitment if elected. Please share with them the documents attached to this week's *IHO Update* including the *IHO Board Member Role and Responsibilities* and a 2008 *IHO Board Nomination* form. Candidates will be required to complete an *IHO Nomination Form* and return it by the deadline.

Sept. 17 Nomination Forms due to IHO office
Sept. 28 Slate of candidates and officers mailed to IHO Member Hospices
Oct. 25 Election at IHO Annual Business Meeting

The Newly elected Board members will begin their term January 1, 2008. If you have questions, please contact any of the IHO Nominating Committee members.

Legal Considerations:

Hiring Multiple Hospice Medical Directors and Other Hospice Physicians:

(submitted by Mary Michal; Reinhart Boerner Van Deuren s.c)

An experienced and engaged hospice medical director is an integral part of any successful hospice. The Medicare Hospice Conditions of Participation require the hospice medical director to be either a doctor of medicine or osteopathy. The medical director's responsibilities include oversight of the medical component of the hospice's patient care programs and certifying and recertifying that hospice patients are terminally ill and therefore eligible to receive hospice care.

Because of these regulatory requirements, and the ever-increasing complexities of the hospice medical director position, it is important for every hospice to have physicians who can provide back-up for the hospice medical director, such as taking call and covering for the medical director while he or she is on vacation. Hospices typically call these individuals associate medical directors or hospice physicians. However, to reduce confusion, we will

refer to each of these individuals collectively as "hospice medical directors" for the remainder of this article, although we recognize that only one physician should be considered to be the hospice medical director to whom the other hospice physicians report.

While an essential relationship for every hospice, a medical director's compensation arrangement has the potential to be abusive from a fraud perspective, especially if the physician's practice area (*e.g.*, oncology) or outside relationships (*e.g.*, a medical director of a local nursing home) make the physician a valuable source of patient referrals to the hospice. The fact that a physician is a valuable referral source does not make the medical director arrangement per se illegal. However, the government could view the arrangement as suspect, depending on the facts and circumstances.

An arrangement might be considered a "sham", if the hospice compensates a medical director above "fair market value" or for services that are never provided and the medical director in turn refers patients to the hospice. Even if not explicitly stated in any written documents related to the arrangement, such an arrangement might be viewed by the government as an arrangement in which the medical director is being compensated for referrals. Both the hospice and physician could be penalized under the federal anti-kickback statute.

The anti-kickback statute is a federal law that makes it a criminal offense to knowingly and willfully offer, pay, solicit or receive remuneration (*i.e.*, anything of value) to induce referrals of items or services for which payment may be made under a federally-funded health care program. Civil monetary penalties may be imposed for violations of the anti-kickback statute. Recognizing the potential breadth of this statute, a series of "safe harbors" were created in order to describe arrangements that would not be prosecuted under the anti-kickback statute. The failure to fit precisely within a safe harbor does not necessarily mean that the arrangement is in violation of the anti-kickback statute. However, it is certainly advisable to fit all physician compensation arrangements within a safe harbor.

Two safe harbors are potentially available to a medical director agreement or other physician compensation arrangement. One is the personal services and management contracts safe harbor, which says that payments made by a principal (hospice) to an agent (physician) will not be considered to be remuneration under the anti-kickback statute so long as:

- the agreement is set out in writing, specifies the services covered by the agreement and provides that the services are being provided for the term of the agreement;
- the agreement specifies the schedule, length and exact charge for intervals of services, if not full-time services;
- the term of the agreement is not less than one year;
- the compensation paid under the agreement is set in advance, consistent with fair market value in an arm's length transaction, and does not take into account the volume or value of referrals or other business generated between the parties for which payment may be made in whole or in part by Medicare or Medicaid;

- the services performed under the agreement do not involve the promotion of business arrangements or other activities that violate any state or federal law; and
- the aggregate services contracted for do not exceed those which are reasonably necessary to accomplish the commercially-reasonable business purpose of the services.

This safe harbor is applicable when a physician is under contract with, and not employed by, the hospice.

A second safe harbor is available to cover "bona fide" employment relationships between the hospice and a medical director. The employment safe harbor simply states that any amount paid by an employer to an employee who has a bona fide employment relationship with the employer would not be considered "remuneration" under the anti-kickback statute.

Medical director arrangements between a physician and a hospice that fit precisely within one of these exceptions are immune from prosecution under the federal anti-kickback statute. Documenting the fair market value for physician services and then paying the physician at such market value, is particularly important in the context of health care fraud and abuse laws.

The following is a hypothetical situation that examines fact scenarios and analyzes risk factors under the federal anti-kickback statute.

Scenario One: A hospice has contracted with four part-time physicians to provide medical director services for the hospice, each working approximately half-time as independent contractors (not employees) of the hospice. The four physicians serve as the medical directors at all four of the local nursing homes, and have no experience in palliative medicine. The hospice is relatively small, and has only needed one part-time medical director in the past. However, the hospice hopes to lock up a stream of referrals by contracting with the medical directors at each of the local nursing homes, and projects that the hospice's resulting growth will eventually justify two FTE medical directors.

Potential Risk Factors:

1. The Physicians Might be Valuable Referral Sources Because of Their Position as Nursing Home Medical Directors.

The first risk factor in this arrangement is the fact that each of the medical directors also serves as medical director for each of the local nursing homes in the area. The hospice would likely have to overcome the inference that these arrangements are somehow designed to reward patient referrals. While this fact does not by itself render the arrangement illegal, as the government still must prove the arrangement violates the anti-kickback statute, it draws attention to the arrangement and may cause the government to closely scrutinize the arrangement.

2. Aggregate Services Contracted For May Not Be Commercially Reasonable.

As discussed above, one element of the safe harbor for personal services and management contracts requires that "the aggregate services contracted for do not exceed those which are reasonably necessary to accomplish the commercially-reasonable business purpose of the services." Depending upon how the hospice is going to use the medical directors, the aggregate services contracted for may not be commercially reasonable. For this analysis, it does not matter that future projections may justify two FTE medical directors at some later date. However, if the hospice is adding another FTE physician because it wants to improve patient service, promote the hospice concept in the community, or for some other legitimate reason, the hospice might be able to argue that this is a commercially reasonable arrangement.

3. Compensation May Not Be Fair Market Value.

Given that the hospice's patient census may only justify one part-time medical director, the arrangement might not meet the safe harbor component that requires compensation paid under the arrangement to be consistent with fair market value and not take into account the volume or value of referrals or other business generated between the parties. For example, if the hospice pays a medical director a flat fee or hourly rate that is based on 20 hours per week, but the physician only performs an average of 10 hours of work per week because of over-staffing, the compensation arrangement is unlikely to be at fair market value. A natural question for a regulator to ask is why would a hospice pay a physician for 20 hours of work when only 10 hours are performed? Regulators examining this arrangement could certainly infer that the medical directors are being paid for the value of the referrals they are generating due to their positions at local nursing homes. Given this reasonable inference, the hospice now has a heavy burden to convince the regulators that this is a legitimate business arrangement and not an attempt to funnel payments for referrals.

4. One of the Hospice's Stated Goals in this Arrangement is to "Lock Up a Stream of Referrals."

This is a significant risk factor, because it could show intent on behalf of the hospice to compensate physicians in exchange for patient referrals. One of the difficulties the government often has in prosecuting an anti-kickback violation is proving that a party intended to give or receive compensation in exchange for referrals. However, courts have decided that if one purpose of a compensation arrangement was to reward or induce referrals, the arrangement violates the anti-kickback statute. If a stated goal of an arrangement with a medical director is to "lock up" or otherwise increase a stream of referrals from a particular entity (such as a nursing home), the government might be able to make a relatively convincing case that the hospice had the necessary intent to violate the anti-kickback statute.

5. Contracted Physicians Are Not Experienced in Palliative Medicine.

The fact that none of the contracted physicians is experienced in palliative medicine is another risk factor, because it might tend to strengthen the government's case that the hospice

chose these physicians based on their ability to refer patients, rather than any specific expertise they offer the hospice.

Analysis:

An arrangement that does not precisely fit an anti-kickback statute safe harbor will be analyzed by the government on a case-by-case basis, taking into account all of the facts and circumstances of the arrangement. As discussed above, this arrangement may not fit within an anti-kickback safe harbor, depending upon the specific facts. If the arrangement does not precisely meet a safe harbor, regulators might conclude that the hospice had the intent to pay remuneration to these physicians to induce referrals. Therefore, this arrangement could be found to violate the anti-kickback statute, bringing significant legal risk to both the hospice and the physicians. The facts in this particular scenario are not strong for the hospice or medical directors.

Conclusion

Hospices and physicians need to proceed with caution when entering into arrangements for medical director services. When structured properly, hospices can contract with multiple hospice physicians to provide medical director services, even if these physicians are in a position to generate significant patient referrals to the hospice. However, each party should work with their legal counsel to ensure that such an arrangement is structured to comply with the federal anti-kickback statute.

Reinhart Boerner Van Deuren's Hospice and Palliative Care Practice Group serves hospices across the country in a variety of areas, including regulatory compliance; survey and certification; accreditation; licensing; HIPAA; caregiver misconduct investigations; due diligence, mergers and acquisitions and other corporate matters; labor and employment; criminal and civil investigations by state or federal government agencies; litigation; contracts and daily operational issues.

Cahaba to Review Claims with Long Lengths of Stay for Hospice

As a result of data analysis, Cahaba Government Benefit Administrators, LLC will soon be conducting a widespread review on hospice claims. This edit is set to select hospice claims with a routine level of care and a length of stay greater than two years. The topic code for this review will be 5003W. Claims will be selected across the provider community billing these services that meet the parameters of the edit. Once selected, the claims will be reviewed for medical necessity (e.g., compliance with CMS; guidelines, contractor local coverage determinations (LCDs), correct billing and coding). Once completed, the results of this probe will be posted on Cahaba's Web site. Providers must monitor their claims to determine if any are selected for an Additional Development Request (identified by status/location S B6001) and respond timely to the documentation request. Once completed, the results of this probe will be posted on Cahaba's Web site.

The September *Newsline* has been posted to Cahaba's Web site. This *Newsline* includes articles regarding the Hospice Payment Rate updates for FY 2008 (page 25) and Clarification of Hospice HCPCS to Identify Place of Service (page 30).

IHO encourages hospice agencies to review documentation, ongoing eligibility, proper billing for all of patients meeting this criteria, prior to Cahaba making a similar request.

Free Elder Law Seminars for Older Iowans and Their Caregivers

The Iowa Department of Elder Affairs and Iowa Legal Aid's Legal Hotline for Older Iowans are repeating a series of free Elder Law seminars in October that were first presented in June and July 2007. The seminars will provide older Iowans and their caregivers with valuable information to protect their rights and limited resources. Pre-registration is required. For more information, see the brochure linked as an enclosure to this week's *IHO Update*.

Education Event on Change Request (CR) 5567

Register now to attend the education events below.

- **October 23, 2007**—Webinar: Sailing Through Hospice Billing Changes; CR 5567
The registration deadline for this educational event is October 18. Registration is limited to one line per provider; therefore, early registration is encouraged.
- **November 14, 2007**—Webinar: Sailing Through Hospice Billing Changes; CR 5567
PLEASE NOTE: The November 14, 2007, event is a repeat of the October 23, 2007, presentation of the same name. The registration deadline for this educational event is November 9. Registration is limited to one line per provider.

These events will review the changes mandated by Change Request (CR) 5567. This CR implements new hospice billing policies which require new revenue codes to indicate visits provided by various hospice disciplines. We encourage providers to solicit their questions prior to the event. Instructions to submit a question can be found on the course summary page. For more information about events and how to register to, please visit the Cahaba Web site at:

https://www.cahabagba.com/apps/course_registration/ia/calendar.jsp

Enclosures

IHO Board Member Role and Responsibilities
2008 IHO Board Nomination form
Elder Law Seminars Brochure

