

Compliance for Intermediate Care Facilities for the mentally retarded

By Robert Slavkin

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Section 1905(d) of the Social Security Act created a benefit to fund "institutions," which are facilities with four or more beds to treat people with mental retardation. These facilities are known as Intermediate Care Facilities for the Mentally Retarded, or ICF/MRs. The institutions must provide "active treatment," defined as aggressive, consistent implementation of a program of specialized and generic training, treatment, and health services. Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous act-of-treatment program [See 42 C.F.R. § 483.440(a)]. Since the implementation of the Medicare Conditions of Participation (CoP), a significant shift in thinking has occurred in the field of developmental disabilities. Emphasis has now turned toward enabling individuals to live in their own homes, control their own daily lives, and be an integral part of their home community, to the extent possible. Such a philosophical shift is not conducive to facilities which provide active treatment. Because many patients may now be found in a community setting, most individuals housed in ICF/MRs have severe multiple health conditions. Surveyors and inspectors reviewing active treatment plans will closely scrutinize these cases to verify that these patients are not merely

"dumped." In other words, they will be verifying that the ICF/MR is not merely acting as a housing complex for the mentally retarded but is, indeed, providing active treatment.

History

Effective January 1, 1972 an optional service known as "ICF/MR and Related Conditions" was added to the Medicaid program. This addition was the result of intense lobbying by advocates who were responding to reported horrific conditions that individuals with mental retardation face when institutionalized. Currently, all 50 states have at least one ICF/MR facility. Nationally, approximately 7,000 such facilities serve approximately 130,000 people with mental retardation and other related conditions, and most have other disabilities as well. Many of these individuals are not ambulatory, have seizure disorders, behavioral problems, mental illness, vision or hearing impairments, or a combination of these conditions. These individuals must qualify financially for Medicaid assistance for the facility to benefit from the Medicaid ICF/MR program.

Further, to qualify for Medicaid reimbursement, ICF/MRs must be certified and comply with the federal CoP found under the federal regulations at 42 C.F.R. part 483, subpart I, §§ 483.400 thru 483.480. These CoP cover eight areas: (1) management, (2) client protections, (3) facility staffing, (4) active treatment services, (5) client behavior and facility practices, (6) health care services, (7) physical environment, and (8) dietetic services.

Compliance concerns under the CoP

As an entity that receives federal Medicare and state Medicaid dollars, an ICF/MR is subject to the government agencies that administer the programs. As such, state Medicaid agencies conduct periodic surveys for initial and ongoing certification of these facilities. If a survey shows a pattern of error in a particular discipline (e.g., nursing or active treatment) or the survey shows deficient program-provided practices or procedures (e.g., inadequate staffing or staff training), the agency may issue a report citing certain deficiencies in the CoP. Depending on the deficiencies, the facility may be required to implement plans of remediation or correction that are subject to follow-up inspections, or, at worst, the facility may lose its certification and its ability to participate in the ICF/MR program.

Ensuring compliance. As with any facility or provider participating in a Medicare, Medicaid, or other government-sponsored health care program, a certain "formula" is used to ensure compliance. Ensuring adequate appropriate compliance by the facility and its staff fosters an atmosphere in which reimbursement is less likely to be disrupted and quality of care is likely to remain consistent. Any such compliance program should be headed by a compliance officer who is assisted by a compliance committee. The compliance officer and committee report directly to the CEO and the board of directors of the facility. Their job is simple: they are responsible for the development, operation, and monitoring of the facility's compliance program, including the key elements outlined below. The compliance committee should be comprised of individuals who understand the eight categories of ICF/MR CoP, have access to information about the categories, and have certain authority over their execution. The compliance officer oversees the development of policies and procedures to be implemented

at the ICF/MR. He/she also oversees all internal auditing, as well as all contractual relationships between the facility and its vendors. The compliance officer makes reports to the board of directors and serves as liaison for reports made to government entities. The compliance officer also oversees any required corrective action.

The compliance committee serves to support the compliance officer in implementing all programs and procedures. The committee also ensures a non-retaliative atmosphere and reviews any audits conducted.

Key elements of initial “buy-in.” As with all compliance programs, an ICF/MR program to ensure compliance with the CoP has seven essential elements:

1. Standards and procedures
2. Oversight
3. Education and training
4. Monitoring and auditing
5. Reporting
6. Enforcement, discipline, and incentives
7. Response and prevention

However, the single most important aspect of a compliance program is financial support, which encourages the development and start up of the program, delivery of training and educational materials, appropriate staffing, and ongoing operations.

In addition to financial support, however, buy-in from all aspects of the organization is required. A compliance program is only as powerful as the number of employees who subscribe to its philosophies. Therefore, input from all officers, employees, subcontractors, and other relevant entities is required to create an effective program.

Written policies and training. Written policies, procedures, and standards of conduct

should demonstrate the organization’s commitment to comply with all applicable federal and state laws. Policies and procedures in place should address how to:

- respond to potential violations of federal and state law,
- identify overpayments at any level and make repayment to state and federal agencies, where appropriate,
- coordinate and cooperate with auditors and investigators, and
- review exclusion lists for the ICF/MR employees, physicians, and contractors.

The policies should also include an overall statement of the conduct expected from employees and contractors.

Further, policies and procedures should encourage employees to report any concerns they may have. It is important that the compliance officer, committee, and the policies and procedures in place do not foster an atmosphere of repression. Moreover, the policies and procedures should be easy to read. (We recommend that attorneys should be actively involved in the development of the policies, but ultimately, the documents should be written in plain language and not in legalese.)

Having well-written policies and procedures is the first step in the creation of an effective compliance program. Effective training and education are vital to implementation. Development of training and education programs should include an overview of the compliance program, a review of potential conflicts of interest, a review of any disciplinary guidelines for non-compliant behavior, and review of policies related to contracting.

In addition to general training and education, specialized training and education should be given to all employees, physicians, and

contractors who pose compliance risks based on their job functions. These specialized training sections should be based on the eight categories of CoP.

Communication. After the policies and procedures have been effectively communicated to the staff, the staff must feel comfortable operating within the arena. Specifically, if an employee seeks to report an incident, procedures should be in place to protect the anonymity of the complainant and to protect whistleblowers from retaliation. Concerns should be reported via independent mechanisms, which may include hotlines, suggestion boxes, employee exit interviews, e-mails, or any other forum that promotes information exchange. Effective communication may be enhanced by putting in place a complaint tracking system that includes a call center with an explicit process for handling complaints. Many facilities have implemented an anonymous reporting process that involves an outside agency which administers a hotline call-center. This effectively fosters greater compliance with policies and procedures and protects employees’ anonymity.

Monitoring and auditing. Monitoring need not focus only on reimbursement processes. Although this is an extremely effective way to authenticate such matters, monitoring may also touch on program effectiveness, compliance reviews, and internal processes. These reviews should not be conducted only annually or infrequently. Rather, these monitoring activities are reviews that should be repeated regularly during the normal course of business. An audit refers to a more formal review of compliance with a particular set of external or internal standards that are pre-set to govern the audit. When developing policies and procedures for monitoring and auditing, an ICF/MR should review its higher risk areas in

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the CoP and structure the monitoring processes accordingly. Ideally, these assessments are made part of the standard operating procedures and become effective tools in the compliance process.

Documentation. As part of creating a compliance program, provisions should be made to track how competencies are documented. A process should be in place to document when employees and contractors are trained in a compliance program, thus indicating how often those competencies are reviewed and updated.

An effective compliance program for an ICF/MR, like any compliance program, is an exercise in continuous improvement, not a static entity. As an organization moves through its constant endeavors towards compliance with the CoP, its compliance program will evolve as well. ■

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