

MEMORANDUM

TO: Health Care Clients and Friends

FROM: Chris Rossman and Margaret A. Shannon,
Honigman Miller Schwartz and Cohn

RE: Commissioner of Insurance Finds Blue Cross Blue Shield of Michigan Provider Class Plan for Freestanding Ambulatory Surgical Facilities Not in Compliance with State Law

DATE: April 26, 2000

Blue Cross Blue Shield of Michigan ("Blue Cross") has Evidence of Necessity ("EON") criteria which a freestanding outpatient surgical facility ("ASF") must meet prior to attaining participation status with Blue Cross. On March 30, 2000, the Insurance Commissioner issued a determination that the Blue Cross provider class plan for ASFs did not meet statutory requirements regarding access and quality goals. This determination is made periodically by the Commissioner under the terms of the Blue Cross regulatory act after a review to determine whether Blue Cross has met its statutory requirements with regard to cost, quality and access goals. Blue Cross is being required to submit a provider class plan to overcome its deficiencies within six months of the date of the determination.

The most significant effect of this order is that it may become easier for physician-owned ASFs to participate with Blue Cross. The Commissioner was critical of a number of aspects of the current ASF EON criteria which made it very difficult for physician-owned ASFs to qualify for Blue Cross participation. There are a number of recommendations which will also affect the ability of hospital-owned ASFs to obtain and retain Blue Cross participation. In addition, the Commissioner suggests that Blue Cross should regularly re-certify compliance with EON criteria, whereas now an ASF must only meet the criteria at the time it is initially granted participation status.

A more detailed analysis of the Commissioner's findings and recommendations is set forth below.

Failure to Meet Access Goal

In the determination, the Commissioner made the following findings regarding access:

1. Blue Cross is not providing members with adequate access to ASFs. Blue Cross' participating rate with eligible ASFs was less than 50%. Blue Cross' argument that certificate-covered services can be performed in a hospital outpatient setting, or often in a physician's office, was rejected by the Commissioner. The Commissioner found that Blue Cross owes it to its members to provide a reasonable amount of choice and balance of both providers and setting, which includes adequate access to ASFs.

2. Blue Cross does not use reasonable standards in applying EON criteria, nor does it apply them consistently. The EON criteria are almost impossible for non-hospital owned ASFs to meet. Hospitals are allowed to add operating rooms without meeting EON. Hospitals are also allowed to transfer operating rooms to outpatient facilities, which acts to dilute the need for operating rooms within the service area.

3. Blue Cross does not consistently apply the criteria to compute EON.

As a result of these findings, the Commissioner has made suggestions for Blue Cross to consider in formulating a new provider class plan that would meet the access goal.

1. Blue Cross should establish reasonable EON guidelines to be applied uniformly throughout the state. The new EON guidelines should allow for participation by more physician owned ASFs in order to give subscribers a choice between hospital outpatient centers and physician owned ASFs. Blue Cross is justified in keeping a needs based formula, so long as it is reasonably and uniformly applied for all providers.

2. Blue Cross has notified the Insurance Bureau that it will eliminate the prior multi-specialty requirement.

3. In computing EON, there should be a minimum number of procedures per room, and the criteria should be based only on Blue Cross certificate covered services.

4. The trading of operating rooms should no longer be included in EON calculation. Hospitals closing operating rooms in the hospital in order to open operating rooms at an ASF create an unfair situation, as physician owned ASFs do not have a fair opportunity to compete for participation.

5. In order to be eligible to participate with Blue Cross, an ASF should be able to show that it is currently performing at least 900 cases per room per year for non-Blue Cross subscribers.

6. Blue Cross should develop a formula that accounts for operating rooms used solely for inpatient procedures and trauma cases. Emergency rooms should not be used in calculating the EON.

Failure to Meet Quality Goal

The Commissioner reached the following conclusions regarding Blue Cross' failure to meet the quality goal:

1. Blue Cross does not review or re-certify ASFs.

2. Blue Cross' audit process for ASFs does not measure the quality of the services provided.

3. Blue Cross did not communicate quality standards clearly to providers.

The Commissioner made the following suggestions for changes that Blue Cross should consider including in the modified provider class plan:

1. Blue Cross should consider developing different EON criteria for single specialty clinics.

2. Blue Cross should require an ASF to have a minimum number of operating suites in order to demonstrate that there is sufficient support staff, supplies and room in the ASF.

3. Blue Cross should re-certify all ASFs for compliance with EON standards within one year after a new plan is in place, and then re-certify ASFs every three years after that.

4. Blue Cross should make a good faith effort to solicit input from all provider associations.

5. Blue Cross should develop and implement new utilization review and quality assessment programs that focus less on monetary recoveries and more on cost and outcome objectives for ambulatory surgery services.

6. Blue Cross should improve communication with ambulatory surgery providers through the development of a liaison committee composed of both hospital owned and physician owned ASFs.

7. Blue Cross should clearly communicate in its applications for participation all of the criteria and quality standards that ASF providers must meet in order to be eligible for Blue Cross participation.

8. Blue Cross should develop methods for gauging subscribers' preferences.

Although the Commissioner's suggestions are not legally binding on Blue Cross, it is likely that the revised provider class plan to be filed by Blue Cross will incorporate many, if not all, of these "suggestions." The implication of this determination, if it is not appealed by Blue Cross, is that a new provider class plan will be developed which will contain significant revisions to the current EON program. What these changes will be, other than those which are likely to address concerns of the Commissioner, will not be known for as long as six months when the new provider class plan is required to be filed.

Blue Cross “grandfathered” ASFs that hospitals operated at the time the new Participating Hospital Agreement was adopted in 1989 without requiring that they meet EON requirements. Although initially these grandfathered facilities continued to be paid under the hospital reimbursement system, since 1992 hospital owned ASFs have been required to sign a separate ASF participation agreement with Blue Cross which provides reimbursement on a price-based system, rather than allowing reimbursement under the Participating Hospital Agreement. This separate agreement has been required by Blue Cross, because under the Participating Hospital Agreement only those parts of a hospital’s operations that are covered by the hospital’s license are to be reimbursed under the hospital reimbursement system. The Participating Hospital Agreement did allow grandfathering of certain facilities that existed at the time the agreement was made, but the agreement provided for their transition to a separate agreement once a separate provider class plan was adopted for the facilities. The Insurance Commissioner’s determination report did reveal two exceptions to the standard Blue Cross policy by noting that Blue Cross allowed Henry Ford and Bronson to receive hospital reimbursement for ambulatory surgery facilities under the Participating Hospital Agreement.

Although it is not possible to be certain regarding the content of the modified provider class plan, it is likely that it will incorporate most or all of the suggestions of the Commissioner. If this occurs, then it will be easier for a physician owned ASF to participate with Blue Cross. Depending on the nature of the changes, it may also be easier for a hospital owned ASF to participate with Blue Cross. However, hospitals will have to determine the potential adverse effect on their business if other ASFs within their service areas participate with Blue Cross.

There is an opportunity for providers and their representatives to comment on the development of the modified provider class plan for ASFs. The Commissioner reserved the right to modify or clarify his order in response to comments.