



Center for Medicaid, CHIP, and Survey & Certification/Survey & Certification Group

Ref: S&C: 11-12-NH

DATE: March 11, 2011

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Relationship Between Civil Money Penalty Funds Paid by Nursing Homes and the *Money Follows the Person Demonstration*

Memorandum Summary

- **Basis for Use of Civil Money Penalty (CMP) Funds** – The Social Security Act specifies that CMP funds paid by nursing homes may only be used for the benefit and protection of nursing home residents.
- **Offering Choice to Nursing Home Residents** - A nursing home resident contemplating residence at another setting may wish to visit such a prospective residence (whether another nursing home or a community setting (such as his or her own apartment)). CMP funds may be used to pay expenses directly incurred in such visits while the individual is a nursing home resident.
- **Prohibition Against Use of CMPs for Non-Nursing Home Residents** – CMP funds shall not be used for non-nursing home residents. An individual discharged from a nursing home is no longer a nursing home resident and CMP funds are not available for that individual except for the relocation or transport of such a person to another setting.
- **References Past Guidance on Use of CMPs** – This memorandum references S&C-02-42 and S&C-09-44, memoranda that contain previous guidance on the use of CMP funds.

The purpose of this letter is to explain the relationship between civil money penalty funds collected from nursing homes that have been out of compliance with Federal requirements, and programs designed to provide alternatives to nursing homes, such as the *Money Follows the Person Rebalancing (MFP) Demonstration* grant program.

CMP funds are collected from nursing facilities (NFs), skilled nursing facilities (SNFs), and from dually-participating skilled nursing facilities (SNFs) that have failed to maintain compliance with Federal requirements. A portion of the funds is returned to States for use in activities for the protection and benefit of nursing home residents. By law, CMP funds cannot be used for any other purposes by States.

Basis for Use of Civil Money Penalties (CMPs)

Section 1919(h)(2)(A)(ii) of the Social Security Act (the Act) states:

“(ii) A civil money penalty assessed and collected, with interest, for each day in which the facility is or was out of compliance with a requirement of subsection (b), (c), or (d). Funds collected by a State as a result of imposition of such a penalty (or as a result of the imposition by the State of a civil money penalty for activities described in subsections (b)(3)(B)(ii)(I), (b)(3)(B)(ii)(II), or (g)(2)(A)(i)) shall be applied to the protection of the health or property of residents of a nursing facilities that the State or the Secretary finds deficient, including payment for the costs of relocation of residents to other facilities, maintenance of operation of a facility pending correction of deficiencies or closure, and reimbursement of residents for personal funds lost.”

Implementing regulations can be found at 42 C.F.R. §488.442(g).

Use of CMP funds for Non-Nursing Home Residents

Prior to the passage of the Affordable Care Act in March 2010, the Center for Medicare & Medicaid Services (CMS) did not have the authority to approve specific uses of CMP funds returned to State Medicaid Agencies. However, we provided guidance with respect to the types of activities and programs are appropriate (through Survey and Certification Letters (see S&C-02-42 and S&C-09-44 at <http://www.cms.gov/SurveyCertificationGenInfo/PMSR/list.asp>)). The newly enacted section 6111 of the *Affordable Care Act* amended titles XVIII and XIX of the Social Security Act (the Act) and specified certain categories of uses for CMP funds. The amended Act also requires that the Secretary (as delegated to CMS) approve the use of CMP funds. The requirement remains that the funds may only be used for activities that benefit or protect nursing home residents.

Recently, CMS has been asked whether CMP funds can be used as the State’s financial match for the MFP demonstration project. Enacted by the Deficit Reduction Act of 2005 (DRA) (Pub. L. No. 109-171), the *Money Follows the Person Rebalancing (MFP) Demonstration* is part of a comprehensive, coordinated strategy to assist States, in collaboration with stakeholders, to make widespread changes to their long-term care support systems. This initiative assists States in their efforts to reduce their reliance on institutional care, while developing community-based long-term care opportunities, enabling the elderly and people with disabilities to fully participate in their communities. CMS has expanded this program and announced \$2.25 billion in grants to extend the program. See attached press release for more information.

The MFP initiative supports an important goal for person-centered, community-integrated care. The initiative reflects CMS’s consistent efforts to help the elderly and people with disabilities to live in the community of their choosing and participate in community life to the fullest extent that they desire.

A nursing home resident contemplating movement to another setting may wish to visit such a prospective residence, whether it is another nursing home or a community setting (such as his or her own apartment). At State request, CMP funds may be used to pay for expenses directly incurred in a time-limited trial visit that occurs prior to discharge from the nursing home and that

takes place as part of an activity organized under State auspices (such as Medicaid home and community-based services programs). Such a visit may help an individual make a more informed choice about his or her future.

However, we will not approve the use of CMP funds to provide the State's non-federal share of funds for the MFP program or any similar Medicaid program, particularly since the nursing home continues to receive federal payments for the cost of nursing home care while the person is a resident. In addition, the law provides that qualified expenditures under the MFP grants may include only payments for services provided to eligible individuals residing in qualified residences in the community and furnished "during the 12-month period beginning on the date the individual is discharged from an inpatient facility."¹

In the case of a nursing home that is closing or is decertified (voluntarily or involuntarily), the *Affordable Care Act* provides that CMP funds may be used for "offsetting costs of relocating residents to home and community-based settings or another facility."² Once an individual is discharged from a nursing home, CMP funds may not be used for the individual except for the relocation of that individual to another setting.

Finally, we wish to emphasize that we will not approve CMP funds to pay for activities for which a nursing home is already responsible under State or Federal regulations or laws, or to fulfill any long-term or on-going fiscal obligation of the State, as such a use might create the appearance or reality that CMPs would be levied for the purpose of generating revenue to fulfill State obligations rather than as a penalty or deterrent to poor quality in a nursing home.

Later in FY 2011 we will issue additional information regarding permitted uses of CMP funds and the processes that we will use to implement section 6111 of the *Affordable Care Act*.

Effective Date: March 23, 2011

Training: This policy should be shared with survey and certification managers and the State/RO training coordinator within 30 days.

/s/

Thomas E. Hamilton

Attachment

cc: Survey and Certification Regional Office Management
State Medicaid Agencies

¹ Section 6071 of the Deficit Reduction Act (DRA) of 2005, P.L. 109-171.

² Sections 6111(a) and (b) of the Affordable Care Act.

July 27, 2010

PRESS RELEASE

Subject: CMS Announces \$2.25 billion in Grants to Extend the Money Follows the Person Rebalancing Demonstration to More States

CMS Announces \$2.25 billion in Grants to Extend the Money Follows the Person Rebalancing Demonstration to More States

Today, the Centers for Medicare & Medicaid Services (CMS) issued a new grant solicitation to encourage states not yet part of the *Money Follows the Person Rebalancing (MFP) Demonstration* to apply for grant funds. The Affordable Care Act included an extension of the MFP demonstration program for an additional 5 years (the funding was scheduled to expire at the end of FY 2011). The extension of the MFP Demonstration Program through 2016 offers States substantial resources and additional program flexibilities to remove barriers and improve people's access to community supports and independent living arrangements.

Due to the *HHS Community Living Initiative*, and resources made available through the Affordable Care Act, more people with disabilities and chronic care needs will have greater opportunities to live in their communities. In celebration of the 20th anniversary of the Americans with Disabilities Act, Secretary Sebelius is encouraging states to take advantage of the numerous community initiatives within the Affordable Care Act and leverage those options through active participation in the MFP demonstration.

Under the MFP demonstration, states will receive an enhanced Federal Medical Assistance Percentage (FMAP) for a one-year period for each individual they transition from an institution to a qualified home and community-based program. States will be able to transition multiple population groups including the elderly, people with intellectual, developmental or physical disabilities, mental illness or those who have a dual diagnosis. The enhanced FMAP funding will then be used by states to expand services and supports. In addition, states receiving a MFP grant award will focus on re-balancing their long-term care systems needs by increasing the use of home and community-based services and decreasing the use of institutional care.

A copy of the invitation to apply for the "FY2010 Money Follows the Person Rebalancing Grant Demonstration," including the application forms and information concerning a national call for applicants, will be posted at www.grants.gov. For more details about Money Follows the Person and a PDF copy of the solicitation, please visit the CMS website at: http://www.cms.gov/CommunityServices/20_MFP.asp.