TITLE 1 ADMINISTRATION

PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 371 MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

SUBCHAPTER G ADMINISTRATIVE ACTIONS AND SANCTIONS

DIVISION 1 GENERAL PROVISIONS

§371.1603. Legal Basis and Scope.

(a) The OIG may take administrative enforcement measures against a person or an affiliate of a person based upon an investigation or finding, including an audit finding, in the Medicaid or other HHS programs. Administrative enforcement measures may include:

 (1) making referrals for further investigation or action;

 (2) taking an administrative action;

 (3) imposing a sanction;

 (4) assessing damages, penalties, costs related to an administrative appeal, and investigative and administrative costs; or

 (5) denying the enrollment of a person for participation in the Medicaid program.

(b) When the OIG receives information regarding a possible program violation or possible fraud, abuse, overpayment, or waste, the OIG conducts an investigation pursuant to Subchapter F of this chapter (relating to Investigations). If, at any point during its investigation, the OIG determines that an overpayment resulted without wrongdoing, the OIG may refer the matter for routine payment correction by the agency's fiscal agent or an operating agency or may offer a payment plan.

(c) At the OIG's sole discretion, overpayments may be collected in a lump sum or through installments. The OIG determines a reasonable length of time for an installment agreement [~~a payment plan~~] based on the circumstances of each individual case. Installment agreements may include provisions for the assessment of interest, administrative penalties, or both, in the event a person fails to make payments or is late in making payments.

(d) Nothing in these rules is intended to prevent concurrent administrative, civil, or criminal investigation and action. Subject to express statutory limitations, the OIG may proceed with recoupment or other administrative enforcement concurrently with judicial prosecution of the same matter.

(e) An OIG case remains open until:

 (1) the investigation is complete;

 (2) the case is settled;

 (3) the OIG makes an administrative determination that closes the case for lack of evidence or appropriate administrative enforcement; or

 (4) all administrative remedies have been exhausted.

(f) Except as provided in other statute, rule, or regulation [~~In determining the appropriate administrative action or sanction, including the amount of any administrative penalty to assess~~], both the OIG, when making a preliminary determination, and the final decision maker in any contested case, will take into consideration the following when determining the appropriate administrative action or sanction, including the amount of any administrative damages and penalties [~~considers~~]:

 (1) the seriousness of the violation;

 (2) the prevalence of errors by the person [~~provider~~];

 (3) the financial or other harm to the state or recipients resulting or potentially resulting from those errors; [~~and~~]

 (4) any [~~aggravating or~~] mitigating factors; and [~~the OIG determines~~ ~~appropriate.~~]

(5) as appropriate, the amount of administrative penalty necessary to deter the person from committing future violations.

(g) When determining the seriousness, prevalence of error, harm, or potential harm of the violation, as described in subsection (f) of this section, the OIG may consider multiple factors. These factors [~~The following may be considered as aggravating factors that warrant more severe or restrictive action by the OIG. Aggravating factors~~] may include:

 [~~(1) harm to one or more patients;~~]

 (1) [~~(2)~~] physical or emotional [~~the severity of patient~~] harm to one or more patients;

 (2) [~~(3)~~] one or more violations that involve more than one patient;

 (3) [~~(4)~~] economic harm to any individual or entity [~~and the severity of such harm]~~;

 (4) [~~(5) increased~~] potential for harm to the public;

 (5) [~~(6)~~] attempted concealment of the act constituting a violation;

 (6) [~~(7)~~] intentional, premeditated, knowing, or grossly negligent act constituting a violation;

 (7) [~~(8)~~] prior similar violations;

 (8) [~~(9)~~] previous disciplinary action by a licensing board, any government agency, peer review organization, or health care entity for committing a violation or violations relevant to the violation or violations under consideration by the OIG;

 (9) [~~(10)~~] violation of a licensing board or government agency order concerning a violation or violations relevant to the violation or violations under consideration by the OIG; or

 (10) [~~(11)~~] other [~~relevant~~] circumstances relevant to [~~increasing~~] the seriousness of the misconduct.

(h) The following may be considered as mitigating factors that warrant less severe or restrictive administrative action or sanction by the OIG, as described in subsection (f) of this section. The person seeking mitigation [~~provider~~] shall have the burden to present evidence regarding any mitigating factors that may apply in any contested [~~the particular~~] case. OIG may consider any mitigating evidence the agency becomes aware of while making a preliminary determination regarding an appropriate administrative action or sanction. Once the OIG issues a notice that the agency intends to impose a sanction upon a person, including a preliminary penalty report, then the person subject to that notice or preliminary report shall provide any mitigating evidence that the person wishes the OIG to consider to the OIG before any scheduled informal resolution meeting or informal review. Mitigating factors may include:

 (1) self-reported and voluntary admissions of a violation or violations [~~violation(s)~~];

 (2) implementation of remedial measures to correct or mitigate harm from the violation or violations [~~violation(s)~~], such as:

 (A) the extent and expeditious initiation of the person’s own investigation;

 (B) resources that the person committed to correcting or mitigating the problem;

 (C) disciplinary action or actions that the person has taken against the individuals responsible for the problem; and

 (D) institutional change or changes made by the person in order to ensure compliance and prevent future violations;

 (3) acknowledgment of wrongdoing and willingness to cooperate with the OIG, such as [~~evidenced~~] by acceptance of a settlement agreement;

 (4) rehabilitative potential;

 (5) prior community service and present value to the community;

 (6) other relevant circumstances reducing the seriousness of the misconduct; or

 (7) other relevant circumstances lessening responsibility for the misconduct.

[~~(i) Any administrative penalties assessed are determined as provided in §371.1715 of this chapter (relating to Damages and Penalties).~~]

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SUBCHAPTER G ADMINISTRATIVE ACTIONS AND SANCTIONS

DIVISION 3 ADMINISTRATIVE ACTIONS AND SANCTIONS

§371.1715. Damages and Penalties.

(a) The OIG may assess administrative [~~damages,~~] penalties otherwise authorized by law on behalf of the commission or a health and human services agency [~~, or both against a person pursuant to §32.039, Texas Human Resources Code~~].

(b) Any administrative penalties or damages assessed for violations related to health care items or services that are authorized or provided under federal law, including claims submitted by persons for payment under the Medicaid program, are determined as provided in Texas Human Resources Code, §32.039. The OIG will also follow the procedures for imposing penalties or damages in Texas Human Resources Code, §32.039, which include opportunities for a person subject to potential penalties or damages to have an informal review and an appeal, and apply the factors described in 1 TAC §371.1603 (relating to Legal Basis and Scope).

~~(b) When determining whether or not a person is prohibited from providing or arranging to provide health care services under the Medicaid program, the OIG considers the following:~~

 ~~(1) the person's knowledge of the violation;~~

 ~~(2) the likelihood that education provided to the person would be sufficient to prevent future violations;~~

 ~~(3) the potential impact on availability of services in the community served by the person; and~~

 ~~(4) any other reasonable factor identified by the OIG.~~

~~(c) The OIG gives notice of a preliminary penalty report and of its final assessment of penalties to the person charged with committing the violation, pursuant to §32.039, Texas Human Resources Code.~~

~~(d) Due process.~~

 ~~(1) After service of a notice of preliminary report, a person has a right to request an informal review not later than the tenth day after service of the notice.~~

 ~~(2) After service of a final notice of assessment of penalties, a person may request an administrative appeal hearing no later than ten days after the date of service of the notice.~~]