

**INFORMATION CONCERNING CMS's DEFINITION OF "IN CUSTODY" AND ITS RELATION TO
PATIENT DISCHARGE STATUS CODE 21**

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A Centura coder brought to our attention information from Trailblazer concerning the definition of the words "in custody." The question was posed as to whether we should be using these definitions for purposes of assigning patient discharge status code 21 **"Discharged/transferred to Court/Law Enforcement. Usage note: Includes transfers to incarceration facilities such as jail, prison or other detention facilities."**

We researched the Trailblazer material by going back to the original sources from CMS. We found the origins of Trailblazers' definitions in the Federal Register, the Code of Federal Regulations, two CMS transmittals and a MedLearn Matters article.

FEDERAL REGISTER, AUGUST 2007: WHAT WAS THE NEW DEFINITION OF "IN CUSTODY?"

The definition originated in the FY2008 IPPS Final Rule, published in the Federal Register on August 22, 2007. The relevant section appears on 72 FR 47405-47406, under the heading "VII. Services Furnished to Beneficiaries in Custody of Penal Authorities." In this passage, CMS asserts that Medicare is prohibited by law from paying for any medical services that neither a beneficiary nor any other organization or plan has an obligation to pay. This seems like a convoluted argument, meaning essentially that "if no one else is obligated to pay, we won't either." What CMS means - but doesn't say in this passage - is that CMS assumes that any person "in custody" is the responsibility of the legal authority (such as the police or the courts or other penal authority) and that the legal authority is the responsible party for payment purposes. If the penal authority requires those in its custody to repay the cost of medical services they receive while in custody and if the penal authority enforces the requirement to pay by billing those individuals and pursuing collections, then Medicare is legally permitted to pay for those services. Pursuing collections includes filing lawsuits to obtain liens against peoples' assets.

CMS then notes that the existing regulations do not define "custody." The purpose of this passage is to create that definition and to establish this rule that Medicare will not pay for services of those "in custody" unless the legal authority meets the standard noted above (i.e., the legal authority pays and expects those "in custody" to re-pay and pursues collections from them if they do not).

According to CMS, the definition of custody is in accordance with how custody is defined by Federal Courts for purposes of habeas corpus protection. "In custody" includes individuals who are:

- under arrest
- incarcerated
- imprisoned
- escaped from confinement
- under supervised release
- on medical furlough
- required to reside in mental health facilities
- required to reside in halfway houses
- required to live under home detention
- confined completely or partially in any way under a penal statute or rule
- on parole
- on probation
- on bail

The remainder of this passage in the Final Rule consists of comments and responses. Commenters strongly objected to what they called an "expansion of the definition of 'custody'." They pointed out that patients not physically confined would likely not volunteer their status as having escaped, being released on bail, or the other categories that did not include current incarceration. Commenters pointed out that law enforcement was not in the medical collections business. This put an unreasonable burden on the hospital, expecting them to ascertain "custody" status for all patients, essentially having to conduct a criminal background check on all registered patients. Furthermore, if local law enforcement entities would not pay, and would not bill and dun those "in custody," then the hospital wouldn't have any recourse either, as the failure of law enforcement to bill and dun would mean that the hospital could not pursue

payment from Medicare. Commenters stated that they thought that "custody" should not include individuals who were not under physical confinement.

CMS blandly replied that they were not expanding the definition of "in custody." They suggested that if a hospital receives a Medicare denial for a patient because the patient was "in custody," then the hospital should then seek payment from the local or state government law enforcement agency that should have been responsible.

HOW DOES CMS IMPLEMENT THIS PROVISION?

In the remaining CMS materials (transmittals and MedLearn Matter article), CMS never mentions patient discharge status codes. It does not appear that patient discharge status codes are to be used in any way to identify these cases. Instead, for outpatient claims, CMS expects hospitals to submit HCPCS code modifier QJ on all lines of non-covered services. For inpatient claims, CMS expects the hospital to identify the non-covered services and expects the MAC to append condition code 63 to such inpatient claims. It is not clear how exactly the hospital or the MAC are supposed to know to do these things, and who exactly in the hospital system and MAC are responsible for doing it.

Once the claim is generated, CMS has an edit in place, using a Social Security data file of Medicare beneficiaries that are known to be in custody, and this file is used to reject claims for those beneficiaries when medical services are provided and a claim submitted. Presumably, this data file would not include, for example, a Medicare beneficiary who was arrested for a DUI last week and is currently out on bail awaiting a court date. This SSA datafile edit therefore probably tends to predispose towards the more common-sense understanding of the word "custody", meaning someone who is physically confined.

It is hard to accept CMS's underlying premise that all people "in custody" are the financial responsibility of the legal authority in question. For example, if the Medicare beneficiary who just received a DUI and is home on bail awaiting trial falls down in the backyard garden and breaks his hip, is the local police department supposed to be financially responsible for the medical bill? This appears to be the meaning of the 2007 rule.

There is no indication that Medicare intends to use the patient discharge status code in any way for the purpose of determining responsibility for payment for services. There is no indication that CMS expects that these definitions that were created for purposes of determining payment responsibility should be used as definitions for patient discharge status codes.

SHOULD WE USE THESE CUSTODY DEFINITIONS FOR PURPOSES OF ASSIGNING PATIENT DISCHARGE STATUS CODE 21?

Pending a discussion with the HIM/CHA Advisory Group and absent any official instructions on this matter, we are recommending that this list *not* be used for purposes of assigning patient discharge status code 21, for the following reasons.

- It is not official advice from the NUBC, which is the HIPAA-mandated authoritative body for UB-04 usage.
- It is defined only by Medicare, which is but one payor of many across the country.
- It is not designed to define patient discharge status codes, but to define scenarios concerning whether Medicare will pay for services or not.
- There is no evidence that the patient discharge status code is being used in any way to implement this CMS rule.
- It would likely lead to extra work for no purpose to try to ascertain "in custody" status by case managers, registrars, coders and other hospital personnel.
- It would likely lead to an overuse of patient discharge status code 21, skewing the practical meaning of the patient discharge status codes, which is a physical location where the patient is sent after acute care.
- The word "custody" does not exist in the definition of patient discharge status code 21, so we would be using a definition list for a word that is not actually referenced in code 21.

REFERENCES

- 42 CFR 411.4(b) (this is the Code of Federal Regulations)
- 72 FR 47405 (this is the FY2008 IPPS Final Rule, published in the Federal Register on August 22, 2007)
- Transmittal 1944, April 9, 2010, change request 6880, Pub 100-04 Medicare Claims Processing
- Transmittal 122, April 9, 2010, change request 6880, Pub 100-02 Medicare Benefit Policy
- MedLearn Matters Number MM6880, April 9, 2010