

MCOs and PIPs are required to comply with these laws, there are separate enforcement mechanisms for ensuring compliance with their provisions. We note that it is the responsibility of an EQRO to assess the MCO's or PIP's ability to provide access to services in a timely manner. If this is accomplished for all enrollees, this would, in effect, constitute compliance with these laws. Through its review of compliance with State-established structural standards, as required in § 438.358(b)(3) of the final rule, the EQRO must ensure that Medicaid beneficiaries, including those who are disabled, do not encounter barriers to care.

Comment: One commenter suggested modifying proposed § 438.354(b)(1)(iii) to read “* * * include quality assessment and improvement technologies and methods.”

Response: We agree with the commenter's suggestion that the word “methods” be used and believe that this term already encompasses technologies that may be employed by the State as a method for assessing and improving quality. Accordingly, in response to this comment, we are revising § 438.354(b)(1)(iii) to use the word “methods.”

Comment: One commenter supported our proposal to allow State agencies to qualify as EQROs in certain situations. Another commenter believed it would also be appropriate for the State HMO licensing organization to be eligible to be an EQRO. Conversely, one commenter felt that EQROs should be independent of most State agencies, particularly Medicaid purchasing or managed care licensing authorities. Another commenter believed that it was extremely important that the definition of independence be explicit for State Medicaid agencies, and that CMS's regional offices should review determinations as to the independence to make sure that true independence is obtained. This was based on concern over what the commenter saw as an inherent conflict of interest permitted under our proposed rule. In the commenter's view, this conflict arises from the fact that State agencies, departments, and universities are ultimately accountable to State legislatures and the Governor who act on purchasing decisions made by the State Medicaid agency, and who appoint members to boards of these entities. One commenter expressed the view that no State agency is truly independent and recommended prohibiting State entities from serving as EQROs.

Response: Section 1932(c)(2) of the Act requires that a State contract with

an independent organization in order to get the enhanced 75 percent FFP for EQR. The expert panel composed of State representatives, advocacy organizations, and other stakeholders that was convened under the auspices of the NASHP recommended that we allow State agencies to qualify under certain circumstances as EQROs. Because we agree with this recommendation and believe it to be reasonable with the safeguards on independence we have in place, the final rule retains the independence requirements that permit State Agencies under certain circumstances to qualify as EQROs. We note that we have received only a few comments opposing our proposal to let State entities qualify as EQROs. CMS regional office staff will assess the EQRO contracts to ensure compliance with the provisions of this rule as part of regular monitoring reviews.

Comment: One commenter did not agree with the requirement that a State entity be governed by a board or similar body, the majority of whose members are not government employees, in order to qualify as an EQRO. The commenter believed that State universities should be permitted to be EQROs because they can produce high quality work for significantly less cost than QIOs.

Response: We understand that the requirement will limit the number of State entities that can qualify as EQROs, including some State universities. We took this recommendation from the expert panel convened under the auspices of the NASHP. This panel included State licensure and Medicaid representatives. We are aware that several States have State entities that meet the criteria set forth in the proposed rule. We have received minimal comments opposing this provision. We conclude that this is a feasible arrangement, and think that the provisions related to the governing board are appropriate and necessary in order to fulfill a requirement for meaningful independence. We also believe it represents a reasonable compromise between banning State entities altogether, and allowing any entity to serve as an EQRO. Therefore, the final rule retains the governing board provision.

Comment: One commenter representing a Medicaid program not operating in the continental United States felt that the proposed independence criteria would have the effect of precluding all of its governmental procurement possibilities related to EQR. The commenter recommended that the independence criteria be waived, or that implementation be postponed, due to

the financial burden the commenter believed that the rule would impose on it because it would have to contract with EQROs in the continental USA.

Response: The statute requires that the EQRO be an independent entity. Consistent with the interpretation of “independence” under the existing external review requirement in section 1902(a)(30)(C) of the Act, we interpret this to mean independent from both the MCO/PIHP and from the State. Thus, it is not clear how this final rule would create a financial burden by referring a contract with an outside entity, since this is already required. We do not agree that exceptions should be made based on a Medicaid program's ability to contract with an EQRO locally. We recognize that many State agencies, departments, and universities do not meet these criteria. However, as noted above, several States do have State entities that meet the independence criteria. We also note that this regulation provides more flexibility than in the past for a variety of organizations to qualify as EQROs.

Comment: One commenter disagreed with our proposal to apply the independence requirement to subcontracts, suggesting that this would result in States being unable to take advantage of the experience of nationally renowned experts affiliated with academic health centers that have ownership interests in MCOs that serve Medicaid beneficiaries. In contrast, one commenter endorsed applying independence criteria to EQRO subcontractors as balanced and reasonable.

Response: The independence provisions are broad enough to allow for a variety of organizations to qualify as EQROs and a variety of experts to subcontract with EQROs. In formulating the provisions, we sought balance between providing flexibility to States to choose from numerous qualified entities, and ensuring that entities were sufficiently independent from the State and the MCOs and PIPs. We realize these requirements will limit some contracting opportunities when experts or the organizations for which they work do not meet the independence criteria.

Comment: Many commenters agreed with the expert panel recommendation that the EQRO should not share management or corporate board membership with the MCO it reviews. The commenters also suggested that the individuals employed by the EQRO or subcontracting with the EQRO should be free of any potential conflicts of interest with the MCO that they review.