THE OPIOID EPIDEMIC: MEDICAID FUNDING FOR RESIDENTIAL AND INPATIENT SUD TREATMENT

Date: 5 March 2018

Health Care Alert

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MEDICAID FUNDS HAVE BEEN LIMITED FOR INPATIENT AND RESIDENTIAL TREATMENT FOR SUBSTANCE USE DISORDER ("SUD")

Until recently, Medicaid funds for inpatient or residential treatment of SUD have been restricted by a federal law prohibition on federal financial participation ("FFP") [1] for individuals aged 21 to 64 in an institution for mental diseases ("IMD"). An IMD is a unique facility designation under federal Medicaid law. It is defined as:

> [A] hospital, nursing facility, or other institution of more than 16 beds that is primarily engaged in providing diagnosis, treatment or care of persons with mental diseases, including medical attention, nursing care and related services [2]. Whether an institution is an institution for mental diseases is determined by its overall character as that of a facility established and maintained primarily for the care and treatment of individuals with mental diseases, whether or not it is licensed as such. An institution for individuals with intellectual disabilities is not an institution for mental diseases [3].

The "IMD exclusion," i.e., the lack of FFP for Medicaid services in an IMD, is based in the statutory definition of Medical Assistance services. Medical Assistance services do not cover services in an IMD unless the person is 65 or older, or is under age 21 and in a psychiatric hospital [4]. Thus, the exclusion generally precludes FFP for services provided in an IMD to individuals aged 21 through 64.

Whether the "overall character" of an entity, including a hospital or nursing facility, makes it an IMD depends initially on the presence of certain factors that CMS has included in the State Medicaid Manual ("SMM"). If any of the below criteria are present, a thorough IMD assessment should be completed to determine whether the entity is an IMD. The assessment criteria are:

1. The facility is licensed as a psychiatric facility
2. The facility is accredited as a psychiatric facility
3. The facility is under the jurisdiction of the state's mental health authority (this criterion does not apply to facilities under mental health authority that are not providing services to mentally ill persons);

4. The facility specializes in providing psychiatric/psychological care and treatment. This may be ascertained through review of patients' records. It may also be indicated by the fact that an unusually large proportion of the staff has specialized psychiatric/psychological training or that a large proportion of the patients are receiving psychopharmacological drugs; and
5. The current need for institutionalization for more than 50 percent of all the patients in the facility results from mental diseases [5].

THE IMD EXCLUSION RESTRICTS AVAILABILITY OF OPIOID USE DISORDER TREATMENT FOR MEDICAID RECIPIENTS

A facility may clearly fall outside the scope of the first four criteria listed above; however, assessing the primary diagnosis of the patients at the facility becomes particularly important when evaluating the fifth criterion. In determining whether a facility is an IMD, CMS examines whether more than half of its patients are in the facility as a result of a mental disease, which includes those individuals with SUD [6]. Consequently, a facility with 17 or more beds that is providing the majority or all of its services to patients with a SUD, including opioid use disorders ("OUD"), is an IMD [7]. FFP is not available for reimbursement of any behavioral health or *medical* services to individuals aged 21 to 64, if they are provided in a facility determined to be an IMD.

Under the IMD exclusion, a facility, such as a freestanding residential SUD treatment provider or a hospital with a large SUD unit that dominates the other services in the hospital, is not able to bill Medicaid for any services to individuals aged 21 to 64. Because the risk of opioid overdose is greatest within this age group, and some individuals require more intensive treatment to address OUD, state Medicaid agencies have been wrestling with the IMD exclusion as part of their policies for attacking the opioid epidemic.

There is an exception to the IMD exclusion for Medicaid managed care plans. On May 6, 2016, CMS published final rule revisions to the Medicaid managed care regulations, which counter, in a limited way, the IMD exclusion. The Medicaid managed care regulations permit the managed care organization to offer a short-term stay (no more than 15 days) for individuals aged 21 to 64 in an IMD, as "in lieu of services [8]." In lieu of services are chosen by the Medicaid recipient to the exclusion of medical services otherwise authorized under the state Medicaid plan [9].

SECTION 1115 WAIVERS CAN REVERSE THE IMD EXCLUSION FOR SUD

In July 2015, CMS issued a State Medicaid Director Letter ("SMD") [10], which provided an opportunity for states to apply for a demonstration project under section 1115 of the Social Security Act [11]. Under SMD #15-003, CMS offered "a new opportunity for Medicaid demonstration projects … to test Medicaid coverage of a full SUD treatment service array in the context of overall SUD service delivery system transformation." The SMD targeted states that were "pursuing significant delivery system transformation efforts in the area of SUD." CMS was looking to states who wanted to design systems that would tie in physical health and mental health services, expand access to SUD treatment, and use quality metrics to measure success of the demonstration. Following the issuance of SMD #15-003, CMS approved demonstration projects for some states, including California (in 2015), Massachusetts, Maryland, Virginia (all in 2016), and West Virginia (in 2017).

On October 26, 2017, President Trump declared the opioid crisis a "national public health emergency" [12]. Shortly thereafter, on November 1, 2017, CMS released SMD #17-003, replacing SMD #15-003. CMS announced an initiative to work with states on section 1115(a) demonstrations to improve access to Medicaid beneficiaries to combat the opioid crises [13]. Like the previous issuance, under SMD #17-003, federal matching funds may be available for SUD treatment in residential treatment facilities, through a waiver of the IMD exclusion.

On the date that the November 2017 SMD was released, CMS approved demonstrations for New Jersey and Utah. Other states working on applications include Arizona, Minnesota, and Pennsylvania.

THE FUTURE OF THE IMD EXCLUSION

On November 1, 2017, the President's Commission on Combating Drug Addiction and Opioid Crisis released its final report recommending that the U.S. Department of Health and Human Services ("HHS") grant each of the 50 states a waiver to the IMD exclusion within the Medicaid program.

Additionally, Congress has proposals to eliminate the IMD exclusion entirely with the "Road to Recovery Act" (H.R. 2938) and the "Medicaid Coverage for Addiction Recovery Expansion (Medicaid CARE) Act" (S. 1169), both of which would amend the IMD exclusion barrier and allow Medicaid coverage in residential treatment facilities with up to 40 beds for up to 60 days and would allow for other medical services to be covered in an IMD. The bills have bipartisan support but present a heavy lift financially because the Congressional Budget Office has estimated a cost associated with these bills as falling between 40 and 60 billion dollars. Nonetheless, Congress now understands that they need to address the IMD exclusion because of the barrier to treatment and for residential treatment providers hoping to provide appropriate services for the Medicaid recipients falling in the prohibited age range.

For now, congressional staff believe that it is more realistic and more likely for the issue to be addressed through the Trump Administration's announced waiver program than through statutory change. It is understood, however, that members of Congress will continue to push for IMD reform and it is expected to remain a legislative priority of the Bi-Partisan Heroin Task Force.

HOW WE CAN HELP

K&L Gates' Public Policy and Law practice is closely tracking developments and providing advocacy for clients and stakeholders as states and the federal government respond to the opioid crisis. These efforts include development and refinement of legislative proposals and messaging; facilitating client engagement with Congress, the executive branch, advocacy groups, and think tanks; and identifying opportunities for clients to serve as trusted advisors and thought leaders. K&L Gates' Health Care practice assists residential, outpatient, and facility-based treatment providers and private equity investors in behavioral health with legal advice, including licensure, certification, reimbursement, regulatory compliance, transactional due diligence, and strategic considerations. Our team pairs its substantive experience in health care law and policy with the political insights of more than 50 bipartisan lawyers and government affairs professionals to develop comprehensive advocacy and legal strategies for our clients.

Notes

[1] The Medicaid program is paid for through shared state and federal funding. See 42 U.S.C. § 1396 (establishing the Medicaid program). FFP is the federal portion. If FFP is unavailable, the state would be required to fully fund the service through another state health care program.
[2] This portion of the definition is in statute. 42 U.S.C. § 1396d(i).
[3] The Centers for Medicare and Medicaid Services ("CMS") expanded on the statutory definition to include the additional language. 42 C.F.R. § 435.1010 (emphasis added).
[4] *See* 42 U.S.C. § 1396d(a)(16),(29)(B).
[5] SMM, Pub. 45, Ch. 4 § 4390. The SMM contains "mandatory, advisory, and optional Medicaid policies and procedures [issued] to the Medicaid State agencies" by CMS. Id. (from the Foreword to the SMM).
[6] SMM at § 4390E.
[7] *Id*.
[8] *See* 42 C.F.R. § 438.6(e).
[9] *See* 42 C.F.R. § 438.3(e)(2).
[10] SMD #15-003, July 27, 2015.
[11] 42 U.S.C. § 1315.
[12] The declaration of a national public health emergency is limited to 90 days, unless renewed by the HHS Secretary. On Jan. 24, 2018, Eric D. Hargan, the acting HHS Secretary renewed the declaration. *See* https://www.phe.gov/emergency/news/healthactions/phe/Pages/opioid-24Jan2018.aspx (last visited Jan. 30, 2018).
[13] The Nov. 1, 2017 letter: https://www.medicaid.gov/federal-policy-guidance/downloads/smd17003.pdf.

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