

SUPPORT FOR PATIENTS AND COMMUNITIES ACT: UTILIZING TELEHEALTH TECHNOLOGY TO PROVIDE SUBSTANCE USE DISORDER AND TREATMENTS

Date: 14 November 2018

By: Tracy L. Lawless, Ruth Granfors, Hilary Homenko Bowman

EXPANDING MEDICARE COVERAGE OF SUBSTANCE USE DISORDER TREATMENTS AND SERVICES DELIVERED THROUGH TELEHEALTH

Section 2001 of the Support Act expressly extends Medicare coverage for SUD services and treatment delivered via telehealth by adding a new Section 1834(m)(7) of the Social Security Act to the existing telehealth subsection of the Medicare statute. [1] Under the current version of Section 1834(m), Medicare covers telehealth services furnished by a physician or practitioner at a "distant site" [2] to an eligible telehealth individual located at an "originating site," [3] if the originating site is in an area designated as a rural health professional shortage area, in a county that is not included in a Metropolitan Statistical Area, or from an entity that participates in a federal telemedicine demonstration project (collectively, the "Geographic Requirements"). [4] An originating site can be a physician's office, a critical access hospital, a rural health clinic, a federally qualified health center, a hospital, a skilled nursing facility, or a community mental health center. [5] The originating site can also be an individual's home in the case of dialysis related services. [6]

Beginning on July 1, 2019, an eligible telehealth individual with a SUD diagnosis may receive covered telehealth treatment services for the disorder or a co-occurring mental disorder, if such telehealth services are provided from an appropriate originating site. [7] The list of permissible originating sites for telehealth treatment services related to a SUD or a co-occurring mental disorder will be revised to include an individual's home. [8] Section 2001(a) of the Support Act also revises Section 1834(m)(2), (4) and (6) to waive the Geographic Requirements and the originating site facility fee when the originating site is an individual's home for SUD telehealth treatment services. [9]

The Secretary of Health and Human Services (the "Secretary") is permitted to use an interim final rule in order to implement these telehealth changes. [10] The Secretary exercised this authority, along with the publication of the Medicare Physician Fee Schedule for CY 2019. The interim final rule will be published in the Federal Register on November 23, 2018. [11] The interim final rule revises applicable regulations to permit the originating site for telehealth services to be an individual's home, waives the facility fee associated with the originating site when the originating site is an individual's home, and clarifies that the Geographic Requirements of Section 1834(m) of the Social Security Act do not apply to telehealth services for SUD treatment. [12]

Within five years of enactment of the Support Act, the Secretary of the Department of Health and Human Services is required to submit a report to Congress on the impact of telehealth services for SUD on (1) utilization of health care items and services, including emergency department visits, and (2) related health outcomes, such as overdose deaths. [13] The Support Act directs the Secretary to transfer \$3,000,000 from the Federal Supplementary Medical Insurance Trust Fund to support initial coverage of the new telehealth services. [14]

EVALUATING FUTURE MEDICAID COVERAGE OF SUBSTANCE USE DISORDER TREATMENTS AND SERVICES DELIVERED THROUGH TELEHEALTH

The Support Act does not expressly mandate Medicaid coverage of SUD services and treatments delivered via telehealth. Nonetheless, to date, some states have opted to provide these services under their state plans [15] or in Medicaid managed care programs. The Support Act does, however, require the federal government to collect, study and disseminate information on the best way to deliver such telehealth services to adult and pediatric Medicaid populations with SUDs.

For example, because Medicaid is a combined federal/state-funded program, Section 1009 of the Support Act provides that within one year of enacting the Support Act, the Administrator for the Centers for Medicare & Medicaid Services ("CMS") shall provide guidance on state options for receipt of federal funding for Medicaid covered treatment of SUDs delivered through telehealth to carry out assessments, medication-assisted treatment, counseling, medication management, and medication adherence with prescribed medication regimes for the general population and high-risk individuals (i.e., American Indians and Alaska Natives, adults under the age of 40, individuals with history of non-fatal overdose, or individuals with co-occurring serious mental illness and substance use disorder). [16] CMS is also required to provide guidance on availability of federal funding in Medicaid coverage of treatment for SUD delivered using telehealth for Medicaid beneficiaries through managed care entities [17] and school-based health centers. [18] According to the Health Resources & Services Administration ("HRSA"), there are approximately 2,000 school-based health centers operating across the country to provide educational and treatment opportunities in the areas of primary care, behavioral health, and substance abuse. [19]

Additionally, the Support Act contains various provisions on SUD treatments provided through telehealth to pediatric Medicaid populations. For example, through a U.S. Government Accountability Office study, Section 1009 of the Support Act requires the Comptroller General to evaluate Medicaid's coverage of services and treatment of SUDs for children through telehealth communications and consider the impact of increasing the number of Medicaid providers performing services and treatment via telehealth to children in rural and underserved areas, as well as evaluate the reimbursement rates regarding those services. [20] The Comptroller General is required to deliver the results of such study to Congress, along with recommendations for any future, additional legislation. [21] Within one year of enacting the Support Act, the Administrator of CMS is also required to submit a report on how to reduce the barriers to using telehealth services and treatment for SUDs to pediatric Medicaid beneficiaries and address various related issues, including best practices for using telehealth to diagnose children with SUD and the differences between telehealth and in-person services from utilization, cost, and quality perspectives. [22] The Secretary is required to publish this report on the Department of Health and Human Services' website.

MANDATING REGULATIONS ON SPECIAL REGISTRATION FOR TELEMEDICINE

The Support Act also amends the Controlled Substances Act by setting a timetable for implementation of the Attorney General's existing authority to "promulgate regulations specifying the limited circumstances in which a special registration [for telemedicine] may be issued." [23] As an example, this special registration could allow a practitioner acting within the scope of the practitioner's license and DEA registration to remotely prescribe Suboxone via telemedicine for patients in rural areas where there are no authorized providers of such services.

Because the regulations for such special registration have never been implemented, Section 3232 of the Support Act amends section 831 to require the Attorney General, in consultation with the Secretary, to promulgate final regulations within one year that specify (1) the circumstances in which a special registration may be issued, and (2) the procedure for obtaining a special registration. [24]

K&L Gates' health care practice can assist health systems and hospitals, and other providers and suppliers in responding to changes implemented by the Support Act and assessing how the Support Act would impact them. We will continue to closely monitor developments related to the Support Act. Please note that this is one in a series of alerts and podcasts from K&L Gates discussing various provisions of the Support Act.

NOTES:

[1] SUPPORT for Patients and Communities Act, Pub. L. 115-271, § 2001(a); S.S.A. § 1834(m); 42 U.S.C. § 1395m(m).

[2] "Distant site" means "site at which the physician or practitioner is located at the time the service is provided via a telecommunications system." 42 U.S.C. § 1395m(m)(4)(A).

[3] "Originating site" means site "at which the eligible telehealth individual is located at the time the service is furnished via a telecommunications system...." *Id.* § 1395m(m)(4)(C).

[4] *Id.* § 1395m(m)(4)(C).

[5] *Id.* § 1395m(m)(4)(C)(ii).

[6] *Id.* § 1395m(m)(4)(C)(ii)(X).

[7] Support Act, § 2001(a).

[8] 42 U.S.C. § 1395m(m)(4)(C)(i), (ii).

[9] Support Act, § 2001(a); 42 U.S.C. § 1395m(m)(2) & (6).

[10] Support Act, § 2001(b)(1).

[11] Expanding the Use of Telehealth Services for the Treatment of Opioid Use Disorder under the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act Interim Final Rule, CMS, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-24170.pdf> (Nov. 5, 2018).

[12] *Id.*

[13] Support Act, § 2001(c)(1).

[14] *Id.* § 2001(c)(2).

[15] Federal law requires each State that administers a Medicaid program to develop a State Plan for Medical Assistance that complies with 42 U.S.C. § 1396a. The State Plan and any amendments are submitted to and

approved by CMS.

[16] Support Act, § 1009(b)(1).

[17] *Id.* § 1009(b)(2).

[18] *Id.* § 1009(b)(3).

[19] School-Based Health Centers, HRSA, <https://www.hrsa.gov/our-stories/school-health-centers/index.html> (Nov. 5, 2018).

[20] Support Act, Section 1009(c)(1).

[21] *Id.* § 1009(c)(2).

[22] *Id.* § 1009(d)(1).

[23] 21 U.S.C. § 831(h).

[24] *See* 21 U.S.C. § 831(h)(2), as amended.

KEY CONTACTS



TRACY L. LAWLESS
GOVERNMENT AFFAIRS COUNSELOR

PITTSBURGH, HARRISBURG
+1.412.355.8910
TRACY.LAWLESS@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.