THE OPIOID EPIDEMIC: THE IMD CARE ACT AND OTHER PROPOSALS TO EXPAND SERVICES

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INTRODUCTION

A bill to temporarily lift the restriction on federal Medicaid funding for certain substance use disorder ("SUD") services to adults between ages 21 and 64 in an institution for mental disease ("IMD") passed the House on June 20, 2018. The Individuals in Medicaid Deserve Care that is Appropriate and Responsible in its Execution Act ("IMD CARE Act") (H.R. 5797) was then combined with a number of other previously passed House bills related to addressing the opioid crisis and sent to the Senate on June 22, 2018. This combined bipartisan bill is known as the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment ("SUPPORT") for Patients and Communities Act (H.R. 6).

In August, the Senate floated a new comprehensive package entitled the "Opioid Crisis Response Act of 2018." While the themes in both legislative proposals are similar, the approaches are different. The Senate and House are expected to negotiate a path forward based on the two pieces of legislation. [1]

THE IMD EXCLUSION

As covered in a prior alert, Medicaid funds for inpatient or residential treatment of SUDs, as well as other Medicaid services, are generally restricted by a prohibition on federal financial participation ("FFP") for individuals aged 21 to 64 in an IMD. This restriction on federal funding for Medicaid services is known as the "IMD exclusion." The prior alert addressed one effort to reverse the IMD exclusion through Section 1115(a) [2] demonstration projects. States that receive approval of a Section 1115(a) demonstration may be able to receive FFP for limited treatment of individuals aged 21 to 64 in IMDs.

THE IMD CARE ACT

If the IMD CARE Act becomes law, states will have another avenue for receiving FFP for care provided to individuals in an IMD. Under the IMD CARE Act, beginning January 1, 2019 through December 31, 2023, a state may elect to provide medical assistance for services furnished in an IMD and for other medically necessary services furnished to Medicaid-eligible individuals with the targeted SUDs. [3] A state would obtain the federal matching reimbursement by submitting an amendment to its State Plan for Medical Assistance and addressing a number of issues as detailed in the IMD CARE Act. The IMD CARE Act authorizes an optional state plan

amendment that would assist individuals with opioid use disorder or cocaine use disorder who are between the ages of 21 and 64, allowing them to receive services in an IMD. The IMD services would be limited to 30 days of treatment (not necessarily consecutive) in a 12-month period.

Prior bills to eliminate the IMD exclusion were broader in scope of service. As a result, the Congressional Budget Office ("CBO") estimated a cost of $40–$60 billion associated with such expansion. In contrast, the targeted focus and limited applicability of the IMD CARE Act drastically reduces the CBO score to approximately $1 billion.

THE IMD AND THE PROPOSED SENATE LANGUAGE

In the proposed language advanced by the Senate, the expansion of Medicaid services under the state plan to individuals aged 21 to 64 is limited to pregnant women. However, certain senators would like to see a broader expansion of inpatient and residential services available for Medicaid recipients, and a broader exception to the IMD exclusion may find its way into a final bill.

With respect to Medicaid managed care plans, the Senate language proposes that "[p]ayment shall be made for capitation payments" when a state has elected to include monthly capitation payments to such plans for services to individuals aged 21 to 64 receiving inpatient treatment in an IMD under current Medicaid managed care regulations.

ADDITIONAL MEDICAID PROVISIONS OF THE SUPPORT ACT

Among its many other provisions, Title I of the SUPPORT Act sets forth various Medicaid amendments "to address the opioid crisis." As with the temporary IMD exclusion initiatives described above, many of these provisions are time-limited, suggesting that the ultimate objective is to get the country through the opioid epidemic, with the hope that these additional services and programs may be reduced or eliminated after other additional ongoing efforts — including required changes in distribution, sales, and prescribing of opioids — help to reduce the number of people with opioid addiction.

Section 1003 of Title I of the SUPPORT Act would create a demonstration project to expand the number of Medicaid-enrolled treatment providers and the capacity of existing treatment providers who treat individuals with SUDs, generally, and specifically individuals with neonatal abstinence syndrome, pregnant and postpartum women and infants, adolescents and young adults between the ages of 12 and 21, and American Indian and Alaskan Native individuals. Initially, the Secretary of HHS would award at least ten 18-month planning grants to states in response to a state proposal for increasing service capacity and then up to five states would receive additional funding for a 36-month period, which would be based on the amount of increased Medicaid payments for such services.

Proposed Section 1006 of Title I of the SUPPORT Act would require HHS to issue guidance to improve care for infants with neonatal abstinence syndrome and their parents with SUDs. [4] This guidance would be expected to address availability and funding of services for such individuals, as well as flexibility and incentives for state Medicaid agencies to include screening, prevention, and parental support activities.

Under Section 1007 of Title I of the SUPPORT Act, states that have a SUD-focused state plan amendment approved on or after October 1, 2018, could request extension of the enhanced FFP available initially under the Affordable Care Act for Medicaid health homes. Medicaid health homes manage individuals enrolled in Medical Assistance who have: (1) two or more chronic conditions, (2) one chronic condition and are at risk for a second, or (3) one serious and persistent mental health condition. "Chronic condition" includes an SUD.

Also, under Section 1007, the Centers for Medicare & Medicaid Services ("CMS") would establish best practices for designing and implementing a SUD-focused state plan amendment by October 2020. Further, this section requires state plans to provide coverage for medication-assisted treatment, which includes methadone and other U.S. Food & Drug Administration- approved drugs for opioid use disorder. This last requirement is applicable from October 1, 2020 through October 1, 2025.

ADDITIONAL MEDICAID PROVISIONS OF THE OPIOID CRISIS RESPONSE ACT

The proposed Senate language contains, in part: (1) a requirement that CMS issue guidance on federal Medicaid reimbursement available for treatment and services for SUDs provided through telehealth modalities, including remote patient monitoring, "live video or synchronous telehealth, store-and-forward or asynchronous telehealth, mobile health, telephonic consultation, and electronic consult including provider-to-provider e-consults"; (2) a requirement that the Comptroller General study barriers to obtaining medications for medication-assisted treatment of SUDs and provide states with options to reduce barriers; (3) a requirement that the Medicaid and CHIP Payment and Access Commission study and develop a report on utilization control policies that may affect access to medication-assisted treatment medications; and (4) a requirement that the Secretary of HHS provide "technical assistance and support to States regarding the development and expansion of innovative State strategies … to provide housing-related supports and services and care coordination" to individuals with SUDs.

CONCLUSION

In an effort to combat the epidemic of opioid use disorders, overdoses, and deaths, both chambers of Congress are proposing laws that contain similar goals of expanding access to treatment and prevention, curbing the flow of illicit and legal opioids into communities, and encouraging development of non-opioid pain therapies. The timing and precise details of these programs remain to be seen and will likely only be known after a conference committee designs the final legislative package. The final bill(s) are bound to propose more treatment options for patients and additional reimbursement for providers who are on the front lines of treating individuals with opioid and other substance use disorders.

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 difficulty in predicting timing of passage of an opioid package is exacerbated by other matters that are diverting the Senate's attention. One of the matters topping the Senate's agenda this summer is Judge Kavanaugh's nomination for the Supreme Court, which could be enough to curtail any significant legislative effort.

[2] Section 1115(a), found at 42 U.S.C. § 1315(a), provides for individual state demonstrations that are determined by the Secretary of the Department of Health and Human Services ("HHS") to further the objectives of certain titles of the Social Security Act and thereby warrant the waiver of specific state plan requirements found at 42 U.S.C. § 1396a.

[3] Under the proposed law, the individuals eligible for FFP must be (1) enrolled in Medicaid, (2) at least 21 years old, (3) not attained the age of 65 years old, and (4) have been diagnosed with at least one of the targeted SUDs, either opioid use disorder or cocaine use disorder.

[4] On June 11, 2018, CMS issued a Center for Medicaid & CHIP Services Informational Bulletin on the subject "*Neonatal Abstinence Syndrome: A Critical Role for Medicaid in the Care of Infants*." https://www.medicaid.gov/federal-policy-guidance/downloads/cib060818.pdf.

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