UPDATE ON MEDICAID AND STRATEGIES FOR OBTAINING ADEQUATE RATES FOR SERVICES

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SYNOPSIS OF REMARKS

• Historical Background On Federal Medicaid Rate Standards


• Medicaid Managed Care Final Rule (81 Fed. Reg. 27,498 [May 6, 2016])

• Alternative Litigation Theories, Other Strategic Approaches, And Case Law Update
Background

• A History Of Federal Medicaid Rate Standards:
  – Originally, No Payment Standards When Medicaid Enacted
  – Section 237, P.L. 90-248 (Jan. 2, 1968) (Established A Ceiling, Not A Floor, By Requiring That Medicaid Rates Not Exceed “Reasonable Charges” Consistent With Efficiency, Economy, And Quality Of Care)
Background (Cont’d)

– Boren Amendment (Reasonable And Adequate Medicaid Rates To Meet Costs Incurred By Efficiently And Economically Operated Facilities To Provide Care And Services Complying With Applicable Laws, Regulations, And Quality And Safety Standards), P.L. 96-499, § 962 (Dec. 5, 1980) (Formerly, 42 U.S.C. § 1396a(a)(13)(A))
  • Repealed In 1997. Section 4711(A), P.L. 105-33 (Aug. 5, 1997)
Background (Cont’d)


• Some Lessons Learned
  – Review Of Provider Finances, Analyses Of Allowable Costs Versus Rates, And Examination Of Geographic Cost Coverage Disparities Are Necessary
  – But, More Importantly, It Is Essential To Demonstrate The Adverse Impact Of Inadequate Medicaid Rates On The Quality Of Patient Care And Access To Care
Armstrong v. Exceptional Child Center, Inc.

- The Court Narrowly Avoided Deciding That Issue Because Of Changed Circumstances In The Case But, Ominously, Four Justices Indicated In Dissent That They Would Find No Such Right Of Action (Chief Justice Roberts And Justices Scalia, Thomas, And Alito)
Armstrong v. Exceptional Child Center, Inc.

(Cont’d)

• The Court Later Granted Certiorari To Decide The Same Questions In Armstrong -- A Case Where The Ninth Circuit Had Again Found Such A Right Of Action And Determined That Idaho’s Medicaid Rates For Habilitation Services Violated The Equal Access Provision

• In Armstrong, The Court Held That There Was No Right Of Action Through The Supremacy Clause For Medicaid Providers To Sue State Officials For Alleged Equal Access Violations And That Congress Had Entrusted Enforcement Of This Requirement To The United States Department of Health And Human Services (HHS)
• Majority Opinion (Written By Justice Scalia And Joined By Chief Justice Roberts And Justices Thomas, Breyer [In Part], And Alito)
• Crucial Concurring Opinion By Justice Breyer
• Dissenting Opinion (Authored By Justice Sotomayor Joined By Justices Kennedy, Ginsburg, And Kagan)
• The Essential Unresolved Factual Issue In Armstrong
• The Many Fallacies In And Problems With The Majority’s Reasoning
Armstrong v. Exceptional Child Center, Inc.  
(Cont’d)

• Implications Of Armstrong
  – Other Federal Potential Causes Of Action Under Medicaid (Public Notice; Reasonable Promptness; Amount, Duration, And Scope) Or Other Federal Statutes (Rehabilitation Act; Americans With Disabilities Act) Or Case Law (Olmstead v. L.C., 527 U.S. 581 [1999])
  – State Law Claims And State Law Courts
Interim Final Equal Access Regulations


• Highlights/Lowlights Of Interim Final Rule
  – Does Not Apply To Medicaid Managed Care Or Certain Waiver Programs, Including Ones Providing For Home And Community-Based Services
Interim Final Equal Access Regulations  
(Cont’d)

• Highlights/Lowlights Of Interim Final Rule (Cont’d)
  – Establishes Five Core Services (Primary Care, Physician Specialist, Behavioral Health, Prenatal And Postnatal Obstetric, And Home Health) Where Medicaid Rates/Access Must Be Reviewed By States At Least Once Every Three Years
  – Other Services Would Only Have Their Medicaid Rates/Access Reviewed More Intensively By HHS Where Rates Are Reduced Or Restructured Or There Is An Abnormal Volume Of Access Complaints
Interim Final Equal Access Regulations (Cont’d)

• Highlights/Lowlights Of Interim Final Rule (Cont’d)
  – No Separate Analysis Of Olmstead Compliance Or Issues
  – Possible Exemptions From Triennial Reviews For States With Certain Medicaid Program Characteristics, Such As High Managed Care Enrollment
  – Lack Of An Established Formal Federal Process For HHS Review Of Beneficiary And Provider Input, Complaints, Or Concerns
  – Process For Addressing Access Deficiencies And State Submissions Of Corrective Action Plans
HHS RFI As To Access Data Metrics And Alternative Processes


• Sought Feedback On Measures And Metrics To Gauge Access To Care

• Encompassed Both Medicaid Fee-For-Service And Managed Care Delivery Systems
HHS RFI As To Access Data Metrics And Alternative Processes (Cont’d)

• Divided Into:
  – Access To Care Data Collection And Methodology
  – Access To Care Thresholds/Goals
  – Alternative Processes For Access Concerns
  – Access To Care Measures/Availability Of Care And Providers, Beneficiary Reported Access, Service Utilization, And Comparison Of Payments

• Outstanding Issues As To Consumer Choice, Beneficiary Directed Care, And Distinctions Between And Among Network Adequacy, Physical Accessibility, And Programmatic Accessibility
Medicaid Managed Care Final Rule

• Issued In Proposed Form On June 1, 2015. 80 Fed. Reg. 31,098


• The Final Rule Covers Multiple Topics, Including, For Example:
  – The Medical Loss Ratio (42 C.F.R. § 438.8);
  – Actuarial Soundness Standards For The Rates Paid By Medicaid To Their Managed Care Organizations (MCOs) (42 C.F.R. § 438.4); And
  – Long Term Services And Supports (LTSS) (42 C.F.R. §§ 438.2 et seq.)
Medicaid Managed Care Final Rule (Cont’d)

• But, The Provision That Pertains Most Directly To Whether The Rates Paid By MCOs To Providers Are Sufficient Involves Network Adequacy (42 C.F.R. § 438.68)
  – The Key Underlying Assumption Is That, Unless Those Rates Are Adequate To Attract Enlistment, Providers Will Not Join Networks In Numbers Sufficient To Sustain Them
Medicaid Managed Care Final Rule (Cont’d)

– Time And Distance Standards For the Following Types Of Providers If Covered By Contract (42 C.F.R. § 438.68(b)(1)):

  • Primary Care, Adult And Pediatric;
  • OB/GYN;
  • Behavioral Health (Mental Health And Substance Abuse Disorder), Adult And Pediatric;
  • Specialist, Adult And Pediatric;
  • Hospital;
  • Pharmacy;
  • Pediatric Dental; And
  • Other Provider Types As Determined By HHS
Medicaid Managed Care Final Rule (Cont’d)

– States Covering LTSS Must Have Time And Distance Standards For Enrollee Travel To The Provider. They Must Also Have Network Adequacy Standards Other Than Time And Distance For Providers That Travel To The Enrollee To Furnish Services (42 C.F.R. § 438.68(b)(2))

– Nine Elements Must Be Considered By States When Developing Network Adequacy Standards, Including Factors Such As Anticipated Medicaid Enrollment, Expected Medicaid Utilization, Characteristics Of Served Populations, Numbers And Types Of Network Providers Needed To Furnish Contracted Services, And Network Providers Not Accepting New Medicaid Patients (42 C.F.R. § 438.68(c))
Medicaid Managed Care Final Rule (Cont’d)

– Stakeholder Engagement Must Occur When LTSS Are Provided Via Managed Care (42 C.F.R. § 438.70)

– There Must Also Be A Beneficiary Support System With Particular Functions Specific To LTSS (42 C.F.R. § 438.71(d))
Contemporary And Future Developments

• Alternative Litigation Theories
  – Other Provisions Of The Medicaid Act That Could Be A Basis For Litigation -- E.g.,:
    • Public Notice (42 U.S.C. § 1396a(a)(13)(A); 42 C.F.R. § 447.205)
    • Furnishing Covered Services With Reasonable Promptness (42 U.S.C. § 1396a(a)(8))
    • Services Sufficient In Amount, Duration, And Scope (42 U.S.C. § 1396a(a)(10)(B))
Contemporary And Future Developments
(Cont’d)

– Corollary Federal Enactments Or Mandates
  • Americans With Disabilities Act, 42 U.S.C. § 12101(b)(1); 28 C.F.R. § 35.130(d)
  • Olmstead
– Possible State Law Claims That Would Have To Be Litigated In State Courts

• Legislative Initiatives?
  – Dependent Upon The Political Environment
  – Unrealistic At National Level Currently Given Political Divisions And Dysfunction
  – State Legislation?
Contemporary And Future Developments (Cont’d)

• Case Law Update – Highlights The Alternative Litigation Approaches. Examples:
  – Idaho Developments In The Wake Of Exceptional Child Center
    • Inclusion Inc. v. Idaho Department of Health And Welfare, CV OC 1521761 (4th Jud. Dist. Id.) (Complaint Based On State APA Claim). Corollary Case In Federal Court Alleges Notice And Appeal Opportunities Denied Despite Service Cuts
    • K. W. v. Armstrong, Case No. 1:12-cv-00022-BLW (D. Id. Mar. 28, 2016) (Idaho Medicaid Required To Develop Additional Procedural Protections For Developmentally Disabled Beneficiaries Threatened With Coverage Cuts)
Contemporary And Future Developments (Cont’d)

– Discriminatory Rates For Out-Of-State Providers
  • Asante v. Cal. Dep’t Of Health Care Srvs., No. 3:14-cv-3226 (N.D. Cal. Dec. 21, 2015) (California’s Failure To Provide Arizona, Nevada, And Oregon Hospitals Certain Adjustments And Payments Accorded California Hospitals When Serving Medicaid Patients Violates Dormant Commerce Clause)
Contemporary And Future Developments
(Cont’d)

– Low Medicaid Rates And Access Issues
  • Settlement In Fla. Pediatric Soc’y v. Dudek, No. 1:05-cv-23037 (S.D. Fla.) In April 2016. Designed To Increase Medicaid Managed Care Rates For Pediatric Medical And Dental Care. Court Had Previously Held That Low Rates Impaired Access

– Supplemental (Wraparound) Payments
  • Legacy Community Health Services, Inc. v. Janek, No. 4:15-cv-25 (S.D. Tex. May 3, 2016) (Texas Could Not Avoid Its Legal Obligation To Make Supplemental Payments To Federally Qualified Health Centers By, Instead, Requiring Medicaid MCOs To Pay Rates Higher Than Those Negotiated)
Contemporary And Future Developments
(Cont’d)

– ADA Claims

• Steimel v. Wernert, Nos. 15-2377 and 15-2389 (7th Cir. May 10, 2016) (Cases Remanded To District Court To Determine Whether Indiana Medicaid’s Handling Of Three Waiver Programs Involving The Developmentally Disabled -- Two Of Them Uncapped As To Services And The Other Capped -- Violated The Integration Mandate Of The ADA And Olmstead By Isolating Recipients Unduly In Their Homes)
QUESTIONS AND ANSWERS