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November 6, 2018

What Does the Partial Repeal of the Medicaid IMD Exclusion Mean for Providers?

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On October 24, 2018, President Trump signed into law the final version of the bipartisan opioid package, known as the "Substance Use Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act" (H.R. 6) (the "Act").[1] Among other measures aimed at combating the nation's opioid epidemic, the Act includes a provision that expands access to substance use disorder ("SUD") treatment for Medicaid beneficiaries by partially repealing the longstanding Medicaid "Institutions for Mental Diseases" exclusion (the "IMD Exclusion") that effectively limited psychiatric inpatient and residential care for Medicaid beneficiaries.

History of the Medicaid IMD Exclusion

Since the establishment of the Medicaid program in 1965, and a concomitant policy to deinstitutionalize persons with mental diseases, the IMD Exclusion has prohibited states from using federal Medicaid funding to pay for mental health and substance use disorder treatment services rendered to Medicaid beneficiaries aged 21 to 64 who are patients in IMDs.[2] An IMD is statutorily 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."[3] The IMD Exclusion denies federal payment for inpatient services furnished to otherwise eligible Medicaid beneficiaries in psychiatric hospitals or freestanding residential psychiatric or substance use disorder facilities with more than sixteen beds. The IMD Exclusion was interpreted broadly, and thus, left the states with the financial responsibility for psychiatric inpatient and residential care. In many cases, the IMD Exclusion effectively prevented Medicaid beneficiaries from accessing specialized behavioral health services in a residential setting.[4]

Recent Revisions to the Medicaid IMD Exclusion

Section 5052 of the Act, entitled the "Individuals in Medicaid Deserve Care that is Appropriate and Responsible in its Execution Act" (the "IMD CARE Act"), partially repeals

1 Substance Use–Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, P.L. 115-271 (H.R. 6), 132 Stat. 3894 (Oct. 24, 2018), available at https://www.congress.gov/115/bills/hr6/BILLS-115hr6enr.pdf.

2 *See* 42 U.S.C. § 1396d(a)(29)(B).

3 42 U.S.C. § 1396d(i).

4 Even with the IMD Exclusion, states still had options to receive federal Medicaid matching funding for inpatient behavioral health services for individuals aged 21 to 64 through other means, including through Section 1115 Demonstration Waivers and Medicaid Managed Care rules. *See* Dept. of Health & Human Servs., Ctrs. for Medicare and Medicaid Servs., SMD# 17-003 Re: "Strategies to Address the Opioid Epidemic," available at https://www.medicaid.gov/federal-policy-guidance/downloads/smd17003.pdf; "Medicaid and Children's Health Ins. Program (CHIP) Programs; Medicaid Managed Care, CHIP Delivered in Managed Care, and Revisions Related to Third Party Liability [CMS-2390-F]," 81 Fed. Reg. 27498, 27555-27564 (May 6, 2016).

the longstanding IMD Exclusion on a temporary basis only--for fiscal years 2019 to 2023. Specifically, this provision permits states to file state plan amendments ("SPAs") to receive federal funding for services rendered at an IMD for up to thirty days[5] of residential SUD treatment[6] annually per beneficiary, who is between the ages of 21 and 64.

States that amend their state Medicaid plans to provide for residential SUD treatment must, as a condition of receiving such federal funds: (i) maintain certain state spending requirements regarding behavioral health care; (ii) cover certain outpatient and inpatient levels of care; (iii) adhere to certain reporting and notification requirements; and (iv) ensure that individuals receive the appropriate evidence-based clinical screening prior to being furnished services at an IMD and that participating facilities have plans for transitioning individuals to outpatient treatment (or other forms of care) following their inpatient stay at the IMD facility.[7] These requirements make it clear that Congress did not want state Medicaid programs to trade or substitute one program entitlement for another since most patients will require ongoing SUD services upon discharge from a residential or inpatient stay.

What Does the Partial Repeal of the Medicaid IMD Exclusion Mean for Providers?

The IMD CARE Act does not impose a requirement that providers accept Medicaid patients, but rather permits states to file SPAs to receive federal funding for the provision of residential SUD treatment. To date, many SUD treatment providers have sought ways to circumvent the IMD Exclusion by establishing programs with less than 16 beds or providing free inpatient or residential SUD care to Medicaid patients. Whether or not this lifting of the IMD Exclusion will result in an increase in the number of providers that offer services to this patient population will depend, in large part, on the level of reimbursement from state Medicaid programs. It is possible, however, that some states may make the acceptance of Medicaid patients a requirement for approval of either a certificate of need or licensure. Moreover, tax-exempt entities may be expected to offer services to Medicaid patients, regardless of how robust their charity care program is. Time will tell as to how state regulators will respond, if at all, to the partial repeal of the Medicaid IMD Exclusion.

Questions or Assistance

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5 The Act permits states to combine this 30-day limit with existing managed care and Section 1115 waiver authorities to elongate patients' lengths of stay, as medically appropriate. *See* P.L. 115-271 (H.R. 6), 132 Stat. 3894, at § 5052(a)(5); § 5052(b).

6 Unlike a prior House bill, the Act provides state Medicaid programs with the option to cover residential treatment of any kind of substance use disorder. *See* 164 Cong. Rec. S6467-02, S6478 (daily ed. Oct. 3, 2018) (statement of Sen. Portman).

7 Section 1012 of the Act also includes a provision that modifies the IMD Exclusion to allow for protections for pregnant and postpartum women receiving substance use disorder treatment services in an IMD. Specifically, the provision modifies the IMD Exclusion so that states may receive federal funds for other Medicaid-covered items or services that are provided to pregnant and postpartum women outside of the IMD (e.g., prenatal services), while the women are receiving substance use disorder treatment services in an IMD.

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