Updates
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Ninth Circuit Raises Bar for Approving Changes in State Medicaid Reimbursement

The U.S. Court of Appeals for the Ninth Circuit Court raised the bar last week for what states must prove to establish that their Medicaid provider reimbursement rates are sufficient to ensure a robust network of providers for Medicaid beneficiaries. In *Hoag Memorial Hosp. Presbyterian et al. v. Price*, __ F.3d __, No. 15-56547 (Aug. 7, 2017), the court held that, under 42 U.S.C. § 1396a(a)(30)(A)'s so-called "equal-access requirement" ("Section 30(A)"), the U.S. Secretary of Health and Human Services may not simply consider data about Medicaid beneficiaries' access to care and services, but must compare their level of access to that of the general population. As a result, states will need to produce comparative access data showing a rate change will not adversely affect access for the Medicaid population relative to the general population to have the proposed rate change certified by the Secretary.

Hoag Memorial Hosp. Presbyterian Background

Over 50 hospitals filed suit to challenge the Secretary's approval of a California Medicaid state plan amendment (SPA) that reduced rates by 10 percent for outpatient services that hospitals provided to beneficiaries of California's Medicaid program, Medi-Cal, from July 2008 through February 2009.

California initially submitted its SPA for the Secretary's approval in September 2008. The Secretary rejected the SPA in November 2010, reasoning that California had failed to provide any information about what impact the SPA would have on beneficiary access to care and services—information required by Section 30(A).

California then resubmitted its SPA for reconsideration, this time providing the Secretary with a study showing that hospital participation rates in providing outpatient services to Medi-Cal beneficiaries and beneficiary use of hospital outpatient services remained largely consistent over a three-year period that included the eight months for which the rate reduction was in effect. Relying on those results, California concluded that the reduced rates "clearly" did not affect beneficiary access to care and services.

The Secretary approved the resubmitted SPA, essentially adopting California's conclusion that its rates were "sufficient to enlist enough providers so that care and services [were] available [to beneficiaries] at least to the extent that care and services [were] available to the general population in the geographic area." The Secretary thus certified that the rate reduction complied with Section 30(A).

Ninth Circuit's Decision

The Ninth Circuit ruled that U.S. Congress had provided clear and unambiguous guidance in the equal-access requirement—guidance that the Secretary's interpretation contradicted. As a result, his interpretation was entitled to no deference. Further, the Ninth Circuit ruled that because the Secretary failed to even consider how Medi-Cal beneficiaries' access to care and services compared to that of the general public, his approval of the SPA was arbitrary and capricious under the Administrative Procedures Act.

Section 30(A), in relevant part, provides: "A State plan for medical assistance must . . . [be] sufficient to enlist enough providers so that care and services are available under the plan ***at least to the extent that such care and services are available to the general population in the geographic area***." [Emphasis added.] The court

determined that this language is clear and unambiguous, reflecting Congress's intent to achieve a particular result: that rates under state plans be sufficiently competitive to ensure that Medicaid beneficiaries have at least the same access to care and services as members of the general population have. This, the court said, was a "concrete standard," unlike the "broad and diffuse" requirement that payments be "consistent with efficiency, economy, and quality of care" that the court had previously addressed in *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9th Cir. 2013).

In contrast to those "broad and diffuse" terms, the Ninth Circuit concluded, the Secretary in this case was provided with a clear directive from Congress—Medicaid beneficiaries must have access "at least to the extent" that the general population has it. In order to make that finding, the court reasoned, the Secretary necessarily must perform a comparative study of Medicaid beneficiary access against general population access. Thus, the Secretary's interpretation of Section 30(A)—namely, that he could approve California's rate reduction by simply looking to whether it negatively affected Medicaid beneficiaries' access to care, without considering the beneficiaries' access as compared to that of the general public—violated the statute.

The court then held that the Secretary's approval of California's SPA was arbitrary and capricious because the agency "entirely failed to consider an important aspect of the problem." Again, the court found that the Secretary "approved rates that must ensure equal access to care for members of two groups, yet considered only the level of access provided to ***one of those two groups***."

Implications for Rate Approval Moving Forward

This case has potentially broad implications for significant state-initiated changes in Medicaid reimbursement, at least in the states that make up the Ninth Circuit—Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

Participation rate data is relatively easy to come by. Comparative data is not. Going forward, states will need to produce comparative access data that demonstrates that the rate change will not adversely affect access for the Medicaid population relative to the general population if they wish to have their SPA amendments certified by their federal counterparts. Additionally, the data must show, and the Secretary must conclude, that under the proposed rates, Medicaid beneficiaries will have access to care and services "at least to the extent that" the general population in the geographic area has such access. As a practical matter, this may inhibit the size of rate cuts if the states cannot demonstrate that they are keeping up with other third-party payment levels. At the very least, it provides an avenue for providers whose rates are being affected to litigate the matter with the Secretary.

One question not addressed, though, is what comparative-access data will be sufficient, both as to its form and content. For that, we will await further litigation for enlightenment.

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