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Welcome to the Ledger

Welcome to the fifth issue of Greenberg Traurig's quarterly Behavioral Health Law Ledger, keeping behavioral health and integrated health providers current on behavioral health legal and regulatory developments. Each quarter we highlight recent legal developments, including but not limited to audit risks, significant litigation, enforcement actions, and changes to behavioral-health-related laws or regulations such as health privacy, confidentiality, and/or security issues, consent issues, data-sharing allowances, and other cutting-edge arrangements and issues facing behavioral and integrated health care providers.

CMS Strengthens Behavioral Health Care for Medicare Beneficiaries

Deputy Administrator and Director of Medicare Meena Seshamani has elevated the focus on mental health and substance use disorders for Medicare beneficiaries. The COVID-19 pandemic necessitated an expanded focus on behavioral health needs. Although some of the changes are temporary, many of the approaches Medicare is taking may become permanent.

Director Seshamani states that timely behavioral health care can be "lifechanging" and that behavioral health care has a "central role in keeping people healthy." In May 2022, the Centers for Medicare & Medicaid Services (CMS) released a strategy to address the national mental health crisis; now the agency is reinforcing some key issues in the future:

1. A data-informed approach to remove barriers to care and services for emotional and mental wellbeing. This will be done by evaluating more than $1 trillion in claims that cover more than 63 million Americans to identify those challenges in getting behavioral health care services and improvements in payment, coding, and coverage for such services.

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2. The ability of licensed behavioral health practitioners to provide and be paid for the services they offer. Specifically, CMS is proposing in the CY 2023 Physician Fee Schedule (PFS) to allow licensed professional counselors (LPCs), marriage and family therapists (LMFTs) and other types of behavioral health practitioners to provide behavioral health services under general (rather than direct) supervision.

3. CMS also is proposing to pay for clinical psychologists and licensed clinical social workers to provide integrated behavioral health services as part of the patient's primacy care team.

4. Behavioral health for chronic care pain has not been adequately addressed. The proposed rules include new bundled payments for team management and treatment of chronic pain.

5. Another key issue is ensuring opioid treatment and recovery services to beneficiaries who are homeless or live in rural areas. Accordingly, CMS is proposing to cover such services from mobile units.

Comments on these proposed changes are due in early September 2022, and many likely will be finalized or strengthened in CMS's final rule in the CY 2023 PFS.

CMS Issues Updates on PHE Waivers Flexibilities

On Aug. 18, CMS Principal Deputy Administrator Jonathan Blum sent out a blog post to Medicare providers, suppliers, and manufacturers, encouraging all to create a roadmap for the end of the Public Health Emergency (PHE). In particular, the blog states that "many waivers and broad flexibilities will terminate at the eventual end of the PHE" as they were used for the COVID-19 pandemic, a period of time during which extraordinary circumstances required certain requirements to be waived. The PHE has been extended to Oct. 15, 2022, and the secretary of the U.S. Department of Health and Human Services has stated that he will give 60 days' notice prior to the end of the PHE – and that has not yet occurred, suggesting at least one additional extension is forthcoming. CMS is evaluating all issues, both in its attempt to identify ways to better prepare for these types of emergencies, as well as to identify allowances that ought to be permanent, such as the expansion of telehealth for the diagnosis, evaluation, or treatment of mental health disorders, which expansion was finalized and will continue post-PHE as a result of the Consolidated Appropriations Act of 2021.

However, some flexibilities that were useful at the beginning of the PHE are no longer needed, e.g., long-term-care facility issues relating to resident care that are unrelated to infection control, such as weight loss, depression, and incidence of pressure ulcers. CMS terminated some of these temporary waivers in April 2022 and is now focused on reinstating regulatory requirements aimed at ensuring long-term-care facility residents' physical, mental, and psycho-social needs are met.

CMS has similarly issued its own roadmap for the eventual end of the Medicare PHE waivers and released fact sheets that summarize the current status of Medicare Blanket waivers and flexibilities by provider type as well as flexibilities applicable to the Medicaid community, and will continue to update those resources to ensure stakeholders have access to current, accurate information during this period of change.

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$13 Billion Invested in US Mental Health Initiatives by Bipartisan Safer Communities Act

Although the Bipartisan Safer Communities Act, Public Law No. 117-159, enacted June 25, 2022, (the "Act") primarily was established in response to gun violence in America, it also provides an opportunity to facilitate access to mental health services for those in need of such services. Specifically, in addition to its gun-control and safety-related provisions, the Act presents a new focus on mental health and provides significant funding support for mental health and substance use disorder (SUD) services both at the school and broader community levels.

The Act appropriated $800 million to the Substance Abuse and Mental Health Services Administration (SAMHSA) within the Department of Health and Human Services (HHS)—the federal agency primarily responsible for supporting community- or school-based mental-health treatment and prevention services. SAMHSA will oversee the expansion or creation of several programs funded by the Act, including: (1) $250 million in funding over four years to the Community Mental Health Services Block Grant supporting mental health services for adults and children; (2) $40 million in funding to the National Child Traumatic Stress Network for children who have experienced traumatic events; (3) $240 million over four years in funding to Project Advancing Wellness and Resilience in Education (AWARE), designed to help children and youth in need of mental health services by enabling easier identification of those children, increasing access to treatment, and educating school employees on mental health; (4) $120 million in funding over four years for the Mental Health Awareness Training Program, which provides training for school personnel on how to recognize mental illness and provide initial guidance; (5) $80 million in grants to support pediatric specialists who want to access mental health expertise in their patients' treatment, as well as another $60 million over five years for training in mental health for clinicians who treat children; (5) $150 million in funding for the National Suicide Prevention Lifeline to enable states to implement the new three-digit dialing code, 988, which provides 24/7 confidential support to people in suicidal crisis or emotional distress.

The Act also provides over $2 billion in funding to the Department of Education, designed to create a variety of school safety and crisis prevention/intervention programs, as well as to enhance training to school personnel regarding mental health and to provide school-based mental health professional resources like social workers and psychologists to address the mental health needs of school students.

Another significant funding recipient under the Act is the Medicaid Certified Community Behavioral Health Clinics (CCBHCs) program, which will receive $8 billion in total funding under the Act. CCBHCs are open 24/7 and provide mental health (including substance use disorder treatment) and behavioral health services to everyone, regardless of ability to pay. Originally set up in eight states through a Medicaid demonstration program, CCBHCs will be substantially expanded under the Act. Specifically, beginning in 2024, new planning grants may be awarded by CMS to states that develop proposals, resulting in up to 10 new states being selected to participate in the CCBHC demonstration program every two years.

The Act also requires CMS to provide guidance to states on how to increase access to telehealth care under Medicaid and the State Children's Health Insurance Program (CHIP), including but not limited to strategies related to training and resource provision for both providers and patients, best practices for providing mental health and SUD services via telehealth in schools, and ways to ensure the availability of telehealth resources to Medicaid and CHIP enrollees.

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Though the Act provides billions of dollars of investment into mental health service and access initiatives, there remain several issues largely unaddressed by the Act, such as strengthening the behavioral health workforce, increasing reimbursement to providers, and mental health parity.

Let's Stay in Touch

We want to stay in touch with you. Through this newsletter, we will share tips and updates we have learned in the course of our services to clients, and we will do our best to facilitate an interactive dialogue with behavioral and integrated health providers and the issues they are facing in their businesses. If you know someone who would appreciate receiving GT's Behavioral Health Law Ledger, please forward this email to them, or they can subscribe here.

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