National Litigation Trends

Caroline M. Brown, Esq.
Covington & Burling LLP

NASMHPD/NASDDDS Legal Divisions Meeting

November 13, 2012

Certification of Psychiatric Hospitals

- Pending OIG audits in several states
- It appears that OIG has conducted a nationwide survey of psychiatric hospital certification
- CMS has not yet agreed or disagreed with OIG's position, but will have to decide soon whether to take recommended disallowances on this issue

Certification of Psychiatric Hospitals

- Psychiatric facilities in many states have historically participated in Medicaid based on Joint Commission accreditation alone
- OIG's position is that Joint Commission accreditation was not sufficient until February 2011

Certification of Psychiatric Hospitals

- *OIG's Position*: Until February 2011, Joint Commission did not have "deeming authority" for two special psychiatric hospital conditions of participation related to staffing and recordkeeping. Thus, prior to February 2011, psychiatric hospitals had to undergo a separate survey for those two conditions. If there is no evidence of this separate survey, no Medicaid payments may be made to the facility.

Certification of Psychiatric Hospitals

- States disagree with OIG's position for two reasons:
  1. Regulations permit Medicaid reimbursement for inpatient psychiatric services provided to children under age 21 in non-hospital settings accredited by the Joint Commission
  2. CMS has never informed the States that certification for the two special conditions of participation is a prerequisite to DSH payments

Certification of Psychiatric Hospitals

- Until this dispute is resolved, states should ensure that their psychiatric hospitals meet the two special conditions of participation
- This may now be accomplished through Joint Commission surveys that include evaluation for the two special conditions

D.C. Circuit Ruling on IMD Under 21

- On May 8, 2012, the D.C. Circuit ruled on a longstanding dispute between CMS and two States regarding the scope of coverage for children residing in institutions for mental diseases (IMDs)
- The court upheld CMS's position that the statute prohibits Medicaid from paying for any services other than inpatient psychiatric services provided to children in IMDs.

D.C. Circuit Ruling on IMD Under 21

Practical effect of the ruling:

There is no federal funding for necessary medical services that are not provided in and by the IMD as part of the child's plan of care

D.C. Circuit Ruling on IMD Under 21

Practical effect of the ruling, cont.:

Example 1: Medicaid-eligible child in IMD breaks leg. IMD rushes child to an acute care hospital, which treats child. CMS will not reimburse the hospital claim.

Example 2: Medicaid-eligible child in IMD breaks leg. Facility can treat the fracture itself and there is a provision in the child's plan of care for "all necessary medical services." CMS might reimburse the claim for treating the fracture.

D.C. Circuit Ruling on IMD Under 21

Basis of CMS Position Upheld by Court's Ruling

- **SSA § 1905(a):** "[E]xcept as otherwise provided in paragraph (16), [medical assistance] does not include—. . .

  (B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for mental diseases."
- **Paragraph (16):** "inpatient psychiatric hospital services for individuals under age 21"

D.C. Circuit Ruling on IMD Under 21

History of Dispute

- *Early 2000s*: OIG audited several States' claims for services provided to children under age 21 in IMDs
- Several of the audits resulted in disallowances
- *2006-2009:* Departmental Appeals Board (DAB) as upheld three disallowances resulting from these audits (in New York, Virginia, and Texas), and also upheld a Kansas disallowance not apparently related to the audits
- *2009-2012:* Virginia and Kansas appealed two of these DAB decisions in the U.S. District Court for the District of Columbia, which ruled adversely, then appealed to the D.C. Circuit

D.C. Circuit Ruling on IMD Under 21

Evolution of CMS Position

New York State Department of Health, DAB No. 2066 (February 6, 2007)

- Board held that FFP was only available for services *provided in and by the IMD as part of the plan of care*
- Board acknowledged that "inpatient psychiatric services for children under age 21" could include basic medical services, so long as those services were provided *in and by the IMD as part of the plan of care.*

D.C. Circuit Ruling on IMD Under 21

Evolution of CMS Position

Virginia Department of Medical Assistance Services, DAB No. 2222 (December 31, 2008)

- Virginia argued, based on place of service codes and provider tax identification number matches, that some of the disputed claims were for services provided in and by IMDs;
- Board stated that CMS could reduce disallowance post-decision if it found Virginia's documentation to be adequate
- CMS did not find Virginia's documentation to be adequate

D.C. Circuit Ruling on IMD Under 21

Evolution of CMS Position

Texas Department of Medical Assistance Services, DAB No. 2237 (April 1, 2009)

- Board reversed part of the disallowance: Texas showed that some claims submitted by physicians (and not by the IMD) qualified for FFP
- Board rejected CMS arguments that only the IMD could submit the claim and that the services must be paid for through the facility per diem rate

D.C. Circuit Ruling on IMD Under 21

Evolution of CMS Position

Kansas Health Policy Authority, DAB No. 2255 (June 23, 2009)

- Dispute centered on whether a Kansas State plan provision permitted add-on payments to psychiatric residential treatment facilities (PRTFs) to cover the costs of health care services provided outside the facilities
- CMS argued, and the Board agreed, that the State plan language did not support the State's position

D.C. Circuit Ruling on IMD Under 21

Key Takeaways

1. Absent Congressional amendment of the statute, CMS is unlikely to revisit its interpretation of the statute.
2. The Board decisions indicate CMS will share in the cost of some medical services provided in IMDs, if the services are provided in and by the IMD as part of the plan of care.
3. The most recent Board decisions suggest that "in and by the IMD" does not mean that the payments must be part of the facility per diem rate or that the claim must be made by the facility.

Federal Scrutiny of Residential Facilities

- DOJ and CMS are increasingly scrutinizing States' use of residential facilities to house persons with mental illness
- States often provide mental health services on an outpatient basis to persons residing in such facilities. Federal Medicaid funds are available for such services so long as the facility is not considered to be an IMD.

Federal Scrutiny of Residential Facilities

- The inquiry is two-pronged:
  - DOJ evaluates whether residents in the facilities are sufficiently integrated with the community
  - CMS evaluates whether the facility is an IMD
  - At least one state, NC, has faced negative scrutiny from both agencies

Federal Scrutiny of Residential Facilities

Recent DOJ settlements with States (such as NC, DE, GA) require the States to provide housing in:

- "scattered site" settings "where no more than 20% of the units in any development are occupied by individuals with a disability known to the State"
- where the inhabitants can leave and enter the developments at will
- have tenancy rights, and access to services that are not a condition of tenancy

Federal Scrutiny of Residential Facilities

- CMS has proposed a new definition of "home-and-community-based setting" that will apply to its State Plan HCBS and Community First Choice programs.

Federal Scrutiny of Residential Facilities

- As currently proposed, the new CMS definition contains many of the same requirements and conditions included in the recent DOJ settlements, such as tenancy rights and access to services that are not a condition of tenancy, but does not require “scattered site” settings

Federal Scrutiny of Residential Facilities

- CMS has also proposed that there be a rebuttable presumption that smaller congregate care settings on the grounds of a larger institution are not community based settings.
- Several states have taken this approach to downsizing larger facilities

Federal Scrutiny of Residential Facilities

Takeaways

- States should ensure that small residential facilities are not IMDs
  - e.g., 16 or fewer beds, no medical services onsite
- States should ensure that small residential facilities comply with CMS's definition of an HCBS setting (when finalized)
- States should comply with as many elements of the recent DOJ settlements as is therapeutically feasible

OIG Reviews of Atypical Antipsychotics

- OIG has conducted several reviews in recent years scrutinizing Medicare Part D claims for atypical antipsychotics prescribed to elderly nursing facility residents
- FY 2013 OIG Work Plan includes a review of Medicaid claims for atypical antipsychotics prescribed to children

OIG Reviews of Atypical Antipsychotics

Atypical antipsychotics include:

- Aripiprazole (Abilify)
- Clozapine (Clozaril)
- Olanzapine (Zyprexa)
- Olanzapine/Fluoxetine (Zyprexa/Prozac)
- Paliperidone (Invega)
- Quetiapine (Seroquel)
- Risperidone (Risperdal), and
- Ziprasidone (Geodon).

OIG Reviews of Atypical Antipsychotics

- Concerns motivating OIG scrutiny include increased off-label prescription of these drugs to vulnerable populations and populations (such as foster children) whose care is federally subsidized

OIG Reviews of Atypical Antipsychotics

Takeaway

- States may want to take proactive measures to evaluate whether these drugs are being disproportionately prescribed to their Medicaid-eligible populations, and if so, take measures to ensure that these drugs are prescribed only when therapeutically appropriate