

ELDERS Update

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Medicare Changes

By Paul Sturgul, Sturgul & Long, S.C., Hurley, Wisconsin

These comments are based on information I obtained from attending the Annual Conference of the National Academy of Social Insurance (March 4-5th, 2020) and the Annual Voices of Medicare Conference (April 30, 2020, and May 21, 2020, and the NAELA webinar, "Two Emergency Section 1135 Waivers" (May 28th, 2020).

Because of the COVID-19 pandemic, health care has changed in the U.S. Most of these changes have been aimed at treating the sick and at stopping or slowing the spread of the COVID-19 virus. Congress has passed much legislation due to COVID-19, but most of these bills have dealt with the economic fallout. While there have been some health care provisions, most of the governmental health care responses have come through the Centers for Medicaid & Medicare Services (CMS), part of the Department of Health and Human Services (HHS). These changes have come about through what are known as section 1135 waivers. We think of these waivers as Medicaid waivers because we hear so much about them in Medicaid parlance, typically as attempts by states to restrict Medicaid coverage. But they can apply to Medicare as well. They are technically waivers under section 1135 of the Social Security Act. The waivers relating to COVID-19 are available only after both the President and the Secretary of HHS have declared a State of National Health Emergency.

Medicare-related changes

Medicare-related changes include expansion of telehealth visits to substitute for in-person visits, scope of practice expansions, and flexibility as to where services can be provided. CMS has significantly relaxed these rules, e.g., audio-only telehealth. Without the expansion, most telehealth services require audio and video chat functions. Providers do have the discretion to waive or reduce co-payments for telehealth visits. There is concern about fraud being conducted over the phone and how often telehealth will be promoted over in-person visits.

The oft-repeated myth is that all treatment for COVID-19 will be covered by Medicare with no cost sharing. However, cost sharing can apply. Testing is generally covered without cost sharing, whether it is traditional Medicare or Medicare Advantage. Medicare Advantage plans may waive cost-sharing for COVID-19 treatments but are not forced to do so. Whenever a vaccine is

available, all Part D drug plans must cover it. Medicare Advantage must cover treatment at non-participating facilities, as long as these facilities have participating agreements with Medicare. This removes prior authorization requirements.

The three-day overnight stay to be eligible for Skilled Nursing Facility (SNF) coverage has been waived, regardless of whether the care the beneficiary requires has a direct relationship to COVID-19. Although this appears to apply to all patients discharged to a SNF, the Aspirus Grand View Hospital Discharge Planner, a/k/a Care Planner, in Ironwood, informed me on June 5, 2020 that she “learned the hard way” that Medicare is interpreting this narrowly to mean the three-day overnight stay is waived only if:

1. The patient is being treated for COVID-19; or
2. The patient does not have COVID-19, but the hospital needs to “free up” the bed to treat COVID-19 patients; or
3. The patient no longer has a medical condition requiring hospitalization, but the setting (other than a nursing home) to which the patient would be discharged has one or more individuals who have tested positive for the COVID-19 virus.

This application of the Section 1135 waiver appears to contradict the plain meaning and presents advocacy challenges.

As for the 100-day spell of illness under Medicare Part A, SNF benefits for residents who have exhausted Part A benefits are extended for another 100 days if there is any arguable nexus to the public health emergency.

There are concerns CMS is putting “patients over paperwork” as to which consumer protections and oversight will remain.

What impact will COVID-19 have on the Medicare program? We all know our economy is taking a massive hit. The pressure now is on the Medicare Trust Fund, including the impact of advanced payments to providers to keep them afloat and in business (mostly pursuant to legislation Congress has passed), which has been primarily responsible for increased Medicare expenditures of \$117 billion, or 32% more, between October and April compared to the same period a year ago. Medicare is under tremendous financial stress (which was exacerbated before the pandemic by, e.g., the 2017 tax bill). After the election, there will be an intense debate between those who want to reduce Medicare, and those who want to expand Medicare. Elections matter!

Concerns for Low-Income and Dually Eligible Beneficiaries

About 11 million Americans are enrolled in both Medicare and Medicaid. The dually eligible are among the sickest and poorest Americans, often having serious and complex medical conditions. Research is showing an increased risk of serious illness if those in low-income communities of color are infected with COVID-19. According to the Urban Institute, COVID-19 racial health disparities highlight why we need to address structural racism. We need to address the systemic factors of underlying health conditions and lack of access to affordable health care. In Michigan, 27% of the cases are African-Americans, who make up 14% of the

population;¹ in Wisconsin, 25% of residents who have died from COVID-19 are African-American, even though they make up less than 7% of the State's population; in Illinois, African-Americans represent about 14% of the population, yet are 32% of fatalities from the virus. Aggravating factors affecting people of color include job loss and more exposure at work (delivery workers, cashiers, etc.).

Section 1135 waivers regarding Medicaid, Section 1915(c), and Appendix K

Medicaid is our nation's first line of defense during a National Health Emergency for:

- Eliminating cost-sharing for COVID-19 testing.
- Extending the timeframe for MA applications, applying less restrictive and modifying eligibility requirements regarding assets and income in order to become eligible for MA; accepting self-attestation for assets and income on MA applications, extending eligibility to additional groups.

CMS has also approved additional waivers known as Section 1915(c) dealing with Home and Community Based Services and Appendix K - Guidance to States.

Concerns are as follows:

- The waivers are temporary (in response to the disaster). Section 1915(c) & Appendix K are effective for a year after the end of the State of National Emergency. Section 1135 expires 60 days after the end of the State of Public Health Emergency.
- Discrimination of COVID-19 treatment, including rationing of life-saving care using disability-based distinctions, e.g., the Michigan Guardianship Association seeking emergency orders making it easier for guardians to provide "DNR" orders for individuals for whom they have been assigned, creating a treatment distinction between individuals who have no pre-existing conditions and those who do.
- The block grants for Medicaid continue despite the national health emergency.

Resources

The [COVID-19 Advocate's Guide 2020](#) from the Center for Medicare Advocacy is available for more information.

Legislative Updates

By Todd Tennis, Capitol Services, Inc.

Governor and Legislature Finalize Deal to Fix Current Year Budget Holes

On July 22 and 23, the Michigan Legislature passed a pair of bills to bring the current year budget into balance. House Bill 5265 and Senate Bill 373 were part of an overall agreement between legislative leaders and Gov. Whitmer to close the combined \$2.2 billion gap in the State General Fund and the Michigan School Aid Fund. In addition to the two bills, the

¹ Michigan Department of Health and Human Services, August 3, 2020

agreement encompasses other mechanisms including an Executive Order (EO 2020 – 155) and a Transfer Letter from the Dept. of Treasury. The deal uses a variety of revenues, lapsed funds, work projects, and cuts to put the budget back into balance, at least for the current fiscal year. Work on next year's budget, beginning on October 1, continues.

The bulk of the \$2.2 billion shortfall was made up with the remainder of leftover federal funds from the CARES Act. This money is dedicated to costs associated with COVID-19, but the deal anticipates that the spending being replaced by CARES Act dollars will fit into that criteria. The specifics of the agreement are as follows:

Executive Order 2020 – 155

The Governor made Executive Order cuts to General Fund expenditures totaling \$619 million, but \$475 million of those cuts are backfilled with CARES Act funds.

Transfer Letter

The following restricted funds had money transferred out to the General Fund, totaling \$165.6 million:

- Michigan Craft Beverage Council Fund
- Scrap Tire Regulatory Fund
- Solid Waste Management Fund – Staff Account
- Certificate of Need
- Juror Compensation Fund
- 21st Century Jobs Fund
- Film Promotion Fund
- Sex Offenders Legislation Fund
- Transportation Economic Development Fund
- Convention Facility Development Fund
- Land Reutilization Fund

HB 5265

HB 5265 contained cuts and appropriations that could not be handled through the executive order or transfer process. While it reduced appropriations by \$538 million, about half was negated by federal Medicaid match (FMAP) savings and CARES Act reallocation. Much of the rest was backfilled by the above restricted fund transfers and lapsed money that was not spent. It increased spending on revenue sharing by \$53 million overall, made \$1.3 billion in caseload adjustments, increased SNAP funds by \$600 million, and includes \$53 million for teacher hazard pay.

One of the line items reduced is the Medicaid Home and Community Based Waiver by \$23.2 million. The rationale was that it was based on caseload reductions.

SB 373

SB 373 made adjustments to the School Aid Fund, cutting \$456 million in total, and adding \$712 million in CARES Act funds and \$561 million in general and budget stabilization funds (the state “Rainy Day Fund”). Overall, education received a \$136 million increase after dealing with the \$1.1 billion deficit.

ELDRS Focused on Remote Legal Services during Pandemic

At the beginning of 2020, the Elder Law and Disability Rights Section had a comprehensive legislative agenda. It included issues related to elder abuse, prevention of financial exploitation of vulnerable adults, and reforms to Michigan Medicaid rules that would remove barriers to Medicaid enrollment. However, like just about everything else this year, COVID-19 has thrown a wrench into the best laid plans.

Since the pandemic began to rapidly spread in Michigan, ELDRS, and our colleagues in the Probate & Estate Planning Section, worked to adapt witnessing and notarization requirements during the statewide quarantine and stay-at-home orders issued by Gov. Whitmer. Our initial efforts focused on temporary emergency orders to allow for remote witnessing and notarization. Gov. Whitmer’s first order, EO 2020-41, regarding remote witnessing and notarization of legal documents, was issued in April. That order was slightly revised, extended by EO 2020-74, and extended again in EO-2020-131. That order expired on July 31 but was extended by EO 2020-158 until August 31.

More recently, the two sections have prepared a proposal for permanent changes to Michigan law that would incorporate and expand upon the emergency orders issued by the governor. Led by Howard Collens and Nathan Piwowarski, the group completed a white paper calling for a multi-bill package that would amend the Estates and Protected Individuals Code and the Michigan Law on Notarial Acts to allow for remote witnessing and notarization. First and foremost, the changes would provide a savings clause to protect remote witnessing and remote notarization done under any of the governor’s executive orders. This is very important to forestall future legal questions about the validity of actions done under these EO’s during this confusing time. The proposed legislation would also narrow the scope of remote witnessing to better protect its validity by requiring at least one remote witness to be a Michigan-licensed attorney. The enumerated documents allowed to be created through remote witnessing would also be expanded to bills of sale or assignment and patient advocate designations.

Michigan’s Notarial Acts already allows for remote notarization, but it currently limits it to a handful of online notary companies. The proposed legislation would provide expanded options for remote notarizations by redefining the phrase “in the presence of” to include the use of an “electronic device or process that...allows a notary public and an individual to communicate

with each other simultaneously by sight and sound.” Language is also added to provide for persons who have visual or hearing impairments.

While the two sections have been working on comprehensive updates, another bill dealing with electronic signatures on wills has been moving through the legislature. House Bill 5795, sponsored by Rep. Graham Filler (R-DeWitt), seeks to expand the use of online technologies to draft and validate wills in Michigan. While the goal is similar to that of the joint ELDRS/Probate effort, the two sections have been unable to support the process being created in HB 5795. The sections’ concerns include electronic wills created under HB 5795 would include a variety of media, including text messages and emails, that could be difficult to prove are evidence of a testator’s intent and could be more easily manipulated than a hard copy document.

ELDRS council members spent weeks trying to find a way to amend HB 5795 to allow for the use of electronic wills without inviting frequent litigation over tampering or fraud. Unfortunately, they were unsuccessful. Instead, ELDRS and Probate opted to present the alternative described above. House Bill 5795 passed the House in July, and Rep. Filler hopes to move it through the senate quickly. Regardless of the outcome, we hope to work with Rep. Filler and his colleagues to enact our proposed changes on remote witnessing and notarization as soon as possible.

Bill to Allow Video Cameras in Nursing Homes Moves to Senate Floor

A bill that would allow nursing home residents to place a video camera in their room received new life after nursing homes and other long-term care facilities were placed under extra scrutiny during the early days of the COVID-19 pandemic. Senate Bill 77, which had previously been quietly dying in the Senate Health Policy Committee, was suddenly moved back on the agenda after families demanded an ability to check on the loved ones they could no longer visit. On June 16, the Senate Health Policy reported a substitute version of the bill that had adopted several amendments suggested by the nursing home industry.

After the bill left committee, the bill sponsor (Sen. Jim Runestad, R-Oakland County), convened a work group with representatives from the Health Care Association of Michigan (a nursing home industry association), ELDRS, the Michigan Elder Justice Initiative, and the Michigan Association for Justice. The senior advocacy groups, including ELDRS, listed several concerns with the substitute version of the bill. These include:

- A requirement that each room with a camera be identified with a sign on the door;
- A prohibition against audio recordings;
- A requirement that the nursing home resident, even if incapacitated, must give personal consent to the use of a video device;
- A requirement that only video that was obtained pursuant to the act could be used in a civil trial;

- A requirement that the video be destroyed after two years.

We have identified these and other issues with the current version of the bill to Sen. Runestad. Hopefully these can be addressed before the bill passes the Senate. Senate Bill 77 is expected to be brought up for a vote on the Senate floor in early September.

Back to Basics Webinar Series and ELDRS Exchange

By Maria R. Messina Wiersma, Chalgian & Tripp Law Offices, PLLC, Southfield

ELDRS is working on new webinars, so watch the Listserv for dates and topics.

We are also continuing the ELDRS Exchange by Zoom. Join us for the next ELDRS Exchange networking and roundtable discussion on August 13. Bring your specific case and practice management questions to discuss with your fellow practitioners.

Thursday, August 13, 2020 7 pm-8 pm

Register in advance for this meeting:

https://zoom.us/join/zoom/register/tJMuduqqrDqoHtVsqFB6SCoMwGGtbaAuOv_a

Calendar of Events (subject to change or cancelation)

By Erma S. Yarbrough-Thomas, Neighborhood Legal Services Michigan Elder Law & Advocacy Center, Redford

ELDRS – www.michbar.org/elderlaw

- Sept. 12 - Virtual ELDRS Council Meeting, 10 am, link to be announced
- Oct. 8 - Virtual Fall Conference and Annual Meeting, 12-4 pm, link to be announced

NAELA – www.naela.org

- Aug. 27 - Lunch & Learn: Tax Basics of Special Needs Trusts; Presenter, Vincent J. Russo, JD, LL.M., CELA, CAP, Fellow, webinar from 2 pm – 3 pm EDT
- Sept. 10 - Lunch & Learn: Helping with Your Clients' Non-Legal Needs; Presenter, Jennifer Balmos, Esq., Webinar, 2 pm – 3 pm, EDT
- Sept. 23 - The Anatomy of a Virtual Client Meeting; Presenters, Judith D. Grimaldi, CELA, CAP & Brad Weaber, Webinar 1 pm – 2 pm, EDT

ICLE/SBM – www.icle.org

- Sept. 10 - Drafting an Estate Plan for an Estate Under \$5 Million, Plymouth (Live). Event originally scheduled for March 19, 2020. Limited to 27 participants.