Buchanan Ingersoll & Rooney PC

Key Reimbursement Issues and Legislative Developments for Addiction Treatment Providers

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Agenda

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- The Financial Realities of the Opioid Crisis
- Whether to Accept Federal Health Program Patients
- Whether to Join Commercial Health Plan Networks
- Negotiating Commercial Health Plan Agreements
- Out-of-Network Issues
- Getting Paid
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- Responding to Refund Demands
- Two New Laws

Speaker Introduction – Sal Rotella

- Representing health care providers exclusively for the past 20 years
- Former federal prosecutor, chief compliance officer for state mental health agency, and attorney at national law firms in DC and Philadelphia
- Represent health systems, hospitals, large physician groups, ambulatory surgery centers, and residential and community-based behavioral health providers
- Negotiate managed care contracts, collect unpaid and underpaid reimbursement claims, respond to refund demands from payors, and provide regulatory advice
- Represent providers across the country offering all types of addiction recovery services – drug and alcohol, detox, residential, partial hospitalization, intensive outpatient, traditional outpatient, and sober living

The Financial Realities of the Opioid Crisis

- High demand for addiction recovery services
- Plenty of patients with commercial insurance – mainstream epidemic, significant patient population under 26 years of age (covered by family plan)
- Investment opportunity – influx of venture capital
- Financial strain on insurers

Whether to Accept Federal Health Program Patients

- Anti-Kickback Statute, Stark Law, Civil Monetary Penalties, False Claims Act
- Oversight by HHS OIG, and State Attorneys General and MFCUs
- Contracting with Medicare Advantage plans and Medicaid MCOs
  - The participation agreement makes a difference, not identical to treating members of fee-for-service programs
  - Managed care is within the scope of government oversight
  - Know terms of plan's contract with CMS/single state agency

Whether to Join Commercial Health Plan Networks

Old calculus

- Go in-network, get paid less, try make it up in volume
- Stay out-of-network, get paid more, often make more money doing fewer/higher paying cases than by joining network

New calculus

- Go in-network
  - Will payor extend an offer? Is there an “any willing provider law” that applies?
  - Low network rates might not be enough, even with higher member volume
  - Unintended consequences – e.g., the Blue Card program
- Stay out-of-network
  - Payors are slow to pay
  - Payors pay less – e.g., reference-based payment (e.g., 110% of Medicare) instead of 80% of UCR (e.g., estimate of average rate paid for same services in same geographic area)
  - Payors pay consumers instead of providers, regardless of valid patient assignment

Negotiating Commercial Health Plan Agreements

Extent to which a provider can negotiate contract terms and rates depends on various factors, but always worth trying to address key issues

Sample key provisions:

- Plan's right to recoup by offset
- Prompt payment period language (applicability, or not, of state prompt payment laws)
- Plan's right to unilaterally amend agreement and/or incorporated provider manual
- Applicability of contract rates at new facilities
- Plan's right to create preferred tiers of contracted providers and/or to direct plan members to certain network providers over others

Out-of-Network Issues (Part I)

Facility flags

- Statutory and contractual prompt payment periods still apply
- Note privacy issues for addiction recovery providers
  - For example, the Pennsylvania DHS' Department of Drug and Alcohol Programs' interpretation of 4 Pa. Code 255.5
  - Limits medical record information a provider can furnish to a health insurance plan regarding substance abuse treatment, even with patient consent and for purposes of getting paid

Repricing entities

- Like MultiPlan, enter into contracts with both payors and OON providers
- Some states will allow provider to enforce its contract with MultiPlan and payor's separate contract with Multiplan as one single agreement

Out-of-Network Issues (Part II)

Patient cost share payments

- No discounts to OON members of Medicare Advantage of Medicaid MCO plans
- Some states also prohibit discounting patient cost share for member of an OON commercial plan
- In remaining states, either charge full OON level cost share or notify payors that you are not doing so

Patient balance billing

- Some payors say they "require" an OON provider to collect from patient the difference between billed charges and allowable amount paid by the insurer to the provider
- No court has, to our knowledge, ever conditioned provider's right to insurance payment on balance billing patient

Getting Paid (Part I)

- If you don't make a record of a service, it didn't happen
- More unusual an addiction treatment modality, more important that it be
  - Described in current treatment plan
  - Documented by clinician

Getting Paid (Part II)

- Filling out claim forms – issue of behavioral health claims misrouted as medical claims (due to type of rendering clinician?) and then erroneously denied
- Bill for level of service actually provided – insurers may well deem billing for "only" PHP when providing residential services, for example, as giving patient an improper inducement to come to your facility and as fraud

Appealing Payment Denials

Mechanism in place to challenge all questionable denials

- Chance to overturn denial and get paid
- Only way to reserve right to bring legal challenge (prove “exhaustion of administrative remedies”)

Checklist for denial appeals

- Make sure appeal is timely and sent to correct address
- Make sure appeal responds to actual denial reason
- Pursue all available levels of appeal

Responding to Refund Demands (Part I)

Not all failures to abide by contract and manual provisions result in an obligation to refund payment.

False Claims Act applies to all federal healthcare programs:

- Potential overpayments from Medicare Advantage plans and Medicaid MCOs, as well as from fee-for-service programs
- Even if initial overpayment resulted from innocent mistake, failure to report and refund identified overpayment could be violation of FCA
- Treble damages and up to over $20,000 penalty per false claim

Responding to Refund Demands (Part II)

Consider alternative ways of documenting that services were provided if standard records are insufficient.

Note limitations on plans' legal rights of offset

- For example, 2017 decision by federal district court in Minnesota – *Peterson v. UnitedHealth Group Inc. et al.* (Case No. 14-CV-2010) and *Riverview Health Institute v. UnitedHealth Group Inc. et al.* (Case No. 15-CV-3064)
- *Peterson* rejected cross plan offsetting, which is when a TPA withholds current payment owed to provider for services rendered to member of TPA client/self-funded employer A's plan so as to recoup amount of prior alleged overpayment to same provider for services rendered to member of TPA client/self-funded employer B's plan

Two New Laws (Part I)

On October 24, 2018, President signed the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act a/k/a the "SUPPORT Act"

- Ant-kickback provision
  - Prohibits the solicitation or payment of remuneration in exchange for referring a patient or patronage to a recovery home, clinical treatment facility or clinical laboratory, regardless of whether the benefits will be paid by federal, state or private payors
  - Violations of the new kickback prohibitions punishable by criminal fines of up to $200,000 per occurrence, up to 10 years in prison, or both
  - Safe harbors are similar to federal AKS, but not identical
- No rules promulgated yet
  - SUPPORT Act prohibits "referring a patient" in exchange for remuneration
  - Does not extend to "arranging for referrals," like federal AKS
  - Unclear if law will preclude common practice of addiction recovery facility paying productivity bonuses to representatives who market to commercial insurers
- Other notable provisions
  - Loosens Medicare restrictions on telehealth services designed to treat substance abuse
  - New grants to establish or operate 10 "comprehensive opioid recovery centers" across the country (focusing on drug treatments (e.g., methadone), counseling, residential rehabilitation and job-placement assistance)

Two New Laws (Part II)

On August 30, 2018, New Jersey Out-of-Network Consumer Protection, Transparency, Cost Containment and Accountability Act (the "OON Law") went into effect. *See* N.J.S.A § 26:2SS-1 *et seq.*

- The OON Law applies to all fully insured commercial plans and to those of self-funded employer plans elected to be subject to certain requirements and protections of the law
- If provider and plan cannot agree on amount for plan to pay for out-of-network services, they must then engage in a baseball-style binding arbitration
  - Arbitrator ultimately will order the plan to pay – and the provider to accept – either the amount put forward by the plan or the amount put forward by the provider
- OON Law also prohibits an OON provider from discounting in whole or in part the patient cost share owed by a health plan member for a covered service (N.J.S.A. 26:2SS-15)

Thank you

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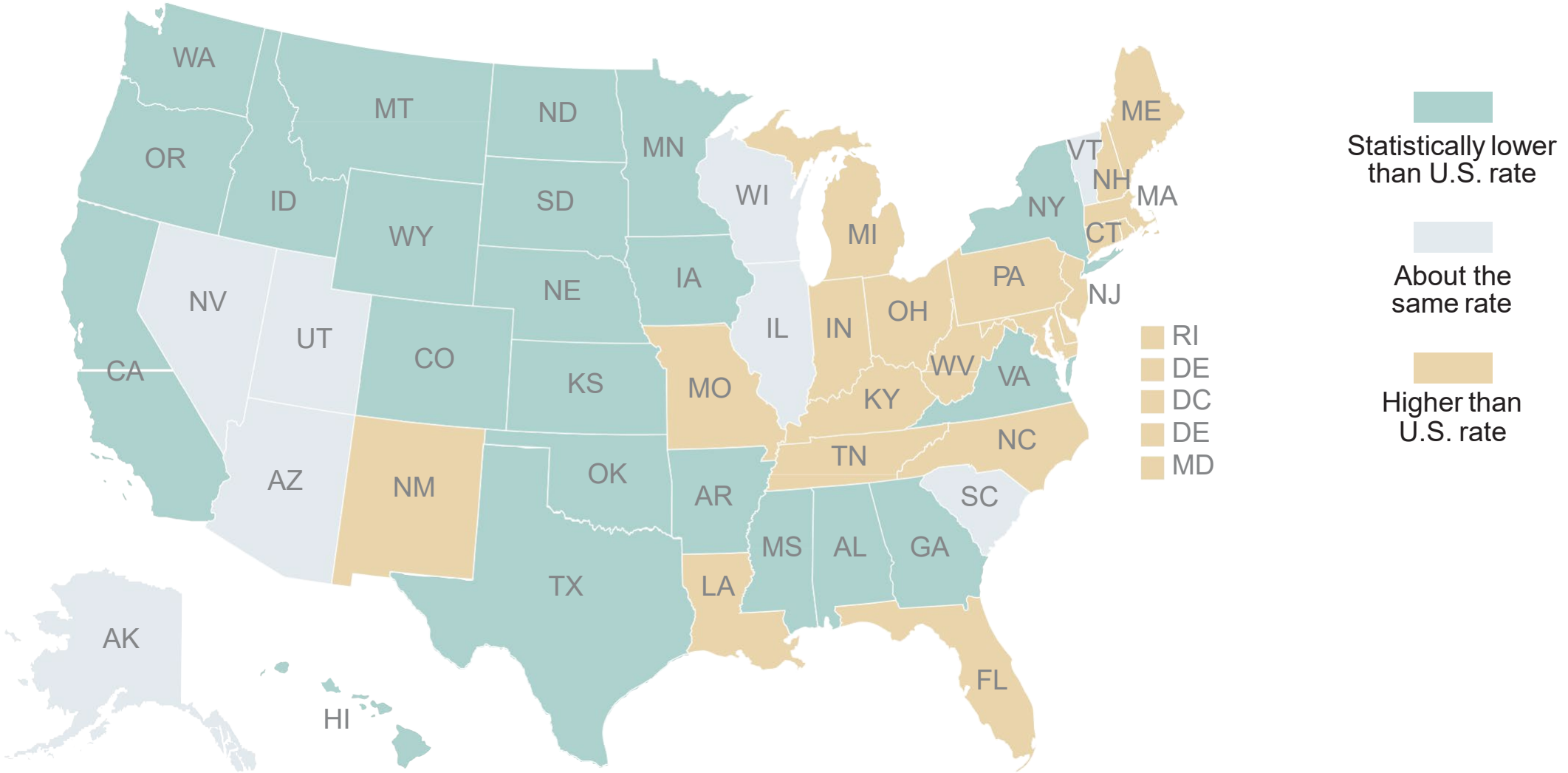
Opioid Crisis

The national rate was 21.7 deaths per 100,000 population in 2017



SUPPORT Act

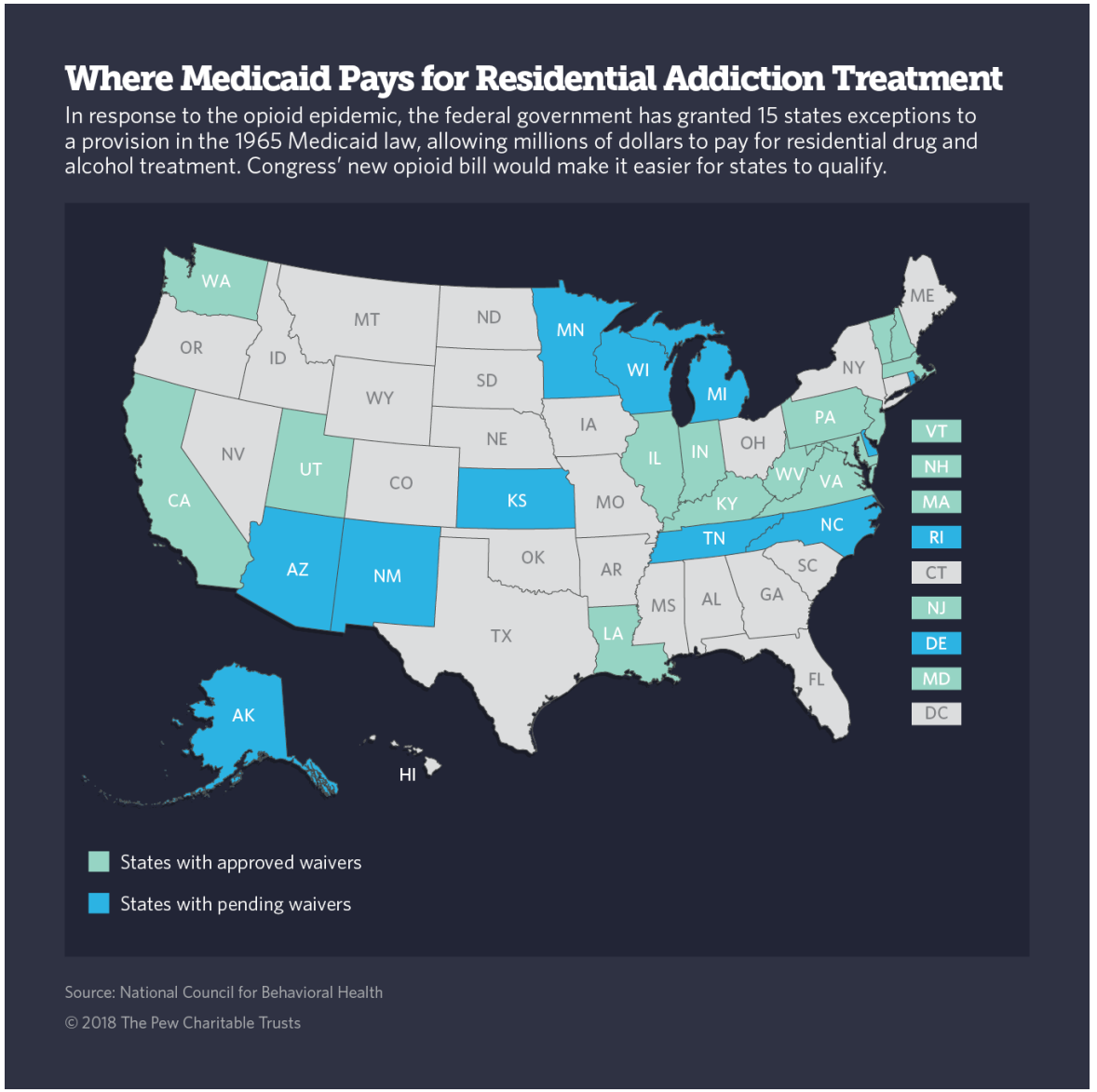
A package of bills addressing various pieces of the opioid crisis was signed into law in October of 2018

- Included in final package:
  - ☑IMD Exclusion partially repealed
  - ☑Alternatives to opioids
  - ☑Prescription drug monitoring
  - ☑Access to quality sober living
  - ☑Report on investigations into mental health parity of SUD benefits
- Not Included:
  - ☐42 CFR Part 2 reform or repeal

IMD Exclusion

The Institutions of Mental Disease or IMD Exclusion is a decades-old prohibition on the use of federal Medicaid funds to pay for care provided to most patients in mental health and substance use disorder residential treatment facilities larger than 16 beds.

CMS has granted waivers to a number of states in recent years but the SUPPORT Act goes further allowing 30 days inpatient SUD treatment.



Alternatives to Opioids

Identifying and incentivizing pain management alternatives to opioids will be critical to addressing the crisis.

The SUPPORT Act:

- Ensures Medicare coverage of methadone for opioid use disorder
- Expands the ability to prescribe buprenorphine

Source: Pew Charitable Trusts

Prescription Drug Monitoring

- Increased transparency into gifts given to physicians assistants and nurse practitioners who prescribe opioids
- States will have grants to create and enhance PDMPs to monitor prescribing of opioids and flag suspicious prescribing
- E-prescribing for controlled substances

Access to Quality Sober Living

- HHS will issue best practices for entities operating recovery housing facilities
- HHS will also identify or facilitate the development of common indicators or fraud in sober homes
- CMS will issue best practices to help states design demonstration projects to improve care transitions for those being released from custody – a population more than twice as likely to die from overdose

42 CFR Part 2

- **42 CFR Part 2** applies to all records relating to the identity, diagnosis, prognosis or treatment of any patient in a substance abuse program requiring consent beyond HIPAA's requirements for use and disclosure
- Critics say it disrupts continuum of care and lobbied for reform to be included in the opioid package
- Proponents say it is necessary to protect patients' privacy because of stigma of addiction
- Despite the efforts several large coalitions boasting hundreds of stakeholders – including major trade associations, health IT companies and providers – no reform was included in the final SUPPORT Act

Two Part 2 Bills failed to make final SUPPORT Act

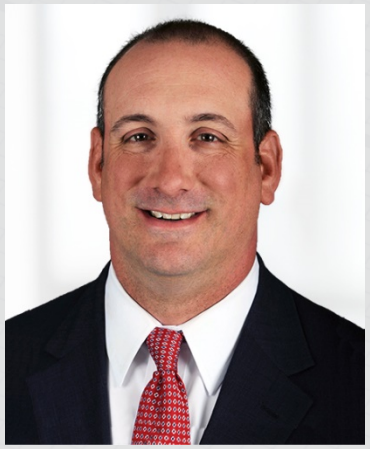
HR 6082

- Overdose Prevention and Patient Safety Act
- Would have permitted substance use disorder (SUD) records to be shared among covered entities and Part 2 programs in accordance with HIPAA for the purposes of treatment, payment and healthcare operations.

S 1850

- Protecting Jessica Grubb's Legacy Act
- Would have amended Public Health Service Act to protect confidentiality of SUD patient records and align with HIPAA
- Named for young woman who died of an overdose after being prescribed oxycodone despite being in addiction recovery

Thank you



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