Medicare Advantage and Physician Nondiscrimination Fact Sheet

Medicare, Title XVIII of the Social Security Act, provides health care benefits to 58 million Americans (as of April 2017).[1] Of those beneficiaries, more than 20 million have signed up for Medicare Advantage (MA) or other health plans, which provide Medicare and additional benefits.[2]

Doctors of optometry have served as physicians for Medicare beneficiaries for three decades.[3] In 2012, and more since, approximately 36,000 doctors of optometry provided 13 million medically necessary services to 6 million beneficiaries. Doctors of optometry and other physicians are paid for the relative value of medical services based primarily on the resources required to provide the service, with geographic adjustments and other incentives related to quality reporting and use of electronic health records.

Broadly, Medicare accepts any willing provider to see patients, guarantees beneficiaries the right to obtain covered medical care from any enrolled physician, allows physicians to provide whatever services they are licensed by their state to perform, and reimburses those doctors equal pay for equal work. All physicians (including doctors of optometry and ophthalmologists) are paid the same basic rate per service under the physician fee schedule and Medicare physician payment policies, regardless of licensure or where the physician went to school.

Medicare beneficiaries have the option to obtain their benefits through certain commercial health insurance companies under the Medicare Advantage program (once known as Medicare + Choice).[4] Rather than accept any willing provider and pay equal amounts for equal service, Medicare Advantage plans do have some flexibility to contract with doctors to pay different rates than the Medicare fee schedule. However, Congress did not grant MA plans unlimited power, which would undermine the rights of Medicare beneficiaries.

Congress prohibits discrimination by an MA plan against doctors of optometry acting within their scope of state licensure. This is a protection for patients, helping to ensure that a Medicare beneficiary may get the health care they want from the doctor of their choice even when they select an MA plan with a limited network. Under the statute, Medicare Advantage plans may not reimburse doctors of optometry differently, based solely on their license, from other health care providers who are licensed to provide the same service.

> A Medicare+Choice organization shall not discriminate with respect to participation, reimbursement, or indemnification as to any provider who is acting within the scope of the provider's license or certification under applicable State law, solely on the basis of such license or certification. This paragraph shall not be construed to prohibit a plan from including providers only to the extent necessary to meet the needs of the plan's enrollees or from establishing any measure designed to maintain quality and control costs

consistent with the responsibilities of the plan.[5]

The corresponding regulation, 42 CFR 422.205,[6] allows Medicare Advantage plans the "use of different reimbursement amounts for different specialties or for different practitioners in the same specialty." However, the wording of the regulation, particularly subsection (b)(2), cannot be read to contradict the statute, which is controlling.

> (a) General rule. Consistent with the requirements of this section, the policies and procedures concerning provider selection and credentialing established under §422.204, and with the requirement under §422.100(c) that all Medicare-covered services be available to MA plan enrollees, an MA organization may select the practitioners that participate in its plan provider networks. In selecting these practitioners, an MA organization may not discriminate, in terms of participation, reimbursement, or indemnification, against any health care professional who is acting within the scope of his or her license or certification under State law, solely on the basis of the license or certification. If an MA organization declines to include a given provider or group of providers in its network, it must furnish written notice to the effected provider(s) of the reason for the decision.
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> (b) Construction. The prohibition in paragraph (a)(1) of this section does not preclude any of the following by the MA organization:
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> 1. Refusal to grant participation to health care professionals in excess of the number necessary to meet the needs of the plan's enrollees (except for MA private-fee-for-service plans, which may not refuse to contract on this basis).
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> 2. Use of different reimbursement amounts for different specialties or for different practitioners in the same specialty.
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> 3. Implementation of measures designed to maintain quality and control costs consistent with its responsibilities.

The AOA HPI believes the only reading of 422.205(b)(2) in light of the actual statutory language in 1852(b), which plainly forbids discrimination in reimbursement based on licensure, is that different specialties within the same license may be paid differently. In other words, Section 422.205 would allow Medicare Advantage plans to pay psychiatrists (MDs) differently than obstetricians (MDs), and to pay some podiatrists (DPMs) differently than other podiatrists (DPMs), but the law continues to prohibit paying doctors of optometry (ODs) differently than podiatrists (DPMs), psychiatrists (MDs), gynecologists (MDs), or ophthalmologists (MDs) for the same service solely because of the degree held by the provider based on where she or he went to school Health plans, including Medicare Advantage plans, have long tried to pay doctors of optometry less than other physicians for the same service. To date, the regional offices of the Centers for Medicare & Medicaid Services (CMS), which oversee the MA plans, have failed to enforce Section 1852(b) of the SSA. Some MA plans and CMS regional offices have apparently failed to understand the limited exceptions provided by the regulation, which does not carry the weight of statute. In fact, some MA plans and regulators appear to give the regulation a broader meaning that contradicts the wording of the statute, an interpretation that renders the regulation invalid.

CMS regional offices have started to increase oversight of MA plans, realizing they can improve the beneficiary experience and return funds to the Medicare trust fund by penalizing Medicare Advantage plans that break the rules.[7] It is long overdue for the CMS regional offices to stop ignoring an additional source of income as well the opportunity to improve patient choice and access with the MA plans, by enforcing the statutory physician nondiscrimination requirement.

[1] https://www.ems.gov/Research-Statistics-Data-and-Systerns/Statistics-Trends-and-Reports/Dashboard/Medicare-Enrollment/Enrollment%20Dashboard.html
[2] https://www.ems.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Dashboard/Medicare-Enrollment/Enrollment%20Dashboard.html
[3] Social Security Act Section 1861(r)
[4] https://www.ems.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareProgramRatesStats/Downloads/MedicareMedicaidSummaries2016.pdf
[5] https://www.ssa.gov/OP_Home/ssact/title18/1852.htm
[6] http://www.ecfr.gov/cgi-bin/text-
[7] https://www.cms.gov/Medicare/Compliance-and-Audits/Part-C-and-Part-D-Compliance-and-Audits/Downloads/2015 CandDProgramAuditandEnforcement-Report.pdf