

## HOSPITALS SUE CMS OVER SITE-NEUTRAL CUTS TO CLINIC VISITS SET FOR 2019

The American Hospital Association (AHA) and Association of American Medical Colleges (AAMC) sued the Centers for Medicare & Medicaid Services (CMS) over deep reimbursement cuts for clinic visits at hospital off-campus facilities that were included in a site-neutral policy in the final 2019 hospital outpatient payment rule. The lawsuit was expected as hospitals had stated before the policy was finalized that it ran against congressional intent and immediately threatened a lawsuit when the rule was released in November.

"This Court should reject CMS's attempts to replace Congress's unequivocal directives with the agency's own policy preferences. CMS may not contravene clear congressional mandates merely because the agency wishes to make cuts to Medicare spending," the lawsuit says.

The hospitals want the court to declare the policy is beyond CMS' authority and unenforceable; prevent CMS from implementing and enforcing the policy and require CMS "to conform its payment policies and conduct to the requirements of the Medicare Act," among other requests.

The final 2019 hospital outpatient rule establishes a new payment rate for off-campus hospital outpatient clinic visits that is equivalent to what those visits would be paid under Medicare's physician fee schedule. The hospitals note that CMS plans to phase in the pay reductions over a two-year period so that hospitals would see a \$380 million pay cut in 2019 and a \$760 million pay cut in 2020.

The administration touts CMS' policies to establish site-neutral payment for certain Medicare services in the HHS report on health care choice and competition. The report recommends Congress allow CMS to move even further in that direction.

AHA and AAMC say the policy in the final rule goes beyond CMS' authority because it violates the Medicare statute's budget neutrality mandate. The lawsuit says that changes to payments that target only specific items or services must be budget neutral. "[I]n an

unprecedented assertion of the agency's authority, the Final Rule purports to do precisely what Congress has expressly prohibited: CMS seeks to reduce total payments for covered hospital outpatient services for calendar year 2019 by hundreds of millions of dollars by targeting a select group of services for non-budget neutral payment adjustments," the lawsuit alleges.

The hospitals say CMS relied on authority meant to control unnecessary increases in the volume of outpatient department services, but that statutory authority does not extend to setting payment rates.

"In any event, CMS has never made an adequate factual finding — as it must to lawfully invoke whatever authority it has under Subsection (t)(2)(F)—that any increase in the volume of covered OPD services is 'unnecessary.' Instead, the agency merely asserted in circular fashion that the increases in volume of covered outpatient services must have been 'unnecessary' simply because they occurred," the lawsuit says.

The hospitals also say the policy violates Congress' intent to treat hospital off campus departments that were excepted from site-neutral pay cuts in the Bipartisan Budget Act of 2015 differently than those subject to the law's site-neutral policy. The Bipartisan Budget Act of 2015 lowered the pay for new hospital off-campus facilities to the level paid to physicians. However, that bill exempted off-campus facilities that were already open and paid the higher hospital rates. A later exemption also applied to hospitals that were mid-build when the Bipartisan Budget Act of 2015 passed.

"By decreeing that excepted and non-excepted entities will now be subject to the same payment rate, CMS has effectively abolished that statutory separateness, performing an end-run around the congressional mandate. But the agency lacks authority to nullify the Medicare statute in such manner," the lawsuit says. ■