

Behavioral Health Law Ledger | December 2023



Welcome to the Ledger

The December 2023 issue of Greenberg Traurig’s quarterly Behavioral Health Law Ledger discusses the expansion of Medicare reimbursement to cover Behavioral Health Intensive Outpatient services and Colorado’s new licensing regulations for behavioral health entities.

CMS Expands Medicare Reimbursement to Cover Behavioral Health Intensive Outpatient Program Services

On Nov. 22, 2023, the Centers for Medicare and Medicaid Services (CMS) published corrections and updates to the **CY 2024 Hospital Outpatient Prospective Payment System (OPPS) and Ambulatory Surgical Center (ASC) Final Rule** (the “Final Rule”) with comment period which updates Medicare reimbursement to cover Behavioral Health Intensive Outpatient (IOP) services in hospital outpatient departments, Community Mental Health Centers (CMHCs), Federally Qualified Health Centers (FQHCs), Rural Health Clinics (RHCs), and Opioid Treatment Programs (OTPs) for the treatment of opioid use disorder (OUD). The Final Rule addresses physician certification requirements, coding and billing guidance, payment rates, and the scope of benefits under the expanded IOP benefit. Comments on the Final Rule are due by Jan. 1, 2024.

For context, Medicare previously only covered inpatient psychiatric admissions, partial hospitalization programs (PHP), and outpatient therapies for behavioral health conditions. However, there was a coverage gap for patients that required less intense services than inpatient-level care that a full or partial hospitalization would provide but more intense services than outpatient therapy could provide. This Final Rule seeks to close this coverage gap and increase accessibility to behavioral health IOP services. The Final Rule aligns with the **CMS Behavioral Health Strategy** to focus on substance use disorders treatment, pain treatment and management, and improving mental health care services available to Medicare beneficiaries.

The Final Rule defines IOP services as “a distinct and intensive ambulatory treatment program that offers less than 24-hour daily care other than in an individual's home or in an inpatient or residential setting and furnishes the services as described in [42 C.F.R.] § 410.44.” Importantly, a patient may receive both IOP and inpatient hospitalization services.

Some key requirements of the expanded IOP benefits include a bimonthly physician certification and plan of care for beneficiaries availing themselves of IOP services. However, CMS did not expand the physician certification for IOP services to enable psychiatric nurse practitioners or other mental health professionals to certify patients for IOP services. CMS also established service codes to recognize activities related to care coordination and discharge planning and a weekly payment adjustment for OTPs furnishing OUD services. Finally, CMS stated that it will release two IOP Ambulatory Payment Classifications (APCs) for providers: one for providers rendering three or fewer services a day and one for providers rendering four or more services a day.

Colorado’s Behavioral Health Administration (BHA) Releases New Licensing Regulations for Behavioral Health Entities

On Nov. 3, 2023, the Colorado State Board of Human Services adopted the updated [BHA Provider Rules](#), which replace the existing Substance Use Disorder (SUD) license, Involuntary Treatment and 27-65 Facility license, and Community Mental Health Center (CMHC) license processes. These regulations will take effect Jan. 1, 2024, and replace the [Current BHA Provider Rules](#), located at 2 CCR 502-1.

The Behavioral Health Entity (BHE) structure allows a provider to hold a single behavioral health license with different endorsements. This update will improve flexibility and make it easier for providers to add services and locations to meet their clients’ needs.

Providers that are required to obtain BHE licensure are SUD license holders, providers who offer education and treatment services to individuals in the criminal justice system, providers with 10 or more Full Time Equivalent behavioral health professionals that are employed or contracted, CMHC license holders, providers who currently hold BHE licenses from the Colorado Department of Public Health and Environment, and providers who have previously been required to obtain any of the above license types.

The new BHE rules do not apply to Residential Child Care Facilities (RCCFs), general or psychiatric hospitals, nursing homes, Assisted Living Residences (ALRs) that provide overnight mental health services, and behavioral health providers who do not meet the criteria above.

The BHE rules also implemented a framework for [Behavioral Health Safety Net Providers](#) in which providers may apply to serve priority populations, including uninsured individuals and those who present acute or chronic behavioral health conditions, under the No Refusal Requirements located at C.R.S. § 27-50-301(4) in exchange for eligibility for enhanced reimbursement rates for behavioral health services. The application opened Nov. 15, 2023. There is no application fee.

Providers who are not currently licensed or designated with BHA must submit a [Letter of Intent](#) and register as a “New Provider” in LADDERS, Colorado’s online substance use disorder licensing and mental health designation application system and service directory. Providers who are currently licensed or designated but whose license expires on or before Dec. 31, 2023, may renew their license under the Current BHA Provider Rules located at 2 CCR 502-1 for 12 months. Providers who are currently licensed or designated and whose license expires between Jan. 1, 2024, and Dec. 31, 2024, will remain subject to the

Current BHA Provider Rules until the expiration of their license, at which point they must submit a Letter of Intent and register as a “New Provider” in LADDERS. Providers who are currently licensed or designated and whose license expires on or after Jan. 1, 2025, will remain subject to the Current BHA Provider Rules until the expiration of their license, at which point they must submit a Letter of Intent and register as a “New Provider” in LADDERS at least 60 days prior to their current license’s expiration date. Entities interested in the transition to the new regulations may find more information on BHA’s [Agency Transition Guide](#).

Let’s Stay in Touch

GT’s Behavioral Health Law Ledger keeps behavioral health and integrated health providers current on behavioral health legal and regulatory developments. Each quarter we highlight recent legal developments, including but not limited to audit risks, significant litigation, enforcement actions, and changes to behavioral-health-related laws or regulations such as health privacy, confidentiality, and/or security issues, consent issues, data-sharing allowances, and other cutting-edge arrangements and issues facing behavioral and integrated health care providers.

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