

## Judge Strikes Down Site-Neutral Payments Rule

On September 17, 2019, U.S. District Court Judge Rosemary Collyer ruled in favor of the *American Hospital Association* (AHA) and other related healthcare organizations, and found that the *Centers for Medicare & Medicaid Services* (CMS) exceeded its statutory authority when it reduced payments for hospital outpatient services provided in off-campus provider-based departments grandfathered under the *Bipartisan Budget Act of 2015* (i.e., the site-neutral payments system).<sup>1</sup> Under the site-neutral payment system, which began in 2019, CMS capped the payments to hospitals for outpatient clinic visits at the same rate as physician office clinic visits.<sup>2</sup> CMS argued that the payment structure changes would lower copays for Medicare beneficiaries (decreasing the average copayment from \$23 per visit to \$9 by 2020 and saving \$150 million per year in copays).<sup>3</sup> Further, the move was projected to cut \$300 million in Medicare spending this year.<sup>4</sup> This new model was part of CMS's larger push to "help lay the foundation for a patient-driven healthcare system," and reorient the healthcare industry to be less industry-centric and more affordable for patients.<sup>5</sup> Prior to the 2019 change, CMS would pay more for the same type of clinic visit in the hospital outpatient setting than in the physician office setting.<sup>6</sup> The rule would have also been a big win for the *ambulatory surgical center* (ASC) industry, as it would have ensured that ASCs and *hospital outpatient departments* (HOPDs) receive comparable payments.<sup>7</sup>

Following the proposal by CMS, the AHA immediately pushed back against the rule change in a letter to the agency, stating that the proposed rule "run[s] afoul of the law and rel[ies] on the most cursory of analyses and policy rationales. Taken together, they would have a chilling effect on beneficiary access to care and new technologies, while also dramatically increasing regulatory burden."<sup>8</sup>

In December 2018, the AHA, joined by the *Association of American Medical Colleges* (AAMC) and several member hospitals, filed this lawsuit against the *U.S. Department of Health and Human Services* (HHS) over the policy to phase in reductions in payments for hospital outpatient clinic visit services furnished in off-campus provider-based departments.<sup>9</sup> The court ultimately sided with the AHA and AAMC, holding that:

*"CMS believes it is paying millions of taxpayer dollars for patient services in hospital outpatient departments that could be provided at less expense in physician offices. CMS may be correct. But CMS was not authorized to ignore the statutory process for setting payment rates in the Outpatient Prospective Payment System and to lower payments only for certain services performed by certain providers."*<sup>10</sup>

Following the court's ruling, the associations issued a joint statement:

*"We are pleased with the District Court's decision that the Department of Health and Human Services exceeded its statutory authority when it reduced payments for hospital outpatient services provided in grandfathered off-campus provider-based departments."*

*The ruling, which will allow hospitals to maintain access to important services for patients and communities, affirmed that the cuts directly undercut the clear intent of Congress to protect hospital outpatient departments because of the many real and crucial differences between them and other sites of care. Now that the court has ruled, it is up to the agency to put forth remedies for impacted hospitals and the patients they serve."*<sup>11</sup>

CMS still has two options moving forward: to start over or to appeal. If CMS were to start over, it would not likely come until spring 2020, when the rulemaking cycle starts; it would then take another year for the agency to finalize it.<sup>12</sup> Alternatively, CMS may pursue an appeal of the decision based on the "exhaustion" argument and claim that the hospitals did not have to exhaust their administrative remedies.<sup>13</sup> The court did not order CMS to pay the challengers for payments that were withheld (as the court vacated the rule and left CMS to determine remedies<sup>14</sup>), but ordered the parties to submit a joint status report by October 1, 2019, to determine if additional briefing on remedies is required.<sup>15</sup>

1 "AMERICAN HOSPITAL ASSOCIATION, et al., Plaintiffs, v. ALEX M. AZAR II, Sec'y of the Dep't of Health & Human Servs., Defendant., No. CV 18-2841 (RMC), 2019 WL 4451984, at \*1 (D.D.C. Sept. 17, 2019).

2 "CMS Empowers Patients and Ensures Site-Neutral Payment in Proposed Rule" Centers for Medicare & Medicaid Services, July 25, 2018, <https://www.cms.gov/Outreach-and-Education/Outreach/FFSProvPartProg/Provider-Partnership-Email-Archive-Items/2018-07-25-eNews-SE.html> (Accessed 9/20/19).

3 *Ibid.*

4 "Judge Tosses HHS Scheme Lowering Hospital Outpatient Payments" By Lydia Wheeler and Tony Pugh, Bloomberg Law, September 17, 2019, <https://news.bloomberglaw.com/health-law-and-business/judge-tosses-hhs-scheme-lowering-hospital-outpatient-payments> (Accessed 9/20/19).

5 CMS, July 25, 2018.

6 *Ibid.*

7 "42 CFR Parts 416 and 419" Department of Health and Human Services, July 31, 2018, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-15958.pdf> (Accessed 9/20/19).

8 "Re: CMS-1695-P, Proposed Changes to Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Requests for Information on Promoting Interoperability and Electronic Health Care Information, Price Transparency, and Leveraging Authority for the Competitive Acquisition Program for Part B Drugs and Biologicals for a Potential CMS Innovation Center Model; Proposed Rule (Vol. 83, No. 147), July 31, 2018." By Seema Verma, American Hospital Association, September 24, 2018,

<https://www.aha.org/system/files/2018-09/180924-comment-letter-cms-outpatient-pps-asc-proposed-rule-cy2019.pdf> (Accessed 9/20/19).

9 "AHA, AAMC File Lawsuit Over Outpatient Payment Policy That Threatens Patient Access to Care" American Hospital Association, December 4, 2018, <https://www.aha.org/press-releases/2018-12-04-aha-aamc-file-lawsuit-over-outpatient-payment-policy-threatens-patient> (Accessed 9/20/19).

10 Sec'y of the Dep't of Health & Human Servs., (D.D.C. Sept. 17, 2019).

11 "JOINT STATEMENT ON OUTPATIENT PAYMENT POLICY COURT DECISION FROM AMERICAN HOSPITAL ASSOCIATION & ASSOCIATION OF AMERICAN MEDICAL COLLEGES" American Hospital Association, September 17, 2019, [https://www.aha.org/press-releases/2019-09-17-joint-statement-aha-and-aamc-outpatient-payment-policy-court-decision?utm\\_source=newsletter&utm\\_medium=email&utm\\_content=09182019%2Dat%2Dpub&utm\\_campaign=aha%2Dtoday](https://www.aha.org/press-releases/2019-09-17-joint-statement-aha-and-aamc-outpatient-payment-policy-court-decision?utm_source=newsletter&utm_medium=email&utm_content=09182019%2Dat%2Dpub&utm_campaign=aha%2Dtoday) (Accessed 9/20/19).

12 "Medicare Agency Can Start Over, Appeal Its Loss on Payment Cuts" By Lydia Wheeler and Tony Pugh, Bloomberg Law, September 19, 2019, [https://www.bloomberglaw.com/product/health/document/X2IE2TD800000?bna\\_news\\_filter=health-law-and-business&jcsearch=BNA%25200000016d4568d450a37d75ed6b2e0001#jcite](https://www.bloomberglaw.com/product/health/document/X2IE2TD800000?bna_news_filter=health-law-and-business&jcsearch=BNA%25200000016d4568d450a37d75ed6b2e0001#jcite) (Accessed 9/20/19).

13 *Ibid.*

14 *Ibid.*

15 Sec'y of the Dep't of Health & Human Servs., (D.D.C. Sept. 17, 2019).

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