National Alliance of Safety-Net Hospitals

Advocacy Agenda for 2020

January 21, 2020

Summary

In the coming year, NASH will:

- Continue to address the major policy challenges of 2019 that had not been resolved as that year drew to a close: an extended delay of Medicaid DSH cuts, surprise medical bills, and prescription drug prices.
- Respond to administration-driven policies such as the calculation of Medicare DSH payments, reduced payments for prescription drugs under the 340B prescription drug discount program, and efforts to reduce Medicaid eligibility and benefits and to limit the means through which states may finance their share of Medicaid payments.
- Respond to expected judicial decisions addressing the extension of site-neutral Medicare outpatient payments to additional outpatient settings and the implementation of a new public charge regulation.

Background

As the summer of 2019 turned to fall, Congress and the administration appeared to be on a path toward bipartisanship and compromise on several health care issues: Medicaid DSH, surprise medical bills, and the price of prescription drugs. This momentum ground to a halt at the end of September, however, when the speaker of the House launched an impeachment inquiry of the president. Now, the movement toward compromise has mostly disappeared, and with all of the unknowns of the impeachment process – when the Senate conducts an impeachment trial, how long that trial might take, and what its outcome will be – the status of health policy as 2020 begins can be viewed from three perspectives: the unfinished business of 2019, administration-driven initiatives expected in the year ahead, and pending court cases that could have a major impact on the delivery and payment of care provided by private safety-net hospitals and others.

Another factor will complicate action on health policy issues in 2020: elections for the presidency, the entire House, and one-third of the Senate. Governing and legislating have always been more difficult in election years and there is no reason to believe 2020 will be different. An added complication: Medicare and the concept of "Medicare for all" in its various permutations appears likely to remain a major issue in the presidential campaign for at least the first quarter of the year, if not through November.

Unfinished Business

Spending legislation passed in late 2019 prevented a shutdown of the federal government but only temporarily addressed a number of issues of importance to private safety-net hospitals. That legislation extended the continued delay of Medicaid DSH cuts mandated by the Affordable Care Act and provided temporary funding for community health centers, the National Health Services Corps, teaching health

center graduate medical education payments, and other popular health care programs of importance to private safety-net hospitals. Both the Medicaid DSH delay and the temporary funding expire in late May, giving Congress another opportunity to address these issues, perhaps along with others such as prescription drug prices and surprise medical bills, by that new deadline. While this disappointed advocates for these and other programs – many, including NASH, had hoped for another two-year delay in implementation of Medicaid DSH cuts – the current approach gives those advocates, including NASH, another opportunity in 2020 to advocate the policy solutions they seek.

Delay of Medicaid DSH Cuts

Last year there appeared to be broad bipartisan support for delaying Affordable Care Act-mandated cuts in Medicaid DSH allotments to the states for another two years (FY 2020 and FY 2021). That support remains, but as 2020 begins, the latest delay of those cuts will expire in late May. NASH will continue to advocate a delay of Medicaid DSH cuts because such cuts would be extremely harmful to private safety-net hospitals and the communities they serve.

Surprise Medical Bills

Congress – both Democrats and Republicans – continues to be interested in addressing the challenges posed by surprise medical bills but has yet to reach a consensus on how to do so, with the committees of jurisdiction supporting different proposals. If Congress is to succeed in addressing this issue, it will most likely require compromise between the competing proposals. NASH supports addressing surprise medical bills and will continue to advocate a solution that does not call for federal rate-setting as a means of resolving payment disputes between providers and payers.

Prescription Drugs

Progress toward adopting a means of addressing the high cost of prescription drugs also faltered in 2019 but efforts to do something about this problem will almost certainly continue in 2020. While this is not an issue specific to private safety-net hospitals, it does present opportunities for those hospitals in two ways. First, a prescription drug bill could provide a legislative vehicle for addressing other NASH policy priorities, such as delaying Medicaid DSH cuts. Second, prescription drug legislation could generate savings that could create opportunities to offset the cost of implementing other NASH priorities, such as delaying those same Medicaid DSH cuts. In addition to advocating that any savings from prescription drug legislation be used to help address the policy priorities of private safety-net hospitals, NASH will work with policy-makers in 2020 to ensure that any new legislation designed to manage or reduce prescription drug prices does not interfere with the 340B prescription drug discount program and the ability of private safety-net hospitals to use resources they gain from that program to serve their low-income patients and communities.

Graduate Medical Education

In the fall of 2019, the chairman of the Senate Finance Committee wrote to the Secretary of the Department of Health and Human Services to raise questions about how Medicare's graduate medical education payments are determined, allocated, and used by recipient hospitals. This is not the first time such questions have been raised in recent years. In addition, it has been suggested in the past that Medicare should reduce its graduate medical education spending. Many private safety-net hospitals have medical education programs, so in 2020 NASH will continue to impress on policy-makers the importance of medical education programs and the value they bring to health care consumers across the country.

Administration-Driven Initiatives

Frustrated by its inability to repeal and replace the Affordable Care Act or to persuade Congress to pass what it considers to be needed health care legislation, the Trump administration has for the most part attempted to do its health care policy-making through regulations and executive orders, seeking to introduce sometimes fundamental changes in how government-funded health care is delivered and reimbursed. It can be expected to continue employing this approach in 2020.

Medicaid

Another area in which the administration has been working to introduce changes is Medicaid, with an emphasis on helping states make it more difficult for low-income individuals to qualify for Medicaid and easier for states to reduce Medicaid benefits; the administration also is expected to seek to give states greater flexibility in the areas of reimbursement and freedom to offer protections to providers. Some of these efforts have been hamstrung by court decisions but recent history suggests that those setbacks are unlikely to deter the administration from continuing to pursue such changes. In 2020 NASH will work with members of Congress to promote continued access to Medicaid benefits, and to adequate Medicaid benefits, for low-income Americans and their children, including residents of the communities served by private safety-net hospitals.

Also, in late 2019 CMS published a proposed regulation that seeks to implement major changes in the financing of Medicaid and the distribution of Medicaid payments. This proposed "fiscal accountability regulation" addresses four aspects of Medicaid financing and payment policy: supplemental payments and upper payment limit (UPL) calculations; Medicaid DSH payments; the financing of the state share of Medicaid spending; and health care taxes. This proposed regulation includes provisions that would have potentially serious implications for private safety-net hospitals, so NASH will submit comments to CMS about this proposed regulation, share our views with members of Congress, and work with other hospital trade groups, as appropriate, to convey opposition to proposals that could have a major impact on the ability of private safety-net hospitals to serve their communities.

340B Prescription Drug Discount Program

One area in which the administration has attempted to introduce change through administrative action is the 340B prescription drug discount program. In both 2018 and 2019 the administration implemented new regulations drastically reducing payments to 340B-participating providers but both times the court rejected those attempts. Despite this, the administration continues to pay providers the rates the court rejected and now intends to pay those same reduced payments (average sale price less 22.5 percent) in 2020 that the courts rejected for 2018 and 2019 while it considers appealing its losses in court. Most private safety-net hospitals participate in the 340B program and have a major stake in ensuring the preservation of the program's financial benefits. In 2020, NASH will work to protect the 340B program's benefits for participating hospitals by continuing to urge Congress to ensure that any legislation that seeks to address rising prescription drug costs does not adversely affect the 340B program while also opposing any regulatory changes that threaten the ability of safety-net hospitals to use the 340B program to serve their low-income patients and communities.

Medicare DSH

In 2020 NASH will continue to focus on how CMS calculates hospitals' Medicare DSH payments, its use of hospital-reported uncompensated care in those calculations, and the data it chooses to use in those calculations. NASH has long been concerned about the quality of the uncompensated care data hospitals report on their Medicare cost report's S-10 form and has repeatedly urged CMS to audit the

uncompensated care data hospitals report. After a delay of many years, CMS finally launched that auditing in 2018 but now, NASH is concerned about the quality of that auditing. That process has been marked by problems: inadequate time frames for hospitals to submit data to auditors, rushed auditing, the use of different auditing methodologies in different parts of the country, and the lack of truly comprehensive auditing. Compounding these problems has been CMS's decisions on the data to be used to calculate Medicare DSH payments: NASH believes CMS is not using the most reliable data available for this purpose. In 2020 NASH will continue to work with CMS to encourage the agency to improve its auditing policies and practices and to use better data when calculating Medicare DSH payments because those payments are especially important to private safety-net hospitals.

Stark Rule/Anti-Kickback Proposals

In late 2019 the administration proposed changes in long-time Stark law and anti-kickback regulations that, in its view, are preventing innovation and greater coordination of care among providers. The final regulation should be issued during the winter of 2020 and NASH will keep members apprised of the progress of these proposals.

Pending Court Cases

In 2020 NASH will follow closely several legal challenges with potential implications for private safety-net hospitals.

Constitutionality of the Affordable Care Act

In late 2019 a federal appeals court ruled the Affordable Care Act's individual mandate unconstitutional but did not strike down the entire health reform law, instead sending the case back to a lower court for further review. A group of Democratic state attorneys general and several national hospital trade groups petitioned the Supreme Court to decide the case quickly but the court declined to do so during its current term. The Supreme Court will next look at the case in the fall of 2020, when it will decide whether it will consider the appeal during its term that begins in October of this year.

Site-Neutral Medicare Outpatient Payments

In the fall of 2019, a federal court rejected CMS's regulation calling for site-neutral payments for Medicare-covered outpatient services provided in hospital-based but off-campus outpatient offices. CMS is appealing this ruling, and the court can be expected to rule on that appeal in 2020. Meanwhile, several hospital trade groups and health systems have filed a similar suit against CMS's plan to implement the very same payment system for outpatient services in 2020.

NASH has argued against this form of site-neutral payment in the past but if the court finds in CMS's favor – on either or both suits – NASH will work with federal regulators to ensure that the payment system is implemented in a manner that is least harmful to private safety-net hospitals while also working with Congress to ensure that it reinforces this perspective emphatically to those regulators.

Implementation of a New "Public Charge" Regulation

Also in the fall of 2019, another federal court delayed implementation of regulatory changes in federal public charge guidelines – a delay the administration has appealed. These changes, if implemented, would have a chilling effect on the willingness of legal immigrants to take advantage of the Medicaid

(and other public aid) benefits to which they are entitled by law. This regulation has been widely misunderstood since the day it was proposed and this misunderstanding has led many legal immigrants to withdraw from Medicaid or choose not to apply for Medicaid even though they have reason to believe they are otherwise eligible to enroll in the program. The regulation's implementation, if permitted by the courts, would almost certainly perpetuate this behavior. If that appeal clears the way for implementation of the regulatory changes, NASH will work with federal policy-makers to foster greater understanding of the limits of the regulation and ensure that people who are legally entitled to Medicaid benefits understand that they may apply for and take advantage of them without risking their status as legal residents.

Continuing Advocacy

As always, NASH will participate in the development of federal health care policies at both the executive and legislative levels, keep its members apprised of such developments, and engage in informed, effective advocacy as appropriate. NASH also will continue to interact with the administration and Congress and their staffs to convey to them the distinct challenges private safety-net hospitals face and the policy solutions that would help address those challenges and enable such hospitals to serve their patients, and their communities, more effectively.

In addition to engaging in advocacy on the issues outlined above, NASH will stress in its general advocacy on legislation and regulations that any new spending associated with legislation must not be paid for with offsetting cuts in Medicare and Medicaid payments; that federal regulations are intended to govern and structure programs established by Congress and not to impose spending cuts, which falls strictly within Congress's purview; and that both the administration and Congress should actively explore opportunities to develop and structure programs in ways that reflect the social determinants of health of the people those programs seek to serve.

The 2020 congressional calendar will find members of Congress in their districts for meaningful amounts of time during the year. For this reason, in 2020 NASH will encourage its members to invite their congressional delegations to visit their hospitals and learn, first-hand, about the vital work private safety-net hospitals do in their communities and the challenges they face along the way. NASH will support these visits by assisting its members with invitations, providing background information about individual members of Congress, and developing talking points, position papers, and other documents, as needed, to help maximize the value of such visits.