LeadingAge NY Initial Analysis of Medicare Settlement

We wish to update you with respect to the proposed settlement in the case of Jimmo v. Sebelius, No. 11-cv-17 (D.Vt.), that was filed in federal District Court in Vermont on October 16, 2012 and is now waiting for the court's approval. As you may be aware, in this case the Center for Medicare Advocacy and co-counsel from Vermont Legal Aid filed a class action lawsuit against Kathleen Sebelius, the Secretary of Health and Human Services, aimed at terminating the application of the Medicare "Improvement Standard," a policy and practice that allegedly wrongfully denies Medicare coverage to patients suffering from chronic conditions and in need of skilled nursing care and home health care as well as outpatient therapy, on the alleged ground that the patient did not show any improvement in his or her condition or functional status. The suit alleges that the "Improvement Standard" is shorthand for Medicare coverage denials issued on the grounds that the individual's condition is stable, chronic, not improving, or that the services involved are for "maintenance only." The suit further alleges that the use of an Improvement Standard is not supported by Medicare law and regulations, which do not require improvement in order to receive coverage. The plaintiffs challenged the Secretary's continuing use of an Improvement Standard as a rule of thumb that results in the termination, reduction, or denial of coverage for thousands of Medicare beneficiaries. At issue is CMS' application of the coverage requirements for skilled nursing and home health care found in 42 C.F.R. Sections 409.32(c), 409.44(a), (b), and (c). Notably, those regulations do not mandate an improvement to qualify for coverage.

To settle the case, CMS agreed to revise the Medicare Benefit Policy Manual and the Internet Only Manual 100-02 to "clarify" the coverage standards to include skilled nursing facility ("SNF"), home health ("HH"), and outpatient therapy ("OPT") benefits when a patient has no restoration or improvement potential but when that patient needs skilled SNF, HH, or OPT services. Those manuals will also be revised to clarify the coverage standards to include services performed in an inpatient rehabilitation facility ("IRF"). In so doing, CMS did not acknowledge that it had implemented the "Improvement Standard" policy in violation of the regulations as alleged by the plaintiffs. However CMS agreed to pay plaintiffs' attorneys in the amount of $300,000. While the settlement is subject to court approval, the Center has maintained that the settlement is enforceable now as it is in CMS' words, a clarification of existing policy. The settlement will apply retroactively to January 18, 2011 and the settlement class includes potentially affected Medicare beneficiaries nationwide.

**Analogous Issue**

An analogous issue had been raised on Medicaid audits of PRIs with respect to the need for improvement to qualify for restorative vs. maintenance therapy in nursing homes. In particular, OMIG has initially made adjustments during its audits of PRIs based on lack of evident improvement. See also Elcor Health Services, Inc. v. Novello, 100 N.Y.2d 273 (2003) (Department of Health's interpretation of regulation governing restorative therapy classification to require "actual improvement" by patient before residential health care facility could receive Medicaid reimbursement was not arbitrary and capricious, or irrational, and was therefore entitled to deference; actual improvement standard did not violate Federal or State Medicaid law, and it was not irrational to interpret language of restorative therapy qualifier, "has this

potential/is improving" as requiring the potential for improvement at beginning of therapy, and actual improvement during therapy.).