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111TH CONGRESS
1ST SESSION

H. R. 3372

To establish Medicare performance-based quality measures, to establish an affirmative defense in medical malpractice actions based on compliance with best practices guidelines, and to provide grants to States for administrative health care tribunals.

IN THE HOUSE OF REPRESENTATIVES

JULY 29, 2009

Mr. PRICE of Georgia introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To establish Medicare performance-based quality measures, to establish an affirmative defense in medical malpractice actions based on compliance with best practices guidelines, and to provide grants to States for administrative health care tribunals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Health Care OverUse Reform Today Act (HealthCOURT Act) of 2009''.

SEC. 2. ESTABLISHMENT OF PERFORMANCE-BASED QUALITY MEASURES.

Not later than January 1, 2010, the Secretary of Health and Human Services shall submit to Congress a proposal for a formalized process for the development of performance-based quality measures that could be applied to physicians' services under the Medicare program under title XVIII of the Social Security Act. Such proposal shall be in concert and agreement with the Physician Consortium for Performance Improvement and shall only utilize measures agreed upon by each physician specialty organization.

SEC. 3. AFFIRMATIVE DEFENSE BASED ON COMPLIANCE WITH BEST PRACTICE GUIDELINES.

(a) SELECTION AND ISSUANCE OF BEST PRACTICES GUIDELINES.—

(1) IN GENERAL.—The Secretary of Health and Human Services (in this section referred to as the ''Secretary'') shall provide for the selection and issuance of best practice guidelines (each in this subsection referred to as a ''guideline'') in accordance with paragraphs (2) and (3).

(2) DEVELOPMENT PROCESS.—Not later than 90 days after the date of the enactment of this Act, the Secretary shall enter into a contract with a qualified physician consensus-building organization

(such as the Physician Consortium for Performance Improvement), in concert and agreement with physician specialty organizations, to develop guidelines for treatment of medical conditions for application under subsection (b). Under the contract, the organization shall take into consideration any endorsed performance-based quality measures described in section 2. Under the contract and not later than 18 months after the date of the enactment of this Act, the organization shall submit best practice guidelines for issuance as guidelines under paragraph (3).

(3) ISSUANCE.—

(A) IN GENERAL.—Not later than 2 years after the date of the enactment of this Act, the Secretary shall issue, by regulation, after notice and opportunity for public comment, guidelines that have been recommended under paragraph (2) for application under subsection (b).

(B) LIMITATION.—The Secretary may not issue guidelines unless they have been approved or endorsed by qualified physician consensus-building organization involved and physician specialty organizations.

(C) DISSEMINATION.—The Secretary shall broadly disseminate the guidelines so issued.

(b) LIMITATION ON DAMAGES.—

(1) LIMITATION ON NONECONOMIC DAMAGES.—In any health care lawsuit, no noneconomic damages may awarded with respect to treatment that is within a guideline issued under subsection (a).

(2) LIMITATION ON PUNITIVE DAMAGES.—In any health care lawsuit, no punitive damages may be awarded against a health care practitioner based on a claim that such treatment caused the claimant harm if—

(A) such treatment was subject to the quality review by a qualified physician consensus-building organization;

(B) such treatment was approved in a guideline that underwent full review by such organization, public comment, approval by the Secretary, and dissemination as described in subparagraph (a); and

(C) such medical treatment is generally recognized among qualified experts (including medical providers and relevant physician specialty organizations) as safe, effective, and appropriate.

(c) USE.—

(1) INTRODUCTION AS EVIDENCE.—Guidelines under subsection (a) may not be introduced as evidence of negligence or deviation in the standard of care in any civil action unless they have previously been introduced by the defendant.

(2) NO PRESUMPTION OF NEGLIGENCE.—There would be no presumption of negligence if a participating physician does not adhere to such guidelines.

(d) CONSTRUCTION.—Nothing in this section shall be construed as preventing a State from—

(1) replacing their current medical malpractice rules with rules that rely, as a defense, upon a health care provider's compliance with a guideline issued under subsection (a); or

(2) applying additional guidelines or safe-harbors that are in addition to, but not in lieu of, the guidelines issued under subsection (a).

SEC. 4. STATE GRANTS TO CREATE ADMINISTRATIVE HEALTH CARE TRIBUNALS.

Part P of title III of the Public Health Service Act (42 U.S.C. 280g et seq.) is amended by adding at the end the following:

"SEC. 399T. STATE GRANTS TO CREATE ADMINISTRATIVE HEALTH CARE TRIBUNALS.

"(a) IN GENERAL.—The Secretary may award grants to States for the development, implementation, and evaluation of administrative health care tribunals that comply with this section, for the resolution of disputes concerning injuries allegedly caused by health care providers.

"(b) CONDITIONS FOR DEMONSTRATION GRANTS.—To be eligible to receive a grant under this section, a State shall submit to the Secretary an application at such time, in such manner, and containing such information as may be required by the Secretary. A grant shall be awarded under this section on such terms and conditions as the Secretary determines appropriate.

"(c) REPRESENTATION BY COUNSEL.—A State that receives a grant under this section may not preclude any party to a dispute before an administrative health care tribunal operated under such grant from obtaining legal representation during any review by the expert panel under subsection (d), the administrative health care tribunal under subsection (e), or a State court under subsection (f).

"(d) EXPERT PANEL REVIEW AND EARLY OFFER GUIDELINES.—

"(1) IN GENERAL.—Prior to the submission of any dispute concerning injuries allegedly caused by

health care providers to an administrative health care tribunal under this section, such allegations shall first be reviewed by an expert panel.

''(2) COMPOSITION.—

''(A) IN GENERAL.—The members of each expert panel under this subsection shall be appointed by the head of the State agency responsible for health. Each expert panel shall be composed of no fewer than 3 members and not more than 7 members. At least one-half of such members shall be medical experts (either physicians or health care professionals).

''(B) LICENSURE AND EXPERTISE.—Each physician or health care professional appointed to an expert panel under subparagraph (A) shall—

''(i) be appropriately credentialed or licensed in 1 or more States to deliver health care services; and

''(ii) typically treat the condition, make the diagnosis, or provide the type of treatment that is under review.

''(C) INDEPENDENCE.—

''(i) IN GENERAL.—Subject to clause (ii), each individual appointed to an expert panel under this paragraph shall—

''(I) not have a material familial, financial, or professional relationship with a party involved in the dispute reviewed by the panel; and

''(II) not otherwise have a conflict of interest with such a party.

''(ii) EXCEPTION.—Nothing in clause (i) shall be construed to prohibit an individual who has staff privileges at an institution where the treatment involved in the dispute was provided from serving as a member of an expert panel merely on the basis of such affiliation, if the affiliation is disclosed to the parties and neither party objects.

''(D) PRACTICING HEALTH CARE PROFESSIONAL IN SAME FIELD.—

''(i) IN GENERAL.—In a dispute before an expert panel that involves treatment, or the provision of items or services—

"(I) by a physician, the medical experts on the expert panel shall be practicing physicians (allopathic or osteopathic) of the same or similar specialty as a physician who typically treats the condition, makes the diagnosis, or provides the type of treatment under review; or

"(II) by a health care professional other than a physician, at least two medical experts on the expert panel shall be practicing physicians (allopathic or osteopathic) of the same or similar specialty as the health care professional who typically treats the condition, makes the diagnosis, or provides the type of treatment under review, and, if determined appropriate by the State agency, an additional medical expert shall be a practicing health care professional (other than such a physician) of such a same or similar specialty.

"(ii) PRACTICING DEFINED.—In this paragraph, the term 'practicing' means,

with respect to an individual who is a physician or other health care professional, that the individual provides health care services to individual patients on average at least 2 days a week.

''(E) PEDIATRIC EXPERTISE.—In the case of dispute relating to a child, at least 1 medical expert on the expert panel shall have expertise described in subparagraph (D)(i) in pediatrics.

''(3) DETERMINATION.—After a review under paragraph (1), an expert panel shall make a determination as to the liability of the parties involved and compensation.

''(4) ACCEPTANCE.—If the parties to a dispute before an expert panel under this subsection accept the determination of the expert panel concerning liability and compensation, such compensation shall be paid to the claimant and the claimant shall agree to forgo any further action against the health care providers involved.

''(5) FAILURE TO ACCEPT.—If any party decides not to accept the expert panel's determination, the matter shall be referred to an administrative health care tribunal created pursuant to this section.

''(e) ADMINISTRATIVE HEALTH CARE TRIBUNALS.—

''(1) IN GENERAL.—Upon the failure of any party to accept the determination of an expert panel under subsection (d), the parties shall have the right to request a hearing concerning the liability or compensation involved by an administrative health care tribunal established by the State involved.

''(2) REQUIREMENTS.—In establishing an administrative health care tribunal under this section, a State shall—

''(A) ensure that such tribunals are presided over by special judges with health care expertise;

''(B) provide authority to such judges to make binding rulings, rendered in written decisions, on standards of care, causation, compensation, and related issues with reliance on independent expert witnesses commissioned by the tribunal;

''(C) establish gross negligence as the legal standard for the tribunal;

''(D) allow the admission into evidence of the recommendation made by the expert panel under subsection (d); and

''(E) provide for an appeals process to allow for review of decisions by State courts.

''(f) REVIEW BY STATE COURT AFTER EXHAUSTION OF ADMINISTRATIVE REMEDIES.—

''(1) RIGHT TO FILE.—If any party to a dispute before a health care tribunal under subsection (e) is not satisfied with the determinations of the tribunal, the party shall have the right to file their claim in a State court of competent jurisdiction.

''(2) FORFEIT OF AWARDS.—Any party filing an action in a State court in accordance with paragraph (1) shall forfeit any compensation award made under subsection (e).

''(3) ADMISSIBILITY.—The determinations of the expert panel and the administrative health care tribunal pursuant to subsections (d) and (e) with respect to a State court proceeding under paragraph (1) shall be admissible into evidence in any such State court proceeding.

''(g) DEFINITION.—In this section, the term 'health care provider' has the meaning given such term for purposes of part A of title VII.

''(h) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated for any fiscal year such sums as may be necessary for purposes of making grants to States under this section.''.

SEC. 5. SENSE OF CONGRESS REGARDING HEALTH INSURER LIABILITY.

It is the sense of Congress that a health insurance issuer should be liable for damages for harm caused when it makes a decision as to what care is medically necessary and appropriate.

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