

McDermottPlus Check-Up

McDermott+Consulting is pleased to introduce the McDermottPlus Check-Up, your regular update on health care policy from Washington, DC.



THIS WEEK'S DIAGNOSIS: The House of Representatives returned from recess to continue work on legislation to address surprise medical bills and high drug costs, while the Administration unveiled a proposal to let states opt for Medicaid block grants. The Senate remained busy with impeachment proceedings.

CONGRESS

+ HOUSE LEADERSHIP REMAINS FOCUSED ON REACHING SURPRISE BILLING AND DRUG PRICING DEALS.

- House Majority Leader Steny Hoyer (D-MD) said he hopes lawmakers can reach a deal on legislation to address surprise medical billing by the end of the current legislative work period (February 13), so that the chamber can turn its attention to the issue of lowering drug costs. The House Energy and Commerce and Senate Health, Education, Labor and Pensions (HELP) committees reached a [compromise](#) on surprise billing at the end of last year, but action stalled when the House Ways and Means Committee announced it was developing a [separate proposal](#), though provided few details. According to Chairman Richard Neal (D-MA), Ways and Means plans to release legislative text of its proposal next week ahead of an anticipated February 12 markup. The plan is expected to rely on outside mediation rather than the Energy and Commerce- and HELP-proposed benchmark rate and arbitration to resolve payment disputes between insurers and providers. It remains unclear until we see legislative text if this approach will satisfy the stakeholders who have opposed the benchmark and arbitration approach. Speaker Nancy Pelosi (D-CA) has reportedly urged committee leaders to resolve their differences and find a compromise quickly, though doing continues to be a challenge. The Education and Labor Committee also has jurisdiction and has hinted at doing its own bill, potentially further delaying action on the issue.
- On the drug pricing front, House Majority Leader Hoyer and Speaker Pelosi have both suggested that they are open to negotiating with Republicans and the White House on a drug pricing package. They hope to reach a deal before the May 22, 2020, deadline to fund several expiring healthcare programs (known as the health extenders). Many of the drug pricing and surprise billing proposals on the table would save money, and thus serve as offsets to fund the health extenders. House Republicans have urged Democrats to support [their drug pricing bill](#), which includes several bipartisan provisions. Speaker Pelosi, however, remains committed to [Democrats' proposal](#) to allow Medicare to negotiate drug prices.

Drug pricing and surprise billing legislation remain at the top of Congress' agenda this year. However, the path forward on either issue, especially in the midst of President Trump's heated impeachment trial, is unclear.

ADMINISTRATION

- + **ADMINISTRATION ANNOUNCED MEDICAID BLOCK GRANT PROPOSAL.** The initiative, called the [Healthy Adult Opportunity](#) (HAO) initiative, would allow states to submit a Section 1115 waiver to implement a block grant or per capita cap alternative for certain Medicaid populations while being granted increased flexibility to administer their Medicaid program. Many Republicans have long supported the idea of Medicaid block grants as a way to allow more state flexibility while controlling federal spending. Democrats traditionally worry that it could lead to reduced access and services. In the lead-up to the announcement, a group of House Democrats sent a [letter](#) to the Administration warning that "guidance providing states a roadmap to obtain Medicaid block grant waivers not only defies Congress and the federal Medicaid statute but if implemented, will threaten healthcare for millions of individuals." Many legal experts have questioned whether the Centers for Medicare and Medicaid Services (CMS) has the authority to implement block grants, and the proposal is sure to face legal challenges if granted to any state. Ultimately, the initiative creates only an option for states to pursue. It is not a mandate, and states need to want to implement a block grant or per capita cap for this initiative to move forward. Oklahoma Governor Kevin Stitt (R) has already announced that his state plans to submit an HAO waiver. It remains to be seen which other states, specifically non-expansion states, pursue this initiative.

COURTS

- + **US SUPREME COURT ALLOWED PUBLIC CHARGE RULE TO MOVE FORWARD.** In a 5-4 opinion, the Supreme Court lifted a nationwide injunction issued by a federal district court in New York against the Administration's [public charge rule](#), allowing the policy to take effect while litigation continues in the lower courts. The rule allows immigration authorities to deny visas or green cards based on an individuals' use of Medicaid or other public benefits. It was successfully challenged in several states by Medicaid advocates and immigrant rights groups, but in December 2019, federal appeals courts lifted injunctions issued by Washington, California, and Maryland. The Supreme Court's decision to lift the remaining New York injunction means that the rule can now take effect almost everywhere (it remains blocked only in Illinois where a federal appeals court upheld a statewide injunction). In his [concurring opinion](#), Justice Neil Gorsuch criticized federal judges who issue nationwide injunctions, potentially encouraging a broader challenge to the practice. It is also possible that the Supreme Court will eventually review the merits of the public charge rule, as challenges continue to work their way through the lower courts.

STATES

- + **GEORGIA 1332 WAIVER IS LIKELY TO FACE LEGAL CHALLENGES IF APPROVED.** Two reports published by the left-leaning [Brookings Institution](#) and [Center on Budget and Policy Priorities](#) warn that Georgia's recent Section 1332 [waiver application](#) is illegal because it would limit access to affordable health insurance as guaranteed by Affordable Care Act (ACA). The waiver would allow the state to transition from the federal exchange to a system where consumers would enroll in coverage through private web brokers or directly with insurance carriers. The waiver would also replace the premium tax credits and cost sharing reductions established by the ACA with a state-run financial assistance program, and allow Georgia to cap the total amount of financial assistance that residents could receive. Finally, the waiver would create a new type of plan, called non-qualified health plans, which can impose higher out-of-pocket expenses. The Georgia waiver would be the first Section 1332 waiver approved under [relaxed guidance](#) that the Trump Administration issued in 2018. However, the reports suggest that the waiver application fails to meet the standards of the Trump Administration guidance, as well as being illegal under the ACA. CMS has been aggressive in its support of state Medicaid and health insurance waivers under the Trump Administration and has frequently pursued policies, such as Medicaid work requirements, in spite of legal challenges. If the Georgia waiver is approved, other Republican-led states may seek similar permissions despite the inevitable legal battles. CMS is expected to issue a decision in early February.

QUICK HITS

- + The House Education and Labor Committee [examined](#) ways to address America's maternal and infant health crisis. Read our summary of the hearing [here](#).
- + The House Energy and Commerce Health Subcommittee [considered](#) legislation to improve the safety of America's food and drugs. Read our summary of the hearing [here](#).
- + The US Food and Drug Administration extended the public comment period for the draft guidance [Demonstrating Substantial Evidence of Effectiveness for Human Drug and Biological Products](#) through March 19, 2020. The guidance outlines flexible approaches industry can use to demonstrate the effectiveness of certain drugs.
- + CMS announced it will begin covering [acupuncture](#) for Medicare beneficiaries with chronic low back pain and expand coverage of [Next Generation Sequencing](#) as a diagnostic tool for beneficiaries with inherited breast or ovarian cancer.
- + CMS [announced](#) it plans to consolidate its eight current consumer-facing Medicare quality databases into one comprehensive tool for beneficiaries. The agency anticipates this new tool to be active this spring.
- + The Fifth Circuit Court of Appeals rejected a request from one of its judges to rehear the case challenging the constitutionality of the ACA that the court remanded to a federal district court in Texas in December 2019. The appeals court previously held that the ACA's individual mandate is unconstitutional, but asked the lower court to reconsider which other provisions of the law can stand.

- + The US Government Accountability Office released a [report](#) urging the Health Resources and Services Administration (HRSA) within the US Department of Health and Human Services (HHS) to increase oversight of the interaction between the 340B program and the Medicaid Drug Rebate Program to prevent duplicate discounts. However, HHS responded that HRSA lacks the legal authority to monitor state Medicaid programs to prevent duplicate discounts, and Congress has not acted to expand HRSA's oversight authority, despite HHS' requests.

M+ RESOURCES

- + On the latest episode of the [Health Policy Breakroom](#), our consultants take a look at the 2020 legal landscape and the many health policy issues coming before the courts.
- + For all our latest predictions on the 2020 landscape, be sure to follow our [Policy Forecast page](#).

NEXT WEEK'S DOSE

The House Energy and Commerce Oversight and Investigations Subcommittee will hold a hearing on e-cigarette manufacturers' impact on public health, and the House Ways and Means Health Subcommittee will hold a hearing on overcoming pharmaceutical barriers to drug development. Although the Senate had planned to return to regular session next week, the possibility of witnesses being called to testify in President Trump's impeachment trial means the process could continue.

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