



Vermont Supreme Court Upholds Suspension of Physician's License Despite Due Process Concerns

The Vermont Supreme Court recently upheld the summary suspension of a physician's license in the case of *In re: Mitchell R. Miller, M.D.* The physician, Dr. Miller, brought suit after the Medical Practice Board (the "Board") suspended his license under a Vermont statute allowing emergency suspension to protect the public's health, safety and welfare (the "Statute"). The Court ruled that the State's administrative proceeding afforded Dr. Miller appropriate due process.

History

In March 2009, the State filed charges with the Board alleging that Dr. Miller repeatedly abused his authority by overprescribing narcotics. Dr. Miller was mailed a copy of the motion to suspend his license, but he did not receive notice of the Board's emergency hearing. At the conclusion of the emergency hearing, which Dr. Miller did not attend, the Board suspended Dr. Miller's license. Dr. Miller requested and was granted a post-suspension hearing during which he was represented by counsel, provided evidence, and responded to questions from the Board's members. Following the post-suspension hearing, the Board upheld its earlier decision to suspend Dr. Miller's license.

The Lawsuit

Dr. Miller filed an appeal with the Court, alleging the following: (i) the Statute is unconstitutional because it fails to require a pre-suspension hearing or a prompt and meaningful post-suspension hearing; (ii) the Statute, as applied, violated due process because there was no meaningful opportunity to present evidence and contest the charges; and (iii) the evidence failed to support the finding of unprofessional misconduct or demonstrate an imminent threat of harm justifying an indiscriminate suspension of his license.

The Court upheld the suspension. As for the first claim provided above, the Court held that no pre-suspension hearing is required when the suspension is due to exigent circumstances. That said, the Court emphasized the importance of providing a meaningful post-suspension review. In this case, the Court determined Dr. Miller was afforded a meaningful post-suspension hearing. As for the second claim, the Court stated that due process is a flexible concept and providing less than a full evidentiary hearing may be sufficient prior to a final adverse action by an administrative agency. As for the claim that the evidence failed to support the Board's findings, the Court deferred to the Board's expertise and found no reason to overturn the suspension.

If you have any questions concerning due process rights or summary suspension of a physician's license, please contact a member of Robinson & Cole's Health Law Group.

Proposed Rule Defines "Meaningful Use" of EHR and Interim Final

Rule Sets Certification Standards for the Medicare and Medicaid EHR Incentive Programs

On December 30, 2009, the Centers for Medicare and Medicaid Services ("CMS") released a proposed rule (the "Proposed Rule") specifying the criteria eligible professionals and hospitals must meet to demonstrate meaningful use of certified electronic health record ("EHR") technology in order to receive Medicare and Medicaid EHR Incentive Programs payments under the HITECH Act, part of the American Recovery and Reinvestment Act of 2009.

On the same day, the Office of the National Coordinator for Health Information Technology ("ONC") also issued an interim final rule that introduces initial standards, implementation specifications, and certification criteria that EHR systems must satisfy to be deemed "certified EHR technology" (the "Interim Final Rule").

The Proposed Rule and Interim Final Rule introduce key elements that eligible professionals and eligible hospitals must comply with to receive payments under the Medicare and Medicaid EHR Incentive Programs by demonstrating "meaningful use" of certified EHR technology ("Medicare and Medicaid Incentive Programs"). Under Medicare, an eligible professional is defined as a doctor of medicine, osteopathy, dental surgery, dental medicine, podiatric medicine, or optometry or a chiropractor. Under Medicaid, an eligible professional includes a physician, dentist, certified nurse-midwife, nurse practitioner, or a physician assistant practicing in a physician assistant-run rural health clinic or a federally qualified health center. An eligible hospital is any hospital in the United States except for rehabilitation hospitals, hospitals with patients are predominantly under 18 years old, hospitals with average inpatient stays greater than 25 days, or hospitals involved extensively in the treatment or research of cancer.

The maximum amount an eligible professional may receive in incentive payments is \$44,000 over a five-year period, beginning in 2011. A description of how incentive payments will be paid under the Medicare and Medicaid Incentive Programs and the amount of such payments available to eligible professionals and hospitals under the respective programs is available [/A>](#).

Meaningful Use

The proposed definition of meaningful use is based upon a phased approach by which the definition evolves over a series of three stages as technological advances and new statutory measures are created. The initial meaningful use criteria provided under the Proposed Rule constitutes Stage 1. Stage 1 criteria focus on electronically capturing health information in a coded format, using that information to track key clinical conditions and communicating that information for care coordination purposes, implementing clinical decision support tools to facilitate disease and medication management consistent with other provisions of Medicare and Medicaid law, and reporting clinical quality measures and public health information.

Stage 2 will commence at the end of 2011 and will expand the criteria provided under Stage 1 to encourage the use of health information technology for continuous quality improvement at the point of care and the exchange of information in the most structured format possible. Stage 3 will commence at the end of 2013 and focus on promoting improvement in quality, safety, and efficiency; decision support for national high-priority conditions; patient access to self management tools; and access to comprehensive patient data and improvement of population health. Meaningful use for Stages 2 and 3 will be defined in future CMS rulemaking.

To qualify for incentive payments under Stage 1, *eligible professionals and eligible hospitals* must satisfy specific objectives and their associated measures. Examples of the more than twenty objectives and measures include, without limitation, (i) being able to perform drug-drug, drug-allergy, and drug-formulary checks, (ii) recording specific demographic information for at least 80 percent of certain patients (i.e., preferred language, insurance type, gender, race, ethnicity, and date of birth), and (iii) recording smoking status for at least 80 percent of certain patients 13 years old or older treated by the eligible professional or eligible hospital. Additional criteria that *eligible professionals* must satisfy include, without limitation, (i) using computerized provider order entry for at least 80 percent of all orders, (ii) generating and transmitting

prescriptions electronically through the use of certified EHR technology for at least 75 percent of all permissible prescriptions, and (iii) providing clinical summaries to patients for each office visit for at least 80 percent of all office visits. Additional criteria that *eligible hospitals* must satisfy include, without limitation, (i) providing electronic copies of discharge instructions upon request to at least 80 percent of all patients discharged from the eligible hospital and (ii) successfully reporting hospital quality measures to CMS, or to the states in the case of Medicare-eligible hospitals, in the form and manner specified by CMS. The complete list of the objectives and measures in the Proposed Rule can be accessed on page 1993 of the document that is available [/A>](#).

Medicare fee schedule reductions will begin in 2015 for professional providers who are not meaningful users of EHR, starting with a 1 percent reduction in 2015, and progressing to a 2 percent reduction in 2016 and a 3 percent reduction in 2017. Hospitals that are not meaningful users of EHR will also see reductions under Medicare. No similar penalty will be applicable under Medicaid.

Certification Criteria, Standards, and Implementation Specifications

The Interim Final Rule provides certification criteria, standards, and implementation specifications that EHR technology must satisfy to be considered "certified." The certification criteria includes a detailed list of the capabilities that the EHR technology must incorporate to allow eligible professionals and eligible hospitals to meet the meaningful use objectives in the Proposed Rule. Additionally, the Interim Final Rule introduces an initial set of standards with which certified EHR technology must comply. The categories of standards include (i) vocabulary (i.e., standardized nomenclatures and code sets used to describe clinical problems and procedures, medication, and allergies), (ii) content exchange (i.e., standards used to share clinical information), (iii) transport (i.e., standards used to establish a common, predictable, secure communication protocol between systems), and (iv) privacy and security (i.e., authentication, access control, and transmission security). As for implementation specifications, ONC is requesting input from the health information technology industry and the relevant federal advisory committees prior to adopting a complete set of implementation specifications. The complete list of the certification criteria, standards and implementation specifications in the Interim Final Rule can be accessed on page 2023 of the document that is available [/A>](#).

The Interim Final Rule and the Proposed Rule each have a 60-day period for members of the public to comment on the substance provided in each. The Interim Final Rule goes into effect February 12, 2010, and CMS will issue a final rule that replaces the Proposed Rule at a later date. If you have questions concerning the Proposed Rule, Interim Final Rule, Medicare and Medicaid Incentive Programs, or the HITECH Act, please contact a member of Robinson & Cole's Health Law Group.

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