

MACRA Model Forcing Physicians to Evaluate Risk: Practices are now in the process of deciding which of the two possible reimbursement paths they will take under the Medicare Access and CHIP Reauthorization Act (MACRA). The shift from the much maligned sustainable growth rate formula (SGR) to MACRA is forcing physicians to think about issues typically reserved for the financial industry, such as the balancing of upside and downside risk and capitation. Under MACRA, providers can choose to be reimbursed either through the Merit-based Incentive Payment System (MIPS) or the existing alternative payment model. Currently, about 90% of physicians are expected to choose MIPS as their method of reimbursement, although it has less to do with the merits of MIPS and more to do with the increased risk the alternative payment model brings with it. Under MIPS, providers will be rated on quality, resource use, clinical practice improvement and meaningful use of certified EHR technology. Medicare revenue would be affected by as much as 4% in 2019 and increase to up to 9% in later years. The relatively few groups planning to use the alternative payment model have to first agree to accept more than nominal financial risk. In return, those groups and practices will receive a lump sum incentive payment and higher annual provider payment as benefits. Providers choosing to be reimbursed under the alternative payment model also benefit from being exempt from the MIPS reporting measures. MACRA is a particular challenge for small and rural providers who lack the capital, infrastructure and flexibility to quickly adapt to MACRA's requirements. In fact, the proposed rule included a table that estimated about 60% of practices with between two and nine eligible clinicians would be subject to a negative payment adjustment in 2019 with the rate for solo practitioners a massive 87%. In response, the CMS has stated that solo practitioners and small groups will be able to join "virtual groups" and report their MIPS information together. The CMS will also offer them technical assistance and impose fewer reporting requirements on them.

Federal Court Finds that a Medical Staff Hearing Satisfies Federal Due Process: In the case of *Buchheit v. Lakeland Health Systems*, the United States District Court for the Western District of Michigan granted Lakeland Health Systems' motion for summary judgment on a physician's claims asserting violations of his Federal Constitutional right to due process. In the underlying matter, Lakeland Health Systems terminated Dr. Buchheit's clinical privileges. In response, he sued based on the premise that his Federal Constitutional right to due process was violated. The physician argued that the health system failed to follow its own bylaws during the proceedings, he was not allowed to have an attorney present at the Medical Executive Committee (MEC) meetings, and the decision-makers were biased. The court rejected these arguments and concluded that the physician had a meaningful opportunity to be heard at numerous points in the process, he had an attorney present at the fair hearing, and there was no evidence that the hearing committee was biased. As for the allegations the hospital failed to follow its own bylaws, the court also cited Sixth Circuit precedent, noting that "compliance with organizational bylaws is not a mandatory requirement of due process."

New Jersey Appeals Court Affirms Nursing Board's Discipline Against Licensee: In an unpublished decision, *In re: Kun*, No. A-3086-14T1, slip op. (N.J. App. Div. Aug. 8, 2016), the Superior Court of New Jersey, Appellate Division, affirmed a Final Order of Discipline ("FOD") issued by the New Jersey Board of Nursing (the "Board"). Although the opinion is unpublished, and thus cannot serve as precedent in New Jersey's courts, its fact pattern demonstrates the problems inherent in dealing with licensing boards in New Jersey and the Appellate Division's tendency to affirm licensing boards' decisions. In this case the respondent was licensed in New Jersey in 2003 as an L.P.N. In 2010 she applied to the Montana State Board of Nursing seeking a license as an R.N., and submitted a false transcript indicating she had graduated from an approved registered nursing education program.



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In January, 2011, Montana denied the application on the basis of the submission of a “false transcript.” In May, 2011, the respondent submitted her renewal application to the Board, answering “no” the question asking whether there were any licensure matters which had not been reported on a prior renewal application. The Board submitted a Provisional Order of Discipline (“POD”), finding the failure to have disclosed the license denial from Montana, and failing to report the denial to the Board at the time it occurred, were violations, and proposed a reprimand and a civil penalty of \$250. Respondent filed a certification seeking modification or dismissal of the POD, admitting to the findings of fact but disputing some of the legal conclusions. In response, the New Jersey Attorney General’s office declared the POD had been “overly lenient,” and imposed a fifteen day deadline for the respondent to seek a consent order. The respondent did not respond, and the Board issued an amended POD, calling for a three year suspension and a \$7,500 fine. Respondent opposed this POD as well, and asked for a hearing. The hearing request was denied on the grounds that the respondent had already admitted to the underlying facts, and the Board ultimately imposed an FOD of a one year active suspension, a two year stayed suspension and a \$5,000 fine. Respondent appealed, contending the refusal to grant a hearing was arbitrary and capricious, and the penalty imposed was unfair in light of the POD initially offered and was in retaliation for the respondent’s refusal to agree to a consent order. The Appellate Division affirmed the Board’s FOD, finding the denial of a hearing was justified, as the matter resulted in a license suspension and not a revocation, and the respondent had admitted all material adjudicative facts. The Court also rejected respondent’s arguments about the severity of the sanctions, finding the FOD was less onerous than the amended POD. The lesson from this case is that an individual accused of an infraction by a New Jersey licensing board should consider an initial offer of discipline very carefully, as rejection of such an offer will likely lead to the escalation, rather than a reduction, in the penalties sought.

For more information on the above items, contact Kern Augustine, P.C. at 1-800-445-0954 or via email at info@DrLaw.com.



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