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Judge Tells HHS to Stop Using Invalid Hospice Cap Regulation

On Friday, August 21, 2009, Federal District Court Judge George Wu entered final judgment against the Department of Health and Human Services in favor of Los Angeles Haven Hospice on its challenge to Medicare's hospice cap regulation. Haven Hospice had challenged the regulation used to calculate the hospice cap on the grounds that it did not meet the clear requirements of the governing hospice cap statute. The decision demonstrates that HHS has been miscalculating the cap, and harming hospices, by failing to give proportional allowances that could decrease the cap liability of any hospice that has experienced periods of long average length of stay.

The Federal Court's final judgment provides that:

- ✓ The hospice cap regulation, 42 C.F.R. 418.309(b)(1), is invalid and set aside.
- ✓ HHS may not use the cap regulation in calculating the cap of any hospice from this point forward.
- ✓ HHS' prior FY 2006 cap repayment demand to Haven Hospice is set aside.
- ✓ HHS must either return funds previously paid by Haven Hospice, with interest, or apply those funds to a new demand calculated in accordance with the statute.
- ✓ Haven Hospice is awarded costs and may apply for an award of attorneys' fees.

Although HHS may choose to appeal the District Court's final judgment, this judgment represents an important further step in NAHA's overall efforts to seek change in the hospice benefit including reform of the hospice cap. While this court's ruling precludes HHS from using the regulation to calculate cap demands prospectively, it also calls into question the accuracy of prior cap demands.

According to David Daucher, co-founder of the National Alliance for Hospice Access (NAHA), a grassroots coalition of over 500 independent hospices, Haven is one of many NAHA members harmed by the cap regulation who are challenging it in court.

"The invalidated Medicare regulation dates from 1983 and is seriously flawed," said Daucher, "it makes a bad 1982 cap statute worse by overstating cap liability for hundreds of hospices, especially those serving rural, minority and economically disadvantaged communities."

Daucher said that although the current HHS administration is not responsible for writing the flawed 1982 cap statute or the invalid 1983 regulation, the Secretary now has a chance to enhance hospice access and save Medicare money. "We hope HHS will urgently review and support common sense hospice reform legislation, currently before Congress, that would reform the hospice cap, improve hospice choice for all terminally ill seniors, and at the same time save Medicare billions of dollars each year," he said.

NAHA supports bi-partisan hospice reform legislation (HR 3454) introduced July 31 by Representative John Sullivan (R-OK). This legislation would: (a) improve timely patient choice by introducing evidence-based eligibility criteria; (b) replace the flawed and retrospective aggregate hospice cap with a pay-as-you-go system that ensures Medicare will not pay out monies that it will later want repaid, and dramatically reduces Medicare's administrative burden; (c) provide limited relief to deserving hospices threatened by the flawed 1982 cap statute and 1983 regulation, to allow these hospices to continue serving our dying seniors; and (d) save Medicare \$1 billion to \$2 billion annually, by improving timely hospice choice.

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