Behavioral Health: Where the Integration of Care Is Fueling Industry Growth, Increased Access to Services, and Investment Opportunities

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The behavioral health subsector continues to garner keen interest from a variety of admirers—including payors, consumers, healthcare providers, and investors. Behavioral health incorporates both integrated care and overall wellness and prevention, as the term encompasses both mental illnesses and physical afflictions that result from human behaviors. As behavioral health service providers take a more prominent role in managing the overall health of the population and payors are required to reimburse mental health and substance abuse claims with no more restrictive requirements than physical health related claims,[2] it's no surprise that the behavioral health sector continues to see increased deal volume. According to Capstone Partners, the behavioral health subsector has seen revenue increasing an average of 4.7% per year since 2011 to reach an estimated $18.7 billion in 2016.[3]

Part I of this article investigates factors leading to the behavioral health subsector growth (and the resulting increased regulatory scrutiny). Part II provides examples of recent transactions. Finally, Part III provides considerations for investors and behavioral health providers alike.

I. Factors Leading to Behavioral Health Subsector Growth

Room for continued consolidation,[4] as well as a number of factors, including the increased demand for access to behavioral health facilities and a regulatory environment dictating improved payor behavior reinforced by active enforcement of the same, can be attributed to the recent growth in the behavioral health subsector.

A. Increased Demand for Services

In 2016, the nation spent more than $200 billion on mental health services for anxiety and depression, making mental disorders the most costly medical condition in the country.[5] The increase can be attributed to both an increased awareness and acceptance of behavioral health issues[6] in conjunction with the push by providers to provide a more holistic treatment to patients with comorbidities (i.e., people with co-occurring physical and mental conditions). In fact, according to the National Health Council, a coalition of health associations and businesses (including the American Medical Association), 57% of Americans with behavioral health issues suffer from comorbid physical health conditions.[7] Further, it is estimated that by 2020, 157 million Americans will suffer from a chronic disease and one third of these Americans will have symptoms of depression.[8] Despite the growing need for behavioral health services, the demand for behavioral services continues to outpace supply for behavioral health facilities.[9] Currently, there are an estimated 4,719 counties that have a shortage of mental health providers.[10]

B. Reimbursement Legislation

The traditional payor model for behavioral health services was largely private-pay for inpatient services or state funded community based facilities, which correlated to high-cost services and more limited access to services by behavioral health patients.[11] The implementation of both federal and state legislation equalizing reimbursement of mental health services with other medical services has bolstered the behavioral health subsector by decreasing economic barriers to behavioral health services offered at varying level of care settings.[12]

i. Federal Legislation and Payment Policies Provide for Improved Reimbursement Models for Behavioral Health Services

Recent legislation has spurred progress toward improving access and integration of behavioral health services. For example, the Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA") generally prevents group health plans and health insurance issuers from imposing more restrictive benefit limitations on mental health benefits than on medical/surgical benefits.[13] In practice, this means that those group health plans or health insurance coverage including medical/surgical benefits must make financial requirements, such as deductibles and co-payment and treatment limitations (including number of visits or days of coverage), no more restrictive than the financial requirements and treatment limitations applying to substantially all medical/surgical benefits.[14] Further, the passage of the Patient Protection and Affordable Care Act of 2010 extended the reach of MHPAEA provisions to individual health insurance issuers (which were outside the original scope).[15]

In addition to federal legislation, federal agencies, such as the Centers for Medicare and Medicaid Services ("CMS"), continue to expand payments for behavioral health services, thereby encouraging the integration of mental and behavioral health into team-based primary care.[16] CMS's Psychiatric Collaborative Care Model ("CoCM")[17] illustrates a move toward preventative care and providing payments to physicians for the same using an evidence-based approach.[18] Starting January 1, 2017, as part of the CoCM, Medicare is paying for mental and behavioral health services under new billing codes set forth in the 2017 Medicare Physician Fee Schedule Final Rule issued by CMS on November 2, 2016.[19]

ii. State Legislation and Enforcement Further Bolster Coverage and Reimbursement

Various states have enacted laws that have allowed for increased coverage for mental health treatment. For example, in New York, a law passed in 2006, referred to as Timothy's Law, that provides for broad-based coverage for the diagnosis and treatment of mental, nervous or emotional disorders or ailments at least equal to the coverage provided for other health conditions.[20]

The passage of law in conjunction with an active state-level enforcement regime reinforces appropriate reimbursement for behavioral health services. New York is an example of a state with an active enforcement regime, and appears to have little tolerance for failing to comply with mental health coverage laws. In 2015, New York Attorney General Eric Schneiderman's investigation of Blue Cross Blue Shield's subsidiary Excellus Health Plan Inc. ("Excellus") found that Excellus may have improperly denied nearly $9 million in claims for inpatient substance abuse and mental health treatment from 2011 and 2014.[21] Attorney General Schneiderman noted that his "office has taken an aggressive approach to enforcing mental health parity laws that [he] hope[s] can serve as a national model."[22] Continuing New York's aggressive enforcement approach, Attorney General Schneiderman announced in January that Cigna had agreed to comply with New York's mental health coverage laws after being found in violation of Timothy's Law, requiring Cigna to pay a $50,000 penalty, revise its policies, and pay autism claims it previously rejected.[23]

II. Notable Transactions

There have been a number of successful private equity investments in the behavioral health subsector that have occurred since 2015. A few examples are as follows:

1. ***Trumpet Behavioral Health***. In March 2017, MTS Health Investors recapitalized Trumpet Behavioral Health, a provider of skills acquisition and behavior treatment services for children and adults with autism spectrum disorders.[24]
2. ***WoodRidge Behavioral Healthcare***. In September 2016, Ridgemont Equity Partners acquired WoodRidge Behavioral Care. WoodRidge Behavioral Care operates five psychiatric residential treatment facilities and three acute hospital programs throughout Arkansas, Missouri, and Tennessee.[25]
3. ***Pinnacle Treatment Centers***. In August 2016, Linden Capital Partners acquired Pinnacle Treatment Centers. Pinnacle offers a full continuum of services, including detoxification, residential, outpatient, and transitional living through 30 treatment centers in five states.[26]
4. ***Haven Behavioral Healthcare***. In August 2016, BBH Capital Partners recapitalized Haven Behavioral Healthcare, a provider of specialty behavioral healthcare services.[27]
5. ***Florida Autism Center***. In August 2015, Shore Capital Partners completed an investment in Florida Autism Center, a provider of center-based applied behavior analysis treatment services to children diagnosed with Autism Spectrum Disorder.[28]
6. ***Infinity Behavioral Health Services***. In January 2015, Thompson Street Capital Partners invested in Infinity Behavioral Health Services, a provider of revenue cycle management services for behavioral health.[29]

III. Considerations for Investors and Behavioral Health Providers

Although there has been significant activity by private equity investors in the behavioral health subsector, the marketplace remains highly fragmented and provides opportunities for additional investment. Future private equity investors should consider strategic approaches to the following challenges when investing in the sector:

1. On-Site Laboratory Services. Increasingly, behavioral health facilities have established onsite laboratories to serve their patients. Through on-site laboratory arrangements, physicians treating behavioral health patients often make referrals to their associated facility's on-site laboratory. The behavioral health facility then bills and collects fees from private payors and federal health care programs for its laboratory services. Prior to executing a transaction, private equity firms should ensure the behavioral health facility's laboratory arrangements comply with the federal Stark Law and Anti-Kickback Statute.[30] Investors should also ensure that the laboratory services ordered by the behavioral health facility's providers have all documentation necessary to support medical necessity.[31]

   Referrals for laboratory services to a behavioral health facility in which a physician has a financial relationship (e.g., ownership or employment) can implicate the federal Stark Law and Anti-Kickback Statute (as well as state laws which often mirror the federal restrictions, regardless of the identity of the payor).[32] These referrals can sometimes meet an applicable Stark Law exception or Anti-Kickback safe harbor, such as the Bona Fide Employee safe harbor or Indirect Compensation exception.[33] Both the Bona Fide Employee safe harbor and the Indirect Compensation exception

require the arrangement to meet a number of complex elements. Failing to meet one of the required elements can create risk in the transaction for both the behavioral health facility and the private equity investor.

Private equity investors and behavioral health facilities should also implement processes to ensure medical necessity is documented for all laboratory tests.[34] It has become increasingly common for third-party payors to conduct audits and seek recoupment (or withhold or offset future payments) as a result of improper documentation or perceived over testing. One approach to ensure medical necessity is well documented is to undertake an independent chart audit on a periodic basis.[35] Such chart audits are often conducted by private equity investors in connection with due diligence or by behavioral health facilities through their ongoing compliance programs.

2. Corporate Practice of Medicine. Many states across the country have adopted statutes and/or developed case law implementing corporate practice of medicine restrictions that limit the ability of behavioral health facilities to employ physicians directly, if they are owned by non-physicians.[36] Corporate practice of medicine considerations often impact the structure of private equity investments in behavioral health facilities. Before agreeing to enter into a particular form of investment transaction, private equity firms and behavioral health facilities should familiarize themselves with the applicable state's corporate practice of medicine restrictions and structure their investment in compliance with those restrictions. A common structure that non-physicians use when investing in businesses that provide medical services (e.g., behavioral health services) is a "MSO/PC structure," in which the buyer forms a management company to provide administrative services to the medical provider in return for a management fee. The level of control that can be achieved through this structure often hinges on the strength of the corporate practice restrictions in the applicable state.[37] Depending on the nature of the business, the physician component of the services provided (as opposed to the facility services) may or may not be economically significant.

3. Licensure and CON Considerations. Behavioral health services are often required to be provided in licensed facilities, which is dictated by the state in which the applicable facility is located.[38] Prior to performing behavioral health services, investors in the applicable facility should ensure that its location and all providers are in full compliance with applicable state-specific licensing requirements. For example, many states require behavioral health facilities to hold multiple licensure designations, if they are providing multiple types of behavioral health services at a single location.[39] If a behavioral health facility fails to hold all of its required licenses, it may not meet the required conditions for coverage, which could result in improper billing practices with Medicare or other third party payors.

   In addition to state licensure considerations, many states also require behavioral health facilities to obtain a certificate of need.[40] Certificates of need are often sought from the state's health planning commission, and require the applicable facility to demonstrate that there is a sufficient patient need for the behavioral health facility in the facility's patient catchment area. In some states, these certificates are difficult to obtain and can create significant transaction delays. However, in other states, the process is fairly straightforward and can be navigated easily with the help of a consultant or other advisor. Before undertaking a purchase or sale of a behavioral health business, it is crucial that all parties understand the licensing and certificate of need requirements in the applicable state.

Based on recent investment trends, private equity interest in behavioral health facilities continues to grow and opportunities remain for those interested in purchasing and selling businesses in the space. However, as with any investment in the provider space, purchasers should carefully examine the potential target's

regulatory issues and any reimbursement consideration before completing any transaction in the behavioral health subsector.

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