NEW YORK STATE
DEPARTMENT*of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

Insurance Circular Letter No. 14 (2017)
September 6, 2017

TO: **All Insurers Authorized to Write Accident and Health Insurance in New York State, Article 43 Corporations, Health Maintenance Organizations ("HMOs"), Student Health Plans Certified Pursuant to Insurance Law § 1124, and Municipal Cooperative Health Benefit Plans**

RE: Substance Use Disorder Treatment, Prevention, and Utilization Review

STATUTORY AND REGULATORY REFERENCES: N.Y. Ins. Law §§ 3201, 3216, 3221, 4303, and Article 49; N.Y. Pub. Health Law Article 49; 29 U.S.C. § 1185a; 45 C.F.R. § 146.136; 45 C.F.R. § 156.122

I. Purpose

The opioid epidemic continues to have a devastating impact in New York. This circular letter provides direction to insurers authorized to write accident and health insurance in this state, article 43 corporations, health maintenance organizations, student health plans certified pursuant to Insurance Law § 1124, and municipal cooperative health benefit plans (collectively, "issuers") regarding utilization review ("UR") requirements for treatment of substance use disorder ("SUD"), coverage of medication-assisted treatment, non-opioid treatment alternatives to pain management, and coverage of opioid treatment programs under insurance policies or contracts delivered or issued for delivery in New York State.

The circular letter also serves as reminder to issuers that strict compliance with all existing statutory and regulatory requirements for coverage of SUD treatment is critical. This circular letter supplements Insurance Circular Letters No. 15 (2002), No. 5 (2014), No. 6 (2015), No. 4 (2016), and No. 6 (2016).

II. Utilization Review

A. Discharge from Inpatient Admission and Expedited Review of Inpatient SUD Services and Coverage during Pendency of Review

As explained in Insurance Circular Letter No. 6 (2016), Insurance Law § 4903(c) and Public Health Law § 4903(3) provide that a UR agent must make a determination regarding a request for inpatient SUD treatment within 24 hours of receiving the request, if the request is submitted to the UR agent at least 24 hours before discharge from an inpatient admission. Further, an issuer must provide coverage for the inpatient SUD treatment while the determination is

pending. The Superintendent of Financial Services ("Superintendent") has received inquiries as to whether this provision applies only when the patient is discharged from an inpatient *hospital* admission. Insurance Law § 4903(c) and Public Health Law § 4903(3) are not limited to discharges from a hospital. Instead, the requirements for an expedited review of SUD treatment and coverage while the determination is pending apply to discharges from all inpatient facilities covered under the health insurance policy or contract, transfers between covered inpatient facilities, and continued stay requests for inpatient admissions, as long as the request for inpatient SUD treatment is submitted at least 24 hours prior to discharge from an inpatient admission.

B. Prohibition against Preauthorization and Concurrent Review During First 14 Days of Inpatient Admission for SUD Treatment and Coverage Requirements Pending Determination

As explained in Insurance Circular Letter No. 6 (2016), Insurance Law §§ 3216(i)(30)(D), 3221(l)(6)(D), and 4303(k)(4) prohibit issuers from requiring preauthorization for inpatient SUD treatment in facilities that are certified by the New York State Office of Alcoholism and Substance Abuse Services ("OASAS") and participate in the issuer's provider network. These provisions also prohibit issuers from performing concurrent UR in facilities that are certified by OASAS and participate in the issuer's provider network during the first 14 days of an inpatient admission provided the facility notifies the issuer of both the admission and the initial treatment plan within 48 hours of the admission.

The Superintendent has received questions as to how an issuer should apply the Insurance Law § 4903(c) and Public Health Law § 4903(3) requirements for coverage while a UR request for inpatient SUD treatment is pending in conjunction with the Insurance Law §§ 3216(i)(30)(D), 3221(l)(6)(D), and 4303(k)(4) requirements that prohibit UR for certain inpatient admissions or during the first 14 days of certain continued care. When preauthorization is not permitted pursuant to Insurance Law §§ 3216(i)(30)(D), 3221(l)(6)(D), and 4303(k)(4), the Insurance Law § 4903(c)(3) and Public Health Law § 4903(3)(c) requirements for coverage while a request for inpatient SUD treatment is pending would not apply because a UR request would not be made for inpatient SUD treatment. Similarly, when a UR agent is prohibited from performing concurrent review during the first 14 days of an inpatient admission, the Insurance Law § 4903(c)(3) and Public Health Law § 4903(3)(c) requirements for coverage while a request for inpatient SUD treatment is pending would not apply to those 14 days. However, the Insurance Law § 4903(c)(3) and Public Health Law § 4903(3)(c) requirements for coverage while a request for inpatient SUD treatment is pending could apply after day 14 if a request for the inpatient SUD treatment is submitted at least 24 hours prior to discharge from that inpatient admission.

C. Frequency of Utilization Review

Insurance Law § 4905(f) and Public Health Law § 4905(6) provide that an issuer may not conduct UR more frequently than is reasonably required to assess whether the health care services under review are medically necessary. The determination of how frequently an issuer should perform UR should take into account the type of service and level of care being provided. Additionally, the federal Mental Health Parity and Addiction Equity Act ("MHPAEA"), codified in 29 U.S.C. § 1185a, prohibits issuers whose policies or contracts provide medical and surgical benefits and mental health or SUD benefits from applying financial requirements, quantitative treatment limitations, and non-quantitative treatment limitations that are more restrictive than the

predominant financial requirements or treatment limitations that are applied to substantially all medical and surgical benefits covered by the plan.

Pursuant to 45 C.F.R. § 146.136(c)(4)(i), an issuer may not impose a non-quantitative treatment limitation with respect to SUD benefits in any classification of benefit unless the processes, strategies, evidentiary standards, or other factors used in applying the limitation are comparable to, and no more stringent than, the processes, strategies, evidentiary standards, or other factors used in applying the limitation with respect to the medical and surgical benefits in the same classification of benefit. Insurance Law §§ 3216(i)(30) and (31), 3221(l)(6) and (7), and 4303(k) and (l) also require that coverage for inpatient and outpatient SUD services be provided consistent with MHPAEA. Issuers are reminded that UR is a non-quantitative treatment limitation. If it appears that an issuer is performing UR for SUD more frequently than it does for medical and surgical benefits in the same benefit classification, then the issuer should be prepared to demonstrate to the Superintendent how it is in compliance with MHPAEA.

D. Requests for Medical Records to Perform Utilization Review

Insurance § 4905(g) and Public Health Law § 4905(7) provide that when making prospective, concurrent and retrospective determinations, UR agents may collect only such information as is necessary to make such determinations and may not routinely require health care providers to numerically code diagnoses or procedures to be considered for certification or routinely request copies of medical records of all patients reviewed. During prospective or concurrent review, a UR agent only may require copies of medical records when necessary to verify that the health care services subject to such review are medically necessary. In such cases, a UR agent only may require the necessary or relevant sections of the medical record. A UR agent may request copies of partial or complete medical records retrospectively. These provisions do not apply to health maintenance organizations

Issuers are reminded that they should only request and collect medical records or the relevant sections of medical records needed to conduct UR for SUD services. Requests for medical records should not be overly burdensome on providers and should only seek the portions of the records needed to ensure the SUD treatment is medically necessary.

Additionally, as discussed above, UR is a non-quantitative treatment limitation that is subject to the requirements of MHPAEA. A request for medical records as part of a UR is therefore also subject to the requirements of MHPAEA. As such, when requesting medical records during the course of UR of SUD benefits, issuers must ensure that the processes, strategies, evidentiary standards, or other factors used in determining the scope of the request for medical records are comparable to and no more stringent than the processes, strategies, evidentiary standards, or other factors used in determining the scope of the request for medical records for UR of medical and surgical benefits in the same classification of benefit.

III. Coverage of Medication-Assisted Treatment

As explained in Insurance Circular Letter No. 6 (2016), issuers are again reminded about their responsibility to provide coverage for medication-assisted treatment for SUD. The federal Affordable Care Act ("ACA") requires individual and small group health insurance policies and contracts to provide essential health benefits ("EHB"). Prescription drugs are specifically

identified as an EHB that must be covered. Pursuant to 45 C.F.R. §156.122(a)(1), in order to be considered to be providing EHB, the policy or contract must cover at least the greater of one drug in every United States Pharmacopeia category and class or the same number of prescription drugs in each category and class as the EHB-benchmark plan. Although large group policies are not subject to EHB, to the extent that a large group policy does include coverage for prescription drugs, it must provide coverage for SUD drugs on parity with prescription drugs for medical or surgical conditions in compliance with MHPAEA.

Further, as a result of Chapter 69 of the Laws of 2016, large group policies or contracts issued, renewed, modified, altered, or amended on or after January 1, 2017, must provide coverage for medication approved by the Federal Drug Administration or the detoxification or maintenance treatment of SUD. Please refer to Insurance Circular Letter No. 6 (2016) for a fuller discussion of an issuer's responsibilities to provide coverage for medication-assisted treatment.

IV. Coverage of Non-Opioid Alternatives to Pain Management

Given the continuing epidemic of opioid addiction and deaths related to opioid overdose, the Department of Financial Services ("Department") encourages issuers to broaden their coverage of non-opioid alternatives to pain management, such as acupuncture, massage therapy, and yoga, or to provide rewards or incentives to insureds who participate in such alternatives to pain management, such as full or partial reimbursement of costs, through a wellness program set forth in the policy or contract.

Insurance Law § 3239(a) broadly recognizes a "wellness program" as "a program designed to promote health and prevent disease that may contain rewards and incentives for participation." Although the statute lists examples of what a wellness program may include, it also expressly provides that wellness programs are not limited to the list of programs and services described in the statute. A wellness program that offers insureds incentives or rewards to participating in non-opioid alternatives to pain management that would not otherwise be covered under the policy or contract is permissible and encouraged by the Department so long as it is set forth in the policy or contract and complies with the requirements of Insurance Law § 3239. Beyond wellness programs, issuers may also include non-opioid alternatives to pain management as covered benefits under the policy or contract.

Additionally, issuers are reminded that some services that may serve as non-opioid alternatives to pain management may already be required to be covered by a policy or contract. For example, chiropractic care is a mandated benefit in New York. Insurance Law §§ 3216(i)(21), 3221(k)(11) and 4303(y) require policies or contracts that provide coverage for physician services in a physician's office or that provide comprehensive-type coverage to provide coverage for chiropractic care provided by a doctor of chiropractic in connection with the detection or correction by manual or mechanical means of structural imbalance, distortion or subluxation in the human body for the purpose of removing nerve interference, and the effects thereof, where such interference is the result of or related to distortion, misalignment or subluxation of the vertebral column. Similarly, coverage for physical therapy must be included in all individual and small group policies or contracts, as it is an EHB under the ACA. In addition, Insurance Law §§ 3221(l)(3) and 4303(e) require issuers to make available coverage for physical therapy to large groups. Both chiropractic care and physical therapy may be beneficial to insureds as non-opioid alternatives to pain management.

V. Coverage of Substance Use Disorder Prevention

The Department also encourages issuers to consider expanding wellness programs to incorporate substance use disorder prevention programs as an additional opportunity to combat the continuing epidemic of opioid addiction and opioid overdose deaths. As stated above, wellness programs are not limited to the list of programs and services described in the statute. OASAS has providers that deliver a wide range of services including evidence-based education programs, skills development workshops, training sessions for parents, teachers, and other professionals, and positive alternative activities for youth. A wellness program that offers insureds incentives or rewards to participate in OASAS SUD prevention services, is permissible and encouraged by the Department as long as it is set forth in the policy or contract and complies with the requirements of Insurance Law § 3239.

VI. Opioid Treatment Programs

The Superintendent has received inquiries regarding coverage for opioid treatment programs. 14 NYCRR § 822.5(w) defines opioid treatment program as "one or more Office-certified sites where methadone or other approved medications are administered to treat opioid dependency, following one or more medical treatment protocols as defined in this Part. This term encompasses medical and support services including counseling, educational and vocational rehabilitation. OTP also includes a Narcotic Treatment Program (NTP) as defined by the federal Drug Enforcement Agency (DEA) in 21 CFR Section 1301."

Insurance Law §§ 3216(i)(31), 3221(l)(7) and 4303(l) require policies or contracts that provide medical, major medical or similar comprehensive-type coverage to provide outpatient coverage for the treatment of SUD, including detoxification and rehabilitation services. Coverage may be limited to facilities in New York certified by OASAS or licensed by OASAS as outpatient clinics or medically-supervised ambulatory substance abuse programs and, in other states, to those which are accredited by the Joint Commission as alcoholism or chemical dependence substance abuse treatment programs. Therefore, issuers must provide coverage for medically necessary care that is provided at an opioid treatment program when all of the other terms and conditions of the policy or contract are met.

VII. Conclusion

Issuers must comply with the foregoing important requirements for SUD treatment as described in this circular letter. The Department will monitor compliance with SUD treatment coverage requirements, including during market conduct exams. The Department will take action against an issuer for any failure to adhere to all statutory and regulatory requirements for SUD treatment coverage.

Please direct any questions regarding this circular letter to Thomas Fusco, Supervising Insurance Attorney, Health Bureau, New York State Department of Financial Services, Walter J. Mahoney Office Building, 65 Court Street, Room 7, Buffalo, New York 14202 or by e-mail at Thomas.Fusco@dfs.ny.gov.

Very truly yours,

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