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June 25, 2024

Lisa Emerson
Brooke Hall
Senior Policy Analysts
Department of Consumer and Business Services, Division of Financial Regulation
P.O. Box 14480
Salem, OR 97309

SENT VIA EMAIL

RE: Comments on June 11, 2024 Gender Affirming Treatment Draft Rules for Section 20 of HB 2002 (2023)

Dear Ms. Emerson and Ms. Hall:

Thank you for your leadership implementing the gender-affirming treatment law through the Rule Advisory Committee (RAC) meetings. You listened to various perspectives and recommendations before making decisions, the current draft rules reflect a compromise of requests and recommendations, and it's an improvement from the previous drafts.

We appreciate the opportunity to provide comments on the revised draft rules dated June 9, 2024 and decisions that were made at the June 11, 2024 RAC meeting.

Our comments summarize the guidance we were seeking and the DFR's response at the meeting.

Out-of-Network Gender-Affirming Treatment (GAT) Services:

We had requested at the RAC meetings and in previous comment letters that the DFR include a provision that requires the member to contact the carrier first for assistance in finding a provider before going out-of-network (OON). While we understand that the insurance statutes govern insurers, we expressed that this rulemaking is unique in that there are aspects of the requirements that entail the member and the insurer working together to provide the member with the best and convenient care. We felt including such a provision is not only cost-effective for the member and the insurer but also allows the member to remain in-state and close to their home. In addition, should the member potentially seek services out of state to an OON provider, the first time we would know would be from a claim which may not process correctly the first

time because we would not know the member sought coverage OON. This can cause member abrasion and unnecessary appeals.

Thank you for clarifying at the RAC meeting that while the DFR will not include such a provision in the rules, insurers are permitted to use their current practices of working with the member to find an in-network provider without an unreasonable delay to GAT treatment. Should we be unsuccessful finding an in-network provider, we can pursue other means to provide the member with the care they need. This may include seeking services out-of-network with our approval and a special case agreement.

Out-of-Network GAT Services Reimbursement at In-Network Cost-Sharing

(7) requires that carriers:

(a) Satisfy any network adequacy standards under ORS 743B.505 related to gender-affirming treatment providers; **and**

(b)(A) Contract with a network of gender-affirming treatment providers that is sufficient in numbers and geographic locations to ensure that gender-affirming treatment services are accessible to all enrollees without unreasonable delay; **or**

(B) Ensure that all enrollees have geographical access without unreasonable delay to out-of-network gender-affirming treatment services with cost-sharing or other out-of-pocket costs for the services no greater than the cost-sharing or other out-of-pocket costs for the services when furnished by an in-network provider, and meet all the requirements in:……

With respect to (7)(b)(B), thanks for confirming that should a member seek OON GAT services, unless here is a prior agreement in place with the carrier, providers will be allowed to balance bill because the cost of the service exceeds the cost-sharing for in-network services. Customarily, this is what happens when a member seeks services OON. They are subject to balance billing.

Definition of Unreasonable Delay

(8) provides the definition of “unreasonable delay”, a request sought by carriers. While the DFR chose to follow CMS appointment wait times for plans on the federally facilitated exchange (FFE), we believe it’s very stringent and unreasonable considering carriers will also be required to ensure that enrollees seeking an appointment are able to schedule an appointment within the timeframes in the draft rules at least 90% of the time.

Given the current environment in Oregon where there are workforce shortages and the demand for providers is more than the supply, it’s unrealistic for carriers to meet the CMS timeframes. We recommend that the DFR postpone defining it and rely on its current network adequacy law and rules until the anticipated rulemaking begins to revise the existing network adequacy law and rules.

Procedures that are Experimental or Investigational

Lastly, it's still unclear whether insurers will be allowed to exclude procedures that are included in other sections of the WPATH guidelines but are considered experimental or are not widely agreed by medical professionals to be safe.

In our previous comment letters, we've provided the example of uterine transplants. They are part of WPATH but are still deemed experimental by most medical standards. Similarly, gluteal lipofilling is included in a WPATH appendix, but is not widely considered safe. Gluteal lipofilling has a safety advisory from a task force formed by the American Society of Plastic Surgeons (ASPS), the American Society for Aesthetic Plastic Surgery, International Society of Aesthetic Plastic Surgery, International Society of Plastic Regenerative Surgeons and the International Federation for Adipose Therapeutics and Science. This is due to the high rate of mortality associated with this procedure.

While (3) of the draft rule states that: "*Carriers may use utilization review practices to verify adherence to the accepted standards of care described in subsection (2)(b), provided that such practices are consistent with the requirements of this rule and all other applicable provisions of Oregon law. Utilization review practices shall be implemented in a manner that does not unreasonably limit or delay access to care"* carriers will still have to adhere to "accepted standards of care" which includes at a minimum, the WPATH 8.

Even if the procedure is considered medically necessary as determined by the prescribing physical or behavioral health care provider, carriers should be allowed to exclude the procedure if other standards of care have deemed the procedure to be experimental or investigational and not safe. It should also not be considered unreasonably limiting or delaying access to care when safety is at issue as that's our number one priority.

Conclusion

Thanks for the opportunity to provide comments. It's been a collaborative effort with the DFR and other stakeholders and interested parties to ensure that Oregonians have access to the GAT services they need without delay.

Thank you.

Sincerely,

Antoinette Awuakye
Sr. Public and Regulatory Affairs Specialist