



February 8, 2019

Daniel Tsai, Assistant Secretary for MassHealth
Executive Office of Health and Human Services
One Ashburton Place, 11th Floor
Boston, MA 02108

Re: Beneficiary Access to DME and MassHealth Compliance with Federal Regulations at 42 CFR § 440.70

Dear Assistant Secretary Tsai,

In August 2018 we first wrote to you to bring to your attention the need for MassHealth to make further amendments to its policies and regulations for authorization of home health services and durable medical equipment and medical supplies (DME) in order to comply with federal Medicaid regulations. We write today because it appears that despite the issuance of an October 2018 DME Bulletin, MassHealth representatives continue to deny DME based on unlawful standards.

We met with EOHHS lawyers and with representatives of the Office of Long Term Services and Supports in September 2018 and were encouraged by the progress we seemed to make. At the meeting, MassHealth representatives agreed to issue a Provider Bulletin to immediately clarify that DME that did not adhere to a Medicare Current Local Coverage Determination (LCD) policy could nevertheless be approved based on an individualized determination of medical necessity under Medicaid rules. Such a Bulletin was issued in October 2018 as DME Bulletin 21: Clarification of Definition of Durable Medical Equipment and Use of Medicare Local Coverage Determination. Therefore, we were stunned to learn that at a Jan. 30, 2019 appeal from a Nov. 5, 2018 denial of DME, MassHealth's agent for purposes of DME prior authorization, Optum, read a written statement into the record expressly acknowledging that it was relying on a Medicare Local Coverage Determination. In the course of the hearing, neither the Optum representative nor the hearing officer expressed any knowledge of the October

2018 DME Bulletin. Attorney Uiemenkova is representing the appellant in this case. Optum's reliance on a Medicare DME policy with its homebound requirement and lack of focus on prevention was particularly inappropriate in this case which concerned DME for a child.

Obviously, the policy reflected in the October DME Bulletin has not been effectively communicated to MassHealth's agent Optum. DME decisions are also made by Managed Care Organizations, Accountable Care Partnership Plans, the SCOs and the One Care Plans. We can only assume that they too may be acting in ignorance of the important policy clarification in the October Bulletin and denying DME to MassHealth members based on unlawful criteria.

To remedy the situation, we ask that the Office of Medicaid immediately take steps to assure that Optum and all medical consultants in its employ who have any role in DME determinations are fully trained on the policies reflected in the October bulletin and in the governing federal Medicaid regulations. The same training should be undertaken for representatives of the managed care entities. In addition, we ask that Optum review all DME decisions it has made since October 2018 to identify those in which it may have denied coverage in reliance on a Medicare LCD. At a minimum, the MassHealth beneficiary and DME provider in any such cases should be notified of the error and given the opportunity to have a denial reconsidered. The Board of Hearings should also be notified in any such case that is pending appeal.

We ask to meet again with MassHealth lawyers and OLTSS staff to review the DME situation, and to reiterate the December 2018 recommendations of the Disability Law Center that amended regulations set forth the necessity of individualized determinations based on Medicaid medical necessity criteria more clearly than the October Bulletin.

We also hope to follow up on the illegal conditions on home health aide services. In November, at the request of MassHealth OLTSS and legal staff, we submitted seven case studies that exemplified both the extraordinary medical and behavioral complexity of MassHealth members seeking home health services and the hardship caused by the current policies. We last met in December and reviewed a proposed Provider Bulletin at that time but have heard nothing more since we commented on that proposal.

Despite the disappointing recent developments, we look forward to meeting again as soon as possible and working cooperatively with MassHealth to make progress on these issues.

Yours truly,

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