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January 14, 2008

By fax
Janice Staloski, Director
Bureau of Community Program Licensure
and Certification
132 Kline Plaza, Suite A
Harrisburg, PA 17104

Re: Department of Health Proposed Regulation No. 10-86
Regarding Confidentiality of Addiction Treatment Records

Dear Ms. Staloski:

I write to respond to respond to the Department of Health's Proposed Regulation No. 10-186, which relates to the confidentiality of addiction treatment records. Those regulations would have a direct bearing on the practical application of issues that are now before the Pennsylvania Supreme Court, and would also have a direct bearing on current regulatory guidance from the Pennsylvania Insurance Department.

A Pending Supreme Court Case on Act 106 Will Decide Whether Insurers Can Carry Out Intrusive Medical Necessity Reviews

The proposed new regulations could imperil the consumer protections found in Act 106 of 1989, 40 Pa. Stat. §§ 908-1 to 908-6, and on the regulatory guidance regarding Act 106 set forth in the Insurance Department's Notice 2003-06, titled *Drug and Alcohol Use and Dependency Coverage*, 33 Pa. Bulletin 4041 (August 9, 2003). As a general matter, Act 106 is intended to permit patients with group health insurance coverage to receive addiction treatment without medical necessity reviews or other managed care interference. The Insurance Department and the Attorney General are now enforcing this important law. The Insurance Federation and a coalition of managed care companies have challenged the Insurance Department's reading of the law. On July 26, 2007, a unanimous panel of the Commonwealth Court decided the case in favor of the Insurance Department. The Insurance Federation has appealed the case to the Pennsylvania Supreme Court, and the parties are in the midst of the briefing process.

Thus, the Pennsylvania Supreme Court is set to decide whether or not managed care insurers can carry out medical necessity reviews, with respect to patients and patient days that fall within Act 106.

In the proposed regulations, the Department of Health takes a position that in practical effect sides with the managed care industry in this dispute. What's worse, it does so in a way that could potentially be used to seriously dilute the effect of the Pennsylvania Supreme Court's decision on medical necessity reviews. Here's why.

Addiction treatment facilities know from hard experience that managed care companies routinely demand, from facilities, detailed information and documents about patients. All too often – indeed, routinely – managed care companies demand information that the facilities are not, under the current regulations, permitted to provide. Facilities respond by pointing to the confidentiality regulations, and provide only the information that the regulations allow them to provide. Because confidentiality regulations are the only real bulwark against these managed care demands for information, we know that everything that is allowed to be disclosed will be disclosed.

Addiction treatment facilities also know from hard experience that managed care companies routinely take the position that they cannot tell whether a particular patient is entitled to the protections of Act 106. As a result managed care companies demand – as a condition of authorization and therefore payment – that the facilities produce detailed patient information for every patient, even those entitled to the protections of Act 106. Because the patient needs treatment **immediately** and because facilities need to be (and are entitled to be) reimbursed, facilities must and do accede to these demands up to the limits of what the current regulations permit, even for Act 106 patients. While this does pose some threat to patient confidentiality under the current rules, the harm caused by the managed care companies' feigned ignorance of (or deliberate indifference to) Act 106 status is limited because the information at stake is limited.

The proposed regulations, by contrast, will allow managed care companies to demand everything covered in the broad language of section (c)(2)(ii) (or, potentially, everything covered in the even broader language of sections (c)(1) (which places no limits at all on the types of information disclosed) and (c)(2)(i) (which contains no meaningful limitation)).

Thus, we know that under these proposed rules every patient – even patients otherwise entitled to the protections of Act 106, which ***on its face prohibits this sort of managed care interference*** – will be subject to the intrusive, care-limiting scrutiny of the managed care company. This is a wrong that cannot be righted at some later time, because with the managed care company looking over the facility's shoulder, the patient will get less treatment or won't get treatment at all.

I hasten to add that I am not claiming that these regulations were deliberately intended to work an end-run around Act 106. Nor am I claiming that the proposed regulations were intentionally

designed to provide the managed care companies with a "second line of defense", guarding the managed care companies against the effects of a possible defeat in the Supreme Court. I don't know who came up with this language, or what their intentions were when they did so. What I do know, however, is that if one were indeed to set out to craft regulations that could be used to indirectly but effectively damage the practical availability of Act 106's protections, it would be hard to do better than the proposed changes to the confidentiality regulations.

The Proposed Regulations Would Affect Existing Regulatory Guidance

As explained above, the proposed regulations would have profound practical effects on the regulatory guidance set forth in the Insurance Department's Notice 2003-06. For that reason, I respectfully disagree with the Department of Health's statement, in 27 item of the Regulatory Analysis Form ("RAF"), that the proposed regulations would have no effect on existing regulatory guidance.

The Pennsylvania Supreme Court is set to decide whether or not managed care companies can scrutinize and second-guess decisions made by addiction treatment facilities, when they provide addiction treatment to patients who fall within Act 106. I respectfully submit that this issue should be decided by the Pennsylvania Supreme Court in the case that is now before it, not by the Department of Health through changes to confidentiality regulations.

Very truly yours,

GREGORY B. HELLER

GBH/ld

cc (by fax): Independent Regulatory Review Commission
Senator Edwin Erickson
Senator Vincent Hughes
Representative Frank Oliver
Representative George Kenney

FAX TRANSMITTAL SHEET

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Comments: