

To: Clients and Friends
From: Manatt, Phelps & Phillips, LLP
Date: June 30, 2014
Subject: Substance Use Disorder Treatment Coverage Requirements

In the final days of the 2014 legislative session, the State Legislature passed a package of eleven bills aimed at the surge in heroin use, including a bill that addressed insurance coverage of substance use disorder (“SUD”) treatment. On June 23rd, Governor Andrew Cuomo signed the package of bills into law, including the insurance-related legislation (Assembly Bill No. 10164/Senate Bill No. 7912), which is now Chapter 41 of the Laws of 2014.

The new insurance requirements are intended to expand coverage of, and access to, treatment for patients suffering from SUDs by: (i) strengthening existing SUD coverage mandates and aligning such coverage with federal mental health parity requirements; (ii) enhancing utilization review (“UR”) requirements concerning qualifications of clinical reviewers, clinical review criteria and the expedition with which UR decisions are made, as well as coverage while such decisions are pending; (iii) clarifying regulatory enforcement obligations with respect to these reforms; and (iv) creating an SUD workgroup to study and make recommendations.

Provisions regarding SUD coverage and UR will generally take effect on April 1, 2015 and apply to policies issued, renewed, modified, altered or amended on and after such date. The coverage requirements will apply to commercial health insurance policies, including those offered through the State’s health benefit exchange, while the utilization review requirements would be applicable across the board to both commercial and Medicaid health plan coverage. Provisions regarding the workgroup established under this legislation and enforcement by the Superintendent of Financial Services (“Superintendent”) take effect immediately.

I. Expanded Coverage of SUD Services

The SUD coverage provisions expand prior coverage requirements regarding SUD treatment, and, in several areas, make changes to reflect requirements under the federal Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (“MHPAEA”)¹ and related regulations.

¹ 29 U.S.C. §1185a.

- **Mandated Coverage of SUD Services.** Every policy that provides hospital, medical, major medical or similar comprehensive or comprehensive-type coverage will be required to provide inpatient and outpatient coverage for SUD diagnosis and treatment, including detoxification and rehabilitation services. This SUD benefit mandate goes beyond requirements under the federal mental health parity law, which does not require coverage of mental health or SUD benefits, but instead, provides that if a plan provides such benefits, then the federal parity requirements apply.
- **Compliance with Federal Mental Health Parity Requirements.** Consistent with federal parity law, the mandated coverage for SUD diagnosis and treatment may not apply financial requirements (e.g., deductibles, co-pays, or coinsurance) or treatment limitations (e.g., limits on number of visits or days of coverage, or other similar limits on the scope or duration of treatment) to inpatient or outpatient SUD benefits that are more restrictive than the predominant financial requirements and treatment limitations applied to substantially all medical and surgical benefits covered by the policy. In addition, the provisions also contain an express requirement that such SUD coverage be provided consistent with requirements under MHPAEA.
- **Permissible Cost-Sharing.** The provisions also permit the mandated SUD coverage to be subject to annual deductibles and co-insurance, as deemed appropriate by the Superintendent, and that are consistent with those imposed on other benefits within a given policy. As noted above, any financial requirements must also comply with federal parity law requirements.
- **Limits on Covered Facilities.** The mandated SUD coverage may be limited to facilities in New York State that are certified by the Office of Alcoholism and Substance Abuse Services (“OASAS”) or, in connection with outpatient services, those facilities 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, substance abuse, or chemical dependence treatment programs.²

² To ensure compliance with federal parity law in applying this covered facility limit, plans should assess the facility limitations applicable to comparable medical and surgical benefits, and ensure that limitations applicable to SUD benefits are no more stringent than those applicable to medical/surgical benefits. Federal regulations treat restrictions based on factors such as facility type or geographic location that limit the scope or duration of benefits as a type of “nonquantitative treatment limitation.” 45 C.F.R. §146.136(c)(4). Generally speaking, such limitations may not be applied to mental health or SUD benefits unless, under the terms of the plan, as written and in operation, any processes, strategies, evidentiary standards, or other factors used in applying the limitation to mental health or SUD benefits are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in applying the limitation with respect to similar medical/surgical benefits. *Id.*

- **Outpatient Visits for Family Members.** A policy that provides the mandated outpatient SUD coverage will also be required to provide up to twenty outpatient visits per policy or calendar year to an individual who identifies him or herself as a family member of a person suffering from SUD, seeks treatment as a family member and is otherwise covered by the applicable policy. Such coverage must include treatment pursuant to the family member's own policy, provided that the family member does not exceed the allowable number of family visits provided by the applicable policy and is otherwise entitled to coverage as a family member under the applicable policy.

II. UR Requirements for SUD Treatment

In an effort to improve access to care, the provisions also establish heightened obligations applicable to UR determinations concerning SUD treatment, including requirements regarding individuals eligible to act as clinical peer reviewers, clinical review criteria to be used, the applicable timeframes for making determinations and coverage of SUD treatment while determinations are pending.

- **Enhanced Clinical Peer Reviewer Requirements.** For purposes of UR determinations involving SUD treatment, clinical peer reviewers will have to be either: (i) a physician with a current and valid non-restricted license to practice medicine who specializes in behavioral health and has experience in the delivery of SUD courses of treatment or (ii) a health care professional, other than a licensed physician, who specializes in behavioral health and has experience in the delivery of SUD courses of treatment and, where applicable, has a current and valid non-restricted license, certificate or registration or, where no provision for a license, certificate or registration exists, is credentialed by the national accrediting body appropriate to the profession.
- **Clinical Review Criteria Requirements.** In determining whether SUD treatment will be covered, a UR review agent (i.e., the entity or organization performing UR) will be required to use recognized evidence-based and peer-reviewed clinical review criteria that are appropriate to the age of the patient and deemed appropriate and approved for such use by the Commissioner of OASAS, in consultation with the Commissioner of Health and the Superintendent. In addition, OASAS, in consultation with the Commissioner of Health and the Superintendent, will be required to approve a recognized evidence-based and peer-reviewed clinical review criterion, in addition to any other approved evidence-based and peer-reviewed clinical review criteria.
- **Expedited Timeframes for Decisions Regarding Inpatient SUD Services.** The provisions also impose more accelerated timeframes for UR decisions regarding

inpatient SUD treatment as compared to those applicable to other ongoing or extended services. When making UR determinations regarding requests for inpatient SUD treatment, the UR agent will be required to provide notice of a UR determination to the patient or the patient's designee, which may be satisfied by notice to the patient's health care provider, by telephone and in writing within twenty-four hours of receipt of the request for services when the request is submitted at least twenty-four hours prior to discharge from an inpatient admission. Under current law, notice of UR determinations regarding requests for continued or extended health care services or additional services for a patient undergoing a course of continued treatment prescribed by a health care provider must be provided within one business day of receipt of the necessary information.³

- **Accelerated Timeframes for Decisions Regarding Expedited Appeals⁴ of SUD Treatment Denials.** The provisions require that expedited appeals of adverse UR determinations with respect to inpatient SUD treatment be determined within twenty-four hours of receipt of the appeal. In contrast, for most other services, expedited appeals must be determined within two business days of receipt of necessary information to conduct such appeal.⁵
- **Coverage of Treatment Pending UR Decision.** The provisions also prohibit a UR agent from denying coverage for inpatient SUD treatment on grounds of medical necessity or lack of prior authorization while a UR decision regarding such services is pending, as long as the request for treatment is submitted to a UR agent at least twenty-four hours prior to a discharge from an inpatient admission. This requirement appears to be generally consistent with federal law, which requires non-grandfathered plans and insurance issuers to provide continued coverage of benefits for an ongoing course of treatment while an internal appeal is

³ N.Y. Ins. Law §4903(c); N.Y. Pub. Health Law §4903(3). An exception applies to notice of UR determinations regarding requests for home health care services following an inpatient hospital admission: such notice must be provided within seventy-two hours of the receipt of the necessary information when the day subsequent to the request falls on a weekend or holiday. N.Y. Ins. Law §4903(c); N.Y. Pub. Health Law §4903(3).

⁴ Generally speaking, New York law requires a UR agent to establish an expedited appeals process for appeals of adverse UR determinations involving continued or extended health care services or adverse determinations in which a health care provider believes an imminent appeal is warranted except any retrospective determination. N.Y. Ins. Law §4904(b); N.Y. Pub. Health Law §4904(2).

⁵ N.Y. Ins. Law §4904(b); N.Y. Pub. Health Law §4904(2). Certain exceptions apply, for example, with respect to home health care services following an inpatient hospital admission.

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pending and prohibits plans and issuers from reducing or terminating benefits without providing advance notice and an opportunity for review.⁶

III. Enforcement

The SUD treatment coverage provisions also clarify that the Superintendent, as part of its periodic required examination of insurers and HMOs, is required to review determinations of coverage for SUD treatment and ensure that such determinations are issued in accordance with the requirements summarized above.

IV. SUD Workgroup

Finally, the enacted legislation creates a SUD workgroup to study and make recommendations regarding improving access to, and availability of, SUD treatment services in New York State. This workgroup will be jointly convened and co-chaired by the Commissioner of OASAS, the Superintendent and the Commissioner of Health, and must also include representatives of health care providers, insurers, additional professionals, and individuals and families affected by addiction, but may also include others. The workgroup's tasks will, at minimum, include: identifying barriers to obtaining necessary SUD treatment services for across the state; making recommendations for increasing access to, and availability of, SUD treatment services in the State, including underserved areas; identifying best clinical practices for SUD treatment services; conducting a review of current insurance coverage requirements and making recommendations for improving insurance coverage for SUD treatment; recommending improvements to state agency communication and collaboration relating to SUD treatment services in the State; reviewing resources for affected individuals and families facing difficulty obtaining necessary SUD treatment services; and reviewing methods for developing quality standards to measure the performance of SUD facilities in the state. The workgroup is required to submit a report of its findings and recommendations to the Governor, the temporary president of the Senate, the speaker of the Assembly, and the chairs of the Senate and Assembly Insurance and Health Committees by December 31, 2015.

Please feel free to share any questions or concerns with us. You can reach Jim Lytle in the Albany office at 518-431-6700 or Ashley Antler in the New York City office at 212-790-4554.

⁶ 42 U.S.C. §300gg-19(a)(1)(C); 45 C.F.R. §147.136(b).