LETTER OPINION
2014-L-12

July 25, 2014

The Honorable Tim Mathern
State Senator
429 16th Ave S
Fargo, ND 58103-4329

Dear Senator Mathern:

Thank you for your letter requesting an opinion regarding whether the Sanford Health Plan and the Blue Cross Blue Shield "metallic" plans[1] provide sufficient coverage of residential treatment programs for substance abuse under N.D.C.C. § 26.1-36-08 (*Group health policy and health service contract substance abuse coverage*) and N.D.C.C. § 26.1-36-08.1 (*Alternative group health policy and health service contract substance abuse coverage*). You also asked whether amendments to the health plans' residential treatment benefits render the plans ineligible for "grandfathered coverage" under the Patient Protection and Affordable Care Act (Affordable Care Act).

BACKGROUND

The Sanford Health Plan was selected by North Dakota as its "Benchmark Plan" under the federal Affordable Care Act. As a result of this designation, the Sanford Health Plan's benefits will be considered the mandatory "benchmark" for certain other health plans offered in North Dakota. You noted the Sanford Health Plan was amended January 1, 2012, to exclude residential treatment services for substance abuse patients age 21 and over. You also noted the Blue Cross Blue Shield metallic plans announced

[1] The "metallic" plans are Blue Cross Blue Shield health plans that will be offered on the health insurance marketplace established by the federal Patient Protection and Affordable Care Act. They are so named because the plans are labeled as Bronze, Silver, Gold and Platinum plans.

similar changes excluding residential treatment services for substance abuse patients over 21 years old.[2] As a result, these Sanford and Blue Cross Blue Shield plans do not cover any residential treatment services for substance abuse disorders for an age-based group of members.

ANALYSIS

You first ask whether the Sanford Health Plan and Blue Cross Blue Shield metallic plans satisfy state and federal laws requiring minimum mental health and substance abuse treatment benefits.

In 1985, N.D.C.C. § 26.1-36-08 was enacted requiring health plans to provide benefits that "meet or exceed" the substance abuse treatment benefits described in the statute. Those benefits include coverage of certain numbers of days of "inpatient treatment, treatment by partial hospitalization, and outpatient treatment."[3] For example, it requires health plans to provide each member at least sixty days of inpatient treatment for substance abuse in any calendar year. Section 26.1-36-08, N.D.C.C., does not, however, mandate coverage of residential treatment services.

In 2003, a new statute, N.D.C.C. § 26.1-36-08.1, was enacted, at least in part to address the need for residential treatment of methamphetamine abusers.[4] This statute gives health plans the option to provide residential treatment benefits in lieu of other substance abuse benefits the plans would normally have to offer under N.D.C.C. § 26.1-36-08. For example, a health plan may choose to cover fewer inpatient treatment days than required by N.D.C.C. § 26.1-36-08 if it also covers at least sixty days of residential treatment services. The plain language and legislative history of N.D.C.C. § 26.1-36-08.1 make it clear that residential treatment benefits are not an

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[2]More specifically, the plans no longer provide benefits to members over 21 for three levels of residential treatment services defined by the American Society of Addiction Medicine (ASAM): ASAM III.1 RTC, ASAM III.3 RTC and ASAM III.5 RTC. ASAM developed these and other levels of care to help treatment providers determine the best treatment settings and services for substance abuse patients. Plan members under 21 years of age will have coverage only for ASAM III.5 RTC services. HealthCare News (Blue Cross Blue Shield of N.D., Fargo, N.D.), Oct. 2013, at 4, submitted to the Human Services Committee as part of Megan Houn's Jan. 7, 2014, testimony.

[3] N.D.C.C. § 26.1-36-08.

[4] Hearing on S.B. 2210 Before the House Comm. on the Judiciary, 2003 N.D. Leg. (Mar. 25).

additional requirement for health plans under the requirements of N.D.C.C. § 26.1-36-08.[5] Every health plan, however, must fully satisfy one of these two statutes.

Regardless of whether a plan provider chooses N.D.C.C. § 26.1-36-08 or N.D.C.C. § 26.1-36-08.1, a plan must provide the benefits required by the applicable statute "to any individual covered under the policy or contract."[6] Offering statutorily-required benefits to only a subset of plan members, such as an age-restricted group, therefore violates state law. Plans may not satisfy state law by picking and choosing certain plan members to receive mandated benefits.

However, age restrictions or other limitations may be allowable when a health plan offers substance abuse benefits beyond the minimum required coverage. The plain language of the two statutes and the legislative history of N.D.C.C. § 26.1-36-08.1 indicate that the statutes are intended to set "floors" rather than "ceilings" for substance abuse treatment benefits.[7] As a result, any plan that complies with N.D.C.C. § 26.1-36-08, which does not require residential treatment benefits, may offer residential treatment coverage as an added benefit for its members. The addition of residential treatment benefits does not subject the plan to the requirements of N.D.C.C. § 26.1-36-08.1 as long as the plan continues to comply with N.D.C.C. § 26.1-36-08. Thus, in instances where residential treatment is an added benefit, the health plans are not statutorily required to provide the added benefits universally. Only statutorily-required benefits must be provided to all plan members without restrictions or other limitations.

The answer to the specific question you asked this office depends on a determination of certain facts which is outside the scope of this opinion.[8] For example, it is yet to be determined whether the full scope of benefits offered by each of the plans fulfilled the requirements of N.D.C.C. § 26.1-36-08. If the Sanford Health Plan and Blue Cross Blue Shield metallic plans satisfy the requirements of N.D.C.C. § 26.1-36-08, the residential treatment benefits provided under those plans are "added benefits" that exceed the floor established by that law. As such, the benefits do not have to be provided universally, and age restrictions on them do not violate state law. If the plans' benefits do not satisfy

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[5] Id.

[6] N.D.C.C. § 26.1-36-08. This requirement also applies to plans providing minimum benefits under N.D.C.C. § 26.1-36-08.1 because that statute explicitly incorporates all the provisions of N.D.C.C. § 26.1-36-08 except the benefit trade-offs listed in subparagraphs 2(a)-(d).

[7] Hearing on S.B. 2210 Before the Sen. Comm. on the Judiciary, 2003 N.D. Leg. (Jan. 27).

[8] See, e.g., N.D.A.G. 2006-L-20; N.D.A.G. 2000-F-17; N.D.C.C. § 54-12-01(8).

N.D.C.C. § 26.1-36-08, however, the plans must comply with N.D.C.C. § 26.1-36-08.1. In that case, the age restrictions would render the residential treatment benefits insufficient for compliance and would constitute a violation a state law.

In addition to the two state statutes analyzed above, your communications with this office raised questions under federal law. As your inquiry to my office noted, the Sanford Health Plan was selected as North Dakota's Benchmark Plan under the Affordable Care Act. Benchmark Plans, and plans that offer insurance on the individual or small group plan health insurance market, must meet federal standards for the benefits they offer.[9] One of these standards is coverage of certain health plan benefits called "Essential Health Benefits" (EHBs).[10] The most relevant EHB is coverage of "[m]ental health and substance use disorder services, including behavioral health treatment."[11] Federal law requires that EHBs be provided in a non-discriminatory fashion.[12] Specifically, Benchmark Plans and other plans subject to these federal rules may not provide EHBs in any way that "discriminates based on an individual's age" or other factors.[13]

Under federal law, the Sanford Health Plan and plans offered on the individual or small group plan market may not deny benefits for residential treatment services to an age-based group of members, provided such services are considered "[m]ental health and substance use disorder services, including behavioral health treatment"[14] for purposes of EHBs. The plain meaning of the words in the federal regulation strongly imply that residential treatment services for substance abuse disorders would be included in the EHB and therefore could not be offered in a way that discriminates based on age. I understand, however, that the North Dakota Department of Insurance has asked the federal Department of Health and Human Services this question and is waiting for a final determination. As the Department of Health and Human Services has authority to interpret its own regulations, it would be premature to give a definitive answer on whether residential treatment services are required as part of an EHB while that federal agency considers the issue.

Additionally, in 2013, the federal Department of Labor, Department of Health and Human Services, and Internal Revenue Service issued regulations for the federal

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[9] 45 C.F.R. 156.100(b); 45 C.F.R. 147.150(a).
[10] 45 C.F.R. 156.110(a), (b).
[11] 45 C.F.R. 156.110(a), (b). Alternatively, a plan may satisfy some EHB requirements by "supplementing" benefits according to a detailed federal formula.
[12] 45 C.F.R. 156.110(d).
[13] 45 C.F.R. 156.125(a).
[14] 45 C.F.R. 156.110(a)(5).

Mental Health Parity and Addiction Equity Act of 2008.[15] The regulations are extraordinarily detailed, but the law essentially requires each health plan to use the same processes and rules for determining coverage of mental health and substance abuse services that the plan uses for determining coverage of medical and surgical benefits. With some exceptions, the regulations apply to health plans that provide mental health or substance abuse disorder benefits for years that begin on or after July 1, 2014.

To accomplish the legally-required parity between mental health/substance abuse benefits and medical/surgical benefits, the federal regulations require health plans to assign all health services to six benefit classifications: inpatient/in-network, inpatient/out-of-network, outpatient/in-network, outpatient/out-of-network, emergency care and prescription medications. Once a plan classifies its benefits into those categories, the plan "may not apply any financial requirement or treatment limitation to mental health or substance use disorder benefits in [a particular] classification that is more restrictive than the predominant financial requirement or treatment limitation of that type applied to substantially all medical/surgical benefits in the same classification."[16]

In response to questions about how to classify intermediate services, including residential treatment for substance abuse disorders, the federal agencies said these services must be assigned "in the same way [health plans] assign comparable intermediate medical/surgical benefits."[17] The agencies noted that "residential treatment tends to be categorized in the same way as skilled nursing facility care in the inpatient classification."[18] More, specifically, they stated, "if a plan or issuer classifies care in skilled nursing facilities or rehabilitation hospitals as inpatient benefits, then the plan or issuer must likewise treat any covered care in residential treatment facilities for mental health or substance user disorders as an inpatient benefit."[19]

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[15] Mental Health Parity and Addiction Equity Act of 2008, 78 Fed. Reg. 68240 (Nov. 13, 2013) (to be codified at 45 C.F.R. pts. 146 and 147).
[16] Mental Health Parity and Addiction Equity Act of 2008, 78 Fed. Reg. 68268 (Nov. 13, 2013) (to be codified at 45 C.F.R. pts. 146 and 147).
[17] Mental Health Parity and Addiction Equity Act of 2008, 78 Fed. Reg. 68262 (Nov. 13, 2013) (to be codified at 45 C.F.R. pts. 146 and 147).
[18] Mental Health Parity and Addiction Equity Act of 2008, 78 Fed. Reg. 68260 (Nov. 13, 2013) (to be codified at 45 C.F.R. pts. 146 and 147)
[19] Mental Health Parity and Addiction Equity Act of 2008, 78 Fed. Reg. 68247 (Nov. 13, 2013) (to be codified at 45 C.F.R. pts. 146 and 147).

Based on the language above, there is a strong likelihood that health plans subject to the federal parity law will need to treat residential treatment benefits like they treat inpatient medical/surgical benefits. Again, this opinion cannot reach a conclusion on the specific question asked due to outstanding questions of fact, such as what age limits or other restrictions, if any, the plans impose on inpatient medical and surgical benefits. However, if the Sanford Health Plan and Blue Cross Blue Shield metallic plans are not exempted from the parity law, their age-based restrictions on residential treatment services will violate federal law if those restrictions are more restrictive than the predominant limitation applied to substantially all medical/surgical benefits in the same classification, which is most likely the classification for inpatient benefits.

Finally, you also ask whether the amendments to the Sanford Health Plan and Blue Cross Blue Shield metallic plans cause those plans to lose, or be ineligible for, designation as "grandfathered coverage"?

Under the Affordable Care Act, plans that are deemed "grandfathered coverage" are exempt from some federal requirements.[20] For example, grandfathered plans do not have to comply with the EHB requirements analyzed in this opinion.[21] If the Blue Cross Blue Shield metallic plans are entitled to grandfathered status, they do not have to provide EHBs under the Affordable Care Act, even if they would otherwise be subject to that requirement.[22] This means the non-discrimination provision for EHBs would be inapplicable to the plans' age restrictions.

"Grandfathered coverage" is defined as "coverage provided by a group health plan, or a group or individual health insurance issuer, in which an individual was enrolled on March 23, 2010 (for as long as it maintains that status...)."[23] Plans that meet that definition will, however, lose their grandfathered status if they make certain types of changes to their benefits.[24] For example, a grandfathered plan that eliminates all or substantially all benefits to diagnose or treat a particular condition will lose its grandfathered status and will have to come into compliance with all relevant provisions of the Affordable Care Act, including providing EHBs, in a non-discriminatory manner.[25] The Blue Cross Blue Shield metallic plans altered their residential treatment services benefit after March 23, 2010. If doing so constituted the "elimination of all or

[20] 45 C.F.R. 147.140(c).
[21] Grandfathered plans must comply with the Mental Health Parity and Addiction Equity Act of 2008, however.
[22] As a benchmark plan, the Sanford Health Plan must comply with EHB requirements.
[23] 45 C.F.R. 147.140(a).
[24] 45 C.F.R. 147.140(a),(g).
[25] 45 C.F.R. 147.140(g)(1)(i).

substantially all benefits to diagnose or treat"[26] a particular condition, then the plans lost any grandfathered status they may have claimed.

There is no federal guidance directly on point regarding the termination of residential treatment services for substance abuse disorders. The Internal Revenue Service, Department of Health and Human Services and Employee Benefits Security Administration, however, issued Interim Final Rules regarding grandfathered plans in 2010.[27] In the preamble of those interim final rules, the agencies provide examples of when plans are considered to have eliminated all or substantially all benefits for a particular condition. One example concerns a plan that provides benefits for a mental health condition that requires treatment by counseling and prescription drugs. The agencies declared that, if that plan eliminates the benefits for counseling (but not medication) for that mental health condition, it will lose its grandfathered status because it will have eliminated all or substantially all benefits for that condition.[28] This example provides a useful analogy. If there are substance abuse disorders affecting adults over the age of 21 that require residential treatment services, then the Blue Cross Blue Shield metallic plans have engaged in the same type of activity prohibited in the federal agencies' example. As a result, they would lose any claimed grandfathered status and could not rely on that status to claim exemption from having to provide EHBs in a non-discriminatory fashion.

CONCLUSIONS

The Sanford Health Plan and Blue Cross Blue Shield metallic plans are subject to a myriad of state and federal laws and regulations. Whether they are in compliance with all applicable requirements depends on findings of fact outside the scope of this opinion.

Nonetheless, the age-based restrictions on the plans' residential treatment services for substance abuse disorders are not compliant with state or federal law under the following circumstances: If the plans do not comply with all the requirements of N.D.C.C. § 26.1-36-08, resulting in their being subject to N.D.C.C. § 26.1-36-08.1; or, if the federal Department of Health and Human Services determines that residential

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[26] Id.
[27] Group Health Plans and Health Ins. Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34537 (June 17, 2010) (to be codified at 45 C.F.R. pt. 147).
[28] Group Health Plans and Health Ins. Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34565 (June 17, 2010) (to be codified at 45 C.F.R. p. 147).

treatment services for substance abuse disorders are considered "mental health and substance use disorder services, including behavioral health treatment" for purposes of EHBs;[29] or, if the plans are not exempt from the Mental Health Parity and Addiction Equity Act of 2008 and their age-based restrictions are more restrictive than the predominant limitation applied to substantially all medical/surgical benefits in the same classification as residential treatment services for substance abuse disorders.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[30]

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[29] This assumes the Blue Cross Blue Shield metallic plans meet the definition of a plan subject to EHBs.
[30] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).