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RE: AN ACT to amend the public health law and the insurance law, in relation to clarifying the grounds for an external appeal based on medical necessity

A.729 (Gottfried)

MEMORANDUM IN OPPOSITION

Submitted on behalf of the Blue Cross and Blue Shield Plans

The Blue Cross and Blue Shield Plans of New York oppose the enactment of this legislation, which would establish unclear and unjustified standards for medical necessity external appeals and give undue weight to the recommendations of providers that lack appropriate qualifications.

1. THE PROPOSED LEGISLATION WOULD CREATE A CONFUSING AND INCONSISTENT STANDARD FOR EXTERNAL REVIEW AGENTS TO USE FOR APPEALS BASED ON MEDICAL NECESSITY.

The current external review law has proven to be an effective process to provide an independent review of claims determinations based on conventional medical theories. If enacted, this bill would result in the existence of two competing standards to be used in determining medical necessity external appeals without providing any guidance for when each standard should be applied. The bill would amend section 4914(2)(d)(A) of the public health law and section 4914(b)(4)(A) of the insurance law by adding the following language:

> Where applicable, the appeal shall be granted if, and to the extent, the external appeal agent determines, upon review of the applicable medical and scientific evidence, the patient's medical record, and any other pertinent information, that the proposed health service or treatment is likely to be more beneficial than any standard treatment or treatments for the patient's condition or disease; if the

> specific health service or treatment recommended by the health care professional would not otherwise be excluded from coverage under the policy on grounds other than medical necessity.

This language sets forth an additional standard: whether the recommended service or treatment is likely to be more beneficial than any standard treatment for the patient's condition. The standard currently applied to external appeals, whether the plan acted reasonably, with sound medical judgment and in the best interest of the patient, would remain in force. The added standard is prefaced by the phrase "where applicable", but the proposed legislation fails to set forth any guidance as to when the new standard applies. Thus, passage of this bill would create confusion in medical necessity external appeals by setting forth two competing standards.

2. THE PROPOSED ADDITIONAL STANDARD IS NOT APPROPRIATE FOR APPEALS OTHER THAN THOSE INVOLVING EXPERIMENTAL OR INVESTIGATIONAL TREATMENTS.

The use of a review standard which, requires plans to cover treatments that are likely to be more beneficial to the insured than any standard health service or procedure, is overly subjective and inappropriate for medical necessity appeals. This standard is appropriate for appeals for experimental or investigational services. It might be reasonable and in sound medical judgment to deny many experimental or investigational treatments; there is usually limited data available on these services, they involve a ceratin measure of risk, and their effectiveness is yet to be determined. Thus, the standard currently applied to medical necessity determinations (whether the plan acted reasonably, with sound medical judgment and in the best interest of the patient) does not suit appeals for experimental or investigational treatments. Because such treatments are not consistent with conventional treatment and often times involve life threatening circumstances, a more flexible standard can be justified. Therefore, when it appears likely that an experimental or investigational treatment would be more beneficial to the patient than standard treatments, they can be covered.

However, there are several other requirements that accompany this otherwise permissive standard for experimental and investigational treatment appeals. In order for such a treatment to be eligible for an external appeal, the insured's physician must attest that the patient has a life-threatening or disabling disease or condition for which other procedures have been ineffective or medically inappropriate, for which there does not exist a more beneficial covered standard health service, or for which there is a clinical trial. The physician's recommendation must be based on two documents from medical and scientific evidence that the treatment is likely to be more beneficial to the insured than any covered standard treatment. The physician must be board certified or board-eligible and qualified to practice in the appropriate area of practice in order to make an attestation or recommendation. These safeguards help to ensure that physicians have carefully considered their recommendations and that these recommendations are based in sound evidence.

In contrast, this bill would expand the applicability of the more permissive standard without including any of these safeguards to ensure that the treatment is necessary and the recommendation is sound. No physician attestation, or an attestation from any medical

professional, is necessary. The relaxed standard is applied to all insureds, not just those with life threatening or disabling diseases.

The current standard for medical necessity appeals requires that the final determination of the plans must be reasonable, within sound medical judgment and in the best interest of the patient. This standard is more than adequate to protect patients and it allows plans to discourage the use of medically unnecessary and frivolous services.

3. THE PROPOSED LEGISLATION WOULD CAUSE AN UNNECESSARY INCREASE IN PREMIUMS BY ENCOURAGING THE USE OF MEDICALLY UNNECESSARY SERVICES.

An important cost control for health insurers is the ability to deny coverage for unnecessary services. This legislation would make it more difficult to sustain denials of medically unnecessary services and would encourage providers to recommend more unnecessary services and enable insureds to utilize services that will not improve their health. This will result in the waste of premium dollars on such speculative services and higher premiums for all insureds, including those who appropriately utilize health services.

For these reasons, the Blue Cross and Blue Shield Plans strongly urge that this bill not be enacted into law.

Respectfully submitted,

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