

United States Senate
WASHINGTON, DC 20510-2003

September 3, 2013

The Honorable Kathleen Sebelius
Secretary of Health and Human Services
United States Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Sebelius,

I am writing to request your consideration of policy concerns raised by the obesity community during the formal rulemaking process on the November 26, 2012 *Proposed Rule: Patient Protection and Affordable Care Act; Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation*.

I was pleased to join former Senators Akaka and Inouye in urging the Department of Health and Human Services to ensure access to the full continuum of medically necessary interventions for those affected by obesity and continue to support this. I have enclosed correspondence from the Obesity Care Continuum (OCC) sent to my office that requests additional clarity regarding whether or not HHS defines management of obesity and metabolic disorders as a part of disease management in the EHB final rule and requests the specific language in the final rule that addresses the concerns raised by the obesity community.

I believe this warrants your full and immediate consideration, and I hope that you will address this as soon as possible. I would appreciate it if you could please respond directly to my constituents, and send a copy of this response to my office, as well.

Thank you for your consideration. I look forward to hearing from you.

Sincerely,



Barbara A. Mikulski
United States Senator



August 21, 2013

RE: Federal Oversight of State Essential Benefit Benchmark Plan Selection

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Sebelius,

The Obesity Care Continuum (OCC) and the undersigned organizations urge federal and state policymakers to recognize that obesity is a serious chronic disease and deserves to be treated seriously in the same fashion as diabetes, heart disease or cancer. Those affected by obesity should have access to the same medically necessary and covered treatment avenues afforded to all others who suffer from chronic disease. Therefore, we are deeply troubled that the Department of Health and Human Services (HHS) continues to remain silent on some of the key issues facing patient access to obesity treatment services in the new state healthcare exchange plans.

The Obesity Care Continuum was established in 2011 and currently includes the Obesity Action Coalition, The Obesity Society, Academy of Nutrition and Dietetics, the American Society for Metabolic and Bariatric Surgery, and the American Society of Bariatric Physicians. With a combined membership of over 125,000 healthcare professionals and patient advocates, the OCC is dedicated to promoting access to, and coverage of, the continuum of care surrounding the treatment of overweight and obesity. The OCC also challenges weight bias and stigma oriented policies – whenever and wherever they occur.

Over the last 18 months, member groups of the Obesity Care Continuum have had encouraging meetings with the Department of Health and Human Services (HHS) and its Center for Consumer Information and Insurance Oversight (CCIIO) regarding possible avenues for addressing coverage for evidence-based obesity treatments such as intensive behavioral counseling, FDA-approved obesity drugs, and bariatric surgery. Unfortunately though, HHS failed to even address specific questions raised by the obesity community regarding these critical treatment services as part of the proposed rulemaking process on the essential health benefit package for state exchange plans. Specifically, whether or not HHS defines management of obesity and metabolic disorders as part of “chronic disease management” or, at a minimum, a serious medical condition worthy of protection under the Department’s regulations regarding pre-existing conditions or discriminatory benefit designs.

The obesity community reiterated these concerns to staff from CCIIO and the Office of Health Reform during an April 15, 2013 meeting and received feedback from your staff that the obesity community should provide HHS with examples of discriminatory benefit designs. Since that meeting, the Obesity Action Coalition (OAC) has researched all the information on the 50 state (and DC) benchmark plans that is currently available via the websites of both CCIIO and the National Association of Insurance Commissioners (NAIC) and have identified a number of egregious examples of benchmark plan policy language (see Appendix I) that we believe clearly violate the discrimination provisions of the ACA as outlined in HHS’s final regulations, which state:

“To address potentially discriminatory practices, we proposed in paragraph (a) that an issuer does not provide EHB if its benefit design, or the implementation of its benefit design, discriminates based on an individual’s age, expected length of life, or present or predicted disability, degree of medical dependency, quality of life, or other health conditions. In paragraph (b), we proposed that §§ 156.200 and 156.225 also apply to all issuers required to provide coverage of EHB, prohibiting discrimination based on factors including but not limited to race, gender, disability, and age as well as marketing practices or benefit designs that will have the effect of discouraging the enrollment of individuals with significant health needs.”

The OAC's analysis reveals benchmark benefit plan language that would either violate pre-existing condition protections or explicitly deny coverage for obesity treatment services EVEN when medically necessary or because of any related condition or diagnosis. While we understand that the plan language cited in the attached document is merely a "snapshot" of coverage policies in place in 2012, how will HHS assure the obesity community that state exchange plans will be in compliance with protecting patient access to all medically necessary obesity treatment services?

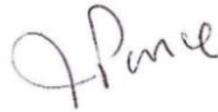
Our country is facing an epidemic – with over two-thirds of Americans currently being affected by overweight or obesity. The complex nature and prevalence of obesity prompted the AMA earlier this year to join other leading organizations in recognizing that obesity is a "disease state with multiple pathophysiological aspects requiring a range of interventions to advance obesity treatment and prevention." HHS must speak up on this issue. Failure to do so could leave millions of Americans without access to the full range of treatment tools available to others affected by chronic disease.

Should you have any questions, please feel free to contact the Obesity Care Continuum through the OCC's Washington Coordinator, Chris Gallagher, at (571) 235-6475 or chris@potomaccurrents.com.

Sincerely,



Harvey Grill, Ph.D.
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www.obesity.org



Jaime Ponce, M.D.
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www.asmb.org



David Bryman, D.O.
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Joseph Nadglowski, Jr.
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President, Academy of Nutrition and Dietetics
www.eatright.org

About Obesity Care Continuum

The Obesity Care Continuum was established in 2011 and currently includes the Obesity Action Coalition, The Obesity Society, Academy of Nutrition and Dietetics, the American Society for Metabolic and Bariatric Surgery, and the American Society of Bariatric Physicians. With a combined membership of over 125,000 healthcare professionals and patient advocates, the OCC is dedicated to promoting access to, and coverage of, the continuum of care surrounding the treatment of overweight and obesity. The OCC also challenges weight bias and stigma oriented policies – whenever and wherever they occur.

Obesity Treatment Services Exclusion Language

The following language is found under the exclusion sections of the state EHB benchmark plans.

Alabama

Services or expenses for treatment of any condition including, but not limited to, **obesity**, diabetes, or heart disease, which is based upon weight reduction or dietary control or services or expenses of any kind to treat obesity, weight reduction or dietary control. This exclusion includes bariatric surgery and gastric restrictive procedures and any complications arising from bariatric surgery and gastric restrictive procedures.

Alaska

Surgical or drug treatment of obesity

Benefits are not provided for treatment, surgery, services, drugs or supplies for any of the following:
Obesity/morbid obesity

Arkansas

Weight Control. Medications prescribed, dispensed or used for the treatment of obesity, or for use in any program of, weight control, weight reduction, weight loss or dietary control are not covered. Weight loss surgical procedures, including complications relating thereto, are not covered.

Colorado

Bariatric Surgery and Cosmetic Surgery Related to Bariatric Surgery.

Connecticut

Weight loss/control treatment, programs, clinics, medications, and surgical treatment for morbid obesity.

DC

Medical and surgical treatment for obesity and weight reduction, including Morbid Obesity

Florida

Bariatric Surgery

Georgia

Obesity – Any services or supplies for the treatment of obesity, including but not limited to, weight reduction, medical care or Prescription Drugs, or dietary control (except as related to covered nutritional counseling) and listed under Covered Services. Nutritional supplements; services, supplies and/or nutritional sustenance products (food) related to enteral feeding except when it is the sole means of nutrition. Food supplements. Services for Inpatient treatment of bulimia, anorexia or other eating disorders which consist primarily of behavior modification, diet and weight monitoring and education. Any services or supplies that involve weight reduction as the main method of treatment, including medical, psychiatric care or counseling. Weight loss programs, nutritional supplements, appetite suppressants, and supplies of a similar nature. Excluded procedures include but are not limited to bariatric services, bariatric surgery (e. g., gastric bypass or vertically banded gastroplasty, liposuction, gastric balloons, jejunal bypasses, and wiring of the jaw).

Idaho

For weight control or treatment of obesity or morbid obesity, even if Medically Necessary, including but not limited to Surgery for obesity. For reversals or revisions of Surgery for obesity, except when required to correct a life endangering condition.

Indiana

For bariatric surgery, regardless of the purpose it is proposed or performed. This includes but is not limited to Roux-en-Y (RNY), Laparoscopic gastric bypass surgery or other gastric bypass surgery (surgical procedures that reduce stomach capacity and divert partially digested food from the duodenum to the jejunum, the section of the small intestine extending from the duodenum), or Gastroplasty, (surgical procedures that decrease the size of the stomach), or gastric banding procedures. Complications directly related to bariatric surgery that result in an Inpatient stay or an extended Inpatient stay for the bariatric surgery, as determined by Us, are not covered. This exclusion applies when the bariatric surgery was not a Covered Service under this Plan or any previous Anthem plan, and it applies if the surgery was performed while the Member was covered by a previous carrier/self funded plan prior to coverage under this Certificate. Directly related means that the Inpatient stay or extended Inpatient stay occurred as a direct result of the bariatric procedure and would not have taken place in the absence of the bariatric procedure. This exclusion does not apply to conditions including but not limited to: myocardial infarction; excessive nausea/vomiting; pneumonia; and exacerbation of co-morbid medical conditions during the procedure or in the immediate post operative time frame.

Kansas

Any service or supply provided directly for or relative to the medical management of obesity. This includes but is not limited to surgery, office visits, hospitalizations, laboratory or radiology services, prescription drugs, medical weight reduction programs, nutrients and diet counseling.

Kentucky

For bariatric surgery, regardless of the purpose it is proposed or performed. This includes Roux-en-Y (RNY), Laparoscopic gastric bypass surgery or other gastric bypass surgery (surgical procedures that reduce stomach capacity and divert partially digested food from the duodenum to the jejunum, the section of the small intestine extending from the duodenum), or Gastroplasty, (surgical procedures that decrease the size of the stomach), or gastric banding procedures. Complications directly related to bariatric surgery that result in an Inpatient stay or an extended Inpatient stay for the bariatric surgery, as determined by Us, are not covered. This exclusion applies when the bariatric surgery was not a Covered Service under this Plan or any previous Anthem plan, and it applies if the surgery was performed while the Member was covered by a previous carrier/self funded plan prior to coverage under this Certificate. Directly related means that the Inpatient stay or extended Inpatient stay occurred as a direct result of the bariatric procedure and would not have taken place in the absence of the bariatric procedure. This exclusion does not apply to conditions including: myocardial infarction; excessive nausea/vomiting; pneumonia; and exacerbation of co-morbid medical conditions during the procedure or in the immediate post operative time frame.

Louisiana

Regardless of Medical Necessity, Benefits are not available for any of the following, except as specifically provided under this Benefit Plan:

- a. weight reduction programs;
- b. removal of excess fat or skin, or services at a health spa or similar facility; or
- c. obesity or morbid obesity.

Minnesota

Bariatric surgery

Mississippi

Weight reduction programs or treatment for obesity including any Surgery for morbid obesity or for removal of excess fat or skin following weight loss, regardless of Medical Necessity, or Services at a health spa or similar facility (except as provided in this Benefit Plan).

Missouri

For bariatric surgery, regardless of the purpose it is proposed or performed. This includes but is not limited to Roux-en-Y (RNY), Laparoscopic gastric bypass surgery or other gastric bypass surgery (surgical procedures that reduce stomach capacity and divert partially digested food from the duodenum to the jejunum, the section of the small intestine extending from the duodenum), or Gastroplasty, (surgical procedures that decrease the size of the stomach), or gastric banding procedures. Complications directly related to bariatric surgery that result in an Inpatient stay or an extended Inpatient stay for the bariatric surgery, as determined by Us, are not covered. This exclusion applies when the bariatric surgery was not a Covered Service under this plan or any previous one of Our Plans, and it applies if the surgery was performed while the Member was covered by a previous carrier/self-funded plan prior to coverage under this Certificate. Directly related means that the Inpatient stay or extended Inpatient stay occurred as a direct result of the bariatric procedure and would not have taken place in the absence of the bariatric procedure. This exclusion does not apply to conditions including but not limited to: myocardial infarction; excessive nausea/vomiting; pneumonia; and exacerbation of co-morbid medical conditions during the procedure or in the immediate post-operative time frame.

Montana

Services, supplies, drugs and devices for the surgical treatment of any degree of obesity, whether provided for weight control or any medical condition.

Nebraska

Treatment and monitoring for obesity or for weight reduction, regardless of diagnosis, including surgical operations.

Ohio

For bariatric surgery, regardless of the purpose it is proposed or performed. This includes but is not limited to Roux-en-Y (RNY), Laparoscopic gastric bypass surgery or other gastric bypass surgery (surgical procedures that reduce stomach capacity and divert partially digested food from the duodenum to the jejunum, the section of the small intestine extending from the duodenum), or Gastroplasty, (surgical procedures that decrease the size of the stomach), or gastric banding procedures. Complications directly related to bariatric surgery that result in an Inpatient stay or an extended Inpatient stay for the bariatric surgery, as determined by Us, are not covered. This exclusion applies when the bariatric surgery was not a Covered Service under this Plan or any previous Anthem plan, and it applies if the surgery was performed while the Member was covered by a previous carrier/self funded plan prior to coverage under this Certificate. Directly related means that the Inpatient stay or extended Inpatient stay occurred as a direct result of the bariatric procedure and would not have taken place in the absence of the bariatric procedure. This exclusion does not apply to conditions including but not limited to: myocardial infarction; excessive nausea/vomiting; pneumonia; and exacerbation of co-morbid medical conditions during the procedure or in the immediate post operative time frame.

Oklahoma

For treatment of obesity, including morbid obesity, regardless of the patient's history or diagnosis, including but not limited to the following: weight reduction or dietary control programs; surgical procedures; prescription or nonprescription drugs or medications such as vitamins (whether to be taken orally or by injection), minerals, appetite suppressants, or nutritional supplements; and any complications resulting from weight loss treatments or procedures.

Oregon

Obesity (including all categories) or weight control treatment or surgery, even if there are other medical reasons for you to control your weight.

Pennsylvania

Weight control services including surgical procedures, medical treatments, weight control/loss programs, dietary regimens and supplements, appetite suppressants and other medications; food or food supplements, exercise programs, exercise or other equipment; and other services and supplies that are primarily intended to control weight or treat obesity, including Morbid Obesity, or for the purpose of weight reduction, regardless of the existence of comorbid conditions. This exclusion does not apply to nutritional supplements (formulas) as **Medically Necessary** for the therapeutic treatment of phenylketonuria. See the Covered Benefits section of this **Certificate** for a description of nutritional supplements coverage.

South Carolina

Any treatment or Surgery for obesity (even if morbid obesity is present), weight reduction, weight control such as gastric by-pass, insertion of stomach (gastric) banding, intestinal bypass, wiring mouth shut, liposuction or complications from it. This includes any reversal or reconstructive procedures from such treatments.

Tennessee

Services or supplies, including bariatric Surgery, for weight loss or to treat obesity, even if You have other health conditions that might be helped by weight loss or reduction of obesity. This exclusion applies whether You are of normal weight, overweight, obese or morbidly obese;

Texas

Any services or supplies provided for reduction of obesity or weight, including surgical procedures, even if the Participant has other health conditions which might be helped by a reduction of obesity or weight, except for healthy diet counseling and obesity screening/counseling as may be provided under **Preventive Services**.

Utah

Obesity surgery, such as gastric bypass, lap-band surgery, etc., including any present and future complications, are not covered.

Complications relating to services and supplies for or in connection with gastric bypass or intestinal bypass, gastric stapling, or other similar surgical procedure to facilitate weight loss, or for or in connection with reversal or revision of such procedures, or any direct complications or consequences thereof;

Virginia

Your coverage does not include benefits for services and supplies related to **obesity** or services related to weight loss or dietary control, including complications that directly result from such surgeries and/or procedures. This includes weight reduction therapies/activities, even if there is a related medical

problem. Notwithstanding provisions of other exclusions involving cosmetic surgery to the contrary, services rendered to improve appearance (such as abdominoplasties, panniculectomies, and lipectomies), are not covered services even though the services may be required to correct deformity after a previous therapeutic process involving gastric bypass surgery.

Washington

Obesity or Weight Reduction/Control: Medical treatment, medication, surgical treatment (including reversals), programs or supplies that are intended to result in or relate to weight reduction, regardless of diagnosis or psychological conditions.

West Virginia

Surgical and non-surgical treatment of obesity.