Responses to Questions on New Hampshire’s
HeW-531 Physician Services Proposed Rule

October 4, 2017

Comment 1: A number of commenters expressed concern that a letter about the change in “gender reassignment” coverage was mailed to parents and in some instances minor children in the New Hampshire Healthy Families program and asked why such information was sent directly to minors. The Department was specifically asked why a letter went out to children, and not the parents, regarding gender reassignment for their children.

Response 1: The Department requires health plans to address all correspondence relative to coverage related to a minor to the parent(s) or guardian. Correspondence sent directly to minors in this instance regarding a change in health benefits was the result of a systems error, for which corrective action has been taken to ensure proper notification in the future. In general, the managed care health plans are required to notify members on changes to their health insurance plan. In this instance, notices were sent regarding changes to several areas of coverage that were effective July 1, 2017 under their contracts with the state, including, in addition to gender re-assignment benefits, changes to mental health and telemedicine benefits, physician incentive plans, and grievance and appeal procedures.

Comment 2: Several people questioned why a Medicaid rule is said to be a "proposed rule change” and yet the plans are already covering the service. Has this decision been made already without public input?

Response 2: The rulemaking process was initiated only after the Department presented the proposed rule change to the Joint Health Reform Oversight Committee in September 2016 and received the Committee’s approval to proceed with the rulemaking change. The rulemaking change, which eliminates the prohibition of payment for general reassignment surgery, was initiated to comply with the requirements of Section 1557 of the Affordable Care and Patient Protection Act.

Comment 3: Would children covered by New Hampshire Healthy Families be able to access "gender reassignment" counseling, medical procedures, hormone treatments, and surgery without parental consent?

Response 3: Gender-related counseling, procedures, treatments and surgeries in the managed care program are subject to prior authorization by the health plan and are determined based on “medical necessity” on a case-by-case basis. These medical services are not provided to individuals younger than 18 without the involvement of the minor’s parents or legal guardians.

Comment 4: If a hospital or healthcare practice were to choose (based on any grounds including religious ones) not to offer "gender reassignment" work, would that hospital or healthcare practice be barred from receiving Medicaid reimbursements altogether?

Response 4: This question raises a legal question, the response to which is governed by federal law and DHHS is unable to provide a response.

Comment 5: Will parents be able to be part of those conversations with their children when considering something as drastic as this and which has been shown to be a risky undertaking in a population who is so fluid in their understanding of their own sexuality?

Response 5: When a service is a covered benefit for a minor, parents, or legal guardians are engaged in making informed decisions about treatment. Determination of whether a treatment is medically necessary must be made on a case-by-case basis taking into consideration a child’s particular needs. Individuals younger than 18 that request gender reassignment must involve any parents or legal guardians.
Comment 6: Why is the Department promoting this service over other services which are not covered, or are covered with limitations? There are equally important services which are not being covered.

Response 6: The Department’s Medicaid program is removing a restriction contained in an administrative rule based on its understanding of federal law that prohibits discrimination on the basis of gender identity. The department also believes that the removal of this restriction will allow for the provision of all services that – on a case-by-case basis and with prior authorization – are deemed medically necessary for the treatment of gender dysphoria.

Comment 7: Why is the Department going forward now when the federal government is re-examining the mandate due to the Texas injunction?

Response 7: The question refers to the issuance of an injunction in Franciscan Alliance, Inc. v. Burwell, Civil Action No. 16-cv-00108, issued by the U.S. District Court for the Northern District of Texas on December 31, 2016. Based upon the Department’s conversations with the New Hampshire Attorney General’s Office, the Department understands the injunction to bar federal enforcement of a federal regulation prohibiting discrimination in the provision of certain medical services based on gender identity. 45 CFR Sec. 92.207(b) bars exclusions or limitations on coverage for health services related to gender transition, including gender reassignment surgery. The injunction issued in the Texas case does not prohibit a state from removing such exclusions or limitations on coverage in order to eliminate discrimination in the provision of medical services for gender dysphoria based on gender identity.

Presently, there are numerous medical services short of gender reassignment surgery that are currently provided if medically necessary and if approved by the managed care providers through a prior authorization process. These services include, but are not limited to, office visits, lab tests, hormone therapy and certain cosmetic procedures. Gender reassignment surgeries are a part of the continuum of care for persons who are treated for gender dysphoria.

Based upon Section 1557 of the Affordable Care Act and in order to eliminate categorical or automatic exclusions or limitations on coverage for all health services related to gender transition that result in discrimination based on gender identity, the Department is seeking approval by the Joint Legislative Committee on Administrative Rules to delete N.H. Administrative Rule He-W 531.06 (g). That action will allow Medicaid recipients to receive gender reassignment surgery as otherwise provided as a covered service and without discrimination.