NoHLA
Northwest Health Law Advocates

November 18, 2022

Ms. Melinda Froud
HCA Rules and Publications Program Manager
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Submitted via e-mail to: melinda.froud@hca.wa.gov; michael.brown@hca.wa.gov

Re: External review, WSR 22-18-069 (Sanctions for Managed Care Organizations)

Dear HCA Rules and Publications Program Manager:

We write on behalf of Northwest Health Law Advocates (NoHLA) to comment in response to the Health Care Authority's (HCA) external review phase draft related to sanctions for managed care organizations (draft rules). We strongly support this rulemaking and encourage HCA to move forward with a CR-102 that aligns with the external review draft.

NoHLA is a nonprofit legal advocacy organization working to ensure all Washington State residents have access to affordable health care. For over two decades, we have monitored the growing prominence of managed care organizations (MCOs) in care delivery for Medicaid enrollees. Of the 2.2 million Washington residents receiving Apple Health today, nearly 85% are enrolled with MCOs.[1] HCA has recently signaled interest in further expanding managed care to some remaining fee-for-service populations.

We view the current landscape with trepidation: while there may be benefits associated with managed care, we have also witnessed a troubling lack of accountability when MCOs fail to uphold basic tenets of Medicaid. For example, we are aware of repeated failures of MCOs to properly determine medical necessity under WAC 182-500-0070, instead relying on proprietary guidelines for coverage decisions. These failures have led to inappropriate coverage denials and lengthy delays as enrollees are forced to appeal MCO decisions that are misaligned with Medicaid law.

Given these concerns, we welcome HCA's effort in the draft rules to clarify its broad authority to impose sanctions where MCOs have abrogated their contractual, state, or federal duties. The proposed amendments to WAC 182-538 -140 and WAC 183-538-070 would streamline existing sanctions language into a single WAC. This change will help regulated entities better understand and comply with the rules.

In addition, the proposed changes to WAC 183-538-070 would reinforce HCA's *existing* authority under federal law to impose the maximum allowable sanction on a per-occurrence, per-day basis for violations which would also warrant intermediate sanctions. Under 42 CFR § 438.702(b), the state may impose sanctions for areas of noncompliance specified in §438.700

[1] HCA, "Standard Procurement Presentation Templates 7.22" (on file).

which exceed the intermediate sanctions described in §438.702(a). We agree with HCA that subsection (b) specifically authorizes the sanction structure HCA is now proposing to clarify in WAC 183-538-070. We also agree with HCA that it is important to reinforce this understanding in rule, given that some MCOs earn billions of dollars in profits each year[2] and thus may not be sufficiently incentivized to comply with Medicaid requirements by intermediate sanction penalties, which can be as small as $25,000.[3] Where MCOs are failing to meet the important standards described in §438.700(b), (c), or (d)— such as the provision of medically necessary services— it is critical that HCA has the full range of compliance tools needed to intervene and correct such deficiencies, including higher maximum allowable sanctions on a per-occurrence, per-day basis.

We urge you to move forward with this draft rule. Thank you for consideration of these comments. Please contact emily@nohla.org with any questions.

Sincerely,

Emily Brice
Senior Attorney & Policy Advisor
Northwest Health Law Advocates

[2] *See, e.g.*, Georgetown University Center for Children & Families, "Medicaid Managed Care Financial Results for 2021: A Big Year for the Big Five" (Feb. 11, 2022), https://ccf.georgetown.edu/2022/02/11/medicaid-managed-care-financial-results-for-2021-a-big-year-for-the-big-five/

[3] Section 5.25.6 of HCA's Integrated Managed Care Contract