Assessment of Public Comment for the Forty-Ninth Amendment to 11 NYCRR 52 (Insurance Regulation 62)

The Department of Financial Services ("Department") received several comments with respect to the 49th amendment to Insurance Regulation 62. Generally, the comments broadly supported the goals and purposes of the amendment but addressed specific areas of concern.

A municipal agency suggested that language throughout section 52.71(a)(1)-(10) be revised to make clear that the listed services were mandatory and not just suggestions; specifically, the agency asked that "such as" be changed to "including."

The listed services are intended as examples of the services to be provided under the various categories of benefits and reflect what is in the current benchmark plan. Other provisions of New York law mandate specific benefits and the conditions or criteria that apply to those benefits. Any plan would have to comply with those New York mandates.

The agency also recommended that the proposed list of essential health benefits in section 52.71(a) contain more explicit parameters regarding services included within the ambit of preventive health services. Specifically, to reference services designated by the United States Preventive Services Task Force and certain other entities.

Other provisions of the Insurance Law and regulations contain explicit parameters for preventive health services. See for example Insurance Law sections 3216(i)(17), 3221(l)(8) and 4303(j). Any plan would have to comply with those and other requirements that may apply.

The agency also recommended that all protected classes under federal and state law be specified in the regulation, which would also include gender identity and sexual orientation, as well as association with members of a protected class. Other commenters likewise urged expansion of the regulation to address discrimination based on sexual orientation, gender expression and transgender status.

The regulation does not reiterate every protection that may already be afforded under state or federal law. All applicable requirements under other laws would apply.

The Department believes that the prohibition against discrimination based on sex in the Insurance Law encompasses discrimination based on gender expression, sexual identity, transgender status and other similar statuses. However, because there was concern that this is not the case, the regulation is amended to explicitly state that discrimination because of sex includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, sexual orientation, gender expression, transgender status, and gender identity.

With respect to discrimination based upon an individual's association with a member of a protected class, the Department is not aware of any practical issue in this regard. If someone had a complaint, the Department would review it to determine whether the issuer was engaging in an unfair or deceptive act or practice.

A comment was also received that the regulation should bar discrimination based on alienage or citizenship status.

The Department believes that alienage status is already addressed by the discrimination bar for national origin. With respect to citizenship status, though, any protections would have to be afforded under existing law. Thus, no change is made with respect to this comment.

The agency also recommended that the proposed rule include language access requirements for individuals with limited English proficiency and communication and accessibility requirements for individuals with disabilities.

These are important issues but not within the scope of this amendment. Certain access issues are already addressed under the law. Further study would be needed on these issues and thus no change in the proposed rule is made.

One commenter urged that a prohibition against discrimination in the regulation with respect to transgender, gender non-conforming and intersex people (TGNCI) should also apply to grandfathered plans.

The anti-discrimination provisions of the Insurance Law and regulations already apply to grandfathered plans so no change is needed.

One commenter urged the Department to make the regulation clear that aged-based restrictions in benefits can be discriminatory; for example, with respect to transgender-related surgery exclusions for minors.

The Department would not approve a policy provision that contained an explicit age restriction. Where medically necessary, coverage should be provided. Any issuer's denial would be reviewed pursuant to medical necessity standards and subject to external appeal pursuant to Insurance Law Article 49.

One commenter requested that the regulation be clarified with respect to dental benefits. Specifically, the request was made to revise the regulation to make clear that a qualified health plan would not fail to be certified by the exchange if it chooses not to offer the pediatric dental benefit so long as a stand-alone dental plan in the exchange offers the required pediatric dental benefit.

The pediatric dental benefit is an essential health benefit. However, the manner and methods by which it is to be provided on the Insurance Exchange is a matter for the Insurance Exchange's rules and is not within the scope of this regulation.

A conference representing certain religious entities raised several objections to the regulation. Specifically;

--that abortion or abortifacient drugs is not an essential health benefit under the federal law and that there is no statutory authority for New York to compel health insurance plans to cover those costs.

--that in vitro fertilization is not an essential health benefit under the federal law and that the Insurance Law does not mandate coverage for infertility treatments such as in vitro fertilization, and that there is no statutory authority for New York to compel health insurance plans to cover those costs.

--that the regulations offer no protections for religious organizations and compel them to participate in abortion on demand, in vitro fertilization procedures and other procedures contrary to their religious and moral beliefs.

The regulation does not mandate additional or expand existing abortion or infertility requirements not already contained in New York law and regulations. For example, contraception is addressed in Insurance Law sections 3221(l)(16) and 4303(cc). The religious employer exception for contraception is specified in Insurance law sections 3221(l)(16)(A) and 4303(cc)(1). Similarly, 11 NYCRR 52.16(o) contains requirements with respect to abortions that are medically necessary but subdivision (o)(2) contains a religious employer exception. With respect to infertility, Insurance Law sections 3216(i)(13), 3221(k)(6) and 4303(s) establish the requirements. The provisions of this amendment are subject to those requirements. As is the case with other requirements, medical necessity remains the appropriate standard for providing coverage under a policy.

The conference was also concerned --that the rule would permit the Superintendent to take arbitrary actions because the regulation permits the Superintendent to act in implementing section 52.71 if the federal essential health benefits are “modified as determined by the superintendent”.

The Department believes that the regulation is consistent with the Superintendent’s authority under the law. Any action to be taken by the Superintendent would be in furtherance of ensuring that insureds be able to obtain coverage for essential health care benefits. In this, as in all things, the Superintendent must implement her actions in a manner that is neither arbitrary nor capricious and consistent with the public policy of the State and legislative goals.