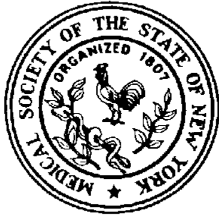

865 Merrick Avenue, Westbury, NY 11590
(516)488-6100 / www.mssny.org

March 14, 2022

Rebecca Wood, Esq.
Deputy Counsel to the Governor
Executive Chamber, State Capitol
Albany, NY 12224

Dear Ms. Wood:

As a follow up to previous discussions, we are writing to express our deep concerns regarding the position taken by the Department of Civil Service (DCS) that NYSHIP/Empire Plan is no longer subject to NY insurance law or Department of Financial Services (DFS) regulations when the Empire Plan reimburses out-of-network physicians for medically necessary, covered services those physicians provide to Plan enrollees. DCS and its agent United Healthcare (United) have directed physicians to bring certain surprising billing claim disputes to the federal dispute resolution process, rather than the state resolution process.

As we have noted, DCS's actions are directly contrary to the provisions of Civil Service Law § 162, which requires that the Empire Plan be subject to NY insurance laws and DFS regulation. There is no statutory authority for DCS or United to override or ignore this statute. Accordingly, we ask you to direct DCS and United to comply with New York law and revise their communications to physicians.

Your intervention is particularly needed because, as we explain below, the Empire Plan's actions have resulted in a drastic, unprecedented, and precipitous drop in reimbursement to out-of-network physicians. According to some physicians, reimbursements have dropped over 80%. If left unchecked, thousands of high-quality, well-respected surgical and medical specialty practices will suffer long-term irreparable harm that will cause many of them to go out of business or drastically reduce their services. Even more devastating is how the Empire Plan's actions will greatly harm patients, who will see the availability of high-quality medical services significantly reduced. For years, a major selling point of public employment in New York has been the Empire Plan's out-of-network benefit, giving enrollees a wide

option of high-quality physicians to choose from. Unfortunately, if the Empire Plan's actions are allowed go unchecked, this sadly will no longer be the case.

Empire Plan is Violating Civil Service Law

In 2010, the Legislature permitted NYSHIP to provide health benefits directly to plan participants using the State's funds rather than purchasing insurance (Civil Service Law § 162[1][a]). In doing so, however, the Legislature directed NYSHIP to ensure it provided all health coverage and benefits mandated by state insurance law, rule, or regulation. Civil Service Law § 162(1)(b)(i).[1] The Legislature also directed NYSHIP when providing direct health benefits to comply with the full range of New York insurance laws, rules, and regulations (Civil Service Law § 162[1][b][iv]).[2]

Historically, Empire Plan reimbursed out-of-network physicians for providing covered medical services to Plan enrollees at a high percentage of the Usual, Customary, and Reasonable (UCR) rate, which was set the benchmarking database maintained by FAIR Health©, a nonprofit organization established in October 2009 as part of the settlement of an investigation by the Attorney General into conflicts of interest involving UnitedHealthcare.[3] The Empire Plan reimbursed in full covered services provided by out-of-network radiologists, anesthesiologists, or pathologists at in-network hospitals.

In March 2015, New York's landmark Surprise Bill Law became effective and changed the relationship between the Empire Plan and out-of-network providers (Financial Services Law §§ 601-08). The It applied to all fully insured health coverage in New York and, through Civil Service Law § 162(1) (b), to the Empire Plan.

Until January 2022, the Empire Plan was treated as subject to the Surprise Bill Law by all stakeholders, including the Empire Plan itself, the Department of Financial Services, state independent dispute resolution

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[1] "Any and all health insurance coverage mandated by any law, rule or regulation, including but not limited to coverage mandated pursuant to article forty-three of the Insurance Law, applicable to contracts for health insurance entered into under this section shall be provided in a manner assuring uninterrupted continuance of coverage for all covered persons. For the purposes of this paragraph 'coverage' shall include but shall not be limited to all benefits, services, rights, privileges and guarantees allowed by law" (Civil Service Law § 162[1][b][i]).

[2] "The provision of direct benefits as per this subdivision shall be subject to review by the superintendent of financial services for the purposes of ensuring compliance with applicable insurance law and any and all associated insurance rules and regulations as noted in this subdivision" (Civil Service Law § 162[1][b][iv]).

[3] To settle allegations of misconduct with regard to its operation of the Ingenix benchmarking database, UnitedHealthcare contributed $50 million to the creation of FAIR Health (https://ag.ny.gov/press-release/2009/attorney-general-cuomo-announces-historic-nationwide-reform-consumer [accessed Mar 13, 2022]).

agencies, and out-of-network providers. Accordingly, out-of-network providers had the ability, for interactions that met the surprise bill or emergency services criteria, to submit a payment dispute to a State independent dispute entity, who was required to take into account the 80th percentile of the FAIR Health benchmarking database when determining the reasonable fee for the services rendered (Financial Services Law § 604[f]; 23 NYCRR §400.2[w]). Accordingly, out-of-network physicians were regularly reimbursed at or near the UCR rate. This is marked contrast to other health plans not subject to state regulation that have attempted for years to get away with reimbursing out-of-network physicians at rates dramatically below the UCR calculated by FAIR Health.

In December 2020, Congress enacted the No Surprises Act (Consolidated Appropriations Act, 2021 [Public Law 116-260; Division BB § 109]). It took effect on January 1, 2022. The Act establishes a federal IDR process to be used by physicians and health plans to determine the out-of-network rate in certain circumstances when a "specified state law" does not apply (42 U.S.C. § 300gg-111). A "specified state law" is a state law that provides for a method of determining the total amount payable to an out-of-network provider (*id*). If there is a specified state law, the state's IDR process, rather than the federal IDR process, applies (*id*.).

The Surprise Billing Law constitutes a "specified state law" because, for health plans and circumstances governed by it, the Law has a method for determining the total amount payable—the health plan pays what it determines to be a reasonable amount, and then either the health plan or the out-of-network physician can submit the matter to IDR, which will determine the reasonable payment amount using the provisions of article 6 of the Financial Services Law (Financial Services Law §§ 600-08). Thus, even after the No Surprises Act took effect on January 1, 2022, for health plans and circumstances covered by the Surprise Bill Law, that Law, and not No Surprises Act, governs the reimbursement of out-of-network physicians.

Indeed, the Department of Financial Services recognized this when it issued its Circular Letter No. 10, in December 2021. In this Letter, the Department of Financial Services stated:

> New York has an IDR process that applies to out-of-network emergency services, including inpatient services that follow an emergency room visit, in hospital facilities, and surprise bills in participating hospitals or ambulatory surgical centers and for services referred by a participating physician. The IDR process requires issuers, physicians, hospitals and ambulatory surgical centers, and providers to whom the patient was referred by their participating physician, to ensure that the insured incurs no

> greater out-of-pocket costs for emergency services and surprise bills than the insured would have incurred with an in-network provider. Since New York has a specified state law, the New York IDR process will continue to apply to out-of-network emergency services and surprise bills.

Unfortunately, the Empire Plan has not recognized that the NY IDR process continues to apply to out-of-network emergency services and surprise bills since the No Surprises Act became effective January 1, 2022. Rather, as discussed above, out-of-network physicians have had their reimbursement dropped precipitously below what they were reimbursed for the services in December 2021.

Empire Plan's explanation for this dramatic lowering of reimbursement is that the Department of Civil Services and/or UnitedHealthcare has determined that the Plan no longer be subject to New York insurance laws or regulation by DFS. Instead, Empire Plan is considering itself a non-governmental self-funded employee health plan that is not subject to New York law or DFS regulation.

As a consequence, Empire Plan is maintaining that it is no longer obligated to reimburse out-of-network physicians at the FAIR Health determined UCR rates. In ordinary circumstances, when a NY regulated health plan fails to reimburse an out-of-network physician at the proper rate, the physician can file a DFS complaint and, if a surprise or emergency services bill is involved, submit the dispute to New York IDR. Since January, Empire Plan has responded to DFS complaints made by out-of-network physicians by contending that it is no longer subject to regulation by that agency. Likewise, since January, Empire Plan has responded to New York IDR proceedings by contending that its reimbursements are no longer reviewable.

The Empire Plan has also taken the extraordinary step of communicating with the federal Centers for Medicare and Medicare Services in an attempt to persuade CMS, inappropriately, that the Empire Plan is not legally subject to the New York Surprise Bill Law and, therefore, the No Surprises Act applies to their out-of-network reimbursement procedures.

However, we believe that the Empire Plan cannot prevail in its effort to be treated like a non-governmental self-funded employee health plan not subject to New York insurance laws or DFS regulation, because the Department of Civil Service cannot override Civil Service Law § 162 by opting out or declaring the Empire Plan no longer subject to New York insurance laws or DFS regulation. This is because, as discussed above, Civil Service Law § 162[1][b][iv] requires that the Empire Plan's actions in

providing benefits – such as reimbursement for covered medical services -- at all times "shall be subject to review by the superintendent of financial services for the purposes of ensuring compliance with applicable insurance law and any and all associated insurance rules and regulations as noted in this subdivision" (*id*.).

Similarly, Civil Service Law § 162(1)(b)(i) provides that "[a]ny and all health insurance coverage mandated by any law, rule or regulation, including but not limited to coverage mandated pursuant to article forty-three of the Insurance Law, applicable to contracts for health insurance" under New York law. The statute goes on to state that "[f]or the purposes of this paragraph 'coverage' shall include but shall not be limited to all benefits, services, rights, privileges and guarantees allowed by law" (id.).

Conclusion

Based on the foregoing, we urge you to direct the Department of Civil Service to direct the Empire Plan to confirm that it remains subject to DFS regulation and NY insurance laws, including New York's Surprise Bill Law. We also request that they correct previous notifications to physicians that have inappropriately stated that disputes will now be decided by the federal dispute resolution process.

We want to be helpful and work together to a satisfactory outcome on this matter. Given the risk to both physicians and patients, we ask that you focus on this promptly. We are happy to meet with you at your earliest convenience to discuss next steps.

Sincerely,

JOSEPH R. SELLERS, MD, FAAP, FACP
President