Client Alert: Optum Abruptly Cuts OON Benefits

Nelson Hardiman has obtained a copy of a notice that was recently circulated by Optum titled “Update to member service are coverage for OON benefits” (the “Notice”). In the Notice, Optum has announced a significant reduction to the availability of out-of-network coverage, set to take effect on July 1, 2021. Below we provide a short summary of the change, our concerns a questions raised by this unexpected announcement and, finally, some suggested actions.

Summary of the Change in Coverage

According to the Notice, the change will affect only UnitedHealthcare Fully Insured plans, to exclude members’ out-of-network (“OON”) benefits for services located outside of their service area. Notably, a “Fully Insured” plan under Optum’s terminology means a plan where the member is not covered by a self-funded employer plan, but rather that the insurer (i.e., Optum) pays for the services. The change will apply to medical and behavioral health services and impacts services that are already subjec to prior authorization.

The Notice specifically calls out behavioral health exclusions for non-emergent, sub-acute inpatient or outpatient services received at any of the following facilities:

- Alternate Care Facility – PHP or IOP
- Freestanding Facility – Psychiatric or Substance Use
- Residential Treatment Facility – Psychiatric or Substance Use
- Inpatient Rehabilitation Facility – Psychiatric or Substance Use

While the Notice appears to be directed to in-network (“INN”) providers, it does not affect services provided by INN providers, who evidently can continue to admit and treat members of Fully Insured plans regardless of geography. Indeed, the Notice specifically advises that INN providers may be asked to accept Optum members who are currently at OON facilities that will n longer be covered once this change in coverage goes into effect.

Practice Concerns Presented by the Change

Despite Optum’s couching this change in policy as a “quality and cost-share” issue, it seems more likely to be strictly a cost-cutting measure, particularly given that the change applies only to Fully Insured plans where Optum is “on the hook” for t cost of care, but not to self-funded employer plans where Optum’s role to serve as an administrator of claims that ultimately a paid by the self-funded plans themselves.

As for providers, especially in the behavioral health space, they typically are either unable to secure contracts with payors like Optum despite efforts to do so, or they opt to stay out-of-network because they do not want to accept the lower reimbursemer rates demanded by the major payors when contracting to be an INN provider. Staying OON offers flexibility to many providers who continue to treat OON members and collect more reasonable reimbursements that more closely align with the costs of providing services. Furthermore, many insureds intentionally choose plans that have OON benefits, paying substantially highe premiums, precisely because they want the flexibility of accessing providers who are outside the network and who may provic superior quality, convenience, or both. By cutting these benefits for services outside an insured’s “service area,” Optum is essentially cutting out a huge swath of providers and significantly limiting patient choice (while presumably continuing to colle the same, higher premiums paid by insureds who have chosen the freedom and flexibility of OON benefits).

Another underlying issue with the change in policy is that it allows Optum further control in dictating what treatment would be best for a given member. For example, a member of an Optum Fully Insured plan who suffers from addiction and wants to escape the influence of her regular surroundings of friends, enablers, and even suppliers, to seek treatment in another service area, will now, under this change in coverage, be denied this opportunity and forced to stay local for treatment. In fact, this change in policy seems directly in conflict with a 2019 court decision in *Wit, et al. v. United Behavioral Health*, which found tha United Behavioral Health had violated the terms of employer-sponsored benefit plans by unlawfully dictating medical necessit determinations to deny coverage for mental health care, “to protect its bottom line.” (The ruling in *Wit* is currently on appeal wi the Ninth Circuit Court of Appeals.)

With the Notice just recently being given and the July 1st just days away, this policy seems sudden, drastic, and not fully

formulated. As explained in the next section, with very little information provided by Optum thus far, this change appears to present more questions than answers. Confusion begets chaos and for many patients who are simply seeking health care services, this chaos will almost certainly have negative impacts on their health.

Questions that Remain Unanswered

The unexpected nature of the Notice, and the extremely short lead-time before the July 1 effective date, coupled with the brev of the Notice itself, leave far more questions than answers. We have heard numerous reports from providers and other stakeholders that Optum's own representatives seem either unwilling or (more likely) unable to offer any specifics as to the origins and rationale behind the Notice, or how and when the changes will be carried out. Foremost among our own questions are the following:

- **What is a Service Area?**Generally speaking, "service area" is a defined term in the benefit plan. However, it is not clea that plans define this term uniformly. We have heard conflicting reports about how Optum defines a service area. Some reports indicate that service areas can be very localized. For instance, a member from the San Fernando Valley area of Los Angeles was advised that a doctor from West Los Angeles would not be covered. This suggests that a member wou be denied OON benefits for going less than twenty miles from home. In other instances, however, we have heard that Optum is defining a service area as an entire state. But even with this broader definition, the coverage change would sti mean that individuals from other states could not travel beyond state lines for services. This is a major concern for patie seeking services at Residential Treatment Facilities because often there are not sufficient resources in the patient's community, and in any case patients suffering from addiction frequently benefit from treatment far from their home environment, in order to escape certain "triggers" to using.

- **What happens to patients who are currently in treatment?**The notice advises INN providers to prepare for the delug of members forced to leave OON facilities outside the members' service areas, stating: "You may be asked to accept admission of a member who is currently at an OON facility." This seems contrary to the standard of care and normal course of business in the insurance industry. If a patient is already admitted to a facility, it could be counterproductive to their recovery to move them to a different facility on short notice. This will undoubtedly create unnecessary harm to the course of treatment that a patient is undergoing. For instance, if a patient is currently on day 14 of a treatment plan with therapist at a facility in California, should that patient now be forced into a new facility in Iowa to be treated by a new therapist and clinical team? And will Optum's network of INN providers even be able to handle the sudden influx of patients seeking transfer from OON facilities? This seems completely contrary to the standard of care and yet, we are concerned that is what this Notice suggests will happen.

- **How will OON providers be notified and what should they do?**The notice does not appear to address OON provider It remains unclear whether Optum has notified its members or these OON facilities that OON patients will lose coverage the coming days. If not, how does Optum expect its members to realize that the services they are currently receiving wil be no longer covered starting July 1st? If the patients must be transferred, who will coordinate and pay for these transfe Are OON providers supposed to just immediately cease any and all discussions with potential patients who are located of state? Will OON providers be paid for services already rendered to patients who traveled outside their service area? The questions and implications are legion, and OON providers who accept patients from other jurisdictions are understandably upset and confused about what this Notice means for their patients and their business.

Next Steps

If you are an OON network provider with Fully Insured patients, we recommend that you:

- Contact Optum as soon as possible to find out if patients currently in treatment will lose coverage;
- Ask Optum if there is a way to appeal the decision on a patient-by-patient basis;
- To avoid non-payment, clarify with Optum before admitting any new "Fully Insured" patients; and
- Notify patients about the potential for having to pay out-of-pocket or be transferred.

In the meantime, Nelson Hardiman is continuing to track this issue and explore options for providers to mount a legal challeng against it. We are concerned that Optum's new policy is a violation of Mental Health Parity laws. While on its face the Notice appears to apply to both medical and behavioral care, in practice there likely will be a disproportionate impact against behavioral health providers, especially residential treatment facilities. As mentioned above, patients in need of residential services often have trouble finding available facilities in their community and, even when they do, there is some evidence that treatment is more effective when patients are able to get away from the problematic influences of their regular environments. Thus, taking away the ability to travel to OON providers outside the service area may, as a practical matter, significantly limit the availability of effective residential treatment services. Not only does this strike us as being a parity violation, we are concerned that insureds are being deprived of a legally-guaranteed essential health benefit and are having their consumer rights violated by this reduction in benefits (while they continue to pay the same, or higher, premiums).

We invite you to contact us with any additional information you have obtained regarding this important matter. Please stay

tuned for further developments.

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