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February 24, 2014

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Toby Douglas, Director  
Department of Health Care Services  
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P.O. Box 997413  
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Dear Mr. Douglas,

We have become aware that several Medi-Cal Managed Care Plans (MCPs) throughout the state are refusing to cover speech therapy and speech therapy evaluation services for children under age 21 enrolled in Medi-Cal because they claim the schools, and not Medi-Cal MCPs, are primarily responsible to provide these children with speech therapy services. We are writing to urge DHCS to take action to instruct the MCPs that they are required under state and federal law (as well as by contract) to provide services mandated by EPSDT to eligible enrollees. Such guidance is necessary to both clarify the MCPs' responsibility for providing these services to their members, when medically necessary and to clarify the current policy of the state in this regard. We have learned about at least two different cases – one recently involving Kern Family Health Care, concerning an 12 year-old child with Down Syndrome, and another from January 2013 involving Health Net in San Diego, concerning a three-year-old child with Autism. In both instances the child was denied Speech Therapy or a related evaluation because the MCP believed the school was providing or should provide the service.

**I. In California, MCPs are responsible for EPSDT for their child enrollees.**

The EPSDT mandate of the Federal Medicaid law requires California to provide children under age 21 with regular health screenings to determine their health needs. And when, in the course of such screenings, a medical provider determines that a child has an illness or condition, the state must cover any services

necessary “to correct or ameliorate” that illness or condition. 42 U.S.C. § 1396d(r)(5); Welf. & Inst. Code § 14132(v); Cal. Code Regs. tit. 22, § 51340(e).

Where Medi-Cal eligible children are served through a managed care delivery system, the managed care entities act as agents of the state and are bound by the same rules that apply to the state Medicaid agency. 42 C.F.R. §§ 438.6(f)(1), 438.100(a)(2) & (d). Therefore, California MCPs must make covered services—including those services required by EPSDT—available to enrollees to the same extent that such services are available to enrollees in fee-for-service Medi-Cal. 42 U.S.C. § 1396b(m)(1)(A)(i). Indeed, for children enrolled in MCPs, California has delegated responsibility for fulfilling the EPSDT mandate—except for certain carved out services—to the MCPs. Cal. Code Regs. tit. 22, § 51840(a); CAL. DEP’T OF HEALTH CARE SERVS., SAMPLE CONTRACT BOILERPLATE FOR TWO-PLAN COUNTIES, Ex. A, Att. 10 § 5 (2011) [hereinafter TWO-PLAN CONTRACT], *available at* [http://www.dhcs.ca.gov/provgovpart/Documents/MMCD\\_TwoPlanBoilerplate-Web.6-1-11.pdf](http://www.dhcs.ca.gov/provgovpart/Documents/MMCD_TwoPlanBoilerplate-Web.6-1-11.pdf); CAL. DEP’T OF HEALTH CARE SERVS., SAMPLE CONTRACT BOILERPLATE FOR GEOGRAPHIC MANAGED CARE, Ex. A, Att. 10 § 5 (2011) [hereinafter GMC CONTRACT], *available at* [http://www.dhcs.ca.gov/provgovpart/Documents/MMCD\\_GMCBoilerplate-Web.6-1-11.pdf](http://www.dhcs.ca.gov/provgovpart/Documents/MMCD_GMCBoilerplate-Web.6-1-11.pdf); CAL. DEP’T OF HEALTH CARE SERVS., SAMPLE CONTRACT BOILERPLATE FOR COUNTY ORGANIZED HEALTH SYSTEMS, Ex. A, Att. 10 § 4 (2011) [hereinafter COHS CONTRACT], *available at* [http://www.dhcs.ca.gov/provgovpart/Documents/MMCD\\_COHS\\_Boilerplate.pdf](http://www.dhcs.ca.gov/provgovpart/Documents/MMCD_COHS_Boilerplate.pdf).

## **II. Under EPSDT, MCPs must cover speech therapy when it is medically necessary.**

As described above, federal and state laws require MCPs to provide services necessary “to correct or ameliorate” covered children’s illnesses and conditions. 42 U.S.C. § 1396d(r)(5); Welf. & Inst. Code § 14132(v); Cal. Code Regs. tit. 22, § 51340(e). While California does not cover speech therapy for adults, state law explicitly notes that EPSDT may require that these services may be provided to eligible children under age 21. Welf. & Inst. Code § 14131.10(c)(1). California regulations set out a detailed list of nine criteria to be used in determining when services including speech therapy are medically necessary under EPSDT. Cal. Code Regs. tit. 22, § 51340(e)(3). When services meet these criteria, MCPs must ensure that the child receives them. TWO-PLAN CONTRACT, Ex. A, Att. 10 § 5(F); GMC CONTRACT, Ex. A, Att. 10 § 5(F); COHS CONTRACT, Ex. A, Att. 10 § 4(F).

## **III. MCPs may not deny coverage of speech therapy simply because it is provided by a child’s school.**

Federal law prohibits states and their agents from restricting payment “for medical assistance for covered services furnished to a child with a disability because such services are included in the child’s individualized education program.” 42 U.S.C. § 1396b(c); see *also* 20 U.S.C. § 1412(a)(1) (the financial responsibility of Medicaid must precede that of

funding provided under the Individuals with Disabilities Education Act); 34 C.F.R. § 300.154(d) (a state agency may use Medicaid to pay for related services).

It is true that Medi-Cal is a payer of last resort, and therefore MCPs need not provide duplicate services when those services are provided by another source. Cal. Code Regs. tit. 22, § 51005(a); *see also* TWO-PLAN CONTRACT, Ex. E at Att. 2 § 23(C) (requiring MCPs to “coordinate benefits with other coverage programs or entitlements, recognizing . . . the Medi-Cal program as the payor of last resort”); GMC CONTRACT, Ex. E at Att. 2 § 22(C) (same); COHS CONTRACT, Ex. E at Att. 2 § 21(C) (same). But MCPs are not absolved from providing services just because the service may be provided in part by a child’s school. Rather, the MCP must evaluate the child’s need for the service and make a determination of what level of service is required to correct or ameliorate the child’s condition. In fact, MCPs may only refer children to receive a needed service from their school once they confirm “the availability of [that] particular service for the member.” Letter from Susanne M. Hughes, Acting Chief, Medi-Cal Managed Care Div., to All Medi-Cal Plans 3 (Dec. 11, 2000) [hereinafter MMCD Policy Letter 00-06], *available at* <http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/PL2000/MMCDPL00006.pdf>. In other words, unless the MCP determines that the necessary level of service is provided completely by the school, the MCP must provide any amount of service needed beyond what the school makes available. *Id.* at 2 (speech therapy services provided by Local Educational Agencies are only “excluded from managed care contracts” to the extent they are “available”).

It is also true that Medi-Cal may pay for services provided by a child’s school pursuant to an IEP or IFSP. 34 C.F.R. §§ 300.34(a), 300.154; Cal. Code Regs. tit. 22, § 51360; MMCD Policy Letter 00-06. But MCPs bear the ultimate responsibility for ensuring that enrolled children receive all medically necessary services, regardless of payment source. 42 U.S.C. § 1396b(c); 42 C.F.R. §§ 438.6(f)(1), 438.100(a)(2) & (d); *see also* TWO-PLAN CONTRACT, Ex. A at Att. 11 § 8(D) (requiring plans to coordinate with other agencies that serve children with special health care needs, including Local Educational Agencies); GMC CONTRACT, Ex. A at Att. 11 § 8(D) (same); COHS CONTRACT, Ex. A at Att. 11 § 7 (same).

**IV. MMCD should issue a new policy letter, explaining MCPs’ obligations to provide medically necessary services when those services are available in part from a child’s school.**

Despite their legal obligations, MCPs have continued to deny speech therapy services to enrolled children on the basis of such services being provided in part by the child’s school. We urge DHCS to issue guidance in the form of an All Plan Letter, to clarify MCPs’ obligations under EPSDT. We are particularly concerned that DHCS’s existing guidance, MMCD Policy Letter 00-06, is written in a confusing manner that may lead some MCPs to mistakenly believe that they are relieved of any responsibility for providing speech therapy for Medi-Cal enrolled children when their schools provide some speech therapy. *See, e.g.,*

MMCD Policy Letter 00-06 at 2 (state that when speech therapy is available through a child's school, it is "excluded from managed care contracts during . . . the school year"). Last year, the DHCS Mental Health and Substance Use Disorder Division issued such a clarifying letter to remind plans of their EPSDT obligations related to mental health services. See Letter from Vanessa Baird, Cal. Dept. of Health Care Servs. Mental Health & Substance Use Disorder Div., to Local Mental Health Directors *et al.* (Jan. 30, 2103), available at <http://www.dhcs.ca.gov/formsandpubs/Documents/13-01.pdf>. By issuing a similar clarifying APL reminding plans that they must cover speech therapy under EPSDT to the extent that a child's need for the service is not completely met by his or her school, DHCS can ensure that all children receive the services they need, and are entitled by law.

We look forward to discussing this matter with you. Thank you for your consideration.

Sincerely,



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Kim Lewis, Managing Attorney  
National Health Law Program



Maria Fernanda Iriarte, Managing Attorney  
Disability Rights California

**CC:** Margaret Tatar, Division Chief, MMCD  
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