

May 25, 2018

Mr. David M. Seltz
Executive Director
Health Policy Commission
50 Milk Street, 8th Floor
Boston, MA 02109

RE: Proposed Regulation: 958 CMR 11.00 – *Internal Appeals Process and External Review Process for Risk-bearing Provider Organizations and Accountable Care Organizations*

Dear Mr. Seltz:

Thank you for the opportunity to comment on the above-referenced proposed regulations (the “Proposed Regulations”). Beth Israel Deaconess Care Organization (BIDCO) is a premier, independent Accountable Care Organization (ACO) focused on building communities of care with a network of diverse and highly skilled physicians and hospitals. Our mission is to move health care forward by engaging providers in their communities to achieve success in a value-based delivery system. We are committed to creating innovative, industry leading best practices in the clinical, administrative and financial aspects of health care.

Our comments on the Proposed Regulations are provided below.¹

1. Section 11.04: Information on Internal Appeals. Section 11.04(2) pertains to the required notice procedures for the RBPO or ACO appeals process in the event of a Primary Care Provider selection or Patient attribution. The wording of this sentence, and in particular its use of “and” instead of “or,” may suggest that the RBPO or ACO must use all of the enumerated notice methods rather than no more than one. We would consider such a requirement unnecessary, and suggest clarification by changing the word “and” as appearing in this sentence to “or.”

2. Section 11.05: Form and Manner of Request. Section 11.05(2) outlines the consent procedures bearing on the release of medical records relevant to an appeal. As you may be aware, consent for the release of medical records is generally obtained at the provider level, and BIDCO as a matter of course does not require nor maintain consent forms from its providers. Instead, under its business associate agreement (BAA), BIDCO has the right to review medical records from each of its practices. Accordingly, we would suggest clarifying in this provision that, in cases where there is a BAA in place and/or the provider has otherwise

¹ Capitalized terms throughout this letter reflect defined terms as appearing in the Proposed Regulations.

obtained the proper consent for the release of a patient's medical records in connection with an appeal, it is not necessary for the RBPO or ACO to secure any additional consent(s).

3. **Section 11.07: Time limits for Resolution of Internal Appeals.** Section 11.07(2) requires that the RBPO or ACO provide the patient with a written resolution of an expedited internal appeal concerning an Urgent Medical Need within three (3) calendar days. As you may know, many provider offices are closed on weekends. This would in some cases limit access by BIDCO staff handling an appeal to necessary documentation and other information held at the practice level during that timeframe. In such cases, compliance with this requirement would be exceedingly difficult, if not impossible. Accordingly, we suggest that the timeframe for the resolution of an appeal concerning an Urgent Medical Need be changed from three (3) calendar days to three (3) business days.

4. **Section 11.09: Form of Written Resolution of Internal Appeal.** This section pertains to the information that must be provided to a patient along with the written resolution of the Internal Appeal. Subsection (2)(c) requires that the information must include a list of "documents and information available to the Patient from the RBPO or ACO, *including* the Patient's medical records relied upon by the RBPO or ACO in the internal appeal" (emphasis supplied). As written, this language may introduce ambiguity as to whether the list of documents must include documents outside of the actual internal appeal record. Accordingly, we suggest clarifying in this provision that the list of documents provided to the Patient must reference only those documents and other information relied upon by the RBPO or ACO in the internal appeal.

5. **Section 11.12: Fees.** This section concerns the costs for an external review, which shall be borne entirely by the involved RBPO or ACO. The Proposed Regulations do not include a role for the RBPO or ACO in the negotiation of external review costs and rates, which we understand will be confirmed through an RFP process administered by the HPC. In order to be better prepared in terms of the financial impact of external reviews, we request that the HPC include a requirement in this section that it must notify, or otherwise be transparent about, the external review fee structure after the procurements for External Review Agencies are completed.

6. **Section 11.19: Medical Records and Other Information.** Section 11.19(1) prescribes the maximum allowable time period for transmitting medical records in "possession or control" of the RBPO or ACO relevant to a patient's appeal to an External Review Agency (upon assignment to such Agency by the Office of Patient Protection (OPP)). As an initial matter, we request clarification that records in the "possession or control" of the RBPO or ACO refers to records that the RBPO or ACO can readily access—that is, limited to the medical and treatment records that were relevant to the resolution of the internal appeal and that have been transferred to the RBPO or ACO.

Secondly, Section 11.19(1)(b) requires that, in the case of an expedited review, the transfer of records described above take place within 24 hours of receipt of notification by the

RBPO or ACO of the assignment to an External Review Agency. For the reasons described in Paragraph 3 above, we request that this time frame be changed to one (1) business day.

7. **Section 11.21: Decisions and Notice**. Section 11.21(8) establishes a process by which an RBPO or ACO can challenge an External Agency's decision, which can be retracted or revised at the sole discretion of the OPP Director only on the basis of a "clear procedural or factual error which is evident on the face of the decision." In our view this review standard is unreasonably stringent, and fails to take into account External Agency decisions that may not be supported by substantial evidence or are otherwise arbitrary and capricious in light of the underlying record. Accordingly, we suggest the inclusion of a review standard that is closer in nature to what would be available under the Massachusetts Administrative Procedures Act (*see* M.G.L. c. 30A, §14), which we believe would promote a greater degree of fairness in the review proceeding, and hold the review agencies to a greater degree of accountability.

Finally, given the costs attendant to External Appeals, which under the Proposed Regulations would be the sole responsibility of the RBPO or ACO (*see* Section 11.12(1)), we suggest that the Proposed Regulations include some mechanism to deter requests for appeals sought by Patients that may be frivolous in nature. This may be accomplished by the requirement that Patients seeking an External Reviews pay a fee of a certain nominal amount that is refundable in the event that the appeal is successful.

Thank you for giving us the opportunity to provide comments on the Proposed Regulations. If you have any questions, please do not hesitate to contact me at 617-754-1098.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Cecilia Ugarte Baldwin', with a stylized, cursive script.

Cecilia Ugarte Baldwin
Director, Public Payer Programs and Policy