

ATTORNEY GENERAL OF THE STATE OF NEW YORK

In the Matter of

HealthNow New York Inc.

Assurance No.: 16-105

**ASSURANCE OF DISCONTINUANCE
UNDER EXECUTIVE LAW
SECTION 63, SUBDIVISION 15**

Pursuant to the provisions of Section 63(12) of the Executive Law and Article 22-A of the General Business Law, Eric T. Schneiderman, Attorney General of the State of New York, caused an inquiry to be made into certain business practices of HealthNow New York Inc. (“HealthNow¹”), relating to its administration of benefits for behavioral health treatment.² Based upon that inquiry, the Office of the Attorney General (“the OAG”) has made the following findings, and HealthNow has agreed to modify its practices and assure compliance with the following provisions of this Assurance of Discontinuance (“Assurance”).

I. BACKGROUND

1. HealthNow is a not-for-profit health service corporation organized under the provisions of Article 43 of the New York Insurance Law. HealthNow operates as BlueCross BlueShield of Western New York within its Western New York division, HealthNow within its Central New York division, and BlueShield of Northeastern New

¹ “HealthNow” includes any entity acting on behalf of HealthNow in connection with the administration of behavioral health benefits within the scope of this agreement.

² “Behavioral health treatment” includes treatment for mental health and substance use disorders.

York within its Eastern New York division. HealthNow's principal offices are located at 257 West Genesee Street, Buffalo NY 14202-2657.

2. In the regular course of business, HealthNow enrolls consumers in health plans and contracts with health care providers for the delivery of health care services to those consumers. HealthNow provides health care coverage for approximately 573,700 New York consumers, of whom approximately 291,000 are enrolled in commercial health insurance.

II. THE OAG'S INVESTIGATION AND FINDINGS

3. The Health Care Bureau of the OAG conducted an investigation into HealthNow's administration of behavioral health benefits provided to enrollees in HealthNow's commercial health insurance products, following the receipt of complaints alleging that HealthNow had improperly denied coverage for consumers' behavioral health treatment. The complaints addressed two of HealthNow's practices: (1) requiring that all outpatient behavioral health visits be preauthorized after the first 20 visits per year; and (2) excluding coverage for nutritional counseling for eating disorders.

A. HealthNow's 20-Visit Threshold for Outpatient Behavioral Health Treatment

4. Utilization review is the process by which a health plan examines members' requests and claims for health care services to determine whether the services are medically necessary, and thus eligible for coverage. Medically necessary services are those that are reasonable and necessary for the diagnosis or treatment of illness or injury, or to maintain or improve the functioning of an individual. For services for which preauthorization is required, before treatment occurs, a provider will submit a request for authorization to a health plan on behalf of the patient, and the plan will review the request

to determine whether the services are medically necessary under its medical necessity criteria. Where services have already been provided, a patient or provider will typically submit a claim for benefits, and the health plan will either pay the claim, if otherwise appropriate, or conduct utilization review for the claim.

5. Many individuals with behavioral health disorders seek outpatient treatment. According to the Substance Abuse and Mental Health Services Administration, outpatient therapy and counseling is an evidence-based treatment for mental and substance use disorders.³ Evidence from rigorous clinical research studies has shown that a variety of psychotherapies are effective with children, adults, and older adults, across diverse conditions.⁴ Additionally, evidence from numerous large scale trials and quantitative reviews supports the efficacy of cognitive-behavioral therapy for alcohol and drug use disorders.⁵

6. Once a member reaches 20 outpatient behavioral health visits in a year, HealthNow subjects that member's behavioral health treatment to medical necessity review (the "20-visit threshold"). HealthNow will not authorize any further outpatient treatment visits until the member's provider completes and submits an outpatient treatment review form, which HealthNow's behavioral health vendor, Health Integrated, reviews to decide whether further outpatient behavioral health visits will be authorized, based on its medical necessity criteria. If no prior authorization has been previously submitted by a provider for a member, Health Integrated will also request additional documentation from behavioral health providers, including the member's initial

³ See <http://www.samhsa.gov/treatment>.

⁴ See <http://www.apa.org/about/policy/resolution-psychotherapy.aspx>.

⁵ See <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2897895/>.

assessment, psychiatric evaluation, current treatment plans, medications, clinical progress notes, and history and physical.

7. The 20-visit threshold is based on HealthNow's past claims paid data. In 2010, HealthNow reviewed the claims history of its members across all lines of business who utilized outpatient behavioral health services and concluded that 90% or more of its members utilized less than 20 visits during that calendar year. HealthNow has employed the 20-visit threshold since then, but it is not based on clinical standards.

8. HealthNow generally does not conduct the same type of utilization review process for outpatient medical services.

9. Since 2012, HealthNow has conducted thousands of reviews in outpatient behavioral health cases under the 20-visit threshold. HealthNow has denied coverage for outpatient behavioral health services for 3,072 members who did not submit a preauthorization request and/or medical information requested by HealthNow, with claims totaling approximately \$1,558,000. HealthNow has also denied coverage for outpatient behavioral health services on the grounds of lack of medical necessity in 50 cases, for which approximately 90 sessions of care were requested, with claims totaling approximately \$11,500. Although members of health plans who receive denials of coverage for behavioral health services sometimes pay out of pocket for treatment, often they cannot afford to do so. According to the Substance Abuse and Mental Health Services Administration, 60% of Americans who do not receive necessary behavioral health treatment cite cost and health insurance issues as the reason.⁶

⁶ Substance Abuse and Mental Health Services Administration (SAMHSA), *Receipt of Services for Behavioral Health Problems: Results from the 2014 National Survey on*

C. HealthNow’s Exclusion of Nutritional Counseling For Eating Disorders

10. Eating disorders are biologically based mental illnesses. According to the New York State Office of Mental Health (“OMH”), up to three to four percent of women will have an eating disorder, such as anorexia nervosa or bulimia nervosa, at some point in their lives, and males also experience eating disorders, to a lesser degree.⁷ OMH states that anorexia nervosa and bulimia nervosa may be associated with other psychiatric problems, such as depression, anxiety and substance abuse, as well as heart complications (including cardiac arrest), electrolyte disturbances, thinning of the bones, muscle loss, lack of menstruation, gastrointestinal problems, low blood pressure and death.⁸ Data from the National Institute of Mental Health show that anorexia nervosa is the most fatal mental disorder, with an estimated mortality rate of approximately 10 percent.⁹

11. Evidence-based medical guidelines confirm the important role of nutritional counseling in the treatment of eating disorders. According to the American Psychiatric Association’s Practice Guideline for the Treatment of Patients with Eating Disorders, nutritional counseling is “a useful part of treatment and helps reduce food restriction, increase the variety of foods eaten, and promote healthy but not compulsive exercise patterns,” and is an empirically supported component of effective treatment.¹⁰

Drug Use and Health, September 2015, available at <http://www.samhsa.gov/data/sites/default/files/NSDUH-DR-FRR3-2014/NSDUH-DR-FRR3-2014/NSDUH-DR-FRR3-2014.htm>.

⁷ See https://www.omh.ny.gov/omhweb/resources/eating_disorders.html.

⁸ See *id.*

⁹ See <http://www.nimh.nih.gov/about/director/2012/spotlight-on-eating-disorders.shtml>.

¹⁰ See

http://psychiatryonline.org/pb/assets/raw/sitewide/practice_guidelines/guidelines/eatingdisorders.pdf;

http://psychiatryonline.org/pb/assets/raw/sitewide/practice_guidelines/guidelines/eatingdi

12. Additionally, the National Eating Disorders Association has stated that nutritional counseling is a necessary component of treatment for eating disorders, because it incorporates education about nutritional needs, and helps plan for and monitor rational choices by patients.¹¹

13. HealthNow does not cover this vital treatment for eating disorders. One complainant asserted that HealthNow denied coverage of nutritional counseling for a member with anorexia nervosa, despite her psychologist's determination that nutritional counseling was an essential part of her treatment because she struggled to effectively make her target body mass index, maintain weight gain, and consume adequate nutrients. The psychologist noted that the member had experienced stress fractures within the course of her illness, highlighting the need for enhanced nutritional support, and was concerned that the member's health status would continue to deteriorate without nutritional counseling. HealthNow's explanation for the denial was that "[b]enefits for nutritional therapy are only available for a diagnosis of diabetes or morbid obesity."

14. Since 2012, HealthNow denied nutritional counseling for dozens of members with eating disorders on the grounds that the member had no benefit for this service. In total, HealthNow denied coverage for approximately 125 sessions of nutritional counseling for its members. This resulted in the members being charged approximately \$14,000 for this treatment. HealthNow covers nutritional counseling for medical conditions such as diabetes and morbid obesity.

[sorders-watch.pdf](#).

¹¹ See <https://www.nationaleatingdisorders.org/treating-eating-disorder>.

III. RELEVANT LAWS

15. Timothy's Law, enacted in 2006, mandates that New York group health plans provide "broad-based coverage for the diagnosis and treatment of mental, nervous or emotional disorders or ailments, . . . at least equal to the coverage provided for other health conditions." N.Y. Ins. Law §§ 3221(1)(5)(A); 4303(g)(1). Timothy's Law also requires that plans provide coverage comparable to that provided for other health conditions for adults and children with biologically based mental illness – including bulimia and anorexia – under the terms and conditions otherwise applicable under the policy, N.Y. Ins. Law §§ 3221(1)(5)(B)(i); 4303(g)(2)(A), and that utilization review for mental health benefits be applied "in a consistent fashion to all services covered by [health insurance and health maintenance organization] contracts." 2006 N.Y. Laws Ch. 748, § 1. New York Insurance Law §§ 3221(1)(7)(A), 4303(1)(1), and 3216(i)(31) require health plans to provide outpatient coverage for substance use disorder consistent with the federal Mental Health Parity and Addiction Equity Act (the "Federal Parity Act").

16. The Federal Parity Act prohibits health plans from: (i) imposing financial requirements (such as deductibles, copayments, co-insurance, and out-of-pocket expenses) on mental health or substance use disorder benefits that are more restrictive than the predominant level of financial requirements applied to substantially all medical/surgical benefits; (ii) imposing treatment limitations (such as limits on the frequency of treatment, number of visits, and other limits on the scope or duration of treatment) on mental health or substance use disorder treatment that are more restrictive than the predominant treatment limitations applied to substantially all medical/surgical

benefits, or applicable only with respect to mental health or substance use disorder benefits; and (iii) conducting medical necessity review for mental health or substance use disorder benefits using processes, strategies or standards that are not comparable to, or are applied more stringently than, those applied to medical necessity review for medical/surgical benefits. 29 U.S.C. § 1185a; 42 U.S.C. § 300gg-26; 45 C.F.R. § 146.136(c)(4)(i).

17. The New York State Executive Law authorizes the Attorney General, where there are “repeated fraudulent or illegal acts” or “persistent fraud or illegality in the carrying on, conducting or transaction of business,” to seek relief, including enjoining the continuance of such business activity or of any fraudulent or illegal acts, as well as restitution and damages. N.Y. Exec. Law § 63(12).

18. Based on the findings of the Attorney General’s investigation, the Attorney General has determined that HealthNow’s conduct has resulted in violations of N.Y. Executive Law Section 63(12), Timothy’s Law, provisions of the New York Insurance Law governing substance use disorder treatment described above in Paragraph 15, and the Federal Parity Act. HealthNow’s practices have had the effect of unlawfully limiting HealthNow members’ access to behavioral health services.

NOW, WHEREAS, HealthNow neither admits nor denies the Attorney General's findings in Paragraphs 1 through 14;

WHEREAS, access to adequate behavioral health treatment is essential for individual and public health; and

WHEREAS, HealthNow has cooperated with the OAG's investigation; and

WHEREAS, the Attorney General is willing to accept the terms of this Assurance under Executive Law Section 63(15) and to discontinue his investigation; and

WHEREAS, this Assurance will apply solely to enrollees in HealthNow's commercial health insurance products; and

WHEREAS, the parties each believe that the obligations imposed by this Assurance are prudent and appropriate; and

WHEREAS, the Attorney General has determined that this Assurance is in the public interest.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the parties that:

IV. PROSPECTIVE RELIEF

19. Within sixty (60) days of the Effective Date, HealthNow will implement the following reforms:

20. HealthNow will not conduct utilization review for outpatient behavioral health treatment based on set thresholds that trigger review, including but not limited to the 20-visit threshold it has applied since 2010. HealthNow may continue to communicate with providers and members regarding care management and medical necessity reviews, so long as any such reviews are consistent with mental health parity

laws. Where a request for authorization is submitted by a credentialed provider for the actual date and services to be provided, and HealthNow denies the request, or a subsequent claim for the services, due to lack of clinical information, HealthNow will treat such denial as a medical necessity denial under Article 49 of the New York Insurance Law and New York Public Health Law.

21. HealthNow will cover nutritional counseling for the following eating disorders: anorexia nervosa (relevant diagnosis codes: R.63.0; F50.0; 307.1); bulimia nervosa (relevant diagnosis codes: F.50.2; 307.51); other eating disorders (relevant diagnosis codes: F.50.8; 307.52; 307.53; 307.59); and eating disorder, unspecified (relevant diagnosis codes: F.50.9; 307.50). If the listed eating disorder codes change in the future, HealthNow will cover the new version of such codes.

22. HealthNow will submit notice of the reforms specified in Paragraphs 20 and 21 to the OAG for comment and approval, prior to dissemination. Within 60 days after receiving OAG approval of HealthNow's notice, HealthNow will provide notice to all commercial members and behavioral health providers.

23. Within 60 days after receiving OAG approval of HealthNow's training materials, HealthNow will train its relevant staff members regarding the reforms specified in Paragraphs 20 and 21.

V. RETROSPECTIVE RELIEF

24. Within ninety (90) days after receiving OAG approval of the notices required below, HealthNow will:

- a. Provide written notice to members of its commercial plans that if, while members of HealthNow from 2012 through the present, they were (i)

denied coverage for a claim for outpatient counseling for a behavioral health condition due to lack of medical necessity or failure to submit a preauthorization request and/or medical information, and (ii) incurred out-of-pocket expenses to obtain these services, they may submit a new claim for reimbursement (an “AOD Claim”) to HealthNow within four (4) months of the notice. HealthNow will provide such notice to the OAG for comment and approval, prior to dissemination. HealthNow may review AOD Claims to confirm member eligibility and proof of out-of-pocket expenses, but will not conduct medical necessity review for such Claims. HealthNow will reimburse eligible AOD Claims in accordance with the terms of the member’s contract in effect at the time the services were rendered. Approximately 3,122 HealthNow members, with claims totaling approximately \$1,569,500, will receive notice pursuant to this provision.

- b. Re-process and pay claims for nutritional counseling for eating disorders previously submitted by members of its commercial plans that it denied due to an exclusion of coverage of nutritional counseling, from 2012 through present. Approximately 125 HealthNow members with claims totaling approximately \$14,000 will receive notice pursuant to this provision.

25. HealthNow will provide written notice to members that if, while members of HealthNow, they received (a) outpatient behavioral health services after HealthNow’s application of the 20-visit threshold, or (b) nutritional counseling services for an eating

disorder, and paid out-of-pocket expenses for, but did not file claims for such services, they may submit an AOD Claim for such services to HealthNow within four (4) months of the notice. HealthNow will provide such notice to the OAG for comment and approval, prior to dissemination. HealthNow will process these AOD Claims in accordance with the terms set forth in Paragraph 24.

26. HealthNow will send a refund letter (in a form agreed to by OAG) together with refund check(s), to each member eligible for restitution under Paragraphs 24 and 25.

27. HealthNow will bear all costs of the restitution process as described above.

VI. PENALTIES

28. In consideration of the making and execution of this Assurance, and within ninety (90) days of the Effective Date of this Assurance, HealthNow shall pay \$60,000 to the OAG as a civil penalty, in lieu of any other action that could be taken by the OAG in consequence of the foregoing.

VII. MISCELLANEOUS

Compliance

29. HealthNow shall submit to the OAG, within five (5) months of the Effective Date, a detailed report certifying and setting forth its compliance with this Assurance. Such report shall include the following:

- a. Evidence of HealthNow's implementation of the reforms specified in Paragraphs 20 and 21 (including copies of communications to members, internal policies and procedures, and plan documents);

- b. Evidence of HealthNow's training of its staff regarding the reforms specified in Paragraphs 20 and 21, including training materials and lists of attendees of training sessions; and
- c. Evidence of HealthNow's provision of notice and payment of restitution pursuant to Paragraphs 24 through 27, including: (i) the date notices were sent; (ii) the number of notices sent; (iii) the number of applications received; (iv) the outcome of those applications; and (v) amounts paid.

HealthNow's Representations

30. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by HealthNow and its counsel and the OAG's own factual investigation as set forth in the above Findings. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

Communications

31. All communications, reports, correspondence, and payments that HealthNow submits to the OAG concerning this Assurance or any related issues is to be sent to the attention of the person identified below:

Michael D. Reisman, Esq.
Assistant Attorney General
Health Care Bureau
Office of the New York Attorney General
120 Broadway
New York, NY 10271
Michael.reisman@ag.ny.gov

32. Receipt by the OAG of materials referenced in this Assurance, with or without comment, shall not be deemed or construed as approval by the OAG of any of

the materials, and HealthNow shall not make any representations to the contrary.

33. All notices, correspondence, and requests to HealthNow shall be directed as follows:

HealthNow New York Inc.
257 West Genesee Street
Buffalo, NY 14202
ATTN: Office of the General Counsel

Valid Grounds and Waiver

34. HealthNow hereby accepts the terms and conditions of this Assurance and waives any rights to challenge it in a proceeding under Article 78 of the Civil Practice Law and Rules or in any other action or proceeding.

No Deprivation of the Public's Rights

35. Nothing herein shall be construed to deprive any member or other person or entity of any private right under law or equity, nor shall anything herein impose upon HealthNow any additional liability which did not exist prior to entering into the Assurance.

No Blanket Approval by the Attorney General of HealthNow's Practices

36. Acceptance of this Assurance by the OAG shall not be deemed or construed as approval by the OAG of any of HealthNow's acts or practices, or those of its agents or assigns, and none of them shall make any representation to the contrary.

Monitoring by the OAG

37. To the extent not already provided under this Assurance, HealthNow shall, upon request by the OAG, provide all documentation and information necessary for the OAG to verify compliance with this Assurance. This Assurance does not in any way limit the OAG's right to obtain, by subpoena or by any other means permitted by law,

documents, testimony, or other information.

No Limitation on the Attorney General's Authority

38. Nothing in this Assurance in any way limits the OAG's ability to investigate or take other action with respect to any non-compliance at any time by HealthNow with respect to this Assurance, or HealthNow's noncompliance with any applicable law with respect to any matters.

No Undercutting of Assurance

39. HealthNow shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects HealthNow's (a) testimonial obligations or (b) right to take legal or factual positions in defense of litigation or other legal proceedings to which the OAG is not a party. This Assurance is not intended for use by any third party in any other proceeding and is not intended, and should not be construed as, an admission of wrongdoing or liability by HealthNow.

Governing Law; Effect of Violation of Assurance of Discontinuance

40. Under Executive Law Section 63(15), evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law in any action or proceeding thereafter commenced by the OAG.

41. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

42. If a court of competent jurisdiction determines that HealthNow has breached this Assurance, HealthNow shall pay to the OAG the cost, if any, of such determination and of enforcing this Assurance, including, without limitation, legal fees,

expenses, and court costs.

43. If the Assurance is voided or breached, HealthNow agrees that any statute of limitations or other time-related defenses applicable to the subject of the Assurance and any claims arising from or relating thereto are tolled from and after the date of this Assurance. In the event the Assurance is voided or breached, HealthNow expressly agrees and acknowledges that this Assurance shall in no way bar or otherwise preclude the OAG from commencing, conducting or prosecuting any investigation, action or proceeding, however denominated, related to the Assurance, against HealthNow, or from using in any way any statements, documents or other materials produced or provided by HealthNow prior to or after the date of this Assurance.

No Presumption Against Drafter; Effect of any Invalid Provision

44. None of the parties shall be considered to be the drafter of this Assurance or any provision for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof. This Assurance was drafted with substantial input by all parties and their counsel, and no reliance was placed on any representation other than those contained in this Assurance.

45. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

Entire Agreement; Amendment

46. No representation, inducement, promise, understanding, condition, or

warranty not set forth in this Assurance has been made to or relied upon by HealthNow in agreeing to this Assurance.

47. This Assurance contains an entire, complete, and integrated statement of each and every term and provision agreed to by and among the parties, and the Assurance is not subject to any condition not provided for herein. This Assurance supersedes any prior agreements or understandings, whether written or oral, between and among the OAG and HealthNow regarding the subject matter of this Assurance.

48. This Assurance may not be amended or modified except in an instrument in writing signed on behalf of all the parties to this Assurance.

49. The division of this Assurance into sections and subsections and the use of captions and headings in connection herewith are solely for convenience and shall have no legal effect in construing the provisions of this Assurance.

Binding Effect

50. This Assurance is binding on and inures to the benefit of the parties to this Assurance and their respective successors and assigns, provided that no party, other than the OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without prior written consent of the OAG.

Effective Date

51. This Assurance is effective on the date that it is signed by the Attorney General or his authorized representative (the "Effective Date"), and the document may be executed in counterparts, which shall all be deemed an original for all purposes.

AGREED TO BY THE PARTIES:

Dated: BUFFALO, New York
August 18, 2016

HealthNow New York, Inc.

By: Kenneth J. Sodaro

Name: *Kenneth J. Sodaro*

Title: *General Counsel*

Dated: New York, New York
August 19, 2016

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

LISA LANDAU
Health Care Bureau Chief

By: Michael D. Reisman
MICHAEL D. REISMAN
Assistant Attorney General
Health Care Bureau