



Comments of Dan Demeritt
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Rule Chapter 865 – Standards for Fertility Coverage
Maine Bureau of Insurance
June 30, 2023

Thank you for the opportunity to present comments on proposed Rule Chapter 865, Standards for Fertility Coverage, on behalf of the Maine Association of Health Plans. We have several comments to share with the Bureau.

Section 4 Adherence with the Authorizing Statute

The coverage requirements outlined in Section 4 should be amended to improve alignment with 24-A M.R.S.A. 4320-U. Specifically, we would suggest the following:

Experimental Fertility Procedures: The proposed rule places limits on carriers related to experimental fertility procedures that are beyond the definition in the statute. As proposed, section 4(1)(A) limits a carrier’s ability to adopt guidelines for these procedures and treatments to those related to the diagnosis and treatment of infertility. The statute does not include that limitation.

Limits on Network Participation: Section 4(1)(B) requires a carrier to use the guidelines established by a standard-setting organization such as the American Society for Reproductive Medicine (ASRM) to set criteria for network participation. The statute does not include this requirement.

Prohibition on Prior Authorization and Utilization Management: The authorizing statute does not establish new prohibitions on prior authorization or utilization management regarding fertility coverage. It only prohibits different limitations, benefits, or requirements on persons who are members of a protected class under the Maine Human Rights Act and requires that any limitations imposed be based on medical history and a carrier’s adopted clinical guidelines.

Section 4(3) of the proposed rule restricts the use of “. . .preauthorization or other utilization management requirements on fertility treatment other than requirements of general applicability that do not have the purpose or effect of defeating the purposes of this subsection.”

The term “general applicability” is not defined. Further, patients will require different treatments and procedures that should be managed based on their individual medical history and evidence-based medicine.

We are concerned that the proposed rule could limit the use of prior authorization and utilization management in ways not intended by the statute, thereby restricting effective tools for helping to safeguard patient safety and restrain cost growth.

Section 5 Required Benefits

The benefits enumerated in Section 5 may include treatments and procedures that are experimental or are of undetermined value. Assisted hatching and intracytoplasmic sperm injections are both required benefits under the proposed rule. Opinions offered by the American Society for Reproductive Medicine (ASRM) raise questions about the appropriateness of requiring these benefits as part of a rule adopted by the Bureau.^{1 2}

In its rulemaking, the Bureau could establish an expectation for commonly covered fertility services that could be expanded to include advancements in treatment that are proven in the future to be effective and valuable.

Separate Rule Setting for Defrayal

We recommend that Section 7 be removed from Chapter Rule 865 and that the Bureau conduct separate rulemaking for procedures related to Defrayal required by the ACA.

Specific comments regarding Section 7 include:

Alignment with CMS Guidance on Prospective Premium Offsetting: CMS reminds states that defrayal calculations are intended to “. . .be done prospectively to allow for the offset of an enrollee’s share of premium and for purposes of calculating the portion of the premium attributable to EHB (Essential Health Benefits) for the purposes of the premium tax credit and identifying benefits subject to reduced cost-sharing.”³

We understand this guidance to mean that defrayal transfers to carriers should come prospectively based on anticipated premium impact rather than as reimbursement for benefits subject to cost defrayal, as proposed in Section 7(1).

Section 7 Ambiguity and Funding Availability: Language in Section 7(1) also creates ambiguity about defrayal for fertility coverage stating, “if some or all of the benefits required by this rule are subject to cost defrayal under the federal Affordable Care Act.”

¹ **The role of assisted hatching in in vitro fertilization: a guideline (2022) | American Society for Reproductive Medicine | ASRM**, https://www.asrm.org/practice-guidance/practice-committee-documents/the-role-of-assisted-hatching-in-in-vitro-fertilization-a-guideline-2022/? t_tags=siteid%3a01216f06-3dc9-4ac9-96da-

² **Intracytoplasmic sperm injection (ICSI) for non–male factor indications: a committee opinion (2020) | American Society for Reproductive Medicine | ASRM**, https://www.asrm.org/practice-guidance/practice-committee-documents/intracytoplasmic-sperm-injection-icisi-for-nonmale-factor-indications-a-committee-opinion-2020/? t_tags=siteid%3a01216f06-3dc9-4ac9-96da-555740dd020c%2clanguage%3aen& t_hit.id=ASRM_Models_Pages_ContentPage/ 0963e9e3-3584-458b-a45f-c554c77723ba_en& t_hit.pos=7

³ <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQ-Defrayal-State-Benefits.pdf>, Q2

Section 7(3)(C) establishes a payment process “if legislative funding is less than the aggregate amount of valid reimbursement requests.” Moreover, we are awaiting budget language subject to very recent votes in the Appropriations Committee that may impact defrayal.

The qualifiers included in the rule, including the benefit reimbursement provisions that are not aligned with available CMS guidance, creates uncertainty that will be difficult for carriers to manage and potential increase rates for consumers.

The Bureau should strongly consider removing Section 7 from the rule and establish a separate rule to address defrayal of any state mandated benefits determined to exceed Maine’s Essential Health Benefits.

Thank you for considering these comments.