January 4, 2013

Submitted through regulations.gov

Director John Berry
U.S. Office of Personnel Management
1900 E Street NW
Washington DC, 20415

Re: RIN 3206-AM47 – Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges

Dear Director Berry:

The American Occupational Therapy Association (AOTA) is the national professional association representing the interests of more than 140,000 occupational therapists, students of occupational therapy, and therapy assistants. The practice of occupational therapy is science-driven and evidence-based, and enables people of all ages to live life to its fullest by promoting health and minimizing the functional effects of illness, injury, disability, and other conditions. AOTA appreciates the challenges that the Office of Personnel Management (OPM) faces in developing regulations to implement the Affordable Care Act's (ACA's) requirement to create a Multi-State Plan Program (MSPP), and welcomes the opportunity to comment on this proposed rule.

In general, AOTA supports OPM's approach in the proposed rule, and encourages OPM's continued coordination with the Department of Health & Human Services (HHS) as they finalize their regulations pertaining to Essential Health Benefits (EHBs). It is critical that OPM and HHS develop regulations that minimize differences in coverage of EHBs, in order to avoid adverse selection and to achieve one of the main goals of the EHB requirement, i.e., reducing consumer confusion regarding the scope of coverage of EHBs. Our comments are limited to proposed § 800.105, which deals with benefits. Occupational therapy practitioners and their clients in all settings will be greatly impacted by the proposed rule's requirements related to benefits, and we are particularly concerned with how habilitative services are covered.

HABILITATIVE SERVICES IS A UNIQUE AND DISTINCT BENEFIT CATEGORY THAT SHOULD BE SUPPLEMENTED TO COMPLY WITH THE EHB REQUIREMENTS OF THE ACA

The experience of our members and their clients is that **health insurance coverage for habilitative services is difficult to access and often denied**. In addition, as states have conducted or commissioned analyses of benchmark plan options, the conclusions have routinely been that except when a state benefit mandate existed for them, there was no

4720 Montgomery Lane
Bethesda, MD 20814-1220
301-652-2682
301-652-7711 fax
800-377-8555 TDD
www.aota.org

habilitative services coverage.[1] Indeed, the Center for Consumer Information and Insurance Oversight (CCIIO), in its December 2011 EHB Bulletin stated, "[t]here is no generally accepted definition of habilitative services among health plans, and in general, health insurance plans do not identify habilitative services as a distinct group of services."[2] CCIIO described procedures it was considering for supplementing certain benefits in that same Bulletin, including habilitative services, precisely because those benefits were not typically included in the benchmark plan options, or in commercial health insurance products generally. Not surprisingly, in the preamble of OPM's proposed rule, it states "the proposed OPM-selected EHB-benchmark plans, like other benchmark-eligible plans, may lack coverage for…habilitative services and devices…."[3] In fact, when Wakely Consulting Group evaluated those plans for the state of Maryland, they determined they lacked habilitative services coverage.[4] We urge OPM to keep this well documented gap in mind when determining whether to supplement the habilitative services category in the OPM-selected EHB benchmark plans.

Habilitative services are distinct from rehabilitative services. In evaluating whether habilitative services should be treated as a distinct EHB, it is instructive to look at the statute, and HHS's proposed rule's interpretation of the statute. In identifying rehabilitative services, habilitative services, and devices as EHBs, the statute places them in a single category, but adjoins them with the conjunction "and," not the disjunction "or."[5] That suggests all were intended to be distinct EHBs. HHS's proposed rule states, "[a] base-benchmark plan not providing any coverage in one or more of the categories…must be supplemented…"[6] implying ***any*** coverage in a category fulfills the requirement imposed by that category. However, the proposed rule also requires that a benchmark plan that does not cover pediatric oral services and pediatric vision services must supplement the plan to cover ***both***, despite the fact that those benefits are included in the ***same*** EHB category. That makes sense, as oral and vision services address distinct health issues. Rehabilitative services and habilitative services likewise address distinct health issues. As was acknowledged by HHS in adopting unique definitions for those two categories of services in the Summary of Benefits and Coverage and Uniform Glossary final rule,[7] rehabilitative services are focused, in part, on restoring function (e.g., occupational therapy services provided to enable a person to bathe independently after a surgical procedure). In contrast, habilitative services are focused, in part, on developing

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[1] *See, e.g.*, MILLIMAN, *Essential Health Benefit Analysis: Review of Options and Recommendations* (prepared for Kansas Insurance Department), Aug. 24, 2012 at 6, 14, http://www.ksinsurance.org/hbexplan/files/20120827_gpidall_KansasEHBReportFinal.pdf.

[2] CENTER FOR CONSUMER INFORMATION & INSURANCE OVERSIGHT, *Essential Health Benefits Bulletin*, Dec. 16, 2011 at 6, http://cciio.cms.gov/resources/files/Files2/12162011/essential_health_benefits_bulletin.pdf.

[3] Patient Protection and Affordable Care Act (PPACA); Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges, 77 Fed. Reg. 72589 (proposed Dec. 5, 2012).

[4] WAKELY CONSULTING GROUP, *State of Maryland Essential Health Benefit Analysis and Results: Updated Aug. 6, 2012* at 14-15, http://www.healthreform.maryland.gov/wp-content/uploads/2012/09/State-of-Maryland-Essential-Health-Benefits-Analysis-and-Results.pdf.

[5] PPACA, Pub. L. 111-148, § 1302(b)(1)(G), 124 Stat. 164, 45-6 (2010).

[6] PPACA; Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation, 77 Fed. Reg. 70669 (proposed Nov. 26, 2012) (to be codified at 45 C.F.R. pt. 156.110(b)).

[7] Summary of Benefits and Coverage and Uniform Glossary, 77 Fed. Reg. 8674 (Feb. 14, 2012).

function (e.g., occupational therapy services to enable a person with a developmental delay to dress independently).

If OPM elects to determine what habilitative services and devices are included in OPM-selected EHB benchmark plans, as it should, habilitative services and devices should be identified as distinct EHBs, apart from rehabilitative services, with distinct limitations, if applicable. To fail to require OPM-selected EHB benchmark plans to distinguish their coverage for rehabilitative services and habilitative services would leave plan beneficiaries in a position where they could exhaust one of those benefits without ever having used it. If OPM does not explicitly require that those plans supplement their benefit packages with distinct habilitative services, it will effectively dilute the rehabilitative benefit in those plans. That would be inconsistent with the language and intent of the statute.

In addition to ensuring habilitative services and devices are treated as distinct benefits, it is important to ensure they are not limited to pediatric benefits. Congress had the opportunity to place habilitative services in the pediatric services EHB category, but it chose not to. This clearly expresses the intent for habilitative services to be an EHB for adults, as well as children.

HHS's proposed EHB rule establishes how OPM could determine appropriate coverage for habilitative services in OPM-selected EHB benchmark plans. That is by requiring parity with coverage for rehabilitative services.[8] **OPM should, at a minimum, require OPM-selected EHB benchmark plans to distinctly cover habilitative services in similar scope, amount, and duration as the plans cover rehabilitative services.**

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AOTA respectfully requests that careful consideration be given to these comments. Should you have any questions or require additional information, please contact us at (301) 652-6611 ext. 2016 or dbrown@aota.org.

Respectfully submitted,

Daniel S. Brown
Senior State Policy Analyst

[8] PPACA; Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation, 77 Fed. Reg. 70669 (proposed Nov. 26, 2012) (to be codified at 45 C.F.R. pt. 156.115(a)(4)(i)).