



May 14, 2019

Timothy Donelan
Medical Director
Sanford Health Plan
P.O. Box 91110
Sioux Falls, SD 57109-1110

Dear Mr. Donelan:

Aimed Alliance is a non-profit health policy organization that seeks to protect and enhance the rights of health care consumers and providers. We are writing to express our concern with recent actions that have been taken by the Utilization Management Department of the Sanford Health Plan.

We recently learned that Sanford Health Plan refused to cover medications prescribed by multiple board-certified nurse practitioners unless they obtained a signature from a physician. In addition to this policy resulting in treatment delays, which can threaten patient health, it also likely violates Section 2706 of the Patient Protection and Affordable Care Act (ACA).¹ For the reasons set forth below, we recommend that Sanford change its policy, and we would like to schedule a call with you to discuss this issue further.

I. Reports of Denials

We recently received a copy of the enclosed letter (the “Letter”) dated February 21, 2019 that Sanford sent to a board-certified nurse practitioner who is also certified in dermatology and licensed to practice in Minnesota. The Letter notes that Sanford requires nurse practitioners to consult with and obtain the signature of a board-certified dermatologist for a prescribed biologic medication to be covered. This requirement has resulted in significant treatment delays for many of this nurse practitioner’s patients, which can threaten their health and treatment outcomes. These denials are particularly an issue for patients living in rural areas, which may lack board-certified dermatologists altogether. Many of this nurse practitioner’s patients have had to travel one to six hours and wait two to six months to have a visit with a dermatologist. In the meantime, their conditions can progress, and they can experience adverse events and decreased quality of life.

Other practitioners have also been impacted by Sanford’s policy. Amy Suda, a nurse practitioner licensed to practice in North Dakota, noted that her patient’s biologic medication was delayed by a full year. The practitioner received several rounds of denials before Sanford explained that the medication was denied because a dermatologist needed to co-sign the prior authorization request. While a family practice physician signed off on the prescription, Sanford still denied coverage, insisting that the prior authorization be signed by a board-certified dermatologist. Yet, in rural eastern North Dakota, board-certified dermatologists are few and far between. The patient

¹ 42 U.S.C. § 300gg-5 (2019).

could not afford transportation to meet with a dermatologist who could see him in the near future. Instead, he was forced to wait an entire year until a local dermatologist was able to see him and sign off. This dermatologist intends to retire soon. As a result, the nurse practitioner's patients will need to drive one hour to find the next closest board-certified dermatologist.

Similarly, Kamrin Macki, a nurse practitioner licensed to practice in North Dakota, reported that her patient with left side ulcerative colitis failed on two different medications. The patient was then successfully converted to another medication. When the patient's gastroenterologist left his practice, the patient began seeing a board-certified nurse practitioner for disease management. After six months, Sanford notified the nurse practitioner that the patient needed prior authorization to continue on his effective medication. Upon submitting the paperwork, the practitioner was notified that Sanford would not approve of coverage until a gastroenterologist signed the prior authorization form. While the nurse practitioner was able to obtain the signature, the prior authorization delayed the patient's infusion by a week. Even short delays for patients with ulcerative colitis could disrupt disease stability and remission, thereby causing additional flare-ups and resulting in abdominal pain, bloody stool, diarrhea, tachycardia, fever, anemia, and bowel distension, among other symptoms.²

II. The Patient Protection and Affordable Care Act

Given that these nurse practitioners are practicing within the scope of their licensure, Sanford's policy likely violates the provider anti-discrimination provision of the ACA.

Section 2706 of the ACA prohibits group health plans from discriminating against a "health care provider who is acting within the scope of that provider's license or certification under applicable state law."³ This provision is intended to prevent health plans, including insured and self-funded plans, from excluding health care professionals "from practicing under the capacity of their training and licensure."⁴ Pursuant to both Minnesota and North Dakota law, advanced practice registered nurses are authorized to prescribe medications without the involvement or supervision of a physician.⁵ In Minnesota, prescriptive authority is part of nurse practitioners' certification, and in North Dakota, prescription authority is granted upon 30 contact hours of education, or the equivalent, in pharmacotherapy related to the nurse practitioner's scope of advanced practice.⁶

The ACA does not create a right of action for providers to enforce Section 2706;⁷ however, given that Section 2706 of the ACA is expressly incorporated into the Employee Retirement

² Johannes Meier & Andreas Sturm, *Current Treatment of Ulcerative Colitis*, 17 World J of Gastroenterol 27 (2011).

³ 42 U.S.C. § 300gg-5 (2019).

⁴ Integrative Health Policy Consortium, *Transcript of Senator Harkin's Intent*, http://www.ihpc.org/wp-content/uploads/HHS-RFI_attachments.pdf (last visited May 2, 2019).

⁵ Minn. Stat. § 148.235 (2018); N.D. Cent. Code § 43-12 (2017).

⁶ N.D. Admin. Code. 54-05-03.1-09; American Medical Association, *State Law Chart: Nurse Practitioner Prescriptive Authority*, <https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/specialty%20group/arc/ama-chart-np-prescriptive-authority.pdf> (last visited May 2, 2019).

⁷ *The Ass'n of New Jersey Chiropractors v. Horizon Healthcare Servs.*, Civil Action No. 16-08400 (FLW), (D.N.J. June 13, 2017).

Income Security Act (ERISA),⁸ at least one court has permitted health plan enrollees to sue under ERISA 29 U.S.C. Sec. 1132(a)(3) for violations of Section 2706 of the ACA.⁹ ERISA contains a civil remedies scheme that empowers health plan enrollees to obtain appropriate equitable relief to enforce any provision of ERISA.¹⁰

Sanford is engaging in discrimination against nurse practitioners, which is prohibited by the ACA. Sanford denied coverage of medications prescribed by board-certified nurse practitioners based solely on the fact that they are nurse practitioners rather than physicians. However, their licensure grants them prescriptive authority under the applicable state law. Moreover, Sanford has not provided a clear rationale as to why a prescription must be authorized by a board-certified physician when prescribing medications is within the scope of a nurse practitioner's license. Instead, upon calling Sanford and inquiring about the policy, a nurse practitioner was condescendingly told to "go back to school" to become a dermatologist if she wanted to prescribe biologics, thereby further perpetuating the discrimination against nurse practitioners. Therefore, Sanford is violating Section 2706 of the ACA.

Patients who have been adversely affected by Sanford Health Plan's discriminatory policy may have a cause of action against Sanford Health Plan pursuant to ERISA Sec. 1132(a)(3). If a health plan enrollee sues Sanford to recover benefits they are entitled to under ERISA, Sanford Health may be enjoined from engaging in future discriminatory practices, such as those described herein.¹¹ As such, we strongly encourage Sanford to change its policy.

III. Conclusion

Sanford has likely violated federal law by discriminating against nurse practitioners. We ask that you voluntarily reverse this discriminatory policy to ensure that patients are not subjected to unreasonable care delays. We would be happy to discuss this issue further to help you understand why this policy is discriminatory and to help you voluntarily come into compliance with the law.

Thank you,

A handwritten signature in black ink, appearing to read "John Wylam". The signature is fluid and cursive, with the first name "John" being larger and more prominent than the last name "Wylam".

John Wylam
Staff Attorney

⁸ 29 U.S.C. § 1185d (2012).

⁹ Doe v. United Health Group, 17-CV-4160 (AMD), (E.D.N.Y. August 20, 2018).

¹⁰ Doe v. United Health Group, 17-CV-4160 (AMD), (E.D.N.Y. August 20, 2018).

¹¹ 29 U.S.C. § 1132 (2012).