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Brent Barnhart
Director
Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725

Re: **Petition Requesting Initiation of Formal Rulemaking and Promulgating of Regulations**

Dear Director Barnhart:

Pursuant to California Government Code Section 11340.6, Kaiser Foundation Health Plan, Inc. ("Petitioner") petitions the Department of Managed Health Care ("DMHC") to initiate formal rulemaking and to promulgate regulations to clarify:

- (1) Whether contracts between health care service plans and the Board of Administration of the California Public Employees Retirement System ("CalPERS") and the Healthy Families Program ("Healthy Families") administered by the California Managed Risk Medical Insurance Board (collectively referred to herein as the "Public Purchasers") must include coverage of Behavioral Health Treatment ("BHT") including Applied Behavioral Analysis ("ABA") defined in Health & Safety Code Section 1374.73 ("S.B. 946");
- (2) If DMHC requires coverage of BHT in health care service plan contracts with Public Purchasers, the licensure and certification requirements for individuals who provide BHT;
- (3) The ongoing statutory obligations of the Regional Centers to provide BHT to enrollees of the Public Purchasers pursuant to the Regional Centers' contracts with the State of California for services governed by the Lanterman Act (Cal. Welfare & Institutions Code § 4500 et seq.) and the Intervention Services Act (Cal. Government Code § 95000 et seq.) in light of the statutory exemption contained in S.B. 946 for health care service contracts with the Public Purchasers.

S.B. 946 mandates that certain Knox-Keene health care service plans "provide coverage for behavioral health treatment for pervasive developmental disorder or autism no later than July 1, 2012." Cal. Health & Safety Code § 1374.73 (a)(1). However, S.B. 946 contains a provision exempting certain types of plans from its mandates (in relevant part):

- (d) This section shall not apply to the following:

...

- (2) A health care service plan contract in the Medi-Cal program (Chapter 7 (commencing with Section 14000) of Part 3 of Division 9 of the Welfare and Institutions Code).
- (3) A health care service plan contract in the Healthy Families Program (Part 6.2 (commencing with Section 12693) of Division 2 of the Insurance Code).
- (4) A health care benefit plan or contract entered into with the Board of Administration of the Public Employees' Retirement System pursuant to the Public Employees' Medical and Hospital Care Act (Part 5 (commencing with Section 22750) of Division 5 of Title 2 of the Government Code).

Id., § 1374.73 (d)(1)-(4).

The plain statutory language, legislative history, and various legislative analyses of S.B. 946 appear to demonstrate the California Legislature's explicit and purposeful exclusion of health care service plan contracts with Medi-Cal, Healthy Families and CalPERS from S.B. 946's coverage mandates. Initial drafts of S.B. 946 required all health care service plan contracts, except for contracts with the Medi-Cal program, to provide coverage for BHT.¹ A report analyzing the initial draft of S.B. 946 determined that the coverage mandates would cost the State more than \$50 million annually for Healthy Families and CalPERS enrollees alone.² Subsequent drafts of S.B. 946 excluded contracts with Healthy Families and CalPERS from its coverage mandates.³ A Senate Appropriations Committee analysis found that because S.B. 946 "would exempt health plans and insurers that contract with Medi-Cal, Healthy Families, and CalPERS, there would be minimal costs to the state to pay for these mandated services."⁴ The Assembly Appropriations Committee Bill analysis similarly noted that S.B. 946 would create "[m]inor, if any, state health care costs. This bill exempts health plans provided through Medi-Cal, Healthy Families program, and CalPERS from the coverage mandate."⁵

In November 2011, the DMHC informed some health care service plans that despite Section 1374.73(d), it believed that, pursuant to Health and Safety Code Section 1374.72, health care service plans should cover BHT for autism and pervasive developmental disorder for the Public Purchaser enrollees, though not Medi-Cal enrollees. Moreover, in or around March 2012, the DMHC confirmed with the California Association of Health Plans that it had begun an emergency rulemaking process to address its interpretation of S.B. 946 and Section 1374.72. Health care service plans have been awaiting the issuance of these emergency regulations.

It is our further understanding that Public Purchasers interpret Section 1374(d) differently than the DMHC's apparent interpretation. Health care service plans and Public Purchasers negotiate premium rates based on the totality of covered services. Therefore, inclusion or exclusion of a particular set of services will necessarily, and possibly materially, impact the premium. Accordingly, it is essential for health care service plans and Public Purchasers to have a meeting of the minds regarding the scope of contractually covered services. However, the current uncertainty and confusion precludes a

¹ California State Senate Appropriations Committee Fiscal Summary, September 9, 2011, at p. 2.

² California Health Benefit Review Program, Analysis of Senate Bill TBD 1: Health Care Coverage: Autism, at 16, Table 1 (March 20, 2011).

³ Fiscal Summary, *supra* note 1 ("... in addition to plans and insurers contracting with Medi-Cal, [S.B. 946] would exempt plans and insurers contracting with Healthy Families and CalPERS.").

⁴ *Id.* at p. 3.

⁵ California State Assembly Appropriations Committee Bill Analysis, September 8, 2011, at p. 2.

meeting of the minds about a sufficient and sustainable premium.

It is our further understanding that several Regional Centers assume that effective July 1, 2012, they will discontinue providing BHT to health care service plan enrollees and refer their clients, including Public Purchaser enrollees, to the health care service plan or insurer with whom a client is enrolled. The Regional Centers' anticipated plans exacerbate the current regulatory and contract uncertainty with respect to Public Purchasers and their enrollees and underscore the urgent need for clarifying regulations.

Based on the forgoing, Petitioner requests that DMHC complete its emergency rulemaking as soon as possible in light of the July 1, 2012 effective date of S.B. 946.

Promulgation of regulations will clarify Public Purchaser enrollees' expectations about their benefits and enable Public Purchaser enrollees to make informed plans and decisions about the needs of their children.

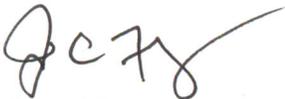
It will establish clear and fair guidance for all health care service plans as they complete their implementation in preparation for the July 1, 2012 effective date of S.B. 946.

It will enable health care service plans and Public Purchasers to agree on the scope of contractual coverage and enable negotiation of premiums appropriately reflecting the scope of coverage.

It will eliminate the uncertainty and confusion that does not serve anyone.

We respectfully await the DMHC's response.

Sincerely,



Jerry Fleming
Senior Vice President
Kaiser Foundation Health Plan, Inc.