July 1, 2021

Secretary Marylou Sudders
Executive Office of Health and Human Services
One Ashburton Place, 11th Floor
Boston, MA 02108-1518

Dear Secretary Sudders:

On behalf of the Massachusetts Association of Health Plans and our 16 member plans and 2 behavioral health organizations that provide health insurance coverage to nearly 3 million residents, we appreciate the opportunity to express our strong support for the establishment of long-term, comprehensive surprise billing protections that will have a significant impact on lowering health care costs for employers and consumers in the Commonwealth in both the near and long-term and will incentivize out-of-network providers to charge more affordable reimbursement rates for health care services.

As you are aware, insured residents are often subjected to surprise medical bills from health care providers that do not contract with health plans. Surprise billing places unexpected financial responsibility on consumers. According to data analyzed by the Health Policy Commission (HPC), Massachusetts health plans reimbursed providers for 68,342 out-of-network (OON) claims in 2017. Nearly one quarter of OON claims result in a balance bill to an insured member for the difference between the provider's charges and the health plan's payment, at an average out of pocket cost of $355. Individuals may also be liable for greater cost sharing for OON services when a member's coinsurance responsibility is based on the provider's full charge amount for the health care service.

In addition to the out-of-pocket costs to members, OON bills are costly for the health care system as a whole. Through the development of provider networks, health plans negotiate fair reimbursement prices with in-network providers that are lower than a provider's charges for a particular service. Conversely, the spending on OON claims in Massachusetts far exceeds in-network spending for the same services. Provider charges are higher for services in which patients have no opportunity to choose an in-network specialist or be informed of the physician's network status. Demand for these providers is constant. Without a threat of losing patient volume, OON providers can avoid contracting directly with health plans and instead bill plans and individuals at a higher rate. In almost two-thirds of OON claims in Massachusetts, the health plan pays the full charge amount after an offer to pay some combination of usual and customary charges and the contracted in-network rate to OON providers. In the absence of a negotiated rate for services, health plan payment is usually based on the price that a provider sets, to protect members from financial exposure. As a result, the drastic disparity in prices negates any savings health plans are able to achieve through contract negotiations.

When health plans are obligated to pay higher rates to OON providers, premiums for employers and consumers must increase to cover those costs. Spending on OON services by just two Massachusetts

health plans in 2014 totaled $27 million. Many indicators of surprise billing in Massachusetts have gotten worse over time, including the number of provider claims with a potential balance bill and the amounts charged by OON providers. The American Journal of Managed Care estimated that eliminating provider leverage stemming from the ability to surprise-bill could reduce commercial insurance premiums by as much as 5.1%, or $212 per member per year. This could reduce aggregate premiums by approximately $38 billion for the nation's commercially insured population.

Establishment of OON Reimbursement Rates Will Increase Patient Access and Affordability

The establishment of reasonable reimbursement rates will increase patient access to health care services by reducing an insured's out-of-pocket costs for health care services from a provider that is unknowingly not contracted with their health plan. Insured individuals should be financially protected when they responsibly seek care at an in-network facility or receive emergency services. OON reimbursement rates will also produce costs savings across the state health insurance system by encouraging OON providers to charge more reasonable rates and to participate in health plan networks. This will result in lower premiums for individuals and small businesses.

Principles established by the Provider Price Variation Commission, reiterated by state agencies, and supported by the Legislature in Section 71 of Chapter 260 of the Acts of 2020 can serve as guidelines for the Legislature in setting reasonable OON reimbursement rates:

- **OON reimbursement rates should result in cost savings to consumers and employers and have minimal additional administrative expense to both providers and payers**. In order to lower the cost of care, rates of payment for emergency and non-emergency OON services should be set at a level significantly below charges, but not lower than the amount paid under Medicare.
- **OON reimbursement rates should ensure that current in-network participation levels by providers are improved upon**. Health plans establish robust networks to direct care to high-value providers. An OON default rate set too high will discourage providers from negotiating an appropriate price for services that will result in cost savings to consumers and employers.
- **There should be a reasonable, transparent, and simple approach to applying a rate**.

Both the House of Representatives and the Senate offered proposals in comprehensive health care legislation last session to prohibit surprise billing and establish default OON reimbursement rates. MAHP plans supported both the House proposal for a rate of the greater of 115% of the carrier's average contracted rate or 135% of the Medicare rate for that service, as well as the framework outlined in the Senate bill to regulate the development and application of OON payments.

MAHP plans strongly support the establishment of OON reimbursement rates for emergency and non-emergency health care services at a rate no greater than 135% of the Medicare rate. OON reimbursement rates at 135% of Medicare will reduce health care expenditures in Massachusetts. The Medicare fee schedule represents an appropriate approximation of the actual costs to provide a health care service, as it accounts for geographic market conditions and provider business costs. Medicare rates usually serve as the basis for contract negotiations and the determination of reasonable payments between health plans and providers. Medicare reimbursement rates are transparent through a publicized fee schedule and can be easily applied, imposing minimal administrative burden on health plans and providers to implement, and facilitating consumer transparency on the health care costs.

Additionally, for the duration of the COVID-19 public health emergency, health plans in Massachusetts have been required to reimburse all COVID-related OON services provided to members, including emergency and inpatient treatment and all associated professional, diagnostic and

laboratory services delivered by noncontracted providers, at a reimbursement rate of 135% of Medicare. This rate was established to limit excessive reimbursement to noncontracted providers during a period when health plans were required to reimburse all OON services delivered to members. As Chapter 260 requires health plans to continue to pay for all COVID-related PCR and antigen testing, vaccines, and emergency, inpatient, and cognitive rehabilitative services delivered by OON providers to Massachusetts members, a continuation of this reasonable default OON reimbursement rate is essential to lower health care expenditures in the state and protect consumers beyond the PHE.

However, MAHP recommends separate, lower OON reimbursement rates for members enrolled in subsidized commercial health plans. In the case of ConnectorCare carriers offering coverage to low-income Exchange enrollees, a rate of 135% of Medicare for OON services is higher than negotiated in-network reimbursement rates. Requiring health plans to utilize this rate would essentially establish a floor and encourage in-network providers to withdraw from ConnectorCare networks unless the carrier contracts at inflated rates of at least at 135% of Medicare. The effect would be to increase the cost of coverage and reduce access to care for some of the Commonwealth's most vulnerable enrollees.

The establishment of reasonable OON reimbursement rates in Massachusetts will protect consumers and lower overall health care spending without administrative complexity. The establishment of OON reimbursement rates in Massachusetts should take place before the federal No Surprises Act becomes effective on January 1, 2022. While the federal law requires the state to implement an elaborate arbitration structure regulated by the federal government, the law defers to existing state laws with respect to state established OON payment amounts.

Arbitration Will Increase Health Care Costs and Complexity in Massachusetts

MAHP opposes the implementation of a new bureaucratic arbitration process in Massachusetts to determine provider reimbursement rates. Arbitration in the commercial insurance market will: 1) increase health care costs for employers, consumers, providers, and health plans, 2) introduce unnecessary administrative cost and complexity into the state's health care system, and 3) inhibit transparency and predictability into health care reimbursement.

- **Arbitration could dramatically increase health care expenditures for OON services in Massachusetts, as arbitration awards are considerably higher than typical in-network payment amounts.** New York arbitration decisions have resulted in payment rates to OON providers that are, on average, 8% higher than the 80th percentile of charges billed by a provider. Arbitration decisions in favor of the health plan have averaged only 11% below the 80th percentile of charges, still far above in-network rates and typical OON payments. In addition, the number of provider requests to arbitrate reimbursement has increased exponentially each year since the creation of an arbitration process in New York. An analysis of the New York data by the USC-Brookings Schaeffer Initiative for Health Policy cautioned, "It is likely that the very high OON reimbursement now attainable through arbitration will increase emergency and ancillary physician leverage in negotiations with commercial insurers, leading either to providers dropping out of networks to obtain this higher payment, extracting higher in-network payment rates, or some combination thereof, which in turn would increase premiums. If insurers are additionally increasing out-of-network payment for services in order to reduce the risk of losing in arbitration, that would further amplify this inflationary impact on premiums."

  Similarly, reimbursements to OON providers in New Jersey in 2019 determined through arbitration were considerably higher than in-network payment amounts. 31% of arbitration disputes resulted

in reimbursements of more than 10 times the in-network price, and 45% of cases awarded reimbursement to providers at more than 10 times what Medicare would have paid. 85 arbitration awards were more than 25 times the in-network price, and 9 disputes were decided for more than 100 times the in-network price. Research found that arbitrators place a strong emphasis on the 80th percentile of charges for services in dispute, "an extremely high amount that is unilaterally set by providers and is largely untethered to market forces…providers can use this leverage to negotiate higher in-network rates, exacerbating the effect of the dispute resolution policy beyond the specific cases that go to arbitration."

The HPC found that payments to OON providers in Massachusetts at the 80th percentile of charges would result in substantially higher reimbursement for services often involved in surprise billing scenarios, typically two to three times higher than those based on negotiated allowed amounts or Medicare rates. Therefore, arbitration will not lower OON health care costs in Massachusetts and will not incentivize providers to negotiate a reasonable market price for OON services provided at in-network hospitals or in emergencies.

- **Arbitration will significantly increase administrative costs within the health care system in Massachusetts**. The operation of an arbitration infrastructure in the state will require health plans to pay for additional resources to respond to reimbursement disputes and prepare for arbitration on an unknown volume of claims from noncontracted providers. Arbitration under the No Surprises Act imposes explicit financial costs on health plans and providers per dispute, including an administrative fee that each party must pay to the government as well as a fee that the losing party is required to pay to the arbitrator. These expenses will add to health care spending in the state and will be paid for through premium revenue collected from small businesses and families in the state.

- **Arbitration will increase complexity and uncertainty in the state health insurance market.** The No Surprises Act includes a list of arbitration factors to be considered when deciding health care reimbursement rates to OON providers. The application of these ambiguous criteria could result in different arbitrators applying factors differently, making arbitration outcomes inconsistent and unpredictable. The cost of an OON health care service for any member becomes unknowable until after the provider's bill has been arbitrated. Unlike the transparency that would be afforded to all stakeholders through the establishment of a calculated, fixed OON reimbursement rate for each service, arbitration will not improve health care cost transparency.

Again, we thank you for your continued commitment to increasing access to high-quality affordable health insurance in the Commonwealth. We respectfully request that the report to be issued by your office recommend the legislative establishment of reasonable OON reimbursement rates for emergency and nonemergency services delivered to fully-insured individuals and small businesses in Massachusetts. This smart solution will protect individuals from exposure to out-of-pocket costs and greatly reduce health care expenditures in the state.

Sincerely,

Lora M. Pellegrini
President & CEO