

ATTORNEY GENERAL OF THE STATE OF NEW YORK

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In the Matter of

**Excellus Health Plan, Inc.**

Assurance No.: 14-201

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**ASSURANCE OF DISCONTINUANCE  
UNDER EXECUTIVE LAW  
SECTION 63, SUBDIVISION 15**

Pursuant to the provisions of Section 63(12) of the Executive Law and Article 22-A of the General Business Law, Eric T. Schneiderman, Attorney General of the State of New York, caused an inquiry to be made into certain business practices of Excellus Health Plan, Inc. (“Excellus”), relating to its administration of behavioral health benefits. Based upon that inquiry, the Office of the Attorney General (“the OAG”) has made the following findings, and Excellus has agreed to modify its practices and assure compliance with the following provisions of this Assurance of Discontinuance (“Assurance”).

**I. BACKGROUND**

1. Excellus, a not-for-profit corporation, offers health plans to New York consumers. Excellus’s principal offices are located at 165 Court Street, Rochester, New York 14647.
2. In the regular course of business, Excellus enrolls consumers in health plans and contracts with health care providers for the delivery of health care services to those consumers. Offering hundreds of different health plans in New York State,

Excellus provides health care coverage for approximately 1.5 million New York consumers, most of whom live in central and western New York.

## II. THE OAG'S INVESTIGATION AND FINDINGS

3. The Health Care Bureau of the OAG conducted an investigation into Excellus's administration of behavioral health benefits following the receipt of consumer complaints alleging that Excellus had improperly denied coverage for behavioral health services. In this Assurance, "behavioral health services" will refer to treatment for both mental health and substance use disorders.<sup>1</sup>

### **The Need for Adequate Coverage of Behavioral Health Treatment**

4. Mental and emotional well-being is essential to overall health. Every year, almost one in four New Yorkers has symptoms of a mental disorder. Moreover, in any year, one in ten adults and children experience mental health challenges serious enough to affect functioning in work, family and school life.<sup>2</sup> Lack of access to treatment, which can be caused by health plans' coverage denials, can have serious consequences for consumers, resulting in interrupted treatment, more serious illness, and even death.

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<sup>1</sup> In this Assurance, "substance use disorder" refers to the diagnostic category employed in DSM-5, the Diagnostic and Statistical Manual of the American Psychiatric Association, which includes alcoholism, and substance use and dependency disorders.

<sup>2</sup> NYSDOH website, available at [http://www.health.ny.gov/prevention/prevention\\_agenda/mental\\_health\\_and\\_substance\\_abuse/mental\\_health.htm](http://www.health.ny.gov/prevention/prevention_agenda/mental_health_and_substance_abuse/mental_health.htm)

5. Mental illness is the leading illness-related cause of disability, a major cause of death (via suicide), and a driver of school failure, poor overall health, incarceration and homelessness.<sup>3</sup>

6. In any given year, one in ten individuals has a diagnosable mood disorder, such as major depression.<sup>4</sup> Three to four percent of women will have an eating disorder, such as anorexia nervosa or bulimia nervosa, at some point in their lives.<sup>5</sup> Individuals with anorexia have a level of mortality up to 18 times greater than the average population without anorexia,<sup>6</sup> the highest mortality rate of any mental illness.<sup>7</sup>

7. The failure of health plans to adequately reimburse members for behavioral health costs, including those for substance use disorder treatment, means that plan members who need treatment may not be getting the treatment recommended by their providers.

8. In any given year, 11%, or 1.8 million, of New Yorkers have a substance use disorder,<sup>8</sup> but only 11% of these individuals receive any treatment for their

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<sup>3</sup> NYSOMH website, available at <http://www.omh.ny.gov/omhweb/commissioner/message.html>.

<sup>4</sup> Grant, B., et al., Prevalence and Co-occurrence of Substance Use Disorders and Independent Mood and Anxiety Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions, *Arch. Gen. Psychiatry* 2004; 61(8):807-816, available at <http://archpsyc.jamanetwork.com/article.aspx?articleid=482045>.

<sup>5</sup> NYSOMH website, available at [https://www.omh.ny.gov/omhweb/resources/eating\\_disorders.html](https://www.omh.ny.gov/omhweb/resources/eating_disorders.html).

<sup>6</sup> C. Birmingham et al., The Mortality Rate from Anorexia Nervosa, *Int. J. Eat. Disord.* 38:2, 143-46 (2005).

<sup>7</sup> P. Sullivan, Mortality in Anorexia Nervosa, *Am. J. of Psychiatry* 152:7, at 1073 (1995).

<sup>8</sup> NYS OASAS 2012 Interim Report at 1, available at <http://www.oasas.ny.gov/pio/commissioner/documents/5YPIntReport2012.pdf>.

condition.<sup>9</sup> In contrast, more than 70% of individuals with hypertension and diabetes receive treatment for those conditions.<sup>10</sup>

9. The Rochester region, like many parts of New York State, is experiencing an opioid overdose epidemic, with deadly consequences. According to data released recently by the Monroe County Medical Examiner's Office, heroin overdoses in Monroe County doubled over the last year, and have increased fivefold since 2011.<sup>11</sup> In 2013 alone, there were 65 heroin-related deaths in Monroe County.<sup>12</sup> Access to substance use disorder treatment—in particular inpatient rehabilitation treatment—is vital to addressing this scourge.

#### **Excellus's Behavioral Health Benefits**

10. Excellus offers health plans that provide inpatient and outpatient benefits for medical/surgical and behavioral health conditions. In administering its members' health benefits, Excellus may conduct utilization review, which is the process by which a health plan examines plan members' requests or claims for health care services to determine whether the services are medically necessary, and thus eligible for coverage. Medically necessary services are those that are reasonable and necessary for the diagnosis or treatment of illness or injury, or to maintain or improve the functioning of an individual.

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<sup>9</sup> CASA: Addiction Medicine: Closing the Gap between Science and Practice, at 10, available at <http://www.casacolumbia.org/upload/2012/20120626addictionmed.pdf>.

<sup>10</sup> CASA: Addiction Medicine: Closing the Gap between Science and Practice, at 10, available at <http://www.casacolumbia.org/upload/2012/20120626addictionmed.pdf>.

<sup>11</sup> David Andreatta, *Regional heroin deaths surge*, Rochester Democrat & Chronicle, February 5, 2014, available at <http://www.democratandchronicle.com/story/news/local/2014/02/04/regional-heroin-deaths-surge/5209465/>.

<sup>12</sup> *Id.*

11. For services for which preauthorization is required, such as certain inpatient services, a provider will typically file a request for authorization with the health plan on behalf of the member, and the plan will review the request to determine whether the services are medically necessary under its medical necessity criteria. If the plan denies the request, in many cases, the member will not receive the requested service, and will not file a claim for benefits. On the other hand, after services have already been provided, a member or provider will typically submit a claim for benefits, and the plan will either pay the claim automatically or conduct utilization review for the claim. In the latter situation, the plan will determine whether the services are medically necessary under its medical necessity criteria.

12. If Excellus deems requested or claimed services to satisfy its criteria, Excellus will authorize the services and/or pay the claim. If Excellus does not deem the services to satisfy its criteria, Excellus will send the member an adverse determination letter, which, under New York law, must contain a detailed explanation of the clinical rationale for the denial and information about the member's appeals rights.

13. A health plan member whose request or claim has been denied due to lack of medical necessity (and for certain other reasons) has the right, under the New York Insurance Law and the New York Public Health Law, to file an internal appeal, and then an external appeal, which is reviewed by an independent clinician who has no relationship with Excellus.

#### **Disparities in Excellus's Utilization Review Process**

14. The OAG's review of consumer complaints and Excellus's utilization review data indicates that Excellus applies more rigorous – and frequent – utilization

review for inpatient substance use disorder treatment than for inpatient medical/surgical treatment.

15. Although Excellus conducts concurrent utilization review for all inpatient behavioral health services, it exempts the majority of inpatient medical/surgical cases from this requirement.

16. Persons with mental health and substance use disorders comprise a vulnerable population, and may be reluctant to seek care. Frequent and time-consuming utilization review may pose obstacles preventing them from accessing or completing treatment.

17. Excellus's denial rate for inpatient substance use disorder treatment is more than double its denial rate for inpatient medical/surgical treatment. For example, in 2012, Excellus issued denials in 48% of the inpatient substance use disorder treatment reviews it conducted (*i.e.*, for preauthorization requests), whereas it issued denials in less than 20% of the inpatient medical/surgical requests it reviewed. Moreover, Excellus reviewed only about one-third of its members' inpatient medical/surgical cases in that year. Thus, in 2012, Excellus issued utilization review denials in only 7% of its members' inpatient medical/surgical cases. In the same year, Excellus' inpatient behavioral health claim denial rate (*i.e.*, for already-received services) was approximately double its inpatient medical claim denial rate (20% vs. 10.5%).

18. Although Excellus does not subject routine outpatient behavioral health services (*e.g.*, psychotherapy and medication management) to preauthorization review, in the first seven months of 2013, its claim denial rate for outpatient behavioral health services was 29%, whereas its claim denial rate for outpatient medical/surgical services

was only 13%. Excellus denied a total of 7,380 outpatient behavioral health claims in 2013.

19. Excellus tracks its utilization review activity using, among other things, an estimate of savings related to medical necessity denials. These data show a disproportionate amount of estimated savings from its denials of behavioral health treatment. For example, in 2012, 11% of Excellus's estimated utilization review savings (more than \$11 million) came from its denials of behavioral health treatment, even though the plan paid only 3.5% of its overall benefits for behavioral health treatment. Additionally, in the first seven months of 2013, Excellus estimated a savings of \$38.6 million related to utilization review activities. 16% of this amount (\$6 million) came from its behavioral health denials, and almost 10% (\$3.6 million) came from its denials of inpatient substance use disorder treatment alone.

20. From January 2011 through 2014, Excellus denied approximately 3,300 preauthorization requests for inpatient substance use disorder rehabilitation. The estimated savings related to these denials was approximately \$9 million.

#### **Excellus's Imposition of "Fail Twice" Requirements**

21. Many of Excellus's denials of inpatient substance use disorder rehabilitation are the result of its application of a "fail twice" requirement, whereby Excellus requires a member to demonstrate that he or she has unsuccessfully attempted outpatient treatment twice within the past year. Excellus does not impose any such "fail twice" requirements as prerequisites for inpatient medical/surgical treatment. Excellus uses InterQual medical necessity criteria, which until July 2014 included a "fail twice"

requirement as a condition of approving inpatient substance use disorder rehabilitation services.

22. Substance use disorder treatment programs in New York State are required to use the Guidelines for Level of Care Determinations approved by the New York Office of Alcoholism and Substance Abuse Services (“OASAS”), which *do not* include a “fail twice” requirement.<sup>13</sup> However, Excellus uses InterQual medical necessity criteria which, in contrast to the OASAS criteria, does include a “fail twice” requirement for inpatient substance use disorder rehabilitation treatment. Consequently, Excellus frequently denies coverage for this level of care under the InterQual criteria, even though members’ OASAS-licensed providers may have determined that they meet the OASAS criteria.

23. Excellus’s “fail twice” requirement places yet another obstacle in front of members who, suffering from addiction, may have a small window of opportunity to access treatment and embark on the path to recovery. Moreover, Excellus applies its “fail twice” requirement in a manner that is inconsistent with InterQual guidelines. Although the InterQual inpatient substance use disorder treatment criteria that Excellus used until July 2014 stated that a member must attempt two forms of treatment, including the “intensive outpatient, partial hospital, inpatient rehabilitation, outpatient detoxification, ambulatory detoxification, or inpatient detoxification levels of care,” Excellus denied numerous requests for inpatient rehabilitation on the erroneous ground that the member did not attempt *outpatient* treatment twice. In other words, Excellus did not count

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<sup>13</sup> New York State OASAS, Guidelines for Level of Care Determination, LOCADTR 2.0, available at [http://www.oasas.ny.gov/treatment/health/locadtr/locadtr\\_home.cfm](http://www.oasas.ny.gov/treatment/health/locadtr/locadtr_home.cfm).

inpatient treatment episodes towards the two attempts, as the InterQual criteria required it to do.

### **Excellus's Arbitrary Denials of Inpatient Substance Use Disorder Rehabilitation**

24. Some of Excellus's denials of coverage for inpatient substance use disorder rehabilitation treatment appear to be arbitrary and wrongly decided. For example, in July 2012, Excellus denied all days of coverage for 96 of the 204 requests for inpatient substance use disorder rehabilitation treatment it received (47%), including cases in which the individuals had the following symptoms of severe substance use disorder:

- Daily use of 10 bags of intravenous heroin, oxycodone and crack cocaine.
- Daily use of opioids.
- Daily use of alcohol, opioids and amphetamines; hospitalized recently for suicidal ideation.
- Daily use of alcohol, cocaine and bath salts; suicidal; has three-year-old child.
- Daily use of crack cocaine and use of opioids; hospitalized recently for suicidal ideation; homeless.
- Daily use of two pints of whiskey; use of opioids multiple times per week; recently hospitalized after overdose.
- Daily use of intravenous heroin; recently overdosed.
- Daily use of 8 to 10 bags of intravenous heroin.
- Daily use of heroin and cocaine; homeless; lost children due to addiction; history of suicidal behavior.

The individuals – like many others for whom Excellus has denied inpatient substance use disorder rehabilitation treatment – were severely addicted to dangerous drugs and presented risks to themselves and/or others. There is no meaningful distinction between the facts of these denials and the facts of inpatient substance use disorder rehabilitation treatment cases that Excellus approved in the same month, for example:

- Daily use of bath salts; homeless; did not fail outpatient treatment twice in last year.
- Daily use of pint of vodka; binge drinks 2-3 days/week; did not fail outpatient treatment twice in last year.

- Daily use of 2 ounces of vodka; did not fail outpatient treatment twice in last year.
- Daily use of up to pint of gin; did not fail outpatient treatment twice in last year.
- Daily use of beer; use of crack cocaine multiple times per week; did not fail outpatient treatment twice in last year.
- Daily use of beer; use of crack cocaine multiple times per week; did not fail outpatient treatment twice in last year.
- Daily use of beer; use of cocaine once per week; did not fail outpatient treatment twice in last year.
- Use of heroin; did not fail outpatient treatment twice in last year.
- Daily use of beer and gin; use of crack cocaine multiple times per week; did not fail outpatient treatment twice in last year.

As such, Excellus's denials appear to be arbitrary and unjustified.

### **Other Disparities in Excellus's Administration of Behavioral Health Benefits**

25. Until 2014, Excellus required that outpatient substance use disorder treatment be rendered in a facility certified by OASAS – even though Excellus does not use OASAS's medical necessity criteria. Outpatient substance use disorder treatment is frequently provided in professional office settings not licensed by OASAS. Such treatment is often given by clinicians who have been granted a waiver pursuant to the federal Drug Addiction Treatment Act of 2000 to prescribe Schedule III, IV and V narcotic medications for the treatment of opioid addiction during the acute detoxification stage of treatment or during stages of rehabilitation. Excellus imposed no similar restriction on outpatient medical/surgical services.

26. Until July 2014, Excellus required that mental health services in intensive outpatient ("IOP") treatment programs be rendered in programs licensed by the New York State Office of Mental Health ("OMH"), even though, as Excellus acknowledged, OMH does not license the IOP level of care. This paradoxical requirement had the effect of limiting access to mental health services. Excellus imposed no similar restriction on outpatient medical/surgical services.

27. When Excellus determines that a member does not meet its criteria for inpatient behavioral health treatment, it does not approve *any days* of inpatient care. In contrast, when Excellus determines that a member does not meet medical necessity criteria for inpatient medical/surgical services, it may approve an observation level of care stay in the requested medical facility for that member, if payment terms applicable to an observation level of care stay are included in the negotiated participation agreement with the facility.

28. Excellus's Chief Medical Officer for Behavioral Health testified that if a member requests to transition from inpatient detoxification to inpatient rehabilitation (a "step down" from a more intensive level of care to a less intensive level), the plan conducts utilization review for the inpatient rehabilitation admission as a prospective review, under which the plan has three days to render a decision. However, depending upon the facts of the particular request, this practice may conflict with New York Insurance Law Section 4903(c), which provides that for requests for coverage of "continued or extended health care services," a health plan must render a decision within one business day. The application of a longer decision time frame can detrimentally affect members' care, in situations in which they are "stepping down" in levels of care. For example, while waiting for Excellus to make a decision, a member with a substance use disorder may be discharged before the member is ready to function independently and appropriately manage his or her illness.

#### **Excellus's Inadequate Behavioral Health Denial Letters**

29. Excellus's adverse determination letters for behavioral health services, in particular for inpatient substance use disorder treatment, are generic and do not

adequately explain why the member does not meet the applicable medical necessity criteria. For example, Excellus's denial letters for inpatient substance use disorder rehabilitation treatment contain boilerplate language such as:

The clinical information from [facility] does not meet [medical necessity criteria] for an inpatient chemical dependency rehabilitation admission. An inpatient admission would be approved if there were a safety risk, which would require an inpatient level of care to manage. The clinical information from [facility] has been reviewed by our medical director and it has been determined that there are no medical problems, acute psychiatric issues or immediate safety risks that would require an inpatient level of care at this time. There has been no participation in an Intensive Outpatient program. Our recommendations are for you to participate in an Intensive Outpatient Program and involvement Alcoholics for a good support system [sic].

Without details of the reason for the denial or the criteria used in making the determination, members lack the means to lodge a meaningful appeal of Excellus's denials.

30. In contrast, Excellus's adverse determination letters for medical/surgical services contain member-specific details and explain why the applicable medical necessity criteria are not met. For example:

On [date], the Medical Services department received a request from [facility] for inpatient admission for the above member. Based on a review of the verbal clinical information provided to us by [facility] our Medical Director has denied this request as not medically necessary. The decision was based upon the following: According to [medical necessity criteria] for increasing abdominal distension and constipation the acute inpatient level of care is appropriate if the following criteria are met: 1. The member meets the findings and treatment criteria points required under the Condition Specific subset Episode Day 1 Admission Criteria; OR 2. The member does not have objective, clinical indicators that show that a level of clinical stability has been reached that is appropriate for safe discharge to an alternate level of care. Based on the information received from [facility], you did not meet the above criteria for acute inpatient admission. You did not have the required findings listed under Episode Day 1 criteria such as abdominal pain with an increased white blood cell count and temperature greater than 99.4 degrees. Nor did you receive

sufficient services to meet the treatment criteria such as pain management. Finally, you had clinical indicators demonstrating that an alternate level of care was appropriate, such as receiving intravenous fluids and care needs that could be met at an alternate level. Therefore, we cannot approve your request for an acute inpatient admission, however we have approved a one day observation level of care stay.

Unlike Excellus's behavioral health denial letters, this medical/surgical letter recites the applicable criteria for the level of care requested, and explains why the member's specific symptoms and circumstances do not satisfy each element of the criteria. This letter, unlike Excellus's behavioral health denial letters, also approves an observation level of care stay.

31. Excellus's denial letters for behavioral health services also state: "Medical policies and criteria related to this decision are available for review in our offices." Many members, in particular those with behavioral health conditions, may be unable to travel to Excellus's offices to review the medical necessity criteria. In contrast, Excellus's medical necessity criteria for some medical/surgical services, including radiology procedures, are available on a public Internet site.

32. Excellus's behavioral health denial letters suggest that in lieu of the requested treatment, members attend support groups, which, although helpful in the appropriate circumstances, are not by themselves an adequate substitute for necessary treatment prescribed by a medical professional. In contrast, Excellus does not suggest support groups in lieu of medical/surgical treatment.

33. Excellus's denial letters also contain factual errors. For example, Excellus's Chief Medical Officer for Behavioral Health admitted that an adverse determination letter denying coverage for inpatient substance use disorder rehabilitation treatment incorrectly stated that the member had "limited or no participation" in an

outpatient treatment program, when in fact he had attended such a program for five months. Nevertheless, Excellus denied inpatient substance use disorder rehabilitation treatment because the member had “failed” outpatient treatment only once, not twice.

### **Excellus’s Lack of Coverage for Residential Treatment**

34. Until July 2014, Excellus did not cover residential treatment for behavioral health conditions in its standard contract, although it made available for an additional premium a subscriber contract rider providing such coverage. Residential treatment is a standard, recommended, evidence-based form of behavioral health treatment. Offering medication, counseling and structure, residential treatment facilities for behavioral health disorders provide a critical intermediate level of care between inpatient and outpatient treatment, enabling patients to transition back to living in the community. Residential treatment programs provide an intermediate level of care as compared to inpatient services, similar to skilled nursing treatment for medical/surgical conditions.

35. According to the American Psychiatric Association’s Practice Guideline for the Treatment of Patients With Eating Disorders, residential treatment is a key component of the treatment spectrum for eating disorders.<sup>14</sup>

36. According to Excellus’s medical necessity criteria, “[a] psychiatric residential treatment center is a licensed residential facility that provides 24-hour continuous, individually planned programs of therapeutic treatment and supervision,” which includes daily clinical assessment, a structured therapeutic program lasting at least

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<sup>14</sup> American Psychiatric Association Practice Guideline for the Treatment of Patients With Eating Disorders, available at <http://psychiatryonline.org/content.aspx?bookid=28&sectionid=1671334>.

four hours per day, daily medication management, therapy at least twice per week, 24-hour-per-day on-site supervision (with nursing staff on call), weekly psychiatric assessment, and discharge planning. According to Excellus's medical necessity criteria, a "[s]ubstance use residential treatment center is a licensed residential facility that provides 24-hour individualized treatment," and includes daily clinical assessment, daily recovery groups, medication reconciliation, therapy at least three times per week, 24-hour-per-day on-site supervision (with nursing staff on call), discharge planning, and toxicology screening and psychiatric assessment as needed.

37. In 2009, a residential treatment facility, Harmony Place, specializing in treating children and youth with eating disorders, opened in Rochester, New York. The facility was a component of the New York State Department of Health-sponsored Comprehensive Care Center for Eating Disorders of Western New York and was licensed by the New York State Office of Mental Health ("OMH"). Nevertheless, from 2011 through 2013, Excellus denied at least seven requests for care at Harmony Place on the grounds that the individual was covered under a benefit plan that did not cover residential treatment for behavioral health conditions. Harmony Place closed in 2013, in part due to lack of insurance coverage for patients.

38. In one case, Excellus denied residential treatment coverage, due to lack of a benefit, for a 16-year old young woman suffering from anorexia nervosa, even though she was at 83% of ideal body weight, had amenorrhea (the absence of menstruation), malnutrition, unstable vital signs, and bradycardia (a dangerously slow heart rate). The young woman later attempted suicide and had to be hospitalized in a medical unit.

39. The vast majority of Excellus's health plans cover skilled nursing care for medical/surgical conditions, which, as an intermediate level of care between inpatient and outpatient treatment, is the functional equivalent of residential treatment for behavioral health conditions. All of Excellus's health plans cover home care for medical/surgical conditions.

### **Excellus's Higher Cost-Sharing for Behavioral Health Services**

40. Excellus charges 31% of its members the higher, specialist copayment for routine, outpatient behavioral health services, rather than the lower, primary care copayment that it charges members for routine, outpatient medical/surgical services. This can have the effect of deterring members from accessing necessary behavioral health care due to cost concerns.

### **III. RELEVANT LAWS**

41. Timothy's Law, enacted in 2006, mandates that New York group health plans that provide coverage for inpatient hospital care or physician services must also provide "broad-based coverage for the diagnosis and treatment of mental, nervous or emotional disorders or ailments, . . . at least equal to the coverage provided for other health conditions." N.Y. Ins. Law §§ 3221(l)(5)(A); 4303(g)(1). Further, all group plans must cover, annually, a minimum of 30 days of inpatient care, 20 visits of outpatient care, and partial hospitalization treatment (as an offset to covered inpatient days at a rate of 2 partial hospitalization visits to 1 inpatient day) for the diagnosis and treatment of mental, nervous or emotional disorders or ailments. N.Y. Ins. Law §§ 3221(l)(5)(A)(i)&(ii); 4303(g)(1)(A)&(B).

42. Timothy's Law also requires that deductibles, co-payments and co-insurance for mental health treatment be consistent with those imposed on other benefits, N.Y. Ins. Law §§ 3221(l)(5)(A)(iii); 4303(g)(1)(C), and that utilization review for mental health benefits be applied "in a consistent fashion to all services covered by [health insurance and health maintenance organization] contracts." 2006 N.Y. Laws Ch. 748, § 1.

43. The New York Insurance Law requires every group plan that provides coverage for inpatient hospital care to cover at least 60 outpatient visits in any calendar year for the diagnosis and treatment of chemical dependence, of which up to twenty may be for family members. N.Y. Ins. Law §§ 3221(l)(7); 4303(l).

44. In 2004, New York enacted legislation creating Comprehensive Care Centers for Eating Disorders (the "CCCED Law"). New York L. 2004, c.114. Pursuant to the CCCED Law, the New York State Department of Health designated three Centers, each of which must provide or arrange for a continuum of care tailored to the specialized needs of individuals with eating disorders, including residential treatment. N.Y. Public Health Law § 2799-g. The CCCED Law prohibits plans from excluding coverage under a policy offering medical, major medical, or similar comprehensive coverage "for services covered under such policy when provided by a Comprehensive Care Center for Eating Disorders". N.Y. Ins. Law §§ 3221(k)(14); 4303(dd).

45. The federal Mental Health Parity and Addiction Equity Act ("The Federal Parity Act"), enacted in 2008, prohibits large group, individual, and Medicaid health plans that provide both medical/surgical benefits, and mental health or substance use disorder benefits, from: (i) imposing financial requirements (such as deductibles, co-

payments, co-insurance, and out-of-pocket expenses) on mental health or substance use disorder benefits that are more restrictive than the predominant level of financial requirements applied to substantially all medical/surgical benefits; (ii) imposing treatment limitations (such as limits on the frequency of treatment, number of visits, and other limits on the scope or duration of treatment) on mental health or substance use disorder treatment that are more restrictive than the predominant treatment limitations applied to substantially all medical/surgical benefits, or applicable only with respect to mental health or substance use disorder benefits; and (iii) conducting medical necessity review for mental health or substance use disorder benefits using processes, strategies or standards that are not comparable to, or are applied more stringently than, those applied to medical necessity review for medical/surgical benefits. 29 U.S.C. § 1185a; 42 U.S.C. § 300gg-26; 45 C.F.R. § 146.136(c)(4)(i). The Federal Parity Act also requires that plans make medical necessity criteria available to current or potential participants. 42 U.S.C. § 300gg-26(a)(4). The Affordable Care Act and its essential health benefit regulations extend the federal parity requirements to small and individual plans. 45 C.F.R. § 156.115(a)(3).

46. Timothy's Law and the Federal Parity Act work together, in that Timothy's Law mandates coverage of mental health treatment, and the Federal Parity Act requires that such coverage be equal to coverage of medical/surgical treatment. For example, Timothy's Law requires coverage of at least 20 sessions of outpatient mental health treatment per year. If a health plan does not place visit limits on substantially all outpatient medical/surgical services, it may not place visit limits on outpatient mental health services.

47. Under New York law, residential treatment facilities for children and youth constitute a sub-class of the class of facilities defined as “hospitals.” N.Y. Mental Hyg. Law §§ 1.03(10); 1.03(33).

48. New York law requires health plans, in the case of an adverse benefit determination, to provide “the reasons for the determination including the clinical rationale,” N.Y. Ins. Law § 4903(e)(1); N.Y. Pub. Health Law § 4903(5)(a), and to make available to members the clinical review criteria relied upon in making such determination. N.Y. Ins. Law § 4903(e)(3); N.Y. Pub. Health Law § 4903(5)(c).

49. The New York State Executive Law authorizes the Attorney General, where there are “repeated fraudulent or illegal acts” or “persistent fraud or illegality in the carrying on, conducting or transaction of business,” to seek relief, including enjoining the continuance of such business activity or of any fraudulent or illegal acts, as well as restitution and damages. N.Y. Exec. Law § 63(12).

50. Based on the findings of the Attorney General’s investigation, the Attorney General has determined that Excellus’s conduct has resulted in violations of New York Executive Law Section 63(12), Timothy’s Law, the New York Insurance Law, the New York Public Health Law, the Federal Parity Act, and the Affordable Care Act. Excellus’s practices have had the effect of unlawfully limiting Excellus members’ access to behavioral health services.

**NOW, WHEREAS,** Excellus neither admits nor denies the Attorney General's findings in Paragraphs 3 through 40 above; and

**WHEREAS,** access to adequate behavioral health treatment is essential for individual and public health; and

**WHEREAS,** Excellus has cooperated with the OAG's investigation; and

**WHEREAS,** the Attorney General is willing to accept the terms of this Assurance under Executive Law Section 63(15) and to discontinue his investigation; and

**WHEREAS,** the parties each believe that the obligations imposed by this Assurance are prudent and appropriate; and

**WHEREAS,** the Attorney General has determined that this Assurance is in the public interest.

**IT IS HEREBY UNDERSTOOD AND AGREED,** by and between the parties that:

#### IV. PROSPECTIVE RELIEF

51. Within ninety (90) days of the Effective Date, unless otherwise specified below, Excellus will implement the reforms set forth below in Paragraphs 52 through 64.

52. **Behavioral Health Treatment Generally.** Excellus will not require that its members demonstrate a substantial impairment in their ability to function in a major life activity in order to receive coverage for behavioral health care. The foregoing does not preclude consideration of impairment in relationships or life activities as a factor in applying medical necessity review criteria to make level of care determinations.

53. **Outpatient Behavioral Health Treatment.**

- a. Effective July 1, 2014, Excellus has been covering partial hospitalization and intensive outpatient (“IOP”) treatment for behavioral health conditions, and has not been limiting IOP coverage to OMH-licensed programs.
- b. In general, Excellus will not impose any preauthorization or concurrent review requirements for routine outpatient behavioral health services (*i.e.*, psychotherapy and medication management).
- c. In those rare cases in which Excellus may identify routine outpatient behavioral health services for preauthorization or concurrent utilization review, it will first attempt to reach out to the provider to discuss the member’s treatment. Any requests for necessary medical records by Excellus that follow will be reasonable and narrowly tailored in scope and time frame to the clinical issues identified by an Excellus Medical Director.

- d. Excellus will cover outpatient substance use disorder treatment, including methadone treatment:
  - i. in facilities in New York State that are certified by OASAS, or licensed by OASAS as outpatient clinics or medically supervised ambulatory substance use disorder programs;
  - ii. in professional office settings for services relating to the diagnosis and treatment of substance use disorders;
  - iii. by physicians who have been granted a waiver pursuant to the federal Drug Addiction Treatment Act of 2000 to prescribe Schedule III, IV and V narcotic medications for the treatment of opioid addiction during the acute detoxification stage of treatment or during stages of rehabilitation;
  - iv. in other states, by providers or programs that are licensed or certified by a similar state agency or which are accredited by the Joint Commission as substance use disorder treatment programs; and
  - v. will provide at least 20 outpatient visits per calendar year for family counseling.

**54. Utilization Review Reforms.**

- a. Fail First: in reviewing preauthorization requests for inpatient substance use disorder rehabilitation treatment, Excellus will not apply any “fail first” requirements, whereby a member must show that he or she has unsuccessfully attempted substance use disorder treatment one or more times.

- b. Inpatient Behavioral Health: To reduce the frequency and intensity of its utilization review for inpatient behavioral health services, Excellus will continue discussions with the OAG regarding the feasibility of implementing: (i) Diagnostic Related Group (“DRG”)-based reimbursement for inpatient behavioral health services; (ii) “Gold Card” status for inpatient behavioral health facilities, whereby treatment at such facilities will not be subject to preauthorization requirements; and (iii) alternative payment methodologies when inpatient services are denied based on lack of medical necessity.
- c. Information Collection: In conducting utilization review for behavioral health services, Excellus will follow the information-collection protocol set forth in Exhibit A.
- d. Medical Necessity Criteria: Excellus will make its behavioral health medical necessity criteria for the level of care at issue available to members and participating providers via a secure Internet site. Excellus will make available toll-free telephone lines for non-participating providers and potential members to request a copy of Excellus’s medical necessity criteria. Excellus will adopt policies and procedures designed to ensure that, in conducting utilization review, its reviewers properly apply medical necessity criteria. Effective April 1, 2015, or the date required by OASAS, when conducting utilization review for purposes of determining health care coverage for substance use disorder treatment, Excellus will utilize recognized evidence-based and peer-reviewed clinical review

criteria that is appropriate to the age of the patient and is deemed appropriate and approved for such use by the Commissioner of OASAS.

- e. Continued Treatment: Excellus will decide requests for coverage of continued or extended health care services for a member undergoing a course of continued treatment prescribed by a health care provider within one business day. In cases in which an Excellus member transitions from one level of behavioral health treatment to another, Excellus will use its best efforts to decide requests for authorization of the second level of care (if such authorization is required) within one business day. Effective April 1, 2015, Excellus will decide requests for authorization for inpatient substance use disorder treatment within twenty-four hours of receipt of the request for services, when the request is submitted at least twenty-four hours prior to discharge from an inpatient admission.

55. **Residential Treatment.**

- a. Subject to a determination of medical necessity and any applicable in-network requirements contained in the member's benefit plan, Excellus will cover inpatient mental health care services relating to the diagnosis and treatment of mental, nervous and emotional disorders received at facilities that provide residential treatment ("residential mental health treatment facilities"), including room and board charges in:
  - i. facilities defined in New York Mental Hygiene Law Section 1.03(33) (which defines residential treatment facility for children and youth);

- ii. residential treatment facilities that are part of a Comprehensive Care Center for Eating Disorders (“CCCED”) identified pursuant to Article 27-J of the Public Health Law;
- iii. residential treatment facilities operated by a general hospital in accordance with its operating certificate issued under Article 28 of the N.Y. Public Health Law; and
- iv. residential treatment facilities in other states that are licensed or certified to provide the same level of treatment as facilities described in Paragraph 55(a)(i-iii), above.

A non-exhaustive list of residential mental health treatment facilities meeting the criteria of Paragraph 55(a)(i), (ii), (iii) or (iv) is attached as Exhibit B. For facilities not listed in Exhibit B, Excellus will use its best efforts to respond to inquiries from a member or provider regarding whether a particular facility is a covered residential mental health treatment facility within 24 hours and, with respect to a request for preauthorization for services from a member or provider at a facility not listed in Exhibit B, Excellus will decide such request within the time frame required by Article 49 of the N.Y. Public Health Law and Article 49 of the N.Y. Insurance Law. Within thirty (30) days of the Effective Date, Excellus will provide to the OAG a written protocol pursuant to which it will make decisions regarding whether a facility meets the criteria set forth in Paragraph 55(a)(i), (ii), (iii) or (iv). Excellus will make available to members and their providers Behavioral Health Advocates (described

below), who will be knowledgeable about Excellus's coverage of residential mental health treatment facilities. Excellus will update the list of residential mental health treatment facilities that meet the criteria set forth in Paragraph 55(a)(i), (ii), (iii) or (iv) on a monthly basis, and supply such updated lists to the OAG, and post such lists on its member website.

- b. Subject to a determination of medical necessity and any applicable in-network requirements contained in the member's benefit plan, Excellus will cover inpatient substance use services relating to the diagnosis and treatment of substance use disorders received at facilities that provide residential treatment ("residential substance use disorder treatment facilities"), including room and board charges, at OASAS-certified facilities defined in 14 N.Y.C.R.R. 819.2(a)(1), and services provided in such facilities in accordance with 14 N.Y.C.R.R. Parts 817 and 819; and, in other states, at facilities that are licensed or certified by a similar state agency or which are accredited by the Joint Commission as substance use disorder treatment programs to provide the same level of treatment. A non-exhaustive list of residential substance use disorder treatment facilities meeting the foregoing criteria is attached as Exhibit C. For facilities not listed in Exhibit C, Excellus will use its best efforts to respond to inquiries from a member or provider regarding whether a particular facility is a covered residential substance use disorder treatment facility within 24 hours and, with respect to a request for preauthorization for services from a member or provider at a facility not listed in Exhibit B,

Excellus will decide such request within the time frame required by Article 49 of the N.Y. Public Health Law and Article 49 of the N.Y. Insurance Law. Within thirty (30) days of the Effective Date, Excellus will provide to the OAG a written protocol pursuant to which it will make decisions regarding whether a facility meets the criteria set forth in this Paragraph 55(b). Excellus will make available to members and their providers Behavioral Health Advocates (described below), who will be knowledgeable about Excellus's coverage of residential substance use disorder treatment facilities. Excellus will update the list of residential substance use disorder treatment facilities that meet the criteria set forth in this Paragraph 55(b) on a monthly basis, and supply such updated lists to the OAG, and post such lists on its member website.

- c. Excellus will continue its commitment to work with CCCEDs in its service area to develop a residential treatment component.
- d. Excellus will use its best efforts to contract with a sufficient number of residential treatment facilities to ensure network adequacy. In particular, Excellus will use its best efforts to contract with residential treatment facilities for the treatment of eating disorders within its New York Blue Cross and Blue Shield service area, and will rely on the national "Blue Card" network when such services are provided by facilities outside of its New York Blue Cross and Blue Shield service area, both within New York and outside of New York.

56. **Cost-Sharing Requirements.** Excellus will apply the primary care co-payment amount to all routine outpatient behavioral services for all standard individual and small group products offered on the New York Health Benefit Exchange, the New York State of Health (the “Exchange”), and will offer products with this co-payment design for purchase off the Exchange. All HMO products will continue to use the primary care co-payment amount for routine outpatient substance use disorder services.

57. **Adverse Determination Notification.** When making adverse benefit determinations, Excellus will provide to the member and provider:

- a. In writing, a detailed explanation of the clinical reason for the denial, citing to specific medical necessity criteria, facts justifying the denial, and treatment records;
- b. In writing, what, if any, additional necessary information must be provided to, or obtained by, Excellus to render a decision on the appeal;
- c. In writing, information about contacting a Behavioral Health Advocate who can provide assistance and information regarding utilization review determinations and processes, medical necessity criteria, appeals, and alternative providers (*see* Paragraph 58 below);
- d. In writing, clear, specific instructions regarding filing internal and external appeals;
- e. In writing, the process for obtaining a copy of the specific medical necessity criteria used in making the adverse determination, and notice that such criteria are available electronically via a secure portal, and will be made available free of charge in hard copy form upon request;

- f. Telephonic notice of adverse determinations: (i) to the member and provider for preauthorization denials; and (ii) to the provider for concurrent review denials.

Adverse determination letters will be reviewed for accuracy by the Excellus staff member who performed intake on the case, prior to distribution to members and providers.

58. **Behavioral Health Advocates.** Excellus will designate a minimum of three employees (at least one of whom will be available to members each business day) to serve as Behavioral Health Advocates (“Advocates”), each of whom will have an appropriate educational background, including at least an undergraduate degree in a behavioral health field, and will spend all necessary time on services related to behavioral health advocacy, as set forth below:

- a. Upon any denial of coverage for behavioral health services, Excellus will provide to the member and provider conspicuous notice of the availability of an Advocate, who will be accessible to both the member and the provider, and will supply them with assistance and detailed, accurate, and current information regarding utilization review determinations and processes, medical necessity criteria, and appeals, as well as information regarding in-network treatment facilities and providers in the member’s service area. Upon member or provider request, Excellus will assign an Advocate to the member.
- b. As set forth below in Paragraph 59(d), on a quarterly basis, Excellus will provide the OAG with data regarding the utilization of Advocates, in particular, daily/weekly call volume and case load (for each Advocate). If,

based on its review of such data, the OAG determines that the number of Advocates or the time spent by Advocates on services related to behavioral health advocacy is insufficient, Excellus shall designate additional Advocates.

- c. Nothing in this Assurance shall be interpreted to prevent any Advocate from engaging in other work activities so long as all members who have requested assistance from an Advocate have been provided assistance within the scope of this Paragraph.

59. **Compliance Administrator.** Within 30 days of the Effective Date, Excellus will appoint, subject to approval by the OAG, a compliance administrator (the “Administrator”) for this Assurance.

- a. The Administrator will be Excellus’s Chief Compliance Officer.
- b. The Administrator will serve for a minimum of three (3) years from the date such Administrator commences service, subject to the provisions of Paragraph 59(g) below.
- c. Excellus will pay for the costs of the Administrator.
- d. The Administrator will evaluate Excellus’s compliance with this Assurance by:
  - i. collecting and examining data regarding a set of metrics (to be agreed upon by the OAG and Excellus), to include, at a minimum: (1) utilization review results (in particular, denial rates); (2) penetration rates (the percentage of members accessing behavioral health services); (3) Excellus’s behavioral health and substance use disorder

- provider network; (4) dollar spend on behavioral health services; (5) internal appeals and results thereof; (6) external appeals and results thereof; and (7) utilization of Behavioral Health Advocates (including daily/weekly call volume and case load);
- ii. auditing a sample of adverse determination cases for various levels of care, including adverse determination letters, to assess correctness of determination, proper application of medical necessity criteria, and inclusion of proper level of detail in letters;
  - iii. providing quarterly reports to the OAG describing Excellus's compliance with the terms of this Assurance, as well as an analysis of the data (to be provided at intervals agreed to by the parties) and adverse determination case audits described above. The first such report shall be due within ninety (90) days of the Effective Date.
- e. If, after reviewing the quarterly reports described above, the Administrator or the OAG conclude that Excellus is not compliant with this Assurance, it will communicate in writing such finding to Excellus's Chief Medical Officer with a copy to the OAG, and upon receiving such written communication, Excellus will create a written plan of corrective action, which it will provide within 30 days to the OAG.
  - f. If, after the Administrator has functioned in the position for two years, Excellus makes a showing to the OAG that it is compliant with this Assurance, the Administrator shall cease to function.

g. If, after the expiration of a three (3)-year period after the Effective Date, the Administrator or OAG determine that Excellus is not compliant with this Assurance, the Administrator will continue to function, pursuant to the provisions of this Paragraph 59, until such time as the Administrator and OAG are satisfied that Excellus is compliant with this Assurance.

60. **Training.** Excellus will provide training to all utilization review and customer relations staff regarding: (i) the prospective measures contained in this Assurance; (ii) the requirements of Timothy's Law, New York Insurance Law provisions regarding substance use and eating disorder treatment, and the Federal Parity Act; (iii) proper application of medical necessity criteria; (iv) classification of reviews; (v) the required level of detail in adverse determination letters; and (vi) appeals processes. Excellus will provide a copy of such training materials to the Administrator and the OAG for approval before dissemination.

61. **Grievances and Appeals.** For a three (3)-year period, Excellus will provide the OAG and the Administrator with a quarterly summary of grievances and grievance appeals from Excellus members regarding behavioral health coverage, without patient-identifying information. A grievance is a member complaint to a health insurance company about something other than a medical necessity denial, *e.g.*, a denial based on limitations or exclusions in the health insurance contract. If, pursuant to the provisions of Paragraph 59(g) above, the Administrator ceases to function prior to the expiration of a three (3)-year period after the Effective Date, Excellus's obligation to provide quarterly member grievances and appeals summaries to the OAG and the Administrator will cease at the same time.

62. **Disclosures.** Excellus will provide to members, in a conspicuous web posting on its member Internet site, disclosures regarding behavioral health coverage, as set forth in Exhibit D.

63. **Annual Compliance Report.** For each of the three (3) years following the Effective Date, Excellus will file an Annual Compliance Report with the Administrator and the OAG, certifying compliance with the terms of this Assurance. Such reports shall include confirmation that Excellus provides the items set forth in Exhibit D. If, pursuant to the provisions of Paragraph 59(g) above, the Administrator ceases to function prior to the expiration of a three (3)-year period after the Effective Date, Excellus's obligation to provide Annual Compliance Reports to the OAG will cease at the same time.

64. **Impact on Certain Non-Commercial Products.** Nothing in this Assurance is intended to supersede or replace any requirement applicable to the Medicaid Managed Care program, the Medicare Advantage program, any benefit applicable to a self-funded group, or coverage applicable to a group exempt from the Federal Parity Act.

## V. **RETROSPECTIVE RELIEF**

65. Excellus shall implement the following remedial measures:

66. **Independent Review of Denials.** Excellus will provide the opportunity for an independent appeal (an "AOD Appeal") to:

- a. members who received denials of preauthorization requests for inpatient substance use disorder rehabilitation treatment from January 1, 2011 through June 30, 2014, due to lack of medical necessity, if such treatment

- was actually rendered at the same facility within one month after the denial, the member paid out-of-pocket expenses or has unpaid expenses for such treatment, and the member did not file an external appeal; and
- b. members who received denials of preauthorization requests for inpatient substance use disorder residential treatment from July 1, 2014, through the Execution Date, if such treatment was actually rendered at the same facility within one month after the denial, the member paid out-of-pocket expenses or has unpaid expenses for such treatment, and the member did not file an external appeal; and
  - c. members who received a total of sixteen denials of coverage of residential treatment at Harmony Place in Rochester, New York beginning on January 1, 2010 on the ground that such treatment did not constitute a covered benefit, if such treatment was actually rendered at Harmony Place and the member paid out-of-pocket expenses.

The AOD Appeals process will be administered by a third-party administrator (the "Claims Administrator," described below), and applications will be reviewed by a New York-certified external appeal agent (the "Reviewer," described below). The Reviewer will determine whether or not the denied services were medically necessary as of the date the adverse determination was made by Excellus, and will be conducted in the same manner as external appeals pursuant to the New York utilization review law. Where the Reviewer concludes that such services were medically necessary, Excellus will reimburse members for the out-of-pocket expenses that they paid. Based on information provided by Excellus, it is anticipated that Excellus members who will receive notice regarding the

possibility of an AOD Appeal will include, at a minimum, approximately 3,300 denials of preauthorization requests for coverage of inpatient substance use disorder rehabilitation treatment due to Excellus's determination that the treatment was not medically necessary, and sixteen Excellus members who received denials for residential treatment coverage on the grounds that such treatment was not covered by Excellus.

67. **Claims Administrator and Claims Process.** The AOD Appeals described in the preceding Paragraph will be subject to the following provisions:

- a. Within twenty (20) business days of the execution of this Assurance, Excellus, at its own expense, will retain an independent third-party administrator with expertise in evaluating claims (the "Claims Administrator") who will be responsible for: (i) creating a notice form and transmitting it to eligible members; (ii) determining the completeness and eligibility of AOD Appeal applications filed by Excellus members and/or their designees ("Excellus Claimants"); (iii) contacting Excellus Claimants, their providers, and Excellus, as necessary, to obtain information regarding such applications; (iv) transmitting complete and eligible applications to the Reviewer; and (v) ensuring, by means of an audit, that Excellus distributes payments to Excellus Claimants pursuant to the terms of this Assurance.
- b. The selection of the Claims Administrator will be subject to the advance approval of the OAG, which will not be unreasonably withheld, provided that the Claims Administrator demonstrates familiarity with and

experience in processing and evaluating health care insurance claims, and conducting outreach to consumers and health care providers.

- c. Within twenty (20) days of being retained by Excellus, the Claims Administrator will provide to the OAG a written plan reflecting the processes and procedures that the Claims Administrator will follow (the "Claims Administrator's Plan"), which will include, at a minimum: (i) the proposed form of notice (the "Notice") to Excellus members; (ii) the proposed commercially reasonable means of notifying members, including factors such as the feasibility of identifying and locating members, the likelihood of reaching members, and alternative means of notifying members whose current locations may be unknown; (iii) the process by which the Claims Administrator will determine the completeness and eligibility of AOD Appeal applications; (iv) the process by which the Claims Administrator will contact Excellus Claimants and their providers, as necessary, to obtain information regarding such applications (including proof of out-of-pocket expenses and/or unpaid bills for treatment); and (v) the process by which the Claims Administrator will transmit complete and eligible applications and other necessary documentation to the Reviewer.
- d. Upon the OAG's approval, the Claims Administrator will implement the processes and procedures set forth in the Claims Administrator's Plan.
- e. The Notice will include an application form that gives the member four (4) months to submit the completed form and any supporting documentation, including proof of out-of-pocket expenses for treatment, an unpaid bill for

treatment, and/or clinical records and documentation. Proof of out-of-pocket expenses will include a canceled check, credit card receipt or statement, or an invoice, receipt, or statement from the healthcare provider reflecting the paid amount. The Notice will include a letter from the OAG regarding the Notice and, among other things, advising members to contact the OAG if the member has any questions or is not satisfied with resolution of his or her application.

- f. The Claims Administrator will determine, within ten (10) business days of receipt, whether each AOD Appeal application is complete and eligible for independent review.
- g. Excellus will cooperate fully with the Claims Administrator, including but not limited to providing the Claims Administrator with access to files, systems, databases, processes, and personnel as reasonably necessary, as determined by the OAG, to facilitate the Claims Administrator's performance of its duties, subject to applicable federal and state laws, including the Health Insurance Portability and Accountability Act.
- h. All AOD Appeal applications deemed complete and eligible by the Claims Administrator will be decided by the Reviewer within forty-five (45) days of such determination.
- i. Excellus will make Behavioral Health Advocates (described above) available to assist Excellus Claimants in completing their appeal applications, including, where necessary, securing proof of out-of-pocket expenses and/or unpaid bills and invoices for treatment.

- j. Where the Claims Administrator believes that an appeal application is incomplete or that an Excellus Claimant is ineligible for an appeal, it may not reject such application unless it has communicated to the Excellus Claimant with specificity and in writing the reason for such incompleteness or ineligibility, has reached out to the Excellus Claimant telephonically to determine the reason for such incompleteness or ineligibility, reasonably concluded that the application is incomplete and/or the member is not eligible for an AOD Appeal, and communicated the basis for this conclusion to the Excellus Claimant and to the OAG. The Claims Administrator will provide such information to the OAG on a weekly basis, unless otherwise agreed.
- k. Excellus will pay all claims of Excellus Claimants eligible for reimbursement within thirty (30) days of the Reviewer's decision.
- l. Excellus will be required to continue to retain the Claims Administrator (or, if necessary, a replacement administrator that is acceptable to the OAG) until all restitution payments have been made to Excellus Claimants.
- m. The OAG, at its discretion, will have the right to require Excellus to change the Claims Administrator upon a reasonable and good faith determination that the Claims Administrator has been ineffective in carrying out its duties pursuant to this Assurance.
- n. The Claims Administrator will not be permitted to subcontract its obligations under this Assurance to any other person or entity, except that,

after notifying the OAG and subject to the OAG's approval, the Claims Administrator may retain additional persons or entities needed for the Claims Administrator to carry out its obligations under this Assurance. If the Claims Administrator subcontracts its obligations under this Assurance, or retains additional persons or entities without notifying the OAG and/or without the OAG's approval, the OAG will have the right to direct Excellus to cancel the contract between Excellus and the Claims Administrator and to require Excellus to retain a new Claims Administrator that is acceptable to the OAG within fifteen (15) days.

- o. This Assurance will be attached to Excellus's contract with the Claims Administrator and all of the OAG's rights herein will be incorporated by reference in Excellus's contract with the Claims Administrator.
- p. Excellus will provide a copy of its contract with the Claims Administrator to the OAG within two (2) business days of its execution.
- q. Excellus will bear any and all costs associated with retaining the Claims Administrator.
- r. Excellus will cooperate with any and all requests by the Claims Administrator or by the OAG to assist in communicating with Excellus Claimants and their providers.
- s. The agreement between Excellus and the Claims Administrator will require the Claims Administrator to treat all information provided by the OAG regarding claimants as confidential and not to share such information with any other person or entity.

- t. Within forty-five (45) days of completion of the Claims Process set forth in this Paragraph, the Claims Administrator will conduct an audit of the Claims Process and report to the OAG as to whether reimbursement pursuant to the Claims Process complied with this Assurance.

**VI. FEES and/or COSTS**

68. Within sixty (60) days of the Effective Date, Excellus shall pay \$500,000 to the OAG for fees and/or costs of the Attorney General's investigation, in lieu of any other action which could be taken by the OAG in consequence of the foregoing. Such sum shall be payable by check to "State of New York Department of Law."

**VII. MISCELLANEOUS**

**Excellus's Representations**

69. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by Excellus and its counsel and the OAG's own factual investigation as set forth in the above Findings. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

**Communications**

70. All communications, reports, correspondence, and payments that Excellus submits to the OAG concerning this Assurance or any related issues is to be sent to the attention of the person identified below:

Michael D. Reisman, Esq.  
Assistant Attorney General  
Health Care Bureau  
Office of the New York Attorney General

120 Broadway  
New York, New York 10271  
Michael.reisman@ag.ny.gov

71. Receipt by the OAG of materials referenced in this Assurance, with or without comment, shall not be deemed or construed as approval by the OAG of any of the materials, and Excellus shall not make any representations to the contrary.

72. All notices, correspondence, and requests to Excellus shall be directed as follows:

Stephen Sloan  
Executive VP, Chief Administrative Officer, & General Counsel  
Excellus BlueCross BlueShield  
165 Court Street  
Rochester, NY 14647

E. Raymond Kolarsey  
Hinman Straub  
121 State Street  
Albany, New York 12207-1693

#### **Valid Grounds and Waiver**

73. Excellus hereby accepts the terms and conditions of this Assurance and waives any rights to challenge it in a proceeding under Article 78 of the Civil Practice Law and Rules or in any other action or proceeding.

#### **No Deprivation of the Public's Rights**

74. Nothing herein shall be construed to deprive any member or other person or entity of any private right under law or equity.

#### **No Blanket Approval by the Attorney General of Excellus's Practices**

75. Acceptance of this Assurance by the OAG shall not be deemed or construed as approval by the OAG of any of Excellus's acts or practices, or those of its agents or assigns, and none of them shall make any representation to the contrary.

### **Monitoring by the OAG**

76. To the extent not already provided under this Assurance, Excellus shall, upon request by the OAG, provide all documentation and information necessary for the OAG to verify compliance with this Assurance. Excellus may request an extension of particular deadlines under this Assurance, and so long as Excellus provides a reasonable, good faith basis for needing such extension, the approval of such request shall not be unreasonably withheld by the OAG. This Assurance does not in any way limit the OAG's right to obtain, by subpoena or by any other means permitted by law, documents, testimony, or other information.

### **No Limitation on the Attorney General's Authority**

77. Nothing in this Assurance in any way limits the OAG's ability to investigate or take other action with respect to any non-compliance at any time by Excellus with respect to this Assurance, or Excellus's non-compliance with any applicable law with respect to any matters.

### **No Undercutting of Assurance**

78. Excellus shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects Excellus's (a) testimonial obligations or (b) right to take legal or factual positions in defense of litigation or other legal proceedings to which the OAG is not a party.

### **Governing Law; Effect of Violation of Assurance of Discontinuance**

79. Under Executive Law Section 63(15), evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law in any

action or proceeding thereafter commenced by the OAG.

80. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

81. If a court of competent jurisdiction determines that Excellus has breached this Assurance, Excellus shall pay to the OAG the cost, if any, of such determination and of enforcing this Assurance, including, without limitation, legal fees, expenses, and court costs.

**No Presumption Against Drafter; Effect of any Invalid Provision**

82. None of the parties shall be considered to be the drafter of this Assurance or any provision for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof. This Assurance was drafted with substantial input by all parties and their counsel, and no reliance was placed on any representation other than those contained in this Assurance.

83. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

**Entire Agreement; Amendment**

84. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by Excellus in agreeing to this Assurance.

85. This Assurance contains an entire, complete, and integrated statement of

each and every term and provision agreed to by and among the parties, and the Assurance is not subject to any condition not provided for herein. This Assurance supersedes any prior agreements or understandings, whether written or oral, between and among the OAG and Excellus regarding the subject matter of this Assurance.

86. This Assurance may not be amended or modified except in an instrument in writing signed on behalf of all the parties to this Assurance.

87. The division of this Assurance into sections and subsections and the use of captions and headings in connection herewith are solely for convenience and shall have no legal effect in construing the provisions of this Assurance.

#### **Binding Effect**

88. This Assurance is binding on and inures to the benefit of the parties to this Assurance and their respective successors and assigns, provided that no party, other than the OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without prior written consent of the OAG.

#### **Effective Date**

89. This Assurance is effective on the date that it is signed by the Attorney General or his authorized representative (the "Effective Date"), and the document may be executed in counterparts, which shall all be deemed an original for all purposes.

**AGREED TO BY THE PARTIES:**

Dated: Rochester, New York

March 11, 2015

**Excellus Health Plan, Inc.**

By: 

Stephen Sloan  
Executive VP, Chief Admin. Off., & General  
Counsel

Dated: New York, New York

March 13, 2015

**ERIC T. SCHNEIDERMAN**  
Attorney General of the State of New York

LISA LANDAU  
Health Care Bureau Chief

By: 

MICHAEL D. REISMAN  
Assistant Attorney General  
Health Care Bureau

## **Exhibit A**

### **Protocol for Collecting Information for Medical Necessity Determinations**

In making medical necessity determinations regarding requests for coverage of behavioral health treatment, Excellus will:

1. Attempt to obtain from the requesting party all information necessary for determining whether a request for coverage of treatment meets the medical necessity criteria for the particular level of care at issue. Such information will, at a minimum, include: diagnosis; symptoms; treatment goals; and, where appropriate, risks to the member from not continuing treatment.
2. In a case in which Excellus determines that it lacks sufficient information to make a medical necessity determination, inform the provider and member (where practicable) -- orally and in writing, or by reference to medical necessity criteria available on Excellus's website -- of the specific information needed for making the medical necessity determination, the time frame to provide the information, and acceptable methods of submission.
3. Offer to make available in hard copy or electronically (via a secure Internet site) to members and participating providers, and in hard copy to non-participating providers and potential members, a copy of Excellus's medical necessity criteria for the level of care at issue, as well as any checklist or questionnaire used by Excellus in making medical necessity determinations for the level of care at issue.

**Exhibit B**

**Non-Exhaustive List of Residential Mental Health Treatment Facilities**

Baker Victory Services	(Lackawanna) New York
Cambridge Eating Disorder Center	Massachusetts
Castlewood Treatment Center	Missouri
Connors Children's Center	(Buffalo) New York
Crestwood	(Auburn) New York
Eating Recovery Center of Washington	Washington
Emily Program PC	Minnesota
Green Chimneys Residential	(Brewster) New York
Hillside RTC	(Rochester) New York
Integriss Bass Baptist Health Center	Oklahoma
La Amistid	Florida
Laureate Psychiatric Clinic	Oklahoma
Laurel Ridge Treatment Center	Texas
Lindner Center of Hope	Ohio
Marillac Center	Kanas
Monte Nido Irvington	(Westchester) New York
Monte Nido Laurel Hill	Massachusetts
Oliver-Pyatt Centers	Florida
Remuda Ranch Center	Arizona
Rogers Memorial Hospital	Wisconsin
The Center for Hope of the Sierras	Nevada
The House of Good Shepherd	(Utica) New York
The McLean Hospital Corporation	Massachusetts
The Renfrew Center	Pennsylvania
The Wetzel Center	Massachusetts
Timberline Knolls Behavioral Health	Illinois

**Exhibit C**

**Non-Exhaustive List of Residential Substance Use Disorder Treatment Facilities**

California Seaside Recovery Center	California
CAN AM Youth Services	New York
Children Treatment Center	Pennsylvania
Clearbrook	Pennsylvania
Credo Center for the Treatment of Addictions	New York
Father Martin Ashley	Maryland
First Step	Florida
Florida Center for Alcohol and Drug Studies	Florida
Hazelden Center for Youth & Families	Minnesota
Hope House	New York
Lakeview Health	Florida
Manchester Alcoholism Rehabilitation Center	New Hampshire
Marworth	Pennsylvania
New York Cayuga Addiction Recovery Services	New York
New York Renaissance Addiction Services Inc.	New York
Nova counseling Services	Wisconsin
Palm Partners LLC	Florida
Phoenix House of Florida	Florida
PRCD Inc., DBA Adolescent Community Residence	New York
Recovery Ways	Utah
Seabrooke House	New Jersey
Serenity Palms	California
St Joseph's Saranac Lake	New York
Treatment Solutions of South Florida	Florida
Valley Recovery Center	California
Williamsville Wellness	Virginia

## **Exhibit D**

### **Parity Disclosures**

Excellus will make the following disclosures in a conspicuous web posting on its member Internet site:

1. Excellus provides broad-based coverage for the diagnosis and treatment of behavioral health conditions, at least equal to the coverage provided for other health conditions. Behavioral health conditions include mental health and substance use disorders.
2. Excellus provides, subject to medical necessity, broad benefits for inpatient and outpatient behavioral health care, as well as for residential treatment for behavioral health conditions.
3. Excellus applies the primary care co-payment amount to all routine outpatient behavioral health services for all standard individual and small group products offered on the New York Health Benefit Exchange, New York State of Health (the "Exchange"), and offers products with this co-payment design for purchase off the Exchange. All Excellus HMO products use the primary care co-payment amount for routine outpatient substance use disorder services.
4. The utilization review conducted by Excellus for behavioral health benefits is comparable to, and applied no more stringently than, the utilization review conducted by Excellus for medical/surgical benefits.
5. Unless otherwise specifically authorized by law, any annual or lifetime limits on behavioral health benefits for Excellus plans are no stricter than such limits on medical/surgical benefits.

6. Excellus does not apply any cost-sharing requirements, including deductible amounts, that are applicable only to behavioral health benefits.
7. Unless otherwise specifically authorized by law, Excellus does not apply any treatment limitations that are applicable only to behavioral health benefits.
8. The criteria for medical necessity determinations made by Excellus regarding behavioral health benefits are made available on the Internet to Excellus members and participating providers and are otherwise available upon request.
9. Where an Excellus plan covers medical/surgical benefits provided by out-of-network providers, the plan covers behavioral health benefits provided by out-of-network providers, subject to the specific terms of the member's certificate of coverage.
10. Excellus offers its members the services of Behavioral Health Advocates, who are trained to assist Excellus members in accessing their behavioral health benefits, by supplying them assistance and detailed, accurate, and current information regarding utilization review determinations and processes, medical necessity criteria, and appeals, as well as names of in-network treatment facilities and providers in the member's service area.