

Congress of the United States

Washington, DC 20515

November 3, 2023

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Administrator Brooks-LaSure,

We appreciate your efforts to improve consumer protections in the Medicare Advantage (MA) program, particularly with respect to the Centers for Medicare & Medicaid Services' (CMS) new prior authorization requirements in the 2024 final Part C and D rule¹. We remained concerned, however, that the new rule might not adequately address MA plans' increased reliance on artificial intelligence (AI) or algorithmic software to guide their coverage decisions. We therefore urge CMS to increase oversight of these tools used by MA plans.

As you are aware, most services and items in traditional Medicare are not subject to prior authorization. Instead, claims for services rendered or items provided are submitted to Medicare Administrative Contractors (MACs) to process payment. Conversely, there is widespread use of prior authorization in the Medicare Advantage program, particularly with respect to more costly services.² The Department of Health & Human Services' (HHS) Office of Inspector General (OIG) found "widespread and persistent problems related to denials of care and payment in Medicare Advantage" in a 2018 report³, and in a 2022 report⁴ found that among prior authorization requests denied by MA plans, 13% met Medicare coverage rules, "in other words, these services likely would have been approved for these beneficiaries under original Medicare."

In recent years, problems posed by prior authorization have been exacerbated by MA plans' increasing use of AI or algorithmic software managed by firms such as naviHealth, myNexus, and CareCentrix to assist in their coverage determinations in certain care settings, including inpatient hospital, skilled nursing facilities, and home health. Advocates and the media report that the use of such software has led to coverage decisions that are more restrictive than allowed under traditional Medicare rules, as well as more frequent and repeated denials of care.⁵ As noted in these reports, despite evidence to the contrary, MA plans and the firms that use these tools assert

¹ 88 Fed Reg 22120 (April 12, 2023).

² KFF, "Medicare Advantage in 2023: Premiums, Out-of-Pocket Limits, Cost Sharing, Supplemental Benefits, Prior Authorization, and Star Ratings" (Aug. 2023), available at: <https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2023-premiums-out-of-pocket-limits-cost-sharing-supplemental-benefits-prior-authorization-and-star-ratings/>.

³ OIG, "Medicare Advantage Appeal Outcomes and Audit Findings Raise Concerns About Service and Payment Denials" (2018) available at: <https://oig.hhs.gov/oei/reports/oei-09-16-00410.pdf>.

⁴ OIG, "Some Medicare Advantage Organization Denials of Prior Authorization Requests Raise Concerns About Beneficiary Access to Medically Necessary Care" (2022), available at: <https://oig.hhs.gov/oei/reports/OEI-09-18-00260.pdf>.

⁵ See, e.g., *STAT News*, "How UnitedHealth's acquisition of a popular Medicare Advantage algorithm sparked internal dissent over denied care" (July 11, 2023) by Casey Ross and Bob Herman, available at: <https://www.statnews.com/2023/07/11/medicare-advantage-algorithm-navihealth-unitedhealth-insurance-coverage/>; *STAT News*, article, titled "[Denied by AI: How Medicare Advantage plans use algorithms to cut off care for seniors in need](#)," (March 13, 2023) by Casey Ross and Bob Herman, available at: https://www.statnews.com/2023/03/13/medicare-advantage-plans-denial-artificial-intelligence/?utm_campaign=daily_recap&utm_medium=email&_hsmi=250049762&_hsenc=p2ANqtz--UUeZoKa2csQ2yRY7v8Fb1mcw7a8YgGA9Rzjy_jkLaYh8ccj7AwyqVHHk7C4ZnPEgYFVkiFWjqsWF4M8OLsCOB5ElaLrGL3lpPXqFgcZn7wRZQ_M&utm_content=250049762&utm_source=hs_email; Center for Medicare Advocacy, "Special Report: The Role of AI-powered Decision-Making Technology in Medicare Coverage Determinations" (Jan. 19, 2022), available at: <https://medicareadvocacy.org/center-for-medicare-advocacy-special-report-the-role-of-ai-powered-decision-making-technology-in-medicare-coverage-determinations/>.

that they are not used to make coverage determinations but merely providing “guidance” about an individual’s care.

We applaud CMS’ effort in the final Part C & D rule to rein in abusive practices by MA plans by limiting their ability to employ prior authorization. Notably, CMS does not explicitly prohibit the use of AI or algorithmic-driven tools. Rather, in the preamble to the rule, CMS states that “MA organizations must ensure that they are making medical necessity determinations based on the circumstances of the specific individual, as outlined at § 422.101(c), as opposed to using an algorithm or software that doesn’t account for an individual’s circumstances,” and that plans “will need to understand the external clinical evidence relied upon in these products and how that evidence supports the coverage criteria applied by these tools” and “must make the evidence that supports the internal criteria used by (or used in developing) these tools publicly available, along with the internal coverage policies themselves.”⁶

Absent prohibiting the use of AI/algorithmic tools outright, it is unclear how CMS is monitoring and evaluating MA plans’ use of such tools in order ensure that plans comply with Medicare’s rules and do not inappropriately create barriers to care. In order to ensure proper oversight of MA plans, we urge CMS to take the following measures:

- Require MA plans to report prior authorization data including reason for denial, by type of service, beneficiary characteristics (such as health conditions) and timeliness of prior authorization decisions;⁷
- Compare “guidance” generated by these tools with actual MA coverage decisions (e.g., compare naviHealth projected length of stays in a skilled nursing facility with the actual approved lengths of stay by the MA plan to assess whether such tools are, indeed, being used to make coverage determinations);
- Assess the frequency of denials related to the same individual in the same episode of care by analyzing data from Quality Improvement Organizations (QIOs) and Independent Review Entities (IREs) that process Medicare appeals to identify trends in MA appeals regarding hospital discharges, skilled nursing facility discharges and home health terminations;
- Assess how and to what extent initial prior-authorized AI determinations for services are adjusted to account for unanticipated changes in a patients’ condition (according to advocates and providers, initial determinations are not generally adjusted);
- Require attestation from MA plans and contractors (including care management firms such as naviHealth, myNexus) that their coverage guidelines are not more restrictive than traditional Medicare (with enforcement if this proves not to be true);
- Given concerns about the homogeneity of patient testing populations when developing AI or algorithmic software in other settings, assess the data plans are relying on to make these determinations or assessments, and whether plans are inappropriately using race/other factors in these algorithms.
- Assess whether the AI/algorithms are “self-correcting,” by determining whether, when a plan denial or premature termination of services is reversed on appeal, that reversal is then factored into the software so that it appropriately learns when care should be covered.


⁶ 88 Fed Reg 22195.

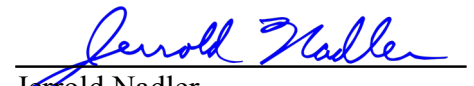
⁷ MA plans are not currently required to report this data; see, e.g., KFF, “Gaps in Medicare Advantage Data Limit Transparency in Plan Performance for Policymakers and Beneficiaries” (April 2023), available at: <https://www.kff.org/medicare/issue-brief/gaps-in-medicare-advantage-data-limit-transparency-in-plan-performance-for-policymakers-and-beneficiaries/>.


Medicare Advantage plans are entrusted with providing medically necessary care to their enrollees. While CMS has recently made considerable strides in ensuring that this happens, more work is needed with respect to reining in inappropriate use of prior authorization by MA plans, particularly when using AI/algorithmic software. We applaud the Biden Administration's recent Executive Order released on October 30, 2023 to establish the first set of standards on the use of artificial intelligence in health care, and we encourage CMS to incorporate the measures outlined above to protect Medicare beneficiaries suffering from illnesses and injuries and prevent future AI-related harms in health care.

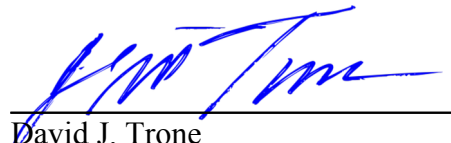
Thank you for your attention to this important matter. We look forward to working with you on ways to increase oversight of these tools in Medicare Advantage plans.

Sincerely,


Judy Chu
Member of Congress

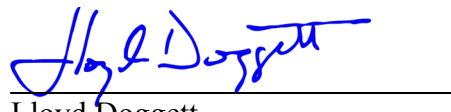

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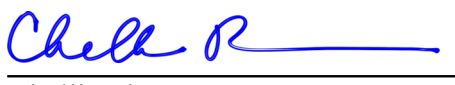

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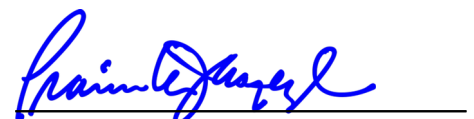

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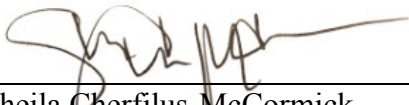

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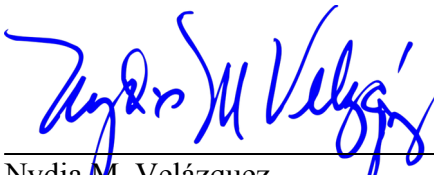

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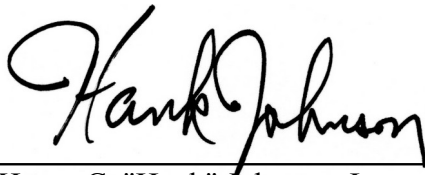
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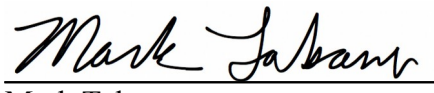
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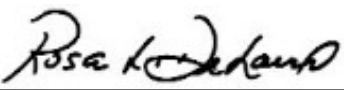
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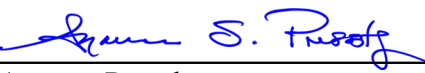
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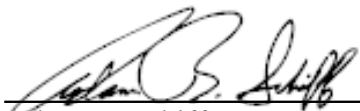
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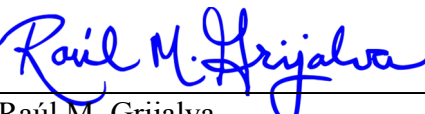
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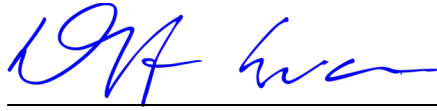
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