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HOSPITAL
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*Providing Leadership in
Health Policy and Advocacy*

July 21, 2011

Juan C. Davila
Senior Vice President Network Management
Blue Shield of California
6300 Canoga Avenue, 12th floor
Woodland Hills, CA 91367

Re: Blue Distinction Centers

Dear Mr. Davila:

According to documents distributed by the Blue Cross and Blue Shield Association (BCBSA), changes are being made to the Blue Distinction program. Participating hospitals were initially asked to sign a contract amendment within 30 days that requires all hospital based physicians and key specialists to have in-network status, except as prohibited by law. Otherwise, the hospital is required to indemnify and hold BCBSA and the plan harmless from all amounts in excess of the in-network rate, and pay for medically necessary professional services without regard to a hospital's ability to bind or assume risk for the professional component.

California Health & Safety Code Section 1375.7(b)(1)(A) provides that a plan may not change a material term of a contract unless it has first been negotiated and agreed to by the provider. This law also requires 45 business days' notice to the provider. We understand, but have been unable to confirm, that Blue Shield of California has extended the contract amendment deadline in order to comply with this law.

The stated goal of the proposed amendment is to better protect Blue members from incurring unexpected out-of-network charges when choosing Blue Distinction Centers for their specialty care. We appreciate this objective, which is now California law in that plan members may not be billed for the balance due providers (*Prospect* case). Hospitals want patients to receive high quality coordinated care without incurring unexpected charges. Our concern is not the objective, but that certain legal and policy issues may not have been properly evaluated by BCBSA before implementing this amendment in California.

California is one of only five states in the nation that prohibits hospitals from directly employing physicians. California's version of the ban on the corporate practice of medicine (CPM) is the most restrictive. The University of California hospitals and other public hospitals are among a small percentage of facilities that are exempt from CPM and directly employ physicians. As a result of the CPM, most California hospitals must engage in expensive and complex contracting and alternative arrangements in order to align with physicians. Hospitals have no effective

means for ensuring that physicians contract with any particular plan, and there is no legal requirement to do so.

Not only would it be difficult to implement the contract amendment in California from a practical point of view considering the CPM, it very well may violate a number of federal and state laws. While the contract amendment contemplates the possibility that some of its provisions may be prohibited by law, it places the burden on the hospital to cite relevant law that the contract amendment might be prohibited by law. We believe that the integrity and success of the Blue Distinction Centers program requires that BCBSA itself evaluate whether or not the contract amendment complies with state and federal law prior to its implementation.

The contract amendment raises serious questions under the federal anti-kickback and Stark laws, the rules regarding tax-exempt organizations, and state and federal antitrust requirements regarding illegal tying and inducements. Initiating this program in California should be premised upon BCBSA first working with state and federal regulators to obtain assurance that the program as proposed does not expose BCBSA or institutional providers to risk of violating state or federal laws applicable to the BCBSA Blue Distinction Centers program.

The contract amendment may also implicate the Knox-Keene Act because it appears to shift the risk for out-of-network professional services and charges from the BCBSA plan to the hospital. It also implicates the plan requirement of licensure to demonstrate and maintain an adequate network of hospital and professional providers. California Health & Safety Code Section 1374.66(e) imposes various regulatory requirements on plan operations including provider contracting, network adequacy, risk sharing arrangements for out-of-network services and, and requires approval by the California Department of Managed Health Care for such arrangements.

We encourage BCBSA to evaluate the legal impact of the contract amendment prior to implementing the program, and to ensure that the appropriate state and federal regulatory approvals and/or review have been obtained. There are significant risks not only to hospitals, but to the BCBSA plans as well. It serves no one to inadvertently establish a program that is subsequently found to be illegal.

Sincerely,



Dietmar Grellmann
Sr. Vice President, Managed Care & Professional Services

DG:vw

cc: Frank Coyne, Blue Cross Blue Shield Association