



April 17, 2024

Senator Tammy Duckworth  
524 Hart Senate Office Building  
Washington, DC 20510

Senator Dick Durbin  
711 Hart Senate Office Building  
Washington, D.C. 20510

**Re: CMS Medicare Review and Education Program Targeted Probe and Educate (TPE) Reviews**

Dear Senators Duckworth and Durbin:

Psychotherapy Action Network (PsiAN) and the Illinois Psychological Association are writing to express our concerns regarding the Medicare Targeted Probe and Educate (TPE) audit process and the Merit-based Incentive Payment System (MIPS), and to advocate for revisions to improve effectiveness and fairness, particularly in mental health and substance use services.

PsiAN is a nonprofit organization founded in Chicago, IL, that advocates for quality therapy, with a nationwide membership of 6,000 individuals and 90 partner organizations representing clinicians, researchers, administrators, and consumers across all disciplines. The Illinois Psychological Association (IPA) is a 501(c)(6) non-profit association, and the largest professional association of psychologists in Illinois, with nearly 1,200 members.

We are concerned about how TPE audits are initiated, managed, and enforced. Some participating providers are overly targeted, some CPT codes that are essential to effective, evidence-based psychotherapy are disproportionately impacted, and education opportunities—a stated goal—are underleveraged. As a result, in practice, providers report being overburdened by administrative requirements and not offered sufficient opportunities for education. The resulting negative potential impact on patient care can be significant.

The situation is important to address at this time in our nation's history in which 2024 marks the beginning of the "Peak 65® Zone," an unprecedented surge of Americans who will be

celebrating their 65th birthday in 2024, according to a report published by Jason Fichtner, Executive Director of the Alliance for Lifetime Income's Retirement Income Institute. Over 4.1 million Americans will turn 65 annually through 2027, which is more than 11,200 daily.

However, the healthcare industry is losing Medicare providers, and many behavioral health providers are choosing not to opt in as participating providers. If this persists, there will be an even worse mental health crisis in the United States. During this time of suffering, we are concerned that there is a shortage of providers to serve some of our nation's most vulnerable populations. If CMS's practices do not change, more providers will leave, creating a greater shortage.

**Here are our concerns about the current process:**

- We have concerns regarding the potential targeting of providers who bill for CPT code 90837. There is no valid justification for singling out this code or imposing additional requirements based on acuity or diagnosis. According to Generally Accepted Standards of Care, the duration of treatment should be tailored to each patient's needs, and it is essential to ensure the provision of treatment for chronic and underlying conditions.
- Medicare Administrative Contractors (MACs) are granted significant latitude in shaping and implementing the metrics for targeted probe and educate (TPE) reviews. However, this broad discretion raises questions about alignment with the Centers for Medicare and Medicaid Services' (CMS) statutory responsibilities under the Department of Health and Human Services (HHS) to ensure consistency and quality in provider education efforts. The current approach permits variation in how TPE review metrics are interpreted and applied among different MACs, resulting in potential inconsistencies and perceived inequities within the audit process.
- Addressing unfavorable outcomes of TPE reviews often entails defensive actions, including appeals of individual claims or challenges to sampling methodologies. While these tactics may offer temporary mitigation, they do not effectively address the underlying issue of limited oversight of MACs by CMS and HHS. Consequently, providers contend with navigating a complex landscape where the outcomes of TPE reviews may not always align with accurate billing practices or compliance assessments.

**Here are our recommended changes:**

- Achieving more consistent and cohesive oversight of Medicare Administrative Contractors (MACs) is crucial to ensure clarity in enforcement and implementation processes. By establishing standardized guidelines and expectations, providers can better understand their obligations and confidently navigate the audit process. Improved oversight and standardization can foster trust and reliability in Medicare program administration, ensuring that the Medicare system remains a reliable and effective source of support for those who need it most.

- The current TPE audit process requirement to audit 40 cases can be overwhelming and burdensome for healthcare providers, leading to increased stress and administrative burden. In addition, with education coming relatively late in the process, there is a significant administrative burden up front, with limited returns. Therefore, we propose substantially reducing audit cases from 40 to 5, focusing on enhancing educational feedback to providers early and throughout the process instead of waiting until the end of the entire review.
- Under the revised process, providers should be presented with detailed feedback and educational resources to address any identified issues after auditing the initial five cases. Providers would then have 60 days to integrate this feedback into their practice. Another five cases would be audited following this integration period, explicitly focusing on dates after the 60-day period, allowing providers sufficient time to implement improvements.
- Additionally, we recommend that the Centers for Medicare & Medicaid Services (CMS) website offer a set of at least 20 de-identified progress notes that did not meet the criteria for specific billing codes, such as 90837 sessions. These progress notes should be accompanied by revised versions highlighting the changes made to meet the criteria and explaining why and how they now meet the requirements. This practical resource would offer valuable guidance to providers striving to improve their documentation practices and billing compliance.

#### Merit-based Incentive Payment System (MIPS)

- Additionally, we wish to address concerns regarding the Merit-based Incentive Payment System (MIPS) criteria, particularly its impact on mental health providers. The current criterion based on the number of Medicare patients per year disproportionately affects psychologists who primarily conduct evaluation-based assessments. This unfairly burdens these providers with additional administrative requirements, while those focusing on treatment may escape the MIPS requirement despite potentially serving a larger number of Medicare beneficiaries.
- To address this issue, we propose revising the MIPS criterion to consider the total number of Medicare visits per year rather than the number of unique Medicare patients. This approach would ensure a fairer assessment of provider workload and eligibility for MIPS participation. For example, setting a threshold of 5,000 Medicare visits per year for triggering MIPS participation would better capture the workload and impact of mental health providers, regardless of their practice focus.

In conclusion, we urge regulators to consider these proposed revisions to the Medicare TPE audit process and MIPS criteria to support mental health providers and ensure equitable treatment within the healthcare system. CMS and HHS must take proactive steps to address these issues and uphold the integrity of the Medicare program. By emphasizing education and

addressing unfair burdens, we can foster a more supportive environment for providers while promoting high-quality care for Medicare beneficiaries.

We thank you for considering our concerns and suggested recommendations to protect Medicare patients and ensure they receive appropriate mental healthcare.

We would like to request a meeting with you and any personnel who oversee audits, and with whom we could address the concerns outlined above. Additional information that is relevant to these issues is listed in the Appendix. We would be interested in learning about such information and discussing it as well.

We look forward to hearing from you.

Sincerely,

### **Psychotherapy Action Network**

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### **Illinois Psychological Association**

Colin Ennis PsyD, President

### **APPENDIX: Information of interest**

Below is the information in which we are interested in order to gain clarity on the auditing process, and learn more about how audits are planned and executed.

1) Please provide any records, either summary statistics or a de-identified list, of all CMS Targeted Probe and Educate (TPE) audits conducted that included claims using code 90837 from 2021 to the present that includes, at a minimum, the date of the audit, the state in which the Medicare beneficiary lived, and the licensure of the provider (e.g., LCSW, clinical psychologist PhD, PsyD, MD).

2) For TPE audits that include the billing code 90837, please provide detailed rubrics utilized to indicate how a claim is processed including any factors that determine the validity of the claim.

3) With regard to the training and qualifications of the Medicare Administrative Contractors (MACs) conducting TPE audits, please provide the following information:

- What, if any, educational degree are they required to have.
- What, if any, licensure they are required to have.
- How many years of experience working in their field of licensure they are required to have.
- What training and/or testing and/or evaluation is required of a MAC for that auditor to be considered by CMS to be qualified to assess the validity and acceptability of claims.

4) Please provide all records of TPE audits that include the billing code 90837. If possible, provide the information requested for each of the years 2021, 2022, 2023, and 2024.

5) Please provide all MAC contracts including the following information:

- How MACs that are hired to do TPE audits are paid.
- What determines how much MACs are paid.
- Whether MACs receive a percentage of the funds they recover or bonuses related to the provision or outcome of audits.
- Whether individual auditors receive an incentive for the amount of funds they recover or any other type of incentivized compensation.
- Performance evaluations related to MACs.

6) Please provide information about who regulates MACs and what, if any, quality control measures are in place regarding MACs. Please provide any documentation regarding the execution of those quality controls.

7) Please provide any records, either summary statistics or a de-identified list, of how many Medicare providers were qualified to bill for 90837 by state each year from 2013 to 2023.

8) Please provide any records, either summary statistics or a de-identified list, of Medicare providers who voluntarily or involuntarily terminated participation following a TPE audit.

9) Please provide any records, either summary statistics or a de-identified list, of providers qualified to bill for 90837 enrolled in Medicare each year from 2013 through 2023 by state. For example, how many new 90837-qualified providers enrolled in Medicare in New Mexico in 2018?

10) Please provide any records, either summary statistics or a de-identified list, of how many LCPC and LMFT providers have enrolled as Medicare providers since 01 January 2024 by state.

11) Please provide any records, either summary statistics or a de-identified list, of the date of application and the date of enrollment for LCPCs and LFMTs.