**Provider Non-Discrimination, Oregon Insurers are Violating the Law**

Vern Saboe, DC, FACO

Health insurers are violating Oregon’s provider non-discrimination law passed in 2015 via House Bill 2468 known as the “network adequacy” bill. Oregon’s provider non-discrimination language is found at ORS 743B.505, Section (2)(a-d) and modeled after section 2706(a) of the Public Health Service Act, codified at 42 U.S.C. 300 gg-5 and provides that:

 **“(2)(**a) An insurer may not discriminate with respect to **participation** under a health

 benefit plan or **coverage** under the plan against any health care provider who is

 acting within the scope of the providers license or certification in this state.

 **(b)** This subsection does not require an insurer to contract with any health care

 provider who is willing to abide by the insurers terms and conditions for

 participation established by the insurer.

 **(c)** This subsection does not prevent an insurer from establishing **varying**

 **reimbursement rates based on quality or performance measures**.

 **(d)** Rules adopted by the Department of Consumer and Business Services to

 implement this section shall be consistent with provisions of 42 U.S.C.

 300gg-5 and the rules adopted by the United States Department of Health and

 Human Services, the United States Department of the Treasury or the United

 States Department of Labor to carry out 42 U.S.C. 300gg-5.”

At our asking, then Governor John Kitzhaber, MD, inserted this provider non-discrimination language into the initial draft of what would become House Bill 2468 for our work group’s consideration convened by then Oregon Insurance Commissioner Laura Cali. This was the same provider non-discrimination language Governor Kitzhaber inserted into his coordinated care organization (CCOs) legislation Senate Bill 1580 (Section 8) that passed in 2012. The legislative intent being the same as for commercial health insurers, to prevent Oregon’s CCOs from discriminating against any health care provider acting within the scope of the provider’s license or certification. The meaning and legislative intent of “participation,” “coverage,” and “varying reimbursement rates based on quality or performance measures was also the same.

Specifically, the legislative intent not to discriminate with respect to “participation” means that health insurers and CCOs cannot exclude an entire type of provider for example, insurers and CCOs cannot refuse to contract with any chiropractic physicians, they must have some chiropractic physicians on their provider panels. Additionally, Oregon health insurers must have an adequate network of chiropractic physicians and all other types of providers where available. For an insurer not to discriminate with respect to “coverage,” means if a covered service is within the scope of a provider’s license or certification to perform and that health care provider performs that covered service, the insurer or CCO must reimburse that provider for that covered service. An insurer or CCO cannot say, well that covered service may be in a chiropractic physician’s scope of license to provide but we don’t reimburse chiropractic physicians for that service. For example, an insurer cannot suggest they will reimburse osteopathic physicians for manipulative therapy but do not reimburse chiropractic physicians for that same covered service. The legislative intent not to discriminate as per coverage and participation was memorialized on March 25, 2015, in the House Committee on Health Care work session on HB-2468 or the network adequacy bill. Representative Knute Buehler asked then Insurance Commissioner Laura Cali what it means to discriminate against a health care provider, Ms. Cali responded,

 *[A] insurer can’t discriminate based on the type of licensure that*

 *a provider has and say, “well, you may be licensed to do a certain*

 *procedure or the scope of your license allows you to do that, but,*

 *as a general rule, I’m not going to reimburse a chiropractor who*

 *performs that service.” …[The insurer] can’t just say [that the*

 *insurer doesn’t] ever reimburse chiropractors for this.”*

A March 20, 2018 Legislative Counsel opinion comments about legislative intent citing Representative Mitch Greenlick’s comments on the House floor,

 *“Representative Greenlick, in introducing the bill in the House Chamber,*

 *confirmed that the bill was based on a plan developed by the Insurance*

 *commissioner with stakeholder and public input. Therefore, Ms. Cali’s*

 *testimony before the House Committee on Health Care is entitled to*

 *great weight in discerning Legislative intent.”*

The legislative intent with respect to “varying reimbursement rates based on quality or performance measures,” was to establish reimbursement parity. Insurers cannot vary reimbursement rates based on anything other than quality and performance measures. Meaning of course, an insurer cannot varying reimbursement rates based solely on the type of provider performing that covered service. For example, if a health insurer attempts to reimburse a chiropractic physician $150 for the performance of an annual physical examination but, reimburses a medical physician $220 because that provider is a medical and not chiropractic physician, the insurer is in violation of Oregon law. As a member of this work group that discussed and worked on what would become HB-2468, this was the legislative intent and meaning of to not discriminate as it relates to participation, coverage, and varying reimbursement rates based quality and performance measures.

Part of the strategy for inserting section 2706(a) of the federal Public Health Service Act into our Oregon law was even if the US Congress were to repeal the PPACA (ObamaCare), the provider non-discrimination provisions would still be enforceable under Oregon state law. This legislative intent was clearly given on the Senate floor on by State Senator Jeff Kruse, <https://www.youtube.com/watch?v=l8IcclrlZ3U> , that the provider non-discrimination provisions will still be enforceable under Oregon State law regardless if Congress repeals Obama Care.

As mentioned, health insurers continue to disregard these non-discrimination provisions found at ORS 743B.505(2)(a-d) and to date the Oregon Insurance Division has failed to adequately enforce. We believe the cause of this is due in part to much confusion secondary to several specific missteps and erroneous assumptions early on beginning with the State of Oregon Essential Health Benefits (EHB) Work Group. These erroneous assumptions being memorialized in this work group’s final August 21, 2012, report and recommendations to Governor John Kitzhaber, MD. It was abundantly clear this work group at the time, was oblivious to the federal provider non-discrimination provisions in Section 2706a of ObamaCare. The work group’s inaccurate and discriminatory assumptions were further exacerbated by flawed federal guidance given by the Center for Consumer Insurance Information and Oversight (CCIIO) in April, of 2013 and parroted by the Oregon’s Department of Consumer and Business Services on September 20, 2013 only adding to misinterpretation and subsequent confusion.

We are now meeting and work through the confusion with Oregon health insurers and DCBS.