



September 25, 2013

The Hon. Laura Cali
Insurance Commissioner
State of Oregon Insurance Division
Department of Consumer & Business Services
350 Winter Street NE
PO Box 14480
Salem, OR 97309-0405

RE: Implementation of the Non-Discrimination in Health Care Provision of the Affordable Care Act (Section 2706(a), Title XXVII of the Public Health Service Act)

Dear Ms. Cali,

The purpose of this letter is to respectfully comment on the draft guidance on Section 2706 - the “Non-Discrimination in Health Care” provision of the Affordable Care Act – that is currently under review by your department. The draft guidance as currently written is seriously flawed and directly contradictory to the actual language and intent of Section 2706.

The Oregon Association of Naturopathic Physicians (OANP) hopes that this letter will prompt the Division to re-open a dialogue with us before DCBS issues guidance to insurers that will ***put the Division and the insurance industry into questionable legal territory.***

The purpose of the non-discrimination provision of the ACA, often referred to as Section 2706,¹ is to ensure that patients are able to choose the health care provider they believe is best suited to address their health care needs as long as the provider is licensed or certified under state law and is acting within the provider’s permitted scope of practice.

The Law and Its Intent

Section 2706(a) states that:

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall not discriminate with respect to participation under the plan or coverage against any health care provider who is acting within the scope of that provider’s license or certification under applicable State law. This section shall not require that a group health plan or health insurance issuer contract with any health care provider willing to abide by the terms and conditions for participation established by the plan or issuer. Nothing in this section shall be construed as preventing a group health plan, a health insurance issuer, or the Secretary from establishing varying reimbursement rates based

¹ § 2706(a) of the Public Health Service Act, as created by § 1201 of the Patient Protection and Affordable Care Act



on quality or performance measures.

The language of the law is straightforward and self-explanatory. On April 29, 2013, however, the U.S. Department of Health and Human Services offered informal guidance about how Section 2706 should be interpreted.² Inexplicably, that guidance narrowed the meaning of Section 2706 in ways that were not intended in the statute, **and also directly contradicted the statute itself.**

As you are aware, the guidance issued from HHS is informal and does not carry the weight of regulation.

The OANP met with Director Lou Savage and Anthony Behrens on May 28 to discuss several things, including the problematic HHS guidelines. Nevertheless, the Division's draft guidelines not only draw from HHS' faulty document, but also goes on to even *further narrow* the law in a way that Section 2706 does not at all address.

To make clear that HHS' informal guidance was inconsistent with the intent and actual language of the law, the US Senate Committee on Health, Education, Labor and Pensions included the following language in the Committee's report on the 2014 HHS appropriations bill:

*Provider Nondiscrimination.—Section 2706 of the ACA prohibits certain types of health plans and issuers from discriminating against any healthcare provider who is acting within the scope of that provider's license or certification under applicable State law, when determining networks of care eligible for reimbursement. The goal of this provision is to ensure that patients have the right to access covered health services from the full range of providers licensed and certified in their State. The Committee is therefore concerned that the FAQ document issued by HHS, DOL, and the Department of Treasury on April 29, 2013, advises insurers that this nondiscrimination provision allows them to exclude from participation whole categories of providers operating under a State license or certification. In addition, the FAQ advises insurers that section 2706 allows discrimination in reimbursement rates based on broad "market considerations" rather than the more limited exception cited in the law for performance and quality measures. **Section 2706 was intended to prohibit exactly these types of discrimination.** The Committee believes that insurers should be made aware of their obligation under section 2706 before their health plans begin operating in 2014. The Committee directs HHS to work with DOL and the Department of Treasury to correct the FAQ to reflect the law and congressional intent within 30 days of enactment of this act.³*

This language restates the intent of Section 2706 and specifically refutes the language in the informal guidance issued by HHS.

² Centers for Medicare and Medicaid Services, The Center for Consumer Information and Insurance Oversight. "Affordable Care Act Implementation FAQs – Set 15." April 29, 2013.
http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs15.html

³ Report 113-71. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2014. July 11, 2013, p. 126.
<http://www.gpo.gov/fdsys/pkg/CRPT-113srpt71/pdf/CRPT-113srpt71.pdf>



Senator Tom Harkin of Iowa, Chairman of the HELP Committee, had earlier made clear the intent of the law in remarks to the American Association of Naturopathic Physicians:

“I’m very proud of the fact the law includes my amendment: the first federal level, non-discrimination clause to protect naturopathic physicians regarding participation in a health plan. Under that provision, no health plan or insurer may discriminate against any health provider, including naturopathic doctors (NDs) acting within the scope of that provider’s license or certification under applicable state law. This is to ensure that insurance companies cannot exclude NDs or other allied health professionals from practicing under the capacity of their training and licensure.”⁴

Implementation of the Law

Here are specific ways in which both the HHS guidelines, and now the Oregon Insurance Division guidelines are directly contradictory to Section 2706.

1. Section 2706 does not, in fact, allow insurers to exclude an entire category of provider type from the insurer’s network, per Example 2 in the Division’s guidance.

Section 2706 is very clear on this:

“[insurer] shall not discriminate with respect to participation under the plan or coverage against any health care provider.”

Therefore stating in any guidance as you have in Example 2 that an insurer can choose to not contract with an entire category of providers is directly contradictory to the actual law of Section 2706.

Do not make the mistake of confusing the following sentence in Section 2706 as meaning that an insurer can exclude an entire category of providers from their networks.

“This section shall not require that a group health plan or health insurance issuer contract with any health care provider willing to abide by...”

Again, this sentence very clearly clarifies that Section 2706 is not an “every willing provider” law. An “every willing provider law” – which only exists in a handful of jurisdictions – requires that insurers contract with any and every provider willing to sign a contract. Section 2706 very clearly states that it is not an “every willing provider law” - it does not require insurers to enroll every single qualified provider in a provider group.

This does not, however, excuse insurers from fulfilling “network adequacy” requirements meant to ensure that a patients’ ability to be treated by a specified provider type is met. Referring back to the very first sentence of Section 2706, we see that insurers may not discriminate in coverage against any

⁴ Excerpt of remarks presented by Sen. Harkin to the annual legislative conference of the American Association of Naturopathic Physicians, Washington DC. May 5, 2012.

<http://www.naturopathic.org/content.asp?pl=12&contentid=12>



health care provider. Therefore, in the states in which they are licensed, naturopathic physicians and other provider types must be included in health insurance networks in sufficient numbers to satisfy patient demand.

Some opponents of Section 2706 have expressed concern that including licensed or certified health care providers not previously included in insurance plans may result in insurers being required to cover new services. This is incorrect. Section 2706 simply requires insurers to give patients a choice with respect to the type of health care provider from whom they seek care and who delivers services already covered by the insurer. The provider must be licensed or certified by the state and must deliver services within the state's specified scope of practice for that provider type.

2. The non-discrimination language of Section 2706 does, in fact, govern reimbursement rates, except that it allows for variable reimbursement rates based ONLY on “quality or performance measures.”

Therefore the multiple times that the Division's guidance directly states that Section 2706 does not govern reimbursement rates is completely contradictory to the actual language of Section 2706.

3. Nowhere in Section 2706 does it grant authority to insurers to establish conditions based on “reasonable medical management techniques specified under the plan with respect to the frequency, method, treatment, or setting of the service.”

The Division's examples that an insurer must cover a service done by a midwife if it covers it when done by another provider “unless Healthy Health can demonstrate that covering the service when performed by the direct entry midwife is inconsistent with reasonable medical management techniques specified under the plan with respect to the frequency, method, treatment, or setting of the service” blatantly and illegally narrows the actual language of Section 2706, wrongly giving insurers the impression that there is a loophole in the non-discrimination language.

Working with You and Your Office

OANP urges DCBS to issue guidance to insurers **based on the actual LAW and very clear language of Section 2706** rather than based on the faulty and controversial HHS guidelines which carry no weight in a court of law. To do anything otherwise will be leading Oregon's entire insurance industry down an illegal path and will expose insurers and the Insurance Division to lawsuits that can easily be avoided.

We look forward to your implementing Section 2706 in accordance with the actual language and intent as defined in the law and by the Senate HELP Committee. We are hopeful that litigation will not be necessary to achieve full implementation of the law.

We would also reiterate our request to meet in person to provide further information and/or legal precedence to support proper implementation of Section 2706.



Sincerely,

Laura Culberson Farr
Executive Director

Cc: Mike Bonetto, Oregon Governor's Office