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Member
American Chiropractic Association

American College of Chiropractic Orthopedists

Association of American Physicians and Surgeons

Christian Chiropractors Association

Oregon Chiropractic Association

Oregon State, Health Evidence Review Commission

Past Member
Oregon Board of Chiropractic Examiners Peer Review Committee 1993 - 1997

Past President
Chiropractic Association of Oregon 2004 - 2006

American College of Chiropractic Orthopedists 2008 - 2009

Elected Fellow
American Back Society 1986

International College of Chiropractors 1994

Board Certified
American Chiropractic Academy of Neurology 1992

American Board of Forensic Professionals 2000

Academy of Chiropractic Orthopedists 2004

Vern A. Saboe, Jr., D.C.

February 22, 2013

House Committee on Health Care

Dear Chair Greenlick and Committee Members:

RE: **House Bill 2522**

This proposed legislation relates to Oregon's newly formed "coordinated care organizations" (CCOs) and clarifies and codifies the original legislative intent of non-discrimination provisions within the Governor's bill (SB-1580, Section 8) passed last session and subsequently contained with SB-1509 the non-discrimination language appearing in Section 4. The attached legislative counsel legal opinion relative to three issues as they relate to non-discrimination provisions now contained within Oregon law we believe support the legislative concepts in HB-2522, those three issues are as follows;

1. **Primary Care Providers:** CCOs must allow for participating chiropractic physicians, naturopathic physicians and nurse practitioners to provide primary care services to CCO member/patients provided those services are within these provider's license and scope to provide.

2. **Varying Reimbursement Rates:** CCOs may not vary reimbursement rates based solely on a provider' license or certification but, only on "quality and performance measures."

3. **Network Adequacy:** CCOs must provide sufficient numbers of all health care professions so CCO enrollees/members have reasonable access to the provider of their choice without significant waiting periods or other restrictions.

Respectfully submitted,

Vern Saboe, Jr., DC., FACO

Oregon Chiropractic Association
LAS/amj

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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

September 12, 2012

Representative Jim Thompson
900 Court Street NE H388
Salem OR 97301

Re: Participation of Chiropractic Physicians in Coordinated Care Organization Networks

Dear Representative Thompson:

You have asked for a legal opinion on the following question:

> If an Oregon "Coordinated Care Organization" (CCO) refuses to allow <u>any</u> (emphasis in original) chiropractic physicians within the CCO network to act in the capacity of a primary care provider providing primary care services (e.g. annual physical exams, wellness annual counseling, screening and wellness blood work, resting ECGs, lung function testing, nutritional counseling, smoking cessation and obesity prevention and treatment, non-pharmacological treatment of some of the 60 most common health conditions presenting to a primary care office, etc., etc.) [w]ould this violate ORS chapter 414 [section 4, chapter 80, Oregon Laws 2012] which states in part[:]
>
> <u>Section 4.</u> (1) A fully capitated health plan, physician care organization or coordinated care organization may not discriminate with respect to participation in the plan or organization or coverage against any health care provider who is acting within the scope of the provider's license or certification under applicable state law.

The short answer to your question is yes.

Section 4, chapter 80, Oregon Laws 2012, states that a coordinated care organization (CCO) "may not discriminate with respect to participation in the . . . organization or coverage against any health care provider who is acting within the scope of the provider's license or certification under applicable state law." To answer your question, it is necessary to determine, first, whether the services you listed are within the scope of a chiropractic physician's license and, second, whether refusing to reimburse any chiropractic physician who provides those services constitutes the type of discrimination prohibited by the section.[1]

[1] Your question was whether a CCO may refuse to allow any chiropractic physician within the network to act in the capacity of a primary care provider. For purposes of this opinion, I am assuming that this means the refusal to reimburse a chiropractic physician for providing primary care services.

To determine whether primary care services are within the scope of a chiropractic physician's license, I read the Guide to Policy and Practice Questions published by the State Board of Chiropractic Examiners.[2] The guide addressed the following procedures as being within the scope of practice of a chiropractic physician:

- Annual physical exams
- Wellness annual counseling .
- Screening and wellness blood work
- Resting electrocardiograms
- Lung function testing
- Nutritional counseling
- Obesity prevention and treatment

I also contacted Dave McTeague, Executive Director of the State Board of Chiropractic Examiners. He confirmed that all of the services in your list are within the scope of practice of a chiropractic physician. With respect to "non-pharmacological treatment of some of the 60 most common health conditions presenting to a primary care office," he responded that chiropractors may offer or prescribe over-the-counter drugs and other vitamins or mineral supplements.

The next question is whether the refusal to reimburse a chiropractic physician for providing those services constitutes discrimination with respect to participation in the CCO or with respect to coverage. As is relevant here, the dictionary defines "discriminate" as "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." *Webster's Third New International Dictionary of the English Language* (unabridged ed., 2002). By reimbursing for primary care services provided by an allopathic physician, but not for the same services provided by a chiropractic physician, solely on the basis of the physician's license and even though both are licensed to provide the services, a CCO is treating the two classes of physicians differently on a basis other than individual merit in the extent to which the physicians may participate in the organization.

In addition, section 4, chapter 80, Oregon Laws 2012, also prohibits a CCO from varying reimbursement rates based on factors other than quality or performance measures. In the House Committee on Rules work session on the amendments to Senate Bill 1509 (2012), which became section 4, chapter 80, Oregon Laws 2012, I testified that a CCO could vary reimbursement rates based only on quality and performance measures. Representative Freeman further emphasized this point, and the committee adopted the amendment with that understanding. Therefore, a CCO also violates the section by varying reimbursement rates for covered services based only upon the provider's license and not based upon quality or performance measures.

Finally, ORS 414.625 (2)(k) provides that members of a CCO must have "a choice of providers within the coordinated care organization's network." Subsection (4), added by section 20, chapter 8, Oregon Laws 2012, requires the Oregon Health Authority, in selecting CCOs to serve a geographic area, to "optimize access to care and choice of providers." A CCO would be in conflict with these provisions if the CCO refused to permit any of its members to select a chiropractic physician as a primary care physician if that physician is licensed to provide primary care services.

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[2] Available online at <http://cms.oregon.gov/OBCE/publications/Guide_to_Policy_Practice.pdf> (visited September 11, 2012).

I hope this answers your question. Please feel free to contact me if you have further questions or concerns.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

Lorey H. Freeman
Senior Deputy Legislative Counsel

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(h) Dental hygienists employed by public health agencies who are not engaged in direct delivery of clinical dental hygiene services to patients.

(i) Counselors and health assistants who have been trained in the application of fluoride varnishes to the teeth of children and who apply fluoride varnishes only to the teeth of children enrolled in or receiving services from the Women, Infants and Children Program, the Oregon prekindergarten program or a federal Head Start grant program.

(j) Dental hygienists licensed in another state and in good standing, while practicing dental hygiene without compensation for no more than five consecutive days in any 12-month period, provided the dental hygienist submits an application to the board at least 10 days before practicing dental hygiene under this paragraph and the application is approved by the board.

SECTION 3. Section 4 of this 2012 Act is added to and made a part of ORS chapter 414.

SECTION 4. (1) A fully capitated health plan, physician care organization or coordinated care organization may not discriminate with respect to participation in the plan or organization or coverage against any health care provider who is acting within the scope of the provider's license or certification under applicable state law. This section does not require that a plan or organization contract with any health care provider willing to abide by the terms and conditions for participation established by the plan or organization. This section does not prevent a plan or organization from establishing varying reimbursement rates based on quality or performance measures.

(2) A plan or organization may establish an internal review process for a provider aggrieved under this section, including an alternative dispute resolution or peer review process. An aggrieved provider may appeal the determination of the internal review to the Oregon Health Authority.

(3) The authority shall adopt by rule a process for resolving claims of discrimination under this section and, in making a determination of whether there has been discrimination, must consider the plan's or organization's:

(a) Network adequacy;

(b) Provider types and qualifications;

(c) Provider disciplines; and

(d) Provider reimbursement rates.

(4) A prevailing party in an appeal under this section shall be awarded the costs of the appeal.

SECTION 5. Section 4 of this 2012 Act is amended to read:

Sec. 4. (1) A [*fully capitated health plan, physician care organization or*] coordinated care organization may not discriminate with respect to participation in the [*plan or*] organization or coverage against any health care provider who is acting within the scope of the provider's license or certification under applicable state law. This section does not require that [*a plan or*] **an** organization contract with any health care provider willing to abide by the terms and conditions for participation established by the [*plan or*] organization. This section does not prevent [*a plan or*] **an** organization from establishing varying reimbursement rates based on quality or performance measures.

(2) [*A plan or*] **An** organization may establish an internal review process for a provider aggrieved under this section, including an alternative dispute resolution or peer review process. An aggrieved provider may appeal the determination of the internal review to the Oregon Health Authority.

(3) The authority shall adopt by rule a process for resolving claims of discrimination under this section and, in making a determination of whether there has been discrimination, must consider the [*plan's or*] organization's:

(a) Network adequacy;

(b) Provider types and qualifications;

(c) Provider disciplines; and

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