

October 15, 2018

Senator Laurie Monnes Anderson  
900 Court Street NE S-211  
Salem, OR 97301

Dear Senator:

RE: Legislative Intent of Provider Non-Discrimination Provisions in ORS 743B.505 (2)(a-c)

I am writing in response to your letter of September 20, 2018 requesting that I clarify my original intent for the provider non-discrimination language regarding participation, coverage and varying reimbursement rates based on quality and performance measures.

The provider non-discrimination language was taken from Section 2706(a) of the Public Health Service Act (PHSA) which was enacted as part of Section 1201 of the Patient Protection and Accountability Care Act (PPACA/Obama Care) originally known as the Harkin Amendment. Former U.S. Senator Tom Harkin introduced the amendment that later became Section 2706(a) of the PHSA signed into law on March 20, 2010 by President Obama. These provider non-discrimination provisions applied to the commercial health insurers and group health plans.

In 2011-2012 a coalition of chiropractic physicians, naturopathic physicians, licensed acupuncturists, and licensed massage therapists recommended that the provider non-discrimination provisions of the PPACA be inserted into Oregon law and applied to the state's newly formed coordinated care organizations (CCOs). The goal was to prevent CCOs from discrimination against any health care provider acting within the scope of their license or certification regarding participation, coverage, and reimbursement. As governor, I agreed and inserted the provider non-discrimination language into SB-1580 that passed into law during the 2012 session.

Two years later, with the Republican controlled Congress threatening to repeal the PPACA—and with it the provider non-discrimination provisions Section 2706(a)—this same coalition came to me suggesting the need to include these non-discrimination provisions into Oregon law. The goal was to ensure that the provider non-discrimination provisions would be enforceable under Oregon state law, even if Congress repealed the PPACA. I agreed, and in 2014 I instructed then insurance commissioner Laura Cali to insert the non-discrimination language into the Insurance Division's "network adequacy" bill concept. This legislation resulted from the work of stakeholders and public hearings convened by Ms. Cali over roughly nine months and became HB 2468, passed during the 2015 session, and now found in ORS 743B.505. This language states:

“(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.

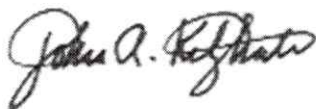
(c) This subsection does not prevent an insurer from establishing varying reimbursement rates based on quality or performance measures.

My original intent for these non-discrimination provisions, is as follows:

1. **Participation.** My intent was that insurers must allow every *type* of provider onto their provider panels where available. An insurer cannot say, for example, that they do not contract with *any* chiropractic physicians or *any* naturopathic physicians, or *any* licensed acupuncturists, or *any* licensed massage therapists. They must contract with some of all provider *types* and they must maintain an adequate number of these providers within their networks. However, this was not intended to be an “any willing provider” provision. Insurers are not required to contract with every health care *provider* willing to abide by the insurers terms and conditions.
2. **Coverage.** My intent was that if a health care provider provides a covered service and that covered service is within the provider’s scope of license or certification, insurers must reimburse that provider for that covered service. An insurer may not say your scope of license may allow you to perform that covered service but, we by general rule/policy don’t reimburse chiropractors who perform that covered service. Additionally, insurers cannot discriminate in this way by utilizing carve out policies/contracts, high deductibles, high copays, triple copays, annual limits, or require optional riders that discriminate against a certain provider type regarding coverage.
3. **Varying reimbursement rates based on quality or performance measures.** My intent was that varying reimbursement rates may only be varied based on quality and performance measures. **Varying reimbursement rates cannot be based solely on type of provider**, providing that same covered service. For example, an insurer cannot, by policy or contract, reimburse an osteopathic physician \$80.00 for manipulative therapy of, say, one to two spinal regions, while at the same time only paying a chiropractic physician performing that same service \$50.00. Payment parity was the legislative intent. However, if a provider performs exceptionally well based on quality or performance measures, the insurer may compensate that provider at a higher level.

I hope that this fully addresses your questions regarding my original intent in the provider non-discrimination provisions regarding participation, coverage and varying reimbursement rates. Please let me know if you have any additional questions.

Sincerely,



John Kitzhaber, MD  
Oregon Governor  
1995-2003, 2010-2015