



June 9, 2014

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9942-NC
P.O. Box 8016
Baltimore, Maryland 21244-8016

Re: CMS-9942-NC, Request for Information Regarding Provider Non-Discrimination

To Whom It May Concern,

In response to your Request for Information, we are writing on behalf of the Coalition for Patients' Rights (CPR), a national multidisciplinary coalition of more than 35 professional organizations representing more than 3.5 million licensed and certified health care professionals committed to ensuring comprehensive choices for all patients. CPR supports efforts to address the negative effects of provider discrimination on patients, particularly the restriction of access to quality care.

We appreciate the opportunity to submit comments to your Departments regarding the appropriate interpretation of Section 2706(a) of the Public Health Services Act as added by the Affordable Care Act (ACA) and the principle of promoting competition, access and choice in healthcare. As the U.S. population ages and healthcare needs shift and expand, healthcare professionals such as those represented by our organizations play increasingly important roles in healthcare delivery. It is important that they be allowed to practice to the fullest extent of their education, training and licensure to meet the demand for services.

For these reasons, our coalition maintains a compelling interest in seeing the ACA implemented accurately, focusing on the preservation and promotion of patient access to care and choice. To this end, Congress clearly intended Section 2706(a) to prevent health plans from discriminating against entire classes of licensed, qualified healthcare professionals.

CPR, therefore, wishes to point out erroneous and misleading statements around the implementation of Section 2706(a) contained within the Frequently Asked Questions [FAQ] document issued on April 29, 2013. CPR recommends that the Departments retract this sub-regulatory guidance due to certain wording which has elicited concern:

1. That whole classes of licensed providers may be excluded from Section 2706(a);
2. That "reasonable medical management techniques" may supersede the broad protections provided under the statute;
3. That Section 2706(a) allows reimbursement rates to be determined based on "market standards and considerations";
4. That Section 2706(a) "does not require plans or issuers to accept all types of providers into a network."

Regarding point 1 above, the FAQ states that Section 2706(a) “does not require plans or issuers to accept all types of providers into a network.” Not only does this statement have no basis in the legislative history of Section 2706(a), it is contrary to the statutory intent and will further the discriminatory practices that Section 2706(a) was intended to prevent.

Regarding point 2 above, discrimination in coverage based on licensure or certification of the provider is clearly forbidden even if such discrimination is referred to as “medical management”. Language implying otherwise has the inevitable effect of confusing patients, providers and payers. If the FAQ is not rescinded, we recommend that it be revised to remove the reference to “reasonable medical management.”

Regarding point 3 above, the FAQ advises that Section 2706(a) allows reimbursement rates to be determined based on “market standards and considerations”. On this point, the ACA language is also clear: the law allows plans to vary reimbursement rates based on quality and performance only; there is no provision for discrimination based on market standards and considerations. The FAQ provides no definition of what “market standards and considerations” may be and therefore implies that plans may establish their own criteria for when to include or exclude entire types of providers. These interpretations were clearly not envisioned in the law and, in fact, run counter to the statutory language. Short of FAQ rescindment, we strongly recommend that this non-statutory provision be removed.

Regarding point 4 above, the language of 2706(a) prohibits a plan from discriminating “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.” The law specifies that the plan is not required to “contract with any health care provider willing to abide by the terms and conditions for participation established by the plan or issuer.” This language envisions plan treatment of individual providers. It does not permit plans to refuse to contract with entire categories of providers who are licensed within a state where the plan may operate. The language of the FAQ implies that plans may refuse to contract with entire categories of providers. Where a plan is subject to coverage requirements, either because of a requirement to provide essential health benefits, or because of state insurance mandates, the plan should be required to include in its network all types of providers whose state licenses allow them provide the mandated covered services.

An FAQ, as you know, does not have the force of law and is not created through a process that allows public comment; it is insufficient as guidance for implementing this important statutory provision. We respectfully request that the Departments of Health and Human Services, Treasury and Labor withdraw or revise their FAQ and, instead, coordinate a rulemaking on Section 2706(a), taking our recommendations into account when formulating proposed regulations.

Any new guidance must be unambiguous, so that Section 2706(a) is understood to:

- Require that all categories of licensed health providers who are acting within the scope of their license or certification under applicable State law be included in-network; and
- Prohibit health insurance plans from covering a given service when offered by one type of provider licensed to provide that service, while denying coverage when the same service is provided by another type of provider also licensed to provide that service.

Separately, many of the undersigned organizations are submitting their own response to the Request for Information highlighting numerous examples of provider discrimination that are occurring in light of the Departments’ problematic FAQ.

Ensuring that Section 2706(a) is properly implemented will, in turn, help to ensure that patients have access to care by the healthcare professional of their choice. Thank you for your consideration of our views. We look forward to learning of the results.

Sincerely,

The Coalition for Patients' Rights

American Nurses Association
American Association of Nurse Anesthetists
American Association of Acupuncture & Oriental Medicine
American Association of Colleges of Nursing
American Association of Critical-Care Nurses
American Association for Marriage and Family Therapy
American Association of Naturopathic Physicians
American Association of Nurse Practitioners
American Chiropractic Association
American Congress of Electroneuromyography
American College of Foot and Ankle Surgeons
American College of Nurse Midwives
Association of periOperative Registered Nurses
American Psychological Association
American Psychiatric Nurses Association
American Physical Therapy Association
Association of Rehabilitation Nurses
American Speech-Language Hearing Association
Assoc. of Women's Health, Obstetric and Neonatal Nurses
Certification Board for Nutrition Specialists
National Board for Certification of Hospice & Palliative Nurses
Integrative Healthcare Policy Consortium
National Association of Clinical Nurse Specialists
National Association of Pediatric Nurse Practitioners
National League for Nursing
National Organization of Nurse Practitioner Faculties
National Association of Nurse Practitioners in Women's Health
Oncology Nursing Society
Alabama Association Nurse. Anesthetists
Minnesota Association of Nurse Anesthetists
Oklahoma Nurses Association
South Carolina Association of Nurse Anesthetists
Michigan Association of Nurse Anesthetists