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Roger A. Seigny  
Commissioner

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Deputy Commissioner

**BULLETIN**  
**Docket No.: INS-15-023-AB**

**TO:** All New Hampshire Licensed Health Carriers and Producers

A handwritten signature in black ink, appearing to read "RAS", is positioned below the "TO:" line.

**FROM:** Roger A. Seigny  
Insurance Commissioner

**DATE:** June 1, 2015

**RE:** Use of Differential Provider Reimbursement Rates to Calculate Cost-sharing Within the Same Plan

The question has arisen of whether a carrier may vary a provider's reimbursement within a proposed 2016 silver-level Qualified Health Plan (QHP) based on whether the patient is enrolled in New Hampshire's Medicaid expansion, the Premium Assistance Program (PAP), or the private market. Such a practice would have the same providers being reimbursed for the same services at a higher rate for services provided to private market enrollees than for services provided to PAP enrollees.<sup>1</sup>

The focus of this analysis is on whether the proposed practice is consistent with New Hampshire law. It is an unfair trade practice under state insurance law for an insurer to make or permit:

any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatsoever.

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<sup>1</sup> For example, for a hospital stay where the private market allowed amount was \$9000 and the PAP allowed amount was \$7000, a private market enrollee in a 70% AV silver plan whose cost-sharing mirrors that of one 2015 QHP, with a \$1500 deductible, 30% coinsurance and a \$500 copay for this service, would end up paying \$4100 out of pocket. If the claim were adjudicated on the same basis as the PAP enrollee, the out of pocket expense would be \$3500 for the same hospital stay. The benefits payable by the carrier to the provider would also vary: the provider would be paid \$4900 for the service provided to the private market member, but only \$3500 for the same service to the same provider for the PAP enrollee. This differential in payments made by the carrier would apply to all private market members, even those enrolled in the private market 94% AV plan variation.

RSA 417:4, VIII (b). The statute prohibits discrimination not only with respect to premiums, but also with respect to “benefits payable” under a policy of health insurance, or “in any other manner whatsoever.” *Id.* The broad language of the statute encompasses differences in cost-sharing adjudication, if they amount to unfair discrimination between individuals.

The 2016 QHPs in which the PAP population will enroll are fully private plans which, under insurance law, are considered to be “polic[ies] or contract[s] of health insurance” within the meaning of RSA 417:4, VIII(b). Under the terms of New Hampshire’s Medicaid expansion law and the federally approved waiver, PAP members are required to be covered under QHPs.<sup>2</sup> The 94% AV variation that QHP carriers must file under the ACA, and in which both the PAP population and lower-income private market purchasers will be enrolled, is considered the same plan as the underlying 70% AV silver plan on which the variation is based.<sup>3</sup>

Under the federal Affordable Care Act (ACA) and New Hampshire statute, the only permissible rating factors in the individual and small group markets in the state, other than number of persons covered, are age and tobacco use. RSA 420-G:4, I; 42 U.S.C. § 300gg. In addition to limiting permissible rating factors, the ACA requires that premium rates and plan design be consistent within a single plan.<sup>4</sup> Given this framework of state and federal regulation, individuals are of the same “class and of essentially the same hazard” within the meaning of RSA 417:4, VIII (b) if they are identical in age and tobacco use, and are covered by the same plan – meaning a 70% AV silver plan and any associated cost-sharing variant, including the 94% AV variant in which PAP members will be enrolled. Because carriers’ use of underwriting is so narrowly constrained, differential treatment within the same plan based on any other factor, even if it could be actuarially justified, is not permissible as a matter of law.

In sum, under RSA 417:4, VIII (b) carriers may not adjudicate individual consumers’ cost-sharing in a manner that results in different levels of payment being made by or on behalf of members of the same plan, regardless of status as a PAP enrollee.<sup>5</sup>

Questions related to this bulletin should be directed to Jennifer Patterson, Health Policy Legal Counsel, at (603) 271-2261 ext. 215 or email at [jennifer.patterson@ins.nh.gov](mailto:jennifer.patterson@ins.nh.gov)

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<sup>2</sup>See RSA 126-A:5, XXV(a): “In order to receive medical assistance from the program, newly eligible adults who are ineligible for the HIPP program shall choose from any qualified health plans (QHPs) offered on the federally-facilitated exchange if cost effective . . .”

<sup>3</sup> 45 CFR §156.420 (a). While the cost-sharing for the 94% AV plan variation that will be available to PAP enrollees is set by NH DHHS, each carrier choosing to offer a 2016 QHP is responsible for defining the terms of cost-sharing for the underlying 70% AV silver plan, and it is the underlying 70% AV silver plan that will be available for purchase by consumers purchasing insurance on the private market; the 70% AV plan will also be used as the basis for adjudicating the claims for consumers enrolling in the variations.

<sup>4</sup> A plan is “the pairing of the health insurance coverage benefits under the product with a particular cost-sharing structure, provider network, and service area.”45 CFR §144.103; see discussion at 80 Fed. Reg. 10755-57.

<sup>5</sup> This analysis focuses on unfair discrimination under state law only. Under the ACA, federal law does not preempt any state law that does not prevent the application of the provisions of the ACA, 42 U.S.C. § 18041(d). Because the state law, in applying not only to premium but also to other the benefits payable, is more protective of consumers than the federal law, it is not preempted by the ACA.