# The State of New Hampshire
# Insurance Department

21 South Fruit Street, Suite 14
Concord, NH 03301
(603) 271-2261 Fax (603) 271-1406
TDD Access: Relay NH 1-800-735-2964

John Elias
Commissioner

Alexander K. Feldvebel
Deputy Commissioner


## Bulletin
## Docket No.: INS No. 19-015-AB

**TO:** All Licensed Health Carriers

**FROM:** John Elias, Insurance Commissioner

**DATE:** July 30, 2019

**RE:** HB 1809 - New Hampshire Balance Billing and Network Adequacy Laws

The purpose of this Bulletin is to provide guidance to carriers for complying with New Hampshire balance billing and network adequacy laws, particularly 2018 N.H. Laws Ch. 356 (HB 1809), which protects patients from balance billing by certain hospital based providers, and which became effective July 1, 2018. The Bulletin also explains the procedures for seeking a determination of commercial reasonableness from the New Hampshire Insurance Department (Department) in the event of a dispute.

**Applicable Legal Standards**

For over twenty years, New Hampshire law has required that, for network-based plans, every contract between a health carrier and a participating provider must include a protection against balance billing. RSA 420-J:8, I. In addition, for Health Maintenance Organizations (HMOs), the Department has issued guidance interpreting RSA 420-B:12 to prohibit the practice of listing a specific hospital as an in-network provider, when the carrier lacks contracts for the hospital based providers at the hospital. See Department Bulletin INS NO. 06-018-AB.

HB 1809 expands New Hampshire's balance billing protections by prohibiting anesthesiologists, radiologists, pathologists, and emergency medicine providers from billing patients for more than regular cost sharing when a patient is treated at an in-network hospital or ambulatory surgery center, even if the provider is out-of-network. See RSA 329:31-b, I. The law also requires that the Department's network adequacy rules include "standards for addressing in-network access to hospital based providers such as anesthesiologists, radiologists, pathologists, and emergency medicine physicians" and that the

Department report annually on "the findings associated with network adequacy review." RSA 420-J:7, II and IV.

The Department has amended its Network Adequacy rule, N.H. Code of Admin. R. Chapter Ins 2701, to address hospital based providers in accordance with HB 1809, requiring that carriers assure that providers whose services are integral to care in a hospital or similar facility either be included in their networks, or that these integral services be provided with no additional cost sharing. Specifically, the rule provides that:

> *(c) To constitute reasonable access to health services, the network shall include providers whose services are integral to care in a hospital, ambulatory surgery center, or similar facility, specifically those services provided by anesthesiologists, pathologists, emergency physicians, and radiologists. When a carrier is unable to assure that an in-network provider of those services is always accessible at an in-network facility, the carrier shall assure that any necessary out-of-network services are provided with no additional cost share to the member, beyond member responsibility were those services provided by an in-network provider.*

N.H. Code of Admin. R. Ins 2701.05(c).

The law amends the physicians and surgeons statute to require that provider "fees for health care services submitted to an insurance carrier for payment shall be limited to a commercially reasonable value..." RSA 329:31-b, II. The notion of a commercially reasonable fee also arises under the network adequacy rules, which provide exceptions from the standards under the rules when a provider has refused to accept a commercially reasonable reimbursement rate, including when:

> *(2) A health carrier demonstrates that the carrier's failure to develop a provider network in a given county that is sufficient in number and type of providers to meet all of the standards in Ins 2701.06 is due to the refusal of a local provider to accept a commercially reasonable rate, fee, term, or condition and that the health carrier has taken steps to effectively mitigate the detrimental impact on covered persons; . . . [or]*
>
> *(4) A health carrier arranges to pay for the required service from an out-of-network provider, and the member is informed prior to the treatment that they can access services from the provider with no additional cost sharing beyond the benefit patient responsibility to an in-network provider.*

N.H. Code of Admin. R. Ins 2701.08.

Under HB 1809, in the event of a dispute about the reasonable value of a service, the New Hampshire Insurance Commissioner has exclusive jurisdiction to determine whether a fee is commercially reasonable. RSA 329:31-b, III; see also RSA 420-J:8-e. From a procedural perspective, the Department's role in resolving a dispute about commercially reasonable payments is governed by existing hearing requirements under the Insurance Code:

*Either the provider or the insurance carrier may petition for a hearing under RSA 400-A:17. The petition shall include the appealing party's evidence and methodology for asserting that the fee is reasonable, and shall detail the efforts made by the parties to resolve the dispute prior to petitioning the commissioner for review. The department may require the parties to engage in mediation prior to rendering a decision.*

RSA 420-J:8-e. In addition to the statutory hearing requirements in RSA 400-A, the Department's procedural rules, N.H. Code of Admin. R. Chapter Ins 200, would apply to the hearing, along with the adjudicative hearing provisions of the New Hampshire Administrative Procedure Act, RSA 541-A.

**Discussion**

HB 1809 was passed to protect consumers from surprise bills in excess of their regular cost sharing liability, and provide a strong incentive for insurance carriers and the specific health care providers to reach an agreement for in-network participation. The legislation did this without specifying a default payment rate or a rate setting mechanism.

The specified health care providers are prohibited from billing the carrier for more than a commercially reasonable value, based on similar payments for similar services.

Carriers are required to meet the network adequacy standard that includes radiology, pathology, anesthesiology, and emergency medicine services, when they are "integral to care in a hospital, ambulatory surgery center, or similar facility..." When a carrier does not meet this standard and has not been granted an exception by the Department, the carrier does not meet network adequacy expectations and cannot market the insurance product in the associated county.

Ins 2701 provides the opportunity for a carrier to *"pay for the required service from an out-of-network provider"* if they have provided advanced notification to the member, and the carrier may calculate cost sharing consistent with a members' in-network liability, but the carrier shall not rely on the financial protection given to the patient under RSA 329:31-b to meet the network adequacy standards.

In the event the provider submits for payment to a carrier, a fee for health care services that the provider believes is limited to a commercially reasonable value, but the carrier disagrees, the provider can petition the Department for a determination that the fee is commercially reasonable. If the Department determines that the fee is commercially reasonable, the provider is considered in compliance with the statute.

Although carriers are required to report on their networks annually, the network adequacy requirement is ongoing, and as specified in Ins 2701.11(d), a carrier shall notify the Department within ten days when the carrier believes the network no longer meets the network adequacy standards. Since the provider specialties included in HB 1809 are routinely part of a group practice or other employer that is the exclusive provider for that specialty servicing a specific hospital, the Department most likely needs to be notified within ten days of a contract termination with the group practice or employer servicing an in-network hospital or ambulatory surgery center. Neither the statute nor Ins 2701 provide for a grace

period that a carrier can market a product without the Department's approval of a commercially reasonable contract offering, so the carrier is encouraged to notify the Department as soon as a contract termination is imminent. Marketing the product without the Department approval for the exception is a violation of Ins 2701 and RSA 420-J:7.

When the anesthesiology, radiology, pathology, or emergency medicine providers at an in-network hospital or ambulatory surgery center are not participating in the carrier network, the carrier shall provide for a commercially reasonable amount to be paid to the provider, provider group, or provider employer. The legislative intent was clearly to provide balance in the dispute between providers and carriers, and commercially reasonable provider payment and coverage for services are referenced in the legislation, Ins 2701, and the 2006 bulletin.

In order to receive an exception to the network adequacy rule, the carrier must demonstrate that a commercially reasonable contract was offered to the provider, and rejected. Since the exception under Ins 2701.08 (2) includes more than payment rates, it's possible that a carrier could be paying commercially reasonable rates to an out-of-network provider, but also be given an exception to the network adequacy standard due to the provider rejecting a commercially reasonable contract offer that included the same rates.

If the payments provided by the carrier to an out-of-network provider are determined by the provider to be less than the standard of commercially reasonable, the carrier or provider may petition the Department for a hearing.

Questions should be directed to Tyler Brannen at tyler.brannen@ins.nh.gov.