

STATE OF NEW JERSEY
DEPARTMENT OF BANKING AND INSURANCE

IN THE MATTER OF THE MEDICAL)
MALPRACTICE LIABILITY) DECISION AND ORDER
INSURANCE PREMIUM ASSISTANCE)
FUND - PREMIUM SUBSIDY)

This matter relates to the determination of eligibility for receipt of a premium subsidy from the Medical Malpractice Liability Insurance Premium Assistance Fund (the “Fund”) in accordance with N.J.S.A. 17:30D-30a(2) and N.J.A.C. 11:27-7.5.

Background

The New Jersey Medical Care Access and Responsibility and Patients First Act, P.L. 2004, c. 17 (the “Act”) enacted changes to the medical malpractice liability system to ensure that the residents of this State have adequate access to highly-trained health care practitioners in all specialties. One of the means by which the Act seeks to achieve this goal is the establishment of the Fund, which is intended to provide premium subsidies to certain practitioners and health care providers, as defined in the Act, to help ensure that access to care in particular specialties or subspecialties is not threatened as a result of the cost of medical malpractice liability insurance in this State. Monies to be distributed from the Fund are obtained through assessments on various parties, as set forth in N.J.S.A. 17:30D-29. The Department is responsible for the administration of the Fund but not for the imposition and collection of the assessments. Pursuant to the Act, the assessments for the Fund and the disbursements of the subsidies will occur annually over a three-year period. The initial assessments were imposed in the latter part of 2004.

In accordance with N.J.S.A. 17:30D-29g, the Department, through an extraordinary procedure authorized by that law, specially adopted and concurrently proposed rules, N.J.A.C. 11:27-7, to provide a process for administering the Fund, the determination of eligibility for payments from the Fund, and, where applicable, the determination of the increases in medical malpractice liability insurance premiums that will qualify for a subsidy in accordance with N.J.S.A. 17:30D-30b. These specially adopted rules became effective November 17, 2004. Public comments on the concurrently proposed rules were submitted through February 18, 2005. Thereafter, the concurrently proposed rules were adopted on May 16, 2005, pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

On February 3, 2005, the Department of Banking and Insurance (“Department”) issued a Public Notice as required by N.J.S.A. 17:30D-28 et seq. and N.J.A.C. 11:27-7 regarding the determination of eligibility for a premium subsidy from the Fund.

As provided in N.J.A.C. 11:27-7.5, the Commissioner of Banking and Insurance (“Commissioner”) shall determine the class or classes of practitioners eligible for the subsidy, by specialty or subspecialty, for each type of practitioner whose average medical malpractice liability insurance premium, as a class, on or after December 31, 2002, is in excess of an amount determined by the Commissioner based upon a review of the information filed pursuant to N.J.A.C. 11:27-7.4 and in accordance with N.J.S.A. 17:30D-30. In determining the relevant premium amounts, the Commissioner shall review and consider, without limitation, the base rate premiums paid by practitioners or charged by insurers transacting business in this State for medical malpractice liability insurance in this State. In certifying the class or classes of practitioners eligible to receive the subsidy, the Commissioner may, in consultation with the Commissioner of the Department of Health and Senior Services, also consider whether access to

care is threatened by the inability of a significant number of practitioners in a particular specialty or subspecialty to continue practicing in a geographic area of the State. Practitioners in a class certified by the Commissioner, including those whose medical malpractice liability insurance coverage is supplied by health care providers who provide professional liability insurance through self-insured hospital funding supplemented with purchased commercial insurance coverage, shall be eligible for a subsidy if:

1. The practitioner received an increase in medical malpractice liability insurance premiums in excess of an amount determined by the Commissioner based on a review of the information filed pursuant to N.J.A.C 11:27-7.4 for one or more of the following: upon policy inception or renewal on or after January 1, 2004, January 1, 2005, and January 1, 2006, from the amount paid in the immediately preceding calendar year(s); or

2. In the case of practitioners whose medical malpractice liability coverage is supplied by health care providers in the manner set forth above, the Commissioner determines that the health care provider increased its total professional liability funding obligation in excess of an amount determined by the Commissioner based on a review of the information filed pursuant to N.J.A.C 11:27-7.4 for one or more of the three year periods set forth above.

Pursuant to N.J.S.A. 17:30D-30, the Commissioner may, however, waive the foregoing criteria for eligibility if he or she determines that access to care for a particular specialty or subspecialty is threatened because of an inability of a sufficient number of practitioners in that specialty or subspecialty to practice in a geographic area of the State. Based upon a review of the information mentioned below, the Commissioner, in consultation with the Commissioner of the Department of Health and Senior Services, has made a determination that access to care for certain specialties and subspecialties is threatened.

Initially, it should be noted that, based on information received from the agencies responsible for collecting the assessments referenced above, it appears that the original estimates of the amount of funding that will be generated by the assessments may not be reached and that it is possible that less than \$17 million will be available for distribution from the Fund. When considering whether access to care in a particular specialty was so significantly threatened as to warrant a determination that practitioners in that specialty would be deemed eligible for the subsidy, the Department recognized that, in view of the limited amount of funds available for distribution, the greater the number of classes deemed eligible to receive subsidies from the Fund, the lower any premium subsidy available to be distributed to individual eligible practitioners and providers would be. Thus, conferring eligibility upon any classes of practitioners other than those in specialties where access to care is most seriously threatened would minimize or eliminate the ameliorative effect of the subsidy. Such a result would be contrary to the intent of the Legislature in enacting the Act.

In assessing whether access to care in certain specialties and subspecialties was threatened as referenced in the Act, the Department solicited information from various sources, including, a report entitled “Availability of Physician Services In New Jersey,” prepared by the Rutgers Center for State Health Policy, premium data from medical malpractice insurers, as well as information from the Board of Medical Examiners in the Division of Consumer Affairs, Department of Law and Public Safety, individual providers, provider trade associations, and the New Jersey Department of Health and Senior Services.

In conducting its analysis, the Department focused on data specifically addressing the numbers of practitioners engaged in designated specialties and subspecialties in recent years and information indicating the extent to which practitioners in those specialties have curtailed the

providing of, or declined to offer certain services in recent years. In addition, the Department focused on the average base rate for medical malpractice liability coverage in the designated specialties and on those specialties which experienced particularly significant increases in base rates during the period for which data was obtained.

Based upon its review of available information, the Department made a preliminary determination, which it indicated was subject to change based on further analysis, that access to care is threatened for the following specialties and subspecialties:

1. Obstetrics/gynecology (practices limited to gynecology alone are excluded);
2. Neurosurgery; and
3. Diagnostic radiology (limited to radiologists who read mammograms).

In accordance with N.J.A.C. 11:27-7.5(f), a Public Notice of that preliminary determination was disseminated to those interested parties on the Department's distribution list utilized pursuant to N.J.A.C. 1:30-5.2(a)6, and was also posted on the Department's web site: www.njdobi.org. In addition, the Public Notice was published in the New Jersey Register. See 37 N.J.R. 678(a). Interested parties were permitted to submit written comments until March 7, 2005.

Summary of Comments

The Department received timely written comments from the following:

1. Dr. Edward Lubat, Radiology Associates of Ridgewood, Department of Diagnostic Imaging, the Valley Hospital;
2. Dr. Fong Wei, President and CEO, Princeton Medical Group;

3. Dr. Marlan Schwartz;
4. Dr. Jared Sullivan;
5. Dr. Kenneth R. Pozner;
6. Dr. Alan P. Krieger, President, Union County Medical Society of New Jersey;
7. Dr. Francine Sinofsky, President, New Jersey Obstetrical and Gynecological Society;
8. Dr. Howard Fox;
9. Dr. Steven A. Katz, President, American College of Emergency Physicians;
10. Dr. Leonard J. Corwin, President, Essex County Medical Society;
11. Dr. Martin E. Kanoff, Director of Women's Services, Kennedy Health Systems, Ambulatory Care Centers; and
12. Dr. Ervin Moss, Executive Medical Director, New Jersey State Society of Anesthesiologists.

Virtually all of the commenters stated that they have experienced increases in medical malpractice liability insurance premiums and supported the preliminary determination on the three specialties/subspecialties proposed to be eligible for a subsidy from the Fund as specified in the Public Notice. Several commenters, however, also suggested that additional specialties or subspecialties be included as eligible for a subsidy.

One commenter, while agreeing that diagnostic radiologists (specifically mammographers) should be targeted for relief from increasing medical malpractice liability insurance premiums, noted that they have had difficulty hiring interventional radiologists (radiologists who perform invasive procedures). The commenter further stated that the two members in its group who are interventional radiologists have had disproportionate premium

increases because they are considered “high risk.” The commenter thus believed that the Department should consider including interventional radiologists among the specialties eligible for a subsidy.

Several commenters, while supporting the Department’s initial determination that obstetrics/gynecology be among the specialties and subspecialties eligible for a subsidy from the Fund, expressed concern with excluding those engaged in “gynecology only.” One commenter engages in an OB/GYN practice, which includes four OB/GYNs and one GYN only. The commenter believed that the Department intended that this gynecology physician would be included in the subsidy because she is practicing in an OB/GYN practice. The commenter stated that within its OB/GYN practice, the gynecology-only physician performs and pays malpractice premiums based on her status of gynecology with major surgery, the highest malpractice premium option within “gynecology only.” The commenter stated that such gynecology-only physicians practicing within an OB/GYN practice have suffered the same financial losses as other OB/GYN physicians. The commenter further stated that the medical malpractice liability insurer that it uses required its gynecology-only physician to hold a minimum liability coverage level of \$2 million/\$4 million. Although the gynecology-only physician has never had a settled claim and has had no open claims in 17 years of practice, her malpractice premiums increased from \$37,000 to \$67,000 (on a cash basis the increase was from \$25,000 to \$80,000). The commenter maintained that an increase in premium of \$55,000 for such a gynecology-only physician is not only a “threatened” financial situation, but has also persuaded the physician to consider giving up gynecologic surgery. The commenter believed that to exclude such gynecology-only physicians in an OB/GYN practice would be contrary to the intent of the Act to

attempt to retain highly trained health care practitioners to help ensure access to care for these threatened specialties.

Another commenter also requested that gynecologic surgeons be permitted to apply to receive a subsidy from the Fund. The commenter stated that this category of physicians have experienced significant increases in medical malpractice insurance premiums and most currently pay about 10 percent less than OB/GYNs. The commenter stated that eliminating obstetrics from the practice has had no significant impact on the premiums for gynecological surgeons. Through subsequent inquiry, the Department was advised that there is a significant difference in premium between a GYN physician that provides office services only and one who performs non-office surgical procedures, and that patients seeking such gynecological surgery services are waiting longer for those services.

Another commenter stated that he is a general surgeon and has been certified as such since 1977. This commenter stated that the practice had been successful and that his exposure to difficult cases had resulted in several medical malpractice suits. In December 2003 the commenter was informed that his insurance carrier would not renew coverage for 2004. The commenter stated that he was denied insurance by every other company and was forced to become insured by a secondary carrier. The commenter stated that his malpractice premium increased from \$25,000 for an occurrence policy in 2003 to \$150,000 for a claims-made policy in 2004. The commenter requested assistance in continuing to practice medicine in this State.

One commenter stated that physicians in all specialties are required to contribute to the Fund and increases in premiums and decreases in revenues have negatively affected physicians in all specialties. The commenter thus believed that the Fund should be opened to all physicians whose liability premiums have risen above a certain percentage over the prior year.

Another commenter, who has been practicing OB/GYN for 29 years, stated that switching to a claims-made policy lowered premium for 2004 from \$66,000 to \$16,000. However, he settled a malpractice case this year, the second case in the past 10 years and the only two cases ever settled or with a pay-out in 29 years of practice. The commenter stated that his company dropped him from preferred status to a standard status plus a 100 percent surcharge resulting in a bill of \$92,000. The commenter stated that he started a new claims-made policy with a premium of \$57,000 for the year 2005 and that he had to take out a loan to pay this premium. The commenter stated that OB/GYNs need help with exorbitant premiums.

Another commenter, who practices OB/GYN, stated that his malpractice premiums are 400 percent of what they were three years ago. The commenter further stated that his employer is having difficulty in recruiting even part-time help to meet the demand for its OB/GYN services, and that his group has been receiving patients from other OB/GYNs who have left the State due to rising malpractice liability insurance costs.

Two commenters generally stated that the Fund would be ineffective, in that it would not provide sufficient funds to offset premium payments. One commenter also stated that other categories of physicians should be included beyond those set forth by the Department in the Public Notice, but did not specify any particular specialty or subspecialty to be included.

One commenter requested that emergency medicine ("EM") be added to the list of physicians eligible for payment from the Fund. The commenter believed that EM meets or exceeds the criteria of the three specialties already identified by the Department in the Public Notice. Specifically, the commenter stated that the report prepared by the Rutgers Center for State Health Policy is subject to interpretation and ignores other studies specific to emergency medicine. In addition, other sources, such as the American College of Emergency Physicians

and The Robert Wood Johnson Foundation, were not polled, even though there is national recognition that emergency departments are in a state of crisis due to malpractice costs, overcrowding, and the growing numbers of uninsured. As emergency departments are the sole entry point to the health care system for millions of New Jersey residents, the commenter asserted that an interruption or slowing of care in emergency departments due to unaffordable malpractice costs would constitute the threat of crisis that was intended to be prevented by the creation of the Fund. Due to the nature of an EM practice and its “24 hour, seven days a week” mission, the commenter stated that they will not and cannot abandon patients before taking “Herculean efforts” to rectify the situation. The commenter asserted that when an access to care crisis occurs in emergency medicine it will be immediate, and that the Fund’s resources may be used to help prevent medical malpractice liability insurance costs from causing this crisis.

The commenter further stated that most standard insurers writing in New Jersey have abandoned EM as a specialty. As a result, the commenter stated the majority of New Jersey emergency physicians are now insured through alternative market mechanisms, including captives and risk retention groups (“RRGs”). The commenter stated that the comparison of base rates for RRGs to commercial rates is inappropriate, in that the exodus of commercial insurers from 2002 to the present has forced emergency physicians to incur significant formation costs, which were borne solely for the purpose of creating insurance to support continuing medical care. The commenter stated that, absent these initiatives to self-insure, New Jersey would have experienced emergency department closings similar to those in other areas. The commenter further maintained that these costs are not reflected in the base rate structure and were not separately collected as part of the Fund’s data collection process and thus believed that these

expenses should be included as appropriate funding cost items for consideration by the Commissioner as provided in the Act and the rules.

The commenter further stated that the added costs of creating the alternative medical malpractice insurance market has negatively affected New Jersey's ability to attract qualified emergency physicians. When the sum of all costs are considered, the true costs greatly exceed the premiums charged by insurers in the neighboring states of Pennsylvania and New York. The commenter stated that these added costs equate to lower available wages and fewer new physicians, as evidenced by the State's rising average age for this specialty and a growing use of associate practitioners such as physician assistants and nurse practitioners. The commenter also stated that newly created RRGs and captives have not been granted access to the recently re-established New Jersey Medical Malpractice Reinsurance Association, forcing the expenditure of additional costs to purchase reinsurance at higher market prices in a "hard market." The commenter believed that, either through the Fund or through the Medical Malpractice Reinsurance Association, the public interest would be served by encouraging emergency physicians to continue to use private assets to fund and tightly manage their malpractice risk and increase safety in New Jersey's emergency departments.

One commenter asserted that the basis for determining eligibility for the subsidy should be based on need (for example, the practitioner's medical malpractice liability insurance premiums exceeding a certain percentage of his or her net income).

Finally, the Department was also provided information from an individual practitioner asserting that pediatric surgeons should also be eligible for the subsidy. The information indicated that there are 10 pediatric surgeons in the State, and there is one pediatric surgeon for Monmouth and Ocean counties covering seven hospitals and a population of 1.5 million. In

addition, it was stated that premiums for one pediatric surgeon increased more than 150 percent and that it was difficult to find a medical malpractice liability insurer to cover this physician. It was also stated that New Jersey lost a net of seven pediatric surgeons over the past 10 years and that one pediatric surgeon has had difficulty recruiting another pediatric surgeon to join him due the medical malpractice liability insurance situation.

Analysis

Initially, the Department notes that, with one exception, no commenter objected to the specialties that were initially proposed to be eligible for a premium subsidy as set forth in the Public Notice. The issues raised by the timely comments and other information provided essentially relate to whether practitioners in the following additional specialties and subspecialties should be deemed eligible to receive a subsidy from the Fund:

1. Interventional Radiologists;
2. Gynecologic Surgeons;
3. General Surgeons;
4. Emergency Medicine;
5. Pediatric Surgeons; and
6. Any specialty based on “need.”

In addition to evaluating the information in the comments previously mentioned, the Department considered the final report and supporting data provided by the Rutgers Center for State Health Policy, sought additional information from providers, hospitals and trade associations, including meetings with practitioners, and continued to consult with the

Department of Health and Senior Services as part of its analysis of the issues raised by the comments. The Department also considered anecdotal evidence such as newspaper accounts, including one account wherein it was reported that women were waiting up to six months for a mammogram. The Department evaluated all of the information received from these various sources in making its final determination of the classes of practitioners deemed eligible to receive a subsidy from the Fund for the first year.

Based on a review of the comments, and its additional review and analysis as set forth above, the Department continues to believe that access to care is most seriously threatened in the specialties set forth in the Public Notice issued in accordance with N.J.A.C. 11:27-7.5(f) and previously set forth herein. Accordingly, practitioners in those specialties and subspecialties shall be eligible to apply for a subsidy from the Fund. The Department is however, clarifying that, in the case of diagnostic radiologists who read mammograms, to be eligible to apply for a subsidy, the radiologist must be a New Jersey board certified or board eligible radiologist and be certified as meeting the requirements under the Federal Mammography Quality Standards Act and regulations (including the requirement that the radiologist has interpreted or multi-read at least 240 mammographic examinations during the immediately preceding six month period). Mammographers are required to meet this standard in order to provide services to Medicare patients. Taking into account average base rates, the Department has also found that the classes of practitioners deemed eligible for the subsidy herein have experienced substantial premium increases for the relevant period.

Regarding the suggestion that all physicians whose liability premiums have increased more than a certain percentage over the prior year should be eligible for the subsidy, the Department does not believe that such action would be appropriate or implement the intent of the

Legislature as set forth in the Act. N.J.S.A. 17:30D-30 provides for the eligibility of practitioners for the subsidy by class. In consideration of the limited amount of funds dedicated and available for the subsidy, and the goal of the Act to help ensure that residents of this State continue to have adequate access to highly-trained health care practitioners in all specialties, the Department believes that eligibility for the subsidy should be limited to those specialties where access to care is most seriously threatened. As discussed previously, conferring eligibility upon classes of practitioners other than those where access to care is most seriously threatened would minimize or significantly dilute the effect of the subsidy, which would be inconsistent with the intent of the Legislature in enacting the Act.

For these same reasons, the Department has determined that expanding eligibility for the subsidy to general surgeons is not warranted. While the Department appreciates the impact of premium increases for the individual general surgeon who commented on the Public Notice, no evidence was provided, nor has the Department found sufficient evidence through its own analysis, that would tend to establish that access to general surgeons, as a class, currently is significantly threatened in this State. For purposes of future determinations on practitioners who are eligible to receive a premium subsidy from the Fund, general surgeons and other specialists not deemed eligible this year may wish to submit any information of which they are aware that would support a contention that, as a class, they should be deemed eligible for the subsidy.

The Department also does not believe that basing eligibility for the subsidy on an individual practitioner's "need" would be feasible or is authorized by the Act. The bases for determining eligibility for a subsidy from the Fund are clearly set forth in N.J.S.A. 17:30D-30, and have been discussed above. An individual practitioner's financial need is not one of the enumerated factors to be considered as criteria for eligibility to receive a subsidy. Eligibility is

determined on the basis of increases in premiums and access to care of a specialty or subspecialty as a class, not the financial position of an individual practitioner.

With respect to the suggestion emergency medicine be added as an eligible specialty, the Department has concluded that presently there is insufficient evidence to suggest that access to EM care is significantly threatened. The commenter generally asserts that because EM physicians created an alternative medical malpractice liability insurance market through the formation of RRGs to address unaffordable insurance costs, a potential crisis in access to EM was avoided. The EM physicians assert that a portion of the formation costs incurred by EM physicians to establish the RRGs should be defrayed by payments from the Fund. In the alternative, the commenter suggested that the RRGs should be eligible to have access to reinsurance through the Medical Malpractice Reinsurance Association. With respect to the latter, that proposal is outside the scope of the review for this Decision and Order. However, the Department will take the commenter's suggestion under consideration for future action as deemed appropriate and authorized by law.

With regard to considering the formation costs of RRGs for reimbursement, disbursements from the Fund for that purpose are not authorized by the Act. While the Department recognizes and appreciates that EM physicians, on their own initiative, took steps to help avert a potential crisis in the access to EM care, there is insufficient evidence that access to EM care is currently threatened. In all probability, this is attributable, at least in part, to the success of the efforts undertaken by the EM community to create an alternative medical malpractice liability insurance market for EM. While the costs associated with the formation of a risk retention group may indeed be indirectly related to the costs of medical malpractice liability insurance in the commercial market, the Act, nevertheless, does not authorize

reimbursement for these expenses from the Fund. Consequently, such reimbursement cannot be made through the process established by N.J.A.C. 11:27-7 to implement the Act's provisions.

The Department has also concluded that there is insufficient evidence to establish that interventional radiologists should be eligible to receive a subsidy from the Fund. Other than the anecdotal account in the single comment from an individual radiologist summarized above, no evidence was provided, and the Department has not found sufficient evidence to suggest, that access to interventional radiologists currently is so significantly threatened in this State as to warrant this subspecialty being made eligible for the subsidy.

The Department has also concluded that there is insufficient evidence to establish that pediatric surgeons should be eligible to receive a subsidy from the Fund at this time. The one anecdotal account summarized above indicated that the number of pediatric surgeons practicing in New Jersey has declined over the past several years. However, a review of the pertinent data, including that provided by the Rutgers Center for State Health Policy, indicates that the number of pediatric surgeons actually increased between 2001 and 2003. Furthermore, consultation with the New Jersey Department of Health and Senior Services indicates that currently there is no perceptible threat to access to pediatric surgeons in this State. Accordingly, the Department was not provided with, and the research conducted on its behalf did not produce, sufficient evidence to suggest that access to pediatric surgeons is so significantly threatened in this State as to warrant practitioners in this subspecialty being deemed eligible for the subsidy.

The Department has also concluded that there is insufficient evidence to establish that gynecologic surgeons should be eligible to receive the subsidy from the Fund. While a review of pertinent data indicates that the number of OB/GYNs practicing in New Jersey has decreased over the past several years, the data also suggests that the number of practicing GYNs over that

period has either decreased at a slower rate or has actually increased. Further, no independent data was provided or secured to support the assertion that women were waiting longer for these services, nor was any data supplied indicating the extent of any delays in the receipt of these services by women. Accordingly, the data reviewed did not provide sufficient evidence to suggest that access to gynecologic surgeons was so significantly threatened as to warrant this subspecialty being deemed eligible for the subsidy. Moreover, including gynecologic surgeons would not further the Legislature's intent in providing the subsidy of encouraging practitioners to continue to engage in high risk specialties. Including gynecologic surgery as an eligible subspecialty could encourage practitioners currently providing obstetric and gynecological services to switch to GYN only and cease to provide obstetric services, thereby exacerbating the threat to access to care in that specialty which the data indicated exists at this time.

The Department stresses that, pursuant to the Act, subsidies will be distributed for a total of three years. The determinations made here relate solely to eligibility for the subsidy for 2004 as referenced in the Act. The Department will evaluate de novo information and data to determine those classes of practitioners that should be eligible for a subsidy for the years 2005 and 2006.

Conclusion

Based on the foregoing, it is on this day of June, 2005 ORDERED that:

1. Practitioners and healthcare providers whose primary practice area is in one of the following specialties and subspecialties shall be eligible to apply for a subsidy from the Fund for 2004:

- i. Obstetric/gynecology (practices otherwise limited to gynecology alone are excluded);
- ii. Neurosurgery; and
- iii. Diagnostic radiology (limited to radiologists who read mammograms.)

The radiologist must be a New Jersey board certified or board eligible radiologist and be certified as meeting the requirements under the Federal Mammography Quality Standards Act and regulation.

2. Applications may be filed in accordance with the form and instructions set forth on the Department's website at www.njdobi.org. Applications shall be filed no later than August 5, 2005.



Donald Bryan
Acting Commissioner