

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 FOR 2005)

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”) for 2005 (payable in 2006) 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 of Banking and Insurance (“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.

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 17, 2006, the Department issued a Public Notice as required by N.J.S.A. 17:30D-28 et seq. and N.J.A.C. 11:27-7.5(f) regarding the preliminary determination of eligibility for a premium subsidy from the Fund for the year 2005.

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. Pursuant to N.J.S.A. 17:30D-30

practitioners in a class certified by the Commissioner on the basis described above, 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, for purposes of the subsidy for calendar year 2005, made a preliminary determination that access to care for certain specialties and subspecialties is threatened.

It should be noted that, as was also noted in Order No. A05-122 regarding determination of eligibility for the subsidy for calendar year 2004, 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: 2001-2005," prepared by the Rutgers Center for State Health Policy; premium data from medical malpractice insurers; and information from the New Jersey Board of Medical Examiners and the New Jersey Department of Health and Senior Services ("DHSS").

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).

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. As set forth in the February 17, 2006 Public Notice of its preliminary determination, these specialties and subspecialties are the same as those that were determined to be eligible for 2004 subsidy (payable in 2005) pursuant to Order No. A05-122.

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.njdoabi.org. In addition, the Public Notice was published in the New Jersey Register. See 38 N.J.R. 1475(a). Interested parties were permitted to submit written comments until March 20, 2006.

Summary of Comments

The Department received timely written comments from the following:

1. Gale Louise Aucott, CNM, MS;
2. Georgia Blair, RN, CNM, MS;
3. Patricia Leonard, CNM;
4. Metta Cahill, CNM, MSN;
5. Deanne R. Williams, CNM, MS, FACNM, Executive Director, American College of Nurse-Midwives;
6. Dawn Durain, CNM, MPH, American College of Nurse-Midwives - NJ Chapter;
7. Dr. Steven G. Dorsky;
8. Dr. Belle Wang, President, New Jersey Obstetrical and Gynecological Society;
9. Dr. John D. Frattarola;
10. Lore DiSalvo; and
11. Dr. George M. Ajjan.

Several commenters suggested that certified nurse-midwives (“CNMs”) should be added as a specialty eligible to receive a subsidy from the Fund. The commenters generally stated that increases in medical malpractice liability insurance premium are a threat to continuing midwifery practice and threaten access to midwifery care for New Jersey women and families.

One commenter stated that there are currently 231 licensed CNMs in New Jersey, while another stated there were 290 licensed CNMs in New Jersey. These and other commenters stated that there were 72 different practice sites in which CNMs are employed.

Several commenters stated that in 2003, eight percent of births were attended by midwives - 90 percent of these occurred in hospitals, where physicians were readily available for consultation; 1.8 percent occurred in birth centers and 0.9 percent occurred in homes. It was also stated that the New Jersey Board of Medical Examiners regulates the practice of CNMs. In addition, it was stated that Medicaid and private health insurance reimbursement is mandatory for nurse-midwifery services and that CNMs have had prescriptive authorities since 1993.

Several commenters stated that, despite the historically low incidence of lawsuits against CNMs, increases in malpractice insurance rates have forced many qualified CNMs to prematurely retire, seek other nursing positions, or go out of practice.

One commenter stated that in her first year of midwifery practice in 1988, she paid \$1,056.00 for medical liability coverages, with gradual increases until 2003, when premiums increased from just over \$5,000.00 per year to \$10,000.00 per year for the same coverage. In 2004, additional increases occurred and the current policy premium is over \$27,000.00 per year. This commenter stated that she will not be able to sustain additional significant increases and will be forced into early retirement if the current trend continues.

Other commenters cited, as an example, that 49 CNMs covered by the same medical malpractice liability insurance carrier will receive a 34.6 percent rate increase, for both occurrence and claims made policies. One commenter stated that when CNMs previously requested assistance from the Fund, the Department denied the application and responded that nurse-midwives were not a subspecialty deemed eligible for the subsidy, although many of their physician colleagues in the same practices were deemed eligible.

Another commenter similarly stated that she has been unable to get a midwifery position in New Jersey although she has tried to obtain one for two months. She was offered a job in a

private gynecological practice, but was told that she must purchase her own medical malpractice liability insurance. The commenter stated that, given the cost of a claims made policy and the fact that she intends to retire in a few years, she was considering returning to a nursing position rather than a nurse-midwifery position.

Other commenters specifically stated that many nurse-midwives practice collegially with their colleagues in the same types of practices, such as those with high risk, vulnerable inner-city populations. The commenter stated that, as is the case with physicians, medical malpractice insurance premiums for nurse-midwives are also rising.

Another commenter stated that CNMs attend over ten percent of the vaginal births in the United States and over seven percent of the births in New Jersey. The commenter further stated that many of the women who receive care from nurse-midwives are vulnerable to poor pregnancy outcomes due to their age, race/ethnicity, level of income, place of residence, and lack of health coverage. This commenter stated that CNMs are an integral part of the “health care team” needed to ensure all women of New Jersey have access to quality health care services. The commenter believed that if subsidies or other forms of relief from rising malpractice premiums are offered to obstetricians-gynecologists, they should also be offered to CNMs. The commenter asserted that this position is in the best interest of the consumer and has been reflected in similar decisions in Pennsylvania and New York.

Another commenter expressly urged the Department to include CNMs as a specialty/subspecialty eligible to apply for a subsidy from the Fund based upon: the Department’s determination of eligibility for OB/GYNs as set forth in Order No. A05-122; the substantial premium rate increase imposed on certain CNMs by ProSelect Insurance Company; and because OB/GYNs are deemed eligible for the same services as are administered by CNMs.

One commenter suggested that spine surgeons be eligible to receive a subsidy from the Fund. The commenter stated that he has worked as a spine surgeon for the past 18 years and that medical malpractice liability insurance has become both exorbitant and difficult to obtain. The commenter noted that neurosurgeons were eligible to receive the subsidy from the Fund for 2004 and preliminarily determined to be eligible for 2005. The commenter stated that he undertakes the same types of procedures as neurosurgeons in the spine, and undertakes more complex cases than most doctors will handle. The commenter stated that most spine surgeons are initially board certified in orthopedic surgery and then undertake fellowship training. In light of this fact, the commenter stated that he is categorized by the Department as an orthopedist, while insurance carriers consider his subspecialty differently, as spine surgeons, with extraordinarily high insurance rates. The commenter stated that he undertakes only spinal surgery. The commenter thus requested that he be considered within the neurosurgery category for purposes of receiving a subsidy from the Fund.

One commenter continued to support distribution of the subsidy to obstetricians and gynecologists. However, the commenter reiterated the comments previously submitted in which it had been urged that the classes of specialists deemed eligible to apply for a 2004 premium subsidy (distributed in 2005) include gynecologists who continue to perform surgery. The commenter stated that this category of physicians has experienced significant increases in their insurance premiums, and that most currently pay only about 10 percent less than obstetricians/gynecologists. The commenter stated that eliminating obstetrics from the practice has had no significant impact on the medical malpractice liability insurance premiums.

Several commenters agreed with the Department's preliminary determination of eligible specialties, but believed that those with higher risk specialties paying higher premiums, such as

OB/GYNs, should receive a greater portion of the subsidy Fund. One commenter stated that the amount provided last year of approximately \$10,800.00 per physician represented approximately 10 percent of the premium for its obstetrical group. The commenter believed that without a more substantial subsidy, as of July 1, 2006 its group will be out of business. The commenter stated that the subsidy at last year's amount is ineffective and must approach 50 percent of premium to be effective. One commenter specifically suggested other solutions, such as caps, homestead protection, regulation of the medical liability insurance companies, surcharges for obstetrical care, or raising insurance payment for obstetrical care to the reasonable and customary fee that should be paid in 2006, rather than the current fee schedule that dates back to the late 1980s.

Analysis

Initially, the Department notes that no commenter objected to the specialties that were proposed to be eligible for a premium subsidy as set forth in February 17, 2006 Public Notice. The issues raised by the timely comments relate to whether nurse-midwives should be eligible to receive a subsidy; whether spine surgeons should be categorized as neurosurgeons or otherwise deemed to be eligible to receive a subsidy from the Fund; whether gynecologists who continue to perform surgery but who do not provide obstetrical care should be eligible for a subsidy from the Fund; and whether those with higher risk specialties and higher premiums should receive a greater proportion of the premium subsidy Fund.

As was done with respect to the premium subsidy for 2004 payable in 2005, in addition to evaluating any information in the comments previously mentioned, the Department considered the premium data supplied by medical malpractice liability insurers and the report and supporting data provided by the Rutgers Center for State Health Policy, 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 evaluated all of the information received from these various sources in making its final determination of the classes of practitioners deemed eligible to receive the subsidy from the Fund for 2005 (payable in 2006).

Based on a review of the comments, and its additional review and analysis 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 February 17, 2006 in accordance with N.J.A.C. 11:27-7.5(f) and previously set forth herein. Accordingly, OB/GYNs, neurosurgeons and radiologists who read mammograms and who are board-certified or board-eligible as set forth herein shall be eligible to apply for a subsidy from the Fund.

Regarding the suggestion that certified nurse-midwives be added as an eligible specialty to receive a subsidy from the Fund, it must be initially noted that the comments provided appear to relate to nurse-midwives who belong to independent practice groups. In order to be eligible to receive a subsidy from the Fund, a nurse must be “employed by a licensed hospital, long-term care facility or assisted living facility in this State.” See N.J.S.A. 17:30D-28 (definitions of “health care provider” and “practitioner”). The Department has obtained no evidence to suggest that access to nurse-midwives employed by New Jersey licensed hospitals, long-term care facilities or assisted living facilities is threatened.¹ The assertion of several of the commenters that CNMs essentially perform the same services as OB/GYNs, and thus should be eligible for a subsidy, may generally be true. That alone, however, does not constitute a basis for a

¹ DHSS also noted that since, pursuant to the Act, the only CNMs who would qualify to receive a subsidy are those employed by licensed hospitals, long-term care facilities or assisted living facilities and, in all probability, the medical malpractice liability insurance premiums for those CNMs would have been paid by their employers and not by the individual CNM, if CNMs were deemed eligible and qualified CNMs applied for a subsidy, the subsidy would be paid to the employer who had paid the premium and not to the applying CNM. Thus, even if a determination were made that CNMs were eligible as a class to apply for a subsidy, it would not result in the limited

determination of eligibility under the Act. With regard to the comment that CNMs are considered the same as OB/GYNs for purposes of programs in Pennsylvania and New York intended to offset the effect of high medical malpractice insurance premium rates, descriptions of the programs, and the context in which those determinations were made were not provided.

As was noted by several of the commenters, 97 percent of the births that were attended by midwives occurred in hospitals, where physicians were readily available for consultation. Accordingly, in almost all cases of births attended by midwives, physicians were present to cover the case if necessary. Moreover, the practice of CNMs with respect to intrapartum management does not include managing labor and birth for women classified as being at increased risk. N.J.A.C. 13:35-2A.10(a). See also N.J.A.C. 13:35-2A.7 and 2A.8, which delineate involvement of the physician as dictated by the condition of the patient, and N.J.A.C. 13:35-2A.8, which places limitations on the prescribing authority for CNMs. As several of the commenters noted, less than 10 percent of the births in New Jersey in 2003 were attended by midwives. While CNMs may have experienced substantial increases in their medical malpractice liability insurance premiums over the past several years, there is insufficient evidence to suggest that the effect of these increases has been to so significantly threaten access to midwifery care as to warrant a conclusion that this specialty should be eligible for a subsidy from the Fund this year. In fact, data provided by the New Jersey Board of Medical Examiners indicated that between 2002 and 2005 the number of actively licensed CNMs has actually increased. Given the relatively limited funds available for distribution, and absent evidence to demonstrate that access to midwifery care from CNMs employed by New Jersey licensed hospitals and facilities as set forth above is seriously threatened, the Department believes it is more appropriate to use the

number of CNM practitioners who under the Act would qualify for a subsidy individually receiving any direct benefit from such a determination.

limited funds available to ameliorate the threat to access to care by OB/GYN physicians to the maximum extent practicable.

Similarly, the Department has determined that extending eligibility for the subsidy to “spine” surgeons is not warranted. The commenter suggested that spine surgeons be considered neurosurgeons for purposes of receiving the subsidy from the Fund. This does not reflect the classification of such surgeons by medical malpractice liability insurers. While some insurers distinguish orthopedic surgeons who perform spinal surgery from those who do not, and assign to those who perform spinal surgery a higher rate, the Department is not aware of any company that classifies such surgeons as neurosurgeons. In addition, no evidence was provided to suggest that access to care is so significantly threatened with respect to spine surgeons to warrant their inclusion as a subspecialty eligible to receive a subsidy from the Fund at this time. For purposes of the 2006 subsidy, orthopedic surgeons performing spinal surgery may wish to submit additional information that would support a contention that, as a class, they should be eligible for the 2006 subsidy to be distributed in 2007.

With respect to the comment that other remedies should be provided, such as homestead protection or increased reimbursement levels, the Department notes that such comments are outside the scope of the public notice and the Commissioner’s authority pursuant to N.J.S.A. 17:30D-30a(2).

The Department has also concluded that there is insufficient evidence to establish that gynecological surgeons should be eligible to receive a subsidy from the Fund. As was determined with respect to the 2004 subsidy in Order No. A05-122, 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 continues to suggest that the number of practicing GYNs over that period

has either decreased at a slower rate or actually increased. Accordingly, the data reviewed did not provide sufficient evidence to suggest that access to gynecological surgeons was so significantly threatened as to warrant this subspecialty being deemed eligible for the subsidy. Moreover, the Department continues to believe that including gynecological surgery as an eligible subspecialty would not further the Legislature's intent in providing the subsidy of encouraging practitioners to continue to engage in high risk specialties. Including gynecological 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 indicates continues to exist at this time.

Finally, with respect to concerns that OB/GYNs should receive proportionately higher subsidies, as was noted in the Public Notice, the Department proposed amendments to N.J.A.C. 11:27-7.7, which appeared in the April 3, 2006 issue of the New Jersey Register (See 38 N.J.R. 1511(a)). The proposed amendments provide that, where a determination is made that access to care is threatened, the Commissioner may adjust the proportional amount of the subsidy distributed to an eligible class based on the average expenditure for medical malpractice liability insurance in an eligible class relative to the average expenditure by practitioners in the other eligible classes. Some commenters stated that the subsidy must equal 50 percent of a practitioner's premium. The Department cannot guarantee the level of the subsidy in relation to an eligible practitioner's premium due to the statutory maximum size of the Fund and variables such as the number of eligible practitioners who apply for a subsidy. However, the ability to make appropriate adjustments in subsidy amounts should, at least in part, address the concerns of these commenters. Accordingly, based on this rule amendment adopted on June 8, 2006, the

subsidy for each specialty will be determined so that it is directly proportional to the relative average expenditure for medical malpractice liability coverage of each eligible specialty. The formula will be as follows:

Premium subsidy equals (the average expenditure for practitioners of the specialty) multiplied by [(collected subsidy fund dollars) divided by (total expenditure for all qualified applicants)]. The "total expenditure for all qualified applicants" will not be the actual total premiums collected for those specific policies, but rather a sum of the average base rates for each specialty (based on the Department's survey) multiplied by the number of qualified applicants in each specialty. The Department utilized average base rates to calculate average expenditures in an effort to minimize distortion. The use of an average paid premium, instead of base rates, would be subject to greater distortion attributable to factors affecting individual insureds, such as increased limits options, claims made maturity factors, and rating tiers.

Conclusion

Based on the foregoing, it is on this 25th day of July, 2006 ORDERED that:

1. Applications for a 2005 premium subsidy as referenced herein 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 25, 2006.
2. Practitioners and healthcare providers whose primary practice area is in one of the following specialties, or subspecialties shall be eligible to apply for a subsidy from the Fund for 2005:

- 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.

3. The amount of the premium subsidy for applicants in each eligible specialty or subspecialty shall be proportionate to the average expenditure for medical malpractice liability coverage, and will be calculated as set forth herein.

/s/ Steven M. Goldman
Steven M. Goldman
Commissioner

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