

**RHODE ISLAND EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES**

**RE: VIRGINIA M. BURKE, RHODE ISLAND HEALTH CARE ASSOCIATION**

**PETITION FOR DECLARATORY RULING**

**DECISION OF THE SECRETARY**

Virginia M. Burke, President and CEO, Rhode Island Health Care Association, (“Petitioner”) filed this Petition for Declaratory Ruling (“Petition”) regarding the interpretation and application of R.I. Gen. Laws §42-35-8.

**THE PETITION**

The Petition asserts jurisdiction under R.I. Gen. Laws §42-35-8 and requests that the Executive Office of Health and Human Services (“EOHHS”) make the following requests for declaration:

1. Is the 3% increase in Neighborhood Health Plan of Rhode Island (“Neighborhood”) rates, established in October 2016 to comply with R.I. §40-8-13-5, also subject to the wage pass-through requirements of R.I. Gen Laws §40-8-19(2)?
2. If the answer to Question 1 is “yes”, then what portion of the 3% increase paid by Neighborhood is subject to the wage pass-through, since Neighborhood’s rates don’t involve a “Direct Care Rate” or an “Indirect Care Rate”?
3. Can facilities use their own judgment in deciding how best to distribute the wage pass through, as long as the beneficiaries fall within the definition of “direct care staff”?

Neighborhood is a Managed Care Organization (“MCO”). Managed Care is a health care delivery system organized to manage cost, utilization, and quality. Medicaid managed care provides for the delivery of Medicaid health benefits and additional services through contracted arrangements between state Medicaid agencies and MCOs that accept a set per member per month (“capitation”) payment for these services. Some Rhode Island Medicaid recipients are members of an MCO, including Neighborhood. Other Rhode Island Medicaid recipients, referred to as Fee For Service (“Fee For Service”) members, are enrolled in traditional Medicaid and their medical claims are paid directly by EOHHS.

## THE CONTROLLING LAW

R.I. Gen. Laws §40-8-19(2) requires that EOHHS adopt a new price-based payment methodology for nursing homes that focuses on the “direct-care rate adjusted for resident acuity” and the “indirect-care rate comprised of a base per diem for all facilities”. R.I. Gen. Laws §40-8-19(2)(vi) provides for an annual adjustment in those rates as follows:

(vi) Adjustment of rates by the change in a recognized national nursing inflation index to be applied on October 1<sup>st</sup> of each year, beginning October 1, 2012. This adjustment will not occur on October 1, 2013 or on October 1, 2015 but will occur on April 1, 2015.

However, R.I. Gen. Laws §40-8-19(2)(vi) provides that the rate adjustment effective October 1, 2016 is subject to what Petitioner (and the statute) calls a “wage pass-through” requirement (“wage pass-through”):

For purposes of October 1, 2016, adjustment only, any rate increase that results from application of the inflation index to subparagraphs (a)(2)(i) and (a)(2)(ii) shall be dedicated to increase compensation for direct-care workers in the following manner: Not less than 85% of this aggregate amount shall be expended to fund an increase in wages, benefits, or related employer costs of direct-care staff of nursing homes. For purposes of this section, direct-care staff shall include registered nurses (RNs), licensed practical nurses (LPNs), certified nursing assistants (CNAs), certified medical technicians, housekeeping staff, laundry staff, dietary staff, or other similar employees providing direct care services; provided, however, that this definition of direct-care staff shall not include: (i) RNs and LPNs who are classified as "exempt employees" under the Federal Fair Labor Standards Act (29 U.S.C. § 201 et seq.); or (ii) CNAs, certified medical technicians, RNs, or LPNs who are contracted, or subcontracted, through a third-party vendor or staffing agency. By July 31, 2017, nursing facilities shall submit to the secretary, or designee, a certification that they have complied with the provisions of this subparagraph (a)(2)(vi) with respect to the inflation index applied on October 1, 2016. Any facility that does not comply with terms of such certification shall be subjected to a clawback, paid by the nursing facility to the state, in the amount of increased reimbursement subject to this provision that was not expended in compliance with that certification.

R.I. Gen. Laws §40-8-19-5 requires Neighborhood to pay nursing facilities “in an amount not less than the rate that would be paid for the care by EOHHS under the Medicaid program.”

On June 25, 2015, EOHHS promulgated regulations entitled the Principles of Reimbursement For Nursing Facilities (“Regulations”). The Regulations provide for annual price increases effective October 1<sup>st</sup> of each year, to specific nursing facility rates. The Regulations provide that those Per Diem Rates should be “increased annually” according to the Global Insight/CMS Skilled Nursing Facility Market Basket. Based on the Global Insight/CMS Skilled Nursing Facility Market Basket, EOHHS increased nursing facility rates, pursuant to the regulations, for nursing facilities participating in Medicaid Fee For Service by 3% effective October 1, 2016 based on the Global Insight/CMS Skilled Nursing Facility Market Basket. At the same time, EOHHS increased Neighborhood’s capitation rate by 3%.

### QUESTIONS PRESENTED

- A. Is the 3% increase in Neighborhood’s rates, established in October 2016 to comply with R.I. Gen. Laws §40-8-13-5, also subject to the wage pass-through requirements of R.I. Gen. Laws §40-8-19(2)?

Short Answer: Yes.

Petitioner requests a Declaratory Ruling on whether the wage pass through requirement at R.I. Gen. Laws §40-8-19(2)(vi) applies to nursing facility rates for both EOHHS Fee For Service nursing facility rates and Neighborhood’s nursing facility rates.

The Legislature defined the scope of R.I. Gen. Laws §40-8-19 as applicable to “rates to be paid by the state to nursing facilities licensed pursuant to chapter 17 of title 23, and certified to participate in the Title XIX Medicaid program for services rendered to Medicaid-eligible residents.” (emphasis added), R.I. Gen. Laws §40-8-19(A)(1).

The Executive Office of Health and Human Services finds that by using the word “state”, the Legislature intended that R.I. Gen. Laws §40-8-19 apply to both Medicaid administered by an MCO and Medicaid administered by EOHHS in traditional Fee For Service Medicaid.

First, the Rhode Island Medicaid State Plan provides that Rhode Island Medicaid benefits are administered through both Fee For Service and MCOs. Both Fee For Service Medicaid and benefits from an MCO are Rhode Island Medicaid benefits administered on behalf of Rhode Island Medicaid beneficiaries.

Second, Federal law defines an MCO, including Neighborhood, in part, as an entity that “(m)akes the services it provides to its Medicaid enrollees as accessible (in terms of timeliness, amount, duration, and scope) as those services are to other Medicaid beneficiaries within the area served by the entity.” 42 C.F.R. §382.2 (emphasis added). A Medicaid Beneficiary is a person who “has been determined to be eligible for Medicaid”. 42 C.F.R. §400.200. A Medicaid Enrollee means “a Medicaid beneficiary who is currently enrolled in an MCO...in a given managed care program.” Ibid.

Applying the federal provisions, Neighborhood, as an MCO, provides Medicaid services to Medicaid beneficiaries who are, in fact, Medicaid enrollees. Therefore, both Medicaid Fee For Service and Medicaid administered through an MCO provide state Medicaid benefits to Medicaid beneficiaries. Both EOHHS and Neighborhood administer Rhode Island Medicaid benefits on behalf of the State. It follows then that the wage pass-through requirement at R.I. Gen. Laws §40-8-19(2)(vi) applies to both Medicaid administered by Neighborhood as an MCO and Fee For Service Medicaid administered by EOHHS.

- B. If the answer to Question 1 is “yes”, then what portion of the 3% increase paid by Neighborhood is subject to the wage pass-through, since Neighborhood’s rates don’t involve a “Direct Care Rate” or an “Indirect Care Rate”?

Short Answer: 85% of the Increase.

The Legislature created the wage-pass through (“any rate increase... shall be dedicated to increase compensation for direct-care workers”). The wage-pass through only applies to the October 1, 2016 rate increase (“for purposes of October 1, 2016, adjustment only”). 85% of Neighborhood’s aggregate rate increase to the nursing facilities must be applied to “compensation”, as that term is defined by the statute, for “direct care staff”, as that term is defined by the statute (“85% of this aggregate amount shall be expended to fund an increase in wages, benefits, or related employer costs of direct-care staff of nursing homes”). “Compensation” means “wages, benefits, or related employer costs of direct-care staff of nursing homes.” Direct-care staff means registered nurses, licensed practical nurses, certified nursing assistants etc.

Managed Care Organizations, including Neighborhood, use a different rate structure than that used in Fee For Service Medicaid. There is no “Direct Care Rate” in MCO Medicaid. However, EOHHS estimates that of the total daily MCO nursing facility rate, approximately 85% of that rate is for direct care workers’ compensation (compensation for direct care workers as defined by R.I. Gen. Laws §40-8-19(2)(vi)).

The Executive Office of Health and Human Services will be issuing further guidance to nursing facilities on implementation of R.I. Gen. Laws §40-8-19(2)(vi) in the near future. That guidance will describe a two-step formula. First, the nursing facilities should determine what percentage of the MCO rate is for direct care worker compensation, approximately 85%, according to the formula proscribed in the EOHHS guidance. Second, the nursing facility should allocate 85% of that amount to increased compensation for direct care workers

- C. Can facilities use their own judgment in deciding how best to distribute the wage pass through, as long as the beneficiaries fall within the definition of “direct care staff”?

Short Answer: Facilities do not have the flexibility to entirely deny an increase to any category of direct care worker, however, facilities do have flexibility to provide different increases to different categories as long as all direct care workers receive some increase.


R.I. Gen. Laws §40-8-19(2) provides that all of a nursing facilities' "direct-care" workers", as that term is defined by the statute, should receive some increase in compensation but EOHHS finds nothing in the statutory language which prohibits the nursing facility from distributing the aggregate wage pass through differentially to different categories of direct-care workers enumerated in the statute.

The statute defines the universe of "direct care workers", "(f)or purposes of this section, direct-care staff shall include..."). The statute defines compensation broadly ("wages, benefits, or related employer costs of direct-care staff of nursing homes").

Therefore, EOHHS concludes that all direct care workers should receive some increase in compensation. The statute provides that 85% of the rate increase must be used to fund "an increase" in compensation "of direct-care staff" or "for direct-care staff" ("this aggregate amount shall be expended to fund an increase in wages, benefits, or related employer costs of direct-care staff" and "shall be dedicated to increase compensation for direct-care workers"). Because the Legislature used the words "staff" and "workers" without limitations or restrictions to describe the universe of direct-care employees who receive increased compensation under the statute, the Legislature intended that all direct-care workers and not just some direct-care workers receive an increase in compensation.

However, the statute only requires that the *aggregate* amount of compensation increase for direct-care employees equal 85% of the rate increase ("not less than 85% of this aggregate amount shall be expended to fund an increase in wages, benefits, or related employer costs of direct-care staff of nursing homes"). Because the statute is silent on how the compensation increases should be dispersed, EOHHS concludes that the Legislature intended that such allocation be at the discretion of the nursing facility provided that all direct-care nursing employees receive some increase in compensation.

**ACCORDINGLY**, in consideration of the above, this Decision of the Secretary is herein given to the Petitioner concerning Petitioner's request for a declaratory ruling. This decision is limited to the facts and circumstances of the Petition.

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Anya Rader Wallack  
Acting Secretary, EOHHS

Date: 4/7/17

