ASSEMBLY, No. 3301

STATE OF NEW JERSEY

217th LEGISLATURE

INTRODUCED FEBRUARY 22, 2016

Sponsored by:
Assemblywoman VALERIE VAINIERI HUTTLE
District 37 (Bergen)

SYNOPSIS

Regulates physician profiling programs used by managed care networks.

CURRENT VERSION OF TEXT

As introduced.

AN ACT concerning physician profiling programs and supplementing Title 17B of the New Jersey Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Legislature finds and declares that:

a. Measuring physicians' performance based on quality and cost efficiency is a relatively new, complex, and rapidly evolving development; and, in order to ensure that consumers receive reliable, valid, meaningful, and accurate information when making important health care decisions, it is critical that physician profiling programs use accurate, meaningful, and statistically valid measures, methodologies, and data;

b. Because those carriers using physician profiling programs may have a financial interest in steering patients away from high-quality physicians or reducing the size of their provider network to limit access to care, the profit motive may affect the rankings; and this potential conflict of interest requires disclosure, scrutiny, and oversight, because the independence, integrity, and verifiable nature of the profiling process are paramount;

c. No physician should be profiled based only upon cost, as cost efficiency cannot be measured without considering patient-specific characteristics and health care outcomes; higher physician charges and increased frequency of outpatient utilization of services may be cost-efficient when they result in reduced mortality, morbidity, hospitalization, or absenteeism, and in increased productivity or quality of life;

d. Physicians who practice as part of a medical group regularly employ inter-specialty cooperation and team-based care to best coordinate medical services for patients; and it is, therefore, administratively infeasible to segregate individual physician performance from that of the group as a whole, and misleading to the public to provide such individual physician data. No physician profiling program should publicly disclose or otherwise use for any provider network or reimbursement purposes the ranking of individual physician members of a medical group that participates in that profiling program; and all physicians practicing as part of a medical group should receive the same ranking as that of the group as a whole, to be identified as such; and

e. Profiling systems that fail to meet the accuracy, transparency, due process, and external validation and oversight requirements set forth in this act create an unreasonable risk of patient confusion and deception, unjustified and injurious disruption of physician-patient relationships, and unfair disparagement of the reputations of qualified physicians.

2. As used in this act:

"Carrier" means an insurance company, health service corporation, hospital service corporation, medical service corporation or health maintenance organization authorized to issue health benefits plans in this State.

"Commissioner" means the Commissioner of Banking and Insurance.

"Department" means the Department of Banking and Insurance.

"Economic criteria" means measures used to determine physician resource utilization or costs of care for specified health care services or sets of such services.

"Health benefits plan" means a benefits plan which pays or provides hospital and medical expense benefits for covered services, and is delivered or issued for delivery in this State by or through a carrier. Health benefits plan includes, but is not limited to, Medicare supplement coverage and risk contracts to the extent not otherwise prohibited by federal law. For the purposes of this act, health benefits plan shall not include the following plans, policies or contracts: accident only, credit, disability, long-term care, TRICARE supplement coverage, coverage arising out of a workers' compensation or similar law, automobile medical payment insurance, personal injury protection insurance issued pursuant to P.L.1972, c.70 (C.39:6A-1 et seq.) or hospital confinement indemnity coverage.

"Independent oversight entity" means the independent oversight entity with which the commissioner contracts pursuant to this act.

"Managed care plan" means a health benefits plan that integrates the financing and delivery of appropriate health care services to covered persons by arrangements with participating health care providers, who are selected to participate on the basis of explicit standards, to furnish a comprehensive set of health care services and financial incentives for covered persons to use the participating providers and procedures provided for in the plan.

"Physician profiling program" means a system that compares, rates, ranks, measures, tiers, or classifies a physician's or physician group's performance, quality, or cost of care against objective or subjective standards or the practice of other physicians, and includes quality improvement programs, pay for performance programs, public reporting on physician performance or ratings, and the use of tiered or narrowed provider networks. The physician profiles maintained by the Division of Consumer Affairs in the Department of Law and Public Safety pursuant to the "New Jersey Health Care Consumer Information Act," P.L.2003, c.96 (C.45:9-22.21 et al.) shall not be considered a physician profiling program for the purposes of this act.

"Quality criteria" means measures used to determine physician quality of care by means of the extent to which health care services for individuals and populations increase the likelihood of the

1 desired health outcomes, consistent with current professional
2 knowledge.
3
4 3. No profiling results of a physician profiling program may be
5 disclosed to the public or used by a carrier for the purposes of
6 determining participation or reimbursement under any managed
7 care plan provider network unless the physician profiling program
8 has been approved by the independent oversight entity under
9 contract with the department as provided for under this act.
10
11 4. a. The quality and economic criteria used to evaluate a
12 physician's performance by a physician profiling program shall be
13 developed in collaboration with practicing physicians and their
14 professional organizations. To the extent feasible, a profiling
15 program shall use standardized quality and cost measures, and shall
16 seek to minimize any administrative burden that it may impose
17 upon physician practices. A profiling program shall not be based
18 on cost alone, but shall utilize quality measures, and ensure that the
19 costs of health care services are considered in the context of
20 professional standards of care, and the resulting mortality,
21 morbidity, productivity, and quality of life.
22 b. A physician profiling program shall, when evaluating a
23 physician's or physician group's quality of care:
24 (1) use measures that are based on specialty appropriate,
25 nationally-recognized, evidence-based medical guidelines or
26 nationally recognized, consensus-based guidelines, which:
27 (a) are endorsed by the National Quality Forum and developed
28 by the Physician Consortium for Performance Improvement or other
29 entities whose work in the area of physician quality performance is
30 generally accepted within the health care industry; or
31 (b) if measures as described in subparagraph (a) of this
32 paragraph are not available, shall be selected by the AQA alliance,
33 formerly known as the Ambulatory Care Quality Alliance; and
34 (c) with respect to measures as described in either subparagraph
35 (a) or (b) of this paragraph, may use professional certification or
36 accreditation in determining physician quality of care, but shall not
37 rely solely upon these factors as the determinant of physician
38 quality;
39 (2) use a statistically valid number of disease state or specialty
40 specific cases, subject to review and approval by the independent
41 oversight entity, to produce accurate and reliable measurements and
42 profiling information;
43 (3) ensure that statistically valid risk adjustment is used to
44 account for the characteristics of the physician's or physician
45 group's patient population, including case mix, severity of patients'
46 conditions, co-morbidities, outlier episodes, and other factors,
47 subject to review and approval by the independent oversight entity.
48 With respect to process measures, these factors shall be considered

1 in evaluating patient compliance rates and whether compliance with
2 a measure is not indicated, contraindicated, or rejected by the
3 patient;
4 (4) determine which physician or physicians shall be held
5 reasonably accountable for a patient's care, subject to review and
6 approval by the independent oversight entity;
7 (5) ensure that patient preferences are respected, and that
8 physician ratings are not adversely affected by patient
9 noncompliance with a physician's referral, treatment
10 recommendation, or plan of care;
11 (6) ensure that the quality measurement system in no way
12 provides a disincentive for physicians to provide preventive care, or
13 to treat sicker, economically underprivileged, or minority patients;
14 and
15 (7) publicly report or otherwise use quality rankings at the
16 physician group practice level, rather than at the individual
17 physician level, when the individual physician is practicing as part
18 of a medical group, and clearly identify such ranking as a group
19 score.
20 c. A physician profiling program shall, when evaluating a
21 physician's cost-efficiency:
22 (1) compare physicians within the same specialty in the same
23 geographical market;
24 (2) use a statistically valid number of patient episodes of care,
25 subject to review and approval by the independent oversight entity,
26 to produce accurate and reliable measurements and profiling
27 information of a physician's cost-efficiency;
28 (3) ensure that statistically valid risk adjustment is used to
29 account for the characteristics of a physician's patient population,
30 including case mix, severity of patients' conditions, co-morbidities,
31 outlier episodes, and other factors, subject to review and approval
32 by the independent oversight entity;
33 (4) determine appropriate rules for attribution for cost-
34 efficiency, subject to review and approval by the independent
35 oversight entity;
36 (5) ensure that patient preferences are respected, and that
37 physician ratings are not adversely affected by patient
38 noncompliance with a physician's referral, treatment
39 recommendation, or plan of care;
40 (6) ensure that the cost-efficiency measurement system in no
41 way provides a disincentive for physicians to provide preventive
42 care, or to treat sicker, economically underprivileged, or minority
43 patients; and
44 (7) publicly report or otherwise use cost-efficiency rankings at
45 the physician group practice level, rather than at the individual
46 physician level, when the individual physician is practicing as part
47 of a medical group, and clearly identify such ranking as a group
48 score.

1 d. A physician profiling program shall ensure that the data
2 relied upon for its evaluations are accurate, including a
3 consideration of whether medical record verification is appropriate
4 and necessary, and the most current data available, considering the
5 necessity to attain adequate sample size, subject to the review and
6 approval of the independent oversight entity. To the extent
7 available, a physician profiling program shall use aggregated data,
8 rather than the data specific to a particular health insurer or other
9 payer.
10 e. A physician profiling program shall conspicuously disclose
11 to patients the following information on the Internet and in other
12 relevant materials:
13 (1) information explaining its physician rating system, including
14 the basis upon which physician performance is measured and the
15 statistical likelihood that the rating is accurate;
16 (2) limitations of the data used to measure physician
17 performance;
18 (3) how the ratings affect the physician, including, but not
19 limited to, a physician's inclusion in, or exclusion from, a provider
20 network;
21 (4) the quality and economic criteria used in the rating system,
22 including the measurements for each criterion and its relative
23 weight in the overall evaluation;
24 (5) a conspicuous written disclaimer, to be written as follows:
25 "Physician performance ratings should only be used as a guide to
26 choosing a physician. You should talk to your doctor before
27 making a health care decision based on the rating. Ratings may be
28 wrong and should not be used as the sole basis for selecting a
29 doctor."; and
30 (6) how the patient may contact the independent oversight entity
31 to register complaints about the system.
32 f. A physician profiling program shall, with respect to those
33 physicians who are subject to its evaluation:
34 (1) disclose to the physician the methodologies, criteria, data,
35 and analysis used to evaluate physicians' quality performance and
36 cost-efficiency, including, but not limited to, the statistical
37 difference between each rating and the statistical confidence level
38 of each rating, and notify the physician of any material change to
39 the program at least 180 days before implementing or making the
40 change;
41 (2) disclose the profile to the physician, including the patient-
42 specific data and analysis used to create the profile, and
43 recommendations on how the physician can improve the physician's
44 score, at least 90 days prior to its public disclosure or other use;
45 (3) provide the physician with the opportunity to correct errors,
46 submit additional information for consideration, and seek a review
47 of data and performance ratings;

(4) provide the physician with the following appeal rights to challenge a profiling determination at least 60 days prior to its public disclosure or other use:

(a) the opportunity to submit a written appeal;

(b) the suspension of the initial or modified quality and cost-efficiency rating when a timely appeal is made; and

(c) the opportunity for review by the independent oversight entity to assess the appeal decision;

(5) ensure that the physician profiling program does not disparage in any way a physician who is not profiled because of insufficient data; and

(6) provide the disclosures, opportunities for correction, and appeal rights set forth in this subsection with respect to the initial and any subsequent profiling determination.

5. a. The commissioner, in consultation with the State Board of Medical Examiners, shall contract with an independent oversight entity, which shall be an organization qualified to oversee physician profiling programs and exempt from taxation pursuant to section 501(c)(3) of the federal Internal Revenue Code of 1986 (26 U.S.C. s.501(c)(3)), to carry out the responsibilities set forth in this act.

b. The commissioner shall provide physicians, carriers and consumer organizations with the opportunity to make recommendations with respect to the selection and ongoing evaluation of the independent oversight entity.

c. The commissioner shall prepare, and make available to the public upon request, a written report with the commissioner's initial selection of, and each subsequent decision concerning, the independent oversight entity and any successor entity, which report shall list the qualifications of the entity to perform its responsibilities, and respond to the comments received by physicians, carriers, and consumer organizations on the selection or evaluation of the oversight entity.

d. The independent oversight entity and any officer, director, or employee thereof, and any person designated thereby, to perform services on behalf of that entity, shall not have any material professional, familial, or financial affiliation, as determined by the commissioner, with:

(1) any physician profiling program overseen by that entity;

(2) any officer, director, or employee of the physician profiling program; or

(3) any physician or physician medical group being evaluated by the physician profiling program.

e. In order to contract with the commissioner for the purposes of this act, the independent oversight entity shall meet the following requirements:

(1) The entity shall not be an affiliate or a subsidiary of, nor in any way be owned or controlled by a carrier or health benefits plan,

a trade association of carriers or health benefits plans, a trade association of employers, a trade association of hospitals, or a trade association of physicians.

(2) A board member, director, officer, or employee of the entity shall not serve as a board member, director, officer, or employee of a carrier or health benefits plan, a trade association of carriers or health benefits plans, a trade association of employers, a trade association of hospitals, or a trade association of physicians.

f. The entity shall demonstrate that it has a quality assurance mechanism in place, which ensures that:

(1) any experts retained by the entity to perform reviews of physician profiling programs are qualified in the areas of physician quality and efficiency measurement;

(2) conflict-of-interest policies and prohibitions are in place to address the independence of the experts retained to perform the reviews;

(3) the reviews performed are timely, clear, credible, and monitored for quality on an ongoing basis; and

(4) the confidential or proprietary information submitted by a carrier or other payer or a physician is not improperly disclosed.

g. The independent oversight entity shall be responsible for:

(1) establishing the criteria necessary for: assessing compliance with the requirements of this act, including, but not limited to, the minimum statistical confidence level required before any profiling results may be used for provider network participation or reimbursement purposes or disclosed to the public; and monitoring compliance by physician profiling programs with the requirements of this act;

(2) approving the methodologies, data collection and analysis, and disclosure and appeal processes utilized by an entity seeking approval to operate a physician profiling program, consistent with the provisions of this act, or any new processes or material modification of existing processes utilized by an existing physician profiling program prior to implementation of those changes;

(3) resolving patient and physician complaints;

(4) overseeing the physician appeals process;

(5) posting the results of its review of each physician profiling program on the Internet, including its findings with respect to the criteria it has established pursuant to this section; and

(6) reporting and making recommendations to the commissioner as they relate to the provisions of this act.

6. A physician profiling program operating prior to or on the effective date of this act shall apply for review and approval from the independent oversight entity, on a form and in a manner to be prescribed by regulation of the commissioner, no later than the 30th day after the date that the independent oversight entity executes a contract with the commissioner pursuant to subsection a. of section

1 5 of this act. A managed care plan shall cease using, for provider
2 network participation or reimbursement purposes, or publicly
3 disclosing any profiling results of, any program which has not been
4 approved by the independent oversight entity within 90 days of its
5 receipt of the application.
6
7 7. Any determination reached by the independent oversight
8 agency pursuant to this act shall be binding on the physician
9 profiling program and any other affected parties, and shall be
10 enforceable by the department.
11
12 8. a. A physician profiling program that violates any provision
13 of this act, including, but not limited to, a willful and knowing
14 refusal by a physician profiling program to completely disclose
15 profiling data or methodology to a physician at least 90 days prior
16 to the publication or other use for provider network participation or
17 reimbursement purposes of any initial or subsequent profiling
18 determination or to provide the appeal rights required by this act, or
19 the publishing of a false or misleading designation for viewing by a
20 third party, shall be liable to a civil penalty of $500 for each day
21 that the profiling program is in violation of the act. The civil
22 penalty shall be collected by the commissioner in the name of the
23 State in a summary proceeding in accordance with the "Penalty
24 Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).
25 b. For the purposes of this section:
26 (1) An Internet posting shall be deemed to be a disclosure to
27 each person who has access to the provider network affected by the
28 physician profiling program; and
29 (2) A profiling determination published by a physician profiling
30 program that is not currently approved, or waiting to be approved as
31 provided in section 6 of this act, shall be deemed to be false or
32 misleading.
33 c. Nothing in this act shall be construed to prohibit or limit any
34 other claim or cause of action for a claim that a claimant has against
35 any person or entity arising from a violation of this act.
36 d. In addition to any other liability which may apply, a person
37 who publicly discloses or otherwise uses for provider network
38 participation or reimbursement purposes any profiling results in
39 violation of this act shall be liable to the physician or physician
40 group for treble damages, attorneys' fees, and any other appropriate
41 relief, including injunctive relief.
42
43 9. The commissioner, pursuant to the "Administrative
44 Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), and in
45 consultation with the State Board of Medical Examiners and the
46 Commissioner of Health, shall adopt rules and regulations to
47 effectuate the purposes of this act.

10. This act shall take effect on the 180th day after enactment, but the Commissioner of Banking and Insurance may take such anticipatory administrative action in advance thereof as shall be necessary for the implementation of the act.

STATEMENT

This bill provides for the regulation of physician profiling programs operating in New Jersey. Physician profiling programs are relatively new, and are designed to evaluate physicians participating in managed care plan networks, by measuring physicians' performance based on quality and cost efficiency. This bill establishes uniform standards and criteria for this type of physician evaluation.

Specifically, the bill provides that results of a physician profiling program may not be disclosed to the public or used by a carrier for the purposes of determining participation in, or reimbursement under, any managed care plan provider network unless the physician profiling program has been approved by the independent oversight entity, selected by the Commissioner of Banking and Insurance, as provided by the bill.

The bill directs the commissioner, in consultation with the State Board of Medical Examiners, to contract with an independent oversight entity to carry out the responsibilities set forth in the bill. That entity shall be an organization qualified to oversee physician profiling programs and exempt from taxation pursuant to section 501(c)(3) of the federal Internal Revenue Code of 1986. The bill prohibits certain affiliations between the independent oversight entity that contracts with the commissioner, and health benefits plans, employers, hospitals, physicians and physician profiling programs, as specified in the bill.

The independent oversight entity is responsible for establishing the criteria necessary for assessing and monitoring compliance with the requirements of the bill; approving the methodologies, data collection and analysis, and disclosure and appeal processes utilized by an entity seeking approval to operate a physician profiling program; resolving patient and physician complaints; overseeing the physician appeals process; and posting the results of its review of each physician profiling program on the Internet.

The quality and economic criteria used to evaluate a physician's performance by a physician profiling program shall be developed in collaboration with practicing physicians and their professional organizations. A profiling program is not to be based on cost alone, but is to utilize quality measures, and ensure that the costs of health care services are considered in the context of professional standards of care, and the resulting mortality, morbidity, productivity, and quality of life.

The bill specifies the criteria for the measurement systems to be used by a physician profiling program when evaluating a physician's or physician group's quality of care and cost-efficiency, subject to the review and approval of the independent oversight entity. A physician profiling program shall ensure that the data relied upon for its evaluations are accurate and the most current data available, considering the necessity to attain adequate sample size.

A physician profiling program is to conspicuously disclose to patients, on the Internet and in other relevant materials, information regarding the quality and economic criteria used in the rating system, including the measurements for each criterion and its relative weight in the overall evaluation, as well as how the patient may contact the independent oversight entity to register complaints about the system.

With respect to those physicians who are subject to its evaluation, a physician profiling program shall disclose to the physicians the methodologies, criteria, data, and analysis used to evaluate physicians' quality performance and cost-efficiency, and other information as specified in the bill. It also requires the physician profiling program to notify the physician of any material change to the program at least 180 days before implementing or making the change, ensures that the program does not disparage in any way a physician who is not profiled because of insufficient data, and provides for disclosures, opportunities for correction, and appeal rights with respect to the initial and any subsequent profiling determination.

A physician profiling program operating prior to or on the effective date of the bill must apply for review and approval from the independent oversight entity, on a form and in a manner to be prescribed by regulation of the commissioner, no later than the 30th day after the date that the independent oversight entity executes a contract with the commissioner pursuant to the bill. A managed care plan shall cease using for provider network participation or reimbursement purposes, or publicly disclosing any profiling results of, any program which has not been approved by the independent oversight entity within 90 days of its receipt of the application.

Any determination reached by the independent oversight agency pursuant to the bill is to be binding on the physician profiling program and any other affected parties, and be enforceable by the department.

A physician profiling program that violates any provision of the bill is liable to a civil penalty of $500 for each day that the profiling program is in violation, to be collected by the commissioner in the name of the State in a summary proceeding in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

1 In addition to any other liability which may apply, a person who
2 publicly discloses or otherwise uses for provider network
3 participation or reimbursement purposes any profiling results in
4 violation of the bill is liable to the physician or physician group for
5 treble damages, attorneys' fees, and any other appropriate relief,
6 including injunctive relief.