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DATE: March 11, 2015

ACTION: Notice of Decision on Petition for Rulemaking Action

SUBJECT: Petition by the California Association of Physician Groups requesting amendment or repeal of subdivision (a)(3)(B) of Title 28, section 1300.71.

PETITIONER

The California Association of Physician Groups' (CAPG or Petitioner) petition for rulemaking action (Petition) was received by the Department of Managed Health Care (Department) on August 12, 2014. On September 3, 2014, CAPG provided the Department with an extension of time until March 11, 2015, to respond to the Petition. Pursuant to the requirements of Government Code section 11340.7, the Department issues this Decision on the CAPG Petition.

CONTACT PERSON

Inquiries concerning this decision may be directed to Emilie Alvarez, Regulations Coordinator, Department of Managed Health Care, Office of Legal Services, by mail at: 980 9th Street, Suite 500, Sacramento, CA 95814, by telephone at: (916) 322-6727, or by e-mail at: ealvarez@dmhc.ca.gov or regulations@dmhc.ca.gov.

AVAILABILITY OF PETITION

The Petition for rulemaking action is available upon request directed to the Department's Contact Person listed above.

AUTHORITY

Under authority established in the Knox-Keene Health Care Service Plan Act of 1975 (the Act)[1], including but not limited to Health and Safety Code sections 1343, 1344 and 1346, the Department may adopt, amend and rescind regulations as necessary to carry out the provisions of the Act.

[1] Health and Safety Code section 1340 *et seq*. and California Code of Regulations, title 28.

SUMMARY OF THE PETITION

The action requested by the Petitioner specifically concerns the considerations relevant to the reasonable and customary value of services performed by non-contracted providers, which are detailed in title 28, section 1300.71, subdivision (a)(3)(B), and are known as the "*Gould* factors."[2] The Petitioner requests that the Department amend or repeal section 1300.71, subdivision (a)(3)(B) for the following reasons:

1. Recent court decisions demonstrating that the "reasonable value" of health care services is the only legal issue to be resolved between payors and non-contracted providers; and,
2. The regulation violates the consistency standard under the Administrative Procedure Act (APA) based on recent court decisions.

The Petition requests two alternative rulemaking actions:

1. Repeal subdivision (a)(3)(B) of section 1300.71; or,
2. Amend subdivision (a)(3)(B) of section 1300.71 to include the following two new factors:
    a. The average contract rates for the service of payors and providers in the general geographic area in which the service was provided; and,
    b. The average amount for the service paid to and accepted by non-contracted providers in the general geographic area in which the service was provided, including payments made by both commercial and government payors (e.g., Medicare and Medi-Cal Programs.

In justification of its request, the Petition states that adding the above-stated factors to the six *Gould* factors currently in the regulation "will make the Regulation consistent with prevailing law, and will provide appropriate guidance to payors, providers, and dispute resolvers in this area."

The Petition also cites recent legal developments as a reason for amending the current version of the regulation:

> "[A]s a result of legal developments since the Regulation was adopted, its importance in California's delegated model has grown significantly, while its intrinsic limitations have become more manifest. Since the Regulation was adopted, the courts decided the *Bell*, *Prospect* and *Children's Hospital Central California*[3] cases and the Workers Compensation Appeals Board has had the opportunity to apply the *Gould* case itself.
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> . . .

[2] *Gould v. Workers' Compensation Appeals Board, City of Los Angeles* (*Gould*) (1992) 4 Cal.App.4th 1059, 1071.
[3] *Bell* v. *Blue Cross of California* (2005), 131 Cal.App.4th 211, hereafter "*Bell*"; *Prospect Medical Group* v. *Northridge Emergency Medical Group* (2009), 45 Cal.4th 497, hereafter "Prospect"; and *Children's Hospital of Central California* v. *Anthem Blue Cross* (2014), 226 Cal.App.4th 1260, hereafter "*Children's Hospital*".

> Unfortunately, the plain meaning of the language employed in *Gould* does not clearly signal the way the factors are to be employed in a non-fee schedule environment. As the application in the *Kunz*[4] case shows, and as the court explicitly held in *Children's Hospital*, the factors, although facially limited to charges, should include customary payment data when the services at issue have no applicable fee schedule amount. Because the regulation itself does not indicate its context, the *Gould* language should be revised so that it will be applied in a manner consistent with common law *quantum meruit* principles, i.e., include within its scope factors relating to prevailing payments as well as billed charges."

Finally, the Petition states that the regulation fails to meet the consistency requirement under the APA. The Petition states:

> "The APA requires that regulations adopted by state agencies must be consistent with law. See Gov. Code § 11349.1. 'Consistency' means being 'in harmony with, and not in conflict with or contradictory to existing statutes, court decisions, or other provisions of law.' Gov. Code § 11349(d). For the reasons set forth above, the Regulation conflicts with existing court decisions governing the measure of quantum meruit claims. Accordingly, the Regulation violates the consistency standard for regulations under the APA and should be amended to conform to applicable law."

DEPARTMENT DETERMINATION

Section 1300.71,[5] subdivision (a)(3)(B), which defines "reimbursement of claim,"[6] was adopted by the Department pursuant to the APA and approved by the Office of Administrative Law (OAL) on July 24, 2003.

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[4] *Kunz* v. *Patterson Floor Coverings, Inc*., et al., 67 Cal.Comp.Cas. 1588 (en banc 2002).
[5] California Code of Regulations (CCR), title 28, section 1300.71, detailing claims settlement practices and rules between payors and contracted and non-contracted providers.
[6] See 28 CCR, section 1300.71(a)(3), which reads in part:

(3) Reimbursement of a Claim means:
(A) For contracted providers with a written contract, including in-network point-of-service (POS) and preferred provider organizations (PPO): the agreed upon contract rate;
(B) For contracted providers without a written contract and non-contracted providers, except those providing services described in paragraph (C) below: the payment of the reasonable and customary value for the health care services rendered based upon statistically credible information that is updated at least annually and takes into consideration:
(i) the provider's training, qualifications, and length of time in practice;
(ii) the nature of the services provided;
(iii) the fees usually charged by the provider;
(iv) prevailing provider rates charged in the general geographic area in which the services were rendered;
(v) other aspects of the economics of the medical provider's practice that are relevant; and
(vi) any unusual circumstances in the case; and
(C) For non-emergency services provided by non-contracted providers to PPO and POS enrollees: the amount set forth in the enrollee's Evidence of Coverage.

The "legal developments" cited by the Petitioner do not require the Department to initiate rulemaking to amend or repeal subdivision (a)(3)(B). The holdings in *Bell* (2005) and *Prospect* (2009) do not address the validity of factors used in determining reasonable payments for non-contracted providers, the subject matter of subdivision (a)(3)(B). The *Children's Hospital* case held that in determining *quantum meruit* cases the courts should consider a wide variety of evidence, including evidence of "agreements to pay and accept a particular price."[7]

However, the *Children's Hospital* decision does not in and of itself invalidate the Department's current regulation or require that the regulation be amended. To the contrary, the Department's current regulation contains a non-exhaustive list of factors that should be "take[n] into consideration." This is not an exclusive list. If applicable, other factors, such as those considered under the common law theory of *quantum meruit*, may be appropriately applied when determining the reasonable and customary rate. The *Children's Hospital* court clearly acknowledges this when it states that "while the *Gould* court set forth a comprehensive set of factors, for the situation presented there, those factors are not exclusive or necessarily appropriate in all cases."[8] The *Children's Hospital* court decision even notes that the Department acknowledged this fact in response to public comments during the rulemaking process for Section 1300.71: "[t]he [Department] . . . noted that 'the regulations are intended to set forth *the minimum* payment criteria to ensure compliance with the Act's claims payment and dispute resolution standards' (italics added), and that, to the extent providers wish to pursue other common law or statutory remedies, they may seek redress in the courts."[9]

For the reasons stated above, the Department declines to initiate rulemaking to amend or repeal section 1300.71, subdivision (a)(3)(B) based on legal developments since the regulation was promulgated.

The Department further declines to amend or repeal section 1300.71, subdivision (a)(3)(B) on the grounds that does not meet the consistency standard under the APA. As shown, the regulation is consistent with current law. The OAL conducted a review of the regulation and made a determination concerning the consistency of section 1300.71 with existing statutes, court decisions and other provisions of law when it reviewed the rulemaking file and issued and approval in 2003. As discussed above, the existing regulation is not inconsistent with current law, including recent case law.

CONCLUSION

For the reasons set forth above, the Department has determined that it will not initiate a rulemaking action to amend or repeal section 1300.71(a)(3)(B).

The Petitioner should note that the Department is currently in the process of obtaining information from its stakeholders regarding reasonable and customary values of payment for

[7] *Children's Hospital* at p. 1274.
[8] *Id.*
[9] *Id.* at p. 1273.

services received by providers. The request for information was sent out on February 13, 2015, and responses are due by March 16, 2015.

The Department appreciates the Petitioner's interest in the Department's rulemaking process.