



STATE OF NEW YORK
DEPARTMENT OF HEALTH
P.O. Box 11729
Albany, NY 12211

Notice of Decision

Decision Date: April 15, 2016

NY State of Health Account ID: [REDACTED]
Appeal Identification Number: AP000000005680

[REDACTED]

Dear [REDACTED],

On March 17, 2016, you appeared by telephone at a hearing on your appeal of NY State of Health's denial of your request to be allowed to change qualified health plans for December 2015.

The enclosed Decision, rendered after that hearing, is issued by the Appeals Unit of NY State of Health.

If you have questions about your Decision, you can contact us by:

- Calling the Customer Service Center at 1-855-355-5777
- Sending Mail to:
NY State of Health Appeals
P.O. Box 11729
Albany, NY 12211
- Sending a Fax to 1-855-900-5557

When contacting NY State of Health about your appeal and/or the Decision, please refer to the Appeal Identification number and the NY State of Health number at the top of this notice.

Legal Authority

We are sending you this notice in accordance with 45 Code of Federal Regulations (CFR) § 155.545.

If you need this information in a language other than English or you need assistance reading this notice, we can help you. Call 1-855-355-5777 (TTY - English: 1-800-662-1220) (TTY - Spanish: 1-877-662-4886).

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Decision Date: April 15, 2016

NY State of Health Account ID: [REDACTED]
Appeal Identification Number: AP000000005680

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Issues

The issues presented for review by the Appeals Unit of NY State of Health are:

Did NY State of Health properly deny your request to be allowed to enroll in a different qualified health plan for December 2015?

Did NY State of Health properly and timely determine that you were not eligible for a special enrollment period?

Procedural History

According to your NY State of Health (NYSOH) account, you were enrolled in a platinum-level qualified health plan (QHP) through Health Republic Insurance of New York (Health Republic), effective January 1, 2015.

On October 30, 2015, NYSOH issued a letter notifying you that Health Republic would no longer be able to offer you health care coverage beginning December 1, 2015. The notice informed you that you needed to select a new plan by November 15, 2015 to maintain health care coverage for the month of December 2015.

On November 4, 2015, NYSOH issued a disenrollment notice confirming that your platinum-level QHP through Health Republic would end November 30, 2015.

On November 15, 2015, NYSOH issued an enrollment notice confirming your selection of a silver-level QHP through Blue Cross Blue Shield of Medical

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Downstate (BCBS), with a monthly premium of \$471.19 and an enrollment start date of December 1, 2015.

On November 23, 2015, NYSOH issued a disenrollment notice informing you that your silver-level QHP with BCBS would end December 31, 2015.

On December 22, 2015, you spoke with a representative from NYSOH's Account Review Unit and appealed the denial of your request to change health plans for December 2015.

On March 17, 2016, you had a telephone hearing with a Hearing Officer from NYSOH's Appeals Unit. The record was developed and held open for up to fifteen days to allow you the opportunity to submit supporting documentation.

On April 1, 2016, the Appeals Unit received an updated statement from you that indicated you could not obtain deductible information from Health Republic. That same day, this statement was made part of the record as "Appellant's Exhibit A" and the record was closed.

Findings of Fact

A review of the record support the following findings of fact:

- 1) NYSOH's October 30, 2015 letter informing you that you needed to select a plan for December 2015 coverage contained the following statements:

Transitional Care

It is possible that your current health care provider may not be in the network of your new health plan. You should be aware that in certain circumstances, enrollees who are pregnant, or who are in on-going treatment for a serious condition, qualify for transitional care that allows them to continue to receive care from their current health care provider for up to 60 days even if that provider does not participate with their new health plan. If you have questions about whether your provider is in the network of your new health plan, you should call the health plan you are considering joining. Member service contact information can be found at <http://info.nystateofhealth.ny.gov/PlanCustomerService>.

Annual Deductible

If you are enrolled in a Health Republic plan that has an annual deductible, the NYS Department of Financial Services is working to ensure that your new health plan will not charge you for the amount of deductible you already met in 2015. Keep your records. You may need to

provide your new plan with evidence that you have met all or part of the 2015 deductible.

The NY State of Health Customer Service Center and our certified in-person assistors are available to help you with a smooth transition to a new health plan starting on December 1, 2015.

- 2) You testified that you selected a silver-level QHP on November 14, 2015 to begin December 1, 2015 based on the poor advice and guidance you received from a certified application counselor (CAC) who was assisting you.
- 3) You testified that your preference was to stay in a comparable platinum-level QHP because of the low deductible and the pending birth of your child in [REDACTED] 2015. Your child was born on [REDACTED], 2015.
- 4) You testified that you had a higher deductible in the silver-level QHP you were enrolled in for December 2015 and contacted NYSOH to request to change plans to a platinum-level QHP with BCBS so you could have a lower deductible.
- 5) You testified that you contacted NYSOH on December 12, 2015 and December 14, 2015, and were told by a NYSOH representative that you could not switch health plans. Your interactions on these dates are noted in the Events Section of your NYSOH account.
- 6) According to your NYSOH account, your plan for December 2015 was not changed.
- 7) The December 22, 2015 entry on the Appeal Summary, dated February 19, 2016 and prepared by the NYSOH, stated that:

Since appellant's [] 2015 enrollment with Health Republic ended 11/30/15, she was allowed to select a plan for December 2015 to avoid a gap. On 11/14/2015, appellant's broker selected Empire HMO 2000 Silver ST INN Pediatric Dental Dep 25 effective 12/01/2015. On [REDACTED] appellant gave birth to newborn []. The appellant [] is requesting to appeal the inability to switch her QHP for the month of December 2015; requesting her plan be switched to Empire BCBS Platinum.

(see, Document [REDACTED] p. 2).

- 8) You testified that you believe you should have qualified for a special enrollment period because of the CAC's poor advice and guidance and because the birth of your child was a qualifying life event.

- 9) You testified that the deductible you paid/met in 2015 under your Health Republic QHP was not carried over and applied to your new plan in December 2015, and you want it to be.

Conflicting evidence, if any, was considered and found to be less credible than the evidence noted above.

Applicable Law and Regulations

Free Look Law

During a specified period of time of not less than ten days nor more than twenty days from the date the policy is delivered to the policyholder, he or she may surrender the policy to the insurer together with a written request for cancellation of the policy. In such event, the insurer will refund any premium paid, including any policy fees or other charges for health insurance coverage (NY Ins. Law § 3216(c)(10)). A notice to this effect is to be prominently printed on the first page of the packet of in an attached notice (*Id.*).

De Novo Review

NYSOH Appeals Unit must review each appeal de novo and “consider all relevant facts and evidence adduced during the appeals process” (45 CFR § 155.535(f)). “*De novo review* means a review of an appeal without deference to prior decisions in the case” (45 CFR § 155.500).

NYSOH Eligibility Determinations

When an individual applies for insurance through NYSOH, NYSOH must determine that person’s eligibility promptly and without undue delay (45 CFR § 155.310(e)(1); 42 CFR § 435.1200(b)(3)(iii)).

NYSOH is required to provide “timely written notice to an applicant of any eligibility determination” made pursuant to 45 CFR Part 155, Subpart D, which sets out requirements for functions in the Individual NYSOH (45 CFR § 155.310(g)).

An applicant or enrollee has the right to appeal an eligibility determination or redetermination or a failure by NYSOH to provide timely notice of eligibility determination (45 CFR § 155.505(b)).

Enrollment Periods

NYSOH must provide annual open enrollment periods during which time qualified individuals may enroll in a qualified health plan (QHP) and enrollees may change QHPs (45 CFR § 155.410(a)).

For the benefit year beginning on January 1, 2015, the annual open enrollment period began on November 15, 2014 and extended through February 15, 2015 (45 CFR § 155.410(e)); however, the open enrollment period was further extended to February 28, 2015 for individuals who took steps to apply for coverage on or before the February 15, 2015 deadline, but were unable to complete the enrollment process (Press Release: NY State of Health Implements 'Waiting in Line' Provision Ahead of February 15 Open Enrollment Deadline, <http://info.nystateofhealth.ny.gov/news/press-release-ny-state-health-implements-%E2%80%99waiting-line%E2%80%99-provision-ahead-february-15-open>).

After each open enrollment period ends, NYSOH provides special enrollment periods to qualified individuals. During a special enrollment period, a qualified individual may enroll in a QHP, and an enrollee may change their enrollment to another plan. This is permitted when one of the following triggering events occur:

- (1) The qualified individual or his or her dependent involuntarily loses certain health insurance coverage:
 - (a) Health insurance considered to be minimum essential coverage...
- (4) The qualified individual's or his or her dependent's, enrollment or non-enrollment in a QHP is unintentional, inadvertent, or erroneous and is the result of the error, misrepresentation, or inaction of an officer, employee, or agent of the Exchange or HHS, or its instrumentalities as evaluated and determined by the Exchange; or...
- (9) The qualified individual or enrollee, or their dependent, demonstrates to the Exchange, in accordance with guidelines issued by HHS, that the individual meets other exceptional circumstances as the Exchange may provide...

(45 CFR § 155.420(d)(1(a), (4), and (9))).

For a special enrollment period that is triggered by circumstances as described in paragraphs (4) and (9) above, the Exchange, here NYSOH, must ensure that coverage is effective on an appropriate date based on the circumstances of the special enrollment period (45 CFR § 155.420(b)(2)(iii)).

In addition, the Centers for Medicare & Medicaid Services (CMS) has determined certain categories of individuals eligible for a special enrollment period under paragraph (d)(4) of 45 CFR § 155.420, that is, when (1) the qualified individual's or his or her dependent's, enrollment or non-enrollment in a QHP is unintentional, inadvertent, or erroneous and is the result of the error, misrepresentation, or inaction of an officer, employee, or agent of the Exchange or HHS, or its instrumentalities as evaluated and determined by the Exchange, or (2) a qualified individual or enrollee, or his or her dependents, was not enrolled in QHP coverage or is eligible for but is not receiving advance payments of the premium tax credit or cost-sharing reductions as a result of "misconduct" on the part of a non-Exchange entity providing enrollment assistance or conducting enrollment activities (Federal Register/Vol. 80, No. 39, February 27, 2015, effective April 28, 2015, to be codified at 45 CFR § 155.420(d)(4)). In such cases, the Exchange may take such action as may be necessary to correct or eliminate the effects of such error, misrepresentation, or inaction by the Exchange or misconduct on the part of a non-Exchange entity (*Id.*).

CMS has defined misconduct to include misinformation, misrepresentation, or inaction by individuals or entities providing formal enrollment assistance (like an insurance company, Navigator, certified application counselor, Call Center Representative, or agent or broker) (Guidance for Issuers on Special Enrollment Periods for Complex Cases in after the Initial Open Enrollment Period, Affordable Exchange Guidance, Department of Health & Human Services, CMS, dated March 26, 2014, as retrieved on October 8, 2015 at:

<http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/complex-cases-SEP-3-26-2014.pdf>

Appealable Issues

An applicant has the right to appeal: (1) an eligibility determination, including the amount of advance payments of the premium tax credit and level of cost-sharing reductions, (2) a redetermination of eligibility, including the amount of advance payments of the premium tax credit and level of cost-sharing reductions, (3) an eligibility determination for an exemption, (4) a failure by the Exchange to provide timely notice of an eligibility determination and (5) a denial of a request to vacate dismissal made by the NYSOH Appeals Unit (45 CFR § 155.505).

Legal Analysis

Initially, the record does not support that you exercised your right to a "free look" and returned the insurance policy to the health insurer, BCBS, within ten to twenty days of receipt with a written request to cancel the policy. Therefore, this decision does not address timely cancellation of your new policy.

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The issue turns to whether, on December 12, 14, and 22, 2015, NYSOH properly denied your request to enroll in a different QHP for the month of December 2015 by not affording you a special enrollment period in that month.

The record does not contain any notice in response to your request. However, it does contain a December 23, 2015 notice in which NYSOH acknowledges receipt of an appeal request and identifies the issues on appeal as “Request to change plans for December 2015.”

In this particular case, the lack a notice on the issue of your request to change QHPs does not prevent the Appeals Unit from reaching the merits of the case or constitute material error. Under 45 CFR § 155.505(b), you are as entitled to appeal NYSOH’s failure to timely issue a notice of eligibility determination as you are to appeal an adverse notice of eligibility determination. The text of the December 23, 2015 notice, which acknowledges your request change QHPs in December 2015 and the December 22, 2015 entry on the Appeal Summary, dated February 19, 2016, together permit the inference that NYSOH did not provide timely and proper notice of its denial of your request to change health plans in December 2015.

Since Appeal Unit review of NYSOH determinations is performed on a de novo basis, no deference would have been granted to a formal denial of your request to change health plans that month had a notice issued. Therefore, currently at issue is whether you were properly denied a special enrollment period to change QHPs as of December 1, 2015.

NYSOH provided an open enrollment period from November 15, 2014 until February 15, 2015, which was later extended to February 28, 2015 for people who could not complete their application by the February 15, 2015 deadline. The record reflects that you had coverage with Health Republic since January 1, 2015 and, therefore, completed your application during the open enrollment period.

Once the annual open enrollment period ends, a health plan enrollee must qualify for a special enrollment period in order to enroll in, or change to another QHP offered in NYSOH’s Marketplace. In order to qualify for a special enrollment period, a person must experience a triggering event.

The record reflects that your health insurance coverage with Health Republic ended on November 30, 2015, because that company was no longer authorized to do business and offer health insurance in New York State as of that date. In the first instance, this event constitutes an involuntary loss of coverage during the year and is considered a triggering life event for purposes of a special enrollment period.

Initially, you were granted a special enrollment period as of October 30, 2015, based on the fact that you were to lose minimum essential coverage with Health

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Republic as of November 30, 2015. Therefore, you were properly permitted to enroll in coverage for 2015 after the open enrollment period ended in February 2015.

On November 14, 2015, you chose a silver-level QHP with the assistance of a CAC. On November 15, 2015, you were sent an enrollment notice confirming that your coverage in your silver-level QHP with BCBS would begin effective December 1, 2015.

You credibly testified that you were given poor advice and guidance by the CAC in selecting a replacement silver-level QHP and ended up with a much higher deductible in December 2015 than you had most of 2015 with your Health Republic platinum-level QHP. You testified that you became aware that you had a much higher deductible once the claims associated with the birth of your child in December 2015 were processed. You credibly testified that you had expected to be placed in a QHP in December 2015 with coverage and deductibles comparable to your Health Republic platinum-level QHP, had conveyed your preference to the CAC and relied upon his recommendation of a silver-level QHP, and would not have selected a higher deductible QHP for December 2015, [REDACTED]. You testified and the record reflects that you made requests in December 2015 to change your QHP, but were denied.

A special enrollment period can be triggered when a person's enrollment in a QHP is unintentional, inadvertent, or erroneous and is the result of the error, misrepresentation, or inaction of an officer, employee, or agent of the Exchange or HHS, or as a result of "misconduct" on the part of a non-Exchange entity, including brokers and CACs providing enrollment assistance or conducting enrollment activities. CMS has defined misconduct to include misinformation misrepresentation, or inaction by individuals or entities providing formal enrollment assistance (like an insurance company, Navigator, certified application counselor, Call Center Representative, or agent or broker).

In this instance, you were erroneously enrolled in a BCBS silver-level QHP, which you believed, based on the information provided to you by the CAC assisting you, was comparable to your Health Republic platinum-level QHP, including deductible amounts. However, you credibly testified that the deductible amount for the BCBS silver-level QHP was much higher, which was not what you had intended. Your erroneous and unintentional enrollment in the BCBS silver-level QHP based on misinformation, which constitutes misconduct, by a CAC therefore triggers a special enrollment period.

Accordingly, NYSOH's decision to verbally deny you a special enrollment period for December 2015, when your enrollment in the BCBS silver-level QHP was based on misinformation and misconduct by a CAC, was not correct and is

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RESCINDED. By this decision, you are being granted a 60 day special enrollment period from the date of this decision within which to select a new QHP.

Ordinarily, the start date of an individual's enrollment in a QHP is based on the date the plan was selected. A plan selected between the first day and fifteenth day of the month goes into effect on the first day of the following month.

However, the effective date of a special enrollment period can depend on the circumstances by which it was triggered. As stated above, you should have been eligible for a special enrollment period based on the fact that your enrollment in the BCBS silver-level QHP was based on misinformation and misconduct by a CAC. In the case of a special enrollment period triggered by erroneous and unintentional enrollment in a QHP caused by misinformation and misconduct by a CAC, NYSOH must ensure that coverage is effective on a date that is appropriate for the circumstances.

In this instance, the appropriate date for the circumstances is the date on which you would have been enrolled in a plan fitting your desired criteria, but-for the misinformation you received from a CAC. Since your enrollment in the BCBS silver-level QHP was effective December 1, 2015, then you are eligible for coverage is effective December 1, 2015.

Since you were entitled to a special enrollment period with a coverage effective date of December 1, 2015, your case is RETURNED to NYSOH to facilitate your enrollment in a QHP of your choosing as of December 1, 2015. By this decision, you are being granted a 60 day special enrollment period from the date of this decision within which to select a new QHP for the month of December 2015.

You will be responsible for premium payments for the month of December 2015 in the QHP you select.

Lastly, we note that you expressed concern at the hearing that the Health Republic deductible amount you paid/met in 2015 was not being carried over and applied to your deductible amount for the month of December 2015 in your QHP for that month. This is not an appealable issue over which the Appeals Unit has jurisdiction and, therefore, we lack authority to rule on the matter. Since your issue concerns a health insurer and application of the 2015 deductible to the new QHP you may select for December 2015, you can contact NYS Department of Financial Services at their Consumer Hotline at (800) 342-3736 (Monday through Friday, 8:30 AM to 4:30 PM); or locally to (212) 480-6400; or you can file a complaint at <http://www.dfs.ny.gov/consumer/fileacomplaint.htm>

Decision

NYSOH's denial of a special enrollment is RESCINDED.

By this decision, you are being granted a 60 day special enrollment period from the date of this decision within which to select a new QHP for the month of December 2015.

Your case is RETURNED to NYSOH to facilitate your enrollment in a QHP of your choosing as of December 1, 2015, provided you pay your premium responsibility for that month.

Effective Date of this Decision: April 15, 2016

How this Decision Affects Your Eligibility

You are eligible for a special enrollment period of 60 days from the date of this decision to select a QHP of your choosing with an effective date of December 1, 2015. NYSOH will facilitate your enrollment in the QHP you select for the month of December 2015.

You will be responsible for payment of the December 2015 premium for the QHP you select.

If You Disagree with this Decision (Appeal Rights)

This Decision is final unless you submit an appeal request to U.S. Department of Health and Human Services or bring a lawsuit under New York Civil Practice Law and Rules, Article 78.

You may bring a lawsuit on any Appeals Unit decision in New York State court in accordance with Article 78 of the New York Civil Practice Law and Rules. This must be done within four months after the date of the Decision Date, which appears on the first page of this Decision.

Additionally, Appeals Unit decisions on issues involving eligibility for qualified health plans, advance premium tax credits, and cost-sharing reductions may be appealed to the U.S. Department of Health and Human Services. This must be done within 30 days of the date of the Decision Date, which appears on the first page of this Decision (45 CFR § 155.520(c)).

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If you wish to be represented by an attorney in bringing an outside appeal and do not know how to go about getting one, you may contact legal resources available to you. You may, for example, contact the local County Bar Association, Legal Aid, or Legal Services.

If You Have Questions about this Decision (Customer Service Resources):

You can contact us in any of the following ways:

- By calling the Customer Service Center at 1-855-355-5777
- By mail at:
NY State of Health Appeals
P.O. Box 11729
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- By fax: 1-855-900-5557

Summary

NYSOH's denial of a special enrollment is **RESCINDED**.

By this decision, you are being granted a 60 day special enrollment period from the date of this decision within which to select a new QHP for the month of December 2015.

Your case is **RETURNED** to NYSOH to facilitate your enrollment in a QHP of your choosing as of December 1, 2015, provided you pay your premium responsibility for that month.

You are eligible for a special enrollment period of 60 days from the date of this decision to select a QHP of your choosing with an effective date of December 1, 2015. NYSOH will facilitate your enrollment in the QHP you select for the month of December 2015.

You will be responsible for payment of the December 2015 premium for the QHP you select.

Legal Authority

We are issuing this determination in accordance with 45 CFR § 155.545.

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A Copy of this Decision Has Been Provided To:

