

# Memorandum

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**To:** Balance Billing Protection Act Arbitrators and Arbitration Entities

**From:** Jane Beyer, Senior Health Policy Advisor

**Date:** April 4, 2022

**Subject:** Update regarding E2SHB 1688 – newly enacted legislation aligning the Balance Billing Protection Act and the federal No Surprises Act

## **Background:**

Washington state's Balance Billing Protection Act (BBPA) went into effect on January 1, 2020. The federal No Surprises Act (NSA) went into effect on January 1, 2022. On March 31, 2022, Governor Inslee signed [E2SHB 1688](#). The Washington state legislature enacted E2SHB 1688 with a goal of clarifying Washington state law related to balance billing and access to emergency care services. The legislation became effective upon the Governor's signature.

Several of the new law's provisions relate to carrier/provider dispute resolution and arbitration. e.g. Secs. 11 and 18. OIC will be engaging in rulemaking to fully implement E2SHB 1688 over the course of the next several months. This memorandum is intended to provide information on the provisions of the law related to dispute resolution and arbitration. These provisions apply to arbitration proceedings initiated with the submission of an Arbitration Initiation Request Form to OIC on or after March 31, 2022.

## **Relevant provisions of E2SHB 1688:**

### Services subject to balance billing protections

Sec. 7 of the act amends RCW 48.49.020 to broaden the services for which balance billing is prohibited. These services encompass those protected from balance billing under the NSA. In addition to screening and stabilization services, emergency services now also include post-stabilization services, i.e. services provided after a patient is stabilized and as part of outpatient observation or an inpatient or outpatient stay with respect to the visit during which screening and stabilization services were furnished. Sec. 2(16)(a)(iii); Sec. 2(16)(b)(iii) (broadening the definition of emergency services).

Under E2SHB 1688, in addition to a hospital setting, emergency services can be provided by behavioral health emergency services providers, which include crisis triage and stabilization facilities, mobile rapid response crisis team services, evaluation and treatment facilities and medical withdrawal management facilities. Sec. 2(16)(b); 2(48).

E2SHB 1688 defines non-emergency services subject to balance billing protections under state law to include non-emergency health care services performed by nonparticipating providers at certain participating facilities. These non-emergency services are defined in RCW 48.43.005 to include covered items or services other than emergency services with respect to a visit at a participating health care facility, as provided in section 2799A-1(b) of the public health service act (42 U.S.C. Sec. 15 300gg-111(b)), 45 C.F.R. Sec. 149.30, and 45 C.F.R. Sec. 149.120. Sec. 2(46); Sec. 7(1)(b). Non-emergency services protected under the NSA are broader than the scope of non-emergency services formerly protected under the BBPA.

### Dispute resolution procedures

Sec. 11 amends RCW 48.49.040 and includes the changes described below.

To resolve disputes between a nonparticipating (i.e. out-of-network) provider and carrier related to payment of a nonparticipating provider for emergency and non-emergency services, E2SHB 1688 provides for a transition from use of the BBPA arbitration process to use of the NSA independent dispute resolution (IDR) process beginning on July 1, 2023 or later date determined by the Commissioner. Sec. 11(1).

When Washington state transitions to use of the NSA independent dispute resolution system, if behavioral health emergency services payment disputes can be addressed using the federal IDR system, that system will be used. If that is not possible, the BBPA arbitration process will continue to be used to resolve those disputes. Sec. 11(2).

Under E2SHB 1688, air ambulance payment disputes must exclusively use the federal NSA IDR system.

Disputes arising under section 18, as described below, will be resolved using the BBPA arbitration process.

### Arbitrator minimum qualifications

RCW 48.49.040(2) establishes minimum qualifications for arbitrators under the BBPA and directs OIC to provide the parties to an arbitration with a list of qualified arbitrators. The law provided that arbitrators "should" have experience in matters related to medical or health care services. E2SHB 1688 amends that section of law to provide that the arbitrators on the list "must" have experience in matters related to medical or health care services. Sec. 11(5). Accordingly, OIC plans to review current arbitrators' experience within the next several months for compliance with this new requirement.

## Revisions to the BBPA arbitration process

The following revisions were made to the BBPA arbitration process (RCW 48.49.040):

- Claims bundling: Multiple claims may be addressed in a single arbitration proceeding if the claims at issue meet the following requirements:
  - The claims must involve identical carrier and provider, provider group, facility, or behavioral health emergency services provider parties. Sec. 11(4)(a).
  - The bundled claims must have the same procedural code, or a comparable code under a difference procedural code system. Sec. 114(b).
  - Bundled claims must occur within 30 business days of each other. Sec. 11(4)(c).
- If the parties to a pending arbitration proceeding agree on an out-of-network payment rate at any point before the arbitrator has made their decision, the agreed upon amount will be treated as the out-of-network payment rate for the service(s) at issue. Sec. 11(7).
- “Baseball arbitration” is retained, such that the arbitrator will choose the final offer of either the nonparticipating provider or the carrier. Sec. 11(8).
- The arbitrator’s decision must include an explanation of the elements of the parties’ submissions relied upon to make their decision and why those elements were relevant to their decision. Sec. 11(8)(a).
- The arbitrator’s decision is final and binding on the parties and is not subject to judicial review. Sec. 11(11).
- The Commissioner is given authority to establish arbitrator fee ranges or schedules by rule. Sec. 11(9).
- Arbitrator fees must be paid by the parties to the arbitrator within 30 calendar days following receipt of the arbitrator’s decision by the parties. Sec. 11(9).
- If a federal IDR decisionmaker finds that it does not have jurisdiction over a dispute, timeframes related to good faith negotiations and notice for BBPA arbitration are modified. Sec. 11(3)(b).

## Section 18: Arbitration to resolve contracting disputes:

Washington state adopted [Network Access Rules](#) to ensure that carriers have a sufficient number and type of providers in their health plan provider networks. When a carrier has a gap in their provider network, they can file and request that OIC approve an [alternative access delivery request](#) (AADR) to ensure that consumers will be able to access services covered by their health plan at no greater cost than if they were seeing an in-network provider.

Section 18 of E2SHB 1688 provides for use of the BBPA arbitration process in limited circumstances for services that are subject to balance billing protections when a carrier and an

out-of-network provider or facility cannot reach agreement on a contract and an amended AADR has been approved by the Commissioner. OIC must approve use of this arbitration process. The law includes some provisions that apply specifically to arbitration proceedings in these circumstances:

- The issue before the arbitrator is the commercially reasonable payment for services addressed in the AADR. Sec. 11(13)(a).
- During the period from the effective date of the AADR to issuance of the arbitrator's decision, the allowed amount paid to providers or facilities for services addressed in the AADR, shall be a commercially reasonable amount, based on payments for the same or similar services provided in a similar geographic area. Sec. 18(13)(b).
- The arbitrator shall issue a decision related to whether payment for services should be made at the final offer amount of the carrier or the out-of-network provider or facility. Sec. 11(13)(a).
- The arbitrator's decision is final and binding on the parties for services rendered to enrollees from the effective date of the amended AADR to the expiration date of the AADR or the date the parties enter into a provider contract and provider compensation agreement, whichever occurs first. Sec. 11(13)(a).
- For these disputes, the BBPA arbitration process will continue to be used, rather than transitioning to the NSA IDR system in 2023. Sec. 11(13)(c).

OIC has scheduled a webinar on April 29 at 2:00 p.m. PST to provide a detailed review of E2SHB 1688. Arbitrators are asked to [register](#) for the webinar in advance.

Questions regarding the information in this memorandum can be submitted to [policy@oic.wa.gov](mailto:policy@oic.wa.gov).