

May 31, 2022

Jane Beyer, Senior Health Policy Advisor
Washington Office of the Insurance Commissioner
P.O. Box 40258
Olympia, WA 98504-0258
Submitted via email to: rulescoordinator@oic.wa.gov

Re: Comments on CR-101 for the Implementation of E2SHB 1688 (R 2022-02)

Dear Ms. Beyer,

On behalf of Molina Healthcare, Inc. (“Molina”), thank you for the opportunity to provide input regarding the development of a new rule to implement E2SHB 1688. We understand the intent of this rulemaking is to revise the Balance Billing Protection Act (“BBPA”) rules to be consistent with Engrossed Second Substitute House Bill 1688 (“E2SHB 1688”), which more closely aligns with BBPA with the federal No Surprises Act (“NSA”). With that in mind, we offer the following comments for your consideration.

E2SHB 1688 Behavioral Health Emergency Services –

Section 2(48)(a)-(f) of E2SHB 1688 defines a behavioral health emergency services provider to include (a) a crisis stabilization unit, (b) “[a]n evaluation and treatment facility that can provide directly, or by direct arrangement with other public or private agencies, emergency evaluation and treatment, outpatient care, and timely and appropriate inpatient care to persons suffering from a mental disorder, and which is licensed or certified as such by the department of health”; (c) an agency certified to provide outpatient crisis services; (d) triage facilities, which must meet residential treatment facility standards; (e) secure withdrawal management and stabilization facilities; and (f) mobile rapid response crisis teams, connected with a behavioral health administrative service organization. Sec. 7(3)-(4) states that a behavioral health emergency services provider may not balance bill an enrollee for emergency services provided to an enrollee, and clarifies the rules regarding an enrollee’s cost sharing obligation after receiving emergency services from a behavioral health emergency services provider. Molina understands that for these services an enrollee’s cost sharing obligation is calculated using the methodology to calculate qualifying payment amount (“QPA”) as described in 45 CFR § 149.140 (which implements the NSA), and that until July 1, 2023, or a later date determined by the OIC, the allowed amount paid to an out-of-network provider of these services shall be a “commercially reasonable amount” based on payments for the same or similar services provided in a similar geographic area, and BBPA arbitration is required. After that date, transition to the NSA payment standard and independent dispute resolution system is required.

However, the NSA does not apply to behavioral health emergency services providers. In the emergency services context, the NSA only applies to emergency services rendered at (1) independent freestanding emergency departments, and (2) hospital emergency departments (extending to other hospital departments as applicable). Thus, in many if not most circumstances, “behavioral health emergency service providers” will not be subject to the NSA or the

implementing regulation referenced in E2SHB 1688 (45 CFR § 149.140). Molina seeks clarity on how and whether it can determine the QPA with respect to services that are not subject to the NSA or the referenced regulation.

QPA Requirement

E2SHB 1688 amends the BBPA to more closely align with the NSA, including by requiring patient cost-sharing to be based upon the QPA as defined in the NSA. Previously, the BBPA required patient cost-sharing to be based upon the “commercially reasonable amount” paid to the provider. The NSA and implementing regulations generally define QPA as the median contracted rate for a specific service (defined by CPT, HCPCS, or DRG code) in a geographic region (defined by reference to metropolitan statistical areas) and for a particular provider specialty as of January 31, 2019, adjusted by inflation to present. Plans are also generally required to calculate QPA on a fee-for-service basis even when their contracted rate is based on a bundled payment methodology. Given these stringent requirements, it is a significant operational change to determine QPA for all service types and geographic regions in Washington in order to meet the patient cost-sharing requirement in E2SHB 1688. Molina seeks clarification of whether the OIC will defer enforcement of this new requirement to a reasonable date to permit plans like Molina to calculate QPA values accurately and ensure going-forward compliance with the BBPA.

Services Previously Not Subject to BBPA

E2SHB 1688 expands application of the BBPA to certain services that were previously exclusively subject to the NSA; specifically, (1) post-stabilization emergency services, and (2) services by non-participating providers at participating facilities that are not surgical or ancillary services. However, aside from the patient cost-sharing requirement (which is potentially effective immediately, as addressed above), all services within the scope of E2SHB 1688 remain subject to previous BBPA payment and dispute resolution requirements until July 1, 2023. After this point, the BBPA will align with the NSA in that the NSA’s payment and dispute resolution standards will apply. It would be extremely challenging to temporarily change Molina’s processes for the BBPA’s newly-covered services only to change back to NSA standards on July 1, 2023. It is also consistent with the implicit rationale for the delayed effective date, which is likely to allow all parties time to prepare for the operational changes in shifting from Washington to federal payment and dispute resolution standards. Molina seeks clarity on whether the OIC will enforce Washington payment and dispute resolution standards for services that are newly covered by the BBPA, and for which Molina was previously applying NSA payment and dispute resolution standards, prior to when the BBPA ultimately requires application of the NSA payment and dispute resolution standards on July 1, 2023.

We appreciate your consideration of our comments and your continued collaboration as this effort continues to evolve. Please feel free to contact me to discuss the foregoing.

Sincerely,
Gretchen Gillis
AVP, Government Contracts
Molina Healthcare of Washington