

May 31, 2022

Ms. Jane Beyer
Senior Health Policy Advisor
Office of the Insurance Commissioner

Submitted via email to: janeb@oic.wa.gov; rulescoordinator@oic.wa.gov

Re: Comments on CR-101 Phase of R 2022-02, Implementation of E2SHB 1688

Dear Ms. Beyer:

Thank you for the opportunity to provide preliminary comments as the Office of the Insurance Commissioner (OIC) launches rulemaking to implement E2SHB 1688. Though we anticipate sharing more specific feedback as the rulemaking proceeds, we write at this stage to suggest principles to guide the rulemaking process.

Northwest Health Law Advocates is a nonprofit legal organization working to expand affordable, accessible health care for Washington residents. Over the years, we have encouraged OIC to strike the right balance between consumer access and health care system affordability in its network access standards. We have supported OIC in putting consumers first, while establishing systems-level mechanisms to address provider-issuer contractual disputes and price concerns.

We appreciate the significant strides that OIC has made in this area over the years, including implementing the state's Balance Billing Protection Act (BBPA) and shepherding BBPA refinements through the legislative process in E2SHB 1688. This new bill offers a significant opportunity for OIC to continue prioritizing consumer protections in balance billing while simultaneously addressing inflationary health care price pressures. As OIC proceeds in rulemaking, we ask for a focus on three principles:

1. Center consumers in implementation.

The BBPA, federal No Surprises Act (NSA), and E2SHB 1688 resulted from one terrible problem: a total market failure of providers and issuers to protect consumers from balance billing. For many years, market participants held consumers hostage during contractual disputes, subjecting consumers to unpredictable out-of-network charges. The reforms in E2SHB 1688 will take important steps toward closing many of the remaining loopholes in our law, such as new protections for consumers experiencing behavioral health crises. We encourage OIC to implement the bill with a primary lens of consumer protection, recognizing that the Legislature passed balance billing protection

laws with the explicit goal that “consumers must not be placed in the middle of contractual disputes between providers and health insurance carriers.”¹

2. Retain state law consumer protections.

As OIC begins rulemaking, we ask that you afford particular attention to those areas of the law where the BBPA and E2SHB 1688 exceed the baseline protections of the federal NSA. Throughout last summer’s stakeholder process and this past legislative session, consumer groups emphasized the importance of state law provisions which exceed the NSA, such as the BBPA’s prohibition on consumer waivers of balance billing protections. The Legislature heeded these recommendations, retaining the waiver prohibition and other state-level protections in E2SHB 1688 while introducing new consumer protections from the NSA. We ask that OIC continue in this vein during this summer’s rulemaking, braiding the new laws together while emphasizing our existing state-level protections, with the goal of a uniform law that Washington consumers can readily understand and use.

3. Avoid price inflation effects.

During legislative session, there was substantial discussion about Sections 11 and 18 of E2SHB 1688, related to provider reimbursement when an Alternate Access Delivery Request (AADRs) is in effect. These provisions recognize the serious problem of inflationary pressures that can arise during provider-issuer contractual disputes, and appropriately offer a systems-level mechanism to resolve such disputes while protecting consumers who need access to the provider in question.

While additional policy measures are needed to address the underlying drivers of rising health care prices, Sections 11 and 18 offer an interim approach which place the onus on the provider and issuer, rather than burdening consumers or further inflating health care prices. We support the solution the Legislature crafted, as well as any implementation guidance OIC needs to issue to implement the sections in a strong, consumer-focused fashion.

We also encourage OIC to publish data on any trends in AADR utilization and associated impacts on consumers as roll-out continues, above and beyond the granular AADR reports available on OIC’s website today. We are particularly interested in any uptick in AADRs involving particular provider types, issuers, or geographic locations, as well as any trends in consumer complaints. We suggest that such data would be most useful if it

¹ See Preamble to SSB 1065, codified at Chap. 427, Laws of 2019.

spans from before BBPA implementation in 2020 until after E2SHB 1688 implementation in 2022 and 2023.

Other Implementation Issues

Finally, though we understand the scope of this particular rulemaking may be limited to specific provisions in E2SHB 1688, we seek dialogue with OIC regarding broader implementation of balance billing protections and network access. Specifically:

- We are aware that federal agencies have recently published guidance establishing time-and-distance network adequacy standards for federally-regulated Qualified Health Plans.² We are interested in OIC's view on these standards. We would appreciate discussion with OIC about any current trends in consumer complaints related to network access, and whether there are elements of the new federal standards which could improve access while avoiding inflationary pressures.
- We remain concerned about remaining loopholes in state and federal law, such as carve-outs for ground ambulance and urgent care centers. We look forward to dialogue with OIC about its forthcoming ground ambulance study, as well as solutions to other remaining balance billing problems.

Thank you again for the opportunity to provide initial feedback on this rulemaking. We look forward to working with you and a broad range of stakeholders to ensure that Washington residents are afforded robust consumer protections against balance billing under the new law.

Sincerely,

Emily Brice
Senior Attorney and Policy Advisor
Northwest Health Law Advocates

² CCIIO, 2023 Final Letter to Issuers in the Federally-facilitated Exchanges (April 28, 2022), at <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Final-2023-Letter-to-Issuers.pdf>, Section 3.