

August 12, 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 1st Prepublication Draft of R 2022-02, Implementing 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.

Northwest Health Law Advocates is a nonprofit legal organization working to expand affordable, accessible health care for Washington residents. Given this mission, we support OIC in ongoing efforts to protect consumers from surprise medical bills while establishing mechanisms to address provider-issuer contract and price disputes.

We appreciate OIC's leadership in last session's E2SHB 1688, which aims to seamlessly integrate the state Balance Billing Protection Act (BBPA) and No Surprises Act (NSA) and close certain loopholes in both laws. We now support OIC in the overall tone of the first prepublication rule draft, which hews closely to E2SHB 1688 while implementing the statute with an eye toward consumer protection, as the Legislature intended.¹ With that general support in mind, we offer the following comments on the draft:

1. OIC should retain WAC provisions that would protect consumers from unexpected medical bills and inflated systems costs.

We strongly support the many provisions in the proposed draft that protect consumers from costs associated with contractual disputes. We are particularly supportive of the following elements of the prepublication draft:

- WAC 284-43B-020. Balance billing prohibition & consumer cost-sharing. We support language in the prepublication draft which continues to protect consumers from excess cost-sharing and prohibit providers from asking consumers to "waive" these protections. As the Legislature affirmed in E2SHB 1688 and its predecessor SSHB 1065, Washington residents must not be asked to give up their balance billing protection rights in any context.

- WAC 284-43B0-050. Notice of consumer rights and transparency. We support language in the prepublication draft which continues to require carriers and providers/facilities to use a standard template to inform consumers of their legal rights at key moments in the enrollee/patient experience.
- WAC 284-170-220. Amended alternate access delivery request for services subject to the BBPA. We support this section of the draft and related language, which appropriately implements provisions of E2SHB 1688 related to provider reimbursement when an Alternate Access Delivery Request (AADR) is in effect. As the Legislature intended, this section of the draft recognizes the serious problem of inflationary pressure that can arise during provider-issuer contractual disputes and offers a system-level mechanism to manage such costs while protecting consumers who need access to the provider in question.

Please retain these provisions in the proposed rules moving forward.

2. OIC should clarify a few provisions in the prepublication draft to align with intent.

We suggest minor changes to the following sections to align with the overall consumer-focused tenor of the draft.

- WAC 284-43B-010. Definitions. Section 2(c) defines the term “balance bill” as a “bill sent to an enrollee by a nonparticipating provider, facility, behavioral health emergency services provider or air ambulance services provider for health care services provided to the enrollee after the provider or facility’s billed amount is not fully reimbursed by the carrier, exclusive of permitted cost-sharing.” We suggest that the term “permitted cost-sharing” could be confusing in this context without further definition. We recommend remedying the issue by adding a cross-reference to WAC 284-43B-020, which establishes parameters for consumer cost-sharing.
- WAC 284-43B-020. Balance billing prohibition & consumer cost-sharing. Though we support this section as a whole, we recommend addressing three issues:
 - As currently written, Subsection (1)(a) replaces the BBPA methodology for determining consumer cost-sharing with the NSA’s “qualifying payment amount” (QPA) methodology. Though we agree with this change, we are aware there is uncertainty with respect to pending federal litigation over the QPA. We suggest that OIC could address this uncertainty by adding language that clarifies that if the QPA is invalidated at a federal level, OIC will revert to the existing BBPA methodology for determining consumer cost-sharing.

- As currently written, Subsection (1)(e) states that if a consumer pays excess cost-sharing to a nonparticipating provider/facility, the provider/facility must pay simple interest at a rate of “...twelve percent per annum beginning on the first calendar day after the thirty business days.” This existing language is confusing, as it appears to suggest that the provider should only pay 1% interest for each month that passes after the excess cost-sharing. That is inconsistent with the statute, which does not include a concept of “per annum” and instead simply says “Interest must be paid to the enrollee for any unrefunded payments at a rate of 12 percent beginning on the first calendar day after the 30 business days.” RCW 48.49.020(2)(c). We recommend that OIC read the statute more plainly, which would require the provider/facility to repay the consumer with an additional 12% interest for each month (30 days) that passes after the excess billing. This simpler reading of the statute would better align with its goal, which is to discourage providers/facilities from inappropriately billing consumers. Allowing providers/facilities that have inappropriately billed consumers to repay the debt with a 1% monthly interest accrual does not further the public policy goal of the statute and is not supported by its text.
- As currently written, Subsection 3 includes strong language prohibiting providers/facilities from asking consumers to waive their balance billing protection rights. Though we wholeheartedly agree with this approach and it is aligned with state statute, it is confusing that this draft subsection cross-references the federal No Surprises Act and implementing regulations, which explicitly *allow* such waivers in certain settings. Unless corrected, this could lead a regulated entity to misunderstand Washington law’s clear prohibition on waivers of any kind. We recommend rephrasing the latter portion of this subsection to clarify that consumer waivers which might be permitted under the NSA are never permitted in Washington.
- WAC 284-43B-050. Notice of consumer rights & transparency. Though we support this section as a whole, we recommend addressing four issues:
 - As currently written, Subsection 2(a) does not require carriers to send the standard notice of consumer rights with billing or Explanation of Benefit statements related to out-of-network care. Though the subsection requires carriers to include the notice when authorizing out-of-network care and providers to include the notice when billing for such care, it does not explain what should happen in any billing/benefits-related documents *from the carrier* for out-of-network care that was not previously authorized. We recommend that OIC add language addressing this gap in a future draft.

- As currently written, Subsection 2(b)(i) only requires facilities/providers to comply with consumer notice requirements if the facility or provider is “owned and operated independently from all other businesses and has more than 50 employees.” We have not had an opportunity for exhaustive review of federal statute and regulations given the short time period OIC allowed for comment on this prepublication draft, but have not yet identified a basis for the exemption in federal law and encourage OIC to evaluate whether it remains appropriate given the newly expansive application of the NSA. Though we understand the need for administrative simplification for small businesses, we are concerned that there is a *heightened* risk of inappropriate balance billing by small/independent providers/facilities who are less familiar with the parameters of state and federal law. We ask OIC to revisit this carve-out in future drafts.
- As currently written, Subsection 2(b)(i)(A) also condones the use of text links to a provider/facility webpage to implement notice requirements. As we have previously raised, the Washington Attorney General has repeatedly warned Washington consumers never to click on unsolicited text links, as this technology is frequently used to prey on consumers in text-message “phishing” attacks (known as “smishing”).ⁱⁱ As a fellow statewide agency with a consumer protection mission, OIC should align with AGO on efforts to combat fraud. We recommend removing mention of text-based noticing from this section.
- As currently written, WAC 284-43B-050 is missing any mention of language and disability accommodations for patients and enrollees who need this kind of assistance to understand their legal rights. Please add reference to such accommodations, reviewing federal regulations implementing the NSA at 45 CFR §149.420, as well as OIC’s existing nondiscrimination rules for carriers (WAC 284-43-5940) and other state laws that apply to providers/facilities (e.g., WA Law Against Discrimination, Ch. 49.60 RCW) to determine appropriate content for the standard notice and its dissemination.
- WAC 284-170-210. Alternate access delivery request. As currently written, Subsection 1(b)(i) states that copayments and deductibles must apply to AADRs at the same level as in-network services. We recommend broadening this statement to include all forms of consumer cost-sharing, including coinsurance and out-of-pocket maximum accruals.

3. OIC should evaluate opportunities to improve network access standards.

Though we understand the scope of this particular rulemaking may be limited to specific provisions in E2SHB 1688 given the urgent need to implement rules for statutes that are currently in effect, we seek dialogue with OIC regarding the broader state of network access standard implementation.

Upon re-review of OIC's existing network access standards in WAC 284-170-200 *et. seq.* during this balance-billing-focused rulemaking, we are increasingly concerned about the disconnect between OIC's standards and federal standards. The Centers for Medicare & Medicaid Services (CMS) has recently finalized network access guidance to issuers in the Federally-Facilitated Marketplace for Plan Year 2023 that appears to offer greater consumer protection than Washington's current standards.ⁱⁱⁱ For example, while OIC rules suggest that its minimum standards require 80% of child enrollees to have access to a pediatrician for primary care within 30 miles (urban) or 60 miles (rural), the CMS guidance now require 90% of child enrollees to have access to a pediatrician for primary care within 5 miles (large metro), 10 miles (other metro), 30 miles (rural), or 60 miles (only for counties with extreme access considerations). There are similar disparities for other provider types between the OIC and most recent CMS standard.

We seek dialogue with OIC on the current state of its network access standards and how these standards compare in practice to CMS' recently revised 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.

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

Sincerely,

Emily Brice
Senior Attorney and Policy Advisor
Northwest Health Law Advocates

ⁱ See Preamble to SSBH 1065, codified at Chap. 427, Laws of 2019.

ⁱⁱ See, e.g., <https://www.atg.wa.gov/all-consuming-blog/it-s-national-protect-your-identity-week>

ⁱⁱⁱ 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.