Washington State Hospital Association

September 13, 2022

Jane Beyer, Senior Health Policy Advisor
Office of the Insurance Commissioner
P.O. Box 40255
Olympia, WA 98504

Re: WSHA Comments on Second HB 1688 Prepublication Draft Rule

Dear Ms. Beyer:

On behalf of more than 100 hospital and health system members, the Washington State Hospital Association (WSHA), appreciates the opportunity to provide comments on the second prepublication draft rule for HB 1688.

WSHA concern on definition of outpatient hospital department

We appreciate the changes made as a result of our comments to the first prepublication draft. However, we still have significant concerns with the definition of "hospital outpatient department" as drafted. The definition in the latest draft continues to be overly broad and captures clinics and other non-hospital settings that are not subject to the Balanced Billing Protection Act (BBPA) and No Surprises Act (NSA). The definition is different than the definitions contained in 42 CFR §413.65 used by the Centers for Medicare and Medicaid Services and the Department of Health. This is a significant issue as provisions of the NSA and BBPA apply differently depending on whether a service was performed in a hospital or non-hospital setting.

The BBPA does not apply to freestanding clinics. These types of clinics are owned by both hospitals and non-hospital entities. As drafted, your definition would apply the BBPA to hospital-owned freestanding clinics if they have names or signage that indicate affiliation with a health system, not just those that operate as hospital departments. Freestanding clinics that are affiliated with health systems would be treated differently than independent clinics and medical groups We believe subjecting hospital affiliated freestanding clinics and independent clinics to different requirements is outside the scope of the law and rulemaking authority.

For example, under the BBPA and NSA, charges by nonparticipating providers for the reading/interpretation of radiology services performed at a participating hospital are subject to the balance billing prohibitions, but the same services at a participating independent site are not.

We appreciate the effort made in the draft rules to maintain consistency between the NSA and the BBPA. We are concerned that the definition in the second stakeholder draft expands the definition of hospital in a way that was not contemplated by the legislation and undermines this consistency. As we wrote in our previous comments, the term "hospital outpatient department" should be limited to services provided by sites that are licensed as a department of a hospital in accordance with 42 CFR §413.65. The term should not be applied to a hospital or health system's other affiliated sites, such as its freestanding clinics, unless the site meets the CFR requirements. The CFR does include a "public

awareness" criterion, but it is limited to ensuring that patients that receive services in an actual hospital department setting are aware they are receiving services from the hospital itself and will be billed accordingly. The provision does not apply to a hospital or health system's other entities that are not actually hospital departments. The CFR states:

Public awareness. *The facility or organization seeking status as a department of a provider, a remote location of a hospital, or a satellite facility is held out to the public and other payers as part of the main provider. When patients enter the provider-based facility or organization, they are aware that they are entering the main provider and are billed accordingly.*

The notification requirements of RCW 70.01.040 are consistent with the CMS criterion. The proposed definition is much more expansive and conflicts with the CFR language.

Requested Changes. We recommend the following changes (blue highlight) to the definition of "outpatient hospital department" to provide additional clarity:

(i) "Hospital outpatient department" means an entity or site that is licensed as a hospital department and provides outpatient hospital services, that a patient may reasonably expect is part of a hospital ~~or hospital system,~~ including:

(i) An entity that is a provider-based facility under 42 CFR §413.65;

(ii) An entity that is licensed as a hospital department and provides hospital services with consumer-facing indicia of affiliation with a hospital ~~or hospital system~~, including but not limited to:

(A) Signage indicating an affiliation with a hospital or hospital system;

(B) Charging ~~Inclusion of~~ a hospital facility fee in any billing associated with the receipt of outpatient services from the entity; or

(C) ~~Scheduling from a central office associated with a hospital or hospital system; or~~

~~(D)~~ Billing under a hospital's federal Center for Medicaid and Medicare Services billing identifier.

We recognize OIC's interest in ensuring patients are aware of a site's potential facility status. We do not believe expanding the definition of hospital through rulemaking to include all of a health system's sites is an appropriate way to do this. Nor should non-hospital sites that are affiliated with hospitals or hospital systems be compelled to change their names or remove identification of system affiliation in order to avoid being treated as hospital for purposes of the BBPA. We would appreciate the opportunity to meet to discuss this further.

Thank you again for the opportunity to comment. If you have questions, please contact Andrew Busz, WSHA Policy Director, Finance at (206) 216-2533 or andrewb@wsha.org.

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