NoHLA
Northwest Health Law Advocates

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 2nd Prepublication Draft of R 2022-02, Implementing E2SHB 1688

Dear Ms. Beyer and Rules Team:

Thank you for the opportunity to provide additional comments as the Office of the Insurance Commissioner (OIC) continues rulemaking to implement E2SHB 1688.

Northwest Health Law Advocates is a nonprofit legal organization working to expand affordable, accessible health care for Washington residents. We support OIC in its ongoing efforts to protect consumers from surprise medical bills while establishing mechanisms to address provider-issuer contract and price disputes. We appreciate that the second prepublication draft maintains the critical consumer protections of the first prepublication draft and also addresses a number of the technical suggestions we raised regarding the first draft.

1. We particularly support the following elements of the second prepublication draft, with a few remaining questions as noted:

- WAC 284-43A-010(1)(f). Definitions – Adverse Benefit Determination. We support the addition of a non-exhaustive list of adverse determination circumstances related to surprise billing which may trigger an appeal right. This is a helpful clarification.

- WAC 284-43B-010(2)(h). Definitions – Facility. We strongly support the OIC in retaining and refining language which clarifies that freestanding emergency departments, hospital outpatient departments and other types of hospital-related settings are subject to balance billing requirements for facilities. This is consistent with both the intent and language of the No Surprises Act and state Balance Billing Protection Act. As health care settings grow more varied in our state,[1] it is critical for patients to have a clear and consistent expectation of their balance billing rights throughout their experience with a given hospital system. As the draft rule recognizes, consumers should have balance billing protections whenever they might reasonably view a health care setting as part of a hospital or hospital system due to consumer-facing indicia of affiliation, such as signage, shared billing, or facility fees.

[1] See, e.g., https://www.healthaffairs.org/doi/10.1377/hlthaff.2016.0412.

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The onus should not be on a consumer to understand the corporate structure or specific licensure of a health care setting which holds itself out to be affiliated with a hospital to the public. Please retain the current approach in the final proposed rule.

However, we are wondering why OIC removed shared scheduling as an example of such consumer-facing indicia of affiliation – we agreed with the previous draft that shared scheduling suggests hospital affiliation and would recommend restoration of this provision unless there is a technical reason why it may not be included as an example.

- WAC 284-43B-010(2)(c). Definitions – Balance billing. We appreciate OIC's change to clarify that balance bill cost-sharing may only extend to the circumstances allowed in WAC 284-43B-020.

- WAC 284-43B-020(1)(e). Balance billing prohibition & consumer cost-sharing. We appreciate OIC's change to clarify that of a consumer pays excess cost-sharing to a nonparticipating provider/facility, the provider/facility must pay simple interest at a rate of twelve percent, rather than twelve percent per annum.

- WAC 284-43B-020(3). Balance billing prohibition & consumer cost-sharing. We appreciate OIC's change to clarify that consumer waivers which might be permitted under the NSA are never permitted in Washington under state law.

- WAC 284-43B-050(2)(a)(ii) and (5). Notice of consumer rights & transparency. We appreciate OIC's change to clarify that carriers must send the standard notice of consumer rights with any Explanation of Benefit statements related to services protected by balance billing laws. We also strongly support the change to clarifying that carrier notices must be accessible to individuals with disabilities or limited English proficiency, in accordance with WAC 284-43-5940 through WAC 284-43-5965.

  However, we are concerned that this reference to OIC nondiscrimination rules may be insufficient given ongoing changes at a federal level. As currently written, WAC 284-43-5950 requires issues to provide meaningful access "consistent with federal rules and guidance in effect on January 1, 2017" – in other words, the Obama Administration interpretation of §1557 nondiscrimination rules. As OIC is aware, the Biden Administration is currently engaged in rulemaking to update the §1557 rules, which includes restoring elements of the Obama Administration rules but also further clarifying certain aspects of the federal rules. The outcome of this proposed rulemaking is still pending. To address the possibility of other nondiscrimination laws which ultimately may be more protective of consumers than the 2017 regulations, it

may be valuable for OIC to refer to "WAC 284-43-5940 through WAC 284-43-5965 and other relevant state and federal nondiscrimination laws to ensure the highest standard of meaningful access is available to enrollees."

- WAC 284-170-210(1)(b). Alternate access delivery request. We continue to support OIC in its approach to provider reimbursement when an AADR is in effect. We agree with OIC's current approach in the second prepublication draft: an AADR *may* result in billed charges for the first three months (rather than must), followed by the arbitrated rate for the remainder of the year. This approach offers maximum opportunity for negotiation between the parties and avoids inflationary pressure on prices, rather than locking carriers into payment of billed charges for the first three months of the AADR.

- WAC 284-170-280(3)(j). Network Reports. We support OIC in requiring carriers to demonstrate greater detail about their behavioral health emergency services networks. We agree that it is reasonable for OIC to require more granular reporting about behavioral emergency services providers to support the new statutory requirement that a carrier's provider network include a "sufficient number of contracted behavioral health emergency services providers" on or before January 1, 2023. RCW 48.49.135. We urge OIC to resist industry efforts to delay or weaken this requirement, which reflects the long-standing requirements of federal and state mental health parity law. Carriers ought to have implemented those laws long ago and should not permitted to delay now, in the midst of a severe behavioral health crisis that has worsened during the pandemic.

2. Though we support the second prepublication draft as a whole, we have the following concerns about new changes in the second draft:

- WAC 284-43B-015(2). Coverage of emergency services. In this second prepublication draft, OIC has removed the language "A carrier cannot require transfer of an enrollee receiving post-stabilization care to a participating facility." OIC has retained the reference requiring notification of stabilization or inpatient admission, as described by RCW 48.43.093, and language which requires provider payment for such post-stabilization care to be governed by balance billing laws. However, the second prepublication draft does not clearly articulate the *consumer-facing* expectations in this scenario. As currently written, it is unclear that even after the carrier receives notification of stabilization or inpatient admission at a nonparticipating facility/provider, the consumer may choose to remain at the nonparticipating facility for post-stabilization services, with cost-sharing for such services governed by balance billing laws. That is the result that is required by WA's

policy to prohibit patient waivers of balance billing protections. OIC could rectify this concern with the following edit to this section.

"A carrier may require notification of stabilization of inpatient admission of an enrollee as provided in RCW 48.43.093. Regardless of such notification, payment and cost-sharing for post-stabilization services provided by a nonparticipating facility, provider or behavioral health emergency services provider and dispute resolution related to those services are governed by RCW 48.48.040 and RCW 48.48.160."

- WAC 284-43B-020(1)(a). Balance billing prohibition and consumer cost-sharing. The second prepublication draft enumerates the standard for calculating cost-sharing with more specificity, articulating that for air ambulance services, cost-sharing should be calculated using the lesser of the qualifying payment amount (QPA) or billed charges, while cost-sharing for other services is calculated using the QPA alone. We recommend modifying this language to clarify that cost-sharing for *all* services governed by balance billing protections should be calculated using the lesser of the QPA or billed charges. If this change is not made, insured enrollees could be subjected to higher cost-sharing as a result of the BBPA than uninsured counterparts who need only pay billed charges. This is not consistent with the intent of balance billing laws, which aim to protect consumers from unexpected cost-sharing. We believe the current approach is also inconsistent with the NSA.[2] OIC could address this concern with the following edit to this section:

  "The enrollee satisfies their obligation to pay for the health care services if they pay the in-network cost-sharing amount specified in the enrollee's or applicable group's health plan contract. The enrollee's obligation must be calculated as if the total amount charged for the services were equal to the lesser of the qualifying payment amount or billed charges, determined using the methodology for calculating the qualifying payment amount as determined by…"

  We also do not understand what kind of cost-sharing applies if the consumer has a copay structure to their in-network plan design – would the QPA or billed charges be used to calculate cost-sharing for services subject to the BBPA in that instance, or would the in-network copay amount apply? We believe the latter is the correct reading.

[2] See CMS' articulation of enrollee cost-sharing on p. 18 here: https://www.cms.gov/files/document/a274577-1a-training-1-balancing-billingfinal508.pdf. We are uncertain about how the state BBPA interacts with the CFR's "specified state law" language but this guidance is helpful in articulating the federal standard as "the lesser of" for all services more plainly.

3. We also continue to flag the following issues which arose in the first prepublication draft and have not yet been addressed in the second prepublication draft:

- WAC 284-43B-050(2)(b)(i). Notice of consumer rights & transparency. As currently written, this subsection 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 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 the basis for this carve-out.

  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").[i] As a fellow statewide agency with a consumer protection mission, OIC should align with AGO on efforts to combat fraud. We recommend revisiting of text-based noticing from this section.

- WAC 284-170-210(1)(b)(1). Alternate access delivery request. As currently written, this subsection states that "copayments and deductible requirements" must apply to AADRs at the same level as in-network services. We recommend broadening this statement to include *all* relevant forms of consumer cost-sharing, including coinsurance and out-of-pocket maximum accruals.

As we mentioned in previous drafts, we also continue to 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 for the Federally-Facilitated Marketplace. 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, e.g., https://www.atg.wa.gov/all-consuming-blog/it-s-national-protect-your-identity-week.