Washington State Hospital Association

August 16, 2019

Honorable Mike Kreidler
Office of the Insurance Commissioner
P.O. Box 40255
Olympia, WA 98504

Re: WSHA Comments on Balance Billing Protection Act Stakeholder Draft Rule

Commissioner Kreidler:

On behalf of our 107 hospital and health system members, the Washington State Hospital Association (WSHA) values the opportunity to comment on the stakeholder draft rule implementing HB1065, the Balance Billing Protection Act (BBPA). We appreciate the Commissioner's efforts to obtain and implement legislation that provides protection for patients from balance billing outside their control and to do so in a way that is workable for all stakeholders including carriers, hospitals, and providers and minimizes unintended impacts to the insurance market.

We are pleased the draft rule generally keeps intact provisions specifically negotiated during the legislative process. As drafted, these rules only attempt to provide additional detail and clarity for BBPA provisions where more detail is necessary in order to be implemented by your department.

Attached are our specific comments, some of which provide additional detail on issues we raised at the August 12 stakeholder meeting. If you have questions, please contact Andrew Busz, WSHA Policy Director, Finance at (206) 216-2533 or andrewb@wsha.org.

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WSHA Specific Comments on Stakeholder Draft

WAC 284-43B-010 Definitions "Median rate of same or similar geographic area"

We recognize the stakeholder draft conforms to the language in the bill and there is a workgroup determining implementation details for the all payer claims database reporting. Our understanding of the intent of these provisions is that there would be several geographic areas identified to ensure the rates, as much as possible, accurately reflect the situation for the specific community. We do not believe methodologies that assign services to just a few large regions would be consistent with the bill language. We believe the Department should provide more specificity on the definition and not allow carriers to make their own interpretation. We encourage the Department to, as much as possible, adopt a proposal that provides robust geographical differentiation, while also allowing enough claims to make comparisons reasonable.

WAC 284-43B-010 Definitions "In-network" or "participating"

We were asked to comment on the inclusion of the sentence "A single case agreement between a provider or facility and a carrier executed under WAC 284-170-200 does not constitute a contract under this subsection." We strongly support the inclusion of this sentence in the rule.

WAC 284-170-200 makes clear that such agreements are different than and not a substitute for permanent contracts. We believe that this distinction is important. The BBPA assumes providers will know the contracted status of the facility where the services are performed either from the facility's website or that of the carrier. Knowledge of a single case agreement between the carrier and the facility, however, may not be available to an out-of-network provider who provided services at the facility. This is especially problematic if the carrier executes the agreement with the facility after the services are provided as part of the dispute resolution process and billings by other providers have already taken place. Exclusion of single case agreements are necessary to protect providers who are complying with the BBPA in good faith based on the information available.

WAC 284-432B-080 Self-funded group health plan opt-in

We support provisions of the bill which allow and encourage self-funded groups to opt into the BBPA's provisions on balance billing protections and payment and dispute solutions. We are concerned, however, some groups may elect to opt in to obtain the balance billing protections for their enrollees, but not abide by the payment and dispute resolution provisions. We recognize the Department is limited in its ability to regulate and enforce ERISA plans. We believe, however, it does have the authority and responsibility to determine if a group is meeting the requirements of the opt-in agreement and attestation. We recommend that when a group opts into the provisions, that it is also asked to sign an election form that gives the Department the authority to determine if the group or group's third-party administrator is meeting the requirements and allows the Department to take appropriate action if it is not. Appropriate action could include removal of the group from the list of groups confirmed by the Department to have opted in.

WAC 284-43B-040 Enrollee notice regarding post-stabilization services

We were asked to comment on cases where patients are admitted to an out-of-network hospital on an emergency basis and stabilized but remain admitted to the hospital. In these cases, hospitals admitted the patient in fulfillment of their EMTALA obligations, without consideration of payment or contracted status. While hospitals cooperate with carriers that request a transfer of a stabilized patient, hospitals themselves generally do not initiate transfers other than cases where the patient requires services not available at the hospital.

At the August stakeholder meeting, a question was raised on notification to carriers of an emergency admission at an out-of-network hospital. Our understanding from our members is hospitals make every effort to contact the patient's carrier for all admissions, regardless of whether they are contracted with the carrier. While hospitals attempt to notify the carrier as soon as possible, generally the same day as the admission, there may be a delay of up to a few days in cases where the patient is incapacitated, or if the emergency admission occurs on a weekend. Unless the hospital hears back from the carrier, the hospital may not be aware if they are considered in or out of network by the particular patient's health plan, particularly if the carrier employs a limited or tiered network.

We believe any communication to the patient regarding out-of-network services, out-of-network costs, or transfers should be done by the carrier as only the carrier would be able to determine the patient's financial exposure and with certainty, identify which facilities would be in network for the particular patient. The carrier would normally be the entity, in consultation with the member, making transfer arrangements or arranging a single case agreement with the hospital.

WAC 284-43B-060 Notice of consumer rights and transparency

Facility and provider communications. As drafted, the rules require that carriers, as well as hospitals and providers with more than 50 employees must make available the standard notice on balanced billing. Hospitals and providers are required to post the standard notice on the entity's website and include it in communications confirming scheduling for non-emergency procedures and surgeries.

We appreciate that the requirement that facilities and providers provide the notice of consumer rights is limited to non-emergency services to avoid conflicts with EMTALA requirements. We also appreciate that the requirement is limited to scheduled services where it has been confirmed that the patient's group is subject to the BBPA to minimize the potential for confusion and incorrect reports of provider violations. For this provision to be accurately implemented by facilities and providers, the information from the carriers regarding BBPA applicability must be available pre-service through the eligibility and benefits verification process.

Carrier communications. The rules state that the carrier must indicate on each claim if the service is subject to the balance billing provisions. It is important that carriers convey this information accurately, as incorrect use of the indicator would create confusion for patients.

Posting of contracted insurers. The draft rule requires that facilities and providers post a listing of the carrier networks with which they contract. The stakeholder draft requires the listing to be posted on the entity's website within seven calendar days of receipt of a fully executed contract from the carrier.

A seven-day period to post contracting updates could be difficult for some facilities, particularly smaller organizations that may do website updates less frequently. We recommend the provision be changed to "within 14 business days of the effective date of a fully executed contract from a carrier. If a carrier is posted in advance of the effective date of the contract, the effective date should be indicated."