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September 1, 2023

Katie Merritt
Director of Policy and Planning
Office of the Insurance Commissioner
1326 Strawberry Square
Harrisburg, PA 17120

Via email: ra-in-policyoffice@pa.gov

Re: Commonwealth Essential Health Benefits Benchmark Plan—Public Comment Period; Notice 2023-14

Dear Ms. Merritt

The National Health Law Program (NHeLP) protects and advances the health rights of low-income and underserved individuals, by advocating, educating, and litigating at the federal and state level. The Essential Health Benefits (EHB) have been a key area of NHeLP advocacy since the passage of the Affordable Care Act's (ACA). Our EHB Team has provided resources and technical assistance to health care consumer advocates, state regulators, and legislators. We welcome the Department's request for public comment as it evaluates options for updating the Commonwealth's EHB benchmark plan. We encourage a transparent, data-driven process that maximizes public engagement to identify gaps in coverage and use the benchmark update to address health disparities.

Under federal rules, a new EHB benchmark plan cannot "exceed the generosity" of either the benchmark plan for plan year 2017 or any of the 10 benchmark plan options the state had available for 2017.¹ Since small group plans are generally among the least generous of the benchmark options available,

we believe Pennsylvania has the opportunity to add or improve benefits through the EHB benchmarking process.²

In 2022, NHeLP reviewed the seven states that have updated their EHB benchmark plans, federal regulatory requirements, and surveyed state EHB benchmark selection processes. We identified a number of best practices regarding actuarial analyses, public notice and commenting processes, engaging consumers and other stakeholders, and the need for centering health equity. We shared our findings in a paper - [Essential Health Benefits: Best Practices in State Benchmark Selection](#), and in presentations to the National Association of Insurance Commissioners (NAIC).³

We urge the Department to review these materials and adopt the best practices as it embarks on its EHB benchmark update. In addition, please consider the following points.

Adding benefits to comply with federal laws

The ACA requires states to defray the costs of state-mandated benefits enacted after December 31, 2011.⁴ States can avoid triggering the defrayal requirement by adding benefits through the EHB benchmarking process.⁵ In addition, when a state adds a mandate for the purpose of complying with federal laws, those mandates are not subject to defrayal.⁶

¹ 45 C.F.R. § 156.111(b)(2)(ii).

² In 2015, Pennsylvania selected the largest small group plan as its EHB benchmark (see Pennsylvania Insurance Department, 2017 Essential Health Benefits Benchmark Plan Recommendation (June 19, 2015),

<https://www.insurance.pa.gov/Coverage/Documents/Health/2017%20EHB%20Benchmark%20Plan%20Website%20Content%206-19-15.pdf>. Forty-one other states and the District of Columbia currently use a small group plan as the EHB benchmark, most because they made no selection and this was the default option. See Center for Consumer Information and Insurance Oversight (CCIIO)

https://www.cms.gov/CCIIO/Resources/Data-Resources/Downloads/Final-List-of-BMPs_4816.pdf.

³ See [EHB Benchmark Updating: The Benefits Outweigh the Burden](#), Health Innovations (B) Working Group, NAIC Spring National Meeting 2023; [Advancing Health Equity Through Essential Health Benefits](#), NAIC Special Committee on Race and Insurance, Workstream 5, November 2022). (Note – NHeLP Senior Attorney Wayne Turner is a NAIC Consumer Representative).

⁴ 42 U.S.C. § 18031(d)(3)(B)(ii); 45 C.F.R. § 155.170.

⁵ Ctr. for Consumer Information and Insurance Oversight (CCIIO), Frequently Asked Questions on Defrayal of State Additional Required Benefits (Oct. 23, 2018),

<https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQ-Defrayal-State-Benefits.pdf>.

⁶ 45 C.F.R. § 155.170(a)(2).



Adding benefits as a compliance action can happen outside the EHB benchmarking process. For example, the State of Washington enacted a new law clarifying that coverage of emergency services extends to behavioral health emergency services.⁷ That law hinges on a memorandum from the Washington Office of the Insurance Commissioner explaining that not covering behavioral health emergency services, or excluding some types of emergency services for behavioral health, such as mobile crisis services, would constitute a violation of the Mental Health Parity and Addiction Equity Act (MHPAEA).⁸ Similarly, Virginia required plans to provide Applied Behavioral Analysis (ABA) therapy for the treatment of persons with Autism Spectrum Disorder to comply with MHPAEA.⁹

In 2021, the New York Department of Financial Services issued a letter requiring individual, small group, and large plans “to provide immediate coverage of diagnostic and treatment services, including prescription drugs, for the diagnosis and treatment of infertility (“basic infertility treatments”) for individuals who are unable to conceive due to their sexual orientation or gender identity.”¹⁰ The Department noted that insurer coverage exclusions on fertility treatment “results in unfair discrimination for individuals due to their sexual orientation or gender identity.”¹¹

As the Department considers benefits it might add to its EHB benchmark, it should determine whether such benefits should be required to comply with federal laws, including:

- 42 U.S.C § 18116 - prohibiting discrimination on the basis of sex, age, disability, and race/ethnicity in health programs or activities receiving federal financial assistance (Section 1557);

⁷ 2022 Wash. Sess. Laws 263,

<https://app.leg.wa.gov/billssummary?billnumber=1688&year=2022#documentSection>.

⁸ WA Off. Ins. Comm’r, Memorandum from Jane Beyer, Senior Health Policy Advisor Re: Behavioral Health Emergency Services Under E2SHB 1688 (Chap. 263, Laws of 2022), <https://www.insurance.wa.gov/sites/default/files/documents/e2shb-1688-mhpaea-memo.pdf>.

⁹ Bureau of Insurance, Commonwealth of Virginia, Admin Ltr 2022-02, Re: Treatment for Autism Spectrum Disorder – Requirements and Enforcement of §§ 38.2-3412.1 and 38.2-3418.17 of the Code of Virginia Withdrawal of Administrative Letter 2020-03 (April 19, 2022), https://www.scc.virginia.gov/getattachment/6b226085-e530-4a13-bfa6-df2a80f71733/AL_22-02.pdf.

¹⁰ New York Dept. of Financial Srvs., Insurance Circular Letter No. 3, RE: Health Insurance Coverage of Infertility Treatments Regardless of Sexual Orientation or Gender Identity (Feb. 23, 2021), https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2021_03. (Note, however, that the circular letter does not specifically cite to federal law).

¹¹ Id.



- 42 U.S.C. § 18031(c)(1)(a) – prohibiting marketing practices or benefit designs that have the effect of discouraging the enrollment in such plan by individuals with significant health needs;
- 42 U.S.C. § 300gg-3 – prohibiting pre-existing condition exclusions or other discrimination based on health status;
- 42 U.S.C. § 300gg-4 - prohibiting discrimination against individual participants and beneficiaries based on health status;
- 42 U.S.C. § 18022(b)(4) - the EHB nondiscrimination provision (see *also* 45 C.F.R. §156.125(a) “a non-discriminatory benefit design that provides EHB is one that is clinically-based.”).

Adding or improving benefits to comply with these and other federal laws can be done in conjunction with EHB benchmarking, but does not need to rely on that process. Moreover, such benefit requirements should not count toward the generosity limit for state EHB benchmark.¹²

Requiring oral health services as part of maternity care

As part of its EHB benchmark review and update, Pennsylvania might consider ways to improve maternity care. In recent letters to HHS Secretary Becerra and CCIIO Director Montz, NHeLP identified several ways to improve standards for maternity care, including requiring access to doula services, adherence to guidelines for perinatal care from the American College of Obstetricians and Gynecologists and the American Academy of Pediatrics, and oral health services for pregnant people.¹³

¹² For example, Pennsylvania could (and should) require plans to cover gender affirming care (GAC) to comply with federal nondiscrimination requirements including Section 1557. It could do so through the EHB benchmarking process (as Colorado has laudably done), or the Department can require GAC pursuant to its authority to ensure compliance with federal law. If the Department does include GAC as part of its EHB benchmark update, the value of those services should not count toward the generosity limit, allowing Pennsylvania to add require GAC and additional needed benefits identified through the updating process.

¹³ Nat'l Health Law Prog., *Letter to Sec. Becerra, Re: Advancing Health Equity Through Essential Health Benefits* (Dec. 6, 2021), <https://healthlaw.org/resource/nhelp-letter-to-hhs-sec-becerra-re-advancing-health-equity-through-essential-health-benefits/> [hereinafter *NHeLP Letter Re: Advancing Health Equity Trough EHB*]; Nat'l Health Law Prog., *Letter to CCIIO Director Ellen Montz, Re: Request for Modifications to the Federal Prescription Drug and Maternity Care Essential Health Benefits Standards* (Aug. 19, 2022), <https://healthlaw.org/resource/nhelp-letter-to-cciio-director-ellen-montz-re-request-for-modifications-to-the-federal-prescription-drug-and-maternity-care-essential-health-benefit-standards/>.



Poor oral health during pregnancy can lead to negative pregnancy outcomes such as preterm birth, low birth weight, and preeclampsia.¹⁴ Researchers have concluded that mothers' oral health is a strong predictor of their baby's oral health and that this effect can be compounded well into childhood.¹⁵

We note, however, that through regulation, HHS prohibits EHB plans from offering routine non-pediatric dental services, as well as routine non-pediatric eye exam services, long-term/custodial nursing home care benefits, and non-medically necessary orthodontia as EHB.¹⁶ In our view, oral health services delivered as part of the maternity care benefit category are not "routine" within the meaning of 45 C.F.R. § 156.115(d) and also fit within the separate EHB category of maternal and newborn care. To date, HHS has not directly addressed this issue.

Given the alarming increase in maternal mortality, and where Black women are three times more likely to die from pregnancy-related complications than White woman, we urge the Department to take bold action.¹⁷ This may include adding oral health services as part of the state's EHB benchmark plan. Again, we believe there is a strong legal basis allowing states to require oral health services as part of the maternity benefit, without running afoul 45 C.F.R. § 156.115(d).

¹⁴ Stefano Corbella et al., Adverse Pregnancy Outcomes and Periodontitis: A Systematic Review and Meta-Analysis Exploring Potential Association, 47 *QUINTESSENCE INT.* 193 (2016); Ben-Juan Wei, YiJun Chen, Li Yu, & Bin Wu, Periodontal disease and risk of preeclampsia: a meta-analysis of observational studies, 8 *PLOS ONE* e70901 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3741358/>.

¹⁵ Bruce A. Dye et al., Assessing the relationship between children's oral health status and that of their mothers, 142 *J AM DENT ASSOC.* 173-183 (2011), [https://jada.ada.org/article/S0002-8177\(14\)61498-7/fulltext](https://jada.ada.org/article/S0002-8177(14)61498-7/fulltext).

¹⁶ 45 C.F.R. § 156.115(d).

¹⁷ See Ctrs. for Disease Control and Prevention, Working Together to Reduce Black Maternal Mortality (Apr 6, 2022), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html>; Ctrs. for Disease Control and Prevention, Racial/Ethnic Disparities in Pregnancy-Related Deaths – United States, 2007–2016 (2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6835a3.htm?s_cid=mm6835a3_w#T1_down. See also Bureau of Family Health, *Pennsylvania Maternal Mortality Review: 2021 Report* (Jan. 2022), <https://www.health.pa.gov/topics/Documents/Programs/2021%20MMRC%20Legislative%20Report.pdf>



Conclusion

We have included citations and direct links to research and other materials. We request that the full text of material cited, along with the full text of our comment, be considered part of the formal administrative record. If the Department is not planning to consider these citations part of the record as we have requested, we ask that you notify us and provide us an opportunity to submit copies of the studies into the record.

Thank you for your attention to our comments. If you have any questions or need any further information, please contact me at (202) 384-1273 or at turner@healthlaw.org, or my colleague Héctor Hernández-Delgado at hernandez-delgado@healthlaw.org.

Yours truly,

A handwritten signature in black ink, appearing to read 'W. Turner', followed by a horizontal line extending to the right.

Wayne Turner
Senior Attorney

