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July 10, 2024

Jeff Wu  
Deputy Administrator and Acting Director  
Center for Consumer Information and Insurance Oversight  
Department of Health and Human Services  
7500 Security Blvd.  
Baltimore, MD 21244-8016

Re: District of Columbia Proposed EHB Benchmark Update for  
PY 2026.

Dear Mr. Wu:

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. We understand that the District of Columbia Department of Insurance, Securities and Banking (DISB) and DC Health Benefits Exchange Authority (DC Health Link) submitted an EHB Benchmark Update for PY 2026 on or before May 1, 2024.<sup>1</sup>

We have significant concerns that DC failed to follow procedural requirements for EHB benchmark selection.<sup>2</sup> Specifically, DC failed to provide a public comment period *prior* to submitting its benchmark selection. Instead, DC announced a public comment period only days before the submission deadline and closed that public comment period *well after* DC had already submitted its selection to the Center for Consumer Information and Insurance Oversight (CCIIO).<sup>3</sup>

Having an after-the-fact public comment period is directly contrary to the CMS' regulations requiring "reasonable notice and an opportunity for public comment on the state's selection of an EHB benchmark plan that includes posting a notice on its opportunity for public comment with associated information on a relevant state web site."<sup>4</sup>

CCIIO emphasized the importance of meaningful public engagement in the EHB benchmark process when it established public notice and comment requirements, stating

“the State public notice and comment period is important for transparency to allow consumers to provide feedback on the States’ proposed changes to their EHB benchmark plans.”<sup>5</sup>

We recognize that states have considerable flexibility in state processes for EHB benchmark selection. However, DC’s solicitation of public feedback with just two business days before submitting its benchmark selection belies any “reasonable” public notice and opportunity for comment. In 2018, Alabama proposed significant changes to its EHB benchmark, but provided only a two-week public comment period.<sup>6</sup> Advocates, including NHeLP, objected, arguing that two weeks is not a reasonable length of time to allow for meaningful public review and comment.<sup>7</sup> The state ultimately withdrew its proposal in part because of the lack of opportunity for stakeholder input.<sup>8</sup>

We note that DC’s PY 2026 benchmark update seeks to add a benefit mandate recently enacted via legislation.<sup>9</sup> However, the legislative process enacting a broadly applicable coverage requirement is no substitute for the EHB public notice and comment period.<sup>10</sup> Further, acting upon a legislative mandate does not excuse compliance with federal procedural requirements regarding EHB benchmarking. Other states that have followed a similar process as DC have been able to submit new benchmark proposals without circumventing the reasonable public notice and comment requirements. For example, in 2021 Vermont enacted legislation requiring the State Department of Financial Regulation to submit a new benchmark

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<sup>1</sup> See Department of Insurance, Securities and Banking & DC Health Benefits Exchange Authority, *Announcement – Selection of EHB Benchmark Plan for 2026* (Apr. 26, 2024), <https://disb.dc.gov/page/essential-health-benefits-and-selecting-new-benchmark-plan>.

<sup>2</sup> 45 C.F.R. § 156.111(c).

<sup>3</sup> See Announcement, note 1, *supra*.

<sup>4</sup> 45 C.F.R. § 156.111(c).

<sup>5</sup> Dep’t of Health and Human Svcs., 2019 Notice of Benefit and Payment Parameters Final Rule, 83 FR 16930, 17017 (Apr. 17, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-04-17/pdf/2018-07355.pdf>.

<sup>6</sup> Alabama Dept. of Insurance, EHB Benchmark Plan Revisions (July 19, 2018), <https://www.aldoi.gov/currentnewsitem.aspx?ID=1008>.

<sup>7</sup> Hayley Penan, Nat’l. Health Law Program, Letter to Yada Horace, Insurance Rate Analyst, Alabama Department of Insurance, RE: Alabama PY 2020 EHB Benchmark Plan (Aug. 2, 2018), <https://healthlaw.org/resource/nhelp-comments-re-alabama-py-2020-ehb-benchmark-plan/>.

<sup>8</sup> Alabama DoI, note 6, *supra*.

<sup>9</sup> DC Act 25-123, the Expanding Access to Fertility Treatment Amendment Act of 2023, [https://lms.dccouncil.gov/downloads/LIMS/52068/Signed\\_Act/B25-0034-Signed\\_Act.pdf?Id=166812](https://lms.dccouncil.gov/downloads/LIMS/52068/Signed_Act/B25-0034-Signed_Act.pdf?Id=166812). The Act requires coverage of an array of fertility treatments in the DC Healthcare Alliance program by 2024, and by large group, individual, and small group plans by 2025. The Act also requires the DC Department of Health Care Finance to submit a state plan amendment to CMS to provide for such treatments in DC’s Medicaid program.

<sup>10</sup> DC’s legislation makes no mention of EHB benchmarking and expressly recognizes that the new coverage mandate would trigger the ACA’s requirement to defray the costs in Qualified Health Plans for benefit mandates enacted after December 31, 2011. 45 C.F.R. § 155.170. See, e.g., DC Office of the Chief Financial Officer, Fiscal Impact Statement – Expanding Access to Fertility Treatment Amendment Act of 2023 (May 30, 2023), [https://lms.dccouncil.gov/downloads/LIMS/52068/Other/B25-0034-FIS\\_-\\_Expanding\\_Access\\_to\\_Fertility\\_Treatment.pdf?Id=162374](https://lms.dccouncil.gov/downloads/LIMS/52068/Other/B25-0034-FIS_-_Expanding_Access_to_Fertility_Treatment.pdf?Id=162374).

plan to CCIO that included coverage for hearing aids. The Department complied with this state law requirement in 2022, but only *after* providing an opportunity for public comment on the proposal that extended for 15 days.<sup>11</sup>

DC's end run around EHB public notice and comment deprived consumers and other stakeholders of the opportunity to weigh in on what benefits DC should prioritize to unmet health needs residents. This is exactly the role of the EHB public notice and comment period – so consumers and other stakeholders can provide meaningful feedback. Commenters on EHB benchmark selection must have an adequate opportunity to weigh in, not only the proposed benefit changes, but the valuation of proposed changes, comparator plans, the methodology of the actuarial analysis, among other issues.

If CCIO were to approve DC's PY 2026 benchmark update, it would set a terrible precedent and open the door for other states to circumvent engaging consumers and other stakeholders in EHB benchmark selection.

**We urge CCIO to reject DC's PY 2026 benchmark update as procedurally defective.** We further urge CCIO to issue guidance to states describing best practices for EHB benchmark selection consistent with President Biden's Executive Orders on Advancing Health Equity and Strengthening Medicaid and the ACA.<sup>12</sup>

If you have any questions, please feel free to contact us at [hernandez-delgado@healthlaw.org](mailto:hernandez-delgado@healthlaw.org) or [turner@healthlaw.org](mailto:turner@healthlaw.org).

Sincerely,



Héctor Hernández-Delgado  
Staff Attorney  
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<sup>11</sup> See Vermont EHB Benchmark Plan Confirmation, [https://dfr.vermont.gov/sites/finreq/files/doc\\_library/Copy%20of%20VT\\_Appendix%20A\\_Confirmation.pdf](https://dfr.vermont.gov/sites/finreq/files/doc_library/Copy%20of%20VT_Appendix%20A_Confirmation.pdf).

<sup>12</sup> Exec. Order No. 13,985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 Fed. Reg. 7009-7013 (Jan. 25, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf>; Exec. Order No.14,009, *Strengthening Medicaid and the Affordable Care Act*, 86 Fed. Reg. 7793-7795 (Feb. 2, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-02-02/pdf/2021-02252.pdf>. See also Wayne Turner & Héctor Hernández-Delgado, Nat'l Health Law Program., *Essential Health Benefits: Best Practices in Benchmark Selection* (July 28, 2022), [https://content.naic.org/sites/default/files/national\\_meeting/hiwg-nhelp-ehb-paper-3.22.pdf](https://content.naic.org/sites/default/files/national_meeting/hiwg-nhelp-ehb-paper-3.22.pdf).

