



OFFICE OF
INSURANCE COMMISSIONER

Date: January 31, 2023

Subject: Balance Billing Protection Act (BBPA) dispute resolution mechanism

Dear interested parties,

The Washington state Balance Billing Protection Act (BBPA) was enacted in 2019 and was recently amended by the Legislature in 2022 in [E2SHB 1688](#). The law prohibits balance billing of consumers by nonparticipating providers (also known as out-of-network providers) of emergency services, and nonemergency services provided in participating hospitals and ambulatory surgical facilities by nonparticipating providers. The BBPA includes a dispute resolution mechanism administered by the Office of the Insurance Commissioner (OIC) to be used when a carrier (or self-funded group health plan that has elected to participate in the BBPA) and a nonparticipating provider do not reach agreement on the payment to be made to the nonparticipating provider.

[RCW 48.49.040](#) provides that “(e)ffective July 1, 2023, or a later date determined by the commissioner, services described in RCW 48.43.020(1) other than air ambulance services are subject to the independent dispute resolution process established in” the federal [No Surprises Act](#). Until that date, the BBPA dispute resolution process, i.e. arbitration, applies when a nonparticipating provider and a carrier cannot agree on a “commercially reasonable amount” of payment for services subject to balance billing protections.

Under [recently adopted BBPA rules](#), WAC 284-43B-032(3) states that OIC must provide a minimum of four months advance notice of the date on which the dispute resolution process will transition to the federal independent dispute resolution process. The notice must be posted on the OIC website. If OIC were to transition to the federal IDR system on July 1, 2023, notice would be posted on or before March 1, 2023.

The [BBPA arbitration system](#) has been in place since January 1, 2020. OIC has issued two reports to the legislature related to use of the system.¹ In 2020, 71 arbitration initiation requests were filed with OIC. Of these, 29 resulted in an arbitrator’s decision, 18 were settled prior to arbitration, 19 were rejected for failure to meet statutory requirements and the remaining five were pending resolution. In 2021, 11 arbitration initiation requests were filed with OIC. Nine resulted in an arbitrator’s decision and two were rejected for failure to meet the statutory requirements. In 2022,

¹ [Balance Billing Protection Act arbitration proceedings, Annual Report \(July 1, 2022\)](#); Balance Billing Protection Act Arbitration Proceedings, Annual Report (June 29, 2021)
(https://www.insurance.wa.gov/sites/default/files/documents/bbpa-annual-arbitration-report-2021_0.pdf)

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210 arbitration initiation requests were filed with OIC. Of those requests, 198 involved the same physician group and the same carrier. The remaining 12 involved varied providers and carriers. OIC is currently compiling information on the status of those requests.

The federal [No Surprises Act \(NSA\)](#) includes an Independent Dispute Resolution (IDR) process that is used when carriers or self-funded group health plans and nonparticipating providers have not reached agreement on the amount to be paid to the provider. The federal Department of Health and Human Services, Department of Labor and Treasury Department have implemented the IDR process and have adopted two sets of rules related to its implementation. In 2021, federal agencies adopted interim final rules for the IDR process directing the IDR entity to presume that the median in-network payment rate (Qualifying Payment Amount) was a reasonable payment. Litigation in *Texas Medical Association v. HHS* (Feb. 23, 2022) and *LifeNet, Inc. v. HHS* (July 26, 2022) (E.D. Texas) challenged the rule. The federal district court vacated portions of the 2021 interim final rules related to the presumption. In August 2022, the federal agencies adopted modified rules in response to the Texas federal district court decisions. In September 2022, the Texas Medical Association filed a new challenge to the August 2022 rule, asserting again that the rule violates the NSA IDR statute.

The NSA directs HHS/CMS to issue regular reports related to use of, and outcomes of the IDR process. The [initial report](#) provides descriptive information regarding disputes filed during the period of April 15 – September 30, 2022.

With this request for information, OIC is soliciting comments as to whether Washington state should transition to the federal IDR system on July 1, 2023 or continue to use the BBPA arbitration system to resolve disputes between carriers (or self-funded group health plans that have elected to participate in the BBPA) and nonparticipating providers. If a commenter believes that the BBPA dispute resolution system should be retained, OIC is soliciting comments on when, if ever, the transition to the federal IDR system should occur. We also are soliciting input on the reasons behind commentors' responses to these questions.

The deadline for submission of comments to OIC is close of business on February 15, 2023. Comments should be submitted to policy@oic.wa.gov.