

Memorandum

To: Behavioral Health Crisis Service Providers and Behavioral Health Administrative Services Organizations

From: Jane Beyer, Senior Health Policy Advisor

Date: May 6, 2022

Subject: Behavioral Health Emergency Services Under E2SHB 1688 (Chap. 263, Laws of 2022)

E2SHB 1688¹ (Chap. 263, Laws of 2022) was passed by the 2022 Washington state Legislature and signed by Governor Inslee on March 31, 2022. The law is effective on March 31, 2022. The law relates to protecting consumers from charges for out-of-network health care services by addressing coverage of emergency services, including behavioral health emergencies, and aligning the Washington state Balance Billing Protection Act and the federal No Surprises Act (NSA). Sections 2 and 3 of this legislation amend current law, including provisions related to coverage of emergency services, to clarify the role of behavioral health crisis services providers in meeting the needs of individuals enrolled in fully insured health plans when they experience a behavioral health emergency. Other provisions of the law apply balance billing protections to services provided by behavioral health emergency services providers.

E2SHB 1688 applies to fully insured individual and group health plans offered to residents in Washington state and to Washington state public and school employee health benefit plans (PEBB/SEBB). The prohibition on balance billing, associated consumer protections and provider/carrier dispute resolution processes also apply to [self-funded group health plans that have elected to participate](#) in Washington state's balance billing protections. Self-funded group health plans are not required to comply with the changes in the coverage of emergency behavioral health services under RCW 48.43.093 that are described below. If you have questions about whether a health plan is fully insured or self-funded, contact the health plan for that information.

The Office of the Insurance Commissioner (OIC) hosted a webinar for behavioral health service providers and organizations on May 2, 2022. The webinar described the provisions of E2SHB

¹ See [E2SHB 1688 \(Chapter 263, Laws of 2022\)](#) and a [summary of the act](#).

1688 and will soon be available for viewing on the OIC website. In addition, OIC will undertake rulemaking in 2022 related to the new law.

Coverage of behavioral health emergency services

RCW 48.43.005 defines an emergency medical condition to include “a medical, mental health or substance use disorder condition manifesting itself by acute symptoms of sufficient severity including, but not limited to, severe pain or emotional distress...”, according to a prudent layperson standard, which is consistent with CMS’s interpretation of the federal Emergency Medical Treatment and Active Labor Act (EMTALA) law.²

Section 2 of the act also amends RCW 48.43.005 to include “behavioral health emergency services providers” as providers of emergency services covered by the act. Under the act, “behavioral health emergency services providers” include:

- A crisis stabilization unit as defined in RCW 71.05.020.
- An evaluation and treatment facility that can provide directly, or by direct arrangement with other public or private agencies, emergency evaluation and treatment, outpatient care, and timely and appropriate inpatient care to persons suffering from a mental disorder, and which is licensed or certified as such by the Department of Health.
- An agency certified by the Department of Health under chapter 71.24 RCW to provide outpatient crisis services.
- A triage facility as defined in RCW 71.05.020.
- An agency certified by the Department of Health under chapter 71.24 RCW to provide medically managed or medically monitored withdrawal management services.
- A mobile rapid response crisis team as defined in RCW 71.24.025 that is contracted with a behavioral health administrative services organization operating under RCW 71.24.045 to provide crisis response services in the behavioral health administrative services organization's service area.³

The impact of this language is to incorporate these essential, behavioral health-specific providers and services as part of the full range of behavioral health emergency and crisis care, just as the full range of medical/surgical emergency care is covered in ambulances, hospital emergency rooms and urgent care centers.

Given the act’s definition of “emergency medical condition” under the “prudent layperson standard,”⁴ a health plan enrollee may seek and obtain any type of emergency or urgent care

² See 86 Fed. Reg. at p. 36879 (July 13, 2021)

³ See Sec. 2(48) for additional detail regarding these settings.

⁴ “‘Emergency medical condition’ means a medical, mental health, or substance use disorder condition manifesting itself by acute symptoms of sufficient severity including, but not limited to, severe pain or emotional distress, such

for a medical/surgical condition at a hospital emergency room, via ambulance (mobile) or urgent care center; or for a behavioral health condition, at the facilities listed above and from mobile rapid response crisis teams.

Under the act, health plans must cover “emergency services” provided to a consumer in an out-of-network (nonparticipating) hospital emergency department or by a behavioral health emergency services provider.⁵ The health insurer cannot require prior authorization for the emergency services.

Emergency services include the following services provided by a behavioral health emergency services provider:

- **Screening:** A screening examination that is within the capability of a behavioral health emergency services provider including ancillary services routinely available to the behavioral health emergency services provider to evaluate that emergency medical condition.
- **Stabilization:** Examination and treatment, to the extent they are within the capabilities of the staff and facilities available at the behavioral health emergency services provider to stabilize the patient. Stabilize, with respect to an emergency medical condition, has the meaning given in §1867(e)(3) of the social security act (42 U.S.C. Sec. 1395dd(e)(3)).
- **Post-stabilization care:** Covered behavioral health services provided by staff or facilities of a behavioral health emergency services provider after the enrollee is stabilized and as part of outpatient observation or an inpatient or outpatient stay with respect to the visit during which screening and stabilization services have been furnished. Post-stabilization services relate to mental health or substance use disorder treatment necessary in the short term to avoid placing the health of the individual, or with respect to a pregnant woman, the health of the woman or her unborn child, in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part.

Consumer balance billing protections for behavioral health emergency services

Balance billing occurs when an out-of-network provider bills a consumer for the difference between what a health plan agrees to pay the provider and the full amount charged for a

that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical, mental health, or substance use disorder treatment attention to result in a condition (a) placing the health of the individual, or with respect to a pregnant woman, the health of the woman or her unborn child, in serious jeopardy, (b) serious impairment to bodily functions, or (c) serious dysfunction of any bodily organ or part.” RCW 48.43.005 (15)

⁵ See RCW 48.43.093, as amended by section 3 of E2SHB 1688.

service. Under E2SHB 1688, consumers are protected from balance billing for the following services:

- Emergency services.
- Nonemergency health care services performed by out-of-network (nonparticipating) providers at certain in-network (participating) facilities (i.e. a hospital or ambulatory surgical facility).
- Air ambulance services.⁶

Because behavioral health emergency services providers are integrated into the definition of emergency services under our state law, these providers cannot balance bill consumers enrolled in fully insured individual and group health plans, Washington state public employee and school employee health benefit plans or self-funded group health plans that have opted into the BBPA and cannot ask these consumers to give up their balance billing protections.

Along with the prohibition on balance billing, consumers have the following protections under the act:

- Consumers are only responsible for paying their share of the cost (like the copayments, coinsurance, and deductibles that they would pay if the provider or facility was in-network (participating)).
- The health plan will pay out-of-network (nonparticipating) providers and facilities directly.
- The health plan generally must base what the consumer owes the provider or facility (cost-sharing) on what it would pay an in-network provider or facility. It also must count any amount the consumer pays for emergency services or out-of-network services toward their deductible and out-of-pocket limit.⁷

The act requires the health insurer to pay a “commercially reasonable amount” to an out-of-network (nonparticipating) provider for services subject to the balance billing prohibition and sets out the dispute resolution process that an out-of-network behavioral health emergency services provider can use when it does not believe the amount paid by the insurer is reasonable.⁸ These provisions apply to behavioral health emergency services providers when the services provided are subject to the balance billing prohibition.

Network access

Emergency services are a category of essential health benefits (EHBs) that must be included in health plans offered to individuals and small group health plans. E2SHB 1688 amends the

⁶ See RCW 48.49.020, as amended by section 7 of E2SHB 1688.

⁷ See RCW 48.49.030, as amended by section 8 of E2SHB 1688.

⁸ See sections 9 and 11 of E2SHB 1688.

definition of emergency services to include behavioral health emergency services providers. [OIC's network access rules](#) apply to emergency services.⁹ Section 18(3) provides that when determining the adequacy of a carrier's proposed provider network or the ongoing adequacy of an existing provider network, beginning January 1, 2023, OIC will require that each carrier's proposed provider network include a sufficient number of contracted behavioral health emergency services providers.

⁹ This provision brings state law regarding coverage of emergency services into compliance with the federal Mental Health Parity and Addiction Equity Act and the federal No Surprises Act. See the [OIC memo on this subject](#).