



MAIN CAPITOL BUILDING
HARRISBURG, PENNSYLVANIA 17120

August 30, 2023

Via Email to: ra-in-policyoffice@pa.gov

Pennsylvania Insurance Department
Attn: Katie Merritt, Director of Policy and Planning
1326 Strawberry Square
Harrisburg, PA 17120

RE: Comments on Updating the Commonwealth's EHB Benchmark Plan; Notice 2023-14

Dear Commissioner Humphreys:

In our capacity as the committee chairs overseeing the Pennsylvania Insurance Department ("Department"), we write to share our input in response to the Department's proposal to update the Commonwealth's Essential Health Benefits ("EHB") Benchmark Plan.

We share the Administration's priority of ensuring the delivery of high-quality health insurance for Pennsylvanians. Act 146 of 2022 (prior authorization reform) and Act 1 of 2023 (breast cancer prevention) underscore the legislature's commitment to comprehensive healthcare coverage and enhancing patients' accessibility to benefits. These achievements exemplify bipartisan accomplishments when the Department and the General Assembly work collaboratively with all involved stakeholders to attain shared objectives.

Regarding updating the EHB Benchmark Plan, we offer the following comments:

1. Comments on Legal Authority

In the notice published on July 29, 2023, in the *Pennsylvania Bulletin*, the Department indicates it is "exploring the possibility" of updating the Commonwealth's EHB Benchmark Plan. In past public notices, the Department has referenced its statutory and regulatory authorities; however, the current notice omitted these references.

As you know, when these processes are undertaken, there are generally questions raised about unconstitutional delegations of authority. To address these anticipated questions, we believe it is necessary for the Department to clarify the statutory provisions that grant the Department the ability to select a new EHB Benchmark Plan.

2. Comments on Process

As leaders of the committees of jurisdiction, it is essential for us to understand the process by which the Department will make its decisions. We recognize federal rules provide states with flexibility to update their EHB Benchmark Plan; however, that does not mean the process should be conducted in a closed manner. Something as consequential as modifying required benefits must be done in a robust, inclusive, and transparent way.

In fact, the current selection process differs from the procedure employed during the Department's previous benchmark selection. The prior process mandated the Department choose from a menu of existing plans. Federal rules now allow for the selection of entire sets of benefits as the new benchmark, which has the potential to add benefits and raises concerns should the Department act unilaterally to make these decisions without legislative approval.

States that have already updated their benchmark plan did so through various methods. While certain states' insurance departments have assumed responsibility for the selection, others, such as California and Washington, enacted legislation. Utah, on the other hand, utilized the legislative process to formalize the procedure governing benchmark selection within its insurance department. We would like to understand why the Department chose to act in a purely administrative capacity and has not sought legislation to either authorize such decision-making or outline rules and procedures that will go into the decision-making.

Federal rules stipulate that the updated EHB Benchmark Plan must not exceed the generosity of the most generous plan available to the state in 2017. We request clarification on how the actuarial value of the Commonwealth's current EHB Benchmark Plan compares to the most generous 2017 plan. To ensure compliance, it is advisable to conduct an actuarial analysis early in the process to help determine the potential addition of benefits to the EHB Benchmark Plan.

In addition, we strongly:

- Request the Department provide House and Senate Republican and Democrat committee chairs a detailed briefing, including the Department's plans to seek legislative endorsement before proposed updates are submitted to the federal government.
- Recommend all comments, responses to comments, documents, presentations, analyses, and reports be made publicly available and easily accessible through both the Department and Pennie websites.
- Recommend the Department make publicly available the process, data, and reasoning behind any decision to add benefits into a new EHB Benchmark Plan.

3. Comments on Collaboration

Again, we believe collaboration with the General Assembly on enabling legislation that outlines clear procedures and timelines for plan selection would be most prudent. Notably, the involvement of the Pennie Board in the selection process could prove most valuable, as its member representatives possess extensive experience in serving the individual insurance market and can provide insights into the impact of benchmark updates. We would be interested to know if the Department consulted the Pennie Board regarding this matter prior to the *Pennsylvania Bulletin* notice, and how the Department envisions their role.

In addition to consulting with the Pennie Board, we strongly encourage the Department to establish an ongoing EHB stakeholder group and to conduct public hearings to explain the EHB benchmarking process and proposed changes. States such as Oregon and Colorado have formed collaborative workgroups to provide valuable insights, and livestreaming such sessions would enhance transparency. While federal rules mandate a minimum of two public hearings before submitting a waiver application, a more deliberative process ahead of proposing a new benchmark plan would best serve the interests of Pennsylvanians.

4. Comments on Disparities

When the legislature contemplates new coverage mandates, the Department consistently raises the issue of federal preemption for self-insured ERISA plans and the limited applicability of state-mandated health benefits. The Department must also consider that same issue if it intends to pursue new mandated EHBs. As the Department knows, fully insured large group plans are not obligated to offer EHBs, and any updates rendered through this approach would be inapplicable to roughly two-thirds of state-regulated health plans. This may inadvertently exacerbate health disparities and inequities between different insurance market segments.

As highlighted during the Department's 2017 recommendation, the Benchmark Plan establishes only the minimum essential benefits. Insurers frequently provide more comprehensive benefits in response to the needs of plan participants. In accordance with Act 146 of 2022, insurers are now obligated to review all medical policies at least annually and routinely revise coverage to align with the latest clinically and scientifically validated research. Consequently, any new benefits proposed for the Benchmark Plan must be scrutinized for their medical necessity and appropriateness while ensuring a balance between comprehensive coverage and affordability. This consideration holds heightened significance within the small group market, where rising medical costs and insurance premiums already pose challenges for small businesses. Introducing new mandates could disproportionately impact this segment and we believe the Department should carefully consider the financial impact to small business, the people they employ, and persons purchasing individual plans to fulfill their health insurance needs.

5. Comments on Federal Case Law

Another vital aspect when contemplating new EHB mandates within the small group market is to navigate clear of benefits that could conflict with United States Supreme Court rulings affirming business owners' rights to object to coverage on religious grounds. We encourage the Department to be mindful, considerate, and accommodating of these views when considering new benefits and reviewing public comments.

Conclusion

Thank you for affording us the opportunity to provide input as the Department explores an update of the Commonwealth's EHB Benchmark Plan. We sincerely hope that the Department will work with the General Assembly to integrate best practices from other states' benchmark selections, culminating in a comprehensive process that thoughtfully addresses the health plan needs of Pennsylvanians for years into the future.

Sincerely,



Sen. John DiSanto
Majority Chair
Senate Banking & Insurance Committee
15th Senatorial District



Rep. Tina Pickett
Republican Chair
House Insurance Committee
110th Legislative District

cc: Rep. Kevin Boyle, Majority Chair, House Insurance Committee
Sen. Sharif Street, Minority Chair, Senate Banking & Insurance Committee