Highmark's Weekly Capitol Hill Report

Issues for the week ending April 9, 2021

Federal Issues

Legislative

President Biden Releases First 2022 Discretionary Funding Request

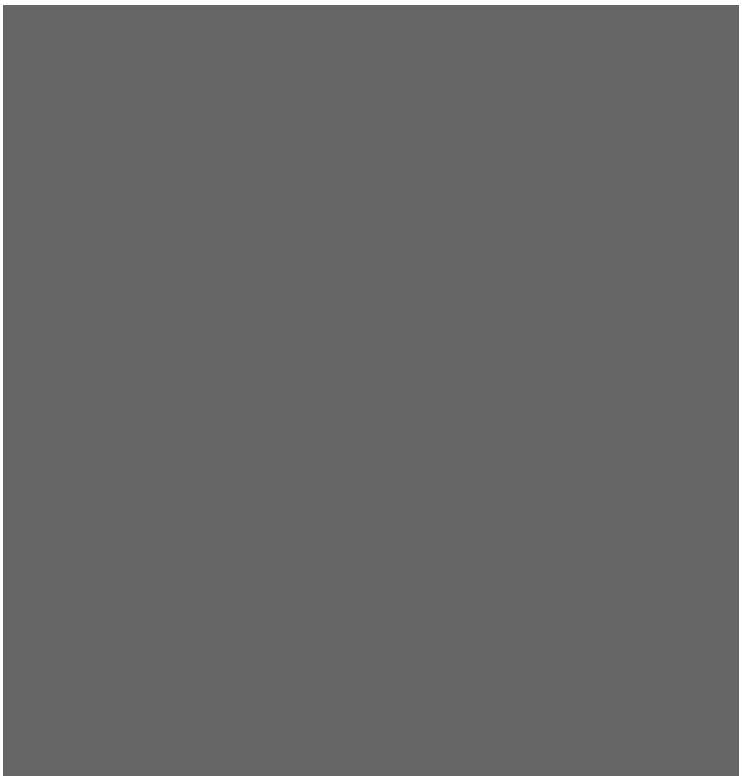
President Biden released his first budget request, calling on Congress to provide $1.52 trillion in funding for discretionary programs for Fiscal Year 2022. The request, which was released with a corresponding press release, includes investments in key health care proposals, K-12 education, medical research, housing, civil rights, and other priorities of the Biden Administration.

The discretionary budget proposed funding for various health initiatives, including:

- Opioids – $10.7 billion to help end the opioid epidemic by investing in research, prevention, treatment, and recovery support services, with targeted investments to support populations with unique needs;
- CDC – $8.7 billion for the Centers for Disease Control and Prevention (CDC) to improve readiness for future public health crises;
- Research – $6.5 billion to launch the Advanced Research Projects Agency for Health (ARPA-H) within the National Institutes of Health (NIH);
- Mental Health – $1.6 billion for mental health requests, including supports for individuals in

In this Issue:

the criminal justice system and suicide prevention;
- HIV/AIDS – $670 million to support efforts to end the HIV/AIDS epidemic in the United States through increased access to treatment and expanded use of pre-exposure prophylaxis (PrEP);
- Family Planning – $340 million to fund the Title X Family Planning program;
- Maternal Health – $200 million to reduce maternal mortality and morbidity rates nationwide and reduce race-based disparities in outcomes among birthing people; and
- Health Equity – $153 million for CDC's Social Determinants of Health program to support states and territories in improving health equity and data collection for racial and ethnic populations.



This proposal does not address funding for mandatory programs, such as Medicare or Medicaid. A full budget request to Congress, which will include spending proposals for all non-discretionary programs, is expected to be released in the coming weeks.

It is important to note that the power of the purse lies within Congress, so the budget recommendation is simply that – a recommendation. Congress will likely ask for the Administration to present their request through hearings as members continue through the appropriation process over the next 6+ months.

Federal Issues

Regulatory

DOL Issues FAQs on COBRA Subsidies; Dem's Push for SEP for COBRA Beneficiaries

The U.S. Department of Labor (DOL) released a series of documents regarding the temporary COBRA premium subsidies available under the American Rescue Plan Act (ARPA).

Why this matters:

- The posted documents include Frequently Asked Questions (FAQs) regarding implementation of section 9501 of ARPA, which authorizes COBRA-eligible individuals to enroll in coverage without any financial obligation from April 1, 2021 through September 30, 2021.
- The full cost of the premium will be paid to the employer, plan administrator, or insurer as a payroll tax credit.

- The FAQs include answers related to eligibility to enroll, interaction with State program requirements, application and premium assistance processes, and new notice requirements. There are also model notices available, including the general notice, one for extended election periods, an alternative notice, and one for when the premium assistance expires.

In related news: On Tuesday, Democratic lawmakers in the House and Senate sent a letter to Health and Human Services (HHS) Secretary Xavier Becerra urging the Administration to establish a special enrollment period (SEP) after COBRA subsidies in the ARPA expire this fall.

The Details: In the letter, lawmakers pointed out that under ARPA, financial assistance expires on September 30, 2021 and lawmakers noted that coverage through an Affordable Care Act (ACA) Marketplace plan does not begin until January 1, 2022. Accordingly, the letter urges HHS Secretary Becerra to establish an SEP to ensure unemployed workers are not forced to pay the full cost of COBRA coverage or go without coverage altogether.

Tri-agencies Issue Guidance on New Mental Health Parity Requirements

The Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury released guidance on implementation of the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), as amended by the No Surprises Act, which passed at the end of last year as part of the Consolidated Appropriations Act.

Why this matters: The No Surprises Act established new reporting and oversight requirements related to mental health and substance use disorder parity compliance of non-quantitative treatment limitations (NQTLs). NQTLs are any limitation on the scope or duration of benefits for mental health or substance use disorder treatment that cannot be expressed quantitatively. Common examples include prior authorization, formulary design, standards for provider network admission, including reimbursement rates, and standards for authorizing out-of-network services, including reimbursement rates. In addition to codifying the comparative analysis approach included in the DOL's 2020 MHPAEA Self Compliance Tool, the Act included processes for corrective action, a report to Congress on the findings of the federal reviews, and information sharing with states on compliance review findings.

Under the FAQs:

- Plans and issuers that offer both medical/surgical benefits and mental health/substance use disorder benefits and impose NQTLs must make their comparative analyses of the design and application of NQTLs available to the Departments or applicable authorities beginning 45 days after the date of enactment (February 10, 2021).
- Plans and issuers that have carefully applied the guidance in the Self-Compliance Tool "should be in a strong position" to submit comparative analyses upon request.

The FAQs provide additional guidance on complying with the new comparative analysis documentation requirements, including the type of information plans and issuers must make available to regulators as well as the specific NQTLs the Departments expect to focus their enforcement on in the near term.

Direct Contracting Model Implemented with Low Profile Roll-Out

CMS announced the participants in the Global and Professional Direct Contracting (GPDC) Model, which began on April 1. The list of participants, called Direct Contracting Entities (or DCEs), evolved from an earlier preliminary list released last year. In addition to accountable care organizations bridging into the

more aggressive Direct Contracting model, the list of participants includes several national or quasi-national primary care platform management companies—such as Oak Street, VillageMD and Lora. Also on the list are a few entities that appear to be owned or affiliated with Medicare Advantage plans—CareMore Aspire Medical Partners, Clover Health Partners, and Humana Direct Contracting Entity. DaVita is also making a big splash in the model through its Vively Health platform operating in multiple states.

The Direct Contracting model was among the boldest of the Trump administration's CMMI projects, establishing ACO-like entities that participate in a model resembling Medicare Advantage in several ways including with respect to assuming risk, receiving risk-adjusted payment, having reimbursement tied to quality, and offering supplemental benefits to entice and better manage Medicare beneficiaries (called beneficiary engagement tools). The Biden administration also announced that it will no longer accept applications for a second cohort that was scheduled to begin in January 2022. Since President Biden's inauguration, CMS has trimmed aspects of the model, including the aggressive "Geo" track and a proposed track for Medicaid managed care organizations.

Coronavirus Updates

- New CDC data show over one-third of Americans have received at least one COVID-19 vaccine dose, and 20% of the total U.S. population has been fully vaccinated.

- White House Press Secretary Jen Psaki announced that President Biden will direct states to open up eligibility for all individuals 16 years and older to receive a COVID-19 vaccine by no later than April 19. The Administration had previously set the deadline as May 1 and is now moving up the target date.

- The Centers for Disease Control and Prevention (CDC) updated guidance regarding surface transmission of SARS-CoV-2. The CDC clarified that the risk of infection through contact with contaminated surfaces or object is considered to be low. The agency reinforced that the principal mode by which individuals are infected is through exposure to respiratory droplets carrying the virus.

- Pfizer and its partner BioNTech requested approval of its coronavirus vaccine for use in children 12 to 15 years old, just one week after the companies said a late-stage trial demonstrated 100% efficacy in this age group. If approved, Pfizer's vaccine would become the first available to younger teens.

- The CDC awarded funding to support local efforts to increase vaccine uptake by expanding COVID-19 vaccine programs and ensuring greater equity and access to vaccine by those disproportionately affected by COVID-19. The awards are part of $3 billion in funding that CDC has granted to 64 jurisdictions to bolster broad-based vaccine distribution, access, and administration efforts. The funding was made available by the American Rescue Plan and the Coronavirus Response and Relief Supplemental Appropriations Act.

- The Kaiser Family Foundation reported a significant decline in vaccine hesitancy amongst U.S. adults since 2020. According to their findings, the number of Americans who have already been vaccinated or want to be as soon as possible continues to rise (currently 61%). Enthusiasm for getting the COVID-19 vaccine continues to grow among people across racial and ethnic backgrounds, with the largest increase this month among Black adults.

HHS Announces More Than 500,000 Americans Enrolled in Marketplace Coverage During SEP

The U.S. Department of Health and Human Services announced more than half a million individuals have already signed up for health insurance through healthcare.gov during the special enrollment period (SEP) for the COVID-19 public health emergency.

The SEP began on February 15, 2021 and runs through August 15, 2021 in most states and gives individuals and families who buy their own coverage a new opportunity to enroll in coverage. In the 36 states using healthcare.gov, anyone who is eligible for marketplace coverage, whether uninsured or already enrolled in coverage, can use this special enrollment opportunity to enroll or switch plans.

State Issues

Pennsylvania

Legislative

Ban on Non-compete/Restrictive Covenants in Practitioner Contracts Passes State House Committee

Last week, the Pennsylvania House Health Committee voted in the affirmative to ban the use of non-compete clauses, also known as restrictive covenants, in practitioner employment contracts.

House Bill 681, sponsored by Rep. Torren Ecker (R-Adams), voids non-compete covenants and makes them unenforceable if the agreements restrict the right of practitioners to practice in any geographic area for any period of time after a separating event. The bill was amended in committee to allow for employers in sixth-, seventh-, and eighth-class counties to utilize non-compete agreements so long as the geography limit is less than forty-five miles from the facility where the practitioner saw the majority of patients and the period is limited to two years.

Other elements of the bill as amended:

- Requires employers to provide notice of a practitioner's departure to the practitioner's prior patients, including information about how to request the transfer of medical records to the departing health care practitioner within 60 days.
- Provides for a health care practitioner to avoid damages if they believe they have cause to leave.
- While the bill allows for recoupment of investments, it places significant limitations on the amount.
- Allows physician-owned practices to utilize non-competes in any county.
- Applies to existing non-compete agreements when a health care practitioner renews their license, registers, or certifies in the commonwealth.

Hospital industry position: The Hospital & Healthsystem Association of Pennsylvania opposed the bill and amendment.

House Committee Holds Hearing on Licensure for Behavior Analysts

The House Professional Licensure Committee held a hearing on the Better Access to Treatment Act (BAT) and House Bill 19, which would establish licensing standards for applied behavioral analysts and regulate the profession under the State Board of Medicine.

Proponents of the legislation, including Rep. Tom Mehaffie (R-Dauphin) and Dr. Cheryl Tierney-Aves, pediatrician, Penn State Children's Hospital, stated that the legislation enables behavior analysts to provide more services in the areas of mental health, suicide prevention, posttraumatic stress disorder, and addiction.

- Supporters of the legislation also argued that the bill would not only help to retain skilled professionals in Pennsylvania, but also give patients and families peace of mind knowing that providers have met stringent academic and training requirements.
- Dr. Tierney-Aves stated that Pennsylvania behavior analysts can only practice in one small area, pediatric autism, and behavioral disorders, with a limited license known as a behavior specialist license.
    - She continued that for all the other disciplines and conditions, professionals may be working with them, but there is no license for behavior analysts to provide those services.

Representatives from the Pennsylvania Occupational Therapy Association (POTA) and the American Speech-Language-Hearing Association (ASHA) testified against the legislation as written.

- POTA argued that House Bill19 uses broad, ambiguous, and far-reaching language that may restrict occupational therapy practitioners and other professionals from providing their services.
- ASHA, in submitted written testimony, stated that the legislation would impede the ability of licensed audiologists and speech-language pathologists to assess and treat communication disorders for individuals with autism spectrum disorder.

Individuals from the Office of Mental Health and Substance Abuse Services and the Department of State (DOS) also voiced their opposition to the current version of the legislation.

- Kalonji Johnson, commissioner, Bureau of Professional and Occupational Affairs (BPOA), DOS, noted that BPOA already has a license issued by the State Board of Medicine that covers behavior analysis: the behavior specialist license, and the department believes that creating another license for behavior analysts would be redundant and unnecessary unless the license sought is to be functionally different. However, the DOS remains open to discussing changes to the scope of practice for the existing behavior specialist license or changes that could support behavior analysts without compromising access to care.
- Courtney Malecki, director, Bureau of Children’s Behavioral Health Services, Office of Mental Health and Substance Abuse Services (OMHSAS) explained that the legislation would restrict who could provide applied behavior analysis (ABA) services to individuals who have a certification as a Board Certified Behavioral Analyst and obtain a behavioral analyst license or assistant behavior analyst license. Malecki stated that if House Bill 19 was enacted, individuals who provide the graduate level component of ABA services or assistant behavior consultation services would be unable to continue providing these services. She stated that the requirements of House Bill 19 would create a barrier to services and cause capacity challenges in the service delivery systems.

State Issues

West Virginia
Legislative

House Votes Down Governor's Tax Reform Proposal
Governor Justice convened another meeting to promote his efforts to repeal the state's personal income tax (PIT)—this time with a bi-partisan group of legislative leaders. Trying to revive interest in his main proposal of the year, the governor announced a new tax package, somewhat different than his original plan, but still contained the core elements of exchanging significant reductions in the PIT for significant increases in a wide variety of other taxes and consumer sales taxes.

Cooperating with the governor, the Senate then modified its tax bill to synch up with the new plan and passed it by a narrow 18-16 margin. The House, which has been adamant in its opposition to increasing or shifting any tax liabilities to reduce the PIT, eventually brought the Senate/Justice tax bill before the body for a vote. Then, the West Virginia House of Delegates voted unanimously 0-100 in opposition to Governor Justice's signature legislative issue of the session.

Outlook: Governor Justice and legislative leaders have all hinted at or called for a special session later in the year to address the PIT reduction and repeal issue once again.

West Virginia Legislative Session Concludes
The 2021 Regular Session of the West Virginia Legislature concluded at midnight on Saturday, April 10, with all legislative issues resolved one way or another and with a state budget for the upcoming Fiscal Year 2022 completely agreed upon between the Senate and House of Delegates as well.

Legislation that Passed

- **HB 2263—Update to the Regulation of Pharmacy Benefit Managers.**
  This was the signature health care issue in the 2021 West Virginia legislative session. The legislation, which was aggressively pushed by the House of Delegates, requires health plans to pay significant dispensing fees to pharmacy stores and to hospital pharmacies, and to pass through the benefits of pharmaceutical manufacturer rebates for prescription medications to the plan member at the point of sale. In addition, ERISA plans would also become subject to the provisions of state law based on a recent U.S. Supreme Court decision. Governor Justice signed HB 2263 into law Friday and will become effective on June 28. However, most of the provisions of the bill are not effective until Jan. 1, 2022.

- **HB 2024—Expand the use of telemedicine to all medical personnel.**
  This bill had many versions throughout the course of the legislative session but was always fundamentally focused on codifying the Executive Orders that were issued by Governor Justice on telemedicine during the pandemic. In the end, HB 2024 largely achieved that goal, but it also includes provisions to require health plan payment parity for in-person and telehealth visits if there is an existing patient relationship. The bill also proposes to allow practitioners to prescribe controlled substances via a telehealth platform.

- **SB 398—Limiting eligibility of certain employers to participate in PEIA plans.**

This legislation was a priority bill for the West Virginia Hospital Association and proposes to immediately cut off (if signed by the governor) any opportunity for a local governmental entity currently covered by a private health plan to terminate that coverage and opt into the coverage of the Public Employees Insurance Agency. Given PEIA's low rates of reimbursement for hospitals, the proposal was designed to limit further conversions from high reimbursement private patients into PEIA reimbursement levels. The House Finance Committee made the bill effective from passage to forestall any potential additional groups moving into PEIA.

- **HB 2005—Relating to health costs.**
  The final version of this bill was very narrow in scope and only requires the Insurance Commissioner to promulgate rules mirroring federal rules regarding hospital disclosures around surprise billing. The original version of the bill proposed provisions that would have exceeded federal laws regarding hospital price transparency, surprise billing, and in addressing health plan network transparency—a topic that was the subject of a new law in 2020. The Senate waited until the last week of the session to consider this measure and modified it significantly before addressing the bill.

- **HB 2776—Creating the Air Ambulance Patient Protection Act.**
  This legislation will permit the Insurance Commissioner to regulate air ambulance service subscriptions/memberships as being instruments of insurance.

- **HB 2877—Expand direct health care agreements beyond primary care to include more medical care services.**
  This bill, which met no controversy during its consideration, will extend the right for providers to enter into direct care (or retainer-type) agreements to other medical practitioners beyond those in primary care.

- **SB 12—Relating to local health department accountability.**
  This bill was very controversial throughout a large portion of the legislative session and will limit the powers of local health departments to take action during future public health emergencies without approval of state officials. Governor Justice has already signed this measure into law, and it becomes effective on June 2.

- **SB 277—Creating COVID-19 Jobs Protection Act.**
  This bill establishes a comprehensive level of liability protection for businesses and employers who may be subject to COVID-related injury or damage claims. In a unique action, the Legislature made the provisions of this new law retroactively effective to January 1, 2020 when Governor Justice signed it.

- **SB 390—Reorganizing the Health Care Authority under DHHR and clarifying responsibilities for the all-payer claims database.**
  This bill was largely technical in nature and made no substantive changes to the law covering the all-payer claims database. The bill has already been signed by the governor and became effective on March 26.

Legislation that Failed to Pass

- **Expanded Alternative Opioid Therapy Mandate**

The most significant issue that failed to be considered in committee this session concerned a bill that proposed to mandate up to 20 physical medical visits for the treatment of chronic paid for a wide variety of providers, most prominently for physical therapists and chiropractors.

- **Health Coverage Mandates**
  Generally, proposed health plan coverage mandates in one form or another represented the predominant number of bills that were not considered this year. Proposals to require enhanced benefits for diabetes patients were numerous, including capping cost-sharing to $25 across a wide range of medications, therapies, equipment, and supplies. As were proposals to restrict health plans' abilities to manage prior authorization of various requested services—most notably for cancer staging screening.

  There were also mandated benefits sought for enhanced autism services, for infertility services, and for PANS/PANDA treatment.

Legislative Interim Committee Meetings
Since there were so many healthcare issues advanced (most unsuccessfully) in the legislative process this year, it seems likely that there will be a potentially large number of topics that will be authorized for legislative study this year by the Senate President and Speaker of the House.

Likely topics for study could include enhanced diabetes coverage, enhanced coverage for mental health and substance abuse, expansion of alternative therapies for alternative pain coverage, as well as mechanisms for achieving long term funding stability for PEIA and local health departments. Additionally, it will not be surprising if there are pushes to examine the state's vaccination policies or employment policies around mandatory COVID-19 vaccination. Study topics will likely be announced on May 10.

The Senate of Pennsylvania is in session April 12-14. The House of Representatives returns to session on April 19.

The Delaware Legislature returns to session April 20.

The West Virginia Legislature concluded their session on April 10.

The New York Legislature: After passage of the budget, the legislature recessed and was due to return on April 14, but that may be extended.

<u>Congress</u>
The U.S. House is in session April 13-16. The U.S. Senate is in session April 12-16.

Interested in reviewing a copy of a bill(s)? Access the following web sites:

Delaware State Legislation: **http://legis.delaware.gov/.**
New York Legislation: **https://nyassembly.gov/leg/**
Pennsylvania Legislation: **www.legis.state.pa.us.**
West Virginia Legislation: **http://www.legis.state.wv.us/**
For copies of congressional bills, access the Thomas website – **http://thomas.loc.gov/.**