EHB Benchmark Updating: The Benefits Outweigh the Burden

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Roadmap

- EHB authorities and compliance
  - HHS Request for Information
  - HHS review and updating process
- The defrayal problem
- Best practices in EHB benchmark updating
  - State selection processes
  - Identifying unmet health needs
  - Engaging consumers and other stakeholders

Background on EHBs

- Pre-ACA - many plans had coverage gaps
  - 40% of plans did not cover maternity care

- EHBs = Set of benefits that non-grandfathered individual and small group insurance plans and Medicaid Alternative Benefit Plans must cover.
  - Most other plans (e.g., large employer) cannot impose annual or lifetime caps on EHB.
- At a minimum, they must include:
  - Ambulatory patient services;
  - Emergency services;
  - Hospitalization;
  - Maternity and newborn care;
  - Mental health and substance use disorder services;
  - Prescription drugs;
  - Rehabilitative and habilitative services and devices;
  - Laboratory services;
  - Preventive and wellness services (incl. family planning) and chronic disease management;
  - Pediatric services, including oral and vision care.

Essential Health Benefits (EHB)

- Sec. 1302 of the ACA: “the Secretary shall define the essential health benefits, except that such benefits shall include *at least*…”
  - Reflect balance among categories;
  - Account for diverse health needs across populations; and
  - Do not discriminate against individuals based on age, disability, or expected length of life

HHS Request for Information on EHB

- The ACA requires HHS to "periodically" review and update EHB categories (42 U.S.C. § 18022(b)(4)(H))
  - difficulty in accessing services
  - identify coverage gaps
  - account for new medical/scientific developments
- Drug classification system, plan documents, barriers to accessing services, typical employer plans
- HHS RFI on EHB: "a lack of consumer complaints about exclusions or claims denials." 87 Fed. Reg. 74098

EHB compliance and enforcement

- Health insurers/PBMs declare certain, high-cost drugs as “non-EHB,” and not subject to ACA cost sharing protections
  - aka “EHB loophole” and “alternative payment model”
  - HHS’ unequivocal affirmation that “plans could exceed the minimum number of drugs required to be covered and that additional drugs would still be considered EHB.” 87 Fed. Reg. 74100
- Clarification: “a non-discriminatory benefit design that provides EHB is one that is clinically-based.” 45 CFR §156.125(a)

Problems with EHB benchmarking

- Leads to vast inconsistencies and coverage gaps
- ACA consumer protections should not be based on commercial health plans
- Most states use small group plan as EHB benchmark
  - Least generous of the benchmark options
  - Embeds discriminatory benefit design
  - Perpetuates disparities
- Out2Enroll – 41 EHB benchmark plans exclude gender affirming care
- See also NHeLP letter to HHS Sec. Becerra – *Re: Advancing Health Equity Through Essential Health Benefits*

About Defrayal

- CCIIO clarified that states seeking new benefits/mandates through benchmarking will not be subject to defrayal
  - However, switching from state mandate to benchmarking mandate is not permitted (state will have to defray in that case)
- Benefit mandates not subject to defrayal when enacted to comply with federal requirements – see 45 CFR §155.170(a)(2)
  - e.g., Nondiscrimination requirements, Mental Health Parity and Addiction Equity Act
    - See Virginia Bulletin and Washington Memo
    - These mandates are also likely exempt from the generosity limit
- Changes in cost-sharing NOT subject to defrayal

Key considerations for EHB benchmarking

- States have considerable EHB flexibility under federal rules
- Many states have no formal process for EHB benchmark selection
- Forty-two states plus the District of Columbia currently use a small group plan as the state's EHB benchmark
- Most states can add or improve benefits without exceeding the EHB generosity test and without triggering defrayal
- Seven states have added/improved benefits with minimal actuarial impact and minimal effect on premiums

Substantive changes to EHB benchmarking options for 2019+

EHB benchmark plan options:

- Selecting EHB benchmark plan used by another state in 2017
- Replacing one or more categories from the state's 2017 benchmark plan with the same category from another state's 2017 benchmark plan
- Selecting new benefits to create a whole new benchmark plan

- New default: previous year's benchmark
- State flexibility grants - September 15, 2021 to September 14, 2023
- Deadline for new EHB benchmark selection: First Wednesday in May

Who selects EHB benchmark plans?

Inconsistency across states

- Lack of legal (or any formal) process in many states
- General lack of public information

- Broadly, we found states have:
  - A legislative selection process
    - CA, MD, NH, WA, CO, and NV
    - Degree of legislative involvement varies
  - A regulatory/delegated selection process
    - Express delegation through statute, e.g., NY, UT, NM
  - An unclear and/or undefined selection process
    - Many states w/ federal default plan (largest small group product in state), e.g., ND, IN, IA, AK, FL, MN, PA, WY, WV
    - Many states w/ virtually no authority found, e.g., IA, PA, WY, WV

Procedural requirements for benchmark selection

- **Public Process:** Requires states to provide *"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."*

  45 C.F.R. § 156.111(c)

- Vague and ill-defined, but CMS has discretion to reject benchmark plan selections if state fails to comply with procedural requirements
- Best practices include forming a stakeholder group, prioritizing health equity, full transparency

Key considerations for state regulators

- Center health equity using a data-driven process to identify unmet health needs
- Industry groups have more resources and power than consumers
- Educate consumers about the process and what is at stake
- Accountability to ensuring that people informing the process are diverse with regards to race, ethnicity, disability, income, LGBTQ+ etc.
  - Full disclosure of participants, consultants, conflict of interest
  - Post all comments, testimony, etc. received
- Provide light-lift ways for consumer groups to inform the process **early** (surveys, etc.)

Best Practices for EHB Benchmark Updates

- **Engage** diverse stakeholders early on (including legislators in states that require legislation for benchmarking changes)
- **Ensure** consumer participation through open meetings, trainings, and a robust public comment period
- **Identify** unmet health needs and prioritize closing disparities through a data-driven approach
- **Recognize** that data gaps can perpetuate health disparities
- **Maximize** transparency
- **Establish** a formal regulatory framework for reviewing and updating the state's benchmark
- **Center** health equity when identifying and prioritizing the greatest unmet health needs

State Changes to EHB Benchmark Plans as of March 2023		
Vermont	• Annual hearing exam and one set of hearing aids per year each 3 years	2024+
Colorado	• Adds annual mental health wellness visit • Adds alternatives for pain management including chiropractic, physical therapy, cognitive therapy • Adds acupuncture • Requires gender affirming care	2023+
Oregon	• Mandatory coverage of buprenorphine • Automatic coverage of naloxone when opioids are prescribed at 50 MME or higher • Adds coverage of non-opioid alternatives to treat pain	2022+
Michigan	• Mandatory coverage of buprenorphine • Automatic coverage of naloxone when opioids are prescribed at 50 MME or higher	2022+
Illinois	• Cover alternative therapies for pain, such as topical anti-inflammatories • Remove barriers to obtaining buprenorphine products for opioid use disorder treatment • Cover at least one intranasal spray opioid reversal agent when initial prescriptions of opioids exceed certain limit • Cover tele-psychiatry care	2022+
New Mexico	• Removes benefit limits for prosthetics • Expands eligibility for weight loss drugs and programs • Adds coverage of 3 naloxone formulations • Adds benefits for artery calcification testing and hepatitis C	2022+
South Dakota	• Adds applied behavior analysis for Autism Spectrum Disorder	2021+

Resources

National Health Law Program

- Essential Health Benefits: Best Practices in EHB Benchmark Selection
- Essential Health Benefits (EHB) benchmarking process
- NHeLP Letter to CCIIO Director, Ellen Montz, Re: Request for Modifications to the Federal Prescription Drug and Maternity Care Essential Health Benefit Standards
- NHeLP letter to HHS Sec. Becerra – Re: Advancing Health Equity Through Essential Health Benefits

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