

Comments of the Independent Regulatory Review Commission



Pennsylvania Health Insurance Exchange Authority #130-1 (IRRC #3401)

Health Equity Accreditation

July 24, 2024

We submit for your consideration the following comments on the proposed rulemaking published in the May 25, 2024 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Pennsylvania Health Insurance Exchange Authority (Exchange Authority) to respond to all comments received from us or any other source.

1. Whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.

This proposal is the first rulemaking promulgated by the Exchange Authority. It is being proposed under the Exchange Authority's rulemaking authority granted to it by the General Assembly under Section 9701 of Act 42 of 2019 (Act 42) (40 Pa.C.S. § 9701), also known as the Health Markets Oversight Act, and their general rulemaking authority of Section 506 of the Administrative Code of 1929 (71 P.S. § 186).

In order to determine if a regulation conforms to the intention of the General Assembly in the enactment of a statute upon which it is based, this Commission is guided by Section 5.2(a) of the RRA. It states, in part, the following: "In making its determination, the commission shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General." Representative Bryan Cutler, Republican Leader, and Senator John Disanto, Chair of the Senate Banking and Insurance Committee, have submitted comments opposing this proposed rulemaking.

In his comments, Representative Cutler states that as the author of Act 42, he believes the proposed regulation "goes beyond the clearly defined purpose and legislative intent of the exchange authority as outlined in 40 Pa.C.S. § 9302(b)(1) and (2)." He also states that Act 42 was passed unanimously by both chambers of the General Assembly and that the agreed-upon intent of it was to "...create a system that made it easy to purchase plans and easy to sell plans. What the Legislature did not intend was for the future boards to add additional conditions on insurers or consumers, no matter how well intended."

Senator DiSanto states in his comments that, “As a general rule, administrative entities such as Pennie should leave social-engineering policy decisions, into which category this clearly falls, to the elected branches of government, unless given clear statutory authorization.”

In light of these comments from current members of the General Assembly, we ask the Exchange Authority two questions. First, what evidence does the Exchange Authority have to show that this type of regulation is what was envisioned by the General Assembly when it granted the Exchange Authority the authority to promulgate regulations? Second, why does the Exchange Authority believe the type of policy set forth by this regulation is within their purview and not a policy decision that should be made by the General Assembly?

2. Need for the regulation.

Representative Cutler questions the need for the rulemaking and how the proposed regulation will lead to the desired outcome of health equity. He points to a lack of data that shows how accreditation of insurers improves health equity issues. Senator DiSanto also questions the need for the rulemaking and poses specific questions related to the information provided by the Exchange Authority in the Regulatory Analysis Form (RAF) submitted with the proposed regulation. His questions relate to terminology, data or evidence to support the rulemaking, and costs. We ask the Exchange Authority to provide more detailed explanations and data in the Preamble and RAF submitted with the final-form regulation that address the concerns of the legislators. We will evaluate the Exchange Authority’s response to the concerns of Representative Cutler and Senator DiSanto to determine if the final-form regulation is in the public interest.

3. Fiscal impact.

In the RAF, the Exchange Authority estimates that the rulemaking will impose a cost of approximately \$6,000 to \$13,080 (plus a \$.06 per member fee) for insurers. Members of the regulated community from the insurance industry have submitted comments that question the Exchange Authority’s quantification of the fiscal impact of the rulemaking. They believe additional costs associated with dedicating staff to comply with health equity accreditation requirements will be required. Senator DiSanto raised a similar concern in his comments. As the Exchange Authority prepares the final-form rulemaking, we ask that it consult with the regulated community to gain a better understanding of fiscal impact the rulemaking could have on the insurance industry. The RAF submitted with the final-form regulation should be amended to reflect the findings of the Exchange Authority.

4. Section 5001.2. Purpose. – Clarity.

This section reads as follows:

The purpose of this chapter is to increase health equity and enhance the *cultural competency* of healthcare services provided in the Commonwealth by requiring insurers selling qualified plans through the Exchange Authority to be accredited in health equity by a recognized accrediting body. [Emphasis added.]

Section 5001.3, relating to definitions, defines the term “health equity.” However, the term “cultural competency” is not defined. We suggest that the final-form rulemaking define the term “cultural competency” to improve the clarity of the regulation.

5. Section 5001.3. Definitions. – Clarity.

Subsection (a) reads as follows, “The definitions in 40 Pa.C.S. § 9103 (relating to definitions) are incorporated by reference and apply to this chapter.” Subsection (b) defines four terms; Department, Exchange Authority, Health equity, and Recognized health equity accreditation organization. Since the first two terms are defined in the cited statute, we recommend that they be deleted from the final-form regulation.

The definition of “health equity” includes the terms “gender” and “disability.” A commentator has suggested that the phrase “gender identity” be used in lieu of “gender.” The commentator also encourages “Pennsylvania’s inclusion of disability as a disparity sensitive characteristic or identity.” We will review the Exchange Authority’s response to these suggestions in our review of the final-form regulation. We note that both terms are also used in § 5001.5(b)(1).

6. Section 5001.4. Achieving health equity accreditation. – Implementation procedures; Clarity.

This section establishes the requirements and timeline to comply with the proposed rulemaking. Commentators representing the insurance industry have identified two issues with this section and how it will be implemented. First, they have suggested that the regulation provide flexibility to insurance companies to align the new health equity accreditation requirement of this rulemaking with their current accreditation schedule and process. They have also suggested that the implementation be phased in over a 24-month period. We ask the Exchange Authority to work with the regulated community on an implementation schedule that is the least burdensome administratively to insurers, while at the same time, meets the goals of the Exchange Authority.

Second, under Subsection (b)(3), they question how an insurer can demonstrate that they made a “good faith” effort to attain accreditation. They have suggested that the criteria that will be used to determine if an insurer has met this standard be included in the final-form regulation. Since a regulation has the full force and effect of law and sets a binding norm, we agree that the final-form regulation should set forth the criteria that will be used by the Exchange Authority to make this determination.

7. Section 5001.5. Recognized health equity accreditation organizations. – Implementation procedures; Clarity.

This section establishes the standards that health equity accreditation organizations must meet for the Exchange Authority to recognize them as an organization through which insurers selling plans through the Exchange Authority can obtain accreditation. Subsection (b)(5) requires a health equity accreditation organization to have “specific parameters” that the applicant seeking accreditation must have prior to becoming accredited in health equity. To assist applicants in meeting this requirement, and to improve the clarity of the regulation, we suggest that the specific parameters be included in the final-form rulemaking.

8. Section 5001.6. Penalties. – Clarity.

This section reads as follows:

Failure to comply with the provisions of this chapter will subject an insurer offering qualified plans through the Exchange Authority to referral to the Department for enforcement in accordance with 40 Pa.C.S. § 9702 (relating to enforcement) **and any other penalty provided by law.** [Emphasis added.]

The phrase “and any other penalty provided by law” is vague. The final-form regulation should either cite the other laws that may be applicable or delete the phrase.