



KANSAS
INSURANCE
DEPARTMENT

Vicki Schmidt, Commissioner

May 5, 2023

Alan Cobb
Kansas Chamber of Commerce
534 S. Kansas Avenue, Suite 1400
Topeka, Kansas 66603

RE: EHB-benchmark plan selection; response to April 4, 2023 comment letter

Mr. Cobb,

The Kansas Insurance Department received the Kansas Chamber of Commerce's April 4, 2023, public comment letter ("Letter") pertaining to the State's proposal to select a new essential health benefits ("EHB") benchmark plan. Your letter will be placed in the public record. I write today to address some of the inaccuracies in your letter so that the public record is complete.

In the Letter, you indicate that the Chamber's utmost concern is the lack of transparency in the process the Department utilized and whether Kansas employers received adequate notice to participate in the process. The concern is noted, but should be assuaged by the fact the Department followed applicable federal law by: holding a public hearing on March 3, 2023; issuing a press release and social media announcement that same day; and by providing more than 30 days' opportunity for written public comment, which is the process by which you were able to submit the April 4 comment letter. The law requires the State to provide "reasonable public 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 website." *See* 45 C.F.R. 156.111(c). Beyond the written public comment period, the Commissioner welcomed dialogue from and took meetings with interested parties, including legislators and an in-person meeting with you on April 11, 2023. The Department also made a recording of the public meeting available on the Department's website on the day of the meeting and included copies of the materials presented at the meeting.

While the Department did not personally invite the Kansas Chamber of Commerce to the public meeting, it is entirely incorrect to say the process lacked transparency. The Department worked diligently to review the current EHB-benchmark plan, evaluate options (including comparisons to other states' benefit designs), narrow the list to quality of life improving benefit options the Department found were actuarially justified and reasonably priced, and presented our proposal to the public. A final decision, by law, could not be made until after the period of public comment.

Simply put, you received adequate notice. That you weren't involved from the very beginning of the grant proposal and project doesn't mean the process lacked transparency or that Kansas employers lacked reasonable notice. The public comment period was your opportunity to meaningfully participate in the process. Unfortunately, you squandered it by failing to reach out to the Department to request a meeting or to ask questions and instead sent a factually and legally inaccurate letter near the end of the comment period. Nevertheless, the Department concurs that a more encompassing notice could have been provided, and we will ensure that a broader swath of stakeholders is notified of key decisions made by the Department going forward.

Process issues aside, there are inaccuracies in your letter that were brought to your attention but have not been corrected. Therefore, the Department must offer this response. You are correct that the federal law allowing a State to select an essential health benefits package is not clear on which entity constitutes the "State", e.g., Governor, Legislature, or Insurance Commissioner. However, long standing guidance from the federal government suggests that it is entirely proper for an insurance commissioner to possess the authority to select the State's EHB-benchmark plan. *Importantly, neither of the two insurance companies that submitted comment letters, Blue Cross and Blue Shield of Kansas, Inc. and Blue Cross and Blue Shield of Kansas City, raised a concern that the Commissioner did not have the authority to select the State's EHB-benchmark plan.*

In Kansas, K.S.A. 40-103 directs that the Commissioner of Insurance has the general supervision, control and regulation of corporations, companies, associations, societies, exchanges, partnerships, or persons authorized to transact the business of insurance, indemnity or suretyship in this state and shall have the power to make all reasonable rules and regulations necessary to enforce the laws of this state relating thereto. Article 22 of Chapter 40 also grants the Commissioner broad authority for regulation of health insurance. The Legislature and Governor must also concur with this conclusion as the recently passed budget included a proviso limiting the Department's ability to expend funds on changing or adding to essential health benefits by stating, in part, "notwithstanding the provisions of K.S.A. 40-103....".

When the Legislature amends a statute, there is a presumption it intended to change the law from how it existed because the legislature does not enact useless or meaningless legislation." *Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors*, 290 Kan. 446, 464, 228 P.3d 403, 415 (2010). Further, there's a presumption "that the legislature acted with full knowledge and information about the statutory subject matter, prior and existing law, and the judicial decisions interpreting the prior and existing law and legislation." *State v. Kershaw*, 302 Kan. 772, 782 (2015) (citing *State v. Bee*, 288 Kan. 733, 738, 207 P.3d 244 (2009)).

Additionally, it is worth noting the EHB review project was funded by a federal grant. The grant was brought to the Legislature's attention multiple times over the past few sessions. No questions about the Department's authority to do the project were raised. You requested the Department cite Kansas law supporting the Commissioner's authority to take this action. Such authority has been provided. No authority to the contrary has been.

Next, your letter suggests the Department bypassed statute requiring legislative approval and social and financial impact reporting. This reliance on these statutes is misplaced. K.S.A. 40-2248 and 40-2249 only apply to the extent the Legislature is considering mandated health insurance coverage. K.S.A. 40-2248 begins “Prior to the legislature's consideration...” and K.S.A. 40-2249 pertains to a report required pursuant to K.S.A. 40-2248, which applies to legislative consideration of mandates, not the Commissioner’s authority pursuant to K.S.A. 40-103 to select an EHB-benchmark plan.

As we pointed out during the April 11 meeting, the EHB-benchmark plan update proposal only applied to individual and small group products. Your members that are in fully-insured large group plans or that self-fund their benefit plans under ERISA would not be directly impacted by the selection of a new EHB benchmark plan. Indeed, many large employers already provide the proposed benefits in some form. The press release was not misleading, and we are very disappointed that, given the opportunity to retract that accusation, you demurred.

The Department followed the law in attempting to get quality of life enhancing benefits available to Kansans. Please know that we have taken all feedback into consideration. Most of the support has been positive, including modest support from Blue Cross and Blue Shield of Kansas and a request to work on the proposal for another year by Blue KC. However, importantly, the Department will follow the mandate from the Legislature to stop the EHB enhancement proposal.

Finally, we acknowledge your philosophical and economic opposition to “mandates” and will take that into consideration in future decision making. However, we told the public we would publicly post the comment letters submitted, and we intend to do so, including yours and this response.

The Department welcomes further dialogue on these issues.

Respectfully,

/s/ Justin L. McFarland

Justin L. McFarland
General Counsel