WISCONSIN LEGISLATIVE COUNCIL STUDY COMMITTEE MEMORANDUM

TO: MEMBERS OF THE STUDY COMMITTEE ON DIRECT PRIMARY CARE

FROM: Andrea Brauer, Staff Attorney, and Brian Larson, Senior Staff Attorney

RE: Options for Committee Discussion

DATE: September 11, 2018

This memorandum summarizes options for potential proposed legislation by the Study Committee on Direct Primary Care (DPC), derived from comments by committee members and invited speakers at meetings on July 24 and August 29, 2018. Each option identifies some of the states that have adopted that option as well as other relevant sources in which the option appears. Key sources used in the preparation of this memorandum, which are attached hereto, include the following:

1. 2017 Assembly Bill 798 and Assembly Substitute Amendment 1 to 2017 Assembly Bill 798, referred to collectively as "AB 798," unless otherwise noted.[1]
2. Model state DPC legislation authored by the Direct Primary Care Coalition (DPCC Model Act).[2]
3. A compilation of recent state legislation on DPC agreements, prepared by National Conference of State Legislatures (NCSL) staff.[3]
4. Copies of enacted DPC legislation in Kansas, Louisiana, Michigan, Oklahoma, Texas, Utah, and Washington, which are not included in the NCSL compilation.

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[1] 2017 Assembly Bill 798 and its companion 2017 Senate Bill 670 were introduced in the 2017-18 legislative session. The Assembly passed the bill, as amended by Assembly Substitute Amendment 1, but no version of it was passed in the Senate. See https://docs.legis.wisconsin.gov/2017/proposals/ab798 and https://docs.legis.wisconsin.gov/2017/proposals/sb670.

[2] Direct Primary Care Coalition, *Model State Legislation: Direct Primary Care Agreements*, www.dpcare.org/dpcc-model-legislation.

[3] Colleen Becker, *Legislation on Direct Primary Care Agreements*, NCSL - Health Highlights, June 29, 2018. This is a compilation of recent state DPC legislation prepared by NCSL staff, and is not an exhaustive list of relevant state laws. It provides background and examples of language that other states have adopted.

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The summary of options is intended for background and discussion. It is not an exhaustive list of issues that may be taken up by the committee, and likewise the committee may choose not to pursue the options listed below.

SHOULD DPC BE STATUTORILY EXEMPT FROM STATE INSURANCE LAW?

Approximately 25 states have enacted DPC legislation that specifically exempts DPC practices from state insurance law. In states that do not have DPC legislation, including Wisconsin, the state insurance commissioner must determine whether the existing DPC practices fall within the definition of insurance under state law. If Wisconsin does not enact DPC legislation, the Office of the Commissioner of Insurance (OCI) would continue to determine whether DPC providers are offering insurance on a case-by-case basis.

SCOPE OF DPC PRACTICE

State law could specify the range of services, practitioners, and patients that may be included in a DPC practice. If the committee wishes to offer recommendations related to this topic, it may consider the options identified below.

Definition of "Primary Care"

Overview

"Primary care" could be defined in state law, in order to specify the range of potential services that may be included in the scope of a DPC practice or a DPC agreement.

Options

- Do not define "primary care," and, instead, allow DPC to cover a broader range of services, such as "health care services." [Alabama and Arkansas.]
- Adopt a definition of "primary care" that is similar to the definition recognized by the federal Department Health and Human Services, which is: "routine health care services, including screening, assessment, diagnosis, and treatment for the purpose of promotion of health, and detection and management of disease or injury." [76 Fed. Reg. 41900 (July 15, 2011)]. [AB 798, DPCC Model Act, Colorado, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, and Washington.]
- Define "primary care" to mean "general health care services of the type provided at the time a patient seeks preventive care or first seeks health care services for a specific health concern," including a list of services such as care that promotes health or prevents disease, treatment of acute conditions, or coordination of care. [Iowa, Nebraska, and Texas.]
- Adopt the definition of "primary care provider" used in the Department of Health Services (DHS) contract with managed care providers in the state Medicaid program. The contract describes primary care as "both the first contact for a person with an undiagnosed health concern as well as continuing care of varied medical conditions,"

and states that "the primary care provider is a person formally designated as primarily responsible for coordinating the services access by the member."[4]

- Adopt the definitions from current state statutes related to defined network plans, which define the term "primary care physician" to mean "a physician specializing in family medical practice, general internal medicine or pediatrics," and also define the term "primary provider" to mean "a participating primary care physician, or other participating provider . . . who coordinates and may provide ongoing care to an enrollee." [s. 609.01 (4m) and (5), Stats.]

Authorization to Offer DPC

Overview

State law could specify which health care providers are authorized to offer DPC. The committee could recommend more than one of the options below. In each of the options, health care providers who are licensed practitioners would remain subject to scope of practice requirements associated with professional licensure.

Options

- Allow any licensed health care provider to offer DPC. [DPCC Model Act, Arkansas, Kansas, Maine, Michigan, Virginia, West Virginia, Washington, and Wyoming.]
- Define "DPC provider" to mean a specific set of licensed health care providers. [AB 798,[5] Alabama,[6] Idaho,[7] Maine,[8] Nebraska,[9] and Tennessee.[10]]
- Allow only physicians to offer DPC. [Louisiana and Texas.]

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[4] BadgerCare Plus and Medicaid SSI Contract for Jan. 1, 2018 to Dec. 31, 2019, effective Jan. 1, 2018, p. 25.

[5] AB 798 authorizes the following individual practitioners to enter a DPC agreement: nurses, chiropractors, dentists, physicians, physician assistants, perfusionists, respiratory care practitioners, physical therapists, physical therapist assistants, podiatrists, dietitians, athletic trainers, occupational therapists, occupational therapy assistants, optometrists, pharmacists, acupuncturists, psychologists, social workers, marriage and family therapists, professional counselors, speech-language pathologists, audiologists, speech and language pathologists, massage therapists, and bodywork therapists. The bill also authorizes participation in DPC practice by a partnership, corporation, or limited liability company of any of the provider types described above; a licensed hospice; a cooperative health care association that directly provides services through salaried employees in its own facility; an inpatient health care facility; a community-based residential facility; or a rural medical center.

[6] Alabama's DPC law authorizes a licensed physician or dentist to be a DPC provider. Additionally, under Alabama law a licensed chiropractor may enter into a "chiropractic care agreement" with a patient to form an arrangement that is similar to DPC for chiropractic services.

[7] Idaho's DPC law authorizes a natural person licensed to provide health care services in the field of pediatrics, family medicine, internal medicine, or dentistry to be a DPC provider.

[8] Maine's DPC law authorizes a licensed physician or other advanced health care practitioner to be a DPC provider.

[9] Nebraska's DPC law authorizes a physician or nurse practitioner who specializes in general medicine, family medicine, internal medicine, or pediatrics to be a DPC provider.

[10] Tennessee's DPC law authorizes a licensed physician or chiropractor to be a DPC provider.

- Specifically authorize a group of health care providers, or an entity that sponsors or employs a group of health care providers, to offer DPC. [DPCC Model Act, AB 798, Iowa, Kansas, Louisiana, Maine, Mississippi, Nebraska, Tennessee, Washington, West Virginia, and Texas.]

Authorization to Contract With a DPC Provider

Overview

State law could specify who is authorized to enter into a DPC agreement with a DPC provider, including whether or not an employer may enter into an agreement on behalf of one or more employees.

Options

- Allow the patient or his or her representative to enter into a DPC agreement with a DPC provider.
- Allow an employer to enter into a DPC agreement on an employee's behalf. [AB 798, Colorado, Florida, Mississippi, Virginia, and Texas.] If such agreements are allowed, the committee may consider additional issues related to third-party payments and disclosures in the employment context, which are discussed in more detail below.

Consumer Protection Disclosures

Overview

State law could require that DPC agreements contain certain consumer protection disclosures. If the committee wishes to offer recommendations related to this topic, it may consider the disclosures outlined in the options below.

Options

- A statement that DPC is not insurance, and is not a medical plan that provides health insurance for the purpose of the individual mandate under the Affordable Care Act (ACA). [DPCC Model Act, AB 798, Alabama, Arkansas, Colorado, Florida, Idaho, Iowa, Indiana, Kansas, Kentucky, Maine, Mississippi, Nebraska, Tennessee, Texas, Utah, and Washington.]
- A statement that DPC fees might not be credited towards deductible and out-of-pocket expenses under an insurance plan. [AB 798.]
- A statement that patients will have to pay for services not covered under the agreement, and are encouraged to purchase wrap-around insurance. [AB 798, Iowa, Washington, and Alabama.]
- A statement that patients should consult with their insurance carrier regarding compatibility of the insurance plan with DPC. [AB 798 and Tennessee.]

- A statement that plans that are compliant with the ACA already have coverage for certain preventative care benefits at no cost to the patient. [Tennessee.]
- A description of the specific duration of the agreement between the parties. [AB 798, DPCC Model Act, Alabama, Iowa, Indiana, Kansas, and Michigan.]
- An explanation of the details of the fee arrangement between the parties, including the terms of any refunds. [AB 798 and DPCC Model Act.]
- A description of the specific services covered under the DPC agreement. Considerations might include whether the range of potential services under the DPC agreement may include some services that are outside of the periodic fee but available on a fee-for-service basis. [AB 798, DPCC Model Act, Alabama, Iowa, Indiana, Kansas, Louisiana, Michigan, and Utah.]
- A statement that if a DPC provider breaches the agreement, the provider may be liable for damages and subject to professional discipline. [Tennessee.]

OTHER REQUIREMENTS OF DPC PROVIDERS

Overview

State law could specify additional elements of a DPC practice or a DPC agreement. If the committee wishes to offer recommendations related to this topic, it may consider the requirements outlined in the options below.

Options

- Requirements related to DPC fee arrangements. Examples include the following:
  - Require DPC providers to charge a capitated fee on a periodic basis, such as on a monthly basis. [AB 798, Indiana, and Washington.]
  - Prohibit DPC providers from requiring patients to pay more than 12 months of the periodic fee in advance. [DPCC Model Act, Alabama, Iowa, and Indiana.]
  - Allow DPC providers to charge fee-for-service. [Texas[11] and Nebraska.] Per-visit fees could be limited to a certain amount (such as "less than the monthly equivalent of the periodic fee"). [DPCC Model Act.]
- Requirements related to third-party payments and billing. An exception could be made for employers paying DPC enrollment fees as an employee benefit. [Kentucky and Nebraska.]

[11] Texas law allows DPC physicians to charge fees in any of the following forms: a monthly retainer; membership fee; subscription fee; fee paid under a DPC agreement; or a fee for each service, visit, or episode of care.

- Requirements related to network participation and referrals. DPC providers could be authorized to participate in a health insurance carrier's network only to the extent that the provider is willing and able to comply with the terms of the participation agreement with the carrier and meet any other terms and conditions of network participation. [AB 798.]
- Requirements or penalties related to misrepresentation by a DPC provider of any terms of a DPC agreement. [Washington.]
- Requirements related to DPC providers' patient panel size.
- Requirements related to selection or acceptance of patients. Examples include the following:
    - State law may specify conditions in which a DPC provider may decline to select or accept a patient. This might apply if a practice has reached its maximum capacity, or the patient's medical condition is such that the provider is unable to provide the appropriate level and type of services required. [DPCC Model Act.]
    - State law may prohibit a DPC provider from discriminating based on health status in selecting or accepting a patient. [DPCC Model Act.]
    - State law may prohibit a DPC provider from discriminating based on other criteria, in addition to health status, in selecting or accepting a patient. This might include criteria such as age, citizenship status, color, disability, gender or gender identity, genetic information, national origin, race, religion, sex, sexual orientation, or other protected classes. [AB 798.]
- Requirements related to termination or discontinuation of patients. Considerations may include the following:
    - State law may specify that a patient may terminate the agreement at any time after giving the DPC provider advanced notice. [AB 798, DPCC Model Act, and Colorado.]
    - State law may specify conditions in which a DPC provider may terminate or discontinue care for a patient. This might apply if the patient fails to pay the periodic fee, the patient has performed an act of fraud, the patient repeatedly fails to adhere to a recommended treatment plan, the patient is abusive or presents an emotional or physical danger to the provider or staff or other patients of the practice, or the DPC provider discontinues operation as a DPC practice. [DPCC Model Act.]
    - State law may prohibit a DPC provider from discriminating based on health status in terminating or discontinuing a patient. [DPCC Model Act.]

- State law may prohibit a DPC provider from discriminating based on other criteria, in addition to health status, in terminating or discontinuing a patient.

ADMINISTRATIVE OVERSIGHT

Overview

Various state administrative agencies may be involved in regulation of a DPC practice, which may depend, in part, on whether it is subject to state regulation as insurance. The current role of state agencies in regulating DPC practices is described below.

Office of the Commissioner of Insurance

OCI regulates and licenses insurance providers. It implements insurance market regulations, reviews insurance policies, assesses providers for solvency, and oversees other issues in the area of insurance. Currently, OCI interprets on a case-by-case basis whether DPC practices are offering insurance, as defined in state law, although OCI has stated that it does not generally consider DPC to be insurance. DPC practices that are not insurance are not currently subject to regulation by OCI.

Department of Safety and Professional Services (DSPS)

DSPS regulates professional licensing and houses various boards responsible for credentialing and examination. Because OCI does not generally consider DPC to be insurance, currently DPC practices are primarily regulated through the providers' professional licensing standards.

Department of Agriculture, Trade, and Consumer Protection (DATCP)

DATCP administers Wisconsin's consumer protection laws, which include general prohibitions against unfair methods of competition, unfair trade practices, and untrue, deceptive, or misleading advertising or sales claims. These laws are very general, and apply to almost all businesses in the state, including DPC practices.[12] DATCP also has more specific authority to regulate certain types of business practices, including through contract reviews.

Department of Health Services

DHS administers Medicaid and other state health programs, involving collection and evaluation of program-related health information. Currently, DHS does not have a large role with regard to regulating DPC practices.

Options

The committee could consider the extent to which the above state agencies might be involved in regulating DPC with regard to any of the following: setting standards by administrative rule, reviewing contracts, investigating misconduct and enforcing the law, or

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[12] More information about the general consumer protection laws enforced by DATCP is available on DATCP's website at: https://datcp.wi.gov/Pages/About_Us/BCPApplicableLaws.aspx.

collecting information and reporting to the Legislature or other parties. Some potential options for consideration are as follows:

- Retain the role of state agencies, as described above.
- With regard to the role of OCI:
    - Specify that a valid DPC agreement is not subject to regulation under the chapters of the Wisconsin Statutes administered by OCI. [AB 798.]
    - Direct OCI to issue guidance to DPC providers to identify criteria or factors relating to a determination of whether a DPC practice constitutes insurance.
    - Give OCI statutory authority to promulgate administrative rules with respect to a determination of whether a DPC practice constitutes insurance.
    - Require DPC practices to submit annual statements to OCI, which include information such as the number of providers in each practice, the number of patients being served, and the average direct fee. OCI could also be required to report certain information annually to the Legislature on DPC practices, such as participation trends and complaints received against DPC providers. [Washington.[13]]
- Authorize DSPS or its credentialing boards to promulgate rules specific to DPC practices.
- Specifically authorize DATCP or DSPS to regulate or oversee DPC contracts.
- Require DSPS or DHS to gather information regarding DPC, which could be related to a potential DPC pilot in the state Medicaid program, and submit a report to the Legislature. [AB 798.]
- Authorize DHS to investigate complaints related to DPC agreements, and require DPC providers to provide DHS with a copy of the DPC agreement and related records upon request. DHS may also be required to refer any complaints or allegations of misconduct related to DPC providers to DSPS. [AB 798 (as originally drafted).]

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Attachments

[13] The Washington Insurance Commissioner's most recent annual report to the Legislature on direct practices in Washington State is available at: https://www.insurance.wa.gov/sites/default/files/2017-11/2017-direct-practice-report.pdf.