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Parity Compliance and Enforcement: What's Working?

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Agenda

1. History and overview of Parity requirements
2. Trends in compliance, enforcement, and litigation
3. CHQI Parity Accreditation
4. What is working?

Learning Objectives

- Consumers and providers have multiple points of leverage under Parity including: disclosure requirements, grievances, appeals, and litigation.
- Parity accreditation presents a promising option for increased compliance and uniformity.
- Because Parity enforcement is so complex and fragmented, improved Parity compliance, and the ultimate goal of improved access to high quality behavioral healthcare, will require further changes in other areas of practice and regulation including evidence-based treatment, utilization management regulations, provider licensing, and value-based payment.

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History and Overview of Parity Requirements

Legislative and Regulatory History

- 1996: Mental Health Parity Act (MHPA)
- 2008: Mental Health Parity and Addiction Equity Act (MHPAEA)
- 2009: Children's Health Insurance Program Reauthorization Act (CHIPRA)
- 2010: Affordable Care Act (ACA)
- 2013 & 2016: MHPAEA Final Rule

MHPAEA – Key Requirements

- **Financial requirements and quantitative treatment limitations (QTLs)**
- **No separate cost sharing requirements or treatment limits** applying only to mental health or substance use disorder benefits
- **Non-Quantitative Treatment Limits (NQTLs)**
- **Coverage in all classifications required if offered in any**
- **Robust disclosure obligations**

Parity in use and application of NQTLs

- **6-step process for demonstrating compliance:**
  1. Provide the specific plan language regarding the NQTL and describe all services to which it applies in each respective benefits classification for MH/SUD and med/surg
  2. Identify the factors and the source for each factor used to determine that it is appropriate to apply this NQTL to MH/SUD benefits
  3. Identify and describe the evidentiary standard for each of the factors identified in Step 2 and any other evidence relied upon to design and apply the NQTL
  4. Identify and provide the methods used to analyze and conclude that the NQTLs are comparable and applied no more stringently, as written
  5. Identify and provide the methods used to analyze and conclude that the NQTLs are comparable and applied no more stringently, in operation
  6. Detailed summary explanation of how the analyses have led the plan to conclude compliance with MHPAEA

Final MHPAEA Medicaid Rule

- Published on March 30, 2016
- States required to certify compliance and post documentation supporting such certification on their public website no later than October 2, 2017
- Provides guidance on the application of MHPAEA to:
  - Medicaid managed care organizations ("MCOs")
  - Medicaid benchmark or benchmark-equivalent plans ("Alternative Benefit Plans" or "ABPs") and
  - The Children's Health Insurance Program ("CHIP")
- DOES NOT apply to the Medicaid State Plan
- Largely the same approach as under commercial Parity rules regarding financial requirements, QTLs, and NQTLs but focus is on *State* compliance

Final MHPAEA Medicaid Rule

OVERSIGHT OF MH/SUD PARITY

- States must conduct oversight to ensure that enrollees in MCOs receive services in compliance with parity requirements
  - CMS oversight is focused on ABP and CHIP benefit documents and MCO contracts
  - States have discretion as to how they perform oversight of MCOs
  - CMS encourages states to include parity oversight and implementation terms in their MCO contracts
  - CMS has begun to provide technical assistance and tools to clarify the types of documentation it seeks to show compliance with parity requirements
  - The parity analysis does not be completed on an annual basis unless there is a change in operations by the state or the plans that would impact parity compliance
  - State documentation demonstrating compliance must be made available to the general public through the state's web site by October 2, 2017

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Trends in compliance, enforcement, and litigation

Parity Enforcement and Oversight

ERISA PLANS

- **DOL** generally has primary enforcement authority over private sector employment-based plans that are subject to ERISA but not over insurers and has only a limited CMP authority
- **IRS** enforces against ERISA plans and their sponsors, and Church Plans through excise taxes of $100/day/individual
- **ERISA plan participants and beneficiaries** may bring suit under ERISA § 502(a)(1) and/or (a)(3)

FULLY INSURED

- **State insurance commissioners** have primary authority over insurance issuers' compliance with federal parity rules, **HHS** has secondary enforcement authority to impose CMP $100/day/individual. State Attorneys General also have enforcement authority.
- **HHS** has CMP authority over QHPs in the marketplace for MHPAEA
- MHPAEA does not preempt State laws and all 50 states, DC, Puerto Rico, and Guam have some sort of MH/SUD parity-type provisions

MEDICAID

- **State Medicaid agencies** have enforcement authority over MCOs, PIHPs and PAHPs
- **CMS** has enforcement authority over states in the delivery of Medicaid benchmark or benchmark-equivalent plans (ABPs), CHIP, and a state's performance of its obligations to oversee MCOs, PIHPs, and PAHPs

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CHQI Parity Accreditation Program

Parity Accreditation

- ClearHealth Quality Institute (CHQI) recently released a draft accreditation program for public comment.
- The CHQI Mental Health Parity Accreditation Program, which has been in development since March 2017, will establish the nation's first accreditation standards outlining a logical sequence of steps for health insurers and health benefits administrators to assess their MHPAEA compliance processes.
- The Mental Health Parity Accreditation Standards reflects MHPAEA regulations and guidance, as well as the experience and insight of CHQI staff (who possess extensive parity enforcement experience) and Parity Standards Committee members.
- The new accreditation program will provide a navigational road map to help health insurers and other organizations better understand how to prepare for and implement strategies to comply with MHPAEA and related state law.

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What is working?

Parity Enforcement and Oversight

DOL ENFORCEMENT AGAINST GROUP HEALTH PLANS

- Employee Benefits Security Administration (EBSA) enforces MHPAEA for 2.2 million private employment-based group health plans covering 130.8 million participants and beneficiaries
- In 2016, the EBSA reviewed 191 plans for MHPAEA compliance and cited 44 violations:
  - 54.5% NQTLs
  - 22.7% FLs or QTLs
  - 13.6% cumulative FRs or TLs
  - 6.8% coverage in all classifications
  - 2.3% annual dollar limits

SOURCE: EBSA enforcement fact sheet, available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/mhpaea-enforcement-2016.pdf

Parity Enforcement and Oversight

LITIGATION – SUMMARY OF TRENDS

- Plaintiffs have mostly been beneficiaries bringing claims under ERISA/MHPAEA or state parity statutes
- Relatively limited state AG litigation to date outside of NY
- Class action attempts are common
- Courts have allowed limited provider and provider association standing for assigned post-service claims
- Highest number of claims involve pediatric patients
- Settlements common following preliminary motions practice
- Third-party administrators frequently made party to suits

Parity Enforcement and Oversight

LITIGATION – COMMON CLAIMS

- Common subjects of claims:
- Experimental/investigational exclusion policies, especially for ABA services
- Age restrictions for medical necessity
- Categorical exclusions for residential MH/SUD treatment, especially for eating disorders (as either QTL or NQTL)
- Quantitative visit limits
- Disparate medical management in practice (more stringent review of MH/SUD prior authorization requests, etc.)

Parity Enforcement and Oversight

SELECT STATE PRACTICES

- Oregon – Issued regulations with small but meaningful differences from MHPAEA final rules, e.g., plans must use a "single definition of medical necessity" for MH/SUD and medical surgical benefits
- California – The Department of Managed Health Care (DMHC) requires plans to submit detailed NQTL information about MHPAEA compliance
- Massachusetts – The Division of Insurance requires plans to submit information about compliance with MHPAEA and state parity statutes, including denial rates, authorization rates, appeal overturn rates.
- Illinois – IL statutes 215 ILCS 5/370c and 5/370c.1 require plans to use ASAM criteria and no other criteria when making SUD medical necessity determinations
- New York – Attorney General has entered into a series of major settlement agreements with commercial insurers over violations of state and federal Parity requirements as well as state human rights laws.

Parity Enforcement and Oversight

SELECT STATE PRACTICES

- Parity@10:
  - In late 2017, the Legal Action Center (LAC), The Kennedy Forum, The National Center on Addiction and Substance Abuse, Partnership for Drug-Free Kids and the Research & Evaluation Group at Public Health Management Corporation launched a three year effort to pursue full enforcement of the Parity Act.
  - Illinois, Maryland, New Jersey, New York and Ohio.
  - An additional five states will be added in the second year.
- SAMHSA/CMS Parity Policy Academies:
  - SAMHSA, CMS, and DOL academies in Colorado, Delaware, Illinois, New Hampshire, and Washington
  - Enforcement in Medicaid and the commercial market.
- Leading states for Medicaid Parity analysis:
  - Missouri, Arizona, Washington State produced particularly detailed parity assessment reports. They are a valuable resource for other states to review.

Learning Objectives

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