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May 27, 2009

Office of Health Plan Standards and Compliance Assistance
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Washington, DC 20210

Attention: MHPAEA Comments

To Whom It May Concern:

Mental Health America of Texas appreciates the opportunity to respond to the Request for Information Regarding the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA) of 2008 published in the Federal Register on April 28, 2009.

In enacting the MHPAEA, Congress made clear that the goal of this new law was to remedy the long history of employers and insurers not providing comparable coverage for mental health and substance use treatment versus medical and surgical benefits.[1] In order to achieve this goal the implementing regulations must reflect the patient/consumer focus and protective intent of this law and ensure access to a meaningful range of evidence-based interventions.

An overly strict reading of the MHPAEA could thwart its fundamental purpose and result in a situation similar to the outcome following enactment of the Mental Health Parity Act of 1996 when the vast majority of employers substituted new restrictions on access to mental health benefits, thereby evading the spirit of the law.

In light of these issues and concerns, our responses to the *Request for Information* are as follows:

Questions from the Request for Information:

1. Financial Requirements and Treatment Limitations:

Do plans currently impose other types of financial requirements or treatment limitations on benefits?

The MHPAEA defines the term "financial requirement" as *including* deductibles, co-payments, coinsurance, and out-of-pocket expenses. The statute likewise defines the term "treatment limitation" as *including* limits on the frequency of treatment, number of visits, or days of coverage "or other similar limits on the scope or duration of treatment."

But the lists of types of limitations and requirements included in these definitions should not be interpreted as the only treatment limitations and financial requirements to which parity applies under the new law. Other examples of treatment limitations that plans disproportionately use to limit the "scope or duration of treatment" for mental health or substance use conditions include the following:

- Prior authorization that are applied more frequently and with higher standards for approval;
- More restrictive medical necessity and appropriateness criteria;
- "Fail first" policies that require consumers to suffer adverse outcomes from a preferred treatment or medication before the treatment or medication recommended by their providers will be covered;
- Step therapy requirements that force consumers to try a series of preferred medications or treatments prior to accessing the recommended treatment;
- Exclusion of certain specialized services like collaborative care, assertive community treatment, residential treatment, and partial hospitalization;
- Higher evidence-based standards;
- More frequent restrictions on treatments due to experimental status;
- Stricter cost effectiveness requirements;
- Lower provider fees;
- Limitations on covering specific types of providers;
- More restrictive provider licensure requirements;
- More limited preferred provider networks or phantom networks with invalid phone numbers and names of providers no longer practicing or accepting new patients;

- Requirement to prove current threat of harm to self or others as the justification for inpatient care; and
- Separate deductibles or lifetime limits.

The MHPAEA regulations should clarify that the parity standard applies to these other types of treatment limitations as well. Plans that manage their mental health and substance use benefits using these techniques must do so in a nondiscriminatory way.

How do plans currently apply financial requirements or treatment limitations to (1) medical or surgical benefits and (2) mental health and substance use disorder benefits? Are these requirements or limitations applied differently to both classes of benefits? Do plans currently vary coverage levels within each class of benefits?

Health plans often impose higher copays, deductibles, and other cost-sharing requirements as well as restricting the number of outpatient visits and inpatient days covered. But these benefit design limitations are only the most obvious examples of discriminatory treatment of mental health and substance use care.

Regulations implementing the MHPAEA must take into account evidence indicating mental health and substance use benefits have thus far been much more strictly managed than medical and surgical benefit. States with preexisting parity laws have not seen large increases in mental health and substance use care utilization, presumably due to strict medical management. A recent study reported that about two-thirds of primary care physicians could not get outpatient mental health services for their patients a rate that was at least twice as high as that for other services due in part to health plan barriers and inadequate coverage.^[2]

Thus, it is critical that the regulations make clear that utilization management techniques qualify as treatment limitations and as such may not be applied to mental health and substance use benefits in a discriminatory and more restrictive fashion.

2. Terms/Provisions in the MHEAPA:

**What terms or provisions require additional clarification to facilitate compliance?
What specific clarifications would be helpful?**

The following terms and provisions should be clarified in the regulations:

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- Parity means equal to or better than—The regulations should emphasize that financial requirements or treatment limitations for mental health and substance use benefits must be “no more restrictive than” those for medical and surgical benefits as stated in the MHPAEA.
- Impact on state parity laws—Clarification is needed to emphasize the continued applicability of state laws that provide for greater protection of mental health and substance use benefits.
- Application of the MHPAEA to Medicaid managed care plans—Since the 1996 parity law applied to Medicaid managed care plans the regulations should make clear that the new parity law applies to these plans as well.
- Application of the MHPAEA to CHIP—Since the 1996 parity law applied to the Children’s Health Insurance Program, the new parity which amends the old, should also apply to CHIP.
- The MHPAEA prohibits separate cost sharing and treatment limits—The statute clearly prohibits separate deductibles and other cost sharing and treatment limits but this is not well understood.

3. Medical Necessity:

What information, if any, regarding the criteria for medical necessity determinations made under the plan with respect to mental health or substance use disorder benefits is currently made available by the plan? To whom is this information currently made available and how is it made available? Are there industry standards or best practices with respect to this information and communication of this information?

MHPAEA requires plans to provide the criteria they use to make medical necessity determinations to any current or potential enrollee or contracting provider upon request.

Most medical necessity standards used by the health plans seem to focus on the following criteria:

1. customary standard of practice whether the treatment accords with professional standards of practice;
2. evidence-based whether there is sufficient evidence to demonstrate effectiveness;
3. medical service whether the treatment is considered medical as opposed to social or custodial; and
4. cost whether the treatment is considered cost-effective by the insurer.^[3]

The following additional clarifications would make this criteria better:

1. Evidence from national experts should be considered if peer-reviewed literature is not available;
2. Services must be available to maintain or restore function and to prevent or ameliorate medical conditions in addition to treating injuries or illnesses; and
3. Cost effectiveness does not necessarily mean lowest cost.

The regulations should require plans to do the following:

- Set timeframes for disclosure of medical necessity criteria;
- Detail appeal and enforcement mechanisms;
- Make available to beneficiaries, upon request, the standards used to determine whether the criteria for medical necessity (e.g., standard of practice, strength of the evidence base, and definition of medical conditions) with regard to mental health and substance use treatments; and
- Make available to beneficiaries, upon request, the standards used to assess whether the medical necessity criteria have been met for medical and surgical benefits.

4. Denials of Reimbursement/Payment for Services: What information, if any, regarding the reasons for any denial under the plan of reimbursement or payment for services with respect to mental health or substance use disorder benefits is currently made available by the plan? To whom is this information currently made available and how is it made available? Are there industry standards or best practices with respect to this information and communication of this information?

The MHPAEA requires plans to provide the reasons for any coverage denials with respect to mental health or substance use benefits to any current or potential enrollee upon request.

The regulations should

- specify that consumers may request at no charge copies of the documentation the plan used to make the coverage determination at issue;
- set timeframes for disclosure of reasons for claims denials; and
- Outline the process for appealing the determinations, including time frames and enforcement mechanisms.

5. Out-of-Network Coverage: To gather more information on the scope of out-of-network coverage, the Departments are interested in finding out whether plans currently provide out-of-network coverage for mental health and substance use

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disorder benefits. If so, how is such coverage the same as or different than out-of-network coverage provided for medical and surgical benefits?

The regulations should require that plans provide information to consumers regarding the relative availability of in-network and out-of-network providers for each of the medical specialties in order to evaluate the adequacy of the networks and their equivalence

6. Cost Exemptions: Which aspects of the exemption for increased cost resulting from the parity requirement, if any, require additional guidance? Would model notices be helpful to facilitate disclosure to Federal agencies, State agencies, and participants and beneficiaries regarding a plan's or issuer's election to implement the cost exemption?

MHPAEA provides that plans may be exempt from the law if they can show that the parity requirements result in an increase in total costs of coverage by over 2 percent in the first year and one percent for each subsequent year.

The regulations should clarify that assessment of whether a plan qualifies for a cost exemption must be determined on a retrospective basis and based on real experience with increased cost instead of hypothetical costs.

7. Other issues: The agencies have also stated that they will accept comments on any other issues relevant to the development of the MHPAEA regulations.

The regulations should provide a methodology for comparing types of service across medical specialty areas to determine their equivalence. In addition, the regulations could outline broad categories of care within which parity will be required; for example, inpatient in-network services as a category and inpatient out-of-network as a separate category.

Another issue to be addressed is whether only covering mental health medications constitutes providing a mental health benefit such that the parity requirements in the MHPAEA are triggered. To exclude medications from consideration as mental health benefits would imply that the new parity requirements do not apply to this essential form of mental health treatment that is one of the therapies most analogous to medical and surgical benefits. This result would be inconsistent with the intent of the MHPAEA to ensure equity between mental health/substance use benefits and medical/surgical

benefits.”[\[4\]](#)

[\[1\]](#) H.R. REP. NO. 110-374, pt. 1 (2007) (Educ. & Labor Comm).

[\[2\]](#) Cunningham, P.J., Beyond Parity: Primary Care Physicians’ Perspectives on Access to Mental Health Care, Health Affairs, April 2009.

[\[3\]](#) Cite Sara Rosenbaum report on “Medical Necessity in Private Health Plans”

[\[4\]](#) H.R. REP. NO. 110-374, pt. 2, Ways and Means Comm., 2007.

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