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VIA ELECTRONIC MAIL

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Timothy D. Hauser
Deputy Assistant Secretary
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Ave. NW, Ste N-5677
Washington DC 20210

RE: Comments on Draft Model Form for Improved Enforcement of the Disclosure Provisions of the Mental Health Parity and Addiction Equity Act

To Whom It May Concern:

Thank you for the opportunity to submit comments regarding the collaborative efforts of the Department of Labor, the Department of Health and Human Services, and the Department of the Treasury to implement the Mental Health Parity and Addiction Equity Act (MHPAEA). These comments are submitted in response to the proposed Model Form, issued on June 16, 2017ⁱ, for use by consumers who seek information and documents to show health plan compliance with MHPAEA.

Health Law Advocates (www.healthlawadvocates.org) is a non-profit public interest law firm that provides free legal assistance to low-income Massachusetts residents who face barriers to obtaining essential health care. Health Law Advocates submits these comments on behalf of the Massachusetts Mental Health Parity Coalition, a diverse group of consumer, provider and legal advocacy organizations dedicated to improving consumer access to needed behavioral health services through education and improved enforcement of state and federal mental health parity laws.

Thank you for providing the opportunity to offer feedback about this important topic of transparency and disclosure of MHPAEA documents and information to plan members and beneficiaries. These disclosure provisions of MHPAEA are critical to the success of the law, as without consumer access to the necessary information in the possession of health plans and health insurance issuers, parity may be an empty promise.

Comments on the Draft Model Form to Request Documentation from an Employer-Sponsored Health Plan or Insurer Concerning Treatment Limitationsⁱⁱ

The draft Model Form is a positive step toward simplifying consumer requests for parity-related disclosures, and we commend the Departmentsⁱⁱⁱ for drafting this resource. We also wish to commend the use of plain-language descriptions of potential parity violations on the form, such as:

“The plan will not authorize any more treatments based on the fact that I failed to complete a prior course of treatment.”

“My plan covers my mental health or substance use disorder treatment, but does not have any reasonably accessible in-network providers for my mental health and/or substance use disorder related treatment.”

and

“I am not sure the methods my plan uses to calculate payment for out-of-network services, such as its methods for determining usual, customary and reasonable charges, complies with parity protections.”

This use of such plain-language descriptions of potential parity concerns will allow the Model Form to serve simultaneously as both a tool to educate consumers about the nature of potential parity violations, and to help simplify and streamline their requests for parity information.

We submit the following comments to help further improve the Model Form.

Recommendations to help reduce the burden upon individuals, families or providers.

We wish to commend the Departments for seeking comments “on any aspect of the draft model form, including ways to reduce burden on individuals, families, health care providers” and others. As advocates for consumers who are struggling to get access to needed mental health and substance use disorder treatment, we see how consumers faced with a denial of service by a health plan are very vulnerable. In this context, they must deal with a lack of service, while also simultaneously trying to access this parity information. During such times, even small administrative obstacles can be so burdensome that individuals or their representatives can easily become discouraged from attempting to understand and assert their rights under MHPAEA.

Considering these concerns, we propose the following changes to reduce the burden upon consumers and their representatives:

(1) Place the burden to identify appropriate parity information in relation to a specific denial upon the health plan.

One aspect of the Model Form that could be improved is the section entitled “Claim/Denial Information Request”. As written, this section requires the consumer to first understand or interpret any denial they received, and then check-off the specific type of denial from the available list, or describe it in the Other category. This is can be unnecessarily burdensome to the

consumer, because denial letters are often long, confusing, and they could include multiple descriptions of different rationales for a denial. Our concern about including such a section in the form is that a consumer who, for various reasons, fails to check off the correct reasons for the denial they received should not be deprived of their right to receive and review parity information concerning that denial. As we stated in our comments submitted Jan. 3, 2017, a Model Form should not be designed or used in such a way as to narrow the information that would otherwise have to be disclosed by the plan.

In contrast, the health plan wrote the denial letter, and thus the plan should bear the burden to identify the reason or basis for their own denial. Therefore, the plan should also have the burden to produce parity documents showing whether the plan feature that was relied upon in the denial complies with MHPAEA. We propose two solutions to this address this concern:

- a) *Allow an individual to request parity information in relation to a specific denial simply by identifying the date of the denial.*

A consumer should be able to request parity information in relation to a service denial simply by identifying the denial by date, such as the date of a denial letter, or the date on which a requested service was denied by a customer service agent, by phone. The Model Form should be amended to state: “I was notified that a service I requested or a claim I submitted was denied on _____ [insert date of denial]. I received this denial by _____ [describe how this denial was communicated to you, such as by phone or by a letter, etc.]

- b) *Revise the heading to include more permissive language that will not be interpreted by a health plan as a limitation to the scope or type of requested parity information.*

Under the heading of “***(Check all that apply)***” the draft Model Form currently includes a list of eight types of denials, plus an “Other” category. While we do not object to an illustrative list of such denial types, we do not feel that a consumer’s failure to check an appropriate box, or a consumer’s selection of too many boxes, should limit their access to parity information in relation to a denial they have received. To address this concern, the heading on this list should be revised from the current “***(Check all that apply)***” to state: “***(Based on your understanding of the denial, check any that seem to apply)***”. Such a modification would make it clear that the consumer is not burdened with defining the scope the parity-related information that is appropriately responsive to this request. Rather, the insurer is required to assess their own denial, and then provide parity information that is responsive, in order to show that their denial was in accord with the MHPAEA.

Recommendations related to parity information and access to out-of-network providers

We commend the Departments for including potential parity concerns encountered by plan members who seek mental health or substance use disorder treatment from out-of-network providers. Specifically, the Model Form frames two scenarios that consumers could encounter:

“My plan covers my mental health or substance use disorder treatment, but does not have any reasonably accessible in-network

providers for my mental health and/or substance use disorder related treatment.”

and

“I am not sure the methods my plan uses to calculate payment for out-of-network services, such as its methods for determining usual, customary and reasonable charges, complies with parity protections.”

(2) Use clear and simple language, and include additional descriptions of potential parity issues in terms of the real-life impacts, such as higher cost sharing that a consumer could face.

While we commend the inclusion of the above examples, we are concerned that some of the language used may be too technical for consumers. One way to address this concern is to include additional examples that describe the same concern, but frame the issue in terms of the out-of-pocket costs that a consumer could face. For instance, the Departments could include the following two additional examples on the Model Form:

- a) “My plan covers my visits to my mental health or substance use disorder provider, but I am forced to pay a lot out-of-pocket. This could be because my plan does not pay this provider in a manner that is similar to what is paid to comparable medical/surgical providers.”
- b) “My plan covers my visits to my mental health or substance use disorder provider, but my provider is on a tier that causes me to pay a higher copay than I think I would pay for a visit to a comparable medical or surgical provider.”

(3) We recommend the Model Form include additional examples of NQTLs identified by the Departments.

The final two examples listed on the draft Model Form illustrate some of the parity concerns that were described as ‘red flag’ issues related to potential parity concerns in health plan design in recent DOL and HHS guidance.^{iv} This guidance also described several additional non-quantitative treatment limits (NQTLs) that would be parity violations if they are not comparably applied to both MH/SUD and medical/surgical benefits in the same benefit classification. (E.g. network tier design; restrictions based on geographical limitations; restrictions based on licensing requirements, and other standards for provider admission to participate in a network, including reimbursement rates.) Consistent with this guidance, we recommend that the Model Form be further amended to include the following additional examples:

- a) “My plan covers my visits to a mental health or substance use disorder provider, but I am forced to pay more for these services due to the ‘tier’ that the providers are on in my plan network.”
- b) “My plan limits my access to treatment for MH/SUD conditions based on where the providers are located geographically, and I am not sure that the plan limits access to medical and surgical treatment in a comparable way.”

- c) “My plan requires that MH/SUD providers or facilities be licensed by my State, and I am not sure that the plan requires that medical and surgical providers or facilities be licensed in in a comparable way.”
- d) “My plan requires that MH/SUD providers or facilities must meet certain standards to join the network of the plan, including that they must accept payment at certain rates, and I am not sure that the plan requires that medical and surgical providers or facilities must also meet comparable standards or accept comparable payment.
- e) “My plan uses criteria to decide how much to pay MH/SUD providers or facilities, or requires them to accept lower payment than comparable medical and surgical providers or facilities, and this limits my MH/SUD providers and treatment.”

(4) Include instructions that the examples listed on the Model Form would include both past and present occurrences of these potential parity violations.

One small improvement to this language would be to clarify that these descriptions include both current and prior denials for services. For instance, the instructions section of the Form, and the specific section listing the “Claim/Denial Information Request” should clarify that the listed examples could be circumstances that occurred in the recent past, or that continue. The section could include the following instructions:

“Please check any of the following circumstances that affect your access to treatment currently, or within the last year.”

Recommendations to help ensure that health plans fully and appropriately comply with requests for parity information.

(5) Clarify through accompanying guidance that the form should not be interpreted by plans to limit the scope of requested parity information.

We recommend that the Departments issue clarifying guidance accompanying the final Model Form to instruct health plans that nothing in the form should be interpreted so as to limit the scope of requested parity information. If a plan is informed adequately of the specific denial that is questioned by a consumer on the basis of parity, then the plan should provide all relevant documents and parity information that is related to the basis for their denial.

(6) Clarify the definition of the parity information to be provided by health plans.

Nonquantitative treatment limitations are limitations to the *scope or duration* of benefits or coverage under a plan that are not expressed numerically. There is not uniform agreement as to what constitutes a NQTL, i.e., what it means to limit the scope or duration of treatment. We have encountered health plans that have refused to produce parity information regarding a claimed NQTL on the basis that the practice identified did not limit the scope or duration of benefits and did not appear on the list of examples included in the Final Rule. To counter plan resistance to disclosing appropriate information, any model form should define “scope” broadly, consistent with the remedial purpose of the Parity rule and common-sense interpretation of regulatory language.^v

We commend the Department for their inclusion of the list of four sets of information that a health plan must provide, in response to the Model Form. We also commend the Departments for listing a 30-day deadline in this final section of the Model Form. However, we make the following recommendations to further improve this section of the Model Form:

- (7) Present the 30-day deadline for the health plan to produce parity documents more prominently on the form, to better inform consumers of this deadline.**
- (8) Include a warning that any health plan that fails to produce parity documents within 30 days of receiving this Model Form can be subject to civil penalties amounting to as much as \$110 per day for each day that they are late.**
- (9) Review the list of four types of parity information described in the Model Form, and expand them to include any information that is required to be provided under regulation 29 CFR 2590.712(d) et. seq.**

For instance, the plan must provide, with respect to a financial or quantitative treatment limit, information on the specific limitation under the plan that was the basis of the denial, and information to show that this limitation is no more restrictive than the predominant limit that applies to substantially all the medical and surgical benefits. For NQTLs, the plan must provide parity information showing that under the terms of the plan, as written and in operation, any processes, strategies, evidentiary standards, or other factors used in applying this NQTL to MH/SUD benefits in the classification are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in applying the limitation with respect to medical/surgical benefits in the same classification group.

In conclusion, we wish to thank the Departments for the opportunity to provide feedback on the disclosure provisions of the Federal Parity Law. We are committed to ensuring that the Federal Parity Law achieves its purpose to eradicate discrimination in insurance coverage of mental health and substance use disorders. Please feel free to contact Health Law Advocates Staff Attorney Wells Wilkinson at (617) 275-2983 or wwilkinson@hla-inc.org if you have any questions about any of our comments or recommendations.

Signed by the following organizational members of the Massachusetts Mental Health Parity Coalition:

Association for Behavioral Healthcare (ABH)
Health Care For All
Health Law Advocates
MA Organization for Addiction Recovery (MOAR)
Massachusetts Psychological Association (MPA)
Massachusetts Council of Community Hospitals.
Mental Health Legal Advisors Committee
The Health Law Group, PC

ENDNOTES

ⁱ See FAQs about Mental Health and Substance Use Disorder Parity Implementation and the 21st Century Cures Act Part 38, available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-38.pdf>.

ⁱⁱ See Form to Request Documentation from an Employer-Sponsored Health Plan or Insurer Concerning Treatment Limitations, CMS, OMB Control Number 1210-0138, available at <https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/Model-Form-to-Request-MH-SUD-Treatment-Limitation-information.pdf>.

ⁱⁱⁱ As used herein, the Departments refers collectively to the Department of Labor, the Department of Health and Human Services and the Internal Revenue Service.

^{iv} See U.S. Department of Labor, U.S. Department of Health and Human Services, Warning Signs – Plan or Policy Non-Quantitative Treatment Limitation (NQTLs) that Require Additional Analysis to Determine Mental Health Parity Compliance, available at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/mental-health-parity/warning-signs-plan-or-policy-nqtl-that-require-additional-analysis-to-determine-mhpaea-compliance.pdf>

^v Scope (noun): extent, range. See <https://www.merriam-webster.com/dictionary/scope>.