



July 24, 2020

Via Email (e-ohpsca-MHPAEA-SCT-2020@dol.gov)

Amber M. Rivers
Director
Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
U.S. Department of Labor

Re: Proposed Updates to 2020 MHPAEA Self-Compliance Tool

Dear Director Rivers,

The Autism Legal Resource Center is a national legal, consulting, education and training firm dedicated to protecting the rights of those with autism and their families. We commend the work of the U.S. Department of Labor (DOL) acting in conjunction with the Department of Health and Human Services and the Department of the Treasury to provide additional updated guidance on compliance with the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). Because coverage of Autism Spectrum Disorder (ASD) treatments in self-funded plans continues to be subject to improper quantitative and nonquantitative treatment limitations in violation of MHPAEA we believe that enhanced guidance for the self-compliance tool as well as additional, ASD specific guidance is essential. Pursuant to your request, we are confining our comments below to the new (highlighted) language in the Proposed Updates to the 2020 MHPAEA Self-Compliance Tool that was circulated along with the Request for Comments. Below we identify specific guidance, provide comments and in some cases suggest specific language for revisions.

Guidance: p. 6, Mental health benefits, Note (“If a plan defines a condition as a mental health condition, it must treat benefits for that condition as a mental health condition.”)

Comment: The Note discusses application of an experimental treatment exclusion to ASD coverage and how that must be evaluated under the NQTL analysis. Because of the continued prevalence of quantitative treatment limitations on ASD coverage in many self-funded plans, we would ask that a reference to QTLs be included as well.

Suggested revision: NOTE: If a plan defines a condition as a mental health condition, it must treat benefits for that condition as mental health benefits. For example, if a plan defines autism spectrum disorder (ASD) as a mental health condition, it must treat benefits for ASD as mental health benefits. Therefore, for example, any exclusion by the plan for experimental treatment that applies to ASD should be evaluated for compliance as a nonquantitative treatment limitation (NQTL) (and the processes,

strategies, evidentiary standards, and other factors used by the plan to determine whether a particular treatment for ASD is experimental, as written and in operation, must be comparable to and no more stringently applied than those used for exclusions of medical/surgical treatments in the same classification). See *FAQs About Mental Health And Substance Use Disorder Parity Implementation And the 21st Century Cures Act Part 39, Q1*, available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-39-final.pdf>. **In addition, no quantitative treatment limitation can be imposed on any services being used for ASD treatment unless such quantitative limit is also applied to medical/surgical benefits and is no more restrictive than the predominant quantitative treatment limitation of that type that is applied to substantially all medical/surgical benefits in the same classification.**

Guidance: p. 8 notes that the final EHB rules for the ACA require that MH/SUD benefits in covered small group and individual markets must be provided in compliance with MHPAEA rules and goes on to state that “this means that individuals in group health plans offered by small employers who purchase non-grandfathered health insurance coverage in the small group market will have coverage that is subject to the requirements of MHPAEA.”

Comment: Because MHPAEA guidance by DOL also serves as a resource to state regulators it would be helpful to also mention that this result also applies to individual plans.

Suggested revision: In practice, this means that **in addition to persons with individual plans subject to the ACA**, individuals in group health plans offered by small employers who purchase non-grandfathered health insurance coverage in the small group market will have coverage that is subject to the requirements of MHPAEA.

Guidance: p. 10 Illustration notes that where a plan covers medical/surgical benefits in all classifications but does not cover MH/SUD outpatient services for either in-network or out-of-network providers it has failed to meet MHPAEA parity requirements.

Comment: A not uncommon problem with ASD coverage is where a funder provides in-network and out-of-network coverage for medical/surgical benefits but limits ASD/MH coverage to in-network providers. It would be helpful to add this variation to the example.

Guidance: p.12 Illustration states that a “plan uses nationally recognized clinical standards to determine coverage for prescription drugs to treat medical surgical benefits based on the recommendations of a Pharmacy and Therapeutics (P&T) committee.”

Comment: Was the sentence intended to state to treat medical or surgical “conditions” not medical surgical benefits? It would be helpful to note in the guidance that even if a treatment limitation does not violate MHPAEA it may still run afoul of other contractual and statutory obligations including Section 1557 of the ACA and contract or ERISA provisions. In particular, any treatment limitation that excludes or limits treatment for a particular condition should be closely scrutinized.

Guidance: p.12 states that if a plan or issuer covers the full range of medical/surgical benefits in all classifications, both in-network and out-of-network), beware of exclusions on out-of-network MH/SUD benefits.

Comment: ASD coverage is sometimes limited to out-of-network only or in-network only, so it would be useful to add to the guidance the various permutations of medical/surgical in-network and out-of-network coverage and emphasize that parity applies to all of these variations.

Guidance: p. 16 Compliance Tips

Comment: Improper QTLs (as well as dollar limits) remains a common problem in self-funded plan coverage of ASD. Including in the compliance tips the simple, if obvious, step of identifying all QTLs imposed on any MH/SUD conditions may focus attention on this issue and improve self-compliance. Guidance in this document or separate guidance noting that ASD is defined as a mental health condition in generally accepted standards of independent medical practice such as the DSM and the ICD may also assist those reviewing for compliance.

Guidance: p. 18 Warning Sign indicates that applying a specialist copayment requirement for all MH/SUD benefits within a classification but applying a specialist copayment only for certain medical/surgical benefits within a classification may be indicative of noncompliance.

Comment: It may also be useful to note that the determination of whether a professional falls within a specialist category for purposes of a copayment is an NQTL that must meet those parity requirements.

Guidance: p.20 Illustration provides examples of cumulative quantitative treatment limits.

Comment: Because the imposition of quantitative treatment limits on ASD coverage remains a not uncommon occurrence in self-funded plans, an ASD example here and in the section on dollar limits would be helpful to improve compliance. QTL's and dollar limits in recent matters addressed by the Autism Legal Resource Center that have subsequently been removed by issuers include:

- an annual dollar cap on benefits for ABA treatment for ASD of \$35,000
- a 50-visit annual limit on ABA treatment for ASD for children over age 3
- annual dollar caps on ABA treatments for ASD of \$25,000 for children age 1-5, \$15,000 for children age 6-12, and \$10,000 for children age 13-15.
- A 130 combined annual visit limit for all ASD assessments and treatments.

Suggested revision: include any or all of the foregoing examples.

Guidance: p.26 states that if the plan or issuer relies on any experts, the plan or issuer should describe the experts' qualifications and whether the expert evaluations in setting recommendations for both MH/SUD and medical/surgical conditions are comparable.

Comment: The experts used for medical/surgical recommendations and evaluations and those used MH/SUD evaluations and recommendations and the evaluations used must be comparable. It is important that experts providing MH/SUD evaluations and recommendations be comparably qualified in terms of education, training, and practice experience in the particular treatment at issue as their counterparts performing these functions on the medical/surgical side.

Suggested revision: if the plan or issuer relies on any experts **with respect to treatment evaluations or recommendations it must ensure that the experts' qualifications in the treatments and conditions at issue are comparable for MH/SUD conditions and medical surgical conditions and the expert evaluations used in setting recommendations for MH/SUD conditions and medical/surgical conditions**

are comparable. Experts providing MH/SUD evaluations and recommendations must be comparably qualified in terms of education, training, and practice experience in the particular treatment at issue as their counterparts performing these functions on the medical/surgical side.

Guidance: p. 27-28 *Examples of methods/analyses substantiating that factors, evidentiary standards, and processes are comparable:*

- Internal Quality Control Reports showing that the factors, evidentiary standards, and processes with respect to MH/SUD and medical surgical benefits are comparable.

Comment: Because the NQTL analyses of the plan or issuer must be available upon request, plans and issuers should be maintaining reports and analyses on file documenting their NQTL analyses demonstrating compliance with MHPAE. These records may be in the form of quality control reports or other documents. The documents should reflect that each NQTL applies to both medical/surgical benefits and MH/SUD benefits and that the factors, evidentiary standards and processes with respect to application of the NQTL to MH/SUD benefits are comparable to the factors, evidentiary standards and processes with respect to application of the NQTL and medical surgical benefits.

Suggested revision: Internal documents, including quality control reports, utilization management analyses and policy and procedure files identifying the NQTL, reflecting that it applies to both medical/surgical benefits and MH/SUD benefits and demonstrating that the factors, evidentiary standards and processes with respect to application of the NQTL to MH/SUD benefits are comparable to the factors, evidentiary standards and processes with respect to application of the NQTL and medical surgical benefits. To comply with timing requirements for disclosure, these documents should be maintained in a readily accessible database known and available to personnel within the issuers organization responsible for responding to external requests for this information.

Guidance: p. 27-28 *Examples of methods/analyses substantiating that factors, evidentiary standards, and processes are comparable:*

- Summaries of research (e.g., clinical articles) considered in designing NQTLs for both MH/SUD and medical/surgical benefits, demonstrating that the research was similarly utilized for both MH/SUD and medical/surgical benefits.

Comment: Generally accepted research design protocols and sources may differ between medical/surgical and MH/SUD conditions. Accordingly, although this point may already be encompassed in the “similarly utilized” language, it could be further acknowledged by adding that the research should be comparably appropriate for the MH/SUD benefits to which the NQTL applies.

Suggested revision: Summaries of research (e.g., clinical articles) considered in designing NQTLs for both MH/SUD and medical/surgical benefits, demonstrating that the research was **comparably appropriate and** similarly utilized for both MH/SUD and medical/surgical benefits.

Guidance: p. 28, **Warning Signs:** The following plan provisions related to NQTLs may be indicative of noncompliance and warrant further review:

Comment: Providing warning sign examples of potentially noncompliant NQTLs improves the efficiency of enforcement efforts. Access to ASD treatment is frequently limited by a number of common NQTLs

and therefore “red flag” examples of these, whether in this document or other guidance and updates issued by DOL would be extremely useful. Examples include:

- conditioning access to treatment on obtaining an ASD diagnosis using overly restrictive diagnostic criteria and tests not required for diagnosis by professionals acting within the scope of their license under state law in accordance with generally accepted standards.
- mandatory requirements for parent or caregiver participation imposed as a condition for access to treatment.
- restrictions on access to medically necessary treatment locations such as clinics, schools, or community locations.
- restrictions based on age or school attendance.
- restrictions on the range of ASD symptoms treated or conditioning access to treatment on demonstration of certain symptoms such as self-injurious behavior or aggression.

Suggested revision: include any or all of the foregoing examples.

Guidance: p. 33, Note states that “[c]ompliance with the disclosure requirements of MHPAEA is not determinative of compliance with any other provision or other applicable Federal or State law.”

Comment: It should also be noted here or elsewhere in the document that compliance with the substantive requirements of MHPAEA does not relieve an issuer of the obligation to comply with other Federal or State laws including ERISA and Section 1557 of the Affordable Care Act which may impose additional obligations and prohibitions on treatment exclusions or limitations. *See, e.g., Schmitt v. Kaiser Foundation Health Plan*, No. 18-35846, 2020 WL 3969281 (9th Cir. July 14, 2020) (holding a categorical exclusion of treatment for hearing loss would raise an inference of discrimination under ACA Section 1557).

Guidance: P. 34 Section H. Establishing an Internal MHPAEA Compliance Plan

Comment: To ensure that any treatment limitations imposed by an issuer are in compliance with MHPAEA, there should at a minimum, be policies and procedures in place to initially verify and no less than annually update:

- a list of all financial requirements and QTLs imposed on MH/SUD coverage and documentation establishing that the financial requirement or QTL is also imposed on medical/surgical coverage and is no more restrictive than the predominant financial requirement or QTL imposed on substantially all medical surgical coverage within the same statutory classification.
- a list of all NQTLs imposed on MH/SUD coverage and imposed on MH/SUD coverage and documentation establishing that the NQTL is also imposed on medical/surgical coverage and as written and in operation, any processes, strategies, evidentiary standards, or other factors used in applying the NQTL to MH/SUD benefits in a classification are comparable to, and are applied no more stringently than, those used in applying the limitation with respect to medical/surgical benefits in the same classification.
- a list of any lifetime or annual dollar limits imposed on any MH/SUD benefits and, if any such limits are imposed, documentation establishing that such aggregate lifetime or annual dollar limits are imposed on at least one-third of all medical/surgical benefits.

To insure compliance with MHPAE disclosure requirements, the forgoing documents should be maintained in an accessible repository known and available to all personnel responsible for responding to requests for this information including provider and beneficiary relations personnel, claims personnel and utilization review and management personnel.

In addition, to comply with timeliness requirements, a log/database should be maintained containing the date a request for information is received, the date it is responded to and a reference to the information provided.

Suggested revision: include the foregoing additional items.

Thank you for the opportunity to provide comments on the Proposed 2020 Updates to the MHPAEA Self-Compliance Tool. If you have any questions or if I can provide any additional information, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Dan Unumb", with a long horizontal flourish extending to the right.

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