health law advocates
Lawyers Fighting for Health Care Justice

One Federal Street, 5th Floor
Boston, MA 02110

T 617-338-5241
888-211-6168 (toll free)
F 617-338-5242
W www.healthlawadvocates.org

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VIA ELECTRONIC MAIL [parity@hhs.gov]

Mental Health & Substance Use Disorder Parity Task Force
U.S. Department of Health & Human Services
200 Independence Avenue SW
Washington, DC 20201

RE: Comments of Massachusetts Mental Health Parity Coalition on the Implementation and Enforcement of the Mental Health Parity and Addiction Equity Act

To Whom It May Concern:

Health Law Advocates (HLA) respectfully submits these comments to the Mental Health and Substance Use Disorder Parity Task Force in response to a request for comments from stakeholders about their experiences with the Mental Health Parity and Addiction Equity Act (MHPAEA or the Federal Parity Law). We write on behalf of the Massachusetts Mental Health Parity Coalition, a group of provider and consumer advocacy organizations committed to making mental health and substance use disorder parity a reality, specifically the following member organizations: Health Law Advocates, Health Care For All, Association for Behavioral Healthcare, Massachusetts Association of Behavioral Health Systems, Massachusetts Association for Mental Health, Massachusetts Hospital Association, Massachusetts Organization for Addiction Recovery, Massachusetts Psychiatric Society, and National Alliance on Mental Illness, Massachusetts.[1] Please refer to the enclosed list for a brief description of each organizational member of the Massachusetts Mental Health Parity Coalition.

Thank you for providing the opportunity to offer feedback about this important topic. While we believe the Federal Parity Act has begun to improve access to treatment for Americans living with mental illness and substance use disorders, much work still needs to be done in order to attain parity in insurance benefits.

HLA is a non-profit public interest law firm in Boston. We provide free legal assistance to low-income Massachusetts residents who face barriers to obtaining essential health care. We have more than 20 years of experience representing consumers denied access to medically necessary health services. Through our Mental Health Parity and Addiction Equity Initiative, HLA assists individuals with mental health conditions and substance use disorders to receive health insurance benefits on fair terms.

[1] A few Coalition members could not review these comments by the deadline. The absence of certain organizations as signers does not indicate disagreement with the content of this letter.

Below we offer our comments on key ways in which the Federal Parity Law could be strengthened.

I. Responsible Government Agencies Should Launch a Sustained Educational Campaign on the Federal Parity Law

HLA conducts trainings statewide on the Federal Parity Law. Many attendees at our trainings have not heard of the law; those that have heard of it are not sure what it means or how it works. There needs to be a greater, coordinated effort by federal and state enforcement agencies to educate consumers, providers and advocates about the law – how it works and the rights it provides. A comprehensive public education campaign should be delivered through various means including traditional media, the internet and social media. If people are not aware of the law and its protections, they will not alert regulators to violations or raise parity claims in appeals to their health plans. In addition, health insurance issuers and group health plans should be required to inform members of their parity rights and provide clear instructions on how to raise a parity violation. Non-governmental organizations can only do so much to spread the word; a government-led information initiative is essential to convey the significance and breadth of the Law.

II. Enforcement Must Be Improved with Respect to Getting Health Plans to Release to Consumers and Providers Information Necessary to Determine Parity Compliance

As mentioned above, HLA attorneys regularly conduct educational programs on the Federal Parity Law. As part of the trainings, we inform attendees about their right to request and receive information from their health plan to confirm that mental health and substance use disorder benefits are compliant with the Law. Most attendees do not know they have the right to request this information. Moreover, it is difficult to encourage audience members to assert this right when HLA, a legal organization, has struggled to obtain requested parity compliance information.

When we represent a client in a health plan appeal where we believe there may be a parity violation, we request from the plan comparative information (mental health/substance use disorder and medical/surgical information) to determine compliance. Here is a sample request:

> The XYZ Employee Benefit Plan administered by ABC Insurance Company generally covers medically appropriate treatments for medical/surgical benefits and mental health and substance use disorder benefits. The Plan requires concurrent review to determine whether inpatient mental health/substance use disorder services continue to be medically necessary. Concurrent review of an inpatient stay is a nonquantitative treatment limitation (NQTL) under the MHPAEA, subject to parity requirements.
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> On information and belief, ABC reviewers routinely deny coverage after approximately 2 weeks of inpatient SUD rehab, regardless of the clinical circumstances. Further, on information and belief, evidentiary standards used in

> determining whether inpatient substance use disorder rehabilitation is medically appropriate are not applied in a manner that is based on clinically appropriate standards of care. On information and belief, ABC's concurrent review of inpatient medical/ surgical benefits for the XYZ Plan is not based on such arbitrary limits.
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> John Doe's coverage for inpatient residential SUD treatment was terminated based on concurrent review conducted in a manner and based on standards that, as applied, violate the MHPAEA. Mr. Doe therefore requests, pursuant to 29 CFR § 2590.712(d)(3), disclosure of all information relevant to medical/surgical, mental health, and substance use disorder benefits for purposes of evaluating the Plan's compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA) in the handling of his claim. This request includes documents with information on medical necessity criteria for *both* medical/surgical benefits and mental health and substance use disorder benefits, and the processes, strategies, evidentiary standards, and other factors used by ABC to apply a nonquantitative treatment limitation with respect to medical/surgical benefits and mental health or substance use disorder benefits under the plan.

Although HLA has made it standard practice to request parity compliance information when pursuing an appeal involving MH/SUD benefits, we have yet to receive *any* such information. We usually receive the applicable MH/SUD medical necessity criteria but not comparative medical/surgical information needed to perform the parity analysis. Attorneys handling similar cases around the country have had the same experience. If trained lawyers cannot obtain the information necessary to assess parity compliance, how can a layperson be expected to successfully do so?

Federal agencies should educate health insurance issuers and group health plans about their disclosure obligations under the Federal Parity Law. Enforcement must also be strengthened against issuers and plans that do not meet their disclosure obligations, including imposition of penalties or sanctions.

Another tool for enhancing compliance with disclosure provisions is to require issuers and plans to designate a parity compliance officer who has access to and is knowledgeable about all plan documents used to design benefits and test for parity compliance. The parity compliance officer should be the point person to respond to requests for documents relevant to parity compliance and alleged parity violations. Plans and issuers that contract with a separate entity to manage behavioral health benefits must demonstrate how the necessary information will be shared and analyzed across entities.

III. Federal and State Agencies Must Do More to Help Consumers Conduct the Complex Parity Analysis

Another obstacle to the fulfillment of the MHPAEA's potential is the complexity of conducting a parity compliance analysis. Even for attorneys immersed in trying to understand the Law, the parity analysis is not at all intuitive or clear. Imagine the challenge for the average consumer. With financial requirements and QTLs, the mathematical calculation of "predominant" and "substantially all" is burdensome, and requires knowledge of the plan's

finances. There will likely be a problem obtaining information on plan expenditures given advocates' experience. Federal agencies, including the DOL and HHS, need to provide support and guidance to help consumers with obtaining and analyzing this complex information. In some cases regulatory agencies will need to provide direct assistance, performing the parity analysis for an affected individual.

IV. Clear and Simple Tools Must Be Developed to Guide Consumers in Identifying and Analyzing a Parity Violation

The responsible federal agencies need to present the parity rules and analysis in a simplified way for consumers who seek to enforce their parity rights. For example, the DOL and HHS could jointly develop and issue a guide or interactive web tool that walks consumers through the analysis. The DOL has created a parity compliance tool for plans (*see* Self-Compliance Tool for Part 7 of ERISA: Health Care-Related Provisions, pp. 15-28, at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/cagappa.pdf); there is no reason that a complimentary tool could not be developed for consumers. Another helpful step would be recommending to health plans and issuers best practice language and materials to be included in a MH/SUD adverse benefit determination. For example, plans must currently inform members to whom an adverse determination is issued how they can obtain their claim file. Similarly, plans should have to explicitly invite members to request information on parity compliance in connection with a claim or appeal. Any steps that can be taken to make the process easier for consumers is a step toward improving the enforcement of the Parity Law.

Now that states must enforce parity for many Medicaid plans, Federal agencies must provide support to ensure that states conduct this compliance review in a meaningful way. Federal agencies should likewise provide support to State agencies charged with enforcing the Parity Law with respect to fully insured private health plans.

Federal regulators should develop and release a parity analysis framework to plans/issuers and consumers. Where inadequate provider networks for MH/SUD services is a widespread complaint and may indicate a parity violation, federal agencies should issue detailed guidance to state regulators on how to monitor and assess compliance with network adequacy requirements under the Parity Law.

The final MHPAEA regulations, issued in 2013 (private plans) and 2015 (certain Medicaid plans) provide a thorough legal framework for analyzing parity violations. Unfortunately, the Rules assume too much about the information available to a plan member. For example, the 2013 Final Rule identifies a non-permitted use of a NQTL as follows:

> Example 1.
>
> (i) Facts.
>
> A plan requires prior authorization from the plan's utilization reviewer that a treatment is medically necessary for all inpatient medical/surgical benefits and for all inpatient mental health and substance use disorder benefits. In practice, inpatient benefits for medical/surgical conditions are routinely approved for seven days, after which a treatment plan must be submitted by the patient's attending provider and approved by the plan. On the other hand, for inpatient mental health and substance use disorder benefits, routine

approval is given only for one day, after which a treatment plan must be submitted by the patient's attending provider and approved by the plan.

(ii) Conclusion.

In this Example 1, the plan violates the rules of this paragraph (c)(4) because it is applying a stricter nonquantitative treatment limitation in practice to mental health and substance use disorder benefits than is applied to medical/surgical benefits.

How does a plan member obtain the information – the number of days for a plan's routine approval of coverage - that makes the violation apparent? Step-by-step guidance is needed to help people get the necessary information and work through the analysis. This guidance must be practical, problem-specific and supported by clear examples of compliant and non-compliant practices.

V. To the Extent Possible Under Existing Law, Enforcement Agencies Should Apply Remedies or Penalties that Strengthen Implementation of MHPAEA

A major weakness in the MHPAEA is that it does not create any remedies or penalties beyond what is provided in ERISA. Most parity claims are raised through ERISA, using the appeals process and sometimes court. Under ERISA the only enforcement mechanisms in individual cases are restitution (reimbursement of benefits paid out-of-pocket) and injunctive relief. There need to be incentives for consumers to bring parity claims and for plans to comply. Creation of a private right of action, independent of ERISA, could help. Some states are contemplating such a right for fully insured health plans; to the extent possible the federal government should consider enhancing enforcement rights too.

Further, as mentioned, there is great difficulty getting the required parity comparison documents from issuers and plans. Yet there is no explicit penalty for those that do not produce these documents. A clear and routinely enforced penalty for failure to produce requested documents would make health plans more apt to provide them.

VI. Responsible Agencies Must Work to Simplify and Coordinate a Mechanism for Consumers to Pursue Parity Complaints

Government agencies cannot fulfill their enforcement role if consumers do not know where or how to complain about parity violations. Health plans cannot be relied on to police themselves; consumer complaints may be the most important tool in keeping plans compliant. Based on feedback we have received, there is a need for a clearer, more targeted parity complaint process. We concur with national advocacy organization Community Catalyst in its recommendation of an easy-to-use national consumer complaint web portal or a toll-free telephone hotline that would collect basic information about potential parity violations. Such a centralized system would help direct complaints to the appropriate agency. Further, having a central agency field and refer complaints would help with data collection and enforcement – i.e., assessing the types of violations occurring and identifying particularly bad actors for targeted follow-up.

Even if it is not possible to centrally coordinate the parity complaints process, each agency that receives parity complaints must have a formal process for handling them. This would entail having information on the agency website on filing a parity complaint and a separate written complaint process for parity complaints alone.

The Massachusetts Division of Insurance has a general written complaint form that does not refer to the Federal or State Parity Laws. HLA has proposed a specialized parity complaint form for the DOI to use. Without a targeted form or field parity violations may be overlooked. The Massachusetts Medicaid program (MassHealth) similarly lacks a special process or form to capture parity complaints. Both the DOI and MassHealth – and their counterparts in other states - should have information about making a parity complaint on their websites and offer a special Parity Complaint form. These changes will put state agencies in a better position to identify and investigate parity-related complaints.

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In conclusion, HLA on behalf of the Massachusetts Mental Health Parity Coalition thanks the Mental Health and Substance Use Disorder Parity Taskforce for the opportunity to provide feedback on the implementation and enforcement of the Federal Parity Law. We are committed to ensuring that the Federal and State Parity laws achieve their important purpose – undoing years of discrimination in insurance coverage of mental health and substance use disorders. We hope we may continue to serve as a resource to the Taskforce. Please feel free to contact me at (617) 275-2983 or cmcgorrian@hla-inc.org if you have any questions about any of our comments or recommendations.

Sincerely,

Clare D. McGorrian
Director, Mental Health Parity and Addiction Equity Initiative
For Health Law Advocates and these other members of the Massachusetts Mental Health Parity Coalition:

Health Care For All
Association for Behavioral Healthcare
Greater Boston Legal Services
Massachusetts Association of Behavioral Health Systems
Massachusetts Association for Mental Health
Massachusetts Association for Occupational Therapy
Massachusetts College of Emergency Physicians
Massachusetts Hospital Association
Massachusetts Law Reform Institute
Massachusetts Psychological Association
Massachusetts Pychiatric Society
Massachusetts Organization for Addiction Recovery
Mental Health Legal Advisors Committee
National Alliance for Mental Illness - Massachusetts
National Association of Social Workers – Massachusetts Chapter
Partners Psychiatry and Mental Health