Coalition for Whole Health

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Office of the Assistant Secretary for Planning and Evaluation
U.S. Department of Health and Human Services
200 Independence Avenue, SW, Room 424E.21
Washington, D.C. 20201

RE: Stakeholder Listening Session: Strategies for Improving Parity For Mental Health and Substance Use Disorder Coverage

Dear Ms. Fuller:

Thank you for the opportunity to submit comments regarding the Department of Health and Human Services' (HHS) action plan for improved Federal and State coordination to enforce the Mental Health Parity and Addiction Equity Act of 2008 (Parity Act).

The Coalition for Whole Health is a broad coalition of local, state, and national organizations in the mental health and substance use disorder prevention, treatment, and recovery communities. We appreciate the opportunity to comment on strategies to improve implementation and enforcement of the Parity Act.

A number of our Coalition member organizations attended and participated in HHS's recent listening session on improving parity for mental health and substance use disorder coverage. Although we offer specific recommendations below about how to strengthen implementation and enforcement of the Parity Act, we would first like to respond to a number of points raised at the listening session.

We are very concerned by a number of comments offered by insurance carriers at the listening session that suggest that compliance problems with the Parity Act, particularly related to non-quantitative treatment limitations (NQTLs), are due to a lack of clarity about standards and requirements to follow. The Federal government has issued many sets of detailed guidance about Parity Act standards and requirements. Problems with Parity Act compliance are not because of a lack of clear implementing guidance. Carriers are largely not complying with many of the requirements and standards of the Parity Act. Stronger State and Federal enforcement of the requirements and standards in Parity Act guidance is urgently needed.

In addition, we are concerned by the insurance industry's call for greater flexibility in the implementation of NQTLs. Every single day, over 266 Americans will die from either a drug overdose or suicide. Substance use disorders and mental illness affect one out of every three adults in this country. Untreated mental health and substance use problems can be devastating and costly – for individuals, families, communities

and society as a whole. The health of our Nation depends on improving Americans' mental health and reducing addictions. We cannot afford to loosen standards that will make it more difficult for people to receive live-saving addiction and mental health care.

As highlighted below, the Coalition urges HHS to adopt strategies and activities, plus a timeline, to fully implement the Presidential Parity Task Force recommendations set out in its October 2016 Final Report. In addition, we urge HHS to pursue several additional strategies that will significantly enhance Parity Act enforcement by shifting the enforcement paradigm from an individual complaint-driven model to a prospective compliance review model. This strategy will implement federal regulatory requirements that bar health plans from offering plans that do not comply with the Parity Act (26 C.F.R. § 54.9812-1(h); 29 C.F.R. § 2590.712(h); and 45 C.F.R. § 146.136(h)) and incorporate a prospective compliance disclosure standard comparable to that required under the Medicaid parity regulations. 42 C.F.R. § 438.920(b).

Specifically, we urge HHS to:

- Develop a uniform Parity Act Transparency and Compliance Report tool that carriers and health plan sponsors would be required to submit to state or federal regulators as a condition of approval to offer plans on the commercial market or as an employee benefit.

- Develop model contract provisions that carriers and plan sponsors could use to provide:

    - Uniform descriptions of substance use and mental health benefits
    - Benefit and prescription drug coverage, and medical management standards that fully align with the Parity Act
    - Full disclosure of the Parity Act's non-discrimination standards and tools (compliance officer contact information and document links) that would provide consumers immediate access to plan documents that are needed to assess compliance and pursue complaints.

- Help regulatory agencies enhance the substance use disorder and mental health provider community's capacity to identify potential Parity Act violations and advocate for plan compliance in network adequacy and rate setting standards.

I. Adopt the Parity Task Force Recommendations That Facilitate the Systemic Review and Correction of Non-Compliant Practices in Health Plans and Strengthen Enforcement Tools.

HHS, Labor and Treasury have issued extensive regulatory and sub-regulatory guidance to facilitate enforcement of the Parity Act. The Parity Task Force enhanced federal and state enforcement capacity in October 2016 by funding state regulatory enforcement efforts, providing technical assistance through State Parity Academies, developing a Consumer Web Portal that directs consumers with complaints to appropriate regulatory bodies, and issuing a disclosure guide that reinforces the obligation of ERISA plans to disclose plan documents related to the design and application of non-quantitative treatment limitations (NQTL). Enforcement will be further bolstered by prompt implementation of all remaining Task Force recommendations, particularly those requiring:

- Federal agency disclosure of parity investigations, results and violations, optimally in real-time rather than annually;
- Office of Personnel Management review of NQTLs applicable to substance use disorder benefits in Federal Employee Health Benefits Program (FEHBP) plans and implementation of corrective actions;
- Review of substance use and mental health benefits in Medicare Advantage plans and identification of corrective actions to ensure older adults and individuals with disabilities can access care and, more generally, evaluation of all benefits under Medicare Parts A, B and D for parity compliance and pursuit of legislative authority to expand coverage of substance use benefits at parity under Medicare.
- Pursuit of legislative authority for DOL and HHS to assess civil monetary penalties for parity violations.

(Reference: The Mental Health & Substance Use Disorder Parity Task Force, Final Report, 23-28, Oct. 2016).

We urge HHS to fully pursue each of these initiatives in its action plan to ensure that all individuals have access to equitable substance use and mental health benefits.

II. Adopt Health Plan Transparency and Compliance Report Requirement.

Even with the adoption of the above strategies, we remain concerned that compliance and enforcement efforts at both the state and federal level have focused primarily on strategies that are of limited utility in their ability to root out parity violations.[1] Discriminatory insurance coverage of mental health and substance use disorder benefits persists because the traditional regulatory approach to compliance review – plan document review, utilization review agent certification, and consumer complaint investigations – will not uncover the vast majority of Parity Act violations. Regulators are not given information that is required for a complete analysis of plan compliance; consumers do not have the information, capacity or resources to navigate the inefficient appeals process, particularly in the midst of a health crisis; and treatment providers face significant challenges responding to the worst opioid epidemic in history, leaving little time to challenge the exclusion of medically necessary benefits,[2] excessive authorization requirements,[3] denials of authorization or exceedingly short authorization periods.

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[1] For example, the Parity Task Force reported that federal enforcement efforts had focused on investigating complaints rather than conducting random audits and recommended increased funding to expand audit capacity. (Task Force Report at 27). It also noted that CMS had not conducted parity compliance reviews of plans subject to essential health benefit requirements, resulting in some state benchmark benefit plans not complying with federal law. (Task Force Report at 28).

[2] For example, over the past two years, commercial and self-insured plans frequently exclude coverage for methadone maintenance treatment, while covering medication assisted treatment for medical conditions. One national carrier, although aware of the clear Parity Act violation, claims that only the plan sponsor of self-insured plans can modify the benefit exclusion and has not addressed this violation across all plans for which it serves as the third-party administrator. This benefit exclusion should never be permissible under the Parity Act, yet regulators do not identify it.

[3] The same national carrier imposes notification and authorization requirements for virtually all substance use disorder benefits other than standard outpatient treatment, even though the DOL's Warning Signs – Plan or Policy Non-Quantitative Treatment Limitations (NQTLs) the Require Additional Analysis to

The adoption of a prospective parity compliance review requirement – implemented through a Parity Act Transparency and Compliance Report tool – would address a significant gap in current enforcement efforts. The recent report, *Parity Tracking Project: Making Parity A Reality,*[4] prepared by the Legal Action Center, National Center on Addiction and Substance Abuse, Treatment Research Institute and The Partnership for Drug-Free Kids (submitted as an attachment) identifies the long list of plan design features that regulators cannot evaluate for parity compliance during form review, simply because key information is not provided in plan documents. (Table 1: Summary of Findings at 23-24). For example:

- Benefit classifications, which are critical to a parity analysis, are not evident from plan documents.
- The benefit description of substance use disorder and mental health benefits is often limited and does not address whether those benefits are comparable in scope to medical benefits.
- Plan documents identify the exclusion of specific mental health or substance use disorder benefits, but no information is provided to demonstrate that the exclusion of a specific benefit is parity compliant.
- Disparities in the coverage and management of medications for substance use disorders suggest that regulators do not review plan formularies/prescription drug lists to determine whether the scope of coverage, tier places and utilization management are compliant.
- Documents provide ***no information about NQTLs***, other than prior authorization requirements for specific levels of care. Even with regard to prior authorization, plans' standards for imposing and applying this NQTL is not referenced in plan documents and cannot be determined from form review.
- Carriers that rely on behavioral health organizations (BHOs) to manage substance use and mental health benefits may defer to the BHO's utilization management standards, but it is not evident that the BHO's documents are collected or evaluated by regulators to compare standards for medical, substance use and mental health benefits.

(Reference: *Making Parity a Reality* at 7-8, 32-35, 37-51).

The mandatory submission of a Parity Act Transparency and Compliance Report tool to support the carrier or plan sponsor's request for plan approval is essential to prevent the sale of

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Determine Mental Health Parity Compliance flags this carrier's precise practice: pre-notification for all mental health and substance use disorder inpatient services, intensive outpatient program treatment, and extended outpatient treatment visits beyond 45-50 minutes. Warning Signs at 2 (*available at* https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/mental-health-parity/warning-signs-plan-or-policy-nqtls-that-require-additional-analysis-to-determine-mhpaea-compliance.pdf).

[4] The study sought to evaluate whether the two groups on the front-lines of Parity Act enforcement – regulators and consumers – could identify Parity Act violations through the standard regulatory review process known as form review (for regulators) and, for consumers, readily identify benefit and prescription drug coverage, out-of-pocket costs and any restrictions on accessing substance use disorder care and identify plan design features that raise "red flags" for violations through publicly available documents. The study examined seven large and small group employer plans offered in New York and Maryland in the 2015 or 2016 plan years. The study methodology and findings are fully set out in the report.

discriminatory health plans. While some State regulators conduct market surveys and audit coverage retrospectively through data reporting, these tools allow for the review of only a small slice of the carrier's plan rather than the full scope of plan design features as written and in operation (29 C.F.R. § 2590.712(c)(4); 45 C.F.R. § 146.136(c)(4)). Most important, the time involved in conducting a thorough investigation of carrier conduct undermines the value of market conduct examinations as a tool to ensure real-time access to non-discriminatory coverage.[5]

Pre-market compliance reports would place responsibility of demonstrating compliance on the entities that have a legal obligation to offer parity compliant health plans and possess the documentation to demonstrate plan compliance. It would also relieve consumers of the nearly impossible burden of identifying Parity Act violations and asserting their right to health care in the midst of a health crisis. The American Medical Association supports this strategy to improve parity compliance (Reference: https://wire.ama-assn.org/delivering-care/key-opioid-progress-make-insurers-comply-treatment-access)

Barring the sale of plans that do not satisfy this requirement is fully consistent with existing regulatory standards (26 C.F.R. § 54.9812-1(h); 29 C.F.R. § 2590.712(h); and 45 C.F.R. § 146.136(h); and 45 C.F.R. § 156.115(a)(3)) and would create an economic incentive for carriers to address violations. This standard also aligns with CMS standards that require Medicaid managed care organizations and States to demonstrate that their Medicaid programs comply with the Parity Act. 42 C.F.R. § 438.920(b) Other federal consumer health protection standards, such as the health privacy standards under the Health Insurance Protection and Portability Act (HIPAA), rely on an enforcement framework that places the onus on covered entities (including insurers and health care providers) to comply with the law rather than relying on consumer complaints.[6]

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[5] By way of example, the Maryland Insurance Administration has conducted two market conduct examinations since late 2014, with each taking over eighteen (18) months to complete. Both examinations probed a limited set of plan design features. (Market Conduct Surveys on file with the author). The first examination resulted in the filing of five orders in November 2015 that identified violations related to network adequacy, including the total absence of methadone treatment programs in the network of the State's predominant carrier. The second examination identified additional network adequacy violations based on the lack of outpatient in-network opioid treatment programs in 6 out of 24 jurisdictions and outpatient in-network programs that treat bi-polar disorder in 11 of 24 jurisdictions. Maryland Insurance Administration to Honorable Thomas McLain Middleton (June 30, 2017) (letter on file with author). Significant gaps in provider access to methadone treatment in the face of the opioid crisis must be addressed immediately, not delayed by years of data collection and review.

[6] Under HIPAA, covered entities must demonstrate compliance via comprehensive written policies and procedures. 45 C.F.R. § 164.530(i)-(j). The covered entity must explain its obligations to consumers in a privacy notice, which must also contain a statement of the individual's rights under HIPAA and a process for registering complaints. 45 C.F.R. § 164.520(b)(1(iv) – (vi). Each covered entity must designate a Privacy Officer, who is responsible for overseeing HIPAA policies and compliance, receiving complaints and responding to requests about the covered entity's privacy practices. 45 C.F.R. § 164.530(a). Further, a covered entity must have procedures in place for filing such complaints and must document all complaints received, and their disposition, if any. 45 C.F.R. § 164.503(d). Finally, the act also imposes monetary penalties for violations, which promotes compliance. 42 U.S.C. §§ 1320d-5 and 1320d-6.

III. Develop Model Contract Language That Fully Informs Consumers About Substance Use and Mental Health Benefit Coverage and Rights Under the Parity Act.

Consumers also face significant barriers in identifying the full scope of substance use disorder and mental health benefits covered under plans and obtaining information about their rights to non-discriminatory health coverage. Lack of transparency prevents consumers from holding plans accountable when requests or claims for services are denied and reflects the inherent limitations of a complaint-driven compliance model.

Making Parity A Reality identifies the following gaps in plan documents that consumers must rely on to determine benefit coverage and appeal rights.

- Descriptions of mental health and substance use disorder benefits are limited, with policies often *naming* a service without providing any description of the full benefit.
- Plan documents contain internal inconsistencies about benefit coverage.
- Descriptions of substance use disorder benefits do not confirm coverage of all critical benefits, as outlined by the American Society of Addiction Medicine's (ASAM) criteria to treat addiction.
- Plans provide no specificity about the benefits that are subject to utilization management, the full range of utilization management (including continuing care requirements) and how those requirements are applied.
- The Parity Act's non-discrimination protections are not explained in plan documents and information about filing a complaint does not specifically reference how to file a parity complaint.

(Reference: *Making Parity A Reality* at 9-10, 32-34, 54-56).

States, such as New York, have begun to use model contracts to help carriers demonstrate compliance with the range of state and federal insurance laws. An *enhanced* model contract is a useful tool to address limitations in the description of benefit coverage and notification of Parity Act protections. We recommend that federal and state regulators develop examples of model contract language that are written at an appropriate reading level and contain the following information:

- Complete list of substance use and mental health benefits and exclusions based on the ASAM criteria.
- Detailed descriptions of covered services, aligning descriptions with levels of care contained in the ASAM criteria.
- Complete list of medications for the treatment of substance use disorders, which should include all FDA-approved medications for opioid use disorders.
- Complete list of utilization management requirements, including concurrent and retrospective review, and any other parity-compliant limitations on access to care.
- The consumer's right to obtain services from in-network providers and options for obtaining services if the carrier does not have an in-network provider.
- Identification of the Parity Act's non-discrimination standards, availability of plan documents to assess possible violations, and the process for appealing a denial of services or reimbursement that implicates the Parity Act.

IV. Enhance the Provider Community's Capacity to Identify Potential Parity Act Violations and Advocate for Plan Compliance in Network Adequacy and Rate Setting Standards.

Providers of substance use and mental health services have an important stake and role in the enforcement of the Parity Act. First, providers must use the Parity Act's protections to obtain admission to networks and secure equitable reimbursement rates. Plan design features regulated under the Parity Act, including reimbursement rates, network admission, credentialing standards, and network adequacy standards, determine whether providers offering a full continuum of services will be included in carrier networks. Second, providers are uniquely positioned to support their patients in accessing parity compliant care. They are often the front-line responders when a plan denies care authorization, excludes benefit coverage or imposes medical necessity standards that are inconsistent with evidence-based practices. Consumer access to care is clearly dependent upon a provider community that is knowledgeable about the Parity Act protections and equipped to assert those standards.

To enhance provider capacity, the federal government should follow its model for enhancing state regulatory capacity: make funding and technical assistance available to mental health and substance use disorder providers to improve their substantive knowledge of the Parity Act; provide technical assistance on insurance contracting and credentialing; and assist with the development of strategies that enable providers to file complaints effectively and efficiently. While a provider/consumer complaint process is not a substitute for a prospective compliance reporting requirement, this tool will remain an important part of enforcement efforts.

We thank you for considering our views and the opportunity to offer brief remarks at the Listening Session. We will be glad to discuss any of these recommendations with you at your convenience.

Sincerely,

Ron Manderscheid and Paul Samuels, Co-Chairs
The Coalition for Whole Health