

Mental Health Parity and Addiction Equity Act: Proposed Federal Regulations

Coalition for Whole Health and Coalition Partners

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LEGAL ACTION CENTER
Breaking Barriers. Defending Dignity.

Agenda

1. Overview of Federal Agency Actions
2. Proposed Regulatory Standards
3. Discussion of Key Issues
4. Comment Opportunities

EQUAL INSURANCE COVERAGE
OF SUBSTANCE USE AND
MENTAL HEALTH DISORDERS

PARITY for
ALL

IT'S THE LAW.

Federal Agency Actions

- Proposed Rule – Depts of Labor, Health and Human Services and Treasury.
 - 60-day comment period – October 2, 2023
- Technical Release – Data Requirements Related to Network Composition - Request for Comments
 - Comments due by Oct. 2, 2023
- MHPAEA Comparative Analysis Report to Congress
- FY 2022 MHPAEA Enforcement Fact Sheet



Improving Access to Mental Health Treatment

White House Announcement
July 25, 2023

Proposed Regulations

- **Goals**

- Improve standards for non-quantitative treatment limitations (NQTLS) to address violations
- Codify Parity Compliance Analysis and Reporting Standards (adopted under Consolidated Appropriations Act of 2021)
- Implement Prohibition of Opt-Out for State and Local Government Plans (CCA of 2023)

- **Findings**

- Significant mental health (MH) and substance use disorder (SUD) crises
- Insurance coverage is separate and too often disparate
- Need meaningful access to MH and SUD care. Key component is access to adequate number of appropriate providers in plan's network but disparate out-of-network utilization for MH/SUD
- Plans are violating Parity Act

- **Applicable Date of Regulations if Finalized**

- Group health plans – first day of plan year on or after January 1, 2025
- Individual policy – January 2026

Identified Purpose: Improve Access to Care

- **New Purpose Provision:** Establishes guiding principle for plans
- Plan members cannot be subject to **more restrictive** financial requirements and treatment limitations for MH and SUD benefits than for medical/surgical benefits.
 - Plans/issuers “must not design or apply financial requirements or treatment limitations **that impose a greater burden on access** (that is more restrictive) to mental health and substance use disorder benefits under the plan or coverage than they impose on access to generally comparable medical/surgical benefits.” ((a)(1))
 - Parity standards “should be interpreted in a manner that is consistent with” this purpose.

New Definitions

- NQTL Standards
 - Factors
 - Evidentiary Standards
 - Processes
 - Strategies
- Sources for defining mental health benefits, substance use disorder benefits, med/surg benefits
 - Must be “consistent with generally recognized independent standards of current medical practice” ((a)(2))
 - For MH benefits and SUD benefits must include all conditions (to extent covered by plan) identified in ICD or DSM (most recent version in the mental, behavioral, and neurodevelopmental disorders chapters)
 - Autism Spectrum Disorder and Eating Disorders are MH conditions not medical/surgical

Coverage of MH and SUD Services

Meaningful Benefits In All Classifications

- **Rule:** If MH and SUD benefits are covered in one classification must cover MH and SUD benefits in all classifications in which med/surg benefits are covered.
- **Classifications** – remain the same and cannot create more subclassifications than set out in regulations.
 - Outpatient (in and out of network)
 - Inpatient (in and out of network)
 - Emergency care
 - Prescription Drug
- **New:** Must provide **meaningful benefits** for treatment of MH and SUD in each classification as determined in comparison to benefits for med/surg conditions ((c)(2)(ii))
- Cannot cover just 1 service for MH or SUD services if cover full range of med/surg services
 - Failure to cover applied behavioral analysis (ABA) for autism spectrum disorder – not meaningful benefits
 - Failure to cover nutritional counseling for eating disorders – not meaningful benefits

Non-Quantitative Treatment Limitations

- Non-Exhaustive List and Additional Items Identified ((c)(4)(iii))
- List – revamped and expanded
 - Medical management including prior authorization
 - Formulary design
 - Network design for plans with multiple tiers
 - **Network composition:** provider and facility admission to network and continued participation, methods for determining reimbursement rates, credentialing standards, procedures to ensure adequate number of providers/facilities
 - Methods for determining out-of-network rates, allowed amounts, usual/customary charges, application of external benchmarks
 - Refusal to pay higher cost care until lower cost service attempted (fail first and step therapy)
 - Failure to complete course of treatment
 - Restrictions based on geographical location, facility type, provider specialty and other criteria limiting scope or duration of care.

Non-Quantitative Treatment Limitation Test: “More Restrictive” Test

- **Proving an NQTL Violation: 3 tests and 2 exceptions**
- **New: “More Restrictive” test ((c)(4)(i))**
 - Cannot apply an NQTL that is “more restrictive” for MH and SUD benefits, as written or in operation” than med/surg benefits
 - Applies the “substantially all” and “predominant level” test currently applied to financial requirements and treatment limitations
 - Does the NQTL apply to 2/3 of the med/surg benefits based on plan payments? Can’t apply to MH or SUD, if not
 - What is the predominant variation of the NQTL for med/surg benefits based on plan payments? Can’t apply more restrictive standard to MH or SUD.
 - Ex: daily concurrent review MH or SUD benefit but 7-day concurrent review med/surg for inpatient care.
- **Exceptions: No Violation**
 - If impartially applying an “independent professional medical or clinical standard” when applying the NQTL (not defined)
 - If applying a standard to detect or prevent and prove fraud, waste or abuse (not defined)

Non-Quantitative Treatment Limitation Test: “Design and Application” Test

- **Retain Current Standard:** Cannot apply an NQTL to MH and SUD benefits unless the processes, strategies, evidentiary standards or other factors used to design or apply the NQTL to MH and SUD benefits are comparable to and no more stringently applied than the processes, strategies, evidentiary standards and other factors for med/surg benefits, as written and in operation. ((c)(4)(ii))
- **New Standard:** cannot use **discriminatory** factors and evidentiary standards
 - Biased, non-objective factors or evidentiary standards that result in less favorable treatment of MH and SUD benefits without legitimate justification
 - Historical plan data or other historical information from a time when not subject to the Parity Act or was in violation of Parity Act.
 - Exception: Impartially applied generally recognized independent professional medical or clinical standards are not discriminatory
 - Exception: Standards reasonably designed to detect fraud, waste and abuse not considered to discriminate

Non-Quantitative Treatment Limitation Test: Outcome Data + Material Difference

- **New Standard:** Must collect and evaluate data to assess impact of NQTL on access to MH and SUD benefits and consider impact in determining whether limitation complies with “in operation” requirement ((c)(4)(iv))
- **Relevant data:**
 - Claims denial and other relevant data
 - Network Composition: in and out-of-network utilization rate, network adequacy metrics, providers accepting new patients, “provider reimbursement rates (including as compared to billed charges).”
- Departments may specify in guidance the type, form and manner of collection and evaluation of data
 - Technical Release requests comments on network composition data

Non-Quantitative Treatment Limitation Test: Outcome Data + Material Difference

- **Current Standard:** disparate outcome data alone is not a violation, but “substantially disparate results are often a red flag” for a violation
- **Disparate Impact on MH and SUD benefits**
 - “Material difference” in access to MH and SUD benefits compared to med/surg – strong indicator of violation and must take reasonable steps to address material differences to ensure compliance and document action to mitigate material differences
 - Network Composition: showing of material difference in accessing MH and SUD benefits is a **Parity Violation**
- Exception for all (c)(4)(iv) requirements for plan/issuer that “impartially applies independent professional medical or clinical standards.”
((c)(4)(iv)(D))

Applying Exceptions

- Independent Professional Medical or Clinical Standards – Applies for all 3 tests
 - Must impartially apply standard and not deviate from those standards in any way by imposing additional or different requirements
 - Ex: Requiring medical necessity review every 30 days for refill of buprenorphine prescription using ASAM criteria. Cannot apply because ASAM criteria do not require medical necessity review every 30 days.
- Detect or Prevent and Prove Fraud, Waste and Abuse – Applies for “more restrictive” and “design and application” tests
 - Reasonably designed to detect fraud, waste and abuse based on indicia of fraud, waste and abuse through objective and unbiased data and narrowly designed to minimize negative effect.
 - Ex: (not in proposed regulations) SUD provider that is identified by F/W/A monitoring system subject to retrospective review for all claims and submission of additional, detailed information for each claim.
- Not intended to Create Loopholes- if Departments become aware of new practices for purpose of imposing more restrictions on MH and SUD benefits, may provide additional guidance.

NQTL Violations

- Plan/issuer must satisfy all 3 tests to impose an NQTL ((c)(4))
 - A parity violation exists if 1 of 3 tests is not satisfied
 - If exception applies to 1 of the applicable tests, still must prove compliance under others.
- Final determination by Secretary that an NQTL violates the Parity Act, may direct the plan to not impose the NQTL unless and until plan demonstrates compliance or takes appropriate action to remedy violation
 - Violation may be based on failure to substantiate compliance (not submitting complete compliance analysis) or finding of violation
 - Determination of whether to cease use of impermissible NQTL depends on the nature of the NQTL, impact on access to MH and SUD benefits and other factors.

Examples of Violations

- **More restrictive concurrent review standards:** peer-to-peer required for SUD and MH for second level review, but clinical record review for med/surg.
- **More restrictive peer-to-peer review requirements:** for inpatient treatment delivered in non-hospital setting, physician must complete a peer-to-peer review for SUD and MH services, but only medical documentation of medical necessity for med/surg.
- **More stringent reimbursement methods:** payment for non-physician MH and SUD practitioners is reduced for each CPT code by a percentage reduction of physician reimbursement rate, but no uniform percentage reduction for non-physician med/surg providers.
- **Exclusion of covered services:** In-patient med/surg services covered in skilled nursing facilities and rehabilitation hospitals, but exclusion of residential services for MH and SUD care.

Compliance Review and Reporting

- DOL FAQ 45 set out standards for compliance reviews and submission upon request to federal or state regulator. Regulations would codify and expand standards.
- Detailed requirements for conducting analyses and required content.
- Timeframes for submitting analysis upon request, addressing deficiencies in analysis, and agency review and final determination of compliance.
- Plan notification of final determination of violation to plan members.
- Standards for making comparative analyses available to plan members.

Key Issues

- Exceptions to NQTL Rules
 - Independent professional medical or clinical standards
 - Detect or prevent and prove fraud, waste and abuse
- Defining Certain Terms
 - “meaningful benefits” in all classifications
 - “material difference” in outcome data

Materials and Comments

- Kennedy Forum – Redline of Proposed Rule compared to existing rule
 - <https://drive.google.com/file/d/1vkTsTOd20GsSwX9TYiUPNnByBQArwja/view?usp=sharing>
- Template comments for advocates
- Portal for consumer comments – NAMI and Mental Health America
 - Available to everyone
- Individual organization comments and separate submission of comments on Technical Release (mhpaea.rfc.ebsa@dol.gov)