

INTRODUCTION

The Coalition for Whole Health appreciates the opportunity to submit the following comments and suggested model form revisions in response to the Departments of Labor (DOL), Health and Human Services (HHS) and Treasury (the Departments) June 16, 2017 joint request for comments in the “FAQs About Mental Health and Substance Use Disorder Parity Implementation and the 21st Century Cures Act Part 38.” The Coalition for Whole Health (CWH) 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 work with the Departments to implement strategies that will ensure access to health plan information that is needed by regulators, providers and consumers to evaluate compliance with and enforce the Mental Health Parity and Addiction Equity Act. (Parity Act). As the Tenth Anniversary of the Parity Act approaches, we are deeply concerned that issuers and employer-sponsored benefit plans continue to offer health plans that exclude and inappropriately limit evidence-based services for the treatment of mental health and substance use disorders. As our nation struggles to respond to the opioid epidemic, other substance use disorders and suicides that ravage families and communities, full enforcement of the Parity Act is essential to achieve access to life-saving health services.

The CWH offers the following comments to the questions posed in FAQ 38 and has proposed revisions to the model disclosure form. *See* Attachment 1. The CWH fully supports the Departments’ effort to identify the full range of strategies that will improve enforcement of the Parity Act. Helping consumers and their representatives (including treatment providers) access the plan information and documents to which they are entitled will promote a better understanding of plan coverage and help some identify discriminatory limitations on care. It is clear, however, that the complexity of the comparative analysis required for parity compliance determinations makes it virtually impossible for consumers and families to identify Parity Act violations or effectively enforce their legal right to non-discriminatory insurance coverage, particularly in the throes of a health crisis.

Disclosure of plan information is essential for effective enforcement of the Parity Act, but improving a consumer’s ability to request plan documents is not enough. **Regulatory attention and enforcement must focus primarily on strategies to ensure that issuers and employer-sponsored health plans: (1) provide their Parity Act compliance documentation to regulators as part of form review; and (2) fully respond to a member’s request for parity compliance analysis and documents, as required under the Parity Act in connection with any grievance and/or consistent with ERISA disclosure requirements.** Members of the CWH routinely request documentation to assess parity compliance on behalf of clients, but carriers fail to respond to such requests or provide complete information, even in response to state regulators.

To create a more effective enforcement scheme, the CWH urges the Departments and state regulators to:

- Require health plans to make comprehensive Parity Act compliance disclosures a condition of plan approval.¹
- Create model forms for members and their representatives to report to regulators a plan's failure to disclose requested documents.
- Improve plan responsiveness to member requests for plan documents and the quality of disclosure through (1) mandatory submission by the plan of a sample set of document disclosures and (2) the imposition of penalties and other sanctions for violation of disclosure requirements.

The CWH is familiar with the Six-Step NQTL Compliance Guide submitted by the American Psychiatric Association, The Kennedy Forum and the Parity Implementation Coalition in its comments to FAQ 38. That model is an appropriate starting point for the pre-market compliance reporting that CWH proposes.

I. DISCUSSION

The following comments address the Departments' questions posed in FAQ 34 and restated in FAQ 38.

A. Value and Content of Model Form

The Departments have requested guidance on the value and content of a model form that a plan member or authorized representative could use to request plan documents. The CWH supports the development of model form(s) as a means to educate consumers and providers about their right to request and obtain documents and to facilitate the submission of such requests.

The CWH has suggested revisions to the Departments' model form that would make it more consumer-friendly and descriptive of Parity Act rights. Health plans that Coalition members have reviewed do not inform enrollees of the Parity Act standards or their right to plan documents. *See* Addiction Solutions Campaign, *Parity Tracking Project: Making Parity a Reality*. **We recommend that state and federal regulators develop model contract language describing Parity Act rights (including those to disclosure of documents related to NQTLs) and protections for inclusion in health plans and Summary Plan Descriptions. We also believe that the model form will serve as a useful tool for public education as well as a disclosure tool.**

As set out in Attachment 1, the CWH suggests revisions to more fully describe the types of benefit design standards that could constitute a Parity Act violation – going beyond the term

¹ Disclosure of parity compliance documentation at the plan approval/pre-market stage is essential to ensure that issuers and employers are not offering plans that violate the Parity Act, consistent with federal law. 29 C.F.R. 2590.712(h); § 45 C.F.R. §146.136(h).

“coverage limitations” – and highlight other coverage problems that could trigger a request for documents. We agree that a single form should be used to guide member requests for information about the full range of NQTLs that relate directly to service or claim denials. This approach will simplify the process, increasing the likelihood of use. We have offered suggestions for expanding the NQTL examples to address service exclusions and identify one additional frequently-applied utilization management standard.

We encourage the Departments to develop a separate form that mental health and substance use treatment providers could use to request documentation of parity compliance with regard to network adequacy, network admission standards, network credentialing and contracting, and reimbursement rates. Members receive no information about these plan design features, and, in many instances, will not know that these design features are limiting access to care. To increase the likelihood that violations related to these NQTLs are identified, providers should be encouraged to make a request for documents on behalf of their patients and independently, under state and federal standards that regulate plan networks.

In addition, the CWH has proposed revisions to the description of the documents that should be routinely requested and disclosed, regardless of the NQTL at issue. *See* Attachment 1. Our comments build upon the Departments’ sub-regulatory guidance in FAQ 31, Q 9 and generally align with the Parity Implementation Coalition’s suggested revisions. The CWH also recognizes that, based on the specific NQTL, a health plan would follow different processes, adopt different strategies and examine different factors and evidentiary standards in the development and implementation of the plan design feature. While the Departments’ sub-regulatory guidance and other source materials have fleshed out some of the elements for specific NQTLs (*see, e.g.,* Parity Implementation Coalition, Attachment C Six-Step NQTL Compliance Guide), the CWH suggests that health plans and issuers possess the underlying process and factors used to develop and implement NQTLs. That information should, through the submission of compliance documentation, guide the development of more granular forms, as appropriate. *See* Pt. B.

B. Model Forms for State Insurance Department Form Review

The Departments have requested comments on whether States should issue model forms that would be used as part of their review of plans. **The CWH strongly endorses the use of a model Parity Act Transparency and Compliance Report that issuers would be required to submit for purposes of pre-market form review.** An examination of group health plans in New York and Maryland by the Addiction Solutions Campaign clearly demonstrates that few NQTLs are identified in documents that are routinely reviewed as part of form review, and health plans do not assemble or submit the documents, including those in the possession of a third-party behavioral health vendor, required for a complete analysis. *See* Addiction Solutions Campaign, *Parity Tracking Project: Making Parity a Reality*. As a result, regulators are unable to perform the most rudimentary pre-market Parity Act compliance review, and members cannot access mental health and substance use disorder services that they pay for and need.

A model form that requests the plan’s documentation of processes, strategies, evidentiary standards and other factors used to develop and operationalize each NQTL and the comparative analysis for each is the appropriate starting point for the Parity Act Transparency and

Compliance form. The set of documents identified in the model disclosure form serves as the framework for the development of a Transparency and Compliance Report form, as does the Six-Step NQTL Compliance Guide.

C. Steps to Improve the Quality and Scope of Disclosures

The Departments have requested guidance on measures that will improve the scope and quality of plan disclosures. **The CWH recommends that regulators use their existing authority to require issuers and health plans to submit, as part of form review, a sample of the plan documents that they disclose to members for each NQTL applied to plan benefits.** This strategy is a corollary to the Parity Act Transparency and Compliance Report and is the best method to ensure that carriers assemble the appropriate documentation for members.

Second, we recommend that the Departments develop a simple form that can be used to file complaints to regulators based on a plan's failure to disclose documents in compliance with the Parity Act and ERISA. While penalties may be imposed under ERISA in court actions challenging the failure to disclose plan documents, that remedy has limited enforcement value. A simple complaint form that notifies a regulator of disclosure violations – a potentially easier and more straightforward complaint than one related to substantive benefit denials – could enhance plan compliance and provide important enforcement information to regulators.

Finally, the CWH recommends that state regulators use their authority to impose significant penalties for violations of the disclosure rules. To the extent regulators rely on consumer complaints as a metric for Parity Act compliance by plans, they should penalize issuers and plans when they stymie consumer and provider efforts to obtain the information required to pursue a complaint. While the CWH urges the adoption of a premarket, plan review compliance model, as opposed to a consumer complaint model, regulatory bodies should affirmatively support consumer compliance efforts and penalize plans that do not comply with clear disclosure requirements.

D. Steps to Improve State Market Conduct Examinations and Federal Oversight of Compliance

The CWH agrees that market conduct examinations and comparable federal auditing processes should be used as one tool within a comprehensive Parity Act compliance toolbox. While we believe that market conduct examinations (MCE) are not well-suited to be the primary source of plan compliance information – targeted MCEs that have been performed by state regulators have taken 18 months or more to complete and often examine a narrow set of NQTLs – they can highlight carrier practices that may be grounded in a parity violation.

To maximize the value of this tool, **the CWH recommends that regulators request underlying plan claims data and other utilization management data that will reveal disparities in access to mental health and substance use disorder services.** Among the data points that should be requested on **an annual basis** for mental health, substance use disorder and medical/surgical services by classification are: number of service requests and medications that are subject to preauthorization and concurrent review; service requests that are denied and those overturned after peer-to-peer review; average lengths of stay in services by classification, including intermediate level services; services obtained from in-network and out-of-network

Coalition for Whole Health

providers; and provider rates and rate setting processes. A thorough review of such data by actuaries will reveal any disparities in issuer and plan practices and provide a basis for further inquiry into underlying processes and standards. (See, e.g., New Hampshire Insurance Dept. Market Conduct Exams <https://www.nh.gov/insurance/reports/index.htm>).

Thank you for considering our recommendations. If you have any questions, please contact Ellen Weber, Legal Action Center, eweber@lac.org (202-544-5478).

Sincerely,

American Association for the Treatment of Opioid Dependence

American Association on Health and Disability

American Psychological Association

Legal Action Center

National Association of County Behavioral Health and Developmental Disability Directors

National Center on Addiction and Substance Abuse

National Association for Rural Mental Health

National Council on Alcoholism and Drug Dependence – Maryland

Partnership for Drug-Free Kids

ATTACHMENT 1

Coalition for Whole Health Recommended Revisions: Explanation

The goal of the proposed revisions in the introductory language is to make the form more consumer-friendly by providing additional information about the Parity Act and connecting the form's content to a consumer's experience as she tries to access benefits. We have also offered revisions that address the suggestion that a consumer, even with the help of a provider, will be able to "determine" whether a health plan's NQTLs comply with the Parity Act. We believe that a realistic outcome of plan disclosure would be the ability to flag potential problems that can be tracked and reported.

The proposed revisions to the set of documents that are subject to disclosure builds upon subregulatory guidance and are consistent with comments offered by the Parity Implementation Coalition. Our comments emphasize the need for document disclosure as well as identification of standards. They also highlight the need to coordinate the disclosure of documents between the issuer/health plan and any third-party vendor that manages behavioral health benefits.

FORM TO REQUEST DOCUMENTATION FROM AN EMPLOYER-SPONSORED HEALTH PLAN OR AN INSURER CONCERNING TREATMENT LIMITATIONS

Background: This is a tool to help you request information from your employer-sponsored health plan or your insurer regarding [your coverage of services and medications for limitations that may affect your mental health or substance use disorder treatment benefits](#). You can use this form to request general information about [your plan's benefit coverage limitations, treatment restrictions and exclusions of mental health or substance use services](#). You can also use this form to request ~~or specific~~ information about [specific limitations, treatment restrictions or exclusions](#) that may have resulted in [the denial of treatment that your provider has recommended](#). ~~your benefits~~. Your plan is required by law to provide you this information in certain instances, ~~and~~ ~~†~~ The information will help you [and your provider understand determine if the your health plan's standards for covering mental health and substance use disorder treatment coverage and identify plan standards that may violate you are receiving complies with the law](#).

Under a federal law called the Mental Health Parity and Addiction Equity Act, ~~many~~ [most](#) health plans [cannot provide discriminatory health insurance coverage for mental health or substance use services](#). [Health plans](#) must make sure that there is "parity" between mental health and substance use disorder benefits, and medical and surgical benefits. This generally means that coverage limits, [exclusions of services and medications and other treatment restrictions that applied](#) to mental health and substance use disorder benefits can't be more restrictive than the coverage limits [that applied](#) to medical and surgical benefits. In other words, [a plan cannot limit or restrict coverage limits cannot be applied to for](#) mental health and substance use disorder benefits unless those limits [and restrictions](#) are comparable to limits applied to medical and surgical benefits. The types of [plan standards limits that must comply with covered by](#) parity protections include:

Coalition for Whole Health

- Financial requirements – such as deductibles, copayments, coinsurance, [caps on out-of-pocket costs](#)~~limits~~;
- Treatment limits– such as limits on the number of days or visits covered, or other [requirements that](#) ~~limits on~~ the scope or duration of treatment (for example, being required to get prior authorization).

If you, a family member, or someone you are representing obtains health coverage through a private employer health plan, federal law requires the plan to provide certain plan documents about your benefits, including coverage limitations on your benefits, at your request. For example, you may want to obtain documentation as to why your health plan is requiring preauthorization for visits to a therapist before it will ~~cover~~ [pay for](#) the visits. Generally, the plan must provide the documents you request within thirty (30) calendar days of the plan's receipt of your request.

This form will help you request information from your plan about [its requirements that may limit your](#) ~~limits~~ treatment. Many common types of treatment limits are listed on this form. If the type of treatment limit being imposed by your plan is not on the list, you may insert a description of the treatment limit you would like more information about under “Other.”

Instructions: Complete the attached form to request general information from your plan about coverage limitations [for services and medications](#) or specific information about why your mental health or substance use disorder benefits were denied. This information can help you appeal a claim denial. You do not have to use this form to request information from your plan.

If you have any questions about this form and you are enrolled in a private employer health plan, you may visit the Employee Benefits Security Administration's (EBSA's) Website at www.dol.gov/ebsa for answers to common questions about your private employer health plan. You may also contact EBSA electronically at www.askebsa.dol.gov or call toll free 1-866-444-3272.

You can also use this form if you are enrolled in coverage other than through a private employer health plan, for example if you have individual health coverage [purchased on a health benefit exchange](#) or coverage sponsored by a public sector employer, like a city or state government. You may contact the Centers for Medicare & Medicaid Services at phig@cms.hhs.gov or 1-877-267-2323 ext. 6-1565 for questions about your individual health coverage or public sector health plan.

Coalition for Whole Health

Mental Health and Substance Use Disorder Parity Disclosure Request

To: _____ [Insert name of the health plan or issuer]

(If you are a provider or another representative who is authorized to request information for the individual enrolled in the plan, complete this section.)

I am an authorized representative requesting information for the following individual enrolled in the plan:

(Check the box to indicate whether your request is for general information or specific information related to your claim or denial for benefits.)

General Information Request

- I am requesting information on the plan's limitations related to coverage for:
 - Mental health and substance use disorder benefits, generally.
 - The following specific [service or medication for my mental health or substance use condition or disorder](#): _____.

Claim/Denial Information Request

- I was notified that a claim for coverage of _____ [Insert mental health condition or substance use disorder [service or medication](#)] was, or may be, denied or restricted for the following reason[s]:

(Check all that apply)

- [I was advised that the treatment service is excluded from coverage.](#)
- I was advised that the treatment was not medically necessary.
- I was advised that the treatment was experimental or investigational.
- The plan requires authorization before it will cover the treatment.
- [The plan requires authorization every few days before it will continue to cover the treatment.](#)
- [The plan is requiring me to try a treatment that is lower in cost before authorizing the treatment that my doctor recommends.](#)
- The plan will not authorize any more treatments based on the fact that I failed to complete a prior course of treatment.
- The plan's prescription drug formulary design will not cover the medication my doctor is prescribing.
- 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.

Coalition for Whole Health

o 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.

o Other: (Specify basis for denial of, limitation on, or reduction in coverage):

Because my health coverage is subject to the parity protections, coverage limits cannot be applied to mental health and substance use disorder benefits unless those limits are comparable to limits applied to medical and surgical benefits and are not applied more stringently for mental health and substance use benefits than for medical and surgical benefits. Therefore, for the limitations or terms of the benefit plan specified above, within thirty (30) calendar days of the date of this request, I request that the plan:

1. Provide the specific plan language, including language in a third-party behavioral health vendor's documents, regarding the limitation and identify all of the medical/surgical and mental health and substance use disorder services and medications ~~benefits~~ to which it applies in the relevant benefit classification;

2. Identify, and provide documents verifying, the processes, strategies, evidentiary standards and other factors used in the development of the limitation and in determining that the limitation will be imposed on the specific mental health and substance use disorder services and medical and surgical services.

a. Identify the evidentiary standards used to evaluate each the factor;

3. Identify the sources for each factor and evidentiary standard used and provide documentation of the source information.

34. Identify, and provide documents verifying, the methods and analysis used ~~in the development of the limitation~~ to demonstrate the limitation is comparable for mental health and substance use disorder benefits and medical and surgical benefits, as written and in operation; ~~and~~

45. Provide ~~any~~ evidence, and supporting documents, to establish that the limitation is applied no more stringently, as written and in operation, to mental health and substance use disorder benefits than to medical and surgical benefits.

6. Provide its detailed summary, referencing its comparative analysis of the underlying processes, strategies, evidentiary standards and other factors, to support its conclusion that the limitation complies with the Parity Act.

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Printed Name of Individual Enrolled in the Plan or his or her Authorized Representative

Signature of Individual Enrolled in the Plan or his or her Authorized Representative

Member Number (number assigned to the enrolled individual by the Plan)

Address
