IMPLEMENTING AND ENFORCING THE FINAL MEDICAID/CHIP RULE FOR THE MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT: IMPLICATIONS FOR THE CRIMINAL JUSTICE SYSTEM

Background

The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (the "Parity Act") became Public Law 110-343 in October 2008. The Parity Act seeks to eliminate discriminatory access to mental health and substance use disorder ("MH" and "SUD") benefits in certain health insurance coverage. Plans subject to the Parity Act are precluded from providing MH and SUD benefits in a more restrictive way than other covered medical and surgical benefits.

The Parity Act prohibits plans from applying financial requirements or treatment limitations to MH and SUD benefits that are more restrictive than those applied to other medical/surgical benefits covered by the plan. A parity analysis requires a comparison of a plan's covered MH and SUD services, and the way those benefits are managed, with the plan's covered medical and surgical benefits, and the way those benefits are managed by the plan.

Common MH/SUD coverage problems that potentially violate the Parity Act include:

- No coverage of medication-assisted treatment for addiction, such as methadone, buprenorphine (e.g., Suboxone), and naltrexone (e.g., Vivitrol) or limits on such coverage;
- Limits on the number of days of MH/SUD treatment allowed, or on the number of visits to a MH/SUD provider;
- Higher co-payments for routine MH/SUD visits than for routine medical/surgical visits;
- A separate deductible for MH/SUD services;
- Limits on how much a health plan will pay per year, or during the beneficiary's lifetime, for MH/SUD benefits;
- A requirement that a patient "fail first" at a lower level of treatment (such as on an outpatient basis) before being approved for a higher level of treatment (e.g., inpatient);
- Refusing to cover MH/SUD treatment because a patient failed to complete previous treatment or because "the patient is not improving;"

- Requiring frequent pre-authorization or concurrent review for MH/SUD services (for example, only approving a few days of services at a time before requiring another pre-authorization);
- A plan says it covers a particular service, such as outpatient SUD treatment, but has no providers for that service in its network; and
- Refusal to provide information, like medical necessity criteria, when a plan enrollee requests it.

Untreated mental health and substance use disorders are extremely prevalent among the criminal justice population and have been shown to contribute to criminal justice involvement and recidivism. The justice-involved population has disproportionately lacked health insurance coverage to address their health care needs, including MH and SUD treatment. Before the Affordable Care Act, most justice-involved people were not eligible for Medicaid or other public coverage no matter how low their income level. In addition, even those individuals who had health insurance often had difficulty accessing quality MH and SUD services and medications.

Regulations to implement the Parity Act for the Medicaid and CHIP programs became final in October 2017. State Medicaid agencies and managed care organizations ("MCOs") are working together, with assistance from the Centers for Medicare & Medicaid Services ("CMS"), to ensure that MH and SUD coverage through the Medicaid program complies with the Parity Act. *It is extremely important for criminal justice decision-makers to be aware of the Parity Act implementation and enforcement process in their states and to engage with Medicaid officials as they work to improve access to MH and SUD care*.

What does the Parity Act Medicaid/CHIP final rule require?

On March 29, 2016, CMS issued a Final Rule on the Parity Act for Medicaid and CHIP plans to provide additional clarity about how Medicaid and CHIP plans must comply with the law. The final rule restates the central requirement of the law: financial requirements and treatment limitations for MH/SUD benefits can be no more restrictive than the predominant financial requirements and treatment limitations applied to substantially all medical/surgical benefits. The regulations identify a specific formula to determine whether a plan's coverage of MH or SUD benefits is so restrictive that it violates the federal parity law.

<u>Which Medicaid beneficiaries are protected by the Parity Act?</u>

All people enrolled in managed Medicaid and all people newly eligible for Medicaid under the Affordable Care Act are protected by the Parity Act. The final Medicaid Parity Act rule makes clear that the protections of the law apply to all MCO enrollees regardless of how services are delivered (including when the MH/SUD services are "carved out" and delivered through fee-for-service ("FFS") or through prepaid health plans). Regardless of the delivery arrangement, CMS states that beneficiaries enrolled in managed Medicaid plans and those who became eligible for Medicaid under the Affordable Care Act are protected by the Parity Act.

How can one determine whether **financial requirements** and **quantitative treatment limitations** applied to MH or SUD benefits comply with the Parity Act?

Financial requirements include co-payments, deductibles, co-insurance, and other out-of-pocket costs. Treatment limitations include both quantitative treatment limitations (such as, day or visit limits or frequency of treatment limits) and non-quantitative treatment limitations (medical management tools). Examples of how to determine whether financial requirements and quantitative treatment limitations applied to a MH or SUD benefit comply with the law follow below:

- It appears that the co-payment for outpatient SUD treatment is higher than co-payments for other outpatient visits covered by the plan. To determine whether a financial requirement applied to a MH/SUD benefit complies with the federal parity law, examine the ***co-payment*** for an ***outpatient*** session of SUD treatment alongside a ***co-payment*** for an ***outpatient*** medical visit.
- It appears that the plan limits the number of outpatient MH visits in a way that could violate the parity law. To determine whether a quantitative treatment limitation applied to a MH/SUD benefit complies with the federal parity law, compare the ***number of covered MH outpatient visits*** with the ***number of covered outpatient visits to a doctor's office.***

How can one determine with **non-quantitative treatment limitations** applied to MH or SUD benefits comply with the Parity Act?

Most violations of the Parity Act can be found in a plan's non-quantitative treatment limitations ("NQTLs"), or medical management tools, which are applied more restrictively to MH and SUD benefits. NQTLs include:

- Medical management standards, including medical necessity criteria and utilization review, and criteria to determine coverage or exclusion of a specific service;
- Prescription drug formulary design;
- Fail-first policies/step therapy protocols for medications and services;
- Standards on how to become a MCO provider;
- Provider rates (must examine type, geographic market, demand for services, supply of providers, provider practice size, Medicare rates, training, experience, and provider licensure); and
- Treatment limitations based on:
    - Geography,
    - Facility type,
    - Provider specialty, and
    - Criteria limiting the scope or duration of benefits or services.

To comply with the Parity Act, the processes or factors used to apply an NQTL to a SUD or MH benefit have to: 1) **be comparable to** and 2) **be applied no more stringently than** the processes/factors used to apply to medical/surgical benefits in the same benefit classification.

Examples of how to determine whether NQTLs applied to MH or SUD benefits comply with the Parity Act:

- To be approved for a SUD medication, the MCO requires that the patient "fail first" at outpatient SUD treatment. To establish whether this NQTL complies with the federal parity law, consider: 1) if the MCO has a comparable policy requiring patients with other chronic diseases to "fail first" at outpatient treatment before approving use of medication, and 2), if the plan does have a "fail first" policy, is it being applied in the same way for patients with SUD as compared with people living with other chronic diseases?
- The MCO routinely approves only one day of inpatient MH/SUD benefits, after which the patient's attending provider must submit a treatment plan for approval. The MCO routinely approves five days of inpatient benefits for medical/ surgical conditions, after which the patient's attending provider must submit a treatment plan for approval. To determine whether this NQTL complies with the federal parity law, examine:
    1) whether the MCO has a comparable prior authorization policy to approve inpatient care for other health conditions, and
    2) if there is a comparable policy, whether the policy is being applied in the same way for patients with MH/SUD as compared with people living with other chronic diseases?

What actions on implementing the Parity Act for the Medicaid program are expected next? What steps can criminal justice decision-makers take?

Although the final Medicaid Parity Act rule became effective in October 2017, most states requested, and were granted by CMS, time extensions. Certain states, including California, Colorado, Delaware, Indiana, Iowa, Massachusetts, New Hampshire, Tennessee and Washington, submitted Parity Act compliance reports although most were limited in terms of analysis and identifying problems with the law.

State Medicaid agencies will continue to work with CMS and managed care plans to bring their Medicaid and CHIP coverage into compliance with the Parity Act. There will then need to be on-going monitoring to ensure continued compliance and to review benefit changes.

Criminal justice professionals have an essential role in helping to ensure that state Medicaid programs address the MH and SUD care needs of justice-involved Medicaid beneficiaries.

It is important for criminal justice decision-makers to work together to review current Medicaid coverage in their states, paying particular attention to MH and SUD services and medications most important to the justice-involved population. Health information about each state, including Medicaid benefits, can be found here.

Criminal justice decision-makers should continue engaging with their state Medicaid agency to share their expertise about the health needs of the criminal justice population, the public safety and public health benefits of justice-involved individuals receiving evidence-based

quality health care, and the need to ensure that MH and SUD coverage through Medicaid complies with parity requirements. Gaps in MH and SUD coverage should be identified and addressed as states are working to bring Medicaid coverage into compliance with the Parity Act.

Helpful resources

- Text of the Mental Health Parity and Addiction Equity Act of 2008
- Text of the final Medicaid Parity Act rule and CMS fact sheet on the final rule
- CMS Parity Compliance Toolkit Applying Mental Health and Substance Use Disorder Parity Requirements to Medicaid and Children's Health Insurance Programs
- CMS slide presentation on the final Medicaid Parity Act rule
- Text of the Final Parity Act rule for commercial health insurers
- Department of Labor FAQs on the Final Parity Act rule
- Legal Action Center's "Health Insurance for Addiction and Mental Health Care: A Guide to the Federal Parity Law"

For additional information, please contact LAC at nationalpolicy@lac.org or 202-544-5478.