

21ST CENTURY CURES ACT: SECTION 13002

ACTION PLAN FOR ENHANCED ENFORCEMENT OF MENTAL HEALTH AND SUBSTANCE USE DISORDER COVERAGE

Section 13002 of the 21st Century Cures Act (Cures Act) directed the Secretary of Health and Human Services (HHS) to convene a public meeting of stakeholders to produce an Action Plan for improved federal and state coordination related to the enforcement of mental health and substance use disorder parity provisions (parity) in the Public Health Service Act (PHS Act), Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code of 1986 (Code), and all comparable state laws.

This Action Plan includes:

- A brief background on parity;
- A description of the Cures Act Section 13002 requirement and information on the Public Stakeholder Listening Session on Strategies for Improving Parity for Mental Health and Substance Use Disorder Coverage held July 27, 2017; and
- An Action Plan, including recent and planned actions to maintain momentum on parity enforcement and implementation.

Background on Parity

Approximately one in five Americans—over 43 million adults—experienced a diagnosable mental illness in 2016¹, and nearly one-quarter of these adults have a serious mental illness (SMI) that interferes with performing daily activities. The prevalence of substance use disorders (SUDs) has increased in the previous two decades, with estimates suggesting that over 20 million adults suffered from an alcohol or substance use disorder in 2015. Almost one-half of those adults (8 million) had both an SUD and a diagnosable mental illness². Congress passed the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA) of 2008 with the goal of increasing coverage of behavioral health services for a growing number of Americans. MHPAEA, which applies to employment-based group health plans and health insurance issuers that insure such plans, does not require health plans to provide behavioral health care coverage—it only requires that those issuers and plans that choose to provide mental health and substance use disorder benefits must cover it in parity with medical and surgical benefits. The Affordable Care Act (ACA) extended parity to non-grandfathered individual insurance plans and small group health plans. Parity applies to quantitative treatment limitations

¹ Substance Abuse and Mental Health Services Administration (SAMHSA). Mental and substance use disorders. <http://www.samhsa.gov/disorders>. Published 2016. Updated March 3. Accessed August 23, 2016.

² Center for Behavioral Health Statistics and Quality. Behavioral health trends in the United States: Results from the 2014 National Survey on Drug Use and Health (HHS Publication No. SMA 15-4927, NSDUH Series H-50). <http://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf>. Published 2015. Accessed August 23, 2016.

(QTLs), for example restrictions on the number of days, episodes, or treatments that are covered and financial requirements, such as copays and coinsurance. Generally, plans must ensure that the limits imposed on behavioral health benefits must be comparable to what is imposed on medical and surgical benefits. In addition, non-quantitative treatment limitations (NQTLs), such as the use of utilization review by an issuer or prior authorization requirements, cannot be more restrictive for behavioral health benefits coverage than for medical and surgical coverage, unless the standard used to develop and apply the NQTL is comparable for both types of care. For more information regarding parity, please visit <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/mental-health-and-substance-use-disorder-parity>.

Since the enactment of MHPAEA, federal agencies have been committed to enforcing the law, promoting compliance, assisting consumers, and conducting investigations. The Departments of HHS, Labor (DOL), the Treasury (Treasury), and other federal agencies have issued regulations to implement the law and continue to issue guidance and publications to address discrete issues raised by stakeholders. For example, the Departments have clarified in previous regulations and guidance the breadth of disclosure required, as well as which documents participants, beneficiaries, and their authorized representatives have a right to receive (and generally may find helpful) under MHPAEA, ERISA, and the ACA. Moreover, in light of the ongoing opioid epidemic, FAQs also included clarifications related to commonly found NQTLs that reduce access to substance use disorder treatments in particular. Such guidance and publications also includes documentation on state best practices to promote parity compliance³, and tools for reporting parity violations⁴. The Departments of Labor and HHS also released a document which identifies plan provisions and health insurance benefit design elements that are red flags for parity limitations⁵ that are potentially impermissible.

With respect to enforcement actions, DOL has worked to ensure compliance in private-sector employer-sponsored group health plans. In fiscal year (FY) 2017, DOL has conducted 187 MHPAEA-related investigations and cited 92 violations of MHPAEA noncompliance.⁶ Federal agencies are also committed to supporting states in their role of enforcing parity requirements and have hosted policy academies and issued FAQs to assist states in their efforts.

Following the convening of the Parity Task Force in 2016, HHS created a one-stop government website to specifically focus on parity (www.hhs.gov/parity) and provide parity-specific

³ <https://store.samhsa.gov/product/Approaches-in-Implementing-the-Mental-Health-Parity-and-Addiction-Equity-Act-Best-Practices-from-the-States/SMA16-4983>

⁴ <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/mental-health-parity/mhpaea-disclosure-template-draft.pdf>

⁵ <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/MHAPeAChecklistWarningSigns.pdf>

⁶ For more information regarding DOL's enforcement visit EBSA's dedicated MHPAEA webpage, available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/mental-health-and-substance-use-disorder-parity>. For the most recent DOL enforcement data, see DOL's FY17 MHPAEA Enforcement Fact Sheet, *available at* <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/mental-health-and-substance-use-disorder-parity>.

resources to consumers and providers, as well as information on new actions taken by federal agencies to enforce or clarify parity regulations.

This Action Plan aims to strengthen ongoing implementation efforts and identify strategies to coordinate these efforts across state and federal agencies. Through the Parity Public Listening Session and written comments provided by stakeholders, HHS solicited feedback on the state of parity compliance and ways to improve the implementation and enforcement of parity requirements.

Parity Public Listening Session

The Office of the Assistant Secretary for Planning and Evaluation (ASPE) within HHS, along with representatives from the Centers for Medicare and Medicaid Services (CMS), the Substance Abuse and Mental Health Services Administration (SAMHSA), in coordination with DOL, Treasury, and the Office of Personnel Management (OPM), held a public listening session on parity implementation in Washington, D.C. on July 27, 2017, and accepted written comments on this issue from stakeholders and interested parties from July 3 to August 10, 2017 via a dedicated e-mail address. Over 40 comments were received, including 20 in-person testimonies from an audience of approximately 70 individuals representing a wide range of stakeholders. This audience included consumers and consumer advocates, providers, insurance companies, employers and other interested parties. To review the full video of the Public Parity Listening Session and full text of the comments, go to: <https://www.hhs.gov/programs/topic-sites/mental-health-parity/index.html>.

Recent Actions and Planned Actions

The following actions are organized in five categories, *Reporting and Enforcement*, *Disclosure Requirements and Increased Transparency*, *Consumer and Compliance Tools*, *State Technical Assistance and Research* taken from the major themes of comments received during the Public Listening Session in July 2017. Each section contains an update on recent actions that have been completed since the release of the *Mental Health and Substance Use Disorder Parity Task Force* Final Report in October 2016, in addition to planned actions.

- ***Reporting and Enforcement***
 - **Recent Actions:**
 - In FY 2017, DOL's Employee Benefits Security Administration (EBSA) conducted 187 investigations related to MHPAEA and cited 92 violations. EBSA investigations are rooting out illegal practices such as preauthorization requirements that prevent patients with mental health or substance use disorder needs from receiving immediate, potentially life-

saving, treatment. More than 100 DOL Benefits Advisors located across the country provide expert-level assistance with MHPAEA and other benefits questions and complaints. DOL's Benefits Advisors assist participants by seeking voluntary compliance from plans, both at an individual and plan-wide levels. When necessary, informal complaints made to these advisors are referred to EBSA investigators for formal investigation. Large nationwide insurance companies are paying attention to EBSA enforcement actions and making changes when problems are found in individual plans. EBSA is authorized to investigate employment-based group health plans and sue for equitable relief, but, does not have the authority to take direct action against health insurance issuers under federal law. EBSA nonetheless has been able to work collaboratively with issuers to ensure widespread corrections by issuers and third-party administrators for thousands of group health plans. In addition, EBSA has worked closely with state insurance departments to ensure that the law's requirements are understood.

- In January 2017, DOL issued a MHPAEA Enforcement Fact Sheet that summarized the Departments' enforcement activities in fiscal year 2016. DOL will release enforcement fact sheets each year with summaries of its investigations in the prior fiscal year.
- The HHS Centers for Medicare & Medicaid Services (CMS) has primary enforcement authority with respect to MHPAEA and other applicable federal laws over non-federal governmental plans. CMS investigates non-federal governmental health plans for compliance. Since the beginning of 2016, CMS has completed MHPAEA investigations of five non-federal governmental plans.

With respect to health insurance issuers selling products in the individual and fully-insured group markets, CMS has primary enforcement authority with respect to MHPAEA only when a state elects not to enforce or fails to substantially enforce MHPAEA. In these states, CMS reviews policy forms of issuers in the individual and group markets for compliance with MHPAEA prior to the forms being offered for sale in the states. Through this process, numerous parity issues are identified by CMS reviewers and are corrected by the issuers before individuals and groups enroll in the products.

CMS also has created a market conduct examination process for health insurance issuers in states where CMS is directly enforcing federal law.

Since the beginning of 2016, CMS has finalized one market conduct examination related to MHPAEA violations.

- **Planned Action:**
 - As mentioned above, DOL has released data on closed federal parity investigations, results, and violations. In the future, the DOL will continue to issue such data annually providing updated information and summaries of enforcement activities in the immediately preceding fiscal year.
 - DOL plans to devote resources to the review of employer sponsored health plans and the extension of widespread correction for MHPAEA compliance, including the re-adjudication of improperly denied claims. Accordingly, EBSA is establishing dedicated MHPAEA enforcement teams to conduct investigations of behavioral health organizations and insurance companies.
 - DOL maintains a self-compliance checklist on its website that may be used to determine whether a group health plan is in compliance with federal laws applicable to group health plans, including MHPAEA. DOL will update this tool with more comprehensive guidance regarding NQTLs and disclosure.
 - CMS will continue to publish information on its enforcement and investigation activities on an annual basis as it relates to investigations for non-federal governmental plans.
- ***Disclosure Requirements and Increased Transparency***
 - **Recent Actions:**
 - DOL, HHS and Treasury issued sub-regulatory guidance (FAQ Part#31, Question 9) clarifying the information that a provider acting as an authorized representative for a participant may request from an ERISA group health plan to assist in evaluating the plan's compliance with MHPAEA.
 - DOL, HHS and Treasury in June 2017 issued Frequently Asked Questions (FAQ) Part 38 that both solicited comments from the public on the adequacy of the current disclosure regime and solicited comments on a draft model form that participants, enrollees, or their authorized representatives could -- but would not be required to -- use to request information from their health plan or issuer regarding NQTLs that may affect their mental health or substance use disorder benefits, or to obtain

documentation after an adverse benefit determination involving mental health or substance use disorder benefits to support an appeal. EBSA received 19 comments and after reviewing these comments and other information collected by the Departments, EBSA anticipates providing further guidance in the near future.

- In 2016, HHS, Treasury, and DOL released FAQs Part#31 and Part#34 with specific information on Medication-Assisted Treatment (MAT) as a substance use disorder benefit and its protections under MHPAEA. This guidance was meant to help respond to the opioid epidemic⁷ and clarify that the parity requirements extend to treatment for substance use disorders including opioid use disorders.

- ***Consumer and Compliance Tools***

- **Recent Action:**

- DOL, in conjunction with HHS published *Warning Signs- Plan or Policy Non-Quantitative Treatment Limitations (NQTLs) that Require Additional Analysis to Determine Mental Health Parity Compliance*, a brief guide for consumers, issuers, state regulators, and other stakeholders. The document provides examples of plan provisions that could be “red flags” that a plan or issuer may be imposing an impermissible NQTL and that should trigger careful analysis to determine MHPAEA compliance.

<https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/mental-health-parity/warning-signs-plan-or-policy-nqtl-that-require-additional-analysis-to-determine-mhpaea-compliance.pdf>

- DOL and SAMHSA issued three joint publications to assist consumers seeking to understand how MHPAEA affects their coverage. *Parity of Mental Health and Substance Use Benefits with Other Benefits: Using Your Employer-Sponsored Health Plan to Cover Services* provides an overview of MHPAEA for consumers, as well as information on how to inform yourself about your health care coverage and appeal a claim. *Know Your Rights: Parity for Mental Health and Substance Use Disorder Benefits* provides a short overview of MHPAEA for consumers, and identifies some of the common limits placed on mental health and substance use disorder benefits and services. The *Consumer Guide To Disclosure Rights: Making The Most Of Your Mental Health and Substance Use Disorder Benefits* explains the various federal disclosure

⁷ In 2015, more than 33,000 people died from opioid overdose, including prescription opioids, heroin, and fentanyl overdoses. See <https://www.cdc.gov/mmwr/volumes/65/wr/mm655051e1.htm>

laws affecting private sector employer-sponsored group health plans and issuers.

<https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/mental-health-and-substance-use-disorder-parity>

- HHS created a Parity Portal to help drive consumers to the appropriate agency and resources to help them solve their coverage issue, file a complaint or submit an appeal, as necessary.
- **Planned Actions:**
 - HHS plans to continue to update the Parity Portal, found at www.parity.hhs.gov, to provide information for consumers about how to determine if they have experienced a parity violation.
- *State Technical Assistance*
 - **Recent Action**
 - SAMHSA, along with DOL and other components of HHS, held two parity policy academies that took place from February 2017 through August 2017. One of the academies focused on advancing parity compliance in the commercial market, and the other focused on parity in Medicaid and the Children’s Health Insurance Program (CHIP). These parity policy academies were a unique opportunity to bring together national experts to conduct technical assistance for teams of state officials on strategies to advance parity compliance and lessons learned from other states’ implementation efforts. Participating in the commercial market policy academy were representatives from CA CO, DE, HI, IL, IN, MA, MI, MN, MS, NH, NJ, NM, NY, OK, OR, PA, RI, WA, USVI. Participating in the Medicaid policy academy were representatives from IL, NV, TX, CO, GA, WA, LA, ID, DE, and NH.
 - **Planned Actions:**
 - Currently, as a result of feedback from the states that participated in the Parity Policy Academies, SAMHSA, in conjunction with DOL, is in the process of developing a “clear language” tool to provide families and caregivers with important information and resources to actively support the individuals in their care. A final report on the Parity Policy Academies is forthcoming.
 - SAMHSA is currently developing a tool kit that provides information necessary to develop a basis for understanding what parity is and how to implement and comply with federal parity laws and regulations. This document will primarily be targeted at state insurance regulators and behavioral health authority staff, along with human resources

professionals, insurance executives, and others that could benefit from a more targeted document as states undertake efforts to improve compliance and enforcement efforts.

- **Research**

- **Planned Action:**

- HHS ASPE conducted a study *Assessing the Impact of Parity in the Large Group Employer-Sponsored Insurance Market*; this study empirically assessed the impact of the MHPAEA on the private, large group employer-sponsored insurance market. Still being finalized, the draft final report points to findings that show MHPAEA has had significant and positive effects on any use and frequency of substance use disorder outpatient services and frequency of mental health outpatient services.

Planned Actions in Review

Action Type	Action Item	Status and Implementation timeline	Notes
Reporting and Enforcement	Annual enforcement data	DOL has released two enforcement data fact sheets and CCIIO has released one enforcement fact sheet. DOL and CCIIO will continue to release enforcement data annually.	DOL’s enforcement fact sheets are available at: https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/mental-health-and-substance-use-disorder-parity . HHS’s enforcement fact sheets are available at: https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/HHS-2008-MHPAEA-Enforcement-Period.pdf
Reporting and Enforcement	Increased MHPAEA enforcement	In progress.	
Reporting and Enforcement	DOL self-compliance checklist	In Progress.	
Consumer Tools	Parity Consumer Portal	Complete.	The portal is available at https://www.hhs.gov/programs/topic-sites/mental-health-parity/mental-health-and-addiction-insurance-help/index.html .

Action Type	Action Item	Status and Implementation timeline	Notes
State Technical Assistance	SAMHSA “Clear language” tool	In progress.	
State Technical Assistance	SAMHSA Policy Academies final report	In progress.	