THE KENNEDY FORUM

State Parity Legislative and Regulatory Compliance Workgroup

September 9, 2020

Agenda

- **State Updates**
- **Federal Updates**

California

SB 855

- Status: **Passed Senate (35-5), Passed Assembly (63-1), with Governor (has until end of September)**
- Summary:
  - Requires insurers to provide coverage for the diagnosis and medically necessary treatment of mental health and substance use disorders, as defined by the most recent edition of the ICD or DSM.
  - Defines "medically necessary" and mandates that plan medical necessity determinations be consistent with Generally Accepted Standards of Care.
  - Requires the use of non-profit clinical specialty association criteria (e.g. ASAM).
  - Prohibits a health care service plan or health insurer from limiting benefits or coverage to short-term or acute treatment.

38 national organizations joined letter to Gov. Newsom urging him to sign.
https://wellbeingtrust.org/wp-content/uploads/2020/09/National-Organizations-Request-to-Gov-Newsom-for-SB-855-Signature.pdf

https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200SB855

New York

Proposed Rule on Requiring Parity Compliance Programs

- Dept. of Financial Services proposed rule requiring insurers to put in place parity compliance program. Would require:
  - Establish formal compliance program with a designed individual heading
  - Written policies/procedures
  - Methodologies for identification and remediation of improper practices
  - Conduct “comparative analysis” on NQTLs
  - Actuarial certification of compliant financial requirements and QTLs
  - Annual certification that compliance program meets rules requirements
  - Training and education of personnel

- Overall very good, but could be strengthened
  - Specify what comparative analysis must contain (i.e. stepwise approach using specific form like Kennedy Forum/APA/Parity Implementation Coalition Six-Step Process)
  - Require parity analysis before any benefit change to MH/SUD ***or to medical/surgical***
  - Information sharing within organization, with UR management services, and carve-outs
  - Make clear MH and SUD, independent of one another, must each be compliant with MHPAEA
  - Stronger language on ensuring proper disclosures and investigating parity complaints
  - CEO signing not optional (parity compliance person can’t take place)

https://www.dfs.ny.gov/system/files/documents/2020/06/reg_proposed_218_text.pdf

Parity Compliance Programs

Vital for Insurers to Have; Should be Required

- **Why Needed?**
  - Without one, it's nearly impossible for insurers to be compliant with MHPAEA
  - MHPAEA compliance unlikely to be accidental; currently insurers often engage in elaborate after-the-fact justifications for why likely MHPAEA violations okay
  - Because MHPAEA is comparative law, must have programs and procedures in place to do the comparison
  - How medical/surgical benefits applied is a critical part of equation
  - Need to move to proactive compliance, not just identifying issues after-the-fact
- There is no excuse for insurers not having a robust parity compliance program.
- MHPAEA designed to address systemic discrimination against MH/SUD in insurance coverage. Good intentions by insurers is insufficient to root out systemic issues.

Requiring Parity Compliance Programs

Critical Requirements (may not be exhaustive)

1) **Structure**
   - Senior person in charge, reporting to CEO or other C-suite executive
   - Written policies and procedures
   - Involvement of all individuals who make decision on benefits and treatment limitations that may affect compliance
2) **Measurement and analysis**
   - System of ongoing assessment of parity compliance, both as written and in operation (latter requires data collection)
   - Actuarial certification of financial requirements and QTLs
   - Specific requirements for NQTL analysis utilizing form that tests all aspects of NQTL rule
3) **Remediation**
   - Fix problems immediately after identification
   - Identify and notify affected enrollees, re-adjudicate claims
   - Notify regulator and public

Requiring Parity Compliance Programs

Critical Requirements (may not be exhaustive), Cont.

4) **Proactive compliance**
   - Review all MH/SUD **and med/surg** benefit changes for parity compliance **before** they're made
5) **Transparency – Internal and External**
   - Requirements for information sharing within insurer, any carve-out, and with any contracted benefit management functions
   - Ensure release of required disclosures per state and federal law
6) **Education / Training**
   - Ensure all personnel who touch MHPAEA compliance receive proper training on MHPAEA requirements and how to identify potential violations
7) **Accountability**
   - Require annual CEO certification that insurer meets compliance program requirements
   - Mechanism for reporting concerns, with retaliation prohibited

- Requirements should be specific with key terms defined
- Rules should align directly with MHPAEA

Texas

Put out "informal draft rule" for comment

- Issued by Texas Department of Insurance (TDI)
- Four divisions
  - Explains and illustrates how a health plan must be designed to comply with Texas law, which mirrors MHPAEA.
  - Requires issues to report on utilization review data on outcomes for MH/SUD and med/surg claims
  - Requires plans to analyze quantitative treatment limitations (QTLs) and NQTLs. Uses template for each based on PA Dept. of Insurance (NQTL template based on Six-Step Process).
  - Clarifications on autism spectrum disorder coverage.

Draft rule may result in formal proposed rule. Potential timing not clear.

COVID-19 and Federal Stimulus

- Unfortunately, not good news.
- Unemployment benefits ran out July 31st. Negotiations between House and Senate broke down.
- Senate's "Skinny" COVID package contains no money for MH/SUD.
- Federal stimulus so far has not met escalating MH/SUD needs. CARES Act only had $425 million for SAMHSA (0.02% of total).
- House-passed HEROES Act included more:
  - $3 billion to SAMHSA
  - Medicaid Reentry Act (allowing enrollment 30 days prior to release)
  - 9-8-8 National Suicide Prevention Lifeline Designation
  - Increase Medicaid matching rate (FMAP by 7.8 percentage points)
  - $200 million for NIMH
- State advocates need to push Senators for strong response.
- Advocates should also push for House to pass S. 2661 (National Suicide Hotline Designation Act) immediately!

Wit v. UBH Update

- U.S. District Court in Northern District of California found United Behavioral Health liable for breach of fiduciary duty in March 2019.
- Court ruled that UBH denied MH/SUD care to more than 50,000 individuals nationwide (half of whom were children/adolescents) using deeply flawed medical necessity criteria that were inconsistent with Generally Accepted Standards of Care.
- Remedies ruling still pending. An important hearing last week.
- Appears likely that judge will call for reprocessing of claims with oversight from monitor.
  - Reimburse for wrongly denied care + interest.
  - Injunctive relief to stop UBH from using flawed criteria. (Though, UBH already has said publicly it has switched criteria.)
- Timing of remedies ruling unclear, but hopefully soon.
- Wit is already having important nationwide effects.
- Due to lack of damages under ERISA, patients cannot be reimbursed for damaged caused by denied care. **This is a major limitation of current federal law.**