NATIONAL PARTNERS

LEGAL ACTION CENTER
THE KENNEDY FORUM
CENTER ON ADDICTION
PARTNERSHIP FOR DRUG-FREE KIDS
PUBLIC HEALTH MANAGEMENT CORPORATION

LOCAL ANCHOR

LEGAL ACTION CENTER

October 9, 2018

Honorable Robert R. Neall
Secretary
Maryland Department of Health
201 W. Preston Street
Baltimore, Maryland 21202

Dear Secretary Neall:

I am writing on behalf of the Maryland Parity Coalition, a participant in the national Parity at 10 Campaign, to thank you for filing the Maryland Department of Health's preliminary analysis of the State's Medicaid and Children's Health Insurance Program's compliance with the Mental Health Parity and Addiction Equity Act (Parity Act). Members of the Maryland Parity Coalition have worked with MDH for over five years to ensure that the State's Medicaid program complies with the Parity Act, and we appreciate the progress the State has made in addressing compliance issues. Our coalition has identified, as among our key priorities, the need for review of prior authorization and other utilization management requirements and the setting of reimbursement rates to ensure non-discriminatory standards.

Pending the submission of MDH's final compliance report, we are writing to identify one area of concern that we urge you to address in the final report. The Department has represented that "the setting of provider rates falls outside the scope of MHPAEA parity requirements." In fact, federal regulations and guidance make crystal clear that the Parity Act governs the setting of reimbursement rates as a non-quantitative treatment limitation. 42 C.F.R. § 440.395(b)(4)(ii). We request that this compliance information be included in the final Parity compliance report.

Parity Act Standards Related to Reimbursement Rate Setting Standards

The Medicaid parity regulations specifically identify provider reimbursement rates as a non-quantitative treatment limitation that is subject to the Parity Act, and HHS/DOL guidance affirms that position. HHS's parity regulations provide that "Non-quantitative

treatment limitations include… (C) Standards for provider admission to participate in a network, including reimbursement rates." 42 C.F.R. § 440.395(b)(4)(ii). The preamble to the Medicaid regulations specifically addresses the application of the NQTL requirements to provider reimbursement. In response to public comments that requested "additional examples to demonstrate the application of NQTL requirements to provider reimbursement," HHS provided the following response, in pertinent part:

> Response: Similar to the guidance provided in the MHPAEA final rule, we clarify that regulated entities may consider a wide array of factors in determining provider reimbursement methodologies and rates for both medical/surgical services and MH/SUD services, such as service type; geographic market; demand for services; supply of providers; provider practice size; Medicare reimbursement rates; and training, experience and licensure of providers. The NQTL provisions require that these or other factors be applied comparably to and no more stringently than those applied for medical/surgical services, noting that disparate results alone do not mean that the NQTLs in use fail to comply with these requirements.

Dept. of Health and Human Services, The Application of Mental Health Parity Requirements to Coverage Offered by Medicaid Managed Care Organizations, the Children's Health Insurance Program (CHIP), and Alternative Benefit Plans, 81 FED REG. 18390, 18404 (March 30, 2016). *See also*, CMS, Parity Compliance Toolkit Applying Mental Health and Substance Use Disorder Parity Requirements to Medicaid and Children's Health Insurance Programs (Jan. 17, 2017) at 4 and 34 (describing NQTLs as including reimbursement rates), 37, 40, 42, 51, 52 (describing process for analyzing NQTLs including reimbursement rates, including charts for guidance) [available at https://www.medicaid.gov/medicaid/benefits/downloads/bhs/parity-toolkit.pdf.]
Additionally, to help the public understand federal NQTL standards, HHS directed parties to the guidance issued by the Departments of Labor, Health and Human Services and Treasury in connection with the application of parity standards to group health plans and health insurance issuers. 81 FED REG. 18402. The most recent [Proposed] FAQs About Mental Health and Substance Use Disorder Parity Implementation (Part 39) – offers this specific example of the application of the Parity Act to reimbursement rates.

> **Q7. My health plan documents state that in-network provider reimbursement rates are determined based on the providers' required training, licensure, and expertise. However, medical/surgical benefits, reimbursement rates are generally the same for physicians and non-physician practitioners. For MH/SUD benefits, the plan pays reduced reimbursement rates for non-physician practitioners. Is this permissible under MHPAEA?**
>
> No. While a plan is not required to pay identical provider reimbursement rates for medical/surgical and MH/SUD providers, a plan's standards for admitting a provider to participate in a network (including the plan's reimbursement rates for providers)

PARITY AT 10.ORG

is an NQTL. A plan may impose an NQTL if under the terms of the plan as written and in operation, the processes, strategies, evidentiary standards, and other factors considered by the plan in implementing its NQTL with respect to MH/SUD services are comparable to and applied no more stringently than those used in applying the NQTL with respect to medical/surgical benefits in the same classification. Here, the plan reduces reimbursement rates for non-physician practitioners providing MH/SUD services. However, the plan does not use a comparable process with respect to reimbursement of non-physician providers of medical/surgical services. Accordingly, the plan's use of this NQTL does not comply with MHPAEA.

[available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-39-proposed.pdf}.

The Department's report provides no support for its statement that reimbursement rate setting is not subject to the Parity Act. While we are very interested in the Department's rate-setting study, ***that study differs from a Parity Act analysis***, which requires an assessment of the "processes, strategies, evidentiary standards, or other factors," as written and in operation, to ensure that they are comparable to and applied no more stringently to MH and SUD benefits than to medical/surgical benefits. The factors identified in the HHS preamble guidance are precisely the information that the Department must obtain from the MCOs so that it can assess whether comparable factors are used to set MH, SUD and medical/surgical rates and are not applied more stringently in setting MH and SUD rates. We request that this compliance information be included in the final Parity compliance report.

Thank you for considering our views, and we request an opportunity to discuss this issue with you. We also look forward to receiving the final Parity Act compliance report.

Sincerely,

Ellen Weber, JD
Vice President for Health Initiatives
Legal Action Center

Cc: Dennis Schrader
Dr. Barbara Bazron
Tricia Roddy