TO: Senator Malcolm Augustine

FR: Ellen Weber

RE: MIA's 2023 Interim Report on Nonquantitative Treatment Limitations and Data

DT: December 13, 2023

We were impressed by the MIA's thorough progress report and candid description of carrier compliance deficiencies and fundamental failure to follow clear guidance from both state and federal regulators when conducting parity analyses. We are very disappointed that following a 2-year review process, the MIA has not made any substantive determinations of parity compliance or violations. We agree that the MIA has worked very hard to carry out its legal obligations, yet we do not think the agency is using its full legal authority to hold carriers accountable for their blatant failure to demonstrate that plans comply with the Parity Act.[1] The analytical deficiencies have had a detrimental spill-over effect to individual providers who have filed parity complaints; the MIA has failed to issue a substantive ruling on at least two such complaints related to reimbursement practices that affect network participation based on insufficient carrier information.

We largely agree with the MIA's recommendations, as described below, although we need clarification on some proposals and must ensure that the state is adhering to federal standards. We are also interested in learning about the activities the MIA's consultant, Examination Resources, will conduct and how its engagement relates to the MIA staff review and oversight of compliance. We do not know whether Examination Resources has significant expertise in Parity Act standards and compliance review and whether it will conduct a thorough and accurate review of carrier reports (if that is part of its role).

The following provides our preliminary reaction and outstanding questions on each recommendation. We are encouraged that the MIA has asked the General Assembly to act on its recommendations in the 2024 session, and we hope Senate and House Committees pursue reform promptly. The status quo wastes state resources and, importantly, does not result in improved access to mental health and substance use disorder care for Marylanders. We must still discuss the MIA's recommendations with our Parity Coalition partners and consider their input before finalizing our position. We plan to share this memo with the Coalition and request feedback, although we recognize the tight timeline with the holidays.

[1] Federal law bars carriers from selling health plans that do not comply with the Parity Act, which places the burden of proof on carriers to demonstrate compliance. We believe the additional proof standard that the MIA has requested already exists in federal law, which the MIA is obligated to enforce.

MIA's Eight Recommendations and LAC's Response

The MIA noted that recommendations 4 and 8 would have the greatest effect on its ability to streamline and improve parity report review and determinations. **In sum, we agree with recommendations 1, 2 (with clarification), 3, 5, 6 (with clarification), and 8 (with clarification and expansion). We do not agree in full with recommendations 4 and 7 because we read the Parity Act to bar some of each proposed revision. We are happy to discuss options to achieve some of the MIA's goals within the statutory standards.** As a next step, we propose to draft amendment language and begin to work with the MIA to reach consensus where possible. We are interested in learning whether the MIA has drafted bill language and/or intends to file an Administration bill.

The following provides more detailed guidance on each recommendation.

1. Continually issue new guidance, best practices, and specific NQTL examples to ensure carriers conduct a sufficient NQTL analysis.

   LAC Response: We agree and encourage the MIA to ask carriers to identify specific issues that are truly confusing – as opposed to a generalized "we need more guidance" and "we need you to write a model comparative analysis for us" – so that appropriate education materials can be developed. We believe carriers are foot-dragging and ultimately do not want to do the comparative analyses and submit complete parity reports. If confusion is, in fact, the problem, we would include a requirement that carrier staff who are responsible for parity compliance reporting participate in on-going education sessions (perhaps led by the MIA's consultant).

2. Continue compliance and data reporting until widespread substantive parity determinations have been made by the MIA.

   LAC Response: We agree that compliance and data reporting is essential for parity compliance and that the reporting requirement must remain in place so that the MIA can conduct substantive reviews and issue determinations. We further believe an indefinite, annual reporting requirement is consistent with Federal law, which requires carriers to conduct NQTL compliance analyses annually and submit those reports to state regulators upon request. This federal law requirement was not in place when the Maryland General Assembly adopted the biennial reporting requirement and sunset. The General Assembly must align state law reporting requirements with federal law.

3. Require carriers to conduct and document comparative analyses for legacy processes impacting NQTLs.

   LAC Response: We agree. As the MIA noted, any factor, evidentiary standard or process that has been used in the design or application of an NQTL must be assessed regardless of whether it was adopted prior to or after the enactment of the Parity Act. Carriers have no legal basis for refusing to analyze those elements. The MIA's position is consistent

with the proposed federal rule by the Departments of Labor, Health and Human Services and Treasury[2] that, if adopted, would clarify that a health plan may not use any discriminatory factors or evidentiary standards in the design or application of an NQTL and defines such standards to include elements that were not subject to the Parity Act at the time of their adoption. The MIA's position is totally aligned with this proposed standard.

4. Reduce the number of NQTLs that plans have to report annually and give the MIA regulatory discretion to identify and select NQTLs it will focus on each year.

   LAC Response: We disagree in part. Federal law requires state-regulated health plans to conduct an annual parity analysis of all NQTLs and gives state and federal regulators the authority to request the submission of ***any*** NQTL analysis and receive such analysis from the health plan, upon request. The MIA should not undermine its own authority or ability to request and obtain such reports. That said, we believe the MIA could be given the authority to determine, as part of its enforcement efforts, that it will not review the reports for all NQTLs and instead identify a standard set of NQTLs that would be reviewed for all carriers and, additionally, select specific NQTLs for each carrier. This retains an element of "randomness" such that carriers pay attention to designated NQTLs to the exception of others. We are interested in learning the criteria the MIA would use to determine the NQTLs that have the greatest impact on patient access to care (the right benchmark in our view). If greater discretion is afforded the MIA, we recommend that legislation require a review of a minimum number of NQTLs and require a process to establish guidelines for the selection of NQTLs so that lawmakers and the public can lend oversight to the NQTL selection. **Regardless, carriers must be required to conduct an analysis of all NQTLs and submit them to the MIA annually.**

5. Remove the requirement that the NAIC template be used as the reporting tool.

   LAC Response: We agree. In 2020, we strongly opposed the uncodified provision requiring the use the NAIC template. We recommended at that time that the DOL's Self-Compliance Tool, the precursor to the standards adopted by federal regulators to implement the Parity Act reporting requirement, be the basis for the MIA's tool. The MIA's reporting template and standards should align with federal regulations and sub-regulatory guidance, as noted by the MIA. This must include any updated standards adopted by federal regulators pursuant to its recent rulemaking.

6. Review existing data requirements for usefulness and amend or repeal, as appropriate, and revise the statute to allow the MIA to develop and require additional standardized data submissions to evaluate "in operation" compliance.

   LAC Response: We agree that the data elements should be assessed and revised, as appropriate, and that the MIA should have authority to require additional data points.

[2] Requirements Related to the Mental Health Parity and Addiction Equity Act, 88 Fed. Reg. 51552 (Aug. 3, 2023).

Federal regulators have identified important data elements for network composition as part of its proposed regulatory process and sought significant information from stakeholders through a Technical Release. The MIA should align with federal data standards, at a minimum, and adopt other data requirements that address Maryland-specific concerns. We are interested in learning which data points the MIA views as unhelpful and those it seeks to add. We also believe that a public process should guide final decisions.

One issue that the proposed federal regulations has raised is the effect of a disparate data outcome when comparing MH, SUD and med/surg benefits on a finding of a violation. Under the existing regulations disparate outcomes are a red flag but do not result in a violation finding. Federal regulators have proposed to revise that standard insofar as a material difference (not defined) in outcome data would constitute a violation for network composition NQTLs (i.e. admission, reimbursement, network adequacy) and, for all other NQTLs, would require remedial steps. The final federal standard will govern the MIA's enforcement.[3]

7. Eliminate plan level reporting and permit reporting on a product level for those plans that use the same NQTLs.

   LAC Response: We disagree with this recommendation. Federal law requires health plans to comply on the plan level (not product level). While the design ("as written") standard and underlying factors and evidentiary standards may be uniform across all plans within a product, that is not true for the application ("in operation") standard, as the data will differ based on plan membership and the health plan's operational practices and decision-making for each plan's members. The MIA noted in its report that carriers applied the same factors and evidentiary standards across multiple plans for the design of the NQTLs, as would be expected. We could envision bill language that authorizes the MIA to review the "design" standards for only one plan within each product if the carrier submits a written attestation confirming its uniform use of the same factors and evidentiary standards. We would like to learn more about any duplication of review of the design standards to fine-tune a possible remedy.

   On the other hand, the MIA must continue to analyze the "application" standard for each plan based on the variability of data across plans. While the MIA has complained about the large number of plans that it is required to review, advocates agreed in 2020 to cap the number of plan submissions to facilitate a manageable review. The carriers' failure to submit complete information is the primary source of the MIA's oversight and review burden not the number of plans it is required to review.

[3] Legal Action Center supports the proposed regulatory standard with modifications. We believe the "material difference" standard sets too high a bar, based on the Parity Act standards, and that disparate outcomes for any NQTL, not just network composition, should result in an "in operation" violation.

8. Provide the MIA with additional enforcement options to address carrier failure to provide sufficient comparative analyses.

   LAC's Response: We fully support the MIA's request for additional enforcement options, including a provision that explicitly places the burden of persuasion on carriers to demonstrate parity compliance in NQTL design and application. This would allow the MIA to find a substantive parity violation if the carrier does not submit a sufficiently complete report that demonstrates NQTL compliance.[4] **This burden of persuasion must also apply to all individual complaints that raise a Parity Act violation.** We are very concerned that the MIA will not make a substantive determination in an individual complaint if the carrier fails to provide sufficient parity compliance information on which to base its review. While the MIA has informed us that it will find a violation without a complete report in cases of "glaring" violations, we expect that few violations are "glaring" at this junction in the law's 15-year life. Individual complainants must have an effective remedy when the carrier's refusal to satisfy reporting requirements undermines the MIA's review.

   We offer the following additional recommendations to both incentivize carriers to submit a complete analysis and penalize them when they fail to submit a report that demonstrates NQTL compliance.

   First, we understand that the MIA seeks discretion to craft the remedy for violations (i.e. barring use of the NQTL, requiring modification based on the totality of the report and the specific NQTL, etc.). We firmly believe that the most effective incentive for carrier compliance is to bar the carrier's use any NQTL that it cannot demonstrate complies with the Parity Act. The Parity Act already bars the sale of any plan that does not comply with regulatory standards; carriers should not be rewarded when they perpetuate the use of discriminatory standards. We seek further discussion with the MIA on this point.

   Second, we propose the adoption of a liquidated damages provision that would be imposed for failure to submit a complete compliance report. Any damages that are received would be placed in a separate Parity Act Compliance fund, which would support further enforcement actions, community education, and the Consumer Health Access Program. The Parity Coalition proposed the creation of this fund in 2020, and other states have adopted such provisions.

[4] The proposed federal regulations, if adopted, would address the MIA's key concern that it lacks authority to find a violation based on an incomplete report. Federal regulators have proposed that the failure to demonstrate compliance would include the failure to submit a sufficient comparative analysis that demonstrates compliance. 88 Fed. Reg. at 51579. The MIA's "burden of persuasion" would provide the same authority to make that final determination and constitute a finding of both an incomplete report and a substantive parity violation.