

The State of Play of Federal Mental Health Parity: Evolutions and Practice Tips

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Presentation Overview

- 1. Background on Federal Implementation of Mental Health Parity and Addiction Equity Act (“MHPAEA,” pronounced: “meh-pee-ah”)**
 - Affordable Care Act Changes
 - Enforcement Landscape
 - 21st Century Cures Act Implementation under the Trump Administration
- 2. What to Expect in a DOL Enforcement Audit**
 - Real World Experiences
 - Best Practice Tips
- 3. Recent Private Litigation**



MHPAEA Implementation

- Passed in 2008
 - *Fun fact:* the \$700B financial bailout bill was an *amendment* to MHPAEA.
- Celebrated its 10-year anniversary
 - But implementing final regulations issued five years later, in 2013 (“MHPAEA Final Rule”).



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How did the Affordable Care Act (ACA) Change MHPAEA?

MHPAEA	ACA
<ul style="list-style-type: none"> • Applied to groups of 51 or more employees • Applied to Medicaid MCOs (further clarified in Mar. 2016 final rule) • CHIP Reauthorization Act of 2009 applied MHPAEA to CHIP plans 	<ul style="list-style-type: none"> • Extended to non-grandfathered groups of fewer than 51 employees and individual market plans • Applied MHPAEA to Medicaid alternative benefit plans
<p>Did not establish a coverage mandate for mental health (MH) and substance use disorder (SUD) benefits</p>	<ul style="list-style-type: none"> • Essential health benefits (EHB) coverage requirement requires all non-grandfathered small groups and individual market plans to cover MH/SUD benefits that are substantially equal to the state benchmark plan, including prescription drug coverage for MH/SUD treatment

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How did the ACA Change MHPAEA?

- **Preventive Services**

- ACA requires coverage including certain MH/SUD services, such as counseling and screenings.
- MHPAEA Final Rule clarifies that large group health plan coverage of only these preventive services does not subject the coverage to additional requirements under MHPAEA (such as the requirement to cover MH/SUD services in each classification).

- **Provider Nondiscrimination**

- ACA requires that issuers shall not discriminate with respect to participation under the plan or coverage against any health care provider who is acting within the scope of the provider's license.

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Who Enforces MHPAEA? Group Health Plans

- DOL's Employee Benefits Security Administration (EBSA) oversees private sector self-funded and fully insured employment-based ERISA group health plans.
- EBSA enforcement tools are limited to equitable relief.
- IRS enforcement tools include \$100 per day, per affected bene excise tax.
- No direct enforcement against health insurance issuers.
 - BUT global corrections often requested, leading to large volume of claims re-adjudicated.
- Recent policy recommendations to pass legislation to extend EBSA's authority to directly enforce against issuers recommended by:
 - Mental Health Parity & Substance Use Disorder Parity Task Force, and
 - President's Commission on Combating Drug Addiction and the Opioid Crisis

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Who Enforces MHPAEA? Health Insurance Issuers

- States have enforcement authority over health insurance issuers and typically enforce through form and rate filing review or market conduct examinations.
- CMS has primary enforcement authority with respect to health insurance issuer compliance with MHPAEA only when a state elects not to enforce or fails to substantially enforce (currently MO, OK, TX, WY).

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How does MHPAEA Relate to State Laws?

- No preemption unless state law “prevents the application” of a MHPAEA requirement.
- State laws typically fall into one of three categories:
 - **Parity or Equal Coverage** - requires the same level of coverage for MH/SUD and medical/surgical conditions.
 - **Coverage Mandates** - requires some level of coverage for MH/SUD conditions or both (e.g., 30 days of inpatient care for MH/SUD), but permits discrepancies between MH/SUD disorder and medical/surgical benefits.
 - **Mandated Offering** - doesn’t require coverage for MH/SUD benefits but requires that either an option for this coverage be provided to the insured usually for a higher premium, or that MH/SUD benefits offered must be equal.
- **Recent Trends:**
 - Parity compliance reporting laws (CO, DE, IL, NY, TN).
 - Third party watchdog groups grading state performance (e.g., Kennedy Forum).
 - Ex. Kennedy Forum rates IL an A grade; AL, CO, ME, NH, TN, VA a C; all other states with an F.

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MHPAEA Under the Trump Administration-What's Changed?

- Addressing 21st Century Cures Act of 2016 provisions.
- Action plan to facilitate joint federal-state collaboration with MHPAEA enforcement as well as provide guidance to help employers and insurers comply with MHPAEA, especially the non-quantitative treatment limitations (NQTLs) (January 2017).
- Public listening session on parity implementation and received comments from consumer advocates, providers, insurers and employers (July 2017).
- Guidance Package (April 2018):
 - HHS Action Plan for Enhanced Enforcement (“Action Plan”)
 - DOL “Pathway to Full Parity” Report to Congress
 - DOL FY 2017 Enforcement Fact Sheet
 - Proposed FAQ Guidance on NQTLs
 - Self-compliance tool for MHPAEA
 - Draft Model NQTL Disclosure Form



MHPAEA Under the Trump Administration

Action Plan details recent and planned actions in 5 categories:

- Reporting and Enforcement
 - DOL and CMS Enforcement Actions
- Disclosure Requirements & Increased Transparency
 - FAQs related to required disclosure of MHPAEA compliance information, especially with regard to NQTLs
- Consumer & Compliance Tools
 - “Warning Signs” document providing examples of “red flags” signaling impermissible NQTLs
 - DOL & SAMHSA joint publications to assist consumers in understanding how MHPAEA affects their coverage
 - HHS created Parity Portal
- State Technical Assistance
 - DOL & SAMHSA parity policy academies focused on advancing parity compliance in commercial market & CHIP
- Research
 - HHS planned study, “Assessing the Impact of Parity in the Large Group Employer-Sponsored Insurance Market”



Findings from 2017 DOL Enforcement Report

- Imposing higher specialist cost sharing on MH/SUD benefits vis-à-vis medical/surgical benefits.
- Failure to provide out-of-network coverage for inpatient and outpatient MD/SUD benefits while providing out-of-network coverage for medical/surgical benefits.
- Lack of preauth parity between MH/SUD benefits and medical/surgical benefits.
- Requiring treatment plans and improvement standards that had no comparable requirements for medical/surgical benefits.
- Conditioning inpatient MH treatment on evidence that at least one daily living activity is affected to the point of dysfunction and treatment is required to avoid deterioration when no such standard exists for inpatient medical/surgical treatment.
- Excluding chronic behavior disorders without restrictions on chronic medical/surgical conditions, and denying any MH/SUD treatment admissions without prior auth while only reducing medical/surgical benefits if no prior auth was obtained.
- Impermissible annual day limit imposed on residential treatment for SUD.

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What to Expect in a MHPAEA Enforcement Audit

Process

1. Group selected based on beneficiary complaints, referrals from benefit advisors, leads from other enforcement agencies, feedback from consumer groups and utilization of “advanced targeting methods that incorporate various sources.”
2. EBSA document request/subpoena issued.
3. Claims samples requested.
4. Interviews and depositions conducted to clarify outstanding questions.
5. DOL issues preliminary finding and voluntary correction letter (plans refusing voluntary correction referred to litigation).
6. Plan remediation including claims re-adjudication and policy modification.
7. Closing letter.

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MHPAEA Enforcement Audit - Real World Experiences

Document Request/Subpoena

- Request typically includes plan document/summary plan description and/or certificate of coverage containing plan provisions regarding benefits, internal guidelines evidencing plan policies and practices, internal MHPAEA analysis.
- Initial document production often identifies more specific compliance issues prompting requests for additional information.
- Subject areas of additional requests:
 - Detailed actuarial testing of compliance of financial requirements and quantitative limits.
 - Detailed documentation of application of medical management techniques such as prior authorization.
 - Detailed information supporting certain plan requirements like MH/SUD specific exclusions and facility licensure.
 - Detailed information based on provider types.

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MHPAEA Enforcement Audit - Real World Experiences

Claims Samples

- Claims evidencing both covered and denied claims for medical/surgical, MH and SUD benefits.
- Often thousands of claims over several years.
- Appeal data also typically requested.
- Reviewed for both accurate processing and indications in claims adjudication or medical necessity reviews that suggest any plan provision is more stringently applied to MH/SUD benefits than to medical/surgical benefits.

NOTE: DOL has identified discrepancies between the terms of the plan, which appear compliant, and actual claim adjudication that indicates discriminatory practices.

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MHPAEA Enforcement Audit - Real World Experiences

Claims Samples - *Best Practice Tips*

- Use extra care where behavioral health coverage is carved out to a third party vendor. Parity requirements apply to the *combined* package of medical/surgical, mental health and substance use disorder benefits!
- Ensure that claims administration is consistent with coverage documents.
- Confirm processes, policies and procedures related to NQTLs such as prior authorization are the same, and applied no more stringently to MH/SUD benefits than to medical/surgical benefits.
- Coordinate as necessary with third party vendor to align processes and procedures.

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MHPAEA Enforcement Audit - Real World Experiences

Follow-up Data Requests – *Best Practice Tips*

- Providing basic testing information and NQTL analysis quickly and early during the audit can eliminate the need for lengthier explanations of plan provisions later and narrow the scope of the inquiry.
- *Example:* While the “specialist copay” may be the predominant copay level under the plan, the DOL has taken the position that, absent clear evidence to the contrary, the specialist copay impermissibly treats MH/SUD providers in a disparate fashion. Immediately provide the testing analysis supporting the appropriation application of the specialist copay level to MH/SUD benefits to significantly reduce or eliminate further inquiries on this issue.

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MHPAEA Enforcement Audit - Real World Experiences

Financial Requirements/Treatment Limitations Documentation –

Best Practice Tip: Work with an Actuary in MH/SUD Benefit Design

- Actuaries can help document in a reasonably clear way how it was determined that cost sharing levels are compliant, without formal actuarial projections.
- Actuaries can document testing methodology and data sources. In light of the FAQ related to use of “book of business” data in MHPAEA testing, plans should clearly document the data relied upon in conducting the testing and an actuarially reasonable justification for the use of that data—if not at plan level.

See <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-34.pdf>



MHPAEA Enforcement Audit - Real World Experiences

Recent Trends

- DOL has increasingly sought highly detailed information supporting development and application of NQTLs such as medical management techniques, particularly prior authorization and concurrent review.
- Inquiries typically seek:
 - criteria used to determine whether a service is subject to medical management and how that criteria is developed
 - policies/procedures to ensure that the criteria are applied consistently to both MH/SUD and medical/surgical benefits

Examples of NQTLs:

- medical management standards
- network tier design
- fail-first/step therapy
- formulary design
- provider admission to network and reimbursement
- failure to complete course of treatment
- restrictions on geographic location/facility type/provider specialty



MHPAEA Enforcement Audit - Real World Experiences

NQTLs - *Best Practice Tips*

- Develop formal policies/procedures detailing how new services are evaluated for purposes of medical management.
- Review policies/procedures for existing services subject to medical management.
- Perform deep substantive analysis, document factors considered, and stringently apply these factors to establish compliance of any NQTL.
- Complete DOL's self-compliance tool!



MHPAEA Enforcement Audit - Real World Experiences

Complaint-Focused Audits

- Some audits result from complaints related to particular benefits and thus document requests are focused on information related to those benefits.
- Examples of subject-specific requests:
 - Autism - DOL has focused on exclusions for Applied Behavioral Analysis ("ABA") therapy and the use of written treatment plans as a means of managing care.
 - Residential treatment facility (RTF)-based treatment.
 - Provider Network Access & Reimbursement - network access standards and fee schedules for both MH/SUD and medical/surgical providers.



MHPAEA Enforcement Audit - Real World Experiences

Complaint-Focused Audits - *Best Practice Tips*

- Plans excluding ABA Therapy should analyze whether similar services are covered for medical/surgical services, like dyslexia.
- Plans limiting/excluding coverage for treatment provided in residential treatment facility (RTF) settings should document the full NQTL analysis for this treatment setting. Compare and contrast the individual components of RTF licensure with the individual components of skilled nursing center licensure.



MHPAEA - Recent Private Litigation

Three Primary Areas:

1. Autism benefits (particularly ABA Therapy)
2. Residential Treatment (of both MH and SUD conditions)
3. Coverage for Wilderness Therapy



MHPAEA-Recent Litigation

- **Autism**

- Most litigation related to coverage for ABA Therapy, either total exclusion or limits on cost or duration.
- Sometimes rendered in a “school-based” or “educational” setting.
- Many cases have been granted class action certification, increasing plan exposure.
- Some settled with prospective coverage changes + reimbursement for previously denied claims.
- At least one federal district court ruled that most plans must provide coverage for ABA Therapy under MHPAEA—exception for plans that impose similar restrictions/exclusions on med/surg benefits as ABA Therapy.
- Court determined that autism is a MH condition for purposes of MHPAEA and exclusion of developmental disabilities was a treatment limitation. Therefore, once issuer covered autism, it was not permitted to exclude treatment for autism, including ABA Therapy.

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MHPAEA - Recent Litigation

- **Residential Treatment Facilities (RTFs)**

- Cases relate to MHPAEA’s scope of services requirements or categorical exclusions.
- MHPAEA Final Rule makes clear that plans that provide coverage for “intermediate” levels of care for med/surg benefits, such as “skilled nursing facilities or rehabilitation hospitals as inpatient benefits” are also required to “treat any covered care in [RTFs] for [MH/SUD] on the same terms.
- However, the source of ongoing litigation is due to Interim Final Regulations that declined to address issue.
- Regarding claims for services *prior to* the Final Rule, courts have split on whether MHPAEA’s statutory language requires coverage for RTFs.
- Therefore, plans may be sued for alleged violations occurring *prior to* the issuance of the Final Rule.

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MHPAEA - Recent Litigation

- Wilderness Therapy

- Typically related to services performed by out-of-network providers who are licensed residential treatment centers.
- Some western states license programs to provide wilderness treatment for mental or behavioral health conditions, often targeted to teenagers.
- Although in some states, this license is different from the licenses generally provided to RTFs.
- Purports to offer mental health benefits through activities in a wilderness setting.
- Many policies limit or exclude coverage for these kinds of programs.

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MHPAEA - Recent Litigation

- Wilderness Therapy Litigation, Cont.

Case 1:

- Policy stated: wilderness therapy programs “do not utilize a multidisciplinary team who are consistently involved in the care of the child” and that the “programs nearly universally do not meet standards for certification as psychiatric residential treatment programs”.
 - The Court granted Defendant’s motion to dismiss, although it allowed Plaintiff’s leave to amend.

Case 2:

- Policy contained blanket exclusion for wilderness treatment centers.
 - The Court denied Defendant’s motion to dismiss, holding:
“the relevant comparison is not whether benefits for wilderness therapy are available for medical/surgical patients, but rather whether the Plan has chosen to provide benefits for skilled nursing facilities and rehabilitation centers for medical/surgical patients, but chosen to deny benefits to those with mental health conditions who seek coverage for a residential treatment center offering wilderness therapy.”

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For Further Reading

1. MHPAEA Self-Compliance Tool: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/compliance-assistance-guide-appendix-a-mhpaea.pdf#_blank
2. HHS Action Plan for Enhanced Enforcement: <https://www.hhs.gov/sites/default/files/parity-action-plan-b.pdf>
3. DOL “Pathway to Full Parity” Report to Congress: https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/mental-health-parity/dol-report-to-congress-2018-pathway-to-full-parity.pdf#_blank
4. DOL FY 2017 Enforcement Fact Sheet: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/mhpaea-enforcement-2017.pdf#_blank
5. Proposed FAQs About Mental Health Parity & Substance Use Disorder Parity Implementation & the 21st Century Cures Act Part XX: https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-39-proposed.pdf#_blank
6. The Kennedy Forum, “Evaluating State Mental Health and Addiction Parity Statutes: A Technical Report,” https://chp-wp-uploads.s3.amazonaws.com/www.paritytrack.org/uploads/2018/09/KF-Evaluating-State-Mental-Health-Report-0918_web.pdf

Thank You! Questions?

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Slide 27

BTA9 here we could cite to things like the cases, Kennedy forum report, various department materials, state laws, etc.

Beckmann, Tricia A., 11/18/2018

FAB5 agreed

Finley, Amy B, 12/11/2018

FAB9 Added some items. Can also add cite citations, but we have them in comments and wasn't sure if we wanted this slide to get more crowded

Finley, Amy B, 12/17/2018