May 31, 2023

Mary Watanabe, Director
Department of Managed Health Care
980 Ninth Street, Suite 500
Sacramento, CA 95814-2725

Re: Inclusion of Parity Compliance Reviews in Behavioral Health Investigations

Dear Director Watanabe,

As organizations committed to improving Californians' access to mental health and substance use disorder (MH/SUD) treatment and ending coverage discrimination against MH/SUD services, we write to express significant concerns about the Department of Managed Health Care's (DMHC) efforts to determine compliance with the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA).[1]

Based on our previous interactions with DMHC staff and the scope of what was included in the budget change proposal to fund its Behavioral Health Investigations (BHIs), we understood that

[1] MHPAEA is incorporated into California law in Health and Safety Code Section 1375.76.

the DMHC was incorporating robust reviews of parity compliance into its BHIs. However, recent information from the DMHC indicates that the results of MHPAEA compliance reviews from the first round of five BHIs may not be made public and that future BHIs may not include MHPAEA compliance reviews. Because robust MHPAEA compliance reviews are essential to eliminating discriminatory treatment limitations and increasing access to treatment, **our organizations request that the Department 1) release the results of all MHPAEA compliance reviews conducted to date and 2) conduct rigorous review of plans' MHPAEA analyses as part of all future BHIs.**

In the 2020-2021 state budget, the DMHC received $2.7 million to conduct BHIs of all full service commercial health plans to "further evaluate health plan compliance with parity and assess whether enrollees have consistent access to medically necessary behavioral health care services."[2] **The legislature clearly intended that the DMHC thoroughly evaluate parity compliance as part of the BHIs when it approved the budget change proposal.**

Fortuitously, shortly after passage of the budget, Congress amended MHPAEA to require commercial health plans to conduct detailed parity compliance analyses on each non-quantitative treatment limitation (NQTL) in each classification of care (i.e., in/out-of-network outpatient, in/out-of-network inpatient, prescription, and emergency).[3] Commercial health plans were required to have such analyses, and to provide them to state regulators such as the DMHC upon request, starting on February 10, 2021. These new federal requirements have given the DMHC a powerful mechanism to obtain plans' NQTL parity compliance analyses, which are the *only* way to determine whether NQTLs are compliant with MHPAEA.

Given this powerful mechanism at the DMHC's disposal, we were alarmed that the proposed BHI Technical Assistance Guide (TAG), which was released in November 2021 and contained the information that plans would be required to provide as part of the BHIs, did not include an evaluation of MHPAEA compliance. In providing feedback on the BHI TAG, several of our organizations urged the DMHC to request and thoroughly review each plan's complete NQTL parity compliance analyses, as well as to collect quantitative comparative data on plans' coverage of MH/SUD and physical health services. Based on this request, our organizations were grateful that DMHC contracted with national MHPAEA experts to help conduct the BHIs, including collecting and analyzing plans' NQTL parity compliance analyses. Our understanding is that, in its first five BHIs, the DMHC has requested and reviewed with expert assistance these plans' NQTL parity compliance analyses.

Yet, recently, we have reason to believe that the results of the NQTL parity compliance analyses reviews may not be included in the public BHI findings. **Any failure to release the results of the parity compliance reviews as part of the public BHI findings would be deeply disturbing,**

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[2] DMHC Announcement on its Behavioral Health Focused Investigations, August 26, 2021. https://www.dmhc.ca.gov/Portals/0/Docs/OPM/Health%20Plan%20Changes_2021-08-26.pdf

[3] The NQTL parity compliance analyses requirements, which were enacted as part of the Consolidated Appropriations Act, 2021, are located at 42 USC 300gg-26(a)(8).

particularly in light of our state's ongoing MH/SUD crisis and the widespread parity non-compliance being uncovered by other state and federal regulators.

For instance, in the Biden Administration's 2022 MHPAEA Report to Congress, the Departments of Labor, Health and Human Services, and Treasury found that **all** health plans' NQTL parity compliance analyses failed to demonstrate compliance. Common parity violations included limitations on autism services, limitations on medications for opioid use disorder, and prior authorization requirements.[4]

Other states have similarly found widespread non-compliance. For example, the Illinois Department of Insurance has issued numerous fines for parity violations based on their review of plans' NQTL parity compliance analyses.[5] New York State has similarly found broad noncompliance, issuing fines and determining that health plans have broadly failed to demonstrate compliance with MHPAEA.[6]

Investigations that do not examine and report on plans' compliance with MHPAEA are fundamentally flawed and incomplete. And reviewing plans' NQTL parity compliance analyses must be the backbone of determinations of MHPAEA compliance. Furthermore, California must not attempt to rely on federal regulators to enforce MHPAEA. Federal regulators review only a small subset of plans' NQTL parity compliance analyses, and the primary federal regulator only has 1 investigator for every 12,500 plans. Congress recognized the primary role of state insurance regulators like the DMHC in enforcing MHPAEA when it required state-regulated plans to provide their NQTL parity compliance analyses to these regulators upon request. Californians deserve to have the DMHC conduct robust oversight to protect their rights.

Therefore, we call upon the DMHC to release complete summaries of all reviews conducted of plans' NQTL parity compliance analyses when it releases the results of the BHIs. Furthermore, it is critical that the DMHC request and review plans' NQTL parity compliance analyses as part of all future BHIs, since no investigation of Californians' access to MH/SUD services can be complete without a thorough review of parity.

We would welcome the opportunity to discuss how the DMHC is incorporating robust reviews of plans' NQTL parity compliance analyses into the BHIs. If you have any questions, please do not hesitate to reach out to Lauren Finke (lauren@thekennedyforum.org).

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[4] https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/report-to-congress-2022-realizing-parity-reducing-stigma-and-raising-awareness.pdf.

[5] See, for example: https://www.illinois.gov/news/press-release.25897.html.

[6] See, for example: https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202112141#:~:text=The%20overall%20DFS%20monetary%20penalty,the%20Behavioral%20Health%20Ombudsman%20Program and https://omh.ny.gov/omhweb/bho/docs/nys-mhpaea-report.pdf.

Sincerely,

Lauren Finke
The Kennedy Forum

Robb Layne
California Association of Alcohol and Drug Program Executives

Adrienne Shilton
California Alliance of Child and Family Services

Cathy Atkins
California Association of Marriage and Family Therapists

Chad Costello
California Association of Social Rehabilitation Agencies

Le Ondra Clark Harvey
California Council of Community Behavioral Health Agencies

Jennifer Alley
California Psychological Association

Paul Yoder
California State Association of Psychiatrists

Kimberly Andosca
California Society of Addiction Medicine

Heidi Strunk
Mental Health America – California

Karen Fessel, Dr. PH
Mental Health and Autism Insurance Project

Jessica Cruz, MPA/HS
National Alliance on Mental Illness (NAMI-CA)

Paul Kumar
National Union of Healthcare Workers

Randall Hagar
Psychiatric Physicians Alliance of California

Corey Hashida
Steinberg Institute

CC:

Senator Scott Wiener
Senate President pro Tem Toni Atkins
Assembly Speaker Anthony Rendon
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Assembly Health Committee
Senate Budget Committee
Assembly Budget Committee
Richard Figueroa, Office of Governor Newsom
Mark Ghaly, HHS
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