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COVID-19 and parity: navigating uncharted waters

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Sweeping changes to state Medicaid healthcare delivery systems in response to COVID-19 may risk compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA).

In response to the national emergency engendered by COVID-19, state Medicaid agencies are making widespread changes to remove restrictions and limits to allow expedient enrollee access to critical health care services, particularly those related to the diagnosis and treatment of COVID-19. However, those changes may impact state compliance with MHPAEA. MHPAEA requires that access to and coverage for mental health and substance use disorders (MH/SUD) to be no more restrictive than the coverage that generally is available for medical/surgical (M/S) conditions. Removing restrictions to medical services in response to COVID-19 may have the unintended consequence of disrupting the comparability and stringency test under MHPAEA. How can states ensure modifications made as a result of the COVID-19 pandemic to their health delivery systems comply with MHPAEA?

Federal Guidance on COVID-19 Changes and MHPAEA Compliance

As a result of the COVID-19 pandemic, President Trump declared an emergency under the National Emergencies Act. When a national emergency has been declared, the Department of Health and Human Services (HHS) has the authority in Section 1135 of the Social Security Act to temporarily waive or modify certain Medicare, Medicaid and Children's Health Insurance Program (CHIP) requirements. This is to ensure that sufficient health care items and services are available to meet the needs of enrollees impacted by the emergency.

In support of COVID-19 response efforts, the Centers for Medicare & Medicaid Services (CMS) is providing technical assistance to states and expediting the reviews and approvals of 1135 waiver requests. CMS has also issued COVID-19 Frequently Asked Questions for State Medicaid and CHIP agencies[1] on COVID-19 related matters.

[1] COVID-19 Frequently Asked Questions (FAQs) for State Medicaid and Children's Health Insurance Program (CHIP) Agencies". 2020. Centers for Medicare & Medicaid Services. https://www.medicaid.gov/state-resource-center/downloads/covid-19-new-faqs.pdf.

However, CMS to date has not issued clarification on waiver, modification, or enforcement of MHPAEA requirements that may be impacted by the changes made in 1135 waivers.

Though CMS has not yet provided direction to states, recent guidance[2] released by HHS, Department of Labor, and the Department of Treasury offers some level of insight into parity considerations at the federal level. The guidance pertinent to MHPAEA notes that HHS will temporarily exercise discretion in the enforcement of parity requirements related to financial requirements and quantitative treatment limitations (FR/QTLs). The release further provides that "HHS will not consider a state to have failed to substantially enforce MHPAEA and its implementing regulations" provided that such an approach is applied during the timeframe that Section 6001 of the Families First Coronavirus Response Act stipulates. Notably, the guidance is silent about the enforcement approach for non-quantitative treatment limitations and reiterates HHS' commitment broadly to the enforcement of MHPAEA.

Traversing Uncertainty

> **What is the pathway for states to manage the risk of non-compliance with MHPAEA during the national emergency?**

From the information available, it appears that states are at a lower risk of enforcement of MHPAEA when applying a change under an approved 1135 waiver in good faith during the national emergency. However, states should consult with their regional CMS contact for guidance to determine if a parity analysis is necessary during the pandemic due to the changes made under time-limited, emergency authorities.

Ideally, states should review and analyze service access and coverage policy and practice changes made as a result of COVID-19 to determine parity between MH/SUD and M/S benefits. While COVID 19 changes have been primarily focused on medical services, related stressors precipitated by the public health emergency, such as unemployment, financial insecurity, and social isolation, warrant consideration of comparable access and coverage of behavioral health services. Based upon the analysis, states could consider whether adjustments to access and coverage requirements for MH/SUD benefits can and should be made.

[2] "FAQS ABOUT FAMILIES FIRST CORONAVIRUS RESPONSE ACT AND CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT IMPLEMENTATION PART 43". 2020 https://www.cms.gov/files/document/FFCRA-Part-43-FAQs.pdf

Key Takeaways

It is evident that any dispensation on enforcement of MHPAEA requirements will most certainly end when the declaration of the national emergency is terminated. Post COVID-19, should states retain changes made during the pandemic, states will need to re-evaluate and assess how the retained changes impact MHPAEA compliance.

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