GT GreenbergTraurig

Behavioral Health Law Ledger | September 2024

Welcome to the Ledger

The September 2024 issue of Greenberg Traurig's quarterly Behavioral Health Law Ledger details the new final rule on the Mental Health Parity and Addiction Equity Act, which aims to improve access to mental health and substance use disorder treatments. The Ledger also covers a National Institutes of Health (NIH) study about individuals' access to substance use disorder (SUD) and opioid use disorder (OUD) treatments while incarcerated.

U.S. Departments of Health and Human Services, Labor, and Treasury Release Final Rule on Mental Health Parity and Addiction Equity Act Requirements

On Sept. 9, 2024, the U.S. Department of Health and Human Services, the U.S. Department of Labor, and the U.S. Department of Treasury (the Departments) co-released the Final Rule on the Requirements Related to the Mental Health Parity and Addiction Equity Act (MHPAEA) (Final Rule). These regulations require health plans and health insurers to reevaluate the impact of nonquantitative treatment limitations (NQTLs) on access to mental health or substance use disorder (MH/SUD) benefits relative to comparable availabilities of medical and surgical benefits. NQTLs are non-numerical limits of benefits and include mechanisms such as medical management techniques and prior authorization requirements. On an operational level, this Final Rule closes loopholes in MHPAEA that health insurers and health plans have used to deny patients covered MH/SUD treatments.

Passed in 2008, MHPAEA intended to prevent health plans and insurers that provide MH/SUD benefits from imposing more "favorable" or restrictive benefit limitations on MH/SUD benefits compared to medical or surgical benefits. In 2013, the Departments published a final regulation under MHPAEA that strengthened the MHPAEA requirements of parity between MH/SUD and medical and surgical benefits. Congress amended MHPAEA in the Consolidated Appropriations Act of 2021 to better facilitate MHPAEA enforcement and to require health plans and insurers to complete comparative analyses of their

nonqualitative treatment limitations. See Behavioral Health Law Ledger, March 2022. On Aug. 3, 2023, the Departments released a Proposed Rule on the Requirements Related to the Mental Health Parity and Addiction Equity Act (Proposed Rule), which sought to prevent health plans and insurers from imposing further restrictions on MH/SUD benefits not similarly being imposed on medical and surgical benefits. The Proposed Rule required health plans and insurers to gather information on the impact of NQTLs and mandated that fiduciaries review the MH/SUD and medical and surgical benefit comparative analyses for compliance.

The Final Rule, which was published in the Federal Register Sept. 23, 2024, adopted many of the requirements posed in the Proposed Rule. For example, the Final Rule has reinforced that health plans and insurers may not use MH/SUD NQTLs, which are more restrictive than the predominant NQTLs applied to substantially all medical or surgical benefits. The Final Rule also imposed a sunset provision for self-funded non-federal governmental plans elections to opt out of MHPAEA compliance. These changes ensure that health plans and insurers meet the primary purpose of MHPAEA: to protect insured patients from facing greater restrictions on accessing MH/SUD benefits than medical or surgical benefits.

The Final Rule generally applies to group health plans and group health insurance coverage on the first day of the first plan year beginning on or after Jan. 1, 2025. The meaningful benefits standard, the prohibition on discriminatory factors and evidentiary standards, data evaluation requirements, and comparative analyses requirements apply on the first day of the first plan year beginning on or after Jan. 1, 2026. For individual health insurance coverage policies, the Final Rule applies for policy years beginning on or after Jan. 1, 2026. Health plans and insurers must comply with the comparative analysis requirements of the Final Rule by Jan. 1, 2026.

The Treatment Gap Widens for Incarcerated Individuals: Only 43.8% of U.S. Jails Provide Access to Opioid and SUD Medications

On Sept. 24, 2024, the NIH published a study titled Factors Associated With the Availability of Medications for Opioid Use Disorder in US Jails. In this study, the authors found that less than half of the U.S. jails surveyed—43.8%—provided medications for OUD. The study found that only 12.8% of those jails offered at least one type of OUD medication for incarcerated individuals diagnosed with OUDs.

70.1% of jails provide some form of SUD or OUD treatment, including outpatient treatments, individual and group therapy, and 12-step programs. However, many of the jails that did not provide SUD or OUD medications cited a lack of available licensed professionals who could prescribe or administer the medications. A small percentage of jails also cited OUD medication cost, policies against providing OUD medications, and a low rate of individuals with OUDs in that jail.

According to the study's statistical analyses, the rate of opioid overdose mortality on a county level directly correlated with the availability of OUD medications in jails in that county. The likelihood of the availability of OUD medications also increased with jail size and jails that employed health care professionals directly, as compared to indirect or contract staffing models.

This study emphasizes the inequitable access to behavioral health services that incarcerated individuals may experience and highlights the importance of providing behavioral health and SUD services to all populations. State and federal funding for behavioral health services remain critical to incarcerated individuals' continued access to SUD and OUD services and medications. For example, on April 17, 2023, the U.S. Department of Health and Human Services (HHS) through the Centers of Medicare & Medicaid Services (CMS) released guidance encouraging states to apply for a Medicaid Section 1115 demonstration

waiver. The Medicaid Section 1115 demonstration waivers permit states to use federal Medicaid funding to provide healthcare, including critical behavioral health services, to individuals transitioning out of incarceration. Since the guidance was published, 24 states have applied for this waiver program. However, because the Section 1115 program was created by CMS regulation and not by statute, changes in CMS priorities in the future may pose a risk to the program's continuation and, thus, continued access to behavioral health services for incarcerated individuals.

Let's Stay in Touch

GT's Behavioral Health Law Ledger keeps behavioral health and integrated health providers current on behavioral health legal and regulatory developments. Each quarter we highlight recent legal developments, including but not limited to audit risks, significant litigation, enforcement actions, and changes to behavioral-health-related laws or regulations such as health privacy, confidentiality, and/or security issues, consent issues, data-sharing allowances, and other cutting-edge arrangements and issues facing behavioral and integrated health care providers.

If you know someone who would appreciate receiving GT's Behavioral Health Law Ledger, please forward this newsletter to them, or they can subscribe here.

Authors

Julie A. Sullivan
Shareholder
+1 303.685.7412
Julie.Sullivan@gtlaw.com

Tyler Strobel
Associate
+1 303.685.7453
Tyler.Strobel@gtlaw.com