

February 1, 2022

The Honorable Patty Murray
Chairman
Committee on Health, Education Labor and
Pension
428 Senate Dirksen Office Building
Washington, DC 20510

The Honorable Richard Burr
Ranking Member
Committee on Health, Education Labor and
Pension
428 Senate Dirksen Office Building
Washington, DC 20510

Dear Chairman Murray and Ranking Member Burr:

On behalf of the American Medical Association (AMA) and our physician and medical student members, I am writing to urge increased legislative action to protect patients with a mental illness or substance use disorder. This call to action is in response to the Senate Health, Education Labor and Pension (HELP) Committee's February 1st hearing entitled, "Mental Health and Substance Use Disorders: Responding to the Growing Crisis." The AMA is gravely concerned by the findings of the 2022 Mental Health Parity and Addiction Equity Act (MHPAEA) Report to Congress, which found that insurers' parity violations have continued and become worse since the MHPAEA was enacted in 2008. The AMA is incredulous that insurers' policies and practices continue to violate federal law when MHPAEA was enacted nearly 15 years ago. This report underscores two simple facts: insurers will not change their behaviors without increased enforcement and accountability, and patients will continue to suffer until that happens.

The report found that insurers' failures were rampant across plans in many ways, including using greater restrictions on treatment, benefits, and evidentiary standards for care for mental health and substance use disorders compared to medical/surgical benefits. Plans failed not only in their written policies but also in how those policies were applied. Every failure caused benefit limitations, delays, and denials of care. More simply, every parity failure caused increased patient suffering and almost certainly deaths that could have been avoided had care been provided. This reality is also consistent with insurers' parity failures in the states¹ and confirmed by many physician and patient stories shared on the AMA's grassroots prior authorization reform website.²

Consider just a few of the egregious violations provided in the 2022 report:

- Harm to individuals with autism. Hundreds of self-funded plans across the country explicitly excluded evidence-based treatment for individuals with autism spectrum disorder. The report said that "research shows that early intervention and access to treatments like [applied behavior analysis] therapy can improve the trajectory of a child's development...so delays or limits on access to treatments like ABA therapy are especially harmful for children with ASD."

¹ See, for example, examples of state violations in 2020 American Medical Association issue brief, available at <https://end-overdose-epidemic.org/wp-content/uploads/2020/12/ARC-Issue-Brief-States-Must-Take-Parity-Action-FINAL-Jan-2020.pdf>

² See Stories section of the AMA's FixPriorAuth website, available at <https://fixpriorauth.org/stories>

- Harm to individuals with a substance use disorder. Plans were found to exclude coverage for evidence-based medications to treat opioid use disorder (MOUD) and also required prior authorization for all out-patient mental health and substance use disorder services.
- Harm to individuals with an eating disorder. More than 1.2 million enrollees were denied benefits for nutritional counseling for mental health conditions like anorexia nervosa, bulimia nervosa, and binge-eating disorder while the plans in the New York region covered such counseling for medical/surgical conditions like diabetes.

At a time when our nation is in the throes of a drug overdose epidemic killing more than 100,000 Americans each year, and a growing mental health crisis affecting children, young adults and people of all ages, this report shows how insurers' failures and parity violations have harmed millions. The AMA strongly agrees with the report's recognition that "[f]or far too long, people with MH/SUD conditions and their loved ones have faced stigma, discrimination, and other barriers inside and outside of the health care system. These biases and discriminatory practices can often operate as an impediment to even seeking MH/SUD treatment in the first place. And once individuals attempt to seek care, they often find that treatment for their mental health condition or substance use disorder operates in a separate, and often very disparate, system than treatment for medical and surgical care, even under the same health coverage." As outlined by the 2022 report, insurers' policies and practices greatly contributed not only to stigma and discrimination against those with a mental illness or substance use disorder, but insurers' systematic, widespread parity violations also contributed to growing inequities and disparities in MH/SUD care for Black, Hispanic, American Indian, Alaska Native and Asian-American communities.

At the core of MHPAEA is the requirement of a comparison of medical/surgical benefits with mental health and substance use disorder (MH/SUD) benefits. The 2022 MHPAEA report found that **"None of the comparative analyses EBSA or CMS have initially reviewed to date contained sufficient information upon initial receipt."** This either indicates insurers do not care or do not know how to comply with the 2008 law. In both cases, the result is patient suffering. The 2022 report shows results from 156 plans and issuers who received letters from Employee Benefits Security Administration to provide a required-by-law comparative analysis showing compliance with MHPAEA. This represents approximately 2 million group health plans covering roughly 136.5 million Americans. The parity analyses requirements do not cover Medicaid managed care plans.

In light of the startling conclusions of the 2022 MHPAEA Report, AMA urges Congress to enact H.R. 3753/S. 1962, the Parity Implementation Assistance Act, which provides grants to assist states with the implementation of the federal mental health parity requirements. States receiving the grants must request and review from private health insurance plans their required comparative analysis of "non-quantitative treatment limitations" (NQTLs) with respect to MH/SUD.

In each of the limited examples provided in the 2022 report, the service provider or health plan only agreed to correct its illegal policy and practice after intervention by the U.S Department of Labor (DOL). These corrective actions are important, but in line with the report's recommendations, **the AMA urges Congress to provide DOL with the authority to assess civil monetary penalties for parity violations.** As discussed in the report, enforcing MHPAEA requires training and expertise for investigators. The report highlights how insurers not only delay and deny care to patients, but they delay and deny information to parity investigations. Providing DOL with the authority to levy monetary penalties can help ensure DOL has the necessary resources moving forward to meaningfully monitor and enforce MHPAEA to help protect patients with a mental illness or substance use disorder. Insurers' actions have made clear for nearly 15 years that they will not comply with MHPAEA unless forced to do so.

We further agree with the report’s recommendation “that Congress amend ERISA to expressly provide that participants and beneficiaries, as well as DOL on their behalf, may recover amounts lost by participants and beneficiaries who wrongly had their claims denied in violation of MHPAEA.” While a patient’s pain and suffering because of an MHPAEA violation can never be fully assuaged, the AMA believes that increased accountability will finally force payers to take action if there are financial implications to their bottom line.

The AMA also reiterates a recommendation we made last year³ to require payers to *prospectively* do the comparisons to analyze whether they are in compliance with the law. Requiring prior comparative analysis can help streamline oversight, can help payers identify gaps, and most important—may help ensure patients have the coverage required by the law. The report thoroughly investigated NQTLs that insurers use to limit, delay or deny care for MH/SUD. MHPAEA requires that MH/SUD coverage and benefits be in parity with NQTLs for medical surgical benefits. Examples of NQTLs⁴ include prior authorization, formulary design for prescription drugs, network tier design, standards for provider admission to participate in a network, including reimbursement rates, fail-first policies or step therapy protocols, and restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services provided under the plan or coverage.

The 2022 report makes clear that insurers failed across the board in the ERISA market with respect to NQTLs. This makes it also highly likely that these same failures also exist in the non-ERISA commercial market. The AMA reiterates its call for state departments of insurance and attorneys general to take similar, state-based enforcement actions to protect patients. **We therefore agree with the report recommendation that “Congress amend ERISA to expressly provide the DOL with the authority to directly pursue parity violations by entities that provide administrative services to ERISA group health plans (including health insurance issuers that provide administrative services to ERISA plans and TPAs).”**

Finally, the AMA agrees with the 2022 MHPAEA Report recommendation that Congress consider ways to permanently expand access to telehealth and remote care services. The AMA is a strong supporter of numerous pieces of legislation that would provide permanent telehealth flexibilities upon conclusion of the COVID-19 public health emergency (PHE), especially H.R. 1332/S. 368, the Telehealth Modernization Act, and H.R. 2903/S. 1512, the CONNECT for Health Act. Both pieces of legislation seek to eliminate the antiquated Medicare telehealth geographic and originating site restrictions. These statutory barriers largely reserve access to telehealth services only for Medicare patients located within a rural area that also travel outside of the home to an accepted health care facility.

In addition, **AMA supports Congress enacting H.R. 4058/S. 2061, the Telemental Health Care Access Act.** Section 123 of the Consolidated Appropriations Act, 2021 (CAA) removed the geographic restrictions and added the home of the beneficiary as a permissible originating site for telehealth services when used for the purposes of diagnosis, evaluation, or treatment of a mental health disorder, effective for

³ AMA letter to the Senate Finance Committee, November 15, 2021, available at <https://searchlf.ama-assn.org/letter/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2021-11-15-Letter-to-Wyden-and-Crapo-re-RFI-v3.pdf>

⁴ The Centers for Medicaid and Medicare Services provides a detailed explanation and examples of NQTLs in the document, Warning Signs- Plan or Policy Non-Quantitative Treatment Limitations (NQTLs) that Require Additional Analysis to Determine Mental Health Parity Compliance, available at <https://www.cms.gov/cciio/resources/regulations-and-guidance/downloads/mhapeachecklistwarningsigns.pdf>

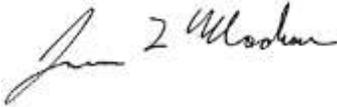
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services furnished on or after the end of the COVID-19 PHE. The CAA also prohibits payment for a mental health service via telehealth unless the physician or a practitioner furnishes an item or service in-person first, without the use of telehealth, within six months before the first time they furnish a telehealth service to the beneficiary, as well as every 12 months for subsequent mental health services delivered via telehealth. H.R. 4058/S. 2061 would remove these arbitrary restrictions on accessing telemental health services, a policy change consistent with the 2022 MHPAEA Report's broad recommendations. The AMA also agrees with the 2022 MHPAEA Report's request for addressing limited broadband access and we strongly support expansion of the Federation of State Medical Board's Interstate Medical Licensing Compact as a way to mitigate interstate licensing issues.

This 2022 MHPAEA report should be a wake-up call that insurers' actions for more than a decade have harmed so many with a mental illness or substance use disorder. Millions of patients have suffered, and likely many have died, because of the failures of insurers to comply with a nearly-15-year-old law. There is no excuse for their actions. The AMA urges Congress to hold insurers accountable for their failures.

The AMA appreciates the opportunity to provide a statement for the record in reference to the Senate HELP Committee hearing on "Mental Health and Substance Use Disorders: Responding to the Growing Crisis" and we look forward to continuing to work on bipartisan policy solutions.

Sincerely,

A handwritten signature in black ink, appearing to read "James L. Madara". The signature is written in a cursive style with a large initial "J" and "M".

James L. Madara, MD