

PROPOSED RULEMAKING

INSURANCE DEPARTMENT

[31 PA. CODE CH. 168]

Mental Health Parity Analysis Documentation

The Insurance Department (Department) proposes to add Chapter 168 (relating to mental health parity analysis documentation) to the Department's regulations to read as set forth in Annex A. This proposed rulemaking is proposed under the Department's general rulemaking authority as set forth in sections 205, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P.S. §§ 66, 186, 411 and 412) and the Department's rulemaking authority under section 606-B of the act of May 17, 1921 (P.L. 682, No. 284), known as The Insurance Company Law of 1921 as amended by the Health Insurance Coverage Parity and Nondiscrimination Act (Parity Act) (40 P.S. § 908-16).

Purpose

Sections 601-B—606-B of the Parity Act (40 P.S. §§ 908-11—908-16) incorporate into State law the mental health and substance use disorder (MH/SUD) parity standards set forth in section 2726 of the Public Health Service Act, which codifies the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) (Pub.L. No. 110-343, 122 Stat. 3881) (42 U.S.C. § 300gg-26). The parity standards require health insurers offering individual and group health insurance to ensure that quantitative and nonquantitative coverage limitations that are applied to MH/SUD treatment are no more restrictive than quantitative and nonquantitative coverage limitations applied to medical or surgical treatment. These standards have been set forth under MHPAEA in Federal regulation including 45 CFR 146.136, 147.160 and 156.10—156.1256, as amended, and its associated formal administrative guidance.

This proposed rulemaking furthers the purpose set forth in section 602-B of the Parity Act (40 P.S. § 908-12), which is to maintain the Commonwealth's sovereignty over the regulation of health insurance in this Commonwealth by implementing the requirements of, inter alia, the MHPAEA, contained in the Public Health Service Act (42 U.S.C. §§ 201 et seq.). Having these standards in State law retains the Commonwealth's authority to regulate health insurance in this Commonwealth, consistent with sections 2722 and 2761 of the Public Health Service Act (42 U.S.C. §§ 300gg-21 and 300gg-61).

Specifically, the purpose of this proposed rulemaking is to create specific reporting requirements that will facilitate the Department's regulation of MH/SUD insurance coverage. Specifically, this proposed rulemaking will require an insurer to attest that it has completed documented analyses of its efforts to comply with MH/SUD parity requirements and ensure that an insurer will have available for review by the Department the documentation necessary to demonstrate compliance with MH/SUD parity requirements set forth in MHPAEA.

Explanation of Regulatory Requirements

Proposed § 168.1 (relating to definitions) defines the words and terms used in proposed Chapter 168.

Proposed § 168.2 (relating to purpose) sets forth that the purpose of the chapter is to specify attestation and documentation requirements on insurers required to comply with MH/SUD statutory and regulatory provisions,

which will enable the Department to effectively review a health insurer's compliance with these requirements.

Proposed § 168.3 (relating to annual attestation) sets forth requirements that insurers submit annual attestations for insurance policy forms to which MHPAEA applies and for those to which MHPAEA does not apply. For policies to which MHPAEA applies, the insurer would be required to attest to the insurer's documented analyses of its efforts to comply with MHPAEA parity standards. For policies to which MHPAEA does not apply, the insurer would be required to attest to the nonapplicability of MHPAEA to the policy form.

Proposed § 168.4 (relating to analysis and disclosure documentation) sets forth requirements for insurers to document parity analyses, including any changes to parity analyses, and disclosure documentation as required by MHPAEA. Additionally, this proposed section includes specific factors that must be included in the analyses for nonquantitative treatment limitations.

Proposed § 168.5 (relating to penalties) sets forth the penalties which may be imposed by the Department for violations of this proposed chapter.

External Comments

The Department circulated an exposure draft substantially similar to this proposed rulemaking on December 16, 2019, to the Insurance Federation of Pennsylvania and those health insurers issuing group and individual accident and health policies in this Commonwealth. Those comments were carefully considered in the drafting of this proposed rulemaking.

Affected Parties

This proposed rulemaking applies to all insurers licensed to transact business in the Commonwealth that offer individual or group, or both, accident and health insurance.

Fiscal Impact

State government

This proposed rulemaking is anticipated to have no costs or savings to the Commonwealth. However, by requiring more efficient compliance methods by insurers, this proposed rulemaking is anticipated to result in streamlined enforcement efforts by the Department.

General public

This proposed rulemaking will have no fiscal impact upon the general public.

Political subdivisions

This proposed rulemaking will have no fiscal impact upon political subdivisions.

Private sector

While the Department cannot quantify the exact costs to the private sector, the Department believes that the costs to the private sector will be minimal because the health insurers that must comply with MHPAEA are already aware of the parity standards and have mechanisms for compliance already in place. This proposed rulemaking will add additional minimal administrative requirements that are not anticipated to be unreasonably burdensome.

Paperwork

This proposed rulemaking would not impose additional paperwork requirements upon the Department. The documentation and analysis requirements of this proposed rulemaking are already required by MHPAEA. To the extent an insurer is not in compliance with these requirements, this proposed rulemaking will impose minimal additional paperwork for the private sector, because it sets forth clear standards that require annual attestations as to compliance with the MHPAEA documentation and analysis requirements and that the documented analyses must be submitted to the Department upon request.

Effectiveness/Sunset Date

This proposed rulemaking will become effective immediately upon final-form publication in the *Pennsylvania Bulletin*. The Department continues to monitor the effectiveness of regulations on a triennial basis. Therefore, a sunset date has not been assigned.

Contact Person

Questions or comments regarding this proposed rulemaking may be addressed in writing to Bridget Burke, Regulatory Coordinator, Insurance Department, 1341 Strawberry Square, Harrisburg, PA 17120, fax (717) 772-1969, briburke@pa.gov within 30 days following the publication of this proposed rulemaking in the *Pennsylvania Bulletin*.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on January 28, 2020, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Insurance Committee and the Senate Banking and Insurance Committee. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the rulemaking by the Department, the General Assembly and the Governor.

JESSICA K. ALTMAN,
Insurance Commissioner

Fiscal Note: 11-258. No fiscal impact; (8) recommends adoption.

(Editor's Note: The following chapter is proposed to be added and printed in regular type to enhance readability.)

Annex A

TITLE 31. INSURANCE

PART VIII. MISCELLANEOUS PROVISIONS

CHAPTER 168. MENTAL HEALTH PARITY ANALYSIS DOCUMENTATION

Sec.	
168.1.	Definitions.
168.2.	Purpose.
168.3.	Annual attestation.
168.4.	Analysis and disclosure documentation.
168.5.	Penalties.

§ 168.1. Definitions.

The definitions as set forth in section 603-B of the act of May 17, 1921 (P.L. 682, No. 284), known as The Insurance Company Law of 1921 as amended by the Health Insurance Coverage Parity and Nondiscrimination Act (40 P.S. § 908-13), are hereby incorporated and apply to the terms used in this chapter. The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Insurance Policy—A policy, subscriber contract, certificate or plan issued by an insurer that provides medical or health care coverage. The term does not include any of the following:

- (1) An accident only policy.
- (2) A fixed indemnity policy.
- (3) A limited benefit policy.
- (4) A credit only policy.
- (5) A dental only policy.
- (6) A vision only policy.
- (7) A specified disease policy.
- (8) A Medicare supplement policy.
- (9) A policy under which benefits are provided by the Federal government to active or former military personnel and their dependents.
- (10) A long-term care or disability income policy.
- (11) A workers' compensation policy.
- (12) An automobile medical payment policy.

Insured—A person on whose behalf an insurer is obligated to pay covered health care expense benefits or provide health care services under an insurance policy. The term includes a policyholder, subscriber, certificate holder, member, dependent or other individual who is eligible to receive health care services through an insurance policy.

MH/SUD—Mental Health and Substance Use Disorder.

MH/SUD Parity Federal Guidance—Federal guidance issued under or in conjunction with MHPAEA and the MH/SUD Parity Federal Regulations.

MH/SUD Parity Federal Regulations—Regulations promulgated by the Federal government to implement MHPAEA, including 45 CFR 146.136, 147.160 and 156.10—156.1256.

MHPAEA—The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (Pub.L. No. 110-343, 122 Stat. 3881), originally enacted as section 2705 of the Public Health Service Act (58 Stat. 682 (42 U.S.C. § 300gg-5)); as renumbered and amended by the Patient Protection and Affordable Care Act (Pub.L. No. 111-148) together with the Health Care and Education Reconciliation Act of 2010 (Pub.L. No. 111-152) as section 2726 of the Public Health Service Act (42 U.S.C. § 300gg-26); as further amended by Div. B, Title XIII § 13001 of the 21st Century Cures Act (Pub.L. No. 114-255); as amended.

Treatment Limitation—A limit on the scope of a benefit or duration of treatment for a covered service.

§ 168.2. Purpose.

The purpose of this chapter is to specify attestation and documentation requirements on insurers required to comply with sections 601-B—606-B of The Insurance Company Law of 1921 as amended by the Health Insurance

Coverage Parity and Nondiscrimination Act (40 P.S. §§ 908-11—908-16), which incorporate into State law the standards set forth in MHPAEA and the MH/SUD Parity Federal Regulations, and to enable the Department to effectively review a health insurer's compliance with these requirements.

§ 168.3. Annual attestation.

(a) For the form for each insurance policy offered, issued or renewed by an insurer in this Commonwealth to which MHPAEA applies, the insurer shall annually file with the Department a statement attesting to the insurer's documented analyses of its efforts to comply with MHPAEA and the MH/SUD Parity Federal Regulations as of the date of the attestation.

(b) For the form for each insurance policy offered, issued or renewed by an insurer in this Commonwealth that is required to be filed by an insurer with the Department for approval but to which MHPAEA does not apply, the insurer shall annually file with the Department a statement attesting to the nonapplicability of MHPAEA to the form for each insurance policy.

(c) Each attestation required under this section must be filed by April 30 of each year, or with each form filing, whichever is earlier.

§ 168.4. Analysis and disclosure documentation.

(a) For each form for each insurance policy offered, issued or renewed by an insurer in this Commonwealth to which MHPAEA applies, the insurer shall:

(1) Perform and document a baseline parity analysis to demonstrate compliance with MHPAEA and the MH/SUD Parity Federal Regulations for each quantitative treatment limitation and each nonquantitative treatment limitation applicable to a MH/SUD benefit.

(2) Perform and document a parity analysis to demonstrate compliance with MHPAEA and the MH/SUD Parity Federal Regulations for each change to a quantitative treatment limitation or nonquantitative treatment limitation applicable to a MH/SUD benefit.

(3) Prepare disclosure documentation required by section 2726(a)(4) of MHPAEA (42 U.S.C. § 300gg-26(a)(4)) as amended, consistent with then-current MH/SUD Parity Federal Guidance issued under section 13001 of the 21st Century Cures Act (Pub.L. No. 114-255) (42 U.S.C. § 300gg-26(a)(6) and (7)), as amended.

(b) Each documented analysis performed under subsection (a)(1) and (2) for a nonquantitative treatment limitation, including medical management, must:

(1) Identify the limitation that is applied to MH/SUD benefits and that is applied to medical and surgical benefits.

(2) Describe the process used to develop, select or continue the use of the limitation for MH/SUD benefits,

and the process used to develop, select or continue the use of that limitation for medical and surgical benefits.

(3) Identify and define each factor used to determine that the limitation is applicable to the MH/SUD benefit, including processes, strategies and evidentiary standards used to develop each factor.

(4) Contain a comparative analysis, including the results of the analysis, performed to determine that, as designed and written, each factor applicable to the limitation of the MH/SUD benefit is comparable to that same factor as applicable to the limitation of medical and surgical benefits.

(5) Specify the findings and conclusions in the analysis that indicate that the insurer is in compliance with this chapter, MHPAEA and the MH/SUD Parity Federal Regulations.

(c) For each nonquantitative treatment limitation, including medical management, that is or has been in operation and applied under an insurance policy form offered, issued or renewed by an insurer in this Commonwealth, an insurer shall maintain documentation to demonstrate that each factor applicable to the limitation for the MH/SUD benefit is comparable to, and is applied no more stringently than, that same factor as applicable to the limitation for medical and surgical benefits. The documentation required by subsections (a) and (b) shall be maintained so that it is available for examination by the Commissioner or the Commissioner's appointed designees pursuant to an examination under section 901 of The Insurance Company Law of 1921 (40 P.S. § 323.1).

(d) An insurer shall make the information and documentation set forth in subsections (a)—(c) available as follows:

(1) The information and documentation set forth in subsections (a)(1)—(3), (b) and (c) shall be available to the Department upon request.

(2) The information and documentation set forth in subsection (a)(3) shall be available to an insured or provider as required by section 2726(a)(4) of MHPAEA (42 U.S.C. § 300gg-26(a)(4)) in response to a good faith request.

(3) If applicable, an insurer may designate the information and documentation produced under this provision as trade secret or confidential proprietary information.

§ 168.5. Penalties.

Failure to comply with the provisions of this chapter will subject an insurer to the penalties provided by section 605-B of The Insurance Company Law of 1921 as amended by the Health Insurance Coverage Parity and Nondiscrimination Act (40 P.S. § 908-15) and any other penalty provided by law.

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