Mental Health Parity and Its Impact on the Behavioral Health Workforce

By Rachel A. Fernbach, Esq.
Deputy Director and Assistant General Counsel, New York State Psychiatric Association

In 2006, New York enacted a parity mandate in the form of Timothy's Law, which requires group health plans to provide 30 inpatient days and 20 outpatient days for most mental health diagnoses and requires large plans to provide full coverage for certain biologically based illnesses. Several years later, Congress enacted the federal Mental Health Parity and Addiction Equity Act, which expands Timothy's Law into a full parity benefit. Despite these hard-won legislative successes, full implementation and enforcement of parity requirements has yet to be achieved and challenges remain, particularly in the context of parity in reimbursement and parity in utilization review. These areas often have a significant impact on the behavioral health workforce and their ability to receive adequate reimbursement for the essential care and treatment they provide to patients in need.

This article will address some recent legislative and litigation-related successes in New York and in other jurisdictions as well as additional advocacy work that is still needed in the parity arena.

Behavioral Health Insurance Parity Reforms

One recent success involves the 2019-20 New York State Budget, which included a comprehensive overhaul of the New York Insurance Law seeking to eliminate discrimination in coverage of care and treatment for mental health conditions, substance use disorders and autism spectrum disorders. These new provisions, called Behavioral Health Insurance Parity Reforms (BHIPR), apply to all health insurance and health benefit plans offered in New York State, including individual plans, group plans and HMOs.

Rachel A. Fernbach, Esq.

The following are some of the key provisions of the BHIPR:

• Coverage for all mental health conditions, substance use disorders and autism spectrum disorders, as defined in the most recent edition of DSM or ICD;

• Prohibits preauthorization and concurrent review of substance use disorder services during the initial 28 days of inpatient and outpatient treatment;

• Prohibits preauthorization and concurrent review of psychiatric inpatient services for persons under the age of 18 for the first 14 days;

• Prohibits prior authorization for formulary forms of prescribed medications for treatment of substance use disorders;

• Clinical review criteria applied by utilization review agents must be approved/designated by OMH or OASAS, where applicable;

• Medical necessity criteria must be made available to insureds, prospective insureds, or in-network providers upon request;

• Prohibits taking any adverse action in retaliation against a provider filing a complaint, making a report, or commenting to a government body regarding policies and practices that violate the law;

• Requires insurers and health plans to post additional information regarding their in-network providers of mental health and substance use disorder services, including whether the provider is accepting new patients as well as the provider's affiliations with participating facilities certified or authorized by OMH or OASAS; and

• Provides additional funding resources for staffing at DFS and DOH to handle oversight and enforcement of parity.

Self-insured plans are not subject to these new provisions, but remain subject to the federal parity law and regulations. The BHIPR provisions take effect January 1, 2020 and apply to all policies issued, renewed, modified or altered after that date.

Landmark Mental Health Ruling in Class Action Suit

A second success in the fight for full implementation of the parity statutes took place earlier this year, when the U.S. District Court for the Northern District of California held that United Behavioral Health (UBH) illegally denied coverage of mental health and substance use disorder treatment by relying on flawed medical necessity criteria (Wit v. United Behavioral Health, Findings of Fact and Conclusions of Law, Case No. 14-cv-02346-JCS, (N.D. Cal. Mar. 5, 2019), ECF No. 418). The Court found that UBH was liable under ERISA for developing restrictive medical necessity criteria that deviated from generally accepted standards, resulting in systematic denials of outpatient, intensive outpatient and residential treatment. Although UBH has indicated publicly that it plans to appeal the decision, this is an important breakthrough because the Court acknowledged that UBH's utilization review activities appear designed to limit coverage and therefore reduce access to necessary behavioral health care and treatment. Although the class action suit did not address parity issues, targeting the treatment of mental illness for medical necessity reviews constitutes a pattern and practice of impermissible discrimination that may also violate the federal Mental Health Parity and Addiction Equity Act.

In the 106-page decision, the Judge noted: "…in every version of the Guidelines in the class period, and at every level of care that is at issue in this case, there is an excessive emphasis on addressing acute symptoms and stabilizing crises while ignoring the effective treatment of members' underlying conditions." He further noted that UBH guidelines appear to be aimed at reducing costs rather than fiduciary duties owed to beneficiaries and reflected "a 'utilization management' model that keeps benefit expenses down by placing a heavy emphasis on crisis stabilization and an insufficient emphasis on the effective treatment of co-occurring and chronic conditions."

Evaluation and Management Claims

On the other hand, there remain significant issues with reimbursement for behavioral health services that directly impact providers and must be addressed. Recently, two NYSPA members received disallowances of evaluation and management (E/M) codes by a commercial carrier in connection with combination psychotherapy claims. During the course of a post-payment documentation audit, the carrier took the position that "the use of

see Parity on page 32