

## Issue brief: States must take action to enforce mental health and substance use disorder parity

### Background

The American Medical Association (AMA) believes that the obligation of demonstrating compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA)<sup>1</sup> is something that health insurance companies can and should do—and be held accountable for violations if they do not. The MHPAEA was enacted in 2008 on a simple principle: Insurance coverage for mental health and addiction treatment should be no more restrictive than insurance coverage for other medical care. In other words, if a person has comprehensive insurance coverage for a chronic disease (such as hypertension), they should have a similar level of comprehensive coverage for mental health and substance use disorders. If it's not as comprehensive—or if it's more restrictive—that likely identifies one or more discriminatory provisions as well as parity violations.

There are multiple ways states can take action<sup>2</sup>, including meaningful oversight and enforcement by state departments of insurance and attorneys general as well as by state legislatures taking action to ensure health insurance companies provide the standard of care.

### Health insurance companies routinely violate the MHPAEA

There are [numerous examples](#) of health insurance companies being found to violate the MHPAEA:

- The [GAO in December 2019](#) reported “For example, DOL reported citing 113 violations of MH/SU parity requirements through its reviews in 2017 and 2018.”
- Pennsylvania—examples include recent findings by the Pennsylvania Insurance Department of violations by [Independence Blue Cross](#) as well as [United Healthcare](#).
- Massachusetts—the Massachusetts Attorney General found [parity and other violations](#) by Harvard Pilgrim Health Care and United Behavioral Health d/b/a Optum; Fallon Community Health Plan and Beacon Health Strategies; AllWays Health Partners; Blue Cross Blue Shield of Massachusetts (BCBS); and Tufts Health Plan.
- Rhode Island—the Rhode Island Office of Health Insurance Commissioner found [significant parity and other violations](#) by United Healthcare and Blue Cross Blue Shield of Rhode Island.
- Illinois—the Illinois Department of Insurance recently released [violation findings](#) from several health insurance carriers, including Cigna and United Healthcare.

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<sup>1</sup> The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (“MHPAEA”), 29 U.S.C.S. § 1185a.

<sup>2</sup> Manatt Health provides a good overview of state enforcement actions. See <https://www.manatt.com/insights/newsletters/health-update/understanding-mental-health-parity-regulatory-poli>

- New York Attorney General Letitia James published a report focused on investigations into health plans' compliance with federal and state parity that contributed to \$3 million in fines and \$2 million for patient reimbursement. The report focused on Anthem, Beacon Health Options, Cigna, EmblemHealth, Excellus, HealthNow and MVP.<sup>3</sup>

In addition, a federal court found that United Behavioral Health (UBH) routinely placed its own financial interests over the safety and well-being of patients from 2011-2017 across four states: Connecticut, Illinois, Rhode Island and Texas. The decision in *Wit v. United Behavioral Healthcare* is a wake-up call that states must take action to prevent additional patient harm. [A 2019 Milliman report](#) highlighted that disparities are prevalent with respect to out-of-network services, reimbursement and adverse effects on children and adolescents.

## Adopt model legislation that holds payers accountable

The AMA urges state medical societies to support model legislation based on [California Senate Bill 855](#), which requires all health insurers and behavioral health management organizations to rely on evidence-based treatment guidelines developed by physicians and health care professionals—and not financial considerations. SB 855 takes effect on January 1, 2021.

The new law, which was spearheaded by The Kennedy Forum and the Steinberg Institute, adopts many of the most important findings of the court in *Wit v. United Behavioral Healthcare*. The American Psychiatric Association (APA) and The Kennedy Forum are among the national experts who are tailoring new model legislation to each state based on SB 855. “SB 855 is vital legislation in the face of a worsening mental health and addiction crisis exacerbated by the current COVID-19 pandemic,” [said Ricardo Lara, California Insurance Commissioner, on June 10, 2020](#). While California health insurers complained bitterly, Commissioner Lara also said that SB 855 would only result in minor costs to the California Department of Insurance: “\$3,000 in FY 2020-21 associated with the slight increase in reviewing form filling.”

[The Kennedy Forum model legislation](#) is ready for immediate introduction into every state.

## Urge DOIs to require prospective compliance with the law

Health insurance companies are regularly found to violate the MHPAEA. Market conduct exams typically involve reviewing claims from *previous* years to determine if a health insurance company provided mental health and substance use disorder benefits in parity with medical and surgical benefits. The AMA strongly supports the use of these exams, but we note that a market conduct exam reviews past behavior by a health insurance company. That is, an exam conducted in 2020 would likely review claims for benefits (not) provided two or three years prior.

Therefore, the AMA urges that health insurance companies be required to complete the comparative analysis in advance of offering plans to ensure that they are in compliance with the MHPAEA and applicable state law.

One tool to do this and make all the necessary calculations required by the regulations is through

<sup>3</sup> N.Y. STATE OFFICE OF THE ATTORNEY GENERAL, MENTAL HEALTH PARITY: ENFORCEMENT BY THE NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL (2018), [https://ag.ny.gov/sites/default/files/hcb\\_mental\\_health\\_parity\\_report.pdf](https://ag.ny.gov/sites/default/files/hcb_mental_health_parity_report.pdf)

“[Enhanced Attestation](#)” – a form/regulatory tool created by the AMA, APA and American Society of Addiction Medicine to guide health insurance companies through the necessary analyses to demonstrate compliance with the law, which can then be made available to a state department of insurance upon request for its own regulatory review. An “enhanced attestation” form requires health insurers to attest that they have performed analyses in each the categories of compliance covered by the federal parity law:

- Defining mental health and substance use disorder benefits and medical/surgical benefits
- Assigning benefits into classifications
- Financial requirements and quantitative treatment limitations (QTLs)
- Cumulative financial requirements and QTLs
- Nonquantitative treatment limitations (NQTLs)
- Disclosure requirements
- Vendor coordination

Enhanced Attestation not only helps state regulators—it also helps health insurers identify potential gaps in parity compliance. Achieving parity is not necessarily easy, but it is the law. Enhanced Attestation helps ensure compliance in an objective, transparent manner. Additionally, at least 13 states have passed legislation that would require insurers to take this process a step further and submit these analyses to regulators on an annual basis. APA has adapted this legislation for every state, which can be [found here](#).

### **Update on *Wit v. United Behavioral Healthcare***

On November 3, 2020, there was an important update to the February 2019 landmark ruling that detailed the widespread failings of United Behavioral Health (UBH) in placing the payer’s financial interests over the safety and well-being of patients from 2011-2017 throughout the country. The court ordered court-appointed supervision, a 10-year injunction, required training for UBH employees and an order to “reprocess 67,000 mental health and substance use disorder treatment claims that it illegally denied over a six-year period,” according to attorneys at [Psych-Appeal](#), the co-counsel to the *Wit* plaintiffs.

The injunction, moreover, will require UBH to exclusively apply guidelines developed by nonprofit clinical specialty associations, such as those from the American Society of Addiction Medicine (ASAM). The ASAM criteria are a key component of the recommendations and other guidance required by SB 855 and new model legislation from The Kennedy Forum.

The [AMA continues to urge policymakers and medical societies](#) to pay close attention to the *Wit* case because:

- If UBH is not using professional medical society recommendations or guidelines, UBH may likely be violating the standard of care as well as its fiduciary duties to its enrollees.
- If a state has, through statute or regulation, explicitly adopted one or more of the medical society guidelines or recommendations, and UBH is doing business in that state, UBH may be in facial violation of state law.

### **For more information**

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