From:	Orla Kennedy
To:	EBSA MHPAEA Request for Comments
Cc:	India Hayes Larrier
Subject:	Comments on Technical Release 2023-01P
Date:	Wednesday, September 20, 2023 3:37:50 PM
Attachments:	09 23 Parity Technical Release Comments FINAL.pdf

Re: Comments on Technical Release 2023-01P

September 20, 2023

Dear Secretary Becerra, Assistant Secretary Gomez, and Deputy Commissioner O'Donnell;

Community Catalyst appreciates the opportunity to comment on the Department of Health and Human Services, Employee Benefits Security Administration, and the Internal Revenue Service's (the "Departments") Technical Release 2023-01P, Request for Comment on Proposed Relevant Data Requirements for Nonquantitative Treatment Limitations (NQTLs) Related to Network Composition and Enforcement Safe Harbor for Group Health Plans and Health Insurance Issuers Subject to the Mental Health Parity and Addiction Equity Act (hereinafter "Technical Release"). **Please see our full comments attached.**

Thank you for your commitment to improving access to substance use disorders and mental health services through strengthening MHPAEA. If you have any questions or would like to discuss this in further detail, please contact our Substance Use Disorders Program Senior Policy Analyst, Orla Kennedy (okennedy@communitycatalyst.org).

Sincerely,
Orla

Orla Kennedy
Senior Policy Analyst, Substance Use Disorders Program
She/her/hers
(617) 275 2945
My typical work hours are 9am–5pm ET (Mon-Thurs); 9am–3pm ET (Fri)

Community Catalyst
communitycatalyst.org

We won't stop until everyone has what they need to be healthy, and our health system is shaped by and accountable to all people.

Community Catalyst

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20002

The Honorable Douglas W. O'Donnell
Deputy Commissioner for Services and Enforcement
Internal Revenue Service
U.S. Department of the Treasury
1111 Constitution Avenue, NW
Washington, DC 20224

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Community Catalyst is a leading non-profit national health advocacy organization dedicated to advancing a movement for health equity and justice. We partner with local, state, and national advocates to leverage and build power so all people can influence decisions that affect their

health. Our Program on Substance Use Disorders and Justice-Involved Populations works to advance racial justice by centering community needs, particularly of those most marginalized, and advocating for policy and practice changes to ensure addiction is treated as a health issue and not a criminal one. The program has focused extensively on improving access to and quality of services, including advocating for full implementation of parity across substance use disorders, mental health, and physical health services.

We strongly support the Departments' proposed NQTL data collection requirements relating to network composition as part of the Departments' efforts to increase access to mental health and substance use disorder (MH/SUD) treatment. Such data collection is critical to ensure that plans and issuers do not impose treatment limitations that place a greater burden on plan members' access to MH/SUD treatment than to medical/surgical (M/S) treatment. Combined with the accompanying proposed requirements related to the Mental Health Parity and Addiction Equity Act (MHPAEA), the data collection requirements that are envisioned in the Technical Release would be powerful steps in the right direction to increasing access to MH/SUD treatment.

- **We urge the Departments to require that the data points for MH services and SUD services be separately collected, analyzed and reported, consistent with MHPAEA statutory and regulatory requirements.** Data should also be collected for M/S services to facilitate MHPAEA comparisons.
- **We also urge the Departments to require that all data be collected, analyzed, and reported by age group, including children and adolescents, and by race/ethnicity (where possible). The Departments should also develop uniform definitions and methodologies for the collection of all data points so that valid data are collected and can be compared across plans/issuers.**

We appreciate the Departments' commitment to ensuring that the data plans/issuers will be required to collect are an accurate reflection of individuals' access to treatment. **Given that the Departments' guidance to plans will likely need to evolve over time to ensure such accuracy, we urge the Departments not to proceed with a "safe harbor" for plans/issuers based on data collection that has yet to be validated as meaningful.** Additional detail on this topic provided below:

- **We urge the Department not to proceed with a safe harbor at this time.** We understand the desire to most effectively target the Departments' enforcement resources. However, network adequacy has always been difficult to define and easy to mismeasure. Thus, a safe harbor has the potential to be harmful if the data collection requirements are not capturing a full and complete picture of participants/beneficiaries' access to MH/SUD services. Given the significant work that the Departments need to do – and likely refinements that are necessary over time – to ensure collected data is complete, accurate, and meaningful, a safe harbor

should not be considered in the near future. Such a safe harbor should only be considered when the Departments and key patient stakeholders are confident that the data collected accurately captures actual access to MH/SUD services. If a safe harbor is put in place prior to this occurring, it could cause enormous damage by giving noncompliant plans/issuers a "safe harbor" against accountability. Furthermore, an issuer residing within such a "safe harbor" would almost certainly escape meaningful oversight from any applicable State authority.

We also offer the following feedback regarding reimbursement rates:

- **We applaud the Departments' suggested data collection relating to reimbursement rates, which are critical determinants of network adequacy; many studies show the strong correlation between network access and reimbursement rates.** We also commend the Departments for putting forward potential requirements that reimbursement rate data be "compared to billed rates." Reimbursement rates that are not reflective of current market reimbursement can profoundly affect the availability of MH/SUD providers, including current providers' decision to join a network and potential providers' decisions whether to enter the field. We strongly recommend the Departments evaluate the ratio of allowed in-network and OON amounts to OON billed market rates for MH/SUD and M/S. The billed rates of OON providers are the most accurate representation of the market rate. We also support developing additional reimbursement rate measures, such as percent of out-of-pocket (OOP) expenses for enrollees using out-of-network providers for MH/SUD versus M/S care.
- **With respect to the use of Medicare Fee Schedule and other external benchmarks such as Fair Health, we urge the Departments to utilize significant care to avoid perpetuating historic (and ongoing) disparities between MH/SUD and M/S reimbursement rates that are embedded in these benchmarks.** We urge the Departments to recognize that Medicare and other claims databases and benchmarks rely on historical data that embeds legacy disparities in reimbursements between MH/SUD and M/S. Additionally, we strongly believe that caution is warranted with respect to Medicare because it:

    - Is not subject to MHPAEA;
    - Does not have allowed amounts for certain sub-types of MH/SUD providers (e.g., sub-acute inpatient care and the full range of MH/SUD professional providers);
    - Does not cover some MH/SUD services for children and adolescents given that this population does not participate in the program; and
    - Has a structure that undervalues the work of MH/SUD professionals, which CMS recently acknowledged in its recent Physician Fee Schedule proposed rules.

Thank you for your commitment to improving access to substance use disorders and mental health services through strengthening MHPAEA. If you have any questions or would like to discuss this in further detail, please contact our Substance Use Disorders Program Senior Policy Analyst, Orla Kennedy (okennedy@communitycatalyst.org).

Sincerely,

Mona Shah
Senior Director of Policy and Strategy
Community Catalyst