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Health Insurance – Mental Health and Substance Use Disorder Benefits – Sunset Repeal and Modification of Reporting Requirements (SB 684)
Finance Committee
February 28, 2024
FAVORABLE

Thank you for the opportunity to submit testimony in support of SB 684, which would strengthen Maryland's Parity Act compliance reporting standards and repeal a sunset of the reporting requirement to ensure that Marylanders have equitable coverage and access to mental health and substance use disorder treatment through their state-regulated insurance. This testimony is submitted on behalf of the Legal Action Center, a law and policy organization that has worked for 50 years to fight discrimination, build health equity and restore opportunities for individuals with substance use disorders, arrest and conviction records, and HIV or AIDs. In Maryland, we convene the Maryland Parity Coalition and work with our partners to ensure non-discriminatory access to mental health (MH) and substance use disorder (SUD) services through enforcement of the Mental Health Parity and Addiction Equity Act (Parity Act). The Parity Coalition advocated for the parity compliance and data reporting standards enacted in 2020, (HB455/SB 334), and worked to establish strong regulatory standards to implement the law. SB 684 would update those standards in response to the Maryland Insurance Administration's (MIA) Interim Report to the General Assembly that found **"uniform and significant" noncompliance by all carriers**.

Nearly four years after the enactment of Maryland's reporting law, Marylanders are no closer to knowing whether they are paying for and receiving non-discriminatory coverage of MH and SUD services. Our overdose and mental health crises have harmed too many Marylanders to allow carriers to flaunt federal and state law and undermine the MIA's enforcement obligations.

I. Carrier Failure to Comply with State and Federal Compliance Reporting Requirements

The federal Parity Act – a civil rights law that requires coverage of MH and SUD benefits on the same level as medical/surgical benefits – bars Maryland's carriers from selling health plans that do not comply with federal non-discrimination standards. Recognizing that carriers have exclusive possession of all the information needed to prove that their health plans comply with the law, federal law requires Maryland's carriers "to perform and document comparative analyses of the design and application of NQTLs [non-quantitative treatment limitations]" and submit them to the MIA upon request. 42 U.S.C. § 300gg-26(a)(8). Maryland's parity reporting law, Ins. § 15-144, enacted eight months before the federal reporting standard, requires carriers to submit only two reports over four years, with a sunset of the reporting requirement in July 2026.

After substantial and time-consuming efforts to address carrier reporting deficiencies and secure the required information, **the MIA found that the carrier reports "were uniformly and significantly inadequate, impeding the [MIA's] ability to reach parity determinations."** Report at 1. The MIA levied penalties again 6 carriers for failing to submit timely reports and 8 carriers for submitting incomplete reports totaling nearly $1 million. The MIA also issued recommendations to strengthen its enforcement authority and streamline its review process.

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SB 684 would implement the MIA's recommendations and strengthen enforcement in three key ways:

- Require carriers to submit an **annual** compliance report on **all** NQTLs and related outcomes data and give the MIA discretion to review a subset of NQTLs based on specific guidelines.
- Place the burden of persuasion squarely on the carriers to demonstrate compliance in their reports and in individual complaints and authorize the MIA to take additional remedial actions against carriers if they file insufficient compliance reports.
- Ensure state law reporting requirements require the MIA to incorporate any future changes in federal reporting standards, including additional tests for parity compliance and data reporting.

II. Require Submission of Annual Compliance Reports on All NQTLs and Outcomes Data and Give MIA Authority to Streamline Report Review

A. Annual Reporting

SB 684, which would update Maryland's law to require **annual rather than biennial** compliance reporting, aligns with federal standards and those of most states. State-regulated plans are sold or renewed on an annual basis and, under federal law, Maryland's carriers cannot offer a plan that does not comply with the Parity Act standards, either as written or in operation (the design or application of the NQTL). 45 C.F.R. § 146.136(h). Carriers should already be conducting an **annual review** of compliance, and they would face no greater burden if required to submit their reports annually. Biennial reporting is an outlier across the twenty-five (25) states that have enacted parity compliance laws: 16 of 25 states require annual reporting, 7 states require reporting on a different submission schedule, and 2 states do not designate a submission schedule. (Legal Action Center's 50-State Survey of Compliance Reporting Standards – on file and available upon request). Even the handful of states that do not authorize reporting on an annual basis require carrier submissions of any NQTL changes in the off-years and attestation of parity compliance (ARIZ. REV. STAT. ANN. § 20-3502(E)) or parity reporting for any significant medical management protocols (DEL. CODE ANN. Tit. 18, §§ 3571U, 3343(g)). The MIA has proposed revisions to the compliance reporting provisions in HB 1085, which would retain biennial reporting. This standard is not consistent with federal standards or other state practices.

An annual compliance report is also essential to ensure that consumers or providers that seek to challenge a carrier's decision as violative of the Parity Act have ready access to their carrier's compliance report. Plan members are entitled to receive the carrier's compliance report for the relevant NQTL and supporting plan documents in an internal grievance process. 45 C.F.R. § 146.136(d)(3). Absent the carrier's report, neither the plan member nor the MIA will have essential information to investigate the carrier's practices, resulting in a significant delay in access to care. One goal of compliance reporting is to place the burden of compliance squarely on the carrier – rather than on a member-driven complaint process – since the carrier has designed and implements its plan. The carriers' demonstrated failure to submit complete reports in March 2022 means that information that is essential to resolve a denial of care has not been available.

While carriers may assert that they make minimal changes from one year to the next in the design of a plan's standards, the breadth of NQTLs and the inevitable changes in how those plan design features are implemented require an annual review. For example, NQTLs encompass every plan design feature that can limit access to MH or SUD benefits, including reimbursement rate

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standards, network adequacy standards and network admission standards, utilization review standards and prescription drug coverage and utilization standards – each of which can change annually or be applied differently from one year to the next. Changes in the carrier's staff that carry out utilization review, network admission reviews and reimbursement rate negotiations can affect the outcome data that are essential to identify possible disparities in implementation for MH and SUD benefits.

B. Analysis and Submission of All NQTLs and Outcomes Data

SB 684 would address the MIA's recommendation (MIA Recommendation 4) to reduce the number of NQTLs that it must review, while establishing sufficient guardrails to ensure carriers conduct an analysis of all NQTLs as required by federal law and consistent with current state law. Federal regulators have made it crystal clear that federal law requires state-regulated health plans to "perform and document comparative analyses for ***all NQTLs imposed,***" even if the regulator reviews a subset of the NQTLs. FAQs About Mental Health and Substance Use Disorder Parity Implementation and the Consolidated Appropriations Act, 2021, Part 45, FAQ 8 (April 2, 2021) (emphasis added). Requiring carriers to submit their analyses of all NQTLs, as currently required by state law, imposes no greater burden on them. This standard also aligns with virtually all states that identify the scope of NQTL reporting: 16 of 17 states require insurers to report on all NQTLs and only 1 state (Georgia) identifies a process for identifying the NQTLs to be reported annually.

Absent the submission of a comparative analysis of all NQTLs, the MIA, current and future plan members and providers will have no way to ensure that carriers are actually conducting and documenting the required comparative analysis. Federal regulators have observed that health plans routinely fail to conduct comparative analyses, even after federal law imposed that requirement, and typically prepare reports only after they have been asked to submit their documentation. MHPAEA Comparative Analysis Report to Congress, July 2023. **Post-hoc carrier analysis is inconsistent with federal law and defeats the fundamental purpose of compliance reporting – to identify and remove discriminatory standards before a plan is offered**. As noted above, the availability of an analysis of each NQTL is also essential to ensure that carrier information is readily available for the investigation and timely resolution of individual complaints.

Following the submission of the carrier reports, we support the MIA's recommendation to *review* a subset of NQTLs. SB 684 would establish a transparent process and timeline by which the MIA would select a representative sample of NQTLs (e.g. no less than 10) and inform carriers and the public of the NQTLs it intends to review for each review period. Announcing the NQTLs post-submission will ensure the greatest accountability when coupled with other proposed standards, as a carrier will be incentivized to prepare a complete analysis for all NQTLs or risk an MIA order barring it from implementing an NQTL.

In contrast, we have strong reservations about the proposed standard in the MIA's bill (HB 1085) that would require the submission of only 4 pre-identified NQTLs. The very small number of NQTLs offers no guarantee of a sufficiently broad selection of different plan features that affect access to care and will not adequately test carrier compliance. For example, the MIA could select 4 NQTLs – all of which address authorization standards – to the exclusion of other critically important features that limit access to care, such as network adequacy, reimbursement rate setting or scope of benefit coverage. **Indeed, the utter failure of every carrier to submit a complete comparative analysis for any NQTL demonstrates carriers are not meeting their legal obligations to offer parity-compliant plans and argues for retaining the existing level of NQTLs submission by carriers, rather than reducing oversight requirements.**

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Finally, an essential component of NQTL compliance analysis – submission and review of outcomes data – would be strengthened in SB 684, consistent with the MIA's recommendation. (MIA Recommendation 3). SB 684 would retain the law's existing data metrics related to service authorization requests, approvals and denials and claims denials and, additionally, allow the Commissioner to identify additional outcomes data points. The bill would also ensure that the MIA's standards stay current with and require consistency the federal regulatory requirements on outcomes data, in anticipation of the adoption of heightened data standards by federal regulators. *See* Departments of Labor, Health and Human Services and Treasury, Technical Release 2023-01P. While we support the MIA's efforts to require additional standardized data submissions to evaluate NQTLs, we are concerned that the provision it has proposed in HB 1085 would remove the existing data standards – which are among the most commonly reviewed metrics – and offer no guarantee that it would require reporting of any new federal guidelines.

III. Strengthen the MIA's Enforcement Standards and Timely Resolution of Discriminatory Practices by Placing the Burden of Persuasion on Carriers.

The carriers' blatant refusal to submit complete parity compliance information has effectively prevented the MIA from identifying discriminatory carrier standards, holding carriers accountable for noncompliance, and correcting discriminatory practices. To provide real enforcement teeth, the MIA has recommended that the reporting law explicitly impose the burden of persuasion on carriers, which it also proposed in the 2020 bill. (MIA Recommendation 8). SB 684 would establish this persuasion standard for both the compliance plan report and in individual matters that assert a Parity Act violation and clearly establish that a carrier's failure to submit complete compliance information in either context would constitute noncompliance with the Parity Act.

In our view, this proposed standard would be the most effective way to incentivize carriers to submit complete and comprehensive NQTL analyses and reduce the MIA's oversight burden. The range of remedies that could flow from a finding of noncompliance, including the issuance of an order to cease the application of the non-compliant NQTL, would likely spur a carrier to submit the required information or eliminate the non-compliant practice. Although the MIA's bill (HB 1085) does not include this explicit requirement, **its Interim Report identifies it as one of the two most important recommendations for the General Assembly to adopt.** While the carriers successfully opposed the persuasion standard in 2020, any on-going opposition should be rejected. The MIA clearly could not overcome the carriers' reporting recalcitrance without this standard during the first round of reports, and it should not be required to pursue compliance in any future review under the same handicap.

This is particularly true because the proposed persuasion standard is entirely consistent with existing federal law. As noted above, federal law bars Maryland's carriers from offering plans that do not comply with the Parity Act standards, and the compliance reporting requirement enforces that standard. Under the federal law, it is the carrier's obligation to "***demonstrate***" that the processes, strategies, evidentiary standards and other factors used to apply the NQTL to MH and SUD benefits, as written and in operation, are comparable to and no more stringently applied than those same elements for medical/surgical benefits. 42 U.S.C. § 300gg-26(a)(8)(A)(iv). The law affords carriers regulated by federal authorities an opportunity to submit additional information based on a regulator's finding of insufficient information, but, following a short time-period for corrective action, the federal regulator may find the plan in violation of the Parity Act if the plan has still not demonstrated compliance. § 300gg-26(a)(8)(B)(ii) and (iii). The same legal analysis applies to state regulators.

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This standard is also essential in individual matters that raise parity compliance violations. While the carriers do have the burden of persuasion in grievance and appeal matters, a parity violation may be asserted in other complaints, particularly by a MH or SUD provider that has been denied admission to a carrier network or a fair reimbursement rate. Indeed, the MIA failed to issue a substantive finding in two Parity Act challenges filed by opioid treatment programs against CareFirst for alleged violations in reimbursement rate setting. MAT Clinics, MIA-2023-1-5-00143686 (CareFirst of Maryland, Inc.) and Behavioral Health Services and Northern Parkway Treatment Services, MIA-2021-6-13-00128023 (CareFirst of Maryland, Inc.). The MIA's determination in both matters stated that it relied on CareFirst's compliance report to address the alleged parity violation and found that CareFirst's insufficient information "did not allow the Administration to make a determination of its compliance with MHPAEA."

That should not have been the outcome because CareFirst is required to demonstrate compliance with the Parity Act. Placing the burden of persuasion on carriers in all matters before the MIA would resolve this problem and ultimately improve access to MH and SUD care.

IV. Ensure Consistency with Federal Comparative Review and Compliance Standards

SB 684 would ensure that Maryland's reporting law conforms to the greatest extent possible with federal Parity Act standards by ensuring that reporting standards encompass all federal substantive non-discrimination standards and track federal reporting practices. Consistency across federal and state standards reduces the burden on Maryland's carriers as they would be required to satisfy the same standards across all markets in which they participate (e.g. state and employer-sponsored ERISA plans). And, as noted above, consumers and providers must rely on the MIA to help enforce their federal parity rights. SB 684 would achieve consistency in three important ways.

First, it would require that the MIA collect compliance information consistent with all federal requirements, including those adopted in future regulations. The Departments of Labor, Health and Human Services (HHS), and Treasury have issued proposed regulations that would establish several new tests for parity compliance and memorialize reporting standards in regulation. *See* Requirements Related to the Mental Health Parity and Addiction Equity Act, 88 Fed. Reg. 51552 (Aug. 3, 2023). Federal regulators, like the MIA, are taking steps to fill regulatory gaps that have hampered enforcement and, consequently, access to MH and SUD care. SB 684 would account for any revisions of federal law, while the MIA's bill (HB 1085), as drafted, would limit its compliance review to the existing comparative analysis test.

Second, SB 684 (and the MIA's bill) would require carriers to conduct an analysis of each process, strategy, evidentiary standard and other factors regardless of whether those elements were used before enactment of the Parity Act, which carriers have previously – and erroneously - refused to submit. (MIA Recommendation 3).

Finally, SB 684 (and the MIA's bill) would remove an outdated compliance reporting form required in 2020 (HB455/SB334), and SB 684 would require submission of information on a form developed by the MIA that conforms to federal regulations on NQTL comparative analysis reporting. Greater consistency between the federal and state standards will also make it easier for Marylanders to understand and enforce their rights to non-discriminatory MH and SUD treatment, as they could take greater advantage of the resources available at the federal level.

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The General Assembly has taken important actions since the enactment of the federal Parity Act to enforce non-discriminatory MH and SUD coverage standards in state-regulated health plans. Based on the documented failure of carriers to comply with state and federal laws, compliance standards must be strengthened to ensure that the underlying purpose of the Parity Act – to improve access to MH and SUD care – can be achieved in Maryland.

Thank you for considering our views. We urge the Committee to issue a favorable report on SB 684.

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