

# Biden Admin's Mental Health Proposal May Not Be Enough

By **Khaled Klele and Jessica Osterlof** (September 21, 2023)

In light of the continuing and significant impacts of the COVID-19 pandemic, specifically mental health issues and substance use disorders, the Biden administration **has proposed** a series of regulatory changes to improve access to providers.

Will these changes be enough to close the coverage gap and availability of services? Possibly not, due to regulatory enforcement issues, the lack of providers, and rate issues with regard to parity for telehealth services.

## Biden's Proposal

The Biden administration has proposed updates to the federal Mental Health Parity and Addiction Equity Act to "strengthen mental and physical health parity requirements and improve mental health care access."

The Biden administration's July 25 fact sheet about its proposal acknowledges that too many Americans still struggle to find and afford care. Research shows that in-network behavioral health care providers have monthslong waitlists or are not accepting new patients.

As a result, many patients have been forced to pay out-of-network fees or defer care altogether. In fact, the gap between usage of out-of-network care for mental health and substance use disorder benefits compared with other health benefits increased 85% from 2013 to 2017, and this discrepancy increased during the pandemic. The proposed changes to MHPAEA are aimed at resolving these issues.

The proposed rule would, among other things, (1) require health plans to make changes when they provide inadequate access to mental health care; (2) make it clear what health plans can and cannot do by providing examples and requiring health plans to be less restrictive; and (3) close loopholes in nonfederal governmental health plans.

As for closing loopholes, when initially enacted, MHPAEA did not apply to nonfederal government health plans, such as those offered by state and local government entities.

The proposed rule would require more than 200 state and local government plans to comply with the statute, providing protection to approximately 90,000 individuals. The proposed rule also aims to ensure comparable payment for mental health care professionals in the hope this will incentivize more people to join the mental health workforce.

In addition to this proposed rule, Biden has announced his administration's intention to issue a request for information on how it can best work with states to ensure compliance with MHPAEA's critical protections for the millions of Medicaid beneficiaries in private Medicaid health plans.

## Current Statistics on Mental Health



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During and after the COVID-19 pandemic, an overwhelming surge of people sought mental health and substance abuse treatment. In November 2020, an American Psychological Association survey showed that 30% of 1,787 psychologists were not able to meet their patients' treatment demands. And nearly 3 in 10 psychologists reported seeing more patients since the start of the pandemic.

A Centers for Disease Control and Prevention study in June 2020 showed that 13% of Americans reported starting or increasing substance use to cope with pandemic-related stresses or emotions.

Additionally, the American Medical Association reported in December 2020 that more than 40 states saw increases in opioid-related mortality, along with increased concerns for those with substance use disorders during the pandemic.

And, according to a survey by KFF/CNN in October 2022, 90% of U.S. adults said they believe the nation is still facing a mental health crisis from the pandemic. The health care system continues to struggle to address this issue for a number of reasons.

The American Hospital Association published a report in 2022 on COVID-19's impact on behavioral health, and the reasons — including access, utilization and payment — for the lack of available treatments.

The report stated that high out-of-pocket costs and lack of insurance coverage were caused, in part, by inadequate enforcement of mental health parity laws, high prescription costs and shortages of in-network providers. Unfortunately, this resulted in patients declining or delaying treatment, which clearly exacerbated the pandemic's impact.

### **Mental Health Parity Laws**

State mental health parity laws gained importance during and after the pandemic. While the federal MHPAEA was passed in 2008, state mental health parity laws only began to expand in recent years due to the pandemic.

Most states now have some form of behavioral health coverage mandate. Many states either refined existing mental health parity laws or created new ones in 2020 and 2021, in the wake of the pandemic, making it clear that the mental health laws were insufficient and exacerbated the crisis.

While requirements differ from state to state, each aims to require insurers to provide behavioral health coverage in parity with other types of nonbehavioral medical benefits.

In addition, many state Medicaid programs and laws expanded coverage of behavioral health telemedicine services during the pandemic, including broadening the range of behavioral health services and allowing for more provider types to be reimbursed for telehealth services. As a result of these laws, private payors were required to improve coverage for mental health and substance use disorders by removing telehealth restrictions.

Despite this, strengthening behavioral health coverage and parity protections remain a hot topic due to shortages of psychologists and other behavioral health care providers, rising behavioral health treatment needs, and the demand for improved coordination of primary and behavioral health care in the health care delivery system.

## **State Laws**

In 2019, New Jersey passed mental health parity legislation, known as New Jersey Revised Statutes, Title 17B, Chapter 26-2.1s.

It requires health insurers to provide coverage for mental health conditions and substance use disorders under the same terms and conditions as other illnesses and to meet the MHPAEA requirements. In addition, during the pandemic, New Jersey required health insurers to pay for telemedicine services at the same rate as in-person services.

In 2020, New York, like many other states, enhanced parity for patients with mental health, substance use and autism spectrum disorders when it passed the Behavioral Health Insurance Parity Reforms. This statute requires, among other things, every insurer to adopt and implement a mental health and substance use disorder parity compliance program.

Both New Jersey's and New York's mental health parity laws indicate that legislators and regulators at the state level are dedicating time and effort to ensure patients receive fair coverage for treating mental health and substance use disorders.

## **What Else Can Be Done**

The insurance framework at both the state and federal levels was initially insufficient to cover mental health and substance use disorder treatments, largely due to the lack of parity in coverage.

Although some states were addressing lack of parity before 2020, the pandemic caused states to expeditiously close the gap. And, although MHPAEA and state mental and behavioral health parity laws, along with the proposed rule by the Biden administration, aim to strengthen parity laws in this area, the question remains whether this will be enough.

It will likely not be the case in the short term for practical reasons. As with many newly enacted laws, there is always a lag time in enforcement. As mentioned above, the studies show that although parity laws for mental health and substance use disorders have become more prevalent in the past few years, there is a lack of enforcement.

To ensure these laws are enforced, providers must be diligent in identifying when the laws are not being followed and must notify the relevant agencies. In turn, the relevant agencies should investigate and pursue legitimate complaints raised by providers.

Another issue that should be addressed is the lack of providers in this health care sector. As rates increase due to the parity laws, there should be an increase in individuals who become providers of this type of service as there will be greater incentive in terms of increased salaries to enter this sector.

However, it will take time to close the current gap. In the meantime, regulators should seriously consider expanding the scope of services of, and providing flexibilities to, licensees who already practice in this area, such as psychologists, therapists, social workers, counselors, physicians, advanced practice nurses and the like.

For example, many providers welcomed the continued flexibility surrounding controlled substances that was introduced during the pandemic.

In that regard, on March 1, the U.S. Drug Enforcement Administration, in conjunction with

the U.S. Department of Health and Human Services, published a proposed rule to extend in-person exceptions to existing DEA regulations so that providers could prescribe a 30-day supply of buprenorphine for the treatment of opioid use disorder without an in-person evaluation.

Another example is telemedicine. Continuing and possibly expanding the scope of telemedicine services for mental health and substance use disorders should increase the availability of providers to treat more patients. Similarly, rate parity for those telemedicine visits should be critical to increase the number of providers as well as their availability to treat more patients.

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