

DEPARTMENT OF HEALTH & HUMAN SERVICES  
Centers for Medicare & Medicaid Services  
Center for Consumer Information and Insurance Oversight  
200 Independence Avenue SW  
Washington, DC 20201



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October 1, 2024

Employees Retirement System of Texas - Texas

Nancy Lippa  
Deputy General Counsel  
[Nancy.Lippa@ers.texas.gov](mailto:Nancy.Lippa@ers.texas.gov)

Re: Final Determination Letter – Mental Health Parity and Addiction Equity Act (MHPAEA)  
Non-Quantitative Treatment Limitation (NQTL) Comparative Analysis Review –  
Concurrent review for outpatient, in-network services.

Dear Ms. Lippa,

This letter informs you that a review of the Corrective Action Plan (CAP) and additional comparative analysis submitted to address the instances of non-compliance noted in the MHPAEA NQTL Analysis Review (Review) is complete.

The purpose of the Review was to assess Employees Retirement System of Texas' (Plan) compliance with the following requirements under Title XXVII of the Public Health Service Act (PHS Act) and its implementing regulations:

PHS Act § 2726, 45 C.F.R. § 146.136 - Parity In Mental Health And Substance Use Disorder Benefits (MHPAEA and its implementing regulations).

The Review covered concurrent review for outpatient, in-network services for the 2022 plan year (hereinafter referred to as "the NQTL").

The Centers for Medicare and Medicaid Services (CMS) conducted this Review on behalf of the Secretary of Health and Human Services pursuant to PHS Act § 2726(a)(8)(A) and (B), as added by Section 203 of Title II of Division BB of the Consolidated Appropriations Act, 2021.<sup>1</sup> CMS contracted with Examination Resources, LLC to assist CMS with conducting this Review.

On August 16, 2023, CMS provided an Initial Determination Letter of non-compliance to the Plan and directed the Plan to submit a CAP and additional comparative analysis to CMS to demonstrate compliance with MHPAEA and its implementing regulations. In CMS' Initial Determination Letter, we identified the following instances of non-compliance with PHS Act

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<sup>1</sup> Pub. L. 116-260 (Dec. 27, 2020).

§ 2726 and its implementing regulations at 45 C.F.R. § 146.136, all of which have been addressed by the Plan's corrective actions and revised comparative analysis.

**I. Failure to Demonstrate Comparability and Relative Stringency in Operation, in Violation of 45 C.F.R. § 146.136(c)(4)(i).**

**1. The Plan applied the Level of Care (LOC) factor not comparably and more stringently to mental health and substance use disorder (MH/SUD) benefits and medical/surgical (M/S) benefits.**

The Plan's "Master Benefit Plan" document stated that Blue Cross Blue Shield of Texas (BCBSTX), the Plan's third-party administrator, determines the appropriate treatment setting for several MH/SUD services subject to the NQTL. However, the document did not include similar language for M/S services subject to the NQTL.<sup>2</sup> The Plan provided in its CAP submission a revised "Master Benefit Plan" document with comparable language for both MH/SUD services and M/S services.<sup>3</sup>

The Plan's "Concurrent Review & Criteria Mapping" document identified several MH/SUD services and M/S services subject to LOC determinations by BCBSTX.<sup>4</sup> The Plan provided the sources used to apply the LOC factor to both MH/SUD services and M/S services, confirming that the Plan uses similar sources and evidentiary standards for MH/SUD services and M/S services when applying the factors considered during a concurrent review.<sup>5</sup> CMS agrees that the Plan's corrective action addressed the concern regarding this issue and no further instances of non-compliance were noted.

**II. Failure to Provide Sufficient Information and Supporting Documentation, in Violation of PHS Act § 2726(a)(8)(A).**

**1. Failure to provide sufficient information regarding the comparability and relative stringency of concurrent review decision turnaround times, in operation.**

The Plan's operational data metrics reflected longer average turnaround times for MH/SUD concurrent review determinations as compared to M/S concurrent review determinations.<sup>6</sup> The Plan stated that BCBSTX had erroneously applied a 15-day turnaround time standard to MH/SUD concurrent review decisions instead of the 72-hour/2-working day turnaround time standard noted in the Plan's written standard.<sup>7</sup> The Plan in its CAP submission provided an updated written turnaround time standard for MH/SUD concurrent review determinations and provided a revised comparative analysis reflecting this update.<sup>8,9</sup> Additionally, the Plan

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<sup>2</sup> FINAL In-Area MBPD PY22 4-22-22, pgs. 82-84 and 90-93.

<sup>3</sup> ERS Master Benefit Plan Document Effective September 1, 2023, pg. 33.

<sup>4</sup> TX Concurrent Review & Criteria Mapping Document In-Network Final 2023, tab Mapping Document, column E.

<sup>5</sup> TX Concurrent Review & Criteria Mapping Document In-Network Final 2023, tab Mapping Document, columns K-M.

<sup>6</sup> CMS Response 6.2 NQTL INN CR, pg. 2.

<sup>7</sup> ERS of TX - Concurrent Review Outpatient In-Network NQTL Response 9-30-2..., pg. 4.

<sup>8</sup> ERS of TX - Concurrent Review Outpatient In-Network NQTL Response 9-30-2..., pg. 4.

<sup>9</sup> NQTL Overview - Concurrent Review Outpatient In-Network, pg. 10.

conducted reviews of MH/SUD concurrent review requests in 2022 and 2023 that exceeded the Plan's updated written turnaround time standard.<sup>10,11</sup> The Plan identified root causes and implemented corrective actions to ensure both MH/SUD concurrent reviews and M/S concurrent reviews are being processed in a comparable, timely manner, including by conducting personnel training, contacting providers on use of correct forms for concurrent review requests, monitoring dashboards to identify pending requests, and implementing other processes and procedures for utilization management reviewers and clinicians.<sup>12</sup> CMS agrees that the Plan's corrective actions addressed the concern regarding this issue and no further instances of non-compliance were noted.

CMS' findings detailed in this letter pertain only to the NQTL under review and do not bind CMS in any subsequent or further review of other plan provisions or their application for compliance with governing law, including MHPAEA and its implementing regulations. If additional information is provided to CMS regarding this NQTL or Plan, CMS reserves the right to conduct an additional review for compliance with MHPAEA or other applicable PHS Act requirements.<sup>13</sup>

CMS' findings pertain only to the specific plans to which the NQTL under review applies and are offered by the Plan and do not apply to any other plan or issuer. However, these findings should be shared with affiliated entities, and steps should be taken as appropriate to ensure compliance with applicable requirements.

CMS will include a summary of the comparative analysis and the results of CMS' review in its annual report to Congress pursuant to PHS Act § 2726(a)(8)(B)(iv).

Sincerely,

Mary M.  
Nugent -S

 Digitally signed by Mary M. Nugent -S  
Date: 2024.09.30 16:44:01 -04'00'

Mary Nugent  
Director, Division of Plan and Issuer Enforcement  
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<sup>10</sup> ERS of Texas - Concurrent Review for Outpatient, In-Network Response, pg. 3.

<sup>11</sup> ERS Response Concurrent Review 2\_29\_24 SIGNED, pgs. 1-4.

<sup>12</sup> ERS Response Concurrent Review 2\_29\_24 SIGNED, pgs. 1-4.

<sup>13</sup> See PHS Act § 2726(a)(8)(B)(i); see also 45 C.F.R. § 150.303.