



## **Application of Federal Parity Law to the State Child Health Insurance Program**

The newly enacted Paul Wellstone and Pete Domenici Mental Health Parity and Addition Equity Act of 2008 (P.L. 110-343) requires large group health insurance plans that include coverage for mental health or substance use disorders to provide these benefits at parity with the plans' medical/surgical benefits.

The statute defines “group health plans” to include ERISA self-insured or self-funded plans, health maintenance organization plans, health insurance plans, and certain governmental plans. Plans created under the State Children’s Health Insurance Program (SCHIP)<sup>1</sup> are one such type of governmental plan covered by the parity law.

### **SCHIP Law**

SCHIP gives federal matching funds to states to provide health insurance to low-income families with children. The program was designed to cover uninsured children in families with incomes that are modest but too high to qualify for Medicaid. The SCHIP statute allows states to provide coverage by either: (1) broadening their Medicaid programs to include SCHIP-eligible children; or (2) creating a new program. For states that choose the Medicaid expansion option, the parity law would apply only to contracted managed health care plans. (Medicaid law already requires that states not have arbitrary limits on care; in other words, as an arbitrary limit, lack of parity is already prohibited.)

For states that create a new program for SCHIP children, the law provides several ways in which the health plan’s benefits can be determined:

- Benchmark Coverage – benefits equivalent to those in a benchmark plan listed in the law, which are:
  - The standard Blue Cross/Blue Shield preferred provider option under the FEHBP;
  - State employee coverage;

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<sup>1</sup> 42 U.S.C. 1397aa, *et seq.*

- Coverage offered by the health maintenance organization that has the largest insured commercial, non-Medicaid enrollment in the state.
- Benchmark Equivalent Coverage – benefits that include certain basic services listed in the law (but not including mental health services), provided that the coverage has an aggregate actuarial value that is at least actuarially equivalent to one of the benchmark packages. For mental health and certain other services, the law permits that the benefit need only be 75% of the actuarial benefit of the benchmark plan.
- Secretary-Approved Coverage -- Benefits can be designed by the state and must then be approved by the Secretary of the U.S. Department of Health and Human Services as providing appropriate coverage for the target population.

The statute also includes a list of required services for all SCHIP plans: hospital inpatient and outpatient services, physician services, laboratory and x-ray services and well-baby/well-child care. As stated above, the law does not mandate coverage of mental health services.

### **Application of Parity Law to SCHIP Plans**

By its terms, the parity law clearly applies to the separate SCHIP plans (that is, it covers plans for SCHIP children not enrolled in Medicaid). Thus, if the plan includes a mental health or substance abuse benefit, those benefits must meet the requirements in the parity law.

This is because the parity law lists only a few exceptions to its basic requirement that all “group health plans” must provide mental health and substance use disorder coverage at parity. The two principal exemptions are for plans offered by employers with fewer than 50 but more than two employees and for plans that experience certain specified cost increases.<sup>2</sup> In addition, the statute allows self-insured plans provided by state, local, and tribal governments to opt out of the parity requirements.<sup>3</sup>

The parity statute contains no such exception or opt-out provision for SCHIP plans. Because all state SCHIP plans are group health plans with at least 50 participants, they are covered by the plain terms of the parity law; the statute applies to SCHIP plans just as it does to all other non-federal government plans.<sup>4</sup>

Indeed, the parity law must be read to apply to SCHIP plans – and it makes perfect sense to do so -- because these two statutes’ requirements are fully consistent with each other. As a basic principle of statutory construction, when two statutes deal with the same

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<sup>2</sup> See Section 712(c) (1) of the Mental Health Parity Act of 1996, 29 U.S.C. § 1185a(c).

<sup>3</sup> See Public Health Service Act, 42 U.S.C. 300gg-21.

<sup>4</sup> See S. REP. accompanying S. 558 at 8-9.

subject matter, courts presume that the subsequent law was enacted in view of existing relevant statutes and apply them consistently to the greatest extent possible.<sup>5</sup>

The SCHIP statute imposes certain minimum requirements for SCHIP plans, *i.e.*, the statute imposes a “floor” of coverage below which SCHIP plans cannot go. The SCHIP statute does not prohibit an SCHIP plan from providing more than this floor of coverage; it only prohibits states from providing less than the requisite minimum coverage.

Application of the parity statute to SCHIP plans would never require a plan to provide less than the requisite minimum coverage. To the contrary, under certain circumstances discussed below, it could require an SCHIP plan to provide more than the requisite minimum coverage. If an SCHIP plan presently does not provide coverage for mental health or substance use disorders at parity with medical/surgical benefits, the new parity law would require it to do so. Thus the two statutes are fully consistent and should be interpreted as such.

The effect of the parity law on state SCHIP plans depends largely on the type of plan the state has elected to design.

- If the state has used a benchmark plan with a parity mental health and substance abuse benefit (such as the federal employees’ plan), then no changes need be made to the SCHIP plan.
- If the benchmark plan the state has adopted includes a limited mental health or substance abuse benefit, the new parity law requires the state to amend its plan to comport with the provisions of the parity law.
- If the state’s application of the 75% rule for actuarially-equivalent benefits results in mental health and substance abuse benefits not being provided at parity with medical/surgical benefits, then the new parity law would require the state to amend its SCHIP plan to comport with the new law.
- If the state has a plan approved by the Secretary, then the same rules apply; if it has mental health or substance abuse coverage, the parity law would apply.
- If the state plan has no mental health or substance abuse coverage, it is unaffected by the parity law.

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<sup>5</sup> See 73 Am. Jur. 2d Statutes § 60; 82 C.J.S. Statutes § 355; 2B Sutherland Statutory Construction § 51:5 (7th ed.). Cf., *Arc of Washington State v. Braddock*, 427 F.3d 615 (9<sup>th</sup> Cir. 2005) (state was subject to both Medicaid statute and Americans with Disabilities Act (ADA); while Medicaid statute permits states to cap home and community-based waiver, ADA may require state to expand community services beyond the cap set under the Medicaid program); *Makin ex rel. Russell v. Hawaii*, 114 F. Supp.2d 1017 (D. Haw. 1999) (same).