# Mental Health Parity and LGBTQ Health

Presented by Derek Waller for the
Minnesota Lavender Bar Association Annual Conference
February 11, 2023

# Goals

- Learn some basic context about the importance of mental health care for LGBTQ people.
- Define mental health parity.
- Gain an understanding of when and to whom mental health parity applies.
- Gain an understanding of general requirements of mental health parity.
- Learn to spot mental health parity issues.
- Obtain resources for future action.

# Overview

I. Mental Health and the LGBTQ Community

II. Mental Health Parity in Federal Law

III. Applicability of the Parity Act

IV. Standard for Measuring Parity

V. Parity Act Enforcement

VI. Specific Coverage Issues for the LGBTQ Community

Note: please refer to the accompanying outline for sources and citations for the content in this presentation.

# Advisory

- This presentation will discuss topics related to mental health, substance use, suicide, gender dysphoria, and eating disorders. I will not discuss detailed factual situations, but rather generalized survey data and information about the nature of insurance claims denials.
- Please take care of yourselves and feel free to leave and return to the room (for whatever reason) as needed.

# Professional Resources

- Minnesota Disability Bar Association
- Lawyers Concerned for Lawyers
- National Alliance on Mental Illness (NAMI) Minnesota
- Substance Abuse and Mental Health Services Administration (SAMHSA)

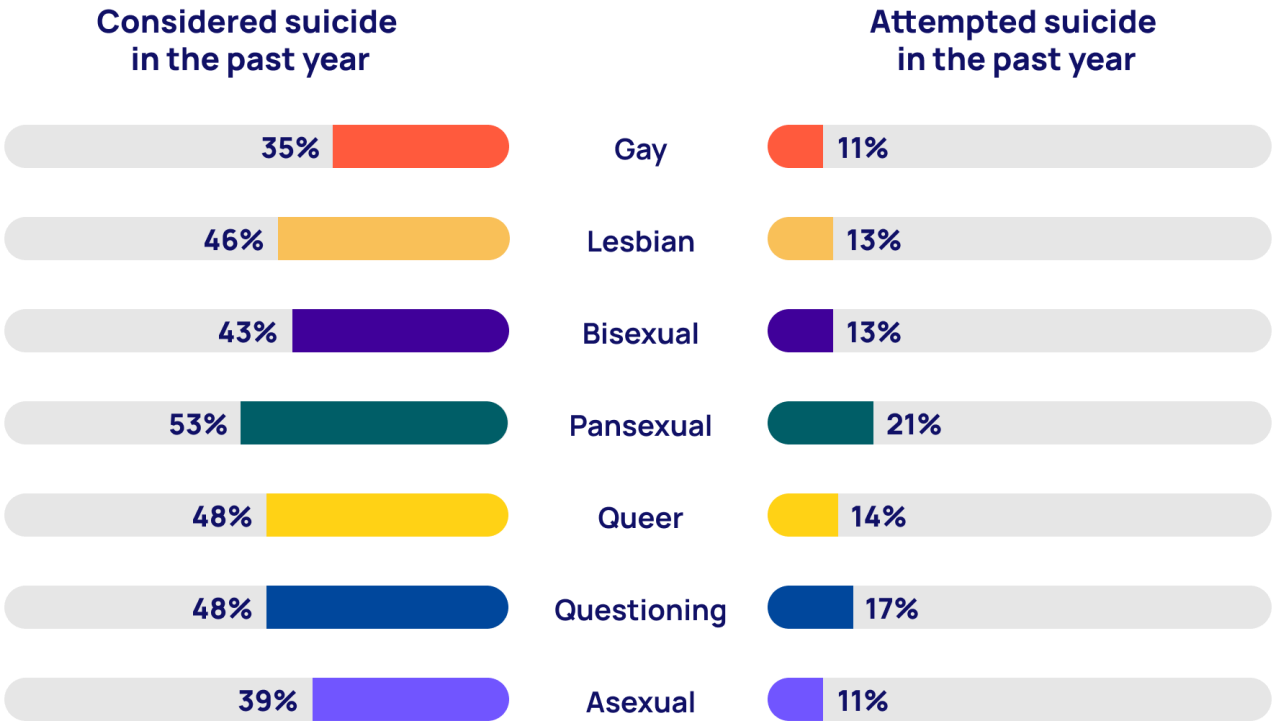
# Mental Health and LGBTQ Communities

- LGBTQ have an overall greater risk of facing behavioral health challenges.
- Minority Stress Theory
  - The idea that minorities face greater stigmatization, discrimination, and fear of rejection based on their identities.
  - This is especially true for groups with intersectional minority identities (*e.g.*, queer black women, non-binary Latinx people, transgender Asian men)

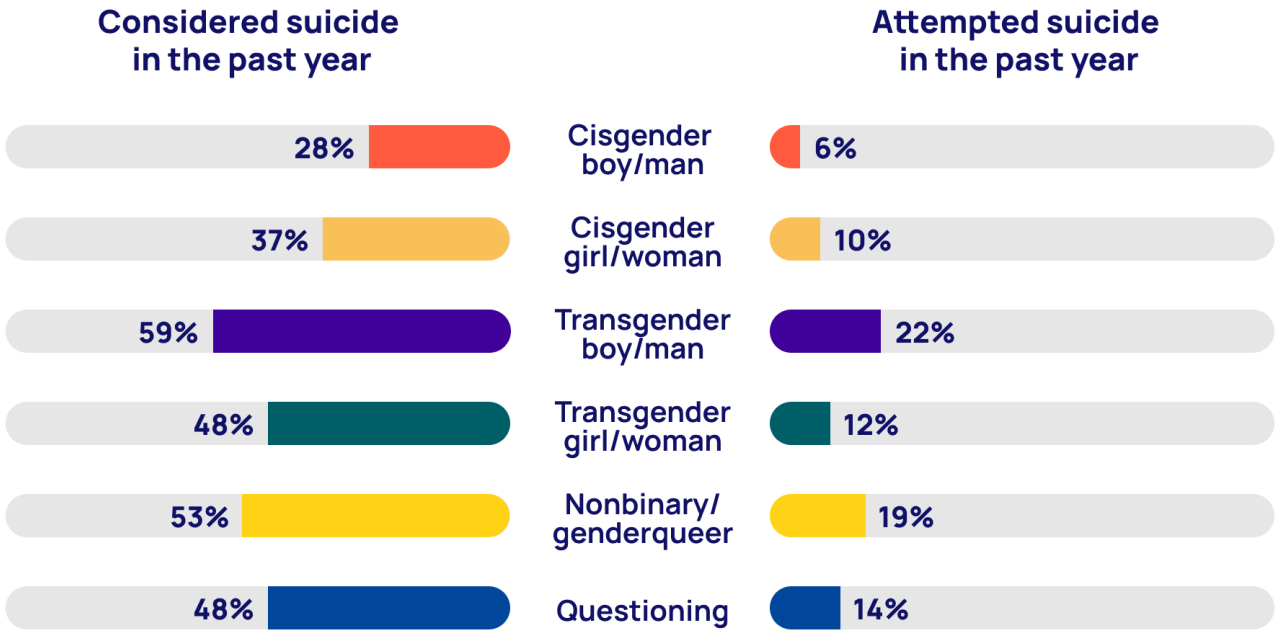
# Mental Health and LGBTQ Communities

- LGBTQ youth, in particular, are significantly more likely to experience mental health challenges.
- The 2022 National Survey on LGBTQ Youth Mental Health by the Trevor Project
  - 73% of LGBTQ youth reported experiencing symptoms of anxiety
  - 58% of LGBTQ youth reported experiencing symptoms of depression
  - 45% of LGBTQ youth seriously considered attempting suicide in the past year.
  - Nearly 1 in 5 transgender and nonbinary youth attempted suicide and LGBTQ youth of color reported higher rates than their white peers.

# Rates of considered and attempted suicide among LGBTQ youth by sexual orientation



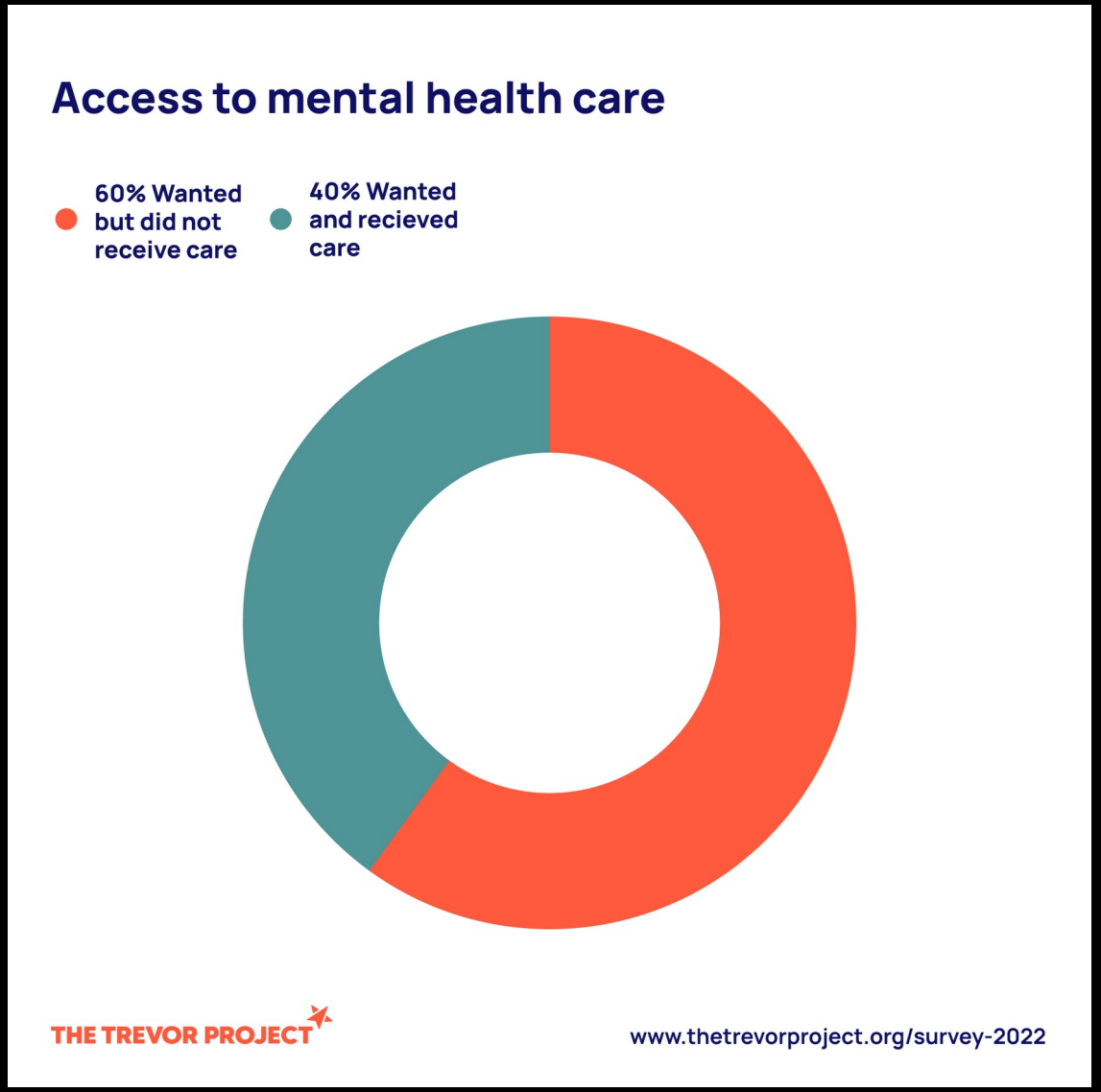
# Rates of considered and attempted suicide among LGBTQ youth by gender identity



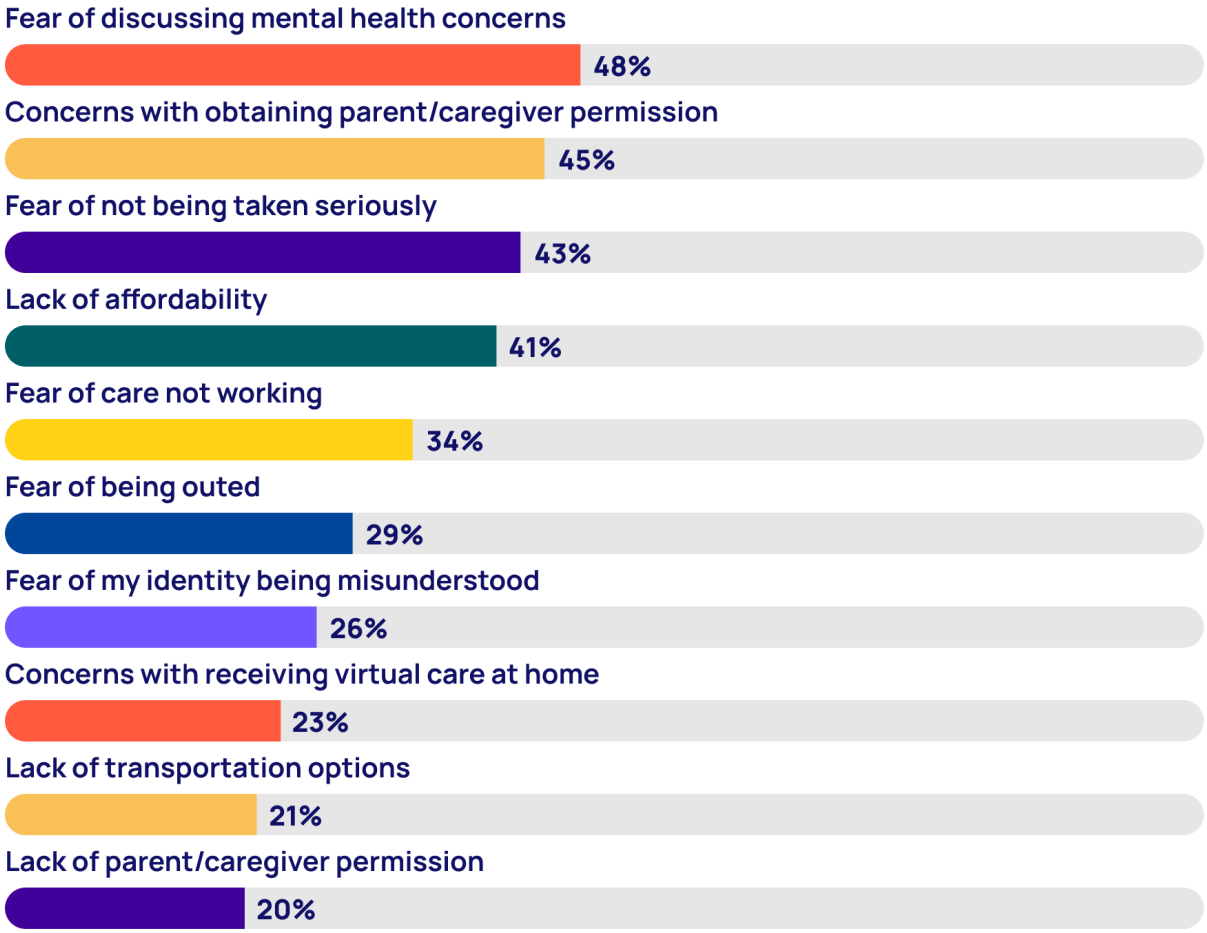

THE TREVOR PROJECT

www.thetrevorproject.org/survey-2022

60% of LGBTQ youth who wanted mental health care in the past year were not able to get it



# LGBTQ youth who wanted mental health care but were unable to get it cited the following top ten reasons




THE TREVOR PROJECT

www.thetrevorproject.org/survey-2022

LGBTQ youth who felt high social support from their family reported attempting suicide at less than half the rate of those who felt low or moderate social support.

https://www.thetrevorproject.org/survey-2022/#key-finding-2

LGBTQ college students with access to mental health services through their college had 84% lower odds of attempting suicide in the past year compared to LGBTQ college students without access.

https://www.thetrevorproject.org/research-briefs/suicide-risk-and-access-to-care-among-lgbtq-college-students-sept-2022/

# What is Mental Health Parity?

A requirement to “treat sicknesses of the mind in the same way that they would a broken bone.”

*L.P. ex rel. J.P. v. BCBSM, Inc.*, No. 18-cv-1241 (MTD/DTS), 2020 WL 981186, at *5 (D. Minn. Jan. 17, 2020).

# What is Mental Health Parity?

- The Parity Act promotes equal access to treatment for mental health and substance use disorders (SUDs) by prohibiting coverage limitations that apply more restrictively to mental health and SUD benefits than for medical/surgical benefits.

- This means that any limitations placed on mental health benefits cannot be less favorable than any equivalent limitations placed on medical/surgical benefits.

# History

The Mental Health Parity Act of 1996

- No annual or lifetime limits on mental health that were less than limits imposed on medical/surgical benefits.
- Pre-Affordable Care Act, so annual and lifetime limits were permitted.
- Did not apply to substance use treatment.

The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008

“MHPAEA”

“The Parity Act

# Affordable Care Act

- Expanded substantive requirements for most health plans.
- Requires coverage of essential health benefits for many plans.
- Requires coverage of preventive health services without cost-sharing.
- Prohibits exclusions based on preexisting conditions.
- Prohibits annual or lifetime limits.

# Where does the Parity Act apply?

- Government Insurance Plans
  - Medicaid and Children's Health Insurance Program ("CHIP") plans
  - *Does not* apply to traditional Medicare or Medicare Advantage plans
  - *Most* government employee plans, including the Federal Employee Health Program and most state and local government employee plans.
  - Self-insured non-federal governmental plans may opt out.

- Non-Government Employer-Sponsored Plans
  - *Applies* to grandfathered plans under the ACA.
  - An exception technically exists for small employers (50 or fewer employees), *but* through the ACA's essential health benefits requirement, the Parity Act functionally applies to small-employer plans.
  - Exception for retiree plans.
  - Exception for special types of plans (*e.g.*, general liability insurance, AD&D, auto, etc.)

# Where does the Parity Act apply?

- State Parity Acts
- Minnesota Parity Act
  - Similar requirements to the federal law.
  - Contains similar exemptions for special plan types (*e.g.*, auto, long-term care insurance, Medicare supplements, workers' compensation)
- California Parity Act
  - Broader than federal law and requires coverage for treatment of all mental health and SUDs listed in the DSM-5

# Types of Treatment Limitations

- Quantitative Treatment Limitations are those that can be expressed numerically
  - *E.g.*, number of visits, days of coverage, frequency of treatment)

- Nonquantitative Treatment Limitations are *any other types of limits*, including processes, strategies, and evidentiary standards.
  - Examples include medical management standards limiting or excluding benefits based on medical necessity or medical appropriateness; formulary design for prescription drugs; standards for provider admission to participate in a network, including reimbursement rates; restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services.

# Measuring Parity

- Parity is an exercise in comparison, so you must compare the mental health or SUD limitation against a medical/surgical analog.
- The Parity Act regulations establish the following “classifications” in which to measure parity:
  - Inpatient, in-network
  - Inpatient, out-of-network
  - Outpatient, in-network
  - Outpatient, out-of-network
  - Emergency Care
  - Prescription Drugs

# Classifying Services

- The insurer is expected to classify services to fit into the 6 categories, and use the same standards for classifying medical/surgical benefits as mental health and substance use benefits.
- Some comparisons are relatively clear.
  - For example, an in-network outpatient mental health therapy visit falls within the "in-network outpatient" classification and would be compared to a medical service in the same classification, such as an outpatient annual check-up with a primary care provider.
- Other comparisons, particularly intermediate levels of care, are more complicated.
  - The Parity Act regulations suggest that for residential mental health treatment, the closest analog is skilled nursing facility care. Thus, the comparison would be between each

# Measuring Parity

- Example 1:
  - A plan reimburses at 75% with a $25 co-pay for an outpatient, in-network office visit with a mental health therapist, but reimburses 100% with a $25 co-pay for an outpatient, in-network office visit with a medical doctor.
  - This is a quantitative treatment limitation in violation of the Parity Act.

- Example 2:
  - A plan requires prior authorization for all outpatient mental health visits after the 9th visit, and will only approve up to 5 additional visits per authorization. For medical outpatient visits, the plan allows an initial visit without prior authorization, and pre-approves benefits based on the individual treatment plan.
  - This non-quantitative treatment limitation violates parity because the limitation (prior authorization to determine medical appropriateness) is not being applied the same way.

# Parity Act Enforcement: Government

- Department of Labor
  - Employee Benefits Security Administration (EBSA) enforces parity for employer-sponsored plans.
- Department of Health and Human Services (HHS)
  - Center for Medicare and Medicaid Services (CMS) enforces parity for government in states that do not have authority to enforce or fail to substantially enforce the Parity Act (in 2021, that was Texas, Missouri, and Wyoming).
  - CMS also has jurisdiction over non-federal governmental health plan sponsors in those and other states.
- Department of the Treasury

# 2022 Parity Act Report to Congress

- The 3 Departments (Labor, Health & Human Services, and Treasury) received a special congressional appropriation and enforcement tool that requires covered plans to provide comparative analyses of non-quantitative treatment limitations to the departments upon request.
- The Consolidated Appropriations Act of 2021 amended the Parity Act to require insurers to "perform and document comparative analyses of the design and application of NQTLs, beginning 45 days after December 27, 2020." 29 U.S.C. § 1185a(a)(8)(A).

# 2022 Parity Act Report to Congress

- EBSA issued 156 letters to plans requesting comparative analyses for 216 NQTLs across 86 investigations.
- CMS issued 15 letters.
- *None* of the comparative analyses received were sufficient upon initial receipt —that is, **100% resulted in an initial determination of non-compliance with the Parity Act.**
- EBSA issued 80 insufficiency letters,
- CMS issued 19 insufficiency letters.
- Enforcement efforts ongoing as of October 31, 2021 (date report was starting to be compiled).

# Common Examples of Noncompliance

- Blanket exclusions
  - All residential mental health treatment for adults is excluded.
  - All residential SUD treatment for adults is excluded.

- Prior authorization requirements without comparable restriction in medical/surgical context
  - Blanket preauth requirements (e.g., preauthorization is required for *all* mental health and SUD services).
  - Requiring prior authorization before admission to a facility for mental health or SUD treatment, or else
  - Requires medical necessity review by its own providers, whereas it defers medical necessity review to attending physician for medical services.

- Fail first protocols
  - Requires a showing that member first try outpatient treatment for SUD before inpatient treatment.
  - Requires that a patient first complete a partial hospitalization (intensive outpatient) treatment program before

# Common Examples of Noncompliance

- Probability of improvement
  - For residential treatment, requires proof of a likelihood of improvement as a result of inpatient treatment.
  - Only covers services that result in measurable and substantial improvement within 90 days.
- Written treatment plans
  - Requires provider to create a written treatment plan prescribed and supervised by a behavioral health provider.
  - Requires individualized treatment plan within 7 days and requires plan review once a week for progress.
  - Requires plan submission on a regular basis.
- Patient non-compliance
  - Excludes services if patient fails to comply with the treatment plan, and/or excluding benefits if patient ends treatment against medical advice.
  - Imposes specific licensure requirements for the mental health or SUD facility, but does not impose the same requirements on the comparable medical surgical facility.

# Examples of Enforcement

- A large service provider was administering claims for hundreds of self-funded plans and excluded applied behavior analysis therapy to treat autism spectrum disorder.
  - The service provider issued notice to over 1,000 plans, with over 500,000 participants.
  - The service provider agreed to stop applying the exclusion.
- A large health plan with 7,600 participants excluded methadone and naltrexone as treatment for SUD conditions—they are essential to treat opioid-use disorders.
- Exclusion for nutritional counseling for all mental health conditions (like anorexia, bulimia, and binge-eating disorder), even though nutritional counselling was permitted for conditions like diabetes.
- Exclusion for urine drug testing related to SUD treatment.

# Private Civil Enforcement

- Parity Act can be enforced against employer-sponsored plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA").
- The Parity Act is incorporated into ERISA, and can therefore be enforced through ERISA's private civil enforcement cause of action.
- A violation of the Parity Act is thus a violation of ERISA, and can (in theory) thus be enforced as one of 3 types of ERISA civil actions:
  - Claims for benefits due (29 USC 1132(a)(1)(B))
  - Claims for breach of fiduciary duty (29 USC 1132(a)(2))
  - Claims for equitable relief (29 USC 1132(a)(3))

# Private Civil Enforcement

- Strict, mandatory administration exhaustion requirements.
  - The beneficiary *must* exhaust the plan's internal appeal mechanism before filing in federal court.
  - Usually, there are at least 2 levels of review, and usually by providers who work for the insurance company.
  - An external review option is required for ACA plans, but not mandatory.

- Remedies limited to benefits owed under the plan.
  - Generally, remedies are limited to the benefits owed under the terms of the plan.

- Terms of the specific plan control

# Private Civil Enforcement

- Standard of review can be *more favorable* in a Parity Act case.
- Typically, claims for benefit denials are reviewed with an abuse of discretion standard and are strictly limited to the administrative record (*i.e.*, the information the insurance company considered during the internal appeals process).
- However, because the Parity Act is a federal statute incorporated into ERISA, a Parity Act violation requires interpretation of federal law, which gets *de novo* review.
- Moreover, because the Parity Act requires a comparison of benefits, often not considered during the internal appeals process, discovery is more likely to be allowed outside of the administrative record.
  - Unless a beneficiary was so unlucky as to have mental health claims denied and claims denied in the analogous medical/surgical context, they could not see the analogous limitations for a comparison without discovery outside the admin. record.

# Specific Coverage Issues

- Gender affirming care
  - *Duncan v. Jack Henry & Assocs., Inc.*, -- F. Supp. 3d ---, 2022 WL 2975072 (W.D. Mo. July 27, 2022).
  - Court denied motion to dismiss where the plan excluded cosmetic surgery as a treatment for gender dysphoria, but did not exclude similar reconstructive surgery after an accident or illness.
- Substance Use Treatment
- Eating Disorder Treatment
  - *Stone v. UnitedHealthcare Ins. Co.*, 979 F.3d 770 (9th Cir. 2020).
  - Court held that geographic limitation on all out-of-state care that applied equally to medical and mental health services was not a violation of the federal Parity Act.

# Thanks for attending!

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