CENTER FOR HEALTH LAW & POLICY INNOVATION
Harvard Law School

HEALTH CARE RIGHTS ENFORCEMENT

UNITED STATES CONFERENCE ON AIDS

SEPTEMBER 15, 2016

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CHLPI's QHP Assessment Project

- CHLPI, along with state partners in 18 states, assessed over 700 silver level QHPs offered in state Marketplaces
- Dual Objectives:
  - To support PLWHIV's ability to make sound plan selection
  - To encourage federal and state enforcement of ACA's non-discrimination law
- Assessments provide specific plan level detail on transparency, coverage and cost related to HIV and HCV treatment
- QHP Assessment findings are summarized in state-specific reports and a nation report (development in progress)
  - **http://www.chlpi.org/plan-assessment/**
- Multi-year effort to monitor and enforce insurance trends

QHP Silver Plan Analysis States and Team Leads

- Alabama (AIDS Alabama)
- California (Project Inform)*
- Florida (The AIDS Institute)*
- Georgia (AIDS Research Consortium of Atlanta)
- Illinois (AIDS Foundation of Chicago)
- Louisiana (CrescentCare)
- Massachusetts (CHLPI)
- Michigan (Unified-HIV Health and Beyond)
- Minnesota (AIDS Project Minnesota)
- Mississippi (Mississippi Center for Justice)
- North Carolina (Health Justice Clinic at Duke University Law School)
- Ohio (AIDS Resource Center Ohio)
- Oregon (Cascade AIDS Project)
- Pennsylvania (AIDS Law Project of Pennsylvania)
- South Carolina (SC AIDS Council)
- Tennessee (Nashville CARES)
- - Wisconsin (AIDS Resource Center of Wisconsin)

* Data Sharing

Wisconsin – Discriminatory Coverage

- In 2016, Anthem Blue Cross Blue Shield failed to cover three-quarters of the sixteen drugs that are a part of the six treatment regimens recommended in the federal governments HIV treatment guidelines

- The level of coverage left five of the six HIV treatment regimens off-limits to enrollees

Georgia – Discriminatory Cost-Sharing

- In 2016, Humana placed 16 out of 22 of the most widely used HIV drugs in highest cost-sharing tier, including every STR
- The effect of this practice is the average enrollee with HIV would spend nearly 20% of their entire monthly income to fill a single HIV prescription
- In comparison, enrollees battling rheumatoid arthritis could maintain their similarly Big Four-priced pharmaceutical regimen for less than 2% of average monthly income

Office for Civil Rights Complaints

- Individuals may bring their own lawsuits or with assistance of legal counsel
- On September 6th, we filed OCR complaints in 8 states (AL, GA, IL, LA, PA, TX, TN and WI) against 14 insurers
- In Round two, we are filing complaints in five states (MI, MN, OH, OR and SC) against at least five insurers
- CHLPI has also participated in a series of informal meetings to align with OCR on legal theories and process for filing OCR complaints

Advocacy Tools: Regulatory Advocacy

- State insurance regulators have frontline oversight of the insurance market
  - Now oversee both the ACA Marketplaces & the traditional health insurance
  - Some states are actively engaged in their ACA responsibilities

- State Department of Insurances (DOIs) must face consumer pressure
  - Few insurance regulators receive complaints from the HIV community documenting discriminatory practices
  - The lack of complaints allows them to ignore

- HHS – OCR

- Appropriate topics for complaints:
  - Transparency issues
  - Changing coverage after the open enrollment period ends
  - Refusing to cover the care and treatment people living with HIV need
  - Requiring unreasonably high cost-sharing for HIV treatment

What We Hope to Accomplish

- There is likely no quick result here, but strategic "litigation" through OCR complaints can:
  - Help shape the regulatory agenda
  - Create favorable case law
- § 1557 complaints can also serve to:
  - Overcome insurance regulator inaction
  - Provide helpful "political cover" to state and federal regulators
- Recent developments in the exchanges make efforts to enforce the health care rights both more difficult and more important

ADVOCACY TOOLS: LITIGATION

- Litigation can be necessary, despite being costly and time consuming
  - State and federal regulators have said that litigation can provide helpful political cover
  - For example, the federal government issued an rule requiring issuers of Marketplace plans to accept premium and cost-sharing payments made by the Ryan White program only after CHLPI filed a lawsuit against Louisiana insurers refusing to accept third party payments

- Litigation can and should happen at the same time as consumer feedback, plan analysis, outreach to insurers, and regulatory advocacy
  - Regulations implementing Section 1557 of the ACA provide consumers with a private right of action

"[A]n individual shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance"

Groups Protected by § 1557 and Relevant Law

§ 1557 prohibits discrimination based on:

Race, color, national origin	• Title VI of the Civil Rights Act
Sex	• Title IX of the Education Amendments
Age	• Age Discrimination Act
Disability	• Section 504 of the Rehabilitation Act (ADA)

§1557 General Anti-Discrimination Protections

- Insurers cannot have a coverage policy that operates in a discriminatory manner
  - In the context of disability must make reasonable modifications in policies, practices, and procedures to avoid discrimination

- For protected classes, health insurance plan design cannot:
  - Deny/cancel/limit/refuse to issue or renew an insurance plan
  - Impose additional cost-sharing or other limitations
  - Have or limit marketing practices or benefit designs to discriminate

- No Blanket Religious Exemption (Existing exemptions and conscious clauses intact)

- Includes an individual right of action

CMS GUIDANCE

- Notices of Benefit and Payment Parameters
  - **Examples of prohibited plan benefit designs**
    - **Exclusion of common STR or extended release regimens**
    - **Placing all or most of the drugs that treat a specific condition on the highest cost tier without regard to cost impact**
    - **Making changes to tiering structure midyear.**
- Outlier reviews
- Largely leaves enforcement to the States.

Disability Standard

- § 1557 incorporates § 504 of the Rehabilitation Act, which applies the ADA definition of disability
  - Under the ADA standard, HIV is a categorical disability, so all covered by § 1557 (as all have one or more major life activities or major bodily function limitation)
  - Other chronic conditions, such as HCV, are not categorically disabled
  - Whether a person with chronic conditions will be considered disabled and covered under § 1557 is determined on a case by case basis
- Disability defined as a physical or mental impairment that substantially limits one or more major life activity or bodily function

Sex Discrimination Standard

- Extends anti-discrimination protections based on sex or gender into health care
- Includes “traditional” protections against treating women differently than men
- Includes protections based on sex stereotyping
  - Defined as stereotypical notions of masculinity or femininity
- Includes protections based on gender identity
  - Defined as an internal sense of gender/non-binary
- Provision encompass transgender individuals and prohibits exclusions on services related to gender transition
- Does not specifically include protections for discrimination based on sexual orientation

MEDICAID COVERAGE OF HCV

- Rationing of treatment in response to drug costs
- CMS Guidance – November 5, 2015
- 42 U.S.C. Sec. 1983 based action to enforce Medicaid Act
  - Provision of "Medical Assistance" – Imports concept of medical necessity.
  - Reasonable Promptness provision
  - Comparability provision
    - Amount, duration and scope must be comparable based on categorical eligibility
    - Is HCV a "condition" or a "disease"?
- *B.E. v. Teeter* – Washington Medicaid class action
- **Dominos**

Q&A

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Get Involved: Twitter Handles:
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