HEALTH CARE RIGHTS ENFORCEMENT

UNITED STATES CONFERENCE ON AIDS
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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)

- 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 6\textsuperscript{th}, 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:
  o Help shape the regulatory agenda
  o Create favorable case law

• § 1557 complaints can also serve to:
  o Overcome insurance regulator inaction
  o 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”
§ 1557 prohibits discrimination based on:

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<thead>
<tr>
<th>Race, color, national origin</th>
<th>• Title VI of the Civil Rights Act</th>
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<td>Sex</td>
<td>• Title IX of the Education Amendments</td>
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<td>Age</td>
<td>• Age Discrimination Act</td>
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<tr>
<td>Disability</td>
<td>• Section 504 of the Rehabilitation Act (ADA)</td>
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§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
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
  o 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)
  o Other chronic conditions, such as HCV, are not categorically disabled
  o 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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