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# MEMORANDUM

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Date: March 29, 2022

To: The Honorable Chair and Members  
Pima County Board of Supervisors

From: Jan Leshel   
Acting County Administrator

**Re: Opt-Out Elections for Self-Funded, Non-Federal Government Plans – Update**

Recently, there have been questions arising from Pima County's decision to opt-out of coverage and oversight for health care services covered under rules within the Mental Health Parity and Addiction Equity Act (MHPAEA), the Health Insurance Portability and Accountability Act (HIPAA), and the Affordable Care Act (ACA). As a self-funded, non-Federal government employer, Pima County has the right to opt-out of these provisions and has done so since its 2014, establishment of the Pima County Self-Funded Healthcare Plan and the Health Benefits Trust (HBT).

The current discussion surrounding these opt-out decisions came as a result of correspondence from Mental Health America representatives and the Kennedy Forum related to benefits provided by our Plan per MHPAEA. In addition to opting-out of the requirements under MHPAEA, Pima County additionally opted-out of oversight regarding and the requirements of providing benefits under HIPAA and ACA for the following areas:

- Reconstructive surgery following mastectomies;
- Dependent students on medically necessary leave of absence; and,
- Benefits for mothers and newborns.

As noted in previous communications with the Board, Pima County chose to opt-out of the oversight regarding the provision of benefits under MHPAEA, HIPAA and ACA, as permitted by the Centers for Medicare & Medicaid Services (CMS). Each year Pima County filed the required letters with CMS in order to continue this practice. Opting-out gave Pima County flexibility with regard to the benefits offered under our Plan and did not unduly subject Pima County to oversight or challenges to benefits provided under our Plan.

After review of this matter, it appears that the decision to continue to opt-out of these requirements is purely a Pima County staff administrative decision and not one under the authority of the HBT Board. As a result, Pima County will no longer opt-out of coverage and oversight of health care services outlined above and covered under MHPAEA, HIPAA, and ACA, and will not file opt-out letters with CMS going forward (July 1, 2022).

The Honorable Chair and Members, Pima County Board of Supervisors  
Re: **Opt-Out Elections for Self-Funded, Non-Federal Government Plans – Update**  
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It is important to note that while Pima County has decided to discontinue formally opting-out of these requirements, this will result in **no material change to benefits currently provided under Pima County’s health insurance program.** Pima County’s Plan at all times remained fully compliant with the MHPAEA, HIPAA and ACA requirements and provided these required essential benefits to our employees and families. Likewise, both the HBT Board and the Plan Administrator actively ensured that the Plan provided equitable coverage in a manner consistent with those rules.

#### Attachments

- c: Carmine DeBonis, Jr., Deputy County Administrator for Public Works  
Francisco García, MD, MPH, Deputy County Administrator & Chief Medical Officer,  
Health and Community Services  
Cathy Bohland, Director, Pima County Human Resources



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# MEMORANDUM

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Date: January 18, 2022

To: The Honorable Chair and Members  
Pima County Board of Supervisors

From: Jan Leshner   
Acting County Administrator

Re: **Provision of Benefits to Pima County Employees as Defined under the Affordable Care Act**

Late last year questions were raised about the provision of several benefits to Pima County employees, noting that the Pima County Health Benefits Trust Board had elected to opt-out of coverage of these services under the Affordable Care Act (ACA).

There are four areas of benefits for which the Health Benefits Trust Board chose to provide coverage through other than the ACA. These are:

- Mental health benefits;
- Reconstructive surgery following mastectomies;
- Dependent students on medically necessary leave of absence; and
- Benefits for mothers and newborns.

Pima County deems these services essential to the health and well-being of our employees and their families and has always provided and will continue to provide these benefits on par with, or in excess of, the ACA required level.

The decision by the Health Benefits Trust Board to opt-out of the provision by the ACA, while still providing the benefits required under the regulation, removes Pima County from the burden of federal oversight, audits and reporting requirements.

Attached is a Memorandum from Human Resources Director Cathy Bohland, which explains the history and rationale of the decision made by the Health Benefits Trust Board. Ms. Bohland's Memorandum notes that the Health Benefits Trust Board affirms that all Pima County employees will have access to all essential health care benefits as defined under the ACA and that the decision to opt-out was not made with an intent to exclude to diminish the benefits being offered to employees and their dependents.

JKL/mp

## Attachments

c: Carmine DeBonis, Jr., Deputy County Administrator for Public Works  
Francisco García, MD, MPH, Deputy County Administrator & Chief Medical Officer,  
Health and Community Services  
Cathy Bohland, Director, Human Resources Department  
Health Benefits Trust Board

Date: December 29, 2021

To: Jan Leshner  
Acting County Administrator

From: Cathy Bohland, Director <sup>CB</sup>  
Human Resources

**Re: Opt-Out Elections for Self-Funded Non-Federal Governmental Plans – Informational Only**

This memorandum provides information concerning inquiries made by Arizona agencies to Board of Supervisor members concerning Pima County’s Health Benefit Trust opting-out of four of the Affordable Care Act’s (ACA) Essential Health Benefits (EHB) requirements. Those four areas include:

- Parity in the application of certain limits to mental health benefits;
- Required coverage for reconstructive surgery following mastectomies;
- Coverage of dependent students on medically necessary leave of absence; and,
- Standards relating to benefits for mothers and newborns.

As noted below, although Pima County has opted-out of these requirements, our health plan has always provided and will continue to provide these benefits on par with, or in excess of, the ACA required level, as we deem these services essential to the health and well-being of our plan members.

**Background History**

In October, Mental Health America of Arizona (MHA AZ) notified Board of Supervisor for District 2, via letter, that Pima County had opted out of federally mandated Mental Health Parity and Addiction Equity Act (MHPAEA) benefits. In December, Children’s Action Alliance reached out to Board of Supervisor for District 3, via letter, notifying that not only had Pima County opted out of MHPAEA, but also opted out of a total of four EHB requirements, all which are identified above in the bulleted items.

The October MHA AZ letter states and asserts in part:

**.....opting out of MHPAEA, Pima County is making a very public statement that its decision-makers do not believe that Pima County employees and their families deserve the same level of care for their mental health as their physical health and that the regulatory burden of being held accountable to treat mental health as equally important as physical health is too high.**

MHA AZ expressed its “dismay” with Pima County’s decision and urged immediate reversal of the decision to opt-out of MHPAEA’s requirements, indicating that Congress “should ultimately be held accountable for allowing this enormous loophole to exist.” In its December email, Children’s Action Alliance Southern Arizona Director stated that it had identified twelve other local Arizona jurisdictions who have also chosen to opt-out of one or more EHB requirements.

**What is the MHPAEA?**

The Mental Health Parity and Addiction Act requires health plans cover services for mental health and substance use and services for medical and surgical problems comparably; it prevents group health plans that provide mental health or substance use disorder (MH/SUD) benefits from imposing less favorable

benefit limitations on those benefits than on medical/surgical benefits. Some examples include:<sup>1</sup>

- If a health plan covers in-network inpatient stays for patients recovering from surgery, it must also cover in-network inpatient treatment for MH/SUD.
- Treatment limitations (e.g. visit limits) cannot be more restrictive for MH/SUD benefits than for “substantially all” physical health benefits.
- Authorization of treatment, treatment frequency and medical necessity determinations must be comparable;
- Copayments, coinsurance, deductibles and out-of-pocket costs for MH/SUD benefits are subject to a formula so that the costs for these services are not higher than copayments for two-thirds of all physical health benefits in the same classification.

### **Decision to Opt-Out**

The original decision by Pima County to opt-out of this provision, while still providing the benefits required under the regulation, was made in order to give Pima County future flexibility in decisions related to these benefits, which may prove to be financially constraining to the Health Benefits Trust or place an undue burden on Pima County staff, administrators or vendors with federal oversight/audits and reporting requirements as stated in the regulations.

The main provisions which have been alluded to and stated by other organizations facing the same decision are:

- Potential audit requirement placed upon plan by Department of Health and Human Services regarding plan compliance with providing benefits under the regulation
- Potential liability placed upon plan by legal challenges to adverse benefit decisions or assuring compliance with the MHPAEA and other regulations

**It is important to note that Pima County’s health plan has always covered Mental Health and Addiction recovery services on par with, or in excess of, the Mental Health Parity Act and MHPAEA requirements.**

### **Requirements for Opting-Out**

Pima County is permitted as a self-funded, non-federal public sector employer plan, to opt-out of the MHPAEA provision and other healthcare-related service provisions as well. In opting-out, Pima County is required to file an annual letter with Centers for Medicare & Medicaid Services (CMS) stating their desire to opt-out of the regulation and its reporting requirements. Furthermore, and in accordance with requirements associated with the opt-out provision, each eligible employee of Pima County receives an annual letter from Pima County stating that Pima County has elected to opt out of the MHPAEA benefit requirement.

Pima County initially opted out of the MHPAEA provision in 2014, which was the same time that Pima County converted from a fully-insured health plan to a self-funded health plan; this was done prior to the formation of the Health Benefits Trust Board. Since 2014, Pima County has complied with the filing of the annual opt out notice letter to CMS and has complied with the required distribution of individual

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<sup>1</sup> American Psychological Association, *What Do Employers Need to Know About Parity?*, May 5, 2021, [What do employers need to know about parity? \(apa.org\)](https://www.apa.org/press-releases/2021/05/05/parity)

opt out notifications to its approximately 5,000 employees enrolled on the medical plan. Additionally, Pima County has included a notice in the letter that the benefits required under MHPAEA are in fact, provided under Pima County's health plan. These benefits are included and outlined in Pima County's health plan document and administered accordingly by Aetna, Pima County's health plan administrator and plan fiduciary.

### **Opt-Outs for Other Benefits and Pima County's Compliance**

After further research by outside community groups, it was noted in a CMS report of public employers opting out of MHPAEA compliance that Pima County also opts-out of three (3) other provisions of healthcare services provided under the plan and allowed by the ACA regulations. These include:

- Reconstruction benefits after mastectomies
- Coverage for students on leave of absence from education
- Coverage for mothers and newborn

The stated goal of this community group is to ask Pima County to "NOT" continue to formally opt-out. It must be noted that if we decided to not formally opt-out in the future, there would be no material change to the benefits offered under Pima County's health insurance program, as Pima County's plan is already in full compliance.

### **Pima County's Plan Offers Essential Health Benefits as Follows:**

#### ***○ Reconstructive Breast Surgery – As Provided in Pima County's Plan Document***

- Covered expenses include reconstruction of the breast on which a mastectomy was performed, including an implant and areolar reconstruction. Also included is surgery on a healthy breast to make it symmetrical with the reconstructed breast and physical therapy to treat complications of mastectomy, including lymphedema.
- Important Notice.
- A benefit maximum may apply to reconstructive or cosmetic surgery services.

#### ***○ Coverage for Dependent Children (regardless of student status)***

- To be eligible for coverage, a dependent child must be under 26 years of age;
- An eligible dependent child includes: your biological children; your stepchildren; your legally adopted children; your foster children, including any children placed with you for adoption; and any children for whom you are responsible under court order; and,
- Coverage for a child with a disability may be continued past the age limits shown above. See Dependent Children with Disabilities for more information.

#### ***○ Coverage for mothers and newborns***

Standard Maternity is covered and does not exclude anything different. Aetna Maternity program is also being used as a benchmark to cover all those services as well.

○ *Newborns' and Mothers' Health Protection Act – As Stated in Pima County Plan Document (NMHPA)*

- Under federal law, group health plans and health insurance issuers offering group health insurance coverage generally may not restrict benefits for any hospital length of stay in connection with childbirth for the mother or newborn child to less than 48 hours following a vaginal delivery, or less than 96 hours following a delivery by cesarean section.
- However, the Plan or issuer may pay for a shorter stay if the attending provider (e.g., your physician, nurse midwife, or physician assistant), after consultation with the mother, discharges the mother or newborn earlier.
- Also, under federal law, plans and issuers may not set the level of benefits or out-of-pocket costs so that any later portion of the 48-hour (or 96-hour) stay is treated in a manner less favorable to the mother or newborn than any earlier portion of the stay.
- Additionally, a plan or issuer may not, under federal law, require that a physician or other health care provider obtain authorization for prescribing a length of stay of up to 48 hours (or 96 hours). However, to use certain providers or facilities, or to reduce your out-of-pocket costs, you may be required to obtain precertification.

**Conclusion**

As stated previously, Pima County made the decision to opt-out in preparation for the conversion to a self-funded health plan and to be free of the burden of the reporting requirements and potential costly federal audits. The decision was made with the intention of providing Pima County with administrative and financial flexibility when it came to providing these benefits to employees and dependents **and not with an intent to exclude or diminish the benefits being offered to employees and their dependents.**

Pima County is in agreement with MHA AZ and the Children's Action Alliance, in that our employees and their families deserve the same level of care for mental health as their physical health and that we must ensure that children's behavioral health programs, services, and insurance coverage are easily available. To this end, Pima County assures that its employees have access to all essential health care benefits as defined under the ACA that fall under our health plan and we will continue to provide this level of benefits for our plan members.

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February 8, 2022

The Honorable Sharon Bronson  
Chair, District 3  
Pima County Board of Supervisors  
33 N. Stone Ave., 11<sup>th</sup> Floor  
Tucson, AZ 85701

The Honorable Adelita Grijalva  
Vice Chair, District 5  
Pima County Board of Supervisors  
33 N. Stone Ave., 11<sup>th</sup> Floor  
Tucson, AZ 85701

The Honorable Rex Scott  
Supervisor, District 1  
Pima County Board of Supervisors  
33 N. Stone Ave., 11<sup>th</sup> Floor  
Tucson, AZ 85701

The Honorable Matt Heinz  
Supervisor, District 2  
Pima County Board of Supervisors  
33 N. Stone Ave., 11<sup>th</sup> Floor  
Tucson, AZ 85701

The Honorable Steve Christy  
Supervisor, District 4  
Pima County Board of Supervisors  
33 N. Stone Ave., 11<sup>th</sup> Floor  
Tucson, AZ 85701

**Re: Pima County's Opt Out of Federal Mental Health and Addiction Parity Requirements**

Dear Chair Bronson, Vice Chair Grijalva, and Supervisors Scott, Heinz, and Christy,

As national organizations dedicated to improving the lives of individuals with mental health and substance use disorders (MH/SUDs), we write to you about Pima County's regrettable decision to opt out of the requirements of the federal Mental Health Parity and Addiction Equity Act (Federal Parity Act), the landmark antidiscrimination law that requires equal coverage for these conditions.<sup>1</sup>

We have recently been made aware of a memorandum provided to the Pima County Board of Supervisors that makes claims about the supposed limited effect of Pima County's parity opt out. For the reasons described below, we strongly believe this memorandum's conclusions about the limited effect of the opt out are incorrect and urge you to end Pima County's opt out.

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<sup>1</sup> For a recent federal opt-out list, see: <https://www.cms.gov/files/document/hipaa-opt-outs.pdf>. Pima County is among an even smaller minority of plans in opting out of three other federal coverage requirements relating to mothers and newborns, reconstructive breast surgery after mastectomies, and dependent students on medically necessary leave of absences.

- **Plan Enrollees Have Been Stripped of Their Rights to Equal Coverage.** The memo makes it seem as if opting out of federal parity requirements has little impact on plan enrollees. This is untrue. Regardless of the provisions of Pima County’s plan policy, *individuals enrolled in Pima County’s plan have absolutely no rights under the Federal Parity Act.* If they believe that their coverage has been limited in a manner that would violate the Federal Parity Act, they have no ability to redress this injury. *Pima County has stripped its covered employees and family members of their federal rights under the most important anti-discrimination law governing mental health and addiction coverage.*
- **Memo Inadequately Covers Key Parity Act Provisions.** The memo does not fully describe the Federal Parity Act requirements. Of critical importance are the Federal Parity Act’s requirements for non-quantitative treatment limitations (NQTLs), which are non-numerical limits on the scope or direction of benefits for treatment (e.g. prior authorization and network admission standards). For each NQTL in each classification of care (e.g. in-network inpatient), the Federal Parity Act requires that any processes, strategies, evidentiary standards, or other factors used in applying the NQTL to mental health or substance use disorder benefits *must be comparable to, and no more stringently applied than,* those applied to medical/surgical benefits both *as written and in operation.*
- **Most Discriminatory Plan Elements Not Found in Plan Policy.** The memo emphasizes that *“Pima County’s health plan has always covered Mental Health and Addiction recovery services on par with, or in excess of, the Mental Health Parity Act and MHPAEA requirements”* (emphasis original). We believe that such a description represents a fundamental misunderstanding of the Federal Parity Act’s requirements, particularly with respect to NQTLs. *It is impossible to determine parity compliance simply by looking at a plan’s covered benefits that are contained in the plan’s coverage documents.* This is particularly true for determining compliance with regard to how an NQTL is applied in operation by the third-party administrator for a self-funded plan like Pima County’s.
- **Most Mental Health and Addiction Coverage Problems Are with Non-Quantitative Treatment Limitations.** The most profound and consequential barriers to mental health and addiction coverage occur in plans’ NQTLs (i.e. their managed care practices). *While the covered MH/SUD benefits in a plan policy may look superficially compliant, deep inequities often exist in how benefits are administered in operation.* *Pima County’s opt out from parity requirements removes any mechanism to determine whether its plan is ultimately providing equitable coverage in a manner consistent with the Federal Parity Act.*
- **Enrollees and Their Families Bear Burden of Being Stripped of Parity Rights.** Our organizations regularly help individuals and families who have been wrongly denied coverage due to discriminatory NQTLs, despite the services they seek being “covered benefits” under their plan. Using the Federal Parity Act to challenge these wrongful denials is frequently their only recourse to ensure coverage of lifesaving treatment for themselves or a family member. In such situations, *Pima County has taken away any*

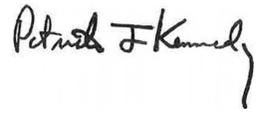
**possibility of challenging parity violations.** It is particularly disheartening that the memo, in an attempt to justify denying Pima County employees and their family members these important rights, cites “administrative and financial flexibility” and the desire “to be free of the burden of the reporting requirements and potentially costly federal audits.” In contrast, individuals denied needed mental health and addiction services due to non-compliant NQTLs, which are very common in plans nationwide, will likely bear significant health and financial burdens that often run into the tens of thousands of dollars. Given the high mortality rates for these illnesses, being unable to afford treatment can have devastating consequences.

- **Accountability Is Critical for Any Antidiscrimination Law.** Essentially, by opting out of federal parity requirements, Pima County wants to be free from regulatory oversight or giving plan enrollees the ability to challenge denials on the basis of parity. We cannot agree with the proposition that it is appropriate for a government entity to claim that, while it does not discriminate, it needs to opt into the right to discriminate. We can think of no other antidiscrimination law where such a position would be acceptable. It is also noteworthy that the overwhelming majority of self-funded non-federal government plans nationwide have not followed Pima County’s path in opting out. Thousands of other plans across the country have willingly accepted the “burden” of complying with federal parity requirements in order to improve mental health and addiction coverage for their employees and their families. **Indeed, many of these plans welcome additional oversight of third-party administrators to ensure that they are upholding plan members’ rights under the Federal Parity Act.**
- **First Responders and Public Workers Have Been Hard Hit by the Pandemic.** While the pandemic has harmed the mental health of communities nationwide, the effects on first responders and other public workers have been particularly dramatic. There have been large increases in stress, trauma, grief, and substance use, with corresponding increases in demand for mental health and substance use services. Pima County employees include nurses, public health professionals, and law enforcement personnel – all of whom have been particularly impacted. Additionally, youth mental health needs have recently skyrocketed, potentially affecting significant proportions of Pima County staff. **To allow potential parity violations to go unchecked and to remove the ability of employees and their families to challenge denials** on the basis of parity does not do justice to the sacrifices public employees have made during the pandemic.

We would like to take Pima County at its word that it does not “intend to exclude or diminish the benefits being offered to employees or their dependents.” To turn this intention into a reality, Pima County should end its opt out to restore parity rights to its employees and their family members.

Thank you for your attention to this matter. If you have any questions, please contact David Lloyd, senior policy advisor at The Kennedy Forum, at [david@thekennedyforum.org](mailto:david@thekennedyforum.org).

Sincerely,

Handwritten signature of Patrick J. Kennedy in black ink.

Patrick J. Kennedy  
Former U.S. Representative (D-RI)  
Founder, The Kennedy Forum

Handwritten signature of Schroeder Stribling in black ink.

Schroeder Stribling  
President and CEO  
Mental Health America