**[SAMPLE Parity Complaint Letter FAIL FIRST]**

[date]

[address]

[member number if applicable]

Ms. Mary Kwei, Chief, Complaints, Appeals and Grievances Division

Maryland Insurance Administration

2700 St. Paul St., Suite 2700

Baltimore, MD 21202

Ms. Kwei,

I am writing regarding **[insert insurer/plan name]** fail first requirement for certain behavioral health services (BHS). This letter serves to raise concerns of whether the fail first requirement embedded in the medical necessity criteria for **[insert service]** is in compliance with the Final Regulations established pursuant to the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act (MHPAEA) of 2008.

**[Insert paragraph describing the issue]**

While MHPAEA does not prohibit the use of utilization review nor the use of fail first requirements it does require that they be comparable to and no more stringent than what is applied to medical/surgical care. We are unaware of comparable requirements for this level of services for medical/surgical conditions.

The utilization review requirementis a nonquantitative treatment limitation (NQTL) as defined in the final regulations. If the fail first or step-therapy requirements for **[insert services]** are not applied to similar levels of medical/surgical care in the same manner,then the above-described medical management protocol for BHS is a more stringent and non comparable application of an (NQTL) as defined by the Parity regulations (45 CFR 146.136c(4)) and is therefore noncompliant with MHPAEA. The rule governing NQTLs is as follows:

(4) *Nonquantitative treatment limitations –* (i) *General rule.* A group health plan (or health insurance coverage) may not impose a nonquantitative treatment limitation with respect to mental health or substance use disorder benefits in any classification unless, under the terms of the plan (or health insurance coverage) as written and in operation, any processes, strategies, evidentiary standards, or other factors used in applying the nonquantitative treatment limitation to mental health or substance use disorder benefits in the classification are **comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards,** or other factors used in applying the limitation with respect to medical surgical/benefits in the classification, except to the extent that recognized clinically appropriate standards of care may permit a difference.

**[Insert insurer]** has a fail first requirement for **[insert services].**We are unable to determine whether insurer employs a similar fail first requirement for similar levels of medical/surgical care; if so, how this requirement is applied; and what if any processes, strategies, factors, or evidentiary standards were used to develop and apply this fail first requirement as we do not have access to the medical necessity criteria for medical/surgical care. The use and application of this fail first requirement may be in violation of the regulation’s “comparable and no more stringently” standard and the “no separate treatment” limitation.

The regulations state clearly that any “processes, strategies, evidentiary standards, or other factors” used in applying a NQTL to BHS benefits in a classification must be “comparable to” and be applied “no more stringently” than the processes, evidentiary standards, or other factors used in applying the limitation with respect to medical/surgical benefits. Given the aforementioned concerns, we have a number of questions and requests regarding whether this policy comports with the parity requirements. We request that MIA require **[insert carrier]** to provide documentation and required analysis to respond to the following questions:

1. ***Which covered health plan services for medical/surgical conditions have similar fail first requirements?***
2. ***What are the processes, strategies and evidentiary factors used to determine when and how to apply fail first requirements to behavioral health services?***
3. ***What are the processes, strategies and evidentiary factors used to determine when and how to apply fail first requirements for similar medical/surgical services?***

The Parity Statute clearly outlines the legal obligation regarding the medical necessity criteria disclosure requirements:

42 CFR 146.136(d)(1) Availability of plan information - (1) Criteria for medical necessity determinations. The criteria for medical necessity determinations made under a group health plan with respect to mental health or substance use disorder benefits (or health insurance coverage offered in connection with the plan with respect to such benefits) must be made available by the plan administrator (or the health insurance issuer offering such coverage) to any current or potential participant, beneficiary, or contracting provider upon request.

Also ERISA regulations 29 CFR 2520.104b-1 outlines the legal obligation regarding the disclosure of plan documents. The Department of Labor issued guidance in December 2010 stating plan documents includes the medical necessity criteria for both medical/surgical benefits and mental health/substance use disorder benefits.

Finally, the Department of Labor has recently released a list of “red flags” or warning signs of nonquantitative treatment limitations that warrant further investigation to determine whether their application to a particular benefit is in compliance with the federal parity law. You will note that fail first requirements are on the list, which can be obtained at this link. <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/mental-health-parity/warning-signs-plan-or-policy-nqtls-that-require-additional-analysis-to-determine-mhpaea-compliance.pdf>

Thank you for your time in investigating this matter.