SB1523: Public Employee Mental Health Parity and Autism Coverage

Key Elements of Legislation

- Does not impact commercial insurance
- Requires self-insured employee health benefit plans offered by PEBB, OEBB and OHSU to comply with:
  - Oregon's Mental Health Parity act (ORS 743A.168)
  - Children with Pervasive Developmental Disorders (ORS 743A.190)
  - Autism Health Insurance Reform (SB365 (2013))

Background

- The Insurance Commissioner has advised that self-insured employee health benefit plans offered by PEBB, OEBB, and OHSU are completely exempt from the insurance code – including all coverage requirements that apply to commercial health insurance plans
- SB365 (2013) – Autism Health Insurance Reform – was intended to apply to PEBB and OEBB
  - The fiscal impact statement was based primarily on the applicability to self-insured PEBB and OEBB plans – which are apparently exempt
- PEBB's 2013 and 2014 Member Handbooks voluntarily opt-in to compliance with Mental Health Parity – but in previous years they did not, and the Plan Administrator (Providence) has cited PEBB's exemption in justifying denials of mental health coverage
  - Despite opting in to Mental Health Parity, PEBB's self-insured plans have exclusions that conflict, creating confusion over whether Mental Health Parity or the conflicting exclusions take precedence
- OHSU's health benefit plan excludes coverage of Applied Behavior Analysis – the leading mental health treatment for autism – "even if otherwise medically necessary, if they relate to a condition that is otherwise covered by the Plan, or if recommended, referred, or provided by an in-network provider" – which would violate Mental Health Parity

Why Act Now?

- Clarify SB365 (2013) to ensure that it applies to self-insured PEBB and OEBB plans as originally intended
- Extend Mental Health Parity (ORS 743A.168) coverage to public employees

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Contents:

- E-Mail from Oregon Insurance Commissioner Laura Cali to Paul Terdal regarding PEBB, OHSU exemption from Oregon Insurance Code, Mental Health Parity
- PEBB Member Handbook, 2012
  - Mental Health section *without* clause opting in to Mental Health Parity
  - Developmental Disabilities exclusion
- PEBB Member Handbook, 2014
  - Mental Health section *with* new clause opting in to Mental Health Parity
- PEBB Denial letter, "Because ABA services are related to autism spectrum disorder, they are therefore not covered by the plan."
- IRO decision overturning PEBB finding that ABA is "investigational," December 2013
- OHSU Member Handbook, 2013, Applied Behavior Analysis is "even if otherwise medically necessary, if they relate to a condition that is otherwise covered by the Plan, or if recommended, referred, or provided by an in-network provider"
- Letters from OHSU faculty in support of ABA treatment, presented to Employee Benefits Council
- OHSU Employee Benefits Council Minutes
  - March, 2013: "Healthcare reform and mental health parity present challenges to limiting plan costs/exposure"
  - September, 2013: "OHSU will consider follow state guidelines beginning in 2015. Some concern that the programs offered through OHSU are not currently a covered benefit under the plan which may result in negative publicity. OHSU will monitor developments and continue discussion…."
- Amicus Curiae brief by Disability Rights Oregon on Providence's Developmental Disabilities exclusion:
  - "Should this Court rule that Providence can avoid coverage for ABA, a medically necessary service for children with autism, despite state and federal laws requiring parity in the provision of coverage for mental disabilities, the implications would devastating for all with mental health conditions – not just for children with autism. The same reasoning as that used by Providence to avoid its obligations under state and federal law to provide ABA to children with autism on the same basis as medically necessary services to those with other medical conditions would be used to deny medically necessary services for people with other mental illnesses in the community. The availability of individual therapy, or group therapy, or drug therapies could be arbitrarily limited, and highly effective treatments such as DBT would be routinely denied. As a result, people with mental illnesses throughout would continue to suffer unnecessarily because of the unavailability of medically sound, proven therapies."

Appendix: Outline of Oregon Mental Health Parity / Autism Legislation

- Provided in a separate file

Paul Terdal

From: Cali Laura N <laura.n.cali@state.or.us>
Sent: Thursday, October 31, 2013 10:05 PM
To: 'Paul Terdal'
Cc: Leslie Berri L; P. Shane Jackson; Patton Joyce E
Subject: RE: Tomorrows Meeting

Hi Paul,

Our team has looked into your questions about PEBB and OHSU, which are a bit involved and required some research. Below, we restate the questions you posed and our general responses based on the information we have at this time:

- **I'd be interested in any information you can provide regarding your regulatory oversight of the PEBB self-funded plan (through Providence), and OHSU's self-funded plan (through MODA). Both are government agencies, and thus exempt from ERISA.**
  In general, the division does not regulate employer sponsored self-insured health benefit plans; these plans are typically regulated by the Department of Labor and subject to the Employee Retirement Income Security Act (ERISA). As you note, however, ERISA does not cover plans established or maintained by governmental entities, church employees, or plans maintained solely to comply with applicable workers' compensation, unemployment or disability laws.

  ORS 243.145 specifically authorizes PEBB to self-insure. This statute is outside of the Insurance Code and does not specify that PEBB is subject to any requirement of the Insurance Code. Fully funded self-insured employer sponsored health benefit plans are not considered to be "transacting insurance" but providing a benefit plan for employees. As a general rule, self-insured government plans are not subject to ERISA requirements, but are subject to state requirements because they cannot claim the preemption that applies to most self-insured plans.

- **Are PEBB and OHSU's employee benefit plans required to comply with ORS 743A.168 and ORS 743A.190 (insurance mandates for health benefit plans)?**
  PEBB is not required to comply with ORS 743A.168 and ORS 743A.190 because it is exempt from the Insurance Code. However, the PEBB benefit handbook for 2013, states: "This plan complies with Oregon and Federal Mental Health Parity". This requirement is part of their contract and not part of our statutes or federal law, but contractually PEBB would be subject to mental health parity laws both Oregon and Federal.

  OHSU is a state owned public corporation managed by a Board of Directors similar to PEBB. Each qualified employee receives a set amount of dollars that they may use to pay for one of three plans, a Preferred Provider Organization (PPO) or one of two, Preferred Provider Plans (PPP). These plans are administered by Moda Health Plans. The OHSU plans are also self-funded by OHSU with Moda acting as the TPA. OHSU would also be subject to federal mental health parity laws.

- **Are they required to file their plans with the Insurance Division for approval?**
  Neither, PEBB nor OHSU is required to file their plans with the division for approval.

- **What is the Insurance Division's role in addressing consumer complaints with those plans?**
  The division handles complaints from PEBB members, even though we have no regulatory authority over PEBB. PEBB has agreed to respond to complaints submitted to them through the division's consumer advocacy unit. This service is provided by consumer advocates and PEBB as a courtesy to their members and not required

by any statute or rule. Similarly, the division addresses complaints received from OHSU plan members by working with Moda to resolve questions and issues.

We hope you find this helpful.

Thanks,
Laura

Phone: 503.947.7200 | Fax: 503.378.4351 | E-mail: laura.n.cali@state.or.us

Statewide Plan Member Handbook

Group #108601

Benefits Effective January 1, 2012

Administered by-
Providence Health Plan
P.O. Box 3125
Portland, Oregon 97208-3125
Telephone: (503) 574-7500
(800) 878-4445
TTY (503) 574-8702
TTY (888) 244-6642

unlike 2015/2014, older 2012 plan didn't opt in to Mental Health Parity

5.4 MENTAL HEALTH AND CHEMICAL DEPENDENCY SERVICES

5.4.1 Mental Health Services

Benefits are provided for Mental Health Services at the same level as and subject to limitations no more restrictive than those imposed on coverage or reimbursement for Medically Necessary treatment for other medical conditions.

Covered Services include diagnostic evaluation, individual and group therapy, inpatient hospitalization as stated in section 5.3, and residential and day or partial hospitalization Services.

All inpatient, residential and day or partial hospitalization treatment Services must be Prior Authorized as specified in section 4.4. Contact Providence Health Plan's Mental Health Services Authorized Agent to arrange Prior Authorization (see section 1).

In an emergency situation, go directly to a Hospital emergency room. You do not need Prior Authorization for emergency treatment; however, Providence Health Plan must be notified within 48 hours following the onset of treatment, or as soon as reasonably possible, for coverage to continue.

5.4.2 Chemical Dependency Services

Benefits are provided for Chemical Dependency Services at the same level as and subject to limitations no more restrictive than those imposed on coverage or reimbursement for Medically Necessary treatment for other medical conditions.

Covered Services include diagnostic evaluation, detoxification, individual and group therapy, inpatient hospitalization as stated in section 5.3, and residential and day or partial hospitalization Services. Residential Services are limited to 180 days per calendar year.

All Chemical Dependency Services must:

- Meet the American Society of Addiction Medicine Placement Guidelines for Substance Related Disorders (ASAM) criteria; and
- For all inpatient, residential and day or partial hospitalization treatment Services, be Prior Authorized as specified in section 4.4. Contact Providence Health Plan's Chemical Dependency Services Authorized Agent to arrange Prior Authorization (see section 1).

Treatments involving the use of Methadone are a Covered Service only when such treatment is part of a medically supervised treatment program that has been Prior Authorized.

In an emergency situation, go directly to a Hospital emergency room. You do not need Prior Authorization for emergency treatment; however, Providence Health Plan must be notified within 48 hours following the onset of treatment, or as soon as reasonably possible, for coverage to continue.

Exclusions that apply to Mental Health and Chemical Dependency Services:

- Conditions that are specified as excluded in section 15 in the definitions of Mental Health and Chemical Dependency;
- Services provided under a court order or as a condition of parole or probation or instead of incarceration which are not Medically Necessary;
- Personal growth Services such as assertiveness training or consciousness raising;
- Services related to developmental disabilities, developmental delays or learning disabilities including, but not limited to, education Services. A learning disability is a condition where there is meaningful difference between a child's current academic function and the level expected for a child that age. Educational Services include, but are not limited to, language and speech training, reading, and psychological and visual integration training as defined by the American Academy of Pediatrics Policy Statement, "Learning Disabilities, Dyslexia and Vision: A Subject Review";
- School counseling and support Services, home-based behavioral management, household management training, peer support Services, recreation, tutor and mentor Services; independent living Services, therapeutic foster care, wraparound Services; emergency aid for household items and expenses; Services to improve economic stability, and interpretation Services;
- Evaluation or treatment for education, professional training, employment investigations, and fitness for duty evaluations;
- Community Care Facilities that provide 24-hour non-medical residential care;
- Speech therapy, physical therapy and occupational therapy Services provided in connection with treatment of psychosocial speech delay, learning disorders, including mental retardation and motor skill disorders, and educational speech delay including delayed language development (except as provided in sections 5.3.3 and 5.9.11;
- Counseling related to family, marriage, sex and career including, but not limited to, counseling for adoption, custody, family planning or pregnancy, in the absence of a DSM-IV-TR diagnosis;
- Neurological Services and tests including, but not limited to EEGs; PET, CT and MRI imaging Services; and brain scans (except as provided in section 5.9.4);
- Services related to the treatment of sexual disorders, dysfunctions or addiction;
- Vocational, pastoral or spiritual counseling;
- Dance, poetry, music or art therapy, except as part of an approved treatment program;
- Treatments that do not meet the national standards for Mental Health/Chemical Dependency professional practice; and

Exclusions that apply to Provider Services:

- The following Services if they are provided by a Non-Participating Provider:
  - All human organ/tissue transplants (see section 6.1);
  - All E-visit Services (see section 5.1.2);
  - Bariatric surgery and related services (see section 6.4);
- Services of homeopaths or faith healers; and
- Services of lay midwives.

Statewide Plan Member Handbook
Group #108601

Benefits Effective Jan. 1, 2014

Administered by-
Providence Health Plan
P.O. Box 3125
Portland, Oregon 97208-3125
Telephone: 503-574-7500
800-878-4445
TTY 711

5.4.3 Skilled Nursing Facility

Covered Services from a Skilled Nursing Facility are limited to 180 days per calendar year and are provided as shown in the Medical Benefit Summary. Only Medically Necessary Services are covered and must be Prior Authorized by Providence Health Plan and prescribed by your Qualified Practitioner. Providence Health Plan may determine that your care needs are better served by transferring you from a Hospital to a Skilled Nursing Facility and reserves the right to make such a transfer.

5.4.4 Rehabilitative Care (Inpatient)

Benefits are provided for physical, occupational and speech therapy, as shown in the Medical Benefit Summary, for Medically Necessary inpatient rehabilitation to restore or improve lost function following illness or injury. Benefits are limited to Covered Services that can be expected to result in the measurable improvement of a Member's condition. Inpatient rehabilitation Services are limited to 30 days per calendar year. If Services are required following a head or spinal cord injury, or for treatment of a cerebral vascular accident (stroke), the limit may be increased to 60 days per calendar year. If a Member is hospitalized when rehabilitative Services begin, rehabilitative benefits will begin on the day treatment becomes primarily rehabilitative. (See section 5.10.12 for coverage of outpatient rehabilitation Services.)

5.5 MENTAL HEALTH AND CHEMICAL DEPENDENCY SERVICES

[This Plan complies with Oregon and Federal Mental Health Parity.] — 2013/2014 plans opt-in to Mental Health Parity

5.5.1 Mental Health Services

Benefits are provided for Mental Health Services at the same level as and subject to limitations no more restrictive than those imposed on coverage or reimbursement for Medically Necessary treatment for other medical conditions.

Covered Services include diagnostic evaluation, individual and group therapy, inpatient hospitalization as stated in section 5.5, and residential and day or partial hospitalization Services.

All inpatient, residential and day or partial hospitalization treatment Services must be Prior Authorized as specified in section 4.4. Contact Providence Health Plan's Mental Health Services Authorized Agent to arrange Prior Authorization (see section 1).

In an emergency situation, go directly to a Hospital emergency room. You do not need Prior Authorization for emergency treatment; however, Providence Health Plan must be notified within 48 hours following the onset of treatment, or as soon as reasonably possible, for coverage to continue.

5.5.2 Chemical Dependency Services

Benefits are provided for Chemical Dependency Services at the same level as and subject to limitations no more restrictive than those imposed on coverage or reimbursement for Medically Necessary treatment for other medical conditions.

Covered Services include diagnostic evaluation, detoxification, individual and group therapy, inpatient hospitalization as stated in section 5.5, and residential and day or partial hospitalization Services when they are Medically Necessary as determined by us or our authorizing agent.

Prior Authorization is required for all inpatient, residential, and day or partial hospitalization treatment Services, as specified in section 4.4.

Treatments involving the use of Methadone are a Covered Service only when such treatment is part of a medically supervised treatment program that has been Prior Authorized.
In an emergency situation, go directly to a Hospital emergency room. You do not need Prior Authorization for emergency treatment; however, Providence Health Plan must be notified within 48 hours following the onset of treatment, or as soon as reasonably possible, for coverage to continue.

Providence Health Plans
P.O. Box 4327
Portland, OR 97208-4327
www.ProvidenceHealthPlans.com

October 16, 2012

Re:
ID #

Dear

This letter responds to your Second Level Appeal communicated to us by email of August 22, 2012, and heard before the Grievance Committee on September 14, 2012, in the matter referenced above. The Committee has determined to uphold the previous denials, for the reasons noted below.

The Basis for the Denial Decision

As explained in detail in the July 13, 2012, letter First Level Appeal decision, the Oregon PEBB Providence Statewide plan specifically excludes services "related to developmental disabilities, developmental delays or learning disabilities," and that was the basis for the First Level denial. (See Member Handbook, page 50). There is no question but that autism spectrum disorder is a "developmental disability" or involves "developmental delay," and Providence as the plan administrator here has so interpreted it, in this case as it has in other cases seeking ABA services for autism spectrum disorder. Because ABA services are related to autism spectrum disorder, they are therefore not benefits covered by the plan.

Your Arguments

Your presentation to the Grievance Committee failed to address the basis for the denial, but focused somewhat on whether ABA therapy is "experimental/investigational" and generally on whether the therapy is effective or efficacious, issues on which we have different perspectives but which were not the basis for the First Level Appeal decision. The decisions of IROs in other cases, to which you made reference, are neither precedent addressing for this question nor binding on PHP in this case, so have no relevance to whether the exclusion quoted above applies to ABA services.

You referred generally to statutes providing persons with mental diagnoses to have coverage available on the same basis as physical ailments. We assume you are referring to the federal Mental Health Parity and Addiction Equity Act of 2008, so address that statute briefly.

Your apparent argument, which we have seen before, is that the MHPAEA requires Providence to cover ABA services because an IRO decision in another case declared ABA services to be "standard of treatment," so unless Providence can demonstrate that it excludes other particular treatments related to "medical/surgical conditions" denying ABA services would be discriminatory under the MHPAEA. We respectfully disagree.

Under the MHPAEA, "treatment limitations" applicable to mental health benefits may be "no more restrictive than the predominant treatment limitations applied to substantially all medical and surgical benefits." 29 U.S.C. § 1185a(a)(3)(A)(ii). "Treatment limitation" is defined to include "limits on the frequency of treatment, number of visits, days of coverage, or other similar limits on the scope or duration of treatment." An Interim Final Rule under that statute addresses the concept of a "non-quantitative treatment limitation" (75 FR 5410, codified at 26 CFR § 54.9812-1T) and defines such limitations as those which limit "scope or duration" of treatment other than "numerically." The regulation gives as examples of nonquantitative treatment limitations:

> (A) Medical management standards limiting or excluding benefits based on medical necessity or medical appropriateness, or based on whether the treatment is experimental or investigative;
>
> (B) Formulary design for prescription drugs;
>
> (C) Standards for provider admission to participate in a network, including reimbursement rates;
>
> (D) Plan methods for determining usual, customary, and reasonable charges;
>
> (E) Refusal to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective (also known as fail-first policies or step therapy protocols); and
>
> (F) Exclusions based on failure to complete a course of treatment.

26 CFR § 54.9812-1T(c)(4)(ii). The exclusion in this case is none of these kinds of limitation. Most directly, however, the regulation specifically excludes from the definition of "treatment limitation" the type of exclusion we have here:

> A permanent exclusion of all benefits for a particular condition or disorder, however, is not a treatment limitation.

26 CFR § 54.9812-1T(a). Because a "permanent exclusion of all benefits" for services related to "developmental disability" or "developmental delay" is not a "treatment limitation" under the MHPAEA, any contention that it violates the MHPAEA would not be accurate.

Further Questions/Appeal Rights

This decision is final, and there are no further administrative appeals available to you. We have included for your information our standard statement of Grievance and Appeal Rights, but note

that no appeal to an independent review organization ("IRO") is available in this case. Under Oregon's IRO statute, such appeals are available for denials of coverage based on three limited grounds: whether a course or plan of treatment is medically necessary, whether a course or plan of treatment is experimental or investigational, and whether a course or plan of treatment is an active course of treatment. *See* ORS 743.857. None of those is the basis for this decision, so the only appeal available to you is by bringing suit in a court of law.

If you have any questions, please call your Customer Service Team at (503) 574-7500 or 1-800-878-4445, or the TDD/TTY number for the hearing impaired at (503) 574-8702 or 1-888-244-6642.

Sincerely,

Mark Jensen
Grievance Committee Chair
Providence Health Plan
Administrator for PEBB

Enclosures

Advanced Medical Reviews

ACCREDITED EXTERNAL REVIEW

PEER REVIEWER FINAL REPORT

AMR Peer Review Network
Peer Review Recommendation

Patient Name: Blinded
ER #: ER13228
Health Plan Name: PROVIDENCE HEALTH PLAN
Review Type: Experimental/Investigational
State: OR
Date Referred: 12/13/2013
Date Completed: 12/16/2013

Requesting Provider Name:

MEDICAL RECORDS:

1. Letter by Blinded, dated 12/13/2013
2. Request for external review by author unknown, dated 12/13/2013
3. Letter by Blinded, dated 12/13/2013
4. Letter by Blinded, dated 12/13/2013
5. Letter by Blinded, dated 12/13/2013
6. Notice of independent review assignment by Blinded, dated 12/13/2013
7. Letter by author unknown, dated 12/12/2013
8. Email by Blinded, dated 12/12/2013
9. Email by Blinded, dated 12/11/2013
10. Appeal review form by author unknown, dated 12/11/2013
11. Fax page dated 12/10/2013
12. Appeals dated 12/10/2013
13. Letter by Blinded LPC, dated 12/6/2013
14. Chronology of events and index of submitted documents dated 12/6/2013 to 12/13/2013
15. Letter by Blinded, dated 12/4/2013 and 12/9/2013
16. Progress notes by Blinded MD, dated 11/23/2013
17. Additional visit information by Blinded MD, dated 11/23/2013
18. Visit summary by author unknown, dated 11/19/2013
19. Intensive behavioral intervention therapy for autism dated 11/7/2013
20. Letter by Blinded MD, dated 10/29/2013
21. Progress notes by Blinded MD, dated 10/19/2013
22. Visit summary by author unknown, dated 10/18/2013
23. Letter by Blinded, dated 10/11/2013
24. Letter by Blinded MD, dated 10/10/2013
25. Letter by Blinded MD, dated 9/14/2013
26. Progress notes by Blinded MD, dated 7/30/2013
27. MRI Brain with without contrast by Blinded, dated 5/22/2013
28. Operation record by author unknown, dated 1/31/2013
29. Operative report by Blinded MD, dated 1/31/2013
30. Statewide plan member handbook dated 1/1/2013
31. Nonmedical Interventions for children dated 11/16/2012
32. Providence health plans dated 2/2/2012
33. Intensive behavioral intervention therapy for autism dated 11/4/2011
34. Summary of final review determination dated 6/30/2011
35. Your benefit summary dated unknown
36. Evidence for effectiveness of treatments dated unknown
37. Providence health plan independent review dated unknown
38. Acknowledgement of receipt of notice dated unknown
39. Grievance and appeal rights for members dated unknown
40. Outcome data dated unknown
41. Goals of admission dated unknown
42. Program description dated unknown
43. Grievance and appeal rights for members dated unknown
44. Summary of final review determination dated unknown
45. Image dated unknown

PATIENT CLINICAL INFORMATION:
Age: 12 **Gender:** Male
Date of Birth: xxx/2001

The patient is a 12 year old male. On December 4, he was admitted to an acute inpatient unit with the diagnoses of Stereotypic Movement Disorder (307.3) and Pica (307.52). In addition, the patient has Tuberous Sclerosis, Autism, Seizures, Intellectual Disabilities - severe, and a mood disorder, not otherwise specified (NOS). After prior admissions, the patient currently resides in a group home and attends a life skills classroom with one to one assistance. He has had multiple failed medication trials. The behavioral problems are long-standing but have worsened over the past four months; in particular, the patient has expressed aggressive behaviors toward self and others.

A request was made for a four month program in a neurobehavioral unit for Applied Behavioral Analysis, which is an excluded benefit under the father's health plan. A prior authorization request determination is as follows: "According to PHP and PBH's reviews, the services requested are for Applied Behavioral Analysis (ABA) therapies. ABA therapies are listed as an exclusion under the employer-funded plan with PHP. In addition, tuberous sclerosis is a severe progressive neurologic disorder which can cause behavioral issues. However, because of the nature of this disease the use of ABA would have no reasonable expectation of improving this condition."

Additional documentation includes a recommendation in early 2012 to overturn a prior denial for ABA treatment based upon current literature. Also included was an article that provides an overview of non-pharmacological and behavioral approaches and their efficacy in autistic spectrum disorders and their behavioral challenges (1).

REQUESTS/QUESTIONS:
Requested Services: Acute Inpatient Admission to Blinded Hospital for inpatient mental health treatment

1. Based on current evidence-based literature, is the service under review experimental/investigational? Please explain in detail and provide literature support for this recommendation. **No**

In this case, the answer is based upon the application of current evidence-based literature to the definition of experimental/investigational as defined in the Providence Health Plan language:
"In determining whether Services are Experimental/Investigational, Providence Health Plan, as the Plan's claims administrator, will consider whether the Services are in general use in the medical community in the United States whether the Services are under continued scientific testing and research; whether the Services show a demonstrable benefit for a particular illness or disease; whether they are proven to be safe and efficacious; and whether they are approved for use by appropriate governmental agencies."

- Is Applied Behavior Analysis (ABA) in general use in the medical community in the United States?
Yes. ABA services are currently available in all states and utilized by the portion of the medical community (psychiatry) for whom patients are likely to be considered appropriate.

- Is ABA under continued scientific testing and research?
Yes. Two recent studies were identified on clinicaltrails.gov. They are as follows:
Using Web-based Technology to Expand and Enhance Applied Behavioral Analysis Programs for Children With Autism in Military Families (ClinicalTrials.gov Identifier: NCT01614275) and Comparison of Applied Behavioral Analysis (ABA) Versus ABA and Risperidone (ClinicalTrials.gov Identifier: NCT00374764).
In each case, the study assumes efficacy is established for ABA. Based upon the current research and literature, ABA is concluded to not be experimental/investigational.

- Does ABA show a demonstrable benefit for a particular illness or disease?
Yes. Applied behavioral analysis, integrated behavioral/developmental programs, the Picture Exchange Communication System, and various social skills interventions have shown efficacy (1, 2). The current literature tends to support the use of ABA as effective for the treatment of autistic spectrum disorders and their behavioral components (3, 4).

- Is ABA proven to be safe and efficacious?
ABA is unquestionably safe. There is nothing in the literature to indicate any adverse outcomes. More challenging is whether ABA is efficacious in this case. ABA, as noted above has been shown to have a demonstrable benefit in patients with various conditions within the autistic spectrum. However, this patient has tubular sclerosis, a disorder in which autism is one of many symptoms. There is nothing in the current literature to specifically support or refute the use of ABA in cases where autism is but a component of a greater spectrum disorder such as tuberous sclerosis. Therefore, the condition of efficacy for the specific subgroup of autistic patients with tuberous sclerosis has not been addressed in the current literature. This compels an inference based solely on the studies of ABA with autistic spectrum disorders which supports its use as not experimental/investigational.

- Is ABA approved for use by appropriate governmental agencies?

Yes. The U.S. Office of Personnel Management, which manages benefits for federal government employees, has determined that behavioral therapy in the form of Applied Behavior Analysis (ABA) merits insurance coverage for the treatment of autism for federal employees. Their review panel determined that based on ample scientific and empirical evidence, ABA therapy qualifies as a medical treatment, rather than purely educational. This will apply to health plans for federal workers beginning in 2013.

Based upon the above findings utilizing current peer reviewed literature, Applied Behavioral Analysis in the setting of acute Inpatient Admission to Kennedy Krieger Children's Hospital for inpatient mental health treatmentis not considered Experimental/Investigational in this case.

REFERENCES:

1. Nonmedical interventions for children with ASD: recommended guidelines and further research needs. Pediatrics. 2012 Nov;130 Suppl 2:S169-78.

2. A comparative efficacy of holistic multidimensional treatment model (HMTM) and applied behavioral analysis (ABA) in the treatment of children with autism spectrum disorder (ASD)
European Psychiatry, Volume 26, Issue null, Page 355.

3. Behavioral Treatments in Autism Spectrum Disorder: What Do We Know? Annual Review of Clinical Psychology. Vol. 6: 447-468 (Volume publication date April 2010).

4. A comparison of intensive behavior analytic and eclectic treatments for young children with autism. Research in Developmental Disabilities. Volume 26, Issue 4, July- August 2005, Pages 359-383.

5. PEBB
Statewide Plan Member Handbook
Group #108601
Benefits Effective Jan. 1, 2013

6. Hayes Directory
Intensive Behavioral Intervention Therapy for Autism
November 4, 2011

7. Health Resources Commission
Evidence for Effectiveness of Treatments for Autism Spectrum Disorders in Children and adolescents
October 2008

8. Plan Language

This reviewer declares, under penalty of perjury, that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I received from others. As to that information, this report accurately describes the information provided to me.

AMR Tracking Num: 442656

REVIEWED BY:

Signature:	Electronic signature on file.
Date:	12/16/2013
Reviewer Specialty:	Psychiatry
State:	TX

GROUP MEDICAL PLAN

Oregon Health & Science University

OHSU PPO Plan

Preferred Provider Organization (PPO) Plan

Effective date: January 1, 2013

Group Number: 10001819

www.odscompanies.com

ODS Health Plan, Inc. provides medical claims payment services only and does not assume financial risk or obligation with respect to payment of claims.

SECTION 8. GENERAL EXCLUSIONS

In addition to the limitations and exclusions described elsewhere in the Plan, the following services, procedures and conditions are not covered, even if otherwise medically necessary, if they relate to a condition that is otherwise covered by the Plan, or if recommended, referred, or provided by an in-network provider. In addition, any direct complication or consequence that arises from these exclusions will not be covered except for emergency medical conditions.

[Applied Behavioral Analysis (ABA)]

Benefits Not Stated
Services and supplies not specifically described in this handbook as covered expenses.

Biofeedback

Breast Pumps
Hospital grade breast pumps.

Charges Over the Maximum Plan Allowance
Except when required under the Plan's coordination of benefits rules (see section 11).

Chelation Therapy

Comfort and First-Aid Supplies
Including but not limited to footbaths, vaporizers, electric back massagers, footpads, heel cups, shoe inserts, band-aids, cotton balls, cotton swabs, and off-the-shelf wrist, ankle or knee braces.

Cosmetic Procedures
Any procedure requested for the purpose of improving or changing appearance without restoring impaired body function, including breast augmentation, lipectomy, liposuction, and hair removal (including electrolysis and laser). Exceptions are provided for reconstructive surgery following a mastectomy (see section 6.8.8) and complications of reconstructive surgeries if medically necessary and not specifically excluded.

Court Ordered Services
Those related to criminal behavior by the member, including a sex offender treatment program and a screening interview or treatment program related to driving under the influence of intoxicants for members age 18 or older. This exclusion does not apply to chemical dependency services for members age 17 or younger or to services provided pursuant to civil commitment proceedings for mental illness.

Custodial Care
Routine care and hospitalization for assistance with activities of daily living, including, but not limited to, bathing, dressing, feeding, and administration of medications. Custodial care also includes care that is primarily for the purpose of separating a member from others, or for preventing a member from harming himself or herself.

Dental Examinations and Treatment; Orthodontia
Except as specifically provided for in sections 6.8.12 and 6.8.13, dental examination and treatment and orthodontia are not covered.

August 29, 2011

To Whom It May Concern:

We are writing at the request of Paul Terdal to discuss Applied Behavioral Analysis and its role in the treatment of children with Autism Spectrum Disorders (ASD). Paul is an advocate and parent of 2 children with ASD. Dr. Sikora is a clinical psychologist and Director of the Autism program at the Child Development & Rehabilitation Center (CDRC) at OHSU. Drs. McCoy and Nickel are developmental pediatricians at CDRC and OHSU. The three of us have many years experience caring for children with ASD and their families.

Applied Behavior Analysis or ABA is the basis of many critically important behavioral health treatments used with children with ASD. Very simply, ABA is the systematic study of variables that influence behavior. It is not one specific treatment. Procedures derived from ABA, however, have been implemented to assess and treat a broad range of behaviors with individuals with ASD and other developmental disabilities. It can be applied in a variety of settings such as the clinic and the home, and applied to a variety of issues, for example, to build skills as well as to address challenging behaviors. Pivotal Response Training, Discrete Trial Training and the Early Start Denver Model are three well-known therapies based on ABA, but there are many others.

ABA and ABA-based treatments have been broadly accepted as behavioral health treatments. They have been endorsed in publications of the American Academy of Pediatrics, the National Institute of Mental Health, the Institute of Medicine of the National Academy of Sciences as well as in a statement in the US Surgeon General's report on mental health. The effectiveness of ABA-based treatments has been established by several decades of research that includes single subject research design, group comparison studies, as well as intensive early behavioral intervention programs.

ABA-based treatments are not one-size-fits-all treatments. They need to be individualized to the child. An effective treatment program will build on the child's interests, offer a predictable schedule, teach tasks as a series of simple steps, and provide regular reinforcement of behavior. ABA-based treatments do share 3 important characteristics: they are intense, for example, 25 hours a week of intervention for young children; they require a very low adult to child ratio, for example, 1:1 or 1:2 for young children; and parents are active participants.

Should you have questions or require further information, please contact us; Dr. Sikora at sikorad@ohsu.edu, Dr. McCoy at mccoyr@ohsu.edu and Dr. Nickel at nickelr@ohsu.edu.

Sincerely,

Darryn Sikora, PhD
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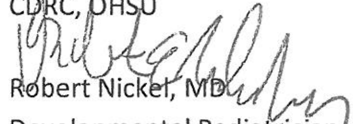
Associate Professor of Pediatrics
CDRC, OHSU

Robin McCoy, MD
Developmental Pediatrician
Assistant Professor of Pediatrics
CDRC, OHSU



Robert Nickel, MD
Developmental Pediatrician
Professor of Pediatrics
CDRC, OHSU

February 1, 2013

To whom it may concern,

As the new director of the autism program at the Child Development & Rehabilitation Center at OHSU, it has been brought to my attention that many of our patient families encounter difficulty accessing the behavioral treatments that are frequently clinically recommended during the course of their multidisciplinary diagnostic evaluations with us (specifically Applied Behavioral Analysis or ABA). Because ABA is broadly accepted as the basis of many behavioral health treatments for children with Autism Spectrum Disorders, I am concerned that not all children who receive this clinical recommendation gain access to its treatment benefits. I have observed that young children with ASD who make the greatest adaptive gains are those who have been able to receive intensive, individualized behaviorally-based treatment.

Over the past 40 years, a large body of literature has shown the successful use of ABA-based treatments to reduce problem behaviors and increase functional skills for individuals with intellectual disabilities, autism and related disorders. ABA has been endorsed in publications of the American Academy of Pediatrics, the National Institute of Mental Health, and the American Association on Intellectual and Developmental Disabilities. The American Psychological Association has developed guidelines for Empirically Supported Treatment (EST) which delineate ABA-based behavioral treatments as ESTs for individuals with developmental disabilities. The U.S. Surgeon General has further stated that ABA approaches have shown strong positive outcomes when used as an early-intervention tool for autism.

OHSU is respected by the autism community and is looked to for leadership in providing best practices in clinical care. As such, it is relevant to consider how its peer institutions support patient access to effective treatment interventions for ASD. Many of these institutions, including those similarly designated as Autism Treatment Network (ATN) sites, both recommend and provide ABA services for their patients diagnosed with ASD. These include well respected centers such as the Center for Autism at Cincinnati Children's Hospital, the Thompson Center for Autism and Neurodevelopmental Disorders, the Center for Autism and Related Disorders at Kennedy Krieger Institute, the Autism Center at the University of Missouri, Nationwide Children's Hospital Autism Program, Arkansas Children's Hospital

Autism Center, University of Washington Autism Center, University of Texas Southwestern Medical Center's Autism Center, and University of California Davis Mind Institute.

I hope that as an institution OHSU will find itself at the front end of the legislative and advocacy changes that will likely soon mandate more global coverage of ABA for children with ASD. If I may be of help in this goal, I hope you will not hesitate to contact me.

Sincerely,

Lark Huang-Storms, PhD

Psychologist
Autism Program Director
Assistant Professor of Pediatrics
Child Development & Rehabilitation Center
Oregon Health & Sciences University

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February 28, 2013

Dear OHSU Employee Benefits Council,

I am writing on behalf of my patient, [redacted] who has a diagnosis of autism disorder and has been under my care since 2011. As his pediatrician, I am urgently asking you to cover Applied Behavioral Analysis (ABA) as a medically necessary therapy for [redacted]

In my role as a general pediatrician at OHSU I have focused on caring for children with autism spectrum disorders; over half of my patients have one of these conditions. I am very familiar with current research on autism including the use of ABA therapy.

ABA is an effective and evidence-based treatment for autism that addresses the mental and behavioral health aspects of the condition. Children with autism who receive such early intensive therapy can make substantial improvements in language development, cognitive performance, and social and adaptive behavior compared to children in control groups.

Since starting ABA therapy, [redacted] behavior and development have noticeably improved, although he continues to experience global developmental delay. Based on a recent neurodevelopment evaluation, the specialists at OHSU's Child Development and Rehabilitation Center (CDRC) recommend that [redacted] continues participation in ABA therapy to address his ongoing developmental deficits.

It has come to my awareness that Kaiser Permanente now covers ABA therapy as a treatment for autism. I respectively urge you to make the right choice and cover this critical therapy for [redacted]

Sincerely,

Dana Hargunani MD, MPH

March 2013 Employee Benefits Council Meeting Agenda

(April 4, 2013)

1. Dependent Audit
2. EBC letter to Dr. Kim explaining process and timing of decision in light of his desire for an expedited review of the policy (volunteer to draft)
3. Dr. Fombonne ABA discussion
4. Upcoming work sessions

1. Dan discussed the dependent audit and walked through a powerpoint presentation. Finalist vendors will be attending the next EBC meeting. UHC will assist with the process for narrowing the selection of vendors. The goal is to have the audit completed by end of the summer and have a clean plan heading into open enrollment. (see attached presentation)

2. Diane Lovell offered to author a memo to Dr. Kim explaining the process and timing of any decision regarding adding coverage for ABA. Goal to have memo sent before 4/18.

3. Dr. Fombonne presented for nearly 2 hours about ASD's and treatments. The following points were made by Dr. Fombonne: there is no cure for autism, he believes that 20 hours of ABA per week provides improvements to the child aged 18 months to 6, the Portland area does not have robust panel of licensed ABA providers, it is challenging from a benefit-provider perspective to measure/monitor progress.

The comments and questions centered on the following themes:

- Is it equitable to provide (or not provide) coverage for ABA?
- There is mixed evidence and evolving evidence in this field
    - OHSU likely covers other benefits with similar levels of evidence
- Should all employees bear the costs for a very specific treatment?
- Are there objective measures of the child's progress and who makes the determination of progress?
- OHSU covers some procedures and programs which may be beneficial and utilized by some but not everything associated with the procedure. The example given was back surgery, the rehab, and necessary medical equipment are covered, but the benefit plan

doesn't cover building a new ramp to the house or refurbishing the bathroom. The discussion point was where is the line and what is employer's responsibility.

- A lack of coverage and treatment before reaching the public schools can be challenging but diagnosis and treatment prior to enter the schools is helpful
- Healthcare reform and mental health parity present challenges to limiting plan costs/exposure
- Is ABA treatment or education?

The group acknowledged the extreme complexity of the issue being faced and Raised questions about the plan for moving forward towards a definitive decision.

Dan took the action item to reach out to a facilitator who may be able to assist the EBC breakdown the issue, establish core tenets, and establish a recommendation for consideration. Dan mentioned he has set up 2 additional meetings in the next 2 weeks to continue the discussion. Chinetta mentioned that perhaps 1 hour for the first meeting was not long enough. (Dan has subsequently added time to make both meetings 2 hours)

Meeting adjourned.

OHSU EBC - Actions Items and Meeting Notes

Meeting Date:	September 26, 2013
Meeting Time:	1:30 PM—3:00 PM
Meeting Location:	Marquam Plaza 260
Participants:	**OHSU:** Kate Baker Kathleen Cooper Katie Crocker Dana Director Harold Fleshman Dan Forbes Tom Heckler Matt Hilton Steven King Chinetta Montgomery Stephen Robinson (Absent) Diane Lovell **Other Non EBC Members:** Won Andersen (Aon) Jane Rozina (Aon) Sam Gyrien (ONA)

Action Items:

Item	Owner	Due Date
1. Add autism discussion to EBC agenda each quarter	Dan/Katie	N/A
2. Quarterly care coordination reporting	Dan/Katie/Aon Hewitt	N/A
3. Passport to health overview for EBC	Moda Health	TBD
4. Reconciliation of final 2014 medical rates	Dan	10/16
5. Contact CDRC about ABA	Dan	Complete – CDRC will be providing a response
6. Notes from previous meeting sent	Dan	Complete

Meeting Notes:

2014 Schedule and calendar was provided including the remaining dates for 2013

Communications Overview:

- Katie and Dan reviewed communications materials that will be distributed to employees during this year's open enrollment
- Open enrollment site will be completed by 09/26
- EBC feedback – include a caveat in future benefit guide that copays roll up to the out of pocket maximum in the plan design summary section

OHSU EBC - Actions Items and Meeting Notes

Dependent Audit

- Dan reviewed dependent audit results. Nearly 98% of employees responded to the audit requests
- 550 dependents were dropped
    - 150 voluntary
    - 192 did not reply
- Approximate savings are $1.65 million ($1.5 million after appeals are processed)
- Members will be added back retroactively if they were away from the country during the audit or if the required documentation is provided at a later date
- Additional employee communications will be distributed around open enrollment

2014 Changes

- Dan reviewed final 2014 plan designs and resulting rates
- EBC would like additional explanation of the final rate increase (vs what was reviewed in the meeting on August 29th)

Autism

- OHSU will consider follow state guidelines beginning in 2015
- Some concern that the programs offered through OHSU are not currently a covered benefit under the plan which may result in negative publicity
- OHSU will monitor developments and continue discussions (EBC wants to allow the Board to be established, more providers credentialed, and additional processes developed by the State, providers, and insurance carriers)
- EBC requested an update on CDRC and expansion plans
- Autism discussion will be added to the agenda quarterly to monitor Board developments

2015 Potential Changes/Needed Data

- EBC reiterated that they want to make decisions based on OHSU data vs general book of business. For example, what chronic medications can be incented to improve compliance for chronic conditions that are prevalent in the population
- EBC requested care coordination reporting to be provided along with quarterly experience reports. Quarterly reports will contain experience summary and high level overview of utilization
- EBC would like additional information on preference sensitive tiers and spousal surcharges
- OHSU will review “Passport to Health” program with EBC
- OHSU to review PEBB program around wellness visits (protocol based visits focused on holistic employee health)

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ATTORNEY FOR AMICUS CURIAE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

A.F., by and through his parents and guardians, Brenna Legaard and Scott Fornier; and A.P., by and through his parents and guardians, Lucia Alonso and Luis Partida, and on behalf of similarly situated individuals,	)	Case No. 3:13-cv-00776-SI
Plaintiffs,	)	AMICUS BRIEF OF DISABILITY RIGHTS OREGON IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS
vs.	)	
Providence Health Plan,	)	
Defendant.	)	

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INTRODUCTION

This is an action brought by a class of children with autism seeking Applied Behavioral Analysis (ABA), a medically necessary service, under the Providence Health Plan. Providence has excluded ABA from coverage under its group health plans. Disability Rights Oregon files this brief as amicus curiae in support of Plaintiffs' Motion for Judgment on the Pleadings, setting forth the rights of people with mental illness under state and federal mental health parity laws and explaining the impact that a decision for defendants could have on people with mental disabilities.[1]

STATEMENT OF CONSENT OF THE PARTIES

Counsel for the Plaintiffs and Counsel for Defendant have each given their consent for Disability Rights Oregon to file this *amicus curiae* brief.

STATEMENT OF AUTHORSHIP

This brief was authored in whole by Kathleen L. Wilde, Legal Director for Disability Rights Oregon. No party or other person contributed money that was intended to fund preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

Disability Rights Oregon ("DRO") is a federally funded, non-profit law office charged with protecting the rights of people with disabilities. DRO has been designated by the Governor as the federal protection and advocacy program for the State of Oregon. It is part of a network of disability rights offices in all 50 states, the District of Columbia and federal territories.

[1] Although there are no rules governing the contents of an amicus brief in United States District Court, counsel for DRO has adopted and includes the contents required in F.R. App. P. 29.

DRO represents and advocates on behalf of individuals with mental disabilities under its authorities as set forth in the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. 10801, et seq., and the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. 15001 et seq.

Each year, DRO develops objectives and priorities to assist people with mental illness and developmental disabilities. One of those priorities is advocating for medically necessary health care services. In support of that objective, DRO has long been involved in advocating for the rights of people with mental disabilities, including supporting the passage, implementation and enforcement of the Oregon law requiring mental health parity.

ARGUMENT

According to the Centers for Disease Control and Prevention, about 1 in 88 children has been identified with an autism spectrum disorder (ASD) and about 25% of all U.S. adults have a mental illness. Further, nearly 50% of U.S. adults will develop at least one mental illness during their lifetime. About one in five Americans take some psychiatric drug. In Oregon, Medicaid funds community-based mental health services and supports for about 24,000 people. DRO has long fought for medically necessary treatments for people with mental disabilities, in the jails, state hospitals and in the community. Those treatments range from individual counseling, group counseling, prescription medication, supported housing and employment, and behavioral therapies that enable management of problematic behaviors. These include cognitive behavioral therapy for people with anxiety, depression, mood disorders or substance abuse issues, dialectical behavioral therapy ("DBT") for people with personality disorders and applied behavior analysis ("ABA") for children with autism.[2]

[2] Autism is a mental health diagnosis according to the *Diagnostic and Statistical Manual of Mental Disorders* (Am. Psychiatric Ass'n 4th ed.)(1994).

Historically, people with mental disabilities have been denied insurance coverage for medically necessary services. However, since 2007, Oregon has mandated that insurance companies provide coverage for "mental or nervous" conditions, including autism, and further that there can be no financial or treatment limitations on those mental health services except limitations that apply to other medical conditions. ORS 743A.168. In 2008, Congress enacted the Federal Mental Health Parity Act, whose purpose was to require equity in the provision of benefits for mental health and substance abuse in group health plans. It imposes the same restriction on treatment limitations as those under state law. Pub. L. No. 110-343, Div. C 511-12, 122 Stat. 3861, 3881.

Should this Court rule that Providence can avoid coverage for ABA, a medically necessary service for children with autism, despite state and federal laws requiring parity in the provision of coverage for mental disabilities, the implications would devastating for all with mental health conditions – not just for children with autism. The same reasoning as that used by Providence to avoid its obligations under state and federal law to provide ABA to children with autism on the same basis as medically necessary services to those with other medical conditions would be used to deny medically necessary services for people with other mental illnesses in the community. The availability of individual therapy, or group therapy, or drug therapies could be arbitrarily limited, and highly effective treatments such as DBT would be routinely denied. As a result, people with mental illnesses throughout would continue to suffer unnecessarily because of the unavailability of medically sound, proven therapies.

CONCLUSION

For the foregoing reasons, DRO joins with plaintiff class in urging this Honorable Court to grant judgment as a matter of law in favor of plaintiffs, and against Providence Health Plans.

This 24th day of January, 2014.

Respectfully submitted,

/s/ Kathleen L. Wilde

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COUNSEL FOR AMICUS CURIAE

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing upon counsel for all parties in this case by placing a copy in the U.S. Mail, with adequate postage thereon, addressed as follows:

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This 24th day of January, 2014.

/s/ Kathleen L. Wilde
Kathleen L. Wilde
Counsel for Amicus Curiae