



## **OREGON INSURANCE DIVISION BULLETIN INS 2014-2**

TO: All Health Insurers, Health Care Service Contractors and Other Interested Persons

DATE: November 14, 2014

SUBJECT: Autism Spectrum Disorder; Applied Behavior Analysis Therapy

### **I. Introduction**

#### **A. Purpose of Bulletin**

Today, the Oregon Insurance Division (division) issued bulletin INS 2014-1 detailing the division's expectations of insurers issuing coverage subject to state and federal mental health mandates. This companion bulletin INS 2014-2 provides additional guidance to insurers about the expectations of the division regarding health benefit plan coverage for autism spectrum disorder (ASD) and other pervasive developmental disorders (PDDs), including the treatment known as applied behavior analysis (ABA).

In addition to the laws described in bulletin INS 2014-1, the specific statutes related to ASD, PDD, and ABA are:

1. ORS 743A.190 (Oregon PDD); and
2. Enrolled Senate Bill 365 (2013 Legislative Session), 2013 Oregon Laws Chapter 771 (SB 365). In addition to adding provisions to the Insurance Code, SB 365 enacted ORS 676.800, creating the Behavior Analysis Regulatory Board (BARB).

In this bulletin, ABA has the meaning defined in SB 365. References to "mandates" in this bulletin include the Oregon Mental Health Parity (MHP), Oregon PDD, and the federal Mental Health Parity and Addition Equity Act (MHPAEA) as implemented under the Affordable Care Act (ACA). If only one mandate is discussed, the bulletin specifies which mandate.

#### **B. Background**

In 2013, the division began developing guidance to clarify whether Oregon's Essential Health Benefit (EHB) Benchmark plan, the PacificSource Codeduct Value plan,<sup>1</sup> included coverage of

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<sup>1</sup> OAR 836-053-0008(1)(a).

ABA. After considering the current status of pending lawsuits, work group discussions before and during the 2013 Legislative Session, and legislative history related to SB 365, the division decided to postpone issuing this guidance until the U.S. District Court for the District of Oregon adjudicated the legal arguments in the *A.F. v. Providence* lawsuit.

In August, 2014, the U.S. District Court for the District of Oregon issued its opinion on the legal arguments in *A.F. v. Providence*, a class action lawsuit challenging denial of coverage for ABA therapy in Oregon. A number of other developments also have occurred that are consistent with that opinion and that have assisted the division in developing this bulletin:

- Court decisions in Oregon and in other states with laws similar to ORS MHP and Oregon PDD;
- Independent Review Organization (IRO) decisions that have repeatedly overturned insurers' denials of coverage for ABA;
- Health Evidence Review Commission (HERC) review and recommendation to cover ABA therapy;
- Bulletins and rules adopted by insurance regulators in other states that address ABA issues and statutes similar to Oregon's statutes. These states include California, Indiana, Washington, and New York.

A list of and citations for many of these developments is attached in Appendix A to this bulletin.

### C. Summary

The division expects insurers to comply with the following guidelines:

- An insurer must adjudicate ASD and PDD claims as mental health claims subject to state and federal mental health parity laws.
- An insurer may not categorically deny treatment for ABA therapy on the basis that the treatment is experimental or investigational. Coverage decisions must be made on the basis of individualized determinations of medical necessity and the experimental or investigational character of the treatment in the individual case. Such determinations must meet the requirements of federal and state law, including mental health parity standards as set forth in INS 2014-1 and OAR 836-053-1405.
- An insurer may not apply a categorical exclusion (such as exclusions for developmental, social or educational therapies) that results in a denial of all ABA or other medically necessary treatment or otherwise results in the mandates being effectively meaningless for ASD or PDDs.
- ABA therapy is a medical service for purposes of ORS 743A.190.
- Under SB 365, a provider actively practicing applied behavior analysis on August 14, 2013 (a "grandfathered provider") may claim reimbursement from a health benefit plan without being licensed until January 1, 2016. A grandfathered provider has that status for any insurer and for any patient. An insurer may impose credentialing requirement on ABA providers so long as the credentialing requirements do not prevent access to treatment required under the mandates. An insurer is not required to contract with any willing provider, but the insurer may not discriminate against any category of

legislatively authorized provider of ABA services and may not negate the mandate to cover medically necessary mental health services by refusing to credential legally qualified providers.

- The provisions of SB 365 that establish quantitative standards—the 25-hour per week coverage standard and the nine-year old age standard—are floors, not limitations on ABA coverage. As floors these provisions do not violate the MHPAEA. If applied as limits, these provisions would violate MHPAEA and its regulations, unless the insurer imposed the same limits as the predominant treatment limitation on substantially all of its medical or surgical outpatient coverage.

#### D. Related Bulletins

INS 2014-1 related to mental health parity provides general guidelines for all mental and nervous conditions. Because ASD and PDD are mental health conditions subject to all of the mental health laws described in bulletin INS 2014-1, all of the discussion in bulletin INS 2014-1 applies to ASD and PDD. This bulletin describes additional considerations specific to ASD, other PDDs, and ABA.

## II. Discussion

### A. Applicability

The Oregon PDD statute applies to health benefit plans issued or renewed on or after January 1, 2008. This statute was incorporated by law into the policy selected by Oregon as its benchmark plan establishing Oregon’s essential health benefits (EHB) plan under OAR 836-053-0008. The benchmark plan, with limited exceptions, establishes the baseline requirements for all individual and small group health benefit plans to be considered ACA-compliant (i.e., comply with all 2014 reforms, including but not limited to essential health benefits, nondiscrimination and guaranteed issue).

SB 365 requires health benefit plans to cover screening, diagnosis, and medically necessary treatment for ASD, including ABA therapy. It applies to commercial health benefit plans that are issued or renewed on or after January 1, 2016. It also applies to the Public Employees’ Benefit Board (PEBB) and the Oregon Educators Benefit Board (OEBB) for coverage beginning on or after January 1, 2015; both boards have decided to accelerate the effective date of ABA coverage (PEBB to August 1, 2015, OEBB to October 1, 2015).

### B. Coverage Requirements

#### **Under State Law:**

The Oregon PDD statute requires a health benefit plan to cover, for a child enrolled in the plan who is under 18 years of age and who has been diagnosed with a pervasive developmental disorder, all medical services that are medically necessary and are otherwise covered under the plan. The statute includes, as medical services, rehabilitation services defined to include physical therapy, occupational therapy or speech therapy services. Therefore, the mandate for medical services requires at least some of both behavioral and physical services. ABA is a behavioral service and is included among “all medical services.”

SB 365 defines ASD using the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). As bulletin INS 2014-1 mentions, the division is adopting a rule to update the references in OAR 836-053-1404(1)(a) to include the parallel references in DSM-5. ASD as defined in SB 365 is a PDD under ORS 743A.190 and a “mental or nervous disorder” under Oregon MHP.

The provisions of SB 365 that apply beginning January 1, 2016 (a year earlier for PEBB and OEGB) are those specifically concerning procedures for management of ABA therapy. The general requirement to cover medically necessary treatment for ASD already exists in the Oregon MHP and Oregon PDD. Insurers should provide access to ABA under existing law (Oregon MHP and PDD) as they would for any other treatment for a mental health condition.

### **Under Federal Law:**

As bulletin 2014-1 summarizes, the regulations under MHPAEA prohibit quantitative treatment limits on mental health benefits in any classification (e.g. inpatient, outpatient) that are more restrictive than the predominant quantitative treatment limitation of that type applied to substantially all medical benefits in the same classification. Because of this requirement, the 25-hour per week floor for coverage of ABA therapy and the requirement to provide coverage if an individual begins treatment before nine years of age established in SB 365, if applied as limitations, could violate MHPAEA and therefore be prohibited. As stated in the preamble to the final MHPAEA rules, the parity requirements of MHPAEA may require an insurer to provide mental health benefits beyond the state minimum.<sup>2</sup>

#### **C. Exclusions or Limitations**

An insurer may apply age limits to coverage of ABA therapy only in a way consistent with the mandates. While medical necessity guidelines are helpful, the medical necessity and experimental character of the treatment must be considered on an individualized basis for a person of any age.

Insurers typically issue policies with broad-based treatment exclusions. Recent opinions by courts, however, have indicated that although insurers may limit their coverage by including broad exclusions, the scope of the exclusion must be restricted if the exclusion is inconsistent with a statutory mandate. An insurer may not profess to include ASD and PDD coverage required by these mandates while at the same time applying a broad exclusion that prevents the insured from receiving medically necessary treatments for these conditions.

#### **D. Provider Qualifications**

ORS 676.800 establishes the Behavior Analysis Regulatory Board (BARB) and sets out the requirements for licensing and registering professionals who provide treatment for ASD using ABA. Although SB 365 prohibits a provider who has not been licensed or registered by the BARB from seeking reimbursement from an insurer starting in 2016, the bill recognizes the need to allow continued services until the licensing and registration procedures are in place. As a result, SB 365 grandfathers certain providers who were actively practicing ABA therapy on the

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<sup>2</sup> 78 Federal Register at 68252.

effective date of the Act (August 14, 2013) and allows these providers to continue to claim reimbursement without registration or licensing.

Grandfathering applies if the individual was actively practicing ABA on August 14, 2013, whether as a Board Certified Behavior Analyst (BCBA), Board Certified Assistant Behavior Analyst (BCABA), a licensed health care provider, or an interventionist (paraprofessional). For purposes of grandfathering, it is not required that the individual was being reimbursed by an insurer on August 14, 2013, so long as he or she was actively practicing ABA at that time. The division expects insurers to provide reimbursement to grandfathered ABA providers until expiration of the grandfathering period on January 1, 2016. This is consistent with the intent of SB 365 to make resources available for access to ABA that insureds might not have if limited to BARB-licensed or certified providers.

At this time, BARB expects the ABA licensing process to be available on December 1, 2014. After the licensing process is available, a new provider who was not actively practicing on the effective date of SB 365 must be licensed or registered in order to be reimbursed by an insurer.

Because the BARB is within the Oregon Health Authority's Health Licensing Office, providers who have been registered with or licensed by the BARB are considered to be "approved" by the Oregon Health Authority for the purposes of ORS 743A.168(5)(a) and thus eligible for reimbursement under Oregon MHP. Under the provider nondiscrimination provision in ACA Section 2706(a), 42 U.S.C. § 300gg-5, insurers may not discriminate in ACA compliant plans against ABA providers licensed by or registered with BARB. Because the grandfathering provision is an applicable state law in lieu of licensure or certification, Section 2706(a) also applies to grandfathered providers in ACA compliant plans.

An insurer may apply credentialing requirements to grandfathered providers so long as the credentialing requirements do not prevent access to medically necessary treatment as mandated by state and federal law. The division does not interpret SB 365 to require an actively practicing ABA provider to seek reimbursement from the same insurer or for the same patient in order to qualify under the grandfather provision.

#### E. Independent Review Organizations

The division has identified 22 instances since 2008 in which insurers' denials of ABA therapy were overturned by an IRO. The insurers' denials were based on determinations that the treatment was experimental or investigational. In these instances, the determinations were overturned by the IRO, which found that such treatment is the recognized standard of care for autism.

Insurers may not deny ABA claims as experimental or investigational unless there is a basis for determining that for a specific patient. The division will examine IRO decisions regarding ASD treatments including ABA therapy to determine if insurers are denying ABA claims on grounds not permitted by law.

### **III. Enforcement**

An insurer's denial of coverage on a basis prohibited by this bulletin may subject the insurer to enforcement measures for violation of the Oregon Insurance Code.

This bulletin is dated the 14<sup>th</sup> of November, 2014, at Salem, Oregon.

A handwritten signature in black ink, appearing to read "L. Cali", with a period at the end. The signature is fluid and cursive.

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Laura N. Cali, FCAS, MAAA  
Insurance Commissioner

## Appendix A

### AUTHORITIES

#### **A. Legislative and Regulatory Materials**

1. Cal. Health and Safety Code, 1374.72
2. California Code of Regulations, Subchapter 3 of Chapter 5 of Title 10, Article 15.2: Mental Health Parity, Sections 2562.1 to 2562.4
3. California Department of Insurance, Notice “Enforcement of Independent Medical Review Statutes” (May 17, 2011).
4. CMCS Informational Bulletin, “Clarification of Medicaid Coverage of Services to Children with Autism” dated July 7, 2014.
5. DCBS 2009 Review of Coverage of Mental or Nervous Conditions and Chemical Dependency in Accordance with OAR 836-053-1405(8)
6. Health Evidence Review Commission (HERC) coverage determination for ABA for ASD (8/14/14)
7. HERC coverage determination for surgical sexual transition for gender dysphoria (8/14/14)
8. In Re United Health Care Insurance Company, Stipulation and Waiver (California Insurance Commissioner Order)
9. Indiana Bulletin 136 (March 30, 2006)
10. MHPAEA final rules, Federal Register Vol. 78, No. 219 p. 68240 (November 13, 2013); 45 CFR §§ 146.136 and 147.160
11. New York Articles on Requirements for MHP
12. Senate Bill 365 Legislative History
13. Washington Insurance Commission, Letter dated October 20, 2014

#### **B. Court Cases**

1. Arce v. Kaiser Foundation Health Plan, 181 Cal App 4th 471 (2010) Settlement Agreement and Order Approving Settlement
2. AF ex rel Legaard v. Providence Health Plan, 2014 WL 3893027 (2014)
3. AG et al. v. Premera Blue Cross and Lifewise, No. 11-2-30233-4SEA, J.P. v. Premera Blue Cross, No. 12-2-33676-8SEA, and R.H. v. Premera Blue Cross and Lifewise, No. 2:13-cv-00097-RAJ, Proposed Settlement Agreement (May 7, 2014).
4. Berge v. US, 879 F Supp 2d 98 (D.D.C., 2012) and 949 F Supp 2d 36 (D.D.C., 2013)
5. Boyle v. Blue Cross Blue Shield of N.C., 2011 WL 60000786 (E.D. Mich., 2011)
6. Chisholm ex rel CC, MC v. Kilebert, 2013 WL 3807990 (E.D.La., 2013)
7. Churchill v. Cigna Corp., 2012 WL 3590691 (E.D.Pa., 2012) and Stipulation of Settlement (January 2014)
8. DF et al v. Washington State Health Care Authority et al, Superior Court of Washington for King County, Case no. 10-2-29400-7 (June 8, 2011)
9. Hummel v. Ohio Dept. of Job and Family Services, 164 Ohio App 3d 776, 844 NE 2d 360 (2005)
10. Johns v. Blue Cross Blue Shield of Michigan, Case No. 2:08-cv-12272 (E.D. Mich) Proposed Settlement and Order Approving Proposed Settlement.
11. KG ex rel Garrido v. Dudek, 864 F Supp 2d 1314 (S.D.Fla., 2012) aff’d in part, 731 F3d 1152 (11th Cir., 2013)

12. KM v. Regence Blueshield, 2014 WL 801204 (W.D.Wa., 2014), and Settlement Agreement (October 2014)
13. Markiewicz v. State Health Benefits Commission, 390 N.J. Super 289, 915 A2d 553 (2007)
14. Mayfield v. ASC Inc. Health & Welfare Benefit Plan, 2007 WL 5272861 (E.D.Mich., 2007)
15. McHenry v. PacificSource, 679 F Supp 2d 1226 (D.Or., 2010)
16. Micheletti v. State Health Benefits Commission, 389 N. J. Super 510, 913 A2d 842 (2007)
17. O.S.T .v. Regence Blueshield, 88940-6, 2014 WL 5088260 (Wa. October 9, 2014)
18. Parents' League for Effective Autism Services v. Jones-Kelley, 339 F. Supp. 2d 542 (6th Cir., 2009)
19. Potter v. Blue Cross Blue Shield of Michigan, 2013 WL 4413310 (E.D. Mich).
20. Reid v. BCBSM, Inc., 984 F Supp 2d 949 (D., Minn., 2013)
21. SAH ex rel SJH v. State Dept. of Social and Health Services, 136 Wash App 342, 149 P3d 410 (2006)
22. ZD v. Group Health Cooperative, Case 2:11-cv-01119-RSL, Settlement Agreement filed 8/2/13 (United States District Court, Western District of Washington)

### **C. Arbitration Awards**

1. Tappert v. Anthem Blue Cross Blue Shield, JAG Case No. 270779 (Nov. 20, 2007)

### **D. Articles**

1. Daniela Caruso, Autism in the U.S.: Social Movement and Legal Change, 36 Am. J. L. & Med. 483 (2010)
2. Jeffrey A. Cohen, Thomas A. Dickerson, Joanne Matthews Forbes, A Legal Review of Autism, A Syndrome Rapidly Gaining Wide Attention in Our Society, 77 Alb. L. Rev. 389 (2014)
3. Kendra Hansel, Rethinking Insurance Coverage of "Experimental" Applied Behavioral Analysis Therapy and Its Usefulness in Combating Autism Spectrum Disorder, 34 J Legal Med 215 (2013)
4. Laura C. Hoffman, Ensuring Access to Health Care for the Autistic Child: More Is Needed Than Health Care Reform, 41 SW L. Rev. 435 (2012)
- . Laura C. Hoffman, Health Care for the Autistic Child in the U.S.: The Case for Federal Legislative Reform for ABA Therapy, 46 J. Marshall L. Rev. 169 (2012)