

Autism Treatment Benefits and Coverage Limitations

In recent years, there has been increased demand for coverage of autism treatment benefits in employer group health plans – and a corresponding uptick in litigation by participants seeking coverage for these benefits. Employer group health plans should be aware of these trends, as well as of compliance concerns with autism treatment coverage gaps.

Background

Autism is a complex medical condition that impairs social communication and interaction, and causes restrictive, repetitive patterns of behavior, interests or activities. The term “autism” is often used interchangeably with the more accurate term, “autism spectrum disorder” (ASD). The specific cause(s) of autism is unclear, but research suggests it is due to genetic predisposition plus one or more environmental triggers. In the U.S., about 1 in 68 children have been identified with ASD according to estimates from the Centers for Disease Control (CDC). Across the spectrum, people vary greatly in terms of the type and severity of deficits.

ASD has no known cure, but treatment options may help individuals overcome many of the disabling aspects of the condition. Applied Behavioral Analysis (ABA) and Applied Behavioral Therapy (ABT) are the most commonly prescribed evidence-based treatments for ASD. These approaches commonly include diagnostic evaluations/assessments, treatment planning, medication management, and individual, family and group therapy.

According to the [National Conference of State Legislatures](#), almost all states require insured plans to cover treatment for ASD, though specific state rules differ based on factors like applicable age group, annual visit limits, and annual spending caps. It is not clear, however, what autism-related coverage requirements may apply to self-funded plans. Historically, self-funded plans have generally excluded or provided only limited coverage for these services.

In recent years, there’s been an increase in employer and employee demand for autism benefits coverage in large, self-funded plans. At least one major carrier has notified clients that it will be covering ABA, ABT, speech, physical, and occupational therapy to treat autism — without age, visit, or dollar limits — as a standard benefit for January 1, 2018, both for its insured and self-funded businesses. This coverage will be automatic unless the client opts out through an exception process and executes a “hold harmless” agreement.

Focus on ASD

Autism Spectrum Disorder has received increased national attention for at least three reasons, including the:

- Impact on the family
- Rising prevalence
- Impact on society

Statutory Guidance

There is no clear guidance under federal law mandating coverage for autism treatment. In 2009, Congress attempted to pass the Autism Treatment Acceleration Act, which would have imposed federal autism coverage requirements, but the bill failed to gain sufficient support to pass. As explained below, however, some stakeholders have taken the position that the Mental Health Parity and Addiction Equity Act (MHPAEA) and/or the Affordable Care Act (ACA) prohibit certain limits on such coverage.

Mental Health Parity and Addiction Equity Act (MHPAEA)

Generally, MHPAEA requires that mental health and substance use disorder (MH/SUD) benefits covered under a group health plan must be provided in the same manner (including coverage level) as medical/surgical (M/S) benefits, and prohibits group health plans from imposing a nonquantitative treatment limitation on MH/SUD benefits that is more stringent than comparable limitations the plan applies to M/S benefits. However, MHPAEA does not require group health plans to cover specific MH/SUD conditions — instead, it provides that services are covered for MH/SUD as defined “under the terms of a health plan.”

Comment. Because MHPAEA and corresponding regulations do not specifically address services relating to ASD, such as behavioral, speech and language, occupational, physical therapies, and wilderness programs, it is not clear whether they are subject to MHPAEA protections. Historically, health plans tend to exclude or provide limited coverage for these services.

Government personnel from HHS, DOL, IRS and Treasury held meetings and received feedback from stakeholders (such as insurers, employers, consultants, and patient advocate groups) about the complexity of MHPAEA compliance, including coverage for autism treatment benefits. Stakeholders have asked the departments to provide clarifying guidance on this topic.

Affordable Care Act (ACA)

The ACA requires non-grandfathered health plans in the individual and small group markets to cover essential health benefits (EHBs). Self-insured, large insured, and grandfathered group health plans are not required to cover EHBs — however, they cannot impose lifetime or annual dollar limits on any EHBs they opt to cover. The ACA also imposes annual in-network, out-of-pocket maximums on the amount an enrollee must pay for EHBs through cost-sharing. It defines EHBs to include items and services in 10 broad categories — including MH/SUDs, preventive and wellness services and chronic disease management, and pediatric services — but states can clarify the benefits and services that make up each category by selecting a specific “benchmark” from among certain insurance products.

MHPAEA Noncompliance Penalties

DOL and Treasury generally have primary enforcement authority over private-sector health plans. Penalties under the Code consist of an excise tax of \$100 per day for each individual to whom a compliance failure relates. Also, under ERISA, participants, beneficiaries, and DOL can file claims to enforce MHPAEA requirements. Since 2010, DOL has conducted over 1,500 MHPAEA investigations and found over 170 compliance violations. In the past fiscal year alone, DOL has answered over 1,000 MHPAEA-related questions from the public and found 44 compliance violations.

For purposes of applying lifetime and annual dollar limits, a self-funded, large insured, or grandfathered group health plan can choose any state’s benchmark plan, or one of three plans available to federal employees, as a reference for defining EHBs. Over 20 state benchmark plans include ABA therapy as an EHB — and a self-funded

or large group health plan that selects one of these as its benchmark plan may not impose annual or lifetime dollar limits on ABA therapy (or any other autism treatment therapies covered by the benchmark plan).

Notably, the EHB rule by its terms only covers dollar — not visit or treatment — limits. An employer group health plan using a benchmark plan that covers ABA therapy would, under a strict reading of those rules, comply with the ACA if it imposed therapy visit limits, for example — even though this might raise compliance issues under MHPAEA. That said, it is possible that a visit or treatment limit could be construed effectively as a dollar limit.

Relevant Case Law

There has been a recent wave of class action lawsuits alleging that employer group health plans violated MHPAEA by failing to cover autism benefits — and ABA therapy in particular. While the case law is still developing, in 2014, the district court in *A.F. ex. Rel. Legaard v. Providence Health Plan*, 35 F. Supp.3d 1298 (D. Ore 2014)

concluded that ABA therapy is subject to MHPAEA requirements, and that an insured plan's denial of coverage for this treatment based on an exclusion for developmental disabilities was an impermissible treatment limitation for a mental health disorder. In *Jarman v. Capital Blue Cross*, 998 F. Supp.2d 369 (M.D. Pa. 2014), the court refused to dismiss MHPAEA claims relating to an insured plan's imposition of an annual dollar limit on autism benefits. And most recently in *D.T. v. NECA/IBEW Family Medical Care Plan et al.*, 2017 U.S. Dist. LEXIS 195186 (W.D. Wash. Nov. 28, 2017), the court denied a motion to dismiss a class action claim involving a self-insured group health plan and an exclusion of neurodevelopmental therapies (including ABA therapy) to treat ASD.

As detailed in the table below, two other federal courts recently allowed claims that ABA therapy is subject to MHPAEA requirements to go forward against self-funded plans. There are several pending complaints against self-funded plans concerning to coverage of autism treatment, and two self-funded plans recently settled autism-related MHPAEA claims.

ACA Noncompliance Penalties

Code penalties for a violation of the annual and lifetime dollar limited prohibition generally will be \$100 per day per individual affected by the violation with a minimum of \$2,500 per individual where the plan does not correct compliance failure(s) before receiving a notice of examination of income tax liability from the IRS and failures continue during the examination period. The penalty will be larger if the failure is found to be more than *de minimis*. Additionally, affected participants and beneficiaries can file lawsuits under ERISA to compel compliance with the ACA's market reforms and/or obtain monetary damages in connection with noncompliance.

Case	Claims Involving Autism Treatment Coverage	Status/Outcome
<i>D.T. v NECA/IBEW Family Medical Care Plan et al</i> , W.D. Wash., No. 2:17-cv-00004-RAJ	Exclusion of neurodevelopmental therapies, including ABA therapy, for ASD	Pending, motion to dismiss denied on November 28, 2017
<i>Whitley v. Dr. Pepper Snapple Group, Inc.</i> , E.D.Tex., No. 4:17-cv-00047	Exclusion of coverage for ABA therapy	Pending a decision on the merits, complaint filed on January 19, 2017
<i>Coleman v. Alcatel-Lucent</i> , No. 2:16-cv-000108, N.D. Ala.	Denial of coverage for ABA therapy	Pending a decision on the merits, complaint filed on January 21, 2016
<i>Raygoza v. ConAgra Foods, Inc.</i> , C.D. Cal., No. 2:15-cv-03741	Denial of coverage for autism-related treatments and administrative remedies	Dismissed on March 9, 2016, with court finding that plaintiff did not exhaust the plan's administrative remedies before bringing the lawsuit, amended complaint pending
<i>A. v. Neiman Marcus Grp. LLC Health & Welfare Benefit Plan</i> , W.D. Wash., No. 2:17-cv-01571	Policy of excluding coverage for ABA and neurodevelopment therapy	Pending, complaint filed on October 24, 2017
<i>S.W. v. Raytheon</i> , D. Mass, No. 1:17-cv-10786	Policy of denying coverage for ABA therapy	Pending, complaint filed on May 4, 2017
<i>Etter v. Banner Health</i> , D. Ariz. No. 2:17-cv-01288	Exclusion of ABA therapy as experimental or investigative	Pending, complaint filed on May 1, 2017
<i>Stewart v. Applied Materials</i> , N.D. Ca., 3:15-cv-02632	Age and frequency limitations imposed on speech therapy	Settled on August 25, 2017
<i>A.D. v. T-Mobile USA, Inc.</i> , W.D. Wash., No. 2:15-cv-00180	Denial of coverage for ABA therapy	Settled on January 5, 2017

Practical Considerations

In considering coverage and costs of autism treatment benefits, employers should keep the following in mind:

- ABA programs require a significant commitment from affected children and their families. Therefore, some families of children with ASD will not seek an ABA program even if a provider is available. Other families may have difficulty accessing a qualified provider due to a critical shortage, thereby limiting utilization.

- Children with the more severe form of ASD, like those with the diagnosis subtype Autistic Disorder (a small portion of the affected group), are likely to require more intensive and costly therapies than those with the diagnosis of Pervasive Developmental Disorder, Asperger’s Syndrome or other developmental deficits.
- ABA treatment typically lasts 3 years beginning at the time of diagnosis, which is usually around age 3, and ending at the time the child begins school (about age 5 or 6). These programs are intended for young children and are not intended to continue indefinitely. Only a very small percentage of children participate in ABA programs into the early teen years, thus, the timeframe for treatment can be limited.

In Closing

Employer-sponsored group health coverage for autism treatment is a complex and evolving compliance area. Plan sponsors should be attuned to the ongoing litigation. It would be prudent to consider plan terms relating to autism treatment coverage and any limitations placed on those benefits in light of potential legal risk as well as the financial and clinical impact of autism-related coverage.

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