

DOL Provides Insight on ABA Therapy Coverage

By: Alex Mattingly on June 4, 2018 on graydon.law

We have received a reoccurring question from clients on whether a group health plan must cover Applied Behavior Analysis (ABA) Therapy. The question is a good one because the current law does not provide a clear answer and is open to interpretation. The DOL has recently issued a proposed FAQ addressing the issue under Mental Health Parity. Although the guidance is only proposed, it provides insight to how the DOL is thinking and how ABA therapy might be treated in the future.

No current law requires a self-funded group health plan to provide mental health benefits, and plans that offer mental health benefits may exclude coverage for any specific disorder or condition (e.g., autism). But if a plan elects to provide mental health benefits and cover a condition, then treatment limitations imposed on those benefits cannot be more restrictive than the treatment limitations that apply to medical/surgical conditions. The statute and regulations define treatment limitations with a general description and non-exhaustive list, but a specific exclusion of a particular treatment method (e.g., ABA therapy) does not fit neatly within those examples. Without clear guidance, there is a litigation risk for covering autism while specifically excluding ABA therapy.

The recently issued FAQ creates a hypothetical plan that excludes experimental treatment (experimental defined as a treatment for a given condition when no professionally recognized treatment guidelines define clinically appropriate standards of care for the condition, and fewer than two randomized controlled trials are available to support the treatment's use with respect to the condition). Autism Spectrum Disorder (ASD) is defined by the plan as a mental health condition. Under the plan's definition, ABA therapy is not experimental, but the plan denied all claims for ABA therapy to treat children with ASD under the rationale that the treatment is experimental. In the same year, the plan approved treatment for medical/surgical conditions when the treatment was not defined as experimental.

The FAQ holds that this hypothetical action by the plan is not permissible. Creating a standard that limits benefits to those that are non-experimental is permissible, but only if the limitation is applied the same for medical/surgical conditions and mental health conditions. Here, the treatment limitation was more stringent for the Mental Health

condition, and therefore the DOL opines that treatment limitation does not comply with current law.

While this FAQ is only proposed, it provides additional ammunition to participants who have ABA therapy claims denied. In addition to the risk that such an exclusion violates Mental Health Parity, claims are also frequently brought that such a provision violates the Americans with Disabilities Act as well. While not yet per se illegal to exclude ABA therapy from your plan, if you are considering doing so we recommend reaching out so we can explain the risks and you can go in eyes wide open.