

CLIENT ALERT

California Court of Appeal Expands Coverage for Autism Related Services for Certain Health Plans

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On April 24, 2014, the California Court of Appeal issued a decision in *Consumer Watchdog v. DMHC* that likely expands the scope of services that certain plans are required to cover in treating autism. This opinion follows a petition of rehearing by Consumer Watchdog after the Court of Appeal unanimously decided these issues on September 10, 2013, *Consumer Watchdog v. Dep't of Managed Health Care*, 162 Cal.Rptr.3d 85, 2014 WL 1618367 (Cal. Ct. App. Apr. 23, 2014).

The case makes clear that recently-enacted legislation in California requiring coverage for Applied Behavioral Analysis (ABA) services for autism requires all health plans subject to California's Mental Health Parity Act to cover ABA services performed by certain non-state-licensed providers, and the California Department of Managed Health Care (DMHC) cannot uphold a denial of coverage on the basis that ABA was provided by these non-state-licensed providers.

Relevant Factual/Legal Background

Applied Behavioral Analysis (ABA) is a form of behavioral health treatment for autistic children. The California Court of Appeal decision addresses how the state's Mental Health Parity Act (MHPA) applies when ABA treatments are provided or supervised by Behavior Analyst Certification Board (BACB) certified therapists that are not licensed by the state.

California's Mental Health Parity Act (MHPA) requires all Knox-Keene plans to cover the "medically necessary treatment" of autism. In a March 2009 memorandum, the DMHC specifically required providers to be licensed if their services were to be covered by the plan. Additionally, the DMHC stated that all grievances for denial of autism services by BACB-certified providers would first be resolved through standard grievance procedures, and would only be sent through Independent Medical Review (IMR) for "medical necessity" determination if it was determined that the plan covered ABA services by BACB-certified providers.

Consumer Watchdog brought a petition for writ of mandate and complaint against the DMHC alleging a violation of MHPA for denial of claims for ABA services performed by BACB-certified therapists, and seeking a declaration that the DMHC's licensing requirement in the March 2009 memo was improper. The trial court disagreed, but held that the March 2009 memo violated the Administrative Procedures Act.

While the case was pending, the California legislature enacted Health & Safety Code section 1374.73 (ABA statute), which required health plans, with some exceptions, to cover ABA treatment that is provided by BACB-certified therapists. California Medicaid (Medi-Cal) health plans are exempt from both the ABA statute and MHPA. Only two plans - the Healthy Families Program and Public Employees' Retirement System (PERS) - are subject to MHPA but not the ABA statute.

Court of Appeal Holding

A plurality of the court determined that only prospective injunctive relief was available because Consumer Watchdog's complaint requested an injunction against denial of coverage for medical necessity on the basis that coverage is not required when a provider is not licensed, and no health plans were joined as defendants. The plurality determined that the underlying complaint did not seek relief directing DMHC to re-open closed grievances.

The concurrence and dissent go a step farther, concluding that prior to the ABA statute, BACB-certified therapists were engaging in the corporate practice of psychology, which is not authorized under California law. On that basis, the concurrence and dissent conclude that DMHC's refusal to order plans to provide coverage for ABA therapy administered by BACB-certified therapists prior to the ABA statute was proper. The plurality determined that the bulk of the appeal is moot because the ABA statute requires all plans (except plans under Medi-Cal, the Healthy Families Program, and PERS) to provide ABA treatment administered by a BACB-certified therapist. With respect to plans under the Healthy Families Program and PERS, the Court determined that the ABA statute constitutes a "license" by "other means" for BACB-certified therapists. Thus, DMHC's practice of upholding denial of coverage on the basis that BACB-certified therapists are unlicensed for those plans is not proper under MHPA.

The Court refused to address the DMHC's cross-appeal related to the trial court's adjudication of the March 2009 memo on the basis that the DMHC's appeal was not filed within 60 days as required under the California Rules of Court.

Implications/Conclusion

While the majority was careful to issue a narrow holding, the case highlights the broad nature of California's MHPA. At the very least, ABA therapy administered by BACB-certified providers must now be covered by every plan subject to the MHPA.

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