

1 Revised 10-21-14

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

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

7  
8 DATE: October 21, 2014

9  
10 SUBJECT: Autism Spectrum Disorder; Applied Behavior Analysis Therapy

11  
12 **I. Introduction**

13 **A. Purpose of Bulletin**

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

20  
21 In addition to the laws described in bulletin INS 2014-1, the specific statutes related to ASD,  
22 PDD, and ABA are:

- 23  
24 1. ORS 743A.190 (Oregon PDD); and  
25 2. Enrolled Senate Bill 365 (2013 Legislative Session), 2013 Oregon Laws Chapter 771 (SB  
26 365). In addition to adding provisions to the Insurance Code, SB 365 enacted ORS  
27 676.800, creating the Behavior Analysis Regulatory Board (BARB).

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

32 **B. Background**

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34 In 2013, the division began developing guidance to clarify whether Oregon's Essential Health  
35 Benefit (EHB) Benchmark plan, the PacificSource Codeduct Value plan,<sup>1</sup> included coverage of  
36 ABA. After considering the current status of pending lawsuits, work group discussions before  
37 and during the 2013 Legislative Session, and legislative history related to SB 365, the division  
38 decided to postpone issuing this guidance until the Oregon federal District Court decided the *AF*  
39 *v. Providence* lawsuit.

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

1 In August, 2014, the federal District Court issued its opinion in *AF v. Providence*, a class action  
2 lawsuit challenging denial of coverage for ABA therapy in Oregon. A number of other  
3 developments also have occurred that are consistent with that opinion and that have assisted the  
4 division in developing this bulletin:

- 5
- 6 • Court decisions in Oregon and in other states with laws similar to ORS MHP and Oregon  
7 PDD;
- 8 • Independent Review Organization (IRO) decisions that have repeatedly overturned  
9 insurers' denials of coverage for ABA;
- 10 • Health Evidence Review Commission (HERC) review and recommendation to cover  
11 ABA therapy;
- 12 • Bulletins and rules adopted by insurance regulators in other states that address ABA  
13 issues and statutes similar to Oregon's statutes. These states include California, Indiana,  
14 Washington, and New York.

15  
16 A list of and citations for many of these developments is attached in Appendix A to this bulletin.

### 17 18 C. Summary

19 The division expects insurers to comply with the following guidelines:

- 20
- 21 • An insurer must adjudicate ASD and PDD claims as mental health claims subject to state  
22 and federal mental health parity laws.
- 23
- 24 • An insurer may not categorically deny treatment for ABA therapy on the basis that the  
25 treatment is experimental or investigational. Although an individual determination may  
26 conclude that treatment would be experimental, e.g. due to the age or circumstances of  
27 the patient, an insurer may not exclude all ABA therapy on the basis that all ABA therapy  
28 is experimental or investigational.
- 29
- 30 • An insurer may not apply a categorical exclusion (such as exclusions for developmental,  
31 social or educational therapies) that results in a denial of ABA or other medically  
32 necessary treatment or otherwise results in the mandates being effectively meaningless  
33 for ASD or PDDs.
- 34
- 35 • ABA therapy is a medical service for purposes of ORS 743A.190.
- 36
- 37 • Under SB 365, a provider actively practicing applied behavior analysis on August 14,  
38 2013 (a "grandfathered provider") may claim reimbursement from a health benefit plan  
39 without being licensed until January 1, 2016. A grandfathered provider has that status for  
40 any insurer and for any patient. An insurer may impose credentialing requirement on  
41 ABA providers and is not required to contract with any willing provider, but the insurer  
42 may not discriminate against all practitioners of ABA.
- 43
- 44 • The provisions of SB 365 that establish quantitative standards—the 25-hour per week  
45 coverage standard and the nine-year old age standard—are floors, not limitations on ABA

1 coverage. As floors these provisions do not violate the MHPAEA. Insurers are  
2 prohibited from limiting coverage on the basis of these provisions in ways that would  
3 violate MHPAEA.

4  
5 D. Related Bulletins

6  
7 INS 2014-1 related to mental health parity provides general guidelines for all mental and nervous  
8 conditions. Because ASD and PDD are mental health conditions subject to all of the mental  
9 health laws described in bulletin INS 2014-1, all of the discussion in bulletin INS 2014-1 applies  
10 to ASD and PDD. This bulletin describes additional considerations specific to ASD, other PDDs,  
11 and ABA.

12 **II. Discussion**

13 A. Applicability

14 The Oregon PDD statute applies to health benefit plans issued or renewed on or after January 1,  
15 2008. This statute was incorporated by law into the policy selected by Oregon as its benchmark  
16 plan establishing Oregon's essential health benefits (EHB) plan under OAR 836-053-0008. The  
17 benchmark plan, with limited exceptions, establishes the baseline requirements for all individual  
18 and small group health benefit plans to be considered ACA-compliant (i.e., comply with all 2014  
19 reforms, including but not limited to essential health benefits, nondiscrimination and guaranteed  
20 issue).

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

27  
28 B. Coverage Requirements

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30 **Under State Law:**

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

39  
40 SB 365 defines ASD using the Diagnostic and Statistical Manual of Mental Disorders, Fifth  
41 Edition (DSM-5). As bulletin INS 2014-1 mentions, the division is adopting a rule to update the  
42 references in OAR 836-053-1404(1)(a) to include the parallel references in DSM-5. ASD as

1 defined in SB 365 is a PDD under ORS 743A.190 and a “mental or nervous disorder” under  
2 Oregon MHP.

3  
4 The provisions of SB 365 that apply beginning January 1, 2016 (a year earlier for PEBB and  
5 OEBC) are those specifically concerning procedures for management of ABA therapy. The  
6 general requirement to cover medically necessary treatment for ASD already exists in the  
7 Oregon MHP and Oregon PDD. Insurers should provide access to ABA under existing law  
8 (Oregon MHP and PDD) as they would for any other treatment for a mental health condition.  
9

#### 10 **Under Federal Law:**

11  
12 As bulletin 2014-1 summarizes, the regulations under MHPAEA prohibit quantitative treatment  
13 limits on mental health benefits in any classification (e.g. inpatient, outpatient) that are more  
14 restrictive than the predominant quantitative treatment limitation of that type applied to  
15 substantially all medical benefits in the same classification. Because of this requirement, the 25-  
16 hour per week floor for coverage of ABA therapy and the requirement to provide coverage if an  
17 individual begins treatment before nine years of age established in SB 365, if applied as  
18 limitations, could violate MHPAEA and therefore be prohibited. As stated in the preamble to the  
19 final MHPAEA rules, the parity requirements of MHPAEA may require an insurer to provide  
20 mental health benefits beyond the state minimum.<sup>2</sup>  
21

#### 22 C. Exclusions or Limitations

23 An insurer may apply age limits to coverage of ABA therapy only in a way consistent with the  
24 mandates. While medical necessity guidelines are helpful, the medical necessity and  
25 experimental character of the treatment must be considered on an individualized basis for a  
26 person of any age.  
27

28 Insurers typically issue policies with broad-based treatment exclusions. Recent opinions by  
29 courts, however, have indicated that although insurers may limit their coverage by including  
30 broad exclusions, the scope of the exclusion must be restricted if the exclusion is inconsistent  
31 with a statutory mandate. An insurer may not profess to include ASD and PDD coverage  
32 required by these mandates while at the same time applying a broad exclusion that prevents the  
33 insured from receiving medically necessary treatments for these conditions.  
34

#### 35 D. Provider Qualifications

36  
37 ORS 676.800 establishes the Behavior Analysis Regulatory Board (BARB) and sets out the  
38 requirements for licensing and registering professionals who provide treatment for ASD using  
39 ABA. Although SB 365 prohibits a provider who has not been licensed or registered by the  
40 BARB from seeking reimbursement from an insurer starting in 2016, the bill recognizes the need  
41 to allow continued services until the licensing and registration procedures are in place. As a  
42 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.

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

3  
4 Grandfathering applies if the individual was actively practicing ABA on August 14, 2013,  
5 whether as a Board Certified Behavior Analyst (BCBA), Board Certified Assistant Behavior  
6 Analyst (BCABA), a licensed health care provider, or an interventionist (paraprofessional). For  
7 purposes of grandfathering, it is not required that the individual was being reimbursed by an  
8 insurer on August 14, 2013, so long as he or she was actively practicing ABA at that time. The  
9 division expects insurers to provide reimbursement to grandfathered ABA providers until  
10 expiration of the grandfathering period on January 1, 2016. This is consistent with the intent of  
11 SB 365 to make resources available for access to ABA that insureds might not have if limited to  
12 BARB-licensed or certified providers.

13  
14 At this time, BARB expects the ABA licensing process to be available on December 1, 2014.  
15 After the licensing process is available, a new provider who was not actively practicing on the  
16 effective date of SB 365 must be licensed or registered in order to be reimbursed by an insurer.

17  
18 Because the BARB is within the Oregon Health Authority's Health Licensing Office, providers  
19 who have been registered with or licensed by the BARB are considered to be "approved" by the  
20 Oregon Health Authority for the purposes of ORS 743A.168(5)(a) and thus eligible for  
21 reimbursement under Oregon MHP. Under the provider nondiscrimination provision in ACA  
22 Section 2706(a), 42 U.S.C. § 300gg-5, insurers may not discriminate against BARB-licensed  
23 ABA providers in ACA compliant plans. Because the grandfathering provision is an applicable  
24 state law in lieu of licensure, Section 2706(a) also applies to grandfathered providers in ACA  
25 compliant plans.

26  
27 An insurer may apply credentialing requirements to grandfathered providers. However, the  
28 requirements must recognize grandfathering required by SB 365. The division does not interpret  
29 SB 365 to require an actively practicing ABA provider to seek reimbursement from the same  
30 insurer or for the same patient in order to qualify under the grandfather provision.

#### 31 32 E. Independent Review Organizations

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

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

### 42 III. Enforcement

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

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1 **Appendix A**

2 **Authorities**

3 **A. Legislative and Regulatory Materials**

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

24

25 **B. Court Cases**

- 26 1. AF ex rel Legaard v. Providence Health Plan, 2014 WL 3893027 (2014)
- 27 2. AG et al. v. Premera Blue Cross and Lifewise, No. 11-2-30233-4SEA, J.P. v. Premera Blue
- 28 Cross, No. 12-2-33676-8SEA, and R.H. v. Premera Blue Cross and Lifewise, No. 2:13-cv-
- 29 00097-RAJ, Proposed Settlement Agreement (May 7, 2014).
- 30 3. Berge v. US, 984 F Supp 2d 98 (D.D.C., 2012) and 949 F Supp 2d 36 (D.D.C., 2013)
- 31 4. Boyle v. Blue Cross Blue Shield of N.C., 2011 WL 60000786 (E.D. Mich., 2011)
- 32 5. Chisholm ex rel CC, MC v. Kilebert, 2013 WL 3807990 (E.D.La., 2013)
- 33 6. Churchill v. Cigna Corp., 2012 WL 3590691 (E.D.Pa., 2012)
- 34 7. DF et al v. Washington State Health Care Authority et al, Superior Court of Washington for
- 35 King County, Case no. 10-2-29400-7 (June 8, 2011)
- 36 8. Hummel v. Ohio Dept. of Job and Family Services, 164 Ohio App 3d 776, 844 NE 2d 360
- 37 (2005)
- 38 9. KG ex rel Garrido v. Dudek, 864 F Supp 2d 1314 (S.D.Fla., 2012) aff’d in part, 731 F3d
- 39 1152 (11th Cir., 2013)
- 40 10. KM v. Regence Blueshield, 2014 WL 801204 (W.D.Wa., 2014), and Settlement Agreement
- 41 (October 2014)
- 42 11. Mayfield v. ASC Inc. Health & Welfare Benefit Plan, 2007 WL 5272861 (E.D.Mich., 2007)
- 43 12. McHenry v. PacificSource, 679 F Supp 2d 1226 (D.Or., 2010)

- 1 13. O.S.T .v. Regence Blueshield, 88940-6, 2014 WL 5088260 (Wa. October 9, 2014)
- 2 14. Parents’ League for Effective Autism Services v. Jones-Kelley, 339 F. Supp. 2d 542 (6th
- 3 Cir., 2009)
- 4 15. Potter v. Blue Cross Blue Shield of Michigan, 2013 WL 4413310 (E.D. Mich).
- 5 16. Reid v. BCBSM, Inc., 984 F Supp 2d 949 (D., Minn., 2013)
- 6 17. SAH ex rel SJH v. State Dept. of Social and Health Services, 136 Wash App 342, 149 P3d
- 7 410 (2006)
- 8 18. ZD v. Group Health Cooperative, Case 2:11-cv-01119-RSL, Settlement Agreement filed
- 9 8/2/13 (United States District Court, Western District of Washington)

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11 **C. ARTICLES**

- 12 1. Rethinking Insurance Coverage of “Experimental” Applied Behavioral Analysis Therapy and
- 13 Its Usefulness in Combating Autism Spectrum Disorder, 34 J Legal Med 215 (2013)

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