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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
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8 DATE: September 11, 2014
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10 SUBJECT: Autism Spectrum Disorder; Applied Behavioral Analysis Therapy
11

12 **Introduction**

13 Purpose of Bulletin

14 Today, the Oregon Insurance Division (division) issued bulletin INS 2014-1 about the
15 expectations of the division for insurers in implementing state and federal mental health
16 mandates. This bulletin provides additional guidance to insurers about the expectations of the
17 division regarding health benefit plan coverage for autism spectrum disorder (ASD) and other
18 pervasive development disorders (PDDs), including the treatment known as applied behavioral
19 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 Summary

29 The division expects insurers to comply with the following guidelines:
30

- 31 • An insurer must adjudicate ASD and PDDs claims as mental health claims subject to
32 state and federal mental health parity laws.
33
34 • An insurer may not deny treatment for ABA therapy on the basis that the treatment is
35 experimental or investigational except in limited circumstances based on a case by case
36 determination.
37
38 • An insurer may not apply a categorical exclusion (such as exclusions for developmental,
39 social or educational therapies) that results in the mandate being effectively meaningless
40 for ASD or PDDs.
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42 • ABA therapy should be considered a medical service for purposes of ORS 743A.190.

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- 2
- 3 • An insurer may not impose conditions for reimbursement (e.g., reimbursement from a
 - 4 specific insurer) on grandfathered providers (those being reimbursed for ABA treatment
 - 5 on August 14, 2013) until licensure is required on January 1, 2016.
 - 6
 - 7 • SB 365’s 25-day treatment limits on the use of ABA therapy violate the federal Mental
 - 8 Health Parity and Addiction Equity Act (MHPAEA) and are therefore prohibited.
 - 9

10 Related Bulletins

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12 INS 2014-1 related to mental health parity provides general guidelines for all mental and nervous

13 conditions. Because ASD and PDD are mental health conditions subject to all of the mental

14 health laws described in bulletin INS 2014-1, all of the discussion in bulletin INS 2014-1 applies

15 to ASD and PDD. This bulletin describes additional considerations specific to ASD and other

16 PDDs and to ABA.

17 Discussion

18 Effective Dates

19 The Oregon PDD statute applies to health benefit plans issued or renewed on or after January 1,

20 2008. The Oregon PDD statute was incorporated by law into the policy selected by Oregon as its

21 benchmark plan establishing Oregon’s essential health benefits (EHB) plan, under OAR 836-

22 053-0008, which, with limited exceptions, establishes the baseline requirements for all individual

23 and small group ACA-compliant health benefit plans issued or renewed on or after January 1,

24 2014.

25 SB 365 requires health benefit plans to cover screening, diagnosis and medically necessary

26 treatment for ASD, including ABA therapy. It applies to insured health plans that renew on or

27 after January 1, 2016.

28 Coverage Requirements

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30 **Under State Law:**

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32 DSM-IV defines five conditions as PDD (shown here with their DSM-IV code):

- 33 299.00 Autistic Disorder
- 34 299.80 Pervasive Developmental Disorder, Not Otherwise Specified
- 35 299.80 Asperger's Disorder
- 36 299.80 Rett's Disorder
- 37 299.10 Childhood Disintegrative Disorder
- 38

39 These diagnoses come within the division’s rule defining “mental or nervous conditions.” OAR

40 836-053-1404(1)(a). PDDs are therefore subject to Oregon’s mental health parity law.

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1 SB 365 defines ASD using the Diagnostic and Statistical Manual of Mental Disorders, Fifth
2 Edition (DSM-5). As bulletin INS 2014-1 mentions, the division has adopted a rule to update the
3 references in OAR 836-053-1404(1)(a) to include the parallel references in DSM-5. ASD as
4 defined in SB 365 is a PDD under ORS 743A.190 and a “mental or nervous disorder” under
5 Oregon MHP.
6

7 The provisions of SB 365 that apply only starting January 1, 2016 are those specifically
8 concerning ABA. The general requirement to cover ASD already exists in current law. Insurers
9 should provide access to ABA as they would to any other medical therapy.
10

11 **Under Federal Law:**

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13 As bulletin 2014-Y summarizes, the regulations under MHPAEA prohibit quantitative treatment
14 limits to mental health benefits in any classification more restrictive than the predominant
15 quantitative treatment limitation of that type applied to substantially all medical benefits in the
16 same classification. Because of this limitation, it is likely that the quantitative treatment
17 limitations included in SB 365 (25 hours per week) violate MHPAEA.
18

19 Exclusions or Limitations

20 An insurer may not apply arbitrary age limits to coverage of ABA therapy. The appropriateness
21 and medical necessity of the treatment must be considered in determining whether to approve
22 ABA therapy for a person of any age. Although the Legislature used age nine as the cutoff for
23 the ABA mandate in SB 365, this does not imply that age nine is the appropriate cutoff under
24 general standards of mental health treatment.
25

26 Some insurers have included in policies broad-based treatment exclusions that are based on
27 categories such as “academic or social skills training,” “educational,” or “developmental
28 disabilities” and applied these to deny coverage for ABA therapy. Recent opinions by courts and
29 independent review organizations (IROs), however, have indicated that such broad exclusions
30 are prohibited if the particular treatment requested is not examined on a case-by-case basis to
31 determine whether the proposed treatment is appropriate and medically necessary. An insurer
32 may not profess to include ASD and PDD coverage required by the state and federal mental
33 health and PDD mandates while at the same time applying a broad exclusion that prevents the
34 insured from receiving medically necessary treatment.
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36 Therapist Qualifications

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38 ORS 676.800 establishes BARB and sets out the requirements for licensing and registering
39 professionals who provide treatment for ASD using ABA. Although SB 365 prohibits a
40 nonlicensed provider from seeking reimbursement from an insurer starting in 2016, the bill
41 recognizes the need to allow continued services until the licensing procedures are in place. As a
42 result, SB 365 grandfathers the services of certain providers on the effective date of the Act
43 (August 14, 2013) and allows those providers to continue to claim reimbursement without
44 registering or licensing.
45

1 This grandfathering does not limit the provider to reimbursement from a carrier from whom the
2 provider is being reimbursed on the effective date. Grandfathering applies if the individual is
3 actively practicing ABA on August 14, 2013. Thus, at a minimum, the division expects insurers
4 to provide reimbursement to grandfathered ABA providers until expiration of the grandfathering
5 period on January 1, 2016.

6
7 At this time, BARB expects the ABA licensing process to be available on December 1, 2014.
8 After that date, a new provider who was not being reimbursed on the effective date of the Act
9 must be licensed in order to be reimbursed by an insurer.

10 11 Independent Review Organizations

12 IROs have repeatedly overturned decisions of insurers that denied coverage for ABA therapy on
13 the basis that the therapy is experimental or investigational. The division finds that continued
14 denial of coverage of ABA therapy on these grounds is unacceptable in most circumstances. The
15 division will examine IROs decisions regarding ASD treatments including ABA therapy. When
16 an IRO finds that a treatment is appropriate and medically necessary, the division will look
17 closely at any subsequent denial on the same basis to ascertain whether the insurer continues to
18 deny the same treatment for other insureds on a basis that has been overruled by the IRO. The
19 division understands that an IRO determination is not binding beyond the individual case, but the
20 division considers patterns of IRO decisions significant evidence in determining whether an
21 ABA treatment denial is appropriate.

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

27 28 III. Enforcement

29 An insurer's denial of coverage on a basis prohibited by this bulletin could subject the insurer to
30 enforcement or other action for being in violation of the Oregon Insurance Code.

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Public Review Draft 9/11/14