

# MENTAL HEALTH PARITY EMERGENCY REGULATION

## TEXT OF REGULATION

### **Add to Subchapter 3 of Chapter 5 of Title 10 of the California Code of Regulations new**

#### **Article 15.2: Mental Health Parity**

##### **Adopt: Section 2562.1. Scope of Article.**

(a) This article shall apply only to coverage for services or treatments rendered for pervasive developmental disorder or autism under a policy of health insurance as defined in Insurance Code section 106.

(b) This article shall not apply to a policy described in Subdivision (g) of Insurance Code section 10144.5.

NOTE: Authority cited: Sections 10144.5, 12921 and 12926, Insurance Code; *CalFarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805 (1989); *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216 (1994). Reference: Section 10144.5, Insurance Code; *Harlick v. Blue Shield of California*, 686 F.3d 699 (2012).

##### **Adopt: Section 2562.2. Medical Necessity; Case Management and Utilization Review.**

(a) Nothing in this article shall be construed to mandate coverage of services that are not medically necessary.

(b) Nothing in this article shall be construed to preclude an insurer from utilizing the following in accordance with the provisions of this article and Insurance Code sections 10144.5 and 10144.51:

- (1) Case management;
- (2) Managed care;
- (3) Network providers;
- (4) Utilization review techniques;
- (5) Prior authorization;
- (6) Copayments; or
- (7) Other cost sharing.

NOTE: Authority cited: Sections 10144.5, 12921 and 12926, Insurance Code; *CalFarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805 (1989); *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216 1994). Reference: Section 10144.5, Insurance Code; *Harlick v. Blue Shield of California*, 686 F.3d 699 (2012).

**Adopt: Section 2562.3. Prohibited Limits on Coverage.**

For purposes of Insurance Code section 10144.5:

(a) If treatment or services are:

(1) Medically necessary;

(2) Rendered to an individual diagnosed with a health condition indicated in Subdivision (a) of Insurance Code section 10144.5; and

(3) Rendered for the purpose of treating that condition:

(b) Then an insurer shall not impose:

(1) An annual visit limit; or

(2) An annual dollar limit when the same limit is not equally applicable to all benefits under the policy.

NOTE: Authority cited: Sections 10144.5, 12921 and 12926, Insurance Code; *CalFarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805 (1989); *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216 (1994). Reference: Section 10144.5, Insurance Code; *Harlick v. Blue Shield of California*, 686 F.3d 699 (2012).

**Adopt: Section 2562.4. Behavioral Health Treatment for Pervasive Developmental Disorder or Autism.**

(a) Scope of Section. In addition to the limitations on scope set forth in Section 2562.1 of this article, the scope of this Section 2562.4 shall be further limited by the following sentence: This section does not apply to a policy or plan described in Subdivision (d) of Insurance Code section 10144.51.

(b) Definition. As used in this section, the term “behavioral health treatment” has the meaning set forth in Paragraph (c)(1) of Insurance Code section 10144.51.

(c) In cases where behavioral health treatment is medically necessary, an insurer shall not deny or unreasonably delay coverage:

(1) Based on an asserted need for cognitive or intelligence quotient (IQ) testing;

(2) On the grounds that behavioral health treatment is experimental, investigational, or educational; or

(3) On the grounds that behavioral health treatment is not being, will not be, or was not, provided or supervised by a licensed person, entity or group when the provider or supervisor in question is

certified by a national entity, such as the Behavior Analyst Certification Board, that is accredited by the National Commission for Certifying Agencies.

NOTE: Authority cited: Sections 790.10, 10144.5, 10144.51, 12921 and 12926, Insurance Code; CalFarm Ins. Co. v. Deukmejian, 48 Cal.3d 805 (1989); 20th Century Ins. Co. v. Garamendi, 8 Cal. 4th 216 (1994). Reference: Sections 790.03, 10144.5(a) and (c), 10144.51, Insurance Code.

### **EXPRESS FINDING OF EMERGENCY**

The Insurance Commissioner has determined that an emergency exists. This regulation is being adopted on an emergency basis for the immediate preservation of the public health and safety, and general welfare, within the meaning of Government Code Section 11346.1.

Emergency regulations are necessary: (1) because of widespread confusion among insurers and policyholders regarding the coverage requirements for medically necessary mental health services for autism, including behavioral health treatment such as Applied Behavior Analysis (ABA) therapy under California's mental health parity law; and (2) to ensure that children receive early treatment that will enable them to succeed in school and society, at insurer expense, saving the taxpayers approximately \$138.8 million to \$197.8 million over the next year and nearly \$2 billion in costs over the next eighteen years that should properly be borne by insurers.

Therefore, the Department of Insurance proposes this emergency regulation to clarify insurer obligations, and ensure uniform and timely application of the Insurance Code provision requiring coverage of medically necessary mental health services, including ABA, for policyholders with autism under the mental health parity law.

### **EXECUTIVE SUMMARY**

An Emergency Regulation is crucially necessary to elucidate to insurers their obligations under California mental health parity law requiring treatment to children with autism. Autism is a neurobiological disorder and developmental disability that severely limits a child's ability to interact with others, seriously hinders verbal and nonverbal communication and social interaction, and is characterized by repetitive problematic behaviors such as self-mutilation, aggression and tantrums. Unless the Emergency Regulation is adopted, California taxpayers will incur approximately \$138.8 million to \$197.8 million in costs in special education and Regional Center services for children with autism before a permanent regulation can be promulgated. Additionally, approximately 8,500 such privately-insured California children between the ages of 3 and 5 and about 42,000 children who are between the ages of 3 and 21<sup>1</sup> will be deprived of the benefits of early intensive behavioral treatment; and may be relegated to a lifetime of disability; deprived of the ability to communicate and achieve academically; denied the life skills needed for independent living; and consigned to a bleak future and ultimate institutionalization.

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<sup>1</sup> See 2012 California State Autism Profiles, *infra* note 150. The 42,000 estimated figure of total lives affected by CDI regulation promulgation takes the total number of California ASD children (reported in 2010-11) and multiplies that figure by the number of privately California ASD children (63.9% are privately insured).

The escalating prevalence of autism among California children has resulted in a public health crisis. Insurer denials and delays of mandated treatment are exacerbating this crisis, causing substantial harm to the public health and welfare, and making enormous and unsustainable demands on scarce governmental finances and services, such as for special education and adult habilitative treatment. California health insurers are paying for only 9-13% of autism treatment, leaving taxpayer funded school districts and regional centers to bear burdens which they can ill afford in these difficult economic times. Among the medically necessary services for autism that insurers are resisting providing is behavioral therapy, including ABA. This therapy is transformative, enabling 47% of treated children to be mainstreamed by first grade, and increasing IQ and success in regular school classrooms for fully 90% of treated children. Other medically necessary services, on which insurers are imposing inappropriate visit limits, are speech therapy that enables children to communicate with their families, schoolmates, and teachers and occupational therapy that enables them to perform tasks essential to self-care such as dressing and eating. Providing behavioral, speech, and occupational therapy to children with autism allows them to succeed in school, participate productively in family and community activities, obtain gainful employment, and avoid institutionalization as adults, thereby lessening demands on public resources and services over their lifetimes.

California's Mental Health Parity Act, which the proposed Emergency Regulation interprets, was passed in 1999 to remedy a history of inadequate insurance coverage for mental illnesses, which deprived insureds of the benefits of policies on which they had paid premiums. The genesis for its passage was legislative recognition that autism and the other listed severe mental conditions are seriously disabling and that inadequate coverage for their treatment causes significant social harm. The Legislature found that the failure to provide adequate coverage for mental illnesses in private health insurance policies resulted in significantly increased expenditures for state and local governments and sought to mitigate the harm to the public health and welfare by mandating coverage of medically necessary treatment, thereby shifting the cost to insurers.

The scientific community agrees that the deficits in basic skills usually present in infants and toddlers with autism, the pervasiveness of these deficits, and the very early onset of symptoms require comprehensive interventions that begin as early as the disorders are recognized. Many studies demonstrate that early intervention is the optimal treatment approach, leading to such significant improvement that children are able to function successfully in their homes, school classrooms, and communities without specialized services, and may no longer be autistic.

Insurers are out of compliance with both the law and public policy despite the existence of the Parity Act, passage of Senate Bill 946, that reconfirms the mandate for behavioral health treatment for autism and expands the definition of qualified autism service providers, and the scientific literature describing the importance of early intensive intervention. Enforcement actions by the Departments of Insurance (CDI) and Managed Health Care (DMHC) have not prevented insurers and health plans from improperly continuing to deny and delay treatment. CDI's Consumer Services division has received 71 complaints, reflecting cumulative delays of 12,864 days, or 35.2 years in obtaining medically necessary treatment. A market conduct examination of another insurer identified 1,539 instances of improper claims payment practices involving behavioral and speech therapy for autism. In addition, approximately 1,600 individuals are transitioning from Regional Centers to insurers for behavioral health treatment for autism and

experiencing delays and denials for seven months after the effective date of SB 946. In January 2013, the State Council of Development Disabilities (SCDD) reported that three and one-half months may pass before children going from Regional Center services to private ABA treatment providers begin receiving services. Insurer failures to comply with California statutes and promptly provide medically necessary behavioral, speech and occupational therapy cause severe consequences to children with autism, including immediate regression, stifled improvement, severe impairment, and permanent developmental damage.

Insurer conduct also generates dire results for governmental entities. The lifetime incremental societal cost for an individual with autism is \$3.2 million. Those costs, many of which should be borne by health insurers, include impacts on public education and special education programs in California's public school system. Services under the Lanterman Act included \$638 million for services for 16,367 children with autism between the ages of 3 and 6 in 2010. Additionally, nearly 40,000 California children with autism between the ages of 3 and 22 now receive special education services at approximate average annual per capita costs ranging from \$25,000 to \$90,000, and totaling \$1 to 3.6 billion annually.

Enormous and burdensome costs also flow to the State when Regional Centers provide therapies that insurance companies have refused to cover. The Department of Developmental Services (DDS) reports that autism is the fastest growing developmental disability in California and estimated that regional centers and developmental centers will be serving as many as 70,000 people with autism by June 2012. That Department further estimated that the General Fund would realize cost savings of \$80 million from enactment of SB 946, based on the assumption that insured individuals would no longer be receiving autism treatments from Regional Centers. That transition has not yet transpired, jeopardizing anticipated cost savings to the state and causing delay and damage to the approximately 1,600 insured children and families who have been Regional Center clients.

Finally, without early intensive treatment for autism, California will be facing an estimated 19,000 autistic adults who need DDS-funded adult habilitative services and employment support by 2018. The further costs for those services are estimated to be at least \$190 million because each individual will require at least \$10,000 for care, education and support services each and every year of their adult lives.

Therefore, in order to ensure that insurers provide medically necessary treatment for children with autism, and avoid continued devastating financial consequences to state coffers, CDI must clarify insurers' obligations to provide such services to this vulnerable population, subject only to financial conditions applicable equally to all benefits under the policy, and do so as expeditiously as possible.