

Applied Behavior Analysis (ABA) Therapy Exclusions

June 2021

Due to recent litigation and regulatory concerns over the exclusion and limitation of treatments for autism spectrum disorder, plan sponsors of self-insured plans should review their current plan documents to determine whether any coverage limitations for ABA therapy or similar treatments will impact compliance under applicable federal and state law. We recommend this review be conducted in consultation with the plan sponsor's qualified legal counsel.



Background

Under the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA), plans are prohibited from imposing more restrictive treatment limitations and financial requirements on mental health or substance use disorder (MH/SUD) benefits than those that apply to medical/surgical benefits. Additional requirements under the Consolidated Appropriations Act of 2021 required health plans and insurers that impose such limitations, known as “nonquantitative treatment limitations (NQTL),” on MH/SUD benefits to conduct and perform a comparative analysis of the design and application of NQTLs to determine whether they comply with the MHPAEA requirements.

Recently, a Federal district court in the Ninth Circuit held that a plan's exclusion of ABA therapy and Intensive Behavioral Therapies (IBT) for a child with autism spectrum disorder violated MHPAEA by imposing more restrictive limitations on mental health benefits than those that applied to all medical and surgical benefits. This decision follows prior court cases in which ABA therapy exclusions have been challenged. In addition to the recent litigation, the DOL has indicated autism spectrum disorder treatment limitations will be an area of focus as part of its national enforcement initiative.

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Issues to Consider

- Plan sponsors with health plans that provide coverage for autism spectrum disorder as a mental health benefit with exclusions or limitations for ABA therapy or similar treatments will need to determine whether they want to remove such exclusions or limitations from their plan. If they have not yet done so, plan sponsors that wish to retain ABA therapy exclusions or limitations should take prompt action to either (1) confirm that their TPA has conducted a comparative analysis to demonstrate that such NQTLs (e.g., ABA therapy exclusions/limitations) comply with the MHPAEA or (2) conduct such a comparative analysis themselves (with the assistance of counsel). The DOL may require plan sponsors to provide a copy of such comparative analysis, and the DOL's request for this analysis could be made at any time.
- If the plan currently treats autism spectrum disorder as a medical condition (as opposed to a mental health condition) for purposes of plan benefits, the employer should confirm with their qualified legal counsel that this definition is consistent with, and supported by, independent standards of medical practice and clearly defined within all applicable plan documents. Plan sponsors should consider that any plan changes from one classification to another may require a plan amendment.
- Fully insured plans will need to consider any state insurance law requirements and definitions regarding coverage of MH/SUD conditions.

Next Steps

It is our understanding that several large regional TPAs are also providing suggestions for employers on how to handle ABA therapy exclusions. We recommend that employers review their current practices concerning ABA therapy with their employee benefits attorney to determine if changes to any ABA therapy exclusions within the plan are appropriate, and if so, when those changes should be made.

As always, the Research and Compliance team at Brown & Brown will continue to monitor the situation and provide important updates as they become available.

