Agenda

- NASEM Report (TRICARE)
- Standards (GASC)
- ABA in Schools (IDEA and ADA)
- Coding
- Audits
- MHPAEA (Mental Health Parity)
- Inadequate Networks/UM
- Regulatory (accreditation, facilities regulation)
- Case roundup
- You go

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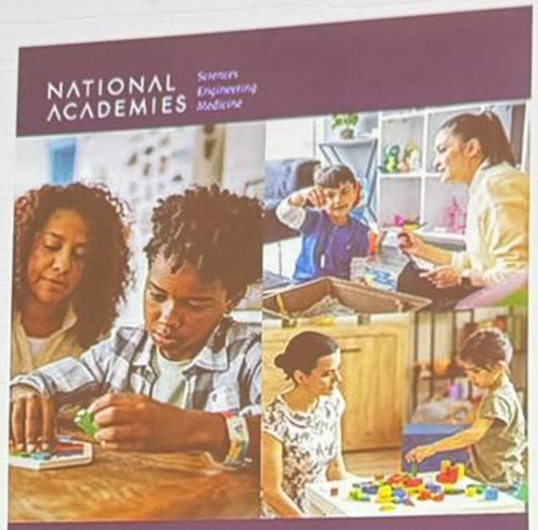
NASEM

- **End the ACD: Cover ASD as a permanent, basic benefit.** ABA meets the Department of Defense's own standards for reliable medical evidence and should be a core TRICARE benefit.
- **Eliminate burdensome assessments:** Mandatory assessments that do not directly support individualized treatment planning should be eliminated.
- **Reduce administrative barriers:** Streamline administrative requirements that create unnecessary burdens for families and ABA providers.
- **Align with best practices:** TRICARE's policies should be updated to align with current clinical standards and industry best practices for ABA service delivery.
- **Establish an advisory council:** Independent advisory council should be formed to guide the implementation of these changes and ensure that stakeholder input is considered.



The Comprehensive Autism Care Demonstration

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NASEM

- Key components in presentations to NASEM
- Developments since 2014
- Case law recognizing ABA as core treatment for ASD.
  - Doe v. UBH, 523 F.Supp.3d 1119 (N.D. Cal. 2021)
- AMA Permanent CPT Codes
  - can only be promulgated for treatments that are safe, effective, and consistent with current medical practice.
- Generally Accepted Standards of Care (CASP Guidelines)
  - Aspects of ACD inconsistent with standards
- ABA as regular benefit in commercial coverage including Self-funded plans and ACA policies, Medicaid coverage, FEHB coverage.
- Proper analysis of evidence under DOD regulations
- Logistical barriers under current system
- Effect of current system, including mandatory parent assessments unrelated to child's treatment on military morale and readiness.

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American Medical Association
Medical Necessity Considerations

- Usage of the term "medical necessity" must be consistent between the medical profession and the Insurance industry. Carrier denials for non-covered services should state so explicitly and not confound this with a determination of lack of "medical necessity."
- AMA encourages physicians to carefully review their health plan medical services agreements to ensure that they do not contain definitions of medical necessity that emphasize cost and resource utilization above quality and clinical effectiveness.
- AMA Policy H-320.953

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American Medical Association
Medical Necessity Definition

- Health care services or products that a prudent physician would provide to a patient for the purpose of preventing, diagnosing, or treating an illness. Injury, disease or its symptoms in a manner that is:
  - (a) in accordance with generally accepted standards of medical practice;
  - (b) clinically appropriate in terms of type, frequency, extent, site, and duration; and
  - (c) not primarily for the economic benefit of the health plans and purchasers or for the convenience of the patient, treating physician, or other health care provider.

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Standards!

BACB

Applied Behavior Analysis
Treatment of Autism
Spectrum Disorder:

Practice Guidelines for Healthcare Funders and Managers

SECOND EDITION

CASP The Council of Autism Service Providers

Applied Behavior Analysis
Treatment of Autism
Spectrum Disorder:

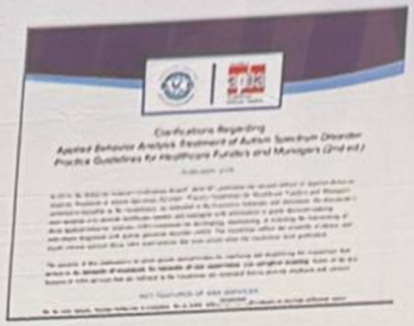
Practice Guidelines for Healthcare Funders and Managers

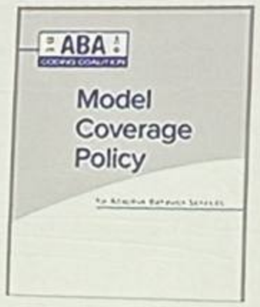
SECOND EDITION

AUTISM LEGAL RESOURCE CENTER

Standards Produced by Nonprofits

	Clinical (GASC)	Organizational	Accreditation
Document	Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guidelines for Healthcare Funders and Managers (CASP)	CASP Organizational Guidelines	Autism Commission on Quality (ACQ) Applied Behavior Analysis Standards
What	Agreed-upon standards for treatment among clinicians that are maintained and updated by non-profit associations	• Develop & promote best practices for *organizations* • Assist organizations in identifying infrastructure to support sustainable, high-quality therapy	Articulate the standards by which organizations seeking accreditation will be measured
Other Relevant Resources	• Clarifications Regarding *Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guidelines for Healthcare Funders and Managers (2nd ed.)* – APBA & BACB • Model Coverage Policy (ABA Coding Coalition) • CPT Assistant (AMA) • Practice Parameters for Telehealth-Implementation of ABA (2d ed. 2022 CASP)		





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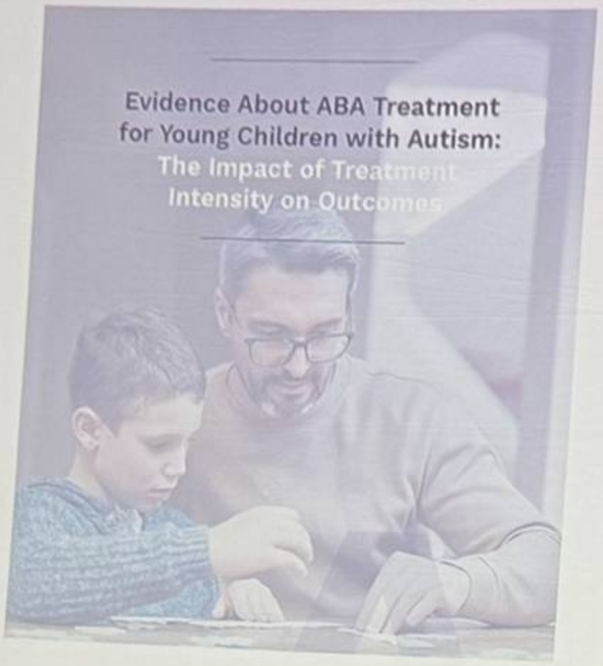

CASP The Council of Autism Service Providers

CASP The Council of Autism Service Providers

Applied Behavior Analysis Practice Guidelines for the Treatment of Autism Spectrum Disorder

Guidance for Healthcare Funders, Regulatory Bodies, Service Providers, and Consumers

THIRD EDITION

AUTISM LEGAL RESOURCE CENTER

- Assessments
- Scope
- Intensity
- Settings
- Treatment Planning
- Staffing
- Supervision
- Care Collaboration
- Progress and Outcome Measures
- Transition and Discharge
- Medical Necessity Reviews

CASP The Council of Autism Service Providers

Applied Behavior Analysis Practice Guidelines for the Treatment of Autism Spectrum Disorder

Guidance for Healthcare Funders, Regulatory Bodies, Service Providers, and Consumers

THIRD EDITION

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Mental Health Parity and Utilization Management

- UM Criteria: *K.D. v. Anthem BCBS* (D. Utah 2023)
  - Health plan violated MHPAEA, where MCG guidelines used by insurer were more restrictive for MH than for M/S.
  - Beneficiaries subject to discharge from residential MH facility when they met certain discharge criteria but M/S patient in residential facility not considered for discharge until they progressed through various stages of care in their treatment plan and demonstrated an ability to transition out of treatment
- UM Review Process: *Ryan S. v. United Health Group, (9th Cir. 2024)*
  - The plaintiff stated a claim for MHPAEA violation based on allegations that the insurer applied a more stringent internal review process of MH as compared to M/S. The allegations are also supported by a report from DMHC. MH had an algorithm system (ALERT system) that imposed certain progress criteria, and if criteria were not met, cases were flagged for peer review and potential denial. No similar system and requirements were imposed on M/S services.
  - Even if all those denials were independently valid, the mere fact that the reasons to deny coverage were identified only because the MH/SUD claims were subjected to an additional layer of scrutiny could violate the Parity Act.

MHPAEA

- Prohibits treatment limitations applied only to MH or a specific MH condition.
- Prohibits quantitative treatment limitations ((QTLS) unless applied to substantially all (2/3 or more) of services for medical conditions in same statutory classification (outpatient)
  - Visit limits, hour limits, code caps, etc.
  - ST/OT/PT

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MHPAEA

- Prohibits nonquantitative treatment limitations (NQTLs) on services for MH conditions unless as written and in operation, any processes, strategies, evidentiary standards, or other factors used in applying the nonquantitative treatment limitation to MH/SUD benefits in the classification are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in applying the limitation with respect to medical surgical/benefits in the same statutory classification (outpatient).
  - Gatekeeping requirements
  - Progress requirements
  - Medical Necessity Criteria including third-party tools (MCG, InterQual)
  - Provider network criteria
  - Rates
  - Utilization management (algorithms, peer reviews)
  - Documentation
  - Audits
  - Claims handling and Payment

AUTISM LEGAL RESOURCE CENTER

ABA in School Settings

- Children are entitled to robust IDEA services to allow them to access a free and appropriate public education.
- Children are entitled to access to third-party medically necessary care in community settings, including school settings.

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K.B. v. Shelby County Schools, Tennessee Case No. 07.03-214603J, January 6, 2025

- Award of 3,105 hours of Applied Behavioral Analysis (ABA) therapy services provided by a Registered Behavior Technician (RBT) supervised by a Board Certified Behavior Analyst (BCBA).
- Based on the trajectory of progress that K.B. was making at Innovations [the ABA center] at which K.B. received services from 2018-2020, it is likely that over time K.B. would have been able to "catch up" to his non-disabled peers in many areas.
- In school services, K.B. was on a flatter, lesser trajectory towards progress with skills acquisition and, in some cases, was regressing.
- A new placement was required because he had "skilled out of many programs specifically designed for children with autism at that placement, and the placement did not have a licensed BCBA or RBT on staff.

AUTISM LEGAL RESOURCE CENTER

Medically Necessary ABA in School Settings

- ABA may be medically necessary for some children in the school setting.
  - Generalization of skills, treatment consistency, and fidelity
  - Deficiencies or inconsistencies in one setting can affect the child's entire treatment program
  - Challenging behaviors
  - Skill development
  - Intensity of treatment
- As with any medically necessary care, if they do not receive it, it negatively impacts their current functioning across settings, their overall treatment program, and their future health and functioning. In short, there are lifelong consequences beyond the quality of their education.

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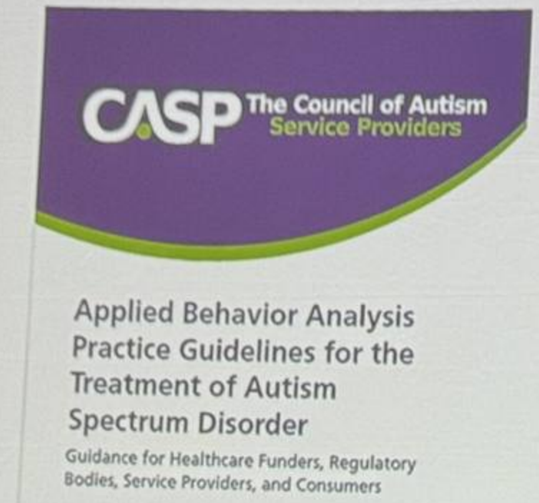
Medical Treatment Generally Accepted Standards of Care



"ABA treatment must not be restricted a priori to specific settings but instead should be delivered in the settings that maximize treatment outcomes for the individual patient. It may be medically necessary for a patient to receive services in a particular location for a variety of reasons, including but not limited to generalization needs, the impact of interactions in this environment on skill building or behavioral targets in the treatment program, or to access the required intensity of services for the patient. For example, treatment in various community settings such as daycare, school, or a recreational activity may be medically necessary to promote social-emotional reciprocity, nonverbal communicative behaviors, and the development and maintenance of relationships." P.39

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Treatment Setting: community settings school settings

- CASP Guidelines: treatment setting is part of the treatment.
- *Burke v. Independence Blue Cross:* ABA is an environmentally sensitive treatment involving the interaction between behavior and the environment, so treatment in school setting could not be prohibited where insurer mandated to cover ABA. *Burke v. Independence Blue Cross*, 642 Pa. 691, 710, 171 A.3d 252, 264 (Pa. 2017). (not a MHPAEA case).
- *Doe v. United Behavioral Health* ABA exclusion violated MHPAEA's prohibition on "more restrictive [limitations] than the predominant treatment limitations applied to substantially all medical and surgical benefits because the "exclusion carves out and rejects from coverage a core treatment for Autism: ABA therapy" and "there are no comparable medical/surgical exclusions" in the plan "exclude[] coverage for the primary treatment modality for a mental health condition." *Doe v. United Behavioral Health*, 523 F. Supp.3d 1119 ,1128 (N.D. Cal. 2021).

Schools' Obligation to Allow Access to Medically Necessary ABA under ADA/504

- Section 504 of the Federal Rehabilitation Act applies to entities receiving federal financial assistance and prohibits discrimination based on disability. 29 U.S.C. § 701, *et seq.*
- The ADA (Americans with Disabilities Act) was passed after Section 504 and applies to private institutions, workplaces, state-funded entities, and other institutions not covered under Section 504.
- ADA requires schools to make reasonable accommodations to allow children access to medically necessary care in the school setting. 42 U.S.C. § 12101, *et seq.*

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ADA/504 Medically Necessary ABA in Schools

- Do not have to proceed under IDEA per the Supreme Court decision in *Fry v. Napoleon Comm. Sch. Dist.* (2017)
- Plaintiffs in *Fry* sought relief under Section 504 for the school's refusal to allow the child to attend school with her prescribed service dog and did not have to exhaust administrative remedies under the IDEA. Supreme Court held plaintiffs could proceed in federal court without going through IDEA dispute resolution. Gravamen of complaint was something other than denial of a free and appropriate education (FAPE) required by IDEA.
- Clues: First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility other than a school—say, a public theater or library? Second, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance?

AUTISM LEGAL RESOURCE CENTER

Z.W. v. Horry County Sch. Dist., 68 F. 4th 915 (4th Cir. 2023)

- The school had used "ABA-like" strategies in response to ongoing regression. MUSC Neurodevelopmental pediatrician prescribed intensive ABA program provided by BACB-certified or registered personnel across settings, including school, as medically necessary. School refused to consider access claiming that its program was meeting child's educational needs.
- "[The "essence" of Z.W.'s beef with the school district is its refusal to permit him to bring his privately supplied and funded ABA therapist to school with him. Z.W. could file essentially the same claim against a library, a museum, or a summer camp. What is more, a non-student visitor (say, a friend, sibling, or other relative) could make a largely identical claim against the school district if it refused to permit an ABA therapist to accompany the visitor to Z.W.'s school."
- Also, "[b]ecause Z.W.'s complaint requests nothing that would be "provided at public expense . . . and without charge" to him and his parents, § 1401(9), its "essence" or "crux" does not appear to "concern[] the denial of a FAPE" in either "surface" or "substance," quoting *Fry*, 580 U.S. at 169, 171, 172.)

HDRC v. Kishimoto, 122 F.4th 353 (9th Cir. 2024)

- Claims against Hawaii DOH and DOE for failing to provide ABA in schools under IDEA or EPSDT and failing to allow access to outside providers of medically necessary ABA under ADA. DOH, as a state Medicaid agency, had "delegated" responsibility for providing ABA to schools, which in turn limited ABA to what was educationally necessary and further limited access to any ABA to addressing challenging behavior after other behavioral interventions had failed).
- Citing *Fry* and ALRC amicus briefing court held that claims against state Medicaid agency for failing to provide medically necessary service during school day and in school setting did not challenge denial of FAPE and exhaustion of IDEA dispute procedures was not required.

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A.J.T. v Osseo Area Schools, 605 U.S. __, 145 S. Ct. 1647 (2025)

- ADA claims brought by school children were subject to the same ADA/504 standards as disability claims in other contexts
- Schoolchildren bringing ADA and Rehabilitation Act claims related to their education are not required to make a heightened showing of "bad faith or gross misjudgment" to state ADA/504 claims against school districts
- The rules outside of school contexts should also apply here. To obtain injunctive relief under ADA/504, plaintiffs are not required to prove intent to discriminate. To obtain compensatory damages, courts generally require a showing of intentional discrimination, which most circuits find satisfied by the "deliberate indifference standard" – a standard requiring only a showing that the defense disregarded a strong likelihood that the challenged action would violate federally protected rights.

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ABA in Schools ADA Access

- State legislation and pending Bills to require schools to have a process consistent with ADA/Section 504 to provide reasonable accommodations allow children access to medically necessary care, including ABA, in school settings.
- Louisiana
- Colorado
- Florida*
- Alaska
- South Carolina
- Nevada
- Michigan
- Kansas

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ABA in Schools ADA Access
State Department of Education Bulletins

- South Carolina
  - https://ed.sc.gov/newsroom/school-district-memoranda-archive/clarification-on-applied-behavior-analysis-aba-therapy-access-in-schools/clarification-on-applied-behavior-analysis-aba-therapy-access-in-schools-memo/
- Colorado
  - https://www.cde.state.co.us/cdesped/hb22-1260amns-guidance
- Minnesota
  - https://mn.gov/autism/assets/SIGNED-MDE-DHS-memo_tcm1070-524601.pdf

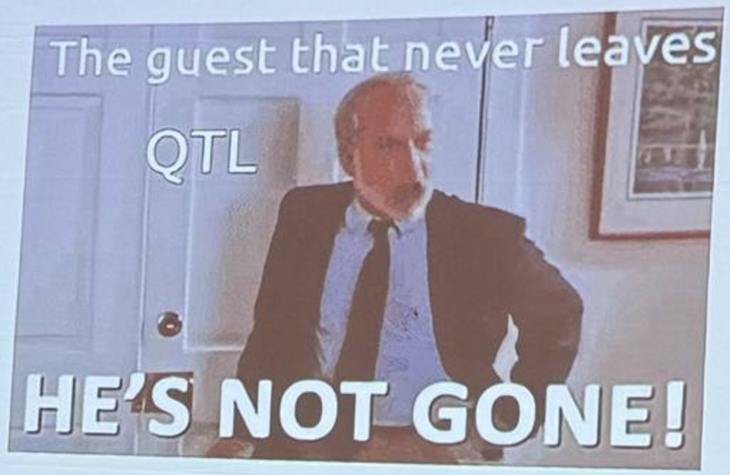
AUTISM LEGAL RESOURCE CENTER

MHPAEA NQTL Review Process

- *Ryan S. v. United Health Group, (9th Cir. 2024)*
  - Plaintiff stated a claim for MHPAEA violation based on allegations that insurer applied a more stringent internal review process of MH as compared to M/S. Allegations also supported by report from DMHC. On MH side had algorithm system (ALERT system) that imposed certain progress criteria and if criteria not met flagged cases for peer review and potential denial, no similar system and requirements imposed on M/S services.
  - Even if all those denials were independently valid, the mere fact that the reasons to deny coverage were identified only because the MH/SUD claims were subjected to an additional layer of scrutiny could violate the Parity Act.
- Pre Payment Review?

MHPAEA QTLS: Why are you still here?

- Hour caps
  - Cumulative hour caps on ABA services
  - Hour caps on specific services (e.g. 97151 assessments)
- ST/OT/PT limits
- Still seeing some hour caps where confusion in how MHPAEA operates. Focus is on condition being treated and whether MH or M/S not characterization of treatment modality (e.g. medical, habilitative)



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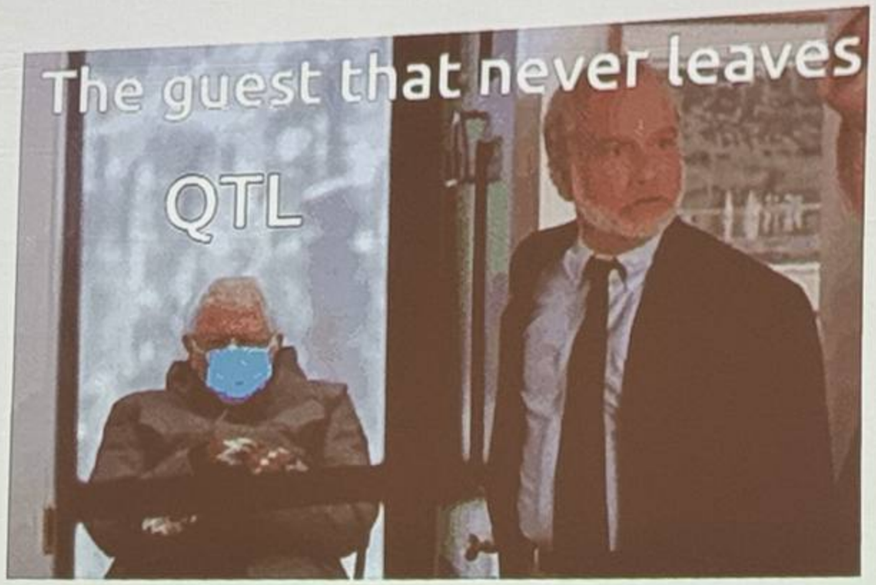

MHPAEA: New Regulations (Sept. 9, 2024) a Lawsuit, and a Stay

- Final Rule strengthened definition of MH Conditions (eliminated state guideline language; all MH conditions within DSM/ICD must be included)
- Added specificity and documentation requirements for "no more restrictive test" on design and application requirements for NQTLs; new prohibition on use of discriminatory factors and evidentiary standards in NQTL design.
- Added data collection (e.g. claims denials) and evaluation requirements to assess the impact of the NQTL and whether it results I material difference in access to MH benefits compared to M/S benefits.
- Added meaningful benefits (core treatment) standard that must offer MB in all classifications in which MB for M/S are offered.
- Added specific provisions on network composition data and effect of all NQTLs on access. Corrective actions may include recruitment of providers, increasing compensation, streamlining credentialing.
- *ERISA Industry Committee v. United States Department of Health and Human Services, et al.*, 1:25-cv-00136 (D.D.C. 2025), filed 1/17/2025.
- Specifically challenges "meaningful benefits" requirement, "material differences in access" standard, comparative analysis requirements, ERISA plan fiduciary certification requirement).
- Case and federal enforcement of regulations are stayed while agencies reconsider regulations.

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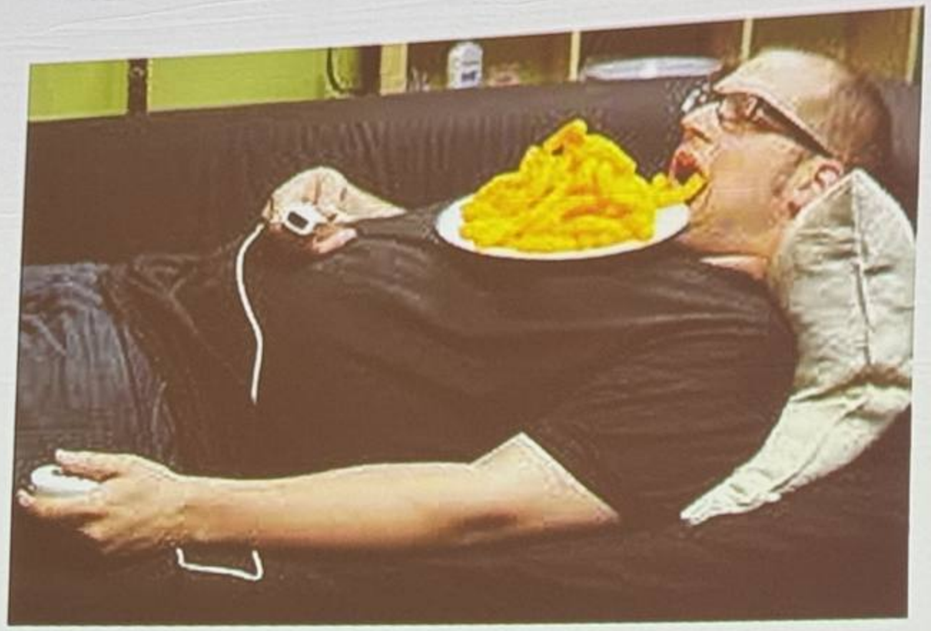
Don’t Panic

- All of the elements of MHPAEA (no unique TLs, prior QTL rules, prior NQTL rules) that were in the 2013 Rule remain in effect.
- A number of things addressed in the new Rule would still be barred under currently in effect rules.
  - Requirement to produce NQTL analysis
  - Exclusion of core treatments (ABA) (*Doe v. UBH*).
  - Disparate standards for MH versus M/S in purchased commercial UM tools such as IQ, MCG. *See K.D. v. Anthem* (D. Utah) (lower discharge standards for MH).
- Reimbursement methodologies, in-network out of network coverage.
- Bones still there



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Medicaid and MHPAEA

- More to do
- Compliance
  - CMS Did Not Ensure Selected States Complied With Medicaid Managed Care Mental Health and Substance Use Disorder Parity Requirements, March 25, 2024. https://oig.hhs.gov/reports-and-publications/all-reports-and-publications/cms-did-not-ensure-that-selected-states-complied-with-medicaid-managed-care-mental-health-and-substance-use-disorder-parity-requirements/
  - States and their MCOs did not conduct required parity analyses (five States), and States did not make documentation of compliance available to the public by the compliance date (eight States). MCOs applied financial requirements (two States) and quantitative treatment limitations (six States) for MH/SUD services that were more restrictive than those for medical/surgical services in the same classifications and imposed nonquantitative treatment limitations (eight States) on MH/SUD benefits that were not comparable to, or were more stringent than, those for medical/surgical benefits in the same classifications.
- Adult services

AUTISM LEGAL RESOURCE CENTER

Case Round-up

- *United States v. Falcon* (E.D.N.Y.) (motion to suppress evidence on fraud prosecution denied; alleged that "defendant submitted fraudulent session notes and invoices and received payment for at least 6,000 non-existent Early Intervention Program sessions, resulting in the improper disbursement of more than $600,000 … as well as lost time and resources for the victim children and their parents."
- *Perrone v. Blue Cross Blue Shield of Michigan* (ERISA gives private right of action to enforce MHPAEA; State law breach of contract claims pre-empted)

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Coding Coalition Update

Although the specific changes to the adaptive behavior services code set remain confidential until released by the AMA, we can share that the Panel accepted the following changes to our code set:

- the addition of six new CPT codes,
- the revision of codes 97151-97158,
- the revision of guidelines around usage of the code set, and
- deletion of the existing T codes.
- Detailed information will be distributed to providers and payers at the earliest possible opportunity. In the meantime, all parties must adhere to all AMA CPT confidentiality rules.

Changes to the code set will take effect on January 1, 2027, and will be included in the 2027 CPT® Professional Code book, which will be published late in 2026.

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Case Round-up

- *Y.E. v. Hewlett Woodmere Union Free Sch. Dist.* (E.D.N.Y.) (distinguishing ABA program from behavioral supports)
- *United States v. Castle* (M.D. Ala.)(downward adjustment in sentencing for defendant with autism on child pornography conviction)
- *Nelson v. Seaside Sch.* (N.D. Fla.)(ADA case based on restriction on participation of autistic student on swim team)
- *C.W. Nevada Dep't of Ed.* (D. Nevada))case involving systemic ADA and IDEA violations brought by students with dyslexia).
- *Robles-Figueroa v. Presbyterian Community Hosp.* (D.P.R.) (medical malpractice case involving birth injury allegedly resulting in autism or autistic like behaviors)

Audits

- Out of Network Audits
- Medicaid OIG audits of State Oversight
  - OIG Audit Reports and Work Plan
    - https://oig.hhs.gov/reports/
  - Indiana, Wisconsin issued, other representative sample states in process
  - Compliance with state policy for provider qualifications, consideration of specific technician eligibility requirements if none already specified.
  - Documentation to support code billed.
  - Provider credentials in conformity to state requirements for code billed
  - Beneficiary qualifications in conformity to state requirements

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Network Issues

- Network terminations, curating networks
  - State statutes and case law on provider termination rights
    - California fair procedure doctrine
    - N.Y. Pub. Health Law § 4406-d
  - Pro Publica, UnitedHealth Is Strategically Limiting Access to Critical Treatment for Kids With Autism (12/13/24) (discussing plans to prevent new providers from joining networks, terminating providers from networks even where waitlists)
- Network adequacy regulation
  - California APL 24-021 (12/12/24)
  - 10 NYCRR 98-5 (Medicaid MCOs) (effective July 1, 2025)
  - 11 NYCRR 38 (Commercial insurance) (effective July 1, 2025)