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# **RECONCILING AUTISM SPECTRUM DISORDER COVERAGE IN FEDERAL AND STATE LAW**

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## RELEVANT FEDERAL LAWS

- Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)
- Employee Retirement Income Security Act of 1974 (ERISA)
- Patient Protection and Affordable Care Act of 2010 (with the Health Care and Education Reconciliation Act of 2010) (ACA)
- Social Security Act—Titles XIX and XXI (Medicaid; Children's Health Insurance Program or CHIP)

# MHPAEA

- Does not mention autism spectrum disorder (ASD) per se.
- Requires parity where both behavioral health and medical/surgical benefits are provided.
- Applies to:
  - state-regulated plans
  - ERISA self-insured plans
  - Medicaid managed care plans

# ERISA

- Applies to self-insured plans, both public and private.
- Mental health parity (MHPAEA) applies to ERISA plans.
- Preempts state insurance laws and state regulation relating to self-insured plans.
- Most ACA insurance reforms apply to ERISA self-insured plans.



# ACA

- Section 1001 bans annual and lifetime limits on coverage.
- Section 1001 requires that plans cover preventive services, including screenings, at no cost to enrollees, as per federal guidelines.
  - Federal guidelines include ASD screening and diagnosis.
- Updates the MHPAEA to apply to individual and public plans.
- Section 1302(b)(1)(E) establishes behavioral health services as "essential health benefits".
- Section 1302(b)(1)(G) establishes rehabilitative and habilitative services and devices as "essential health benefits".

# SOCIAL SECURITY ACT — CENTERS FOR MEDICARE AND MEDICAID SERVICES (CMS) REGULATIONS AND GUIDANCE FOR MEDICAID AND CHIP

- States must cover ASD screening, diagnosis and treatment under the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program for individuals < 21 years.
- For individuals > 21 years:
  - states may elect to put ASD services on state plan; or
  - states may provide ASD services through a home- and community-based waiver.
- States' Medicaid and CHIP programs must comply with MHPAEA parity requirements (81 FR 18389).

# NEW MEXICO STATUTES — PRIVATE PLANS

- New Mexico Insurance Code:
  - Individual contracts: Section 59A-22-49 NMSA 1978
  - Group and blanket plans: Section 59A-23-7.9 NMSA 1978
  - Health Maintenance Organization Law: Section 59A-46-50 NMSA 1978
  - Nonprofit Health Care Plan Law: Section 59A-47-45 NMSA 1978
- Private individual, group and blanket policies, HMO contracts and nonprofit plans must offer coverage for:
  - Diagnosis
  - Speech therapy
  - Occupational therapy
  - Applied behavioral analysis (ABA)
- Defines ASD as a condition diagnosed pursuant to the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), text revision.
  - The fifth edition (DSM-V) is current.



## NEW MEXICO STATUTES — PRIVATE PLANS (CONTINUED)

- Limit ASD benefits and services to individuals 18 and under, or under 22 if enrolled in high school.
- Annual and lifetime caps on dollar value of benefits and services.
- Allowed to establish copays for ASD screenings of children.



## NEW MEXICO—OFFICE OF SUPERINTENDENT OF INSURANCE (OSI)

- March 25, 2015 Bulletin, No. 2015-013.
- Clarifies that commercial individual and small group plans may not have limits in autism coverage pursuant to the ACA.
- Informs insurers that large group plans may not have limits pursuant to the MHPAEA.
- Points out that the DSM-V is the current manual for ASD diagnosis, not the DSM-IV.
- Indicates that the OSI will seek change to state law "at the earliest opportunity".

# NEW MEXICO PRIVATE PLANS — FEDERAL LAW CHALLENGES

- Age limits are NOT applied to benefits provided for medical/surgical benefits, and likely are in violation of the MHPAEA.
- Annual and lifetime caps violate ACA Section 1001.
- ACA Section 1001 requires that plans cover preventive services, including screenings recommended by the federal Health Resources and Services Administration, at no cost to enrollees. These screenings include those for developmental disabilities, which include ASD.

## NEW MEXICO — PUBLIC EMPLOYEE AND RETIREE COVERAGE

- The Group Benefits Act requires ASD benefits and services (Section 13-7-16 NMSA 1978).
- Requires coverage for:
  - Diagnosis
  - Speech therapy
  - Occupational therapy
  - ABA
- Self-insured, so their plans are governed by ERISA.
- The MHPAEA applies to private *and* public sector employers with more than 50 employees.

## NEW MEXICO PUBLIC EMPLOYEE AND RETIREE PLANS (CONTINUED)

- Limits ASD benefits and services to individuals 18 and under, or under 22 if enrolled in high school.
- Annual and lifetime caps on dollar value of benefits and services.
- Allows copays for screenings.



## NEW MEXICO PUBLIC EMPLOYEE AND RETIREE PLANS — FEDERAL LAW CHALLENGES

- Age limits are NOT applied to benefits provided for medical/surgical benefits, likely in violation of the MHPAEA.
- Annual and lifetime caps violate ACA Section 1001.
- Screening copays would violate ACA Section 1001, which requires that plans cover, at no cost to enrollees, preventive services, including screenings — which include ASD/developmental disabilities screenings — recommended by the federal Health Resources and Services Administration.

## NEW MEXICO MEDICAID

- CMS guidance: Medicaid and CHIP must cover ASD-related services for Medicaid recipients under 21.
- The MHPAEA applies to Medicaid and CHIP. ASD treatment is classified as behavioral health and physical health treatment.

## MEDICAID — CHILDREN WITH ASD

- EPSDT includes ASD screenings and services *for children and youth under 21*.
  - the Family Infant Toddler (FIT) Program is for children at risk for or diagnosed with a developmental disability or an intellectual disability.  
8.320.2.16 NMAC

## MEDICAID — WAIVER SERVICES

- No ASD-specific waiver
- Home- and community-based waivers that include services for recipients with ASD:
  - **Developmental disabilities supports and services (all ages) — serve the majority of recipients with ASD**
  - Mi Via self-directed waiver (all ages)
  - Centennial Care long-term services (individuals over 65) — nursing facility level of care
  - Medically fragile (all ages)



## NEW MEXICO MEDICAID (CONTINUED)

- ABA benefits provided to children and youth 12 months to 21 years of age diagnosed with ASD.
  - No ABA for adults
- Age limitation likely violates the MHPAEA with respect to Medicaid managed care plans, as there is no corresponding limitation of physical benefits.
- Fee-for-service age limitation permissible, as MHPAEA parity does not govern.

# HOW TO MAKE COVERAGE COMPLIANT WITH FEDERAL LAW

- Private plans:
  - Office of Superintendent of Insurance rules or bulletins interpreting federal law
  - State legislation
- Public employee and retiree plans:
  - Agencies' coverage changes
  - Federal enforcement — Internal Revenue Service and U.S. Department of Labor
- Medicaid and CHIP:
  - Managed care organization contracts
  - Human Services Department rules
  - State legislation
  - CMS enforcement

# SECTION 59A-2-8 NMSA 1978. GENERAL POWERS AND DUTIES OF SUPERINTENDENT. (2013)

The superintendent shall:

- A. organize and manage the office of superintendent of insurance and direct and supervise all its activities;
- B. execute the duties imposed upon the superintendent by the Insurance Code;
- C. enforce those provisions of the Insurance Code that are administered by the superintendent;
- D. have the powers and authority expressly conferred by or reasonably implied from the provisions of the Insurance Code;
- E. conduct such examinations and investigations of insurance matters, in addition to those expressly authorized, as the superintendent may deem proper upon reasonable and probable cause to determine whether a person has violated a provision of the Insurance Code or to secure information useful in the lawful enforcement or administration of the provision;
- F. have the power to sue or be sued;
- G. have the power to make, enter into and enforce all contracts, agreements and other instruments necessary, convenient or desirable in the exercise of the superintendent's powers and functions and for the purposes of the Insurance Code;
- H. prepare an annual budget for the office of superintendent of insurance;
- I. have the right to require performance bonds of employees as the superintendent deems necessary pursuant to the Surety Bond Act [10-2-13 through 10-2-16 NMSA 1978]. The office of superintendent of insurance shall pay the cost of required bonds;
- J. comply with the provisions of the Administrative Procedures Act [12-8-1 through 12-8-25 NMSA 1978]; and
- K. have such additional powers and duties as may be provided by other laws of this state.