AUTISM LEGAL
RESOURCE CENTER

Legal Duties of Schools, Medicaid, and Insurers to Allow and Fund ABA Services in Schools

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The incidence of Autism Spectrum Disorder (ASD) has increased dramatically in recent years rising from 1 in 166 children in 2004 to 1 in 110 in 2010 when Colorado's autism insurance mandate (HIMAT) was passed to 1 in 54 in 2020.[1] Without adequate medical treatment of the debilitating conditions associated with ASD in the childhood years, the long term costs will be enormous. Fortunately, the availability of effective treatment has also been increasing. Applied Behavior Analysis (ABA) has become generally recognized as the standard of care for autism treatment as the only medical treatment shown to substantially ameliorate the symptoms of ASD. Although highly effective, it can be costly as it requires 30-40 hours per week of specialized treatment for some children which can easily amount to $50,000-$60,000/year or more in the short term. However, the costs if adequate treatment is not provided are far greater. Without adequate medical treatment of the debilitating conditions associated with ASD in the childhood years, the long term costs are estimated at $3.2 million dollars over the life of the child.[2] Additionally, the lost productivity of the families with a child with ASD, must be considered. Typically, with a highly disabled child, at least one parent trades working for caretaking. With Colorado's 2019 per capita GDP at $61,311 the ongoing losses are a significant drain on the state's economy.[3]

Through federal and state initiatives, funding for treatment exists but, tragically, access has been limited or refused in the public schools--the primary environment where children spend many the most effective treatment hours of their day. Without this access--which can be provided at virtually no cost to the schools--children face poor outcomes and diminished futures, the state will bear enormous long term costs and financially strapped school districts will continue to have to try and meet the needs of inadequately treated and therefore substantially disabled children in costly restrictive environments. Conversely, with access to adequate treatment nearly half of children can be potentially be mainstreamed and another 40 percent can achieve a substantial measure of functionality reducing their need for costly supports and services including special

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[1] Autism Speaks https://www.autismspeaks.org/press-release/cdc-estimate-autism-prevalence-increases-nearly-10-percent-1-54-children-us?gclid=EAIaIQobChMI4MmH657U6QIVS7LICh1UnQmjEAAYASAAEgLr8vD_BwE citing CDC News Release March 26, 2020.

[2] Ganz, M. (2007) The Lifetime Distribution of the Incremental Societal Costs of Autism, Arch Pediatric Adolescent Medicine, 161: 343-349.

[3] Per Capita Real Gross Domestic Product of Colorado from 2000 to 2019 (in chained 2012 U.S. Dollars), available at https://www.statista.com/statistics/594394/colorado-gdp-per-capita/

education costs. Long term Medicaid costs will also be reduced if therapy is delivered in the most effective and efficient fashion, which includes providing comprehensive treatment across a child's environments, including schools.

For many children with ASD, particularly those who are severely affected, it is medically necessary to receive Applied Behavior Analysis (ABA) therapy across settings, including school settings, to ameliorate their deficits and conditions and achieve maximum functioning. ASD is a global developmental disorder characterized by difficulties in social/ emotional processing and responding, as well as ritualized patterns of response. Unfortunately, even when progress is made, because children with ASD typically have difficulty generalizing, new skills may not manifest in other settings. For those skills to generalize, consistent treatment across settings is usually necessary for mastery of skills and reduction of problem behavior. Challenging behaviors may occur selectively or manifest differently depending on the environment. Also, to be effective, treatment must frequently be delivered at a high intensity requiring that treatment be ongoing throughout a child's daily activities. Accordingly, generally recognized standards of care for ABA treatment provide that treatment for ASD must be available across all environments where the behaviors occur or are desired to occur, including schools and other community settings as needed to target behaviors and generalize skills. "The standard of care provides for treatment to be delivered consistently in multiple settings to promote generalization and maintenance of therapeutic benefits . . . [including] homes, schools, transportation, and places in the community. Treatment across settings with multiple adults, siblings, and/or typically developing peers, under the supervision of a Behavior Analyst, supports generalization and maintenance of treatment gains."[4]

In the long term, depriving children of medically necessary care in school settings risks lifelong diminution of function as these inadequately treated children grow into adulthood and imposes substantial long-term social and economic costs that ultimately will be borne by Colorado taxpayers. In the near term, it is fiscally and morally irresponsible to forego federal and private funds intended to be used for these behavioral health services and limit children who need behavioral health care to IDEA educational interventions provided through increasingly scarce school funding. Particularly as Colorado begins to emerge from the COVID emergency, it is imperative that all service delivery systems work in the most effective and cost-efficient manner possible. To that end, the legal obligations of the various stakeholders to ensure that medically necessary care in schools is allowed and that all available funding for this is utilized are set forth below.

[4] Behavior Analyst Certification Board, Applied Behavior Analysis Treatment of Autism Spectrum Disorder: Practice Guidelines for Healthcare Funders and Managers (2d Ed.) (BACB Guidelines), p. 17, available at https://www.bacb.com/wp-content/uploads/2017/09/ABA_Guidelines_for_ASD.pdf.

1. **Section 504/ADA requires that schools make reasonable accommodations to allow access to ABA behavioral health treatment when medically necessary for individual students.**

Following recent Supreme Court precedent in *Fry v. Napoleon Comm. Sch.*,[5] federal courts have held that independent of duties owed under IDEA to provide students with disabilities a Free and Appropriate Public Education, schools are required under Section 504 of the Rehabilitation Act and the ADA to make reasonable accommodations to allow disabled students with autism to access medically necessary Applied Behavior Analysis (ABA) services in school settings. *See K.M. v. Tehachapi Unified Sch. Dist.*, No. 1:17–cv–01431, 2018 WL 2096326 (N.D. Cal. May 7, 2018); *A.F. v. Portland Pub. Sch. Dist.*, No. 3:19-cv-0127, 2020 WL 1693674 (D. Or. Apr. 7. 2020). The decisions stress that requests under ADA/Section 504 for reasonable accommodations to access this medically prescribed treatment for a child's disability are not dependent on an IEP team's view of whether this access is necessary to provide a FAPE under IDEA. *K.M.* 2018 WL 2096326 at *4. Where the Plaintiff's claims center on his need for medically necessary services to treat his underlying autism in the educational setting, and not the mere access to educational services, the claims are not subject to the exhaustion requirements of the IDEA. *A.F.*, 2020 WL 1693674 at *4.

When a district is on notice of a request for accommodation or the need is obvious or required by law, the district "is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation." K.M. 2018 WL 2096326 at *8. Failure to conduct such investigation or provide the requested access when this can be done without fundamentally altering the school's program or placing undue financial or administrative burdens on the school is actionable. *Id*.[6] In this regard, it is relevant if plaintiff is not asking for schools to pay for services, but merely to allow access.[7] Moreover, even in those limited instances where a school can demonstrate that a particular accommodation would entail a fundamental alteration or undue burden, the school must consider and take other actions that would not result in such an alteration or such burdens but would meet the request for access to medically necessary services requested for meaningful and safe access to school programs and facilities.

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[5] 137 S. Ct. 743 (2017). In *Fry*, the Supreme Court held that a child's claim that she was not allowed to have her service dog accompany her in school was actionable under the ADA and Section 504 and she did not first have to pursue relief under the IDEA. As recognized in *K.M.*, the Supreme Court's analysis in *Fry* is directly applicable to a child with ASD who requests that her ABA therapist be allowed to accompany her in school. *K.M.*, 2018 WL 2096326 at *5.

[6] *A.G. v. Paradise Valley Unified School Dist.* No. 69, 815 F.3d 1195, 1206-07 (9th Cir. 2016) (reversing judgment for school district on reasonable accommodation and deliberate indifference claims where district failed to address child's behavioral health needs); *K.N. v. Gloucester City Bd. Of Ed.*, 379 F.Supp.3d 334, 354 (D.N.J. 2019) (provision of trained one to one aide would not fundamentally alter program and was reasonable and necessary accommodation under ADA and Section 504); *Snell v. N. Thurston Sch. Dist.*, No. C-13-5786, 2015 WL 6396092 (W.D. Wash. Oct. 21, 2015) at *5 (denying school districts motion for summary judgment on deliberate indifference claim where it did not act to address child's medical needs);

[7] The fact that a request is not seeking for the school to pay for a service is also supportive of the conclusion that a plaintiff's request does not trigger the primary implications of the IDEA and is not subject to IDEA procedural requirements. *A.F.*, 2020 WL 1693674 at *4.

Notwithstanding these well-established rights, many schools still refuse to adequately investigate or respond to requests for access to medically necessary ABA services or even recognize them as valid assertions of rights under the ADA and Section 504. This not only injures Colorado children who have to either forgo medically necessary treatment or withdraw from public school, it works substantial harm to the public fisc by causing schools to forgo desperately needed funding available from other sources and imposes substantial long term social costs for inadequately treated and educated children. To fulfill its obligations under federal and state law and insure that children's rights are protected and the state does not continue to incur unnecessary costs, Colorado Department of Education should issue guidance to schools reminding them of their obligation to respond to requests for access to medically necessary ABA treatment under ADA/Section 504 and providing technical support and best practice information on how such requests can be reasonably accommodated.[8]

2. **Medicaid's EPSDT mandate and CMS Guidance require that HCPF cover all medically necessary care for Medicaid eligible children in Colorado, including medically necessary ABA therapy delivered in school settings.**

Pursuant to Medicaid's EPSDT mandate, the state Medicaid agency is responsible for insuring that all medically necessary ABA/BHT to correct or ameliorate a child's ASD deficits and conditions is provided based on individualized determinations of medical necessity. 42 U.S.C. §1396d(r)(5). As made clear by CMS EPSDT guidance to states, coverage of services in school settings is an important component of EPSDT services and "[s]chools are particularly appropriate places to provide . . . behavioral health services." EPSDT - A Guide for States: Coverage in the Medicaid Benefit for Children and Adolescents (CMS June 2014) ("CMS EPSDT Guide"), p. 21., available at https://www.medicaid.gov/sites/default/files/2019-12/epsdt_coverage_guide.pdf.[9] See also CMS EPSDT Guide, pp. 11-12, 20. CMS has also issued technical guidance to states stressing that regardless of any services provided by schools pursuant to IDEA or otherwise, the state Medicaid program retains primary responsibility for covering and insuring delivery of all medically necessary healthcare service in school settings for Medicaid eligible children. U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, State Medicaid Director Letter #14-006; CMS SMD# 14-006, Re: Medicaid Payment for Services Provided without Charge, December 15, 2014, p. 3, available at https://www.medicaid.gov/sites/default/files/federal-policy-guidance/downloads/smd-medicaid-payment-for-services-provided-without-charge-free-care.pdf. The guidance also makes clear that care meeting Medicaid requirements must be covered regardless of whether it is also deemed necessary by school officials for purposes of IDEA and included in an IEP. *Id.*[10]

[8] The Colorado Department of Education has general supervisory authority over Colorado public schools and also serves as an information resource. Colo. Rev. Stat. §§ 22-2-107, 22-2-113.

[9] *See* CMS EPSDT Guide, pp. 11-12, 20; 42 U.S.C. § 1396b(c); *Detsel by Detsel v. Sullivan*, 895 F.2d 58, 66 (2d Cir. 1990) ((state may not "preclude a claimant who resides at home from receiving Medicaid reimbursement for [services] rendered during those few hours of each day when her normal life activities take her outside her home to attend school")

[10] *See* Florida House of Representatives Staff Analysis, HB 81. 2/3/2020, p.3 (CMS guidance clarifies that Medicaid coverage of services in schools was not limited to students with IEPs or IFSPs but extended to general student

Excluding or limiting Medicaid coverage in school settings is not only contrary to medical necessity and EPSDT, it runs afoul of the integration mandate of the Americans with Disabilities Act (ADA) which requires delivery of care "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) Depriving children of this care also exposing them to the risk of unnecessary segregation and institutionalization in further violation of the ADA. *Olmstead v. L.C.*, 527 U.S. 581 (1999)

Notwithstanding the indisputable obligation of the state Medicaid agency to cover these services, families continue to face difficulties in obtaining authorization from HCPF and its utilization management for school-based ABA services even where it is uncontested that they are medically necessary. Requests for authorization are denied because there is not a location code for schools, because they are mischaracterized as noncompensable care coordination or they are simply pended indefinitely. To prevent continued violations and ensure that EPSDT mandated treatment is covered, HCPF must issue guidance to its utilization management and claims processing personnel and contractors that ABA services must be covered across settings, including schools based on individualized determinations of medical necessity and cannot be denied or limited on administrative or other grounds. Coverage must be available to all Medicaid providers and not just school personnel meeting Medicaid requirements. Reimbursable care must be must be provided in accordance with EPSDT and generally applicable HCPF pediatric behavioral health requirements and standards and therefore claims cannot be denied on grounds of duplication unless the school is providing the full intensity and scope of medically necessary ABA/BHT delivered by qualified and credentialed personnel meeting Medicaid standards needed to be provided in the school setting to correct or ameliorate the child's ASD deficits and conditions in conformity with the child's overall treatment program.[11] Pursuant to its statutory obligations to provide information on EPSDT services, HCPF must also issue program guidance to parents, physicians, school personnel and other stakeholders advising of the availability of school based services and how to obtain them. 42 U.S.C. § 1396a(a)(43)(A). [12].

3. Colorado regulated commercial health insurance policies are required by the Health Insurance Mandated Autism Treatment (HIMAT) statute to cover medically necessary ABA treatment in school settings.

The Colorado Health Insurance Mandated Autism Treatment (HIMAT) statute requires state regulated insurance plans to cover all medically necessary ABA treatment for Autism Spectrum Disorders. Colo. Rev. Stat. §10-16-104 (1.4)(a)(XII)(B) and (b)(l). Health Plans cannot impose additional requirements for authorization of services that operate to exclude coverage of ABA treatment. Colo. Rev. Stat. §10-16-104(d). As the Supreme Court of Pennsylvania has held in construing Pennsylvania's similar autism insurance mandate, because ABA is an "environmentally sensitive" therapy it must be available in all settings, including school settings,

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population), available at https://www.flsenate.gov/Session/Bill/2020/81/Analyses/h0081f.HHS.PDF. Florida HB 81 clarifying expanded Medicaid coverage obligations in schools in accordance with federal law was enacted in June of this year. *See* Chapter 2020-79, available at http://laws.flrules.org/2020/79.

[11] In such cases, the school should be reimbursed by Medicaid upon request.

[12] 42 C.F.R. §441.56(a); *John B. v. Menke*, 176 F.Supp.2d 786, 801 (M.D. Tenn. 2001); *Emily Q. v. Bonta*, 208 F. Supp. 2d 1078, 1095 (C.D. Cal. 2001).

and any contrary general restriction or exclusion in an insurer's policy cannot be enforced where, as here, state law requires coverage of ABA for ASD. *Burke v. Independence Blue Cross*, 171 A.3d 252 (Pa. 2017) (holding insurer could not exclude coverage of ABA in school notwithstanding general exclusion for school-based services in its policy).[13] Exclusion of these medically necessary services would also contravene various federal laws. *See Wit v. United Behavioral Health*, No. 14-cv-02346, (N.D. Cal.) Findings of Fact and Conclusions of Law, February 28, 2019, pp. 104-106 (holding that UBH violated ERISA fiduciary duty and duty of due care owed to health plan beneficiaries by developing and using coverage guidelines that were more restrictive than generally accepted standards of care).[14]

Notwithstanding this clear coverage requirement, some insurers still impose improper restrictions or outright exclusions of medically necessary ABA in school settings requiring families to pursue time-consuming, costly appeals for their children to receive the care to which they are legally entitled. Therefore, to prevent continued noncompliance with state insurance laws and secure the uniform coverage required by HIMAT DORA, Division of Insurance[15] must issue guidance reminding insurers of their obligation to cover all medically necessary ABA treatment across settings, including schools, and that they are not to interpose any restrictions or exclusions that would prevent or limit this coverage.

As the state emerges from the COVID-19 emergency, children with ASD who have been unable to access sufficient treatment will be in an especially precarious position and schools will be more hard-pressed than ever to fund and maintain essential services. Ensuring that children with ASD have access to the treatment they need and are legally entitled to is the fiscally and morally correct thing to do. To accomplish this, all state agencies need to be operating on the same page in discharging their respective and interrelated obligations. Coordinated guidance from the

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[13] HIMAT provides that covered services are in addition to any services provided by schools. Colo. Rev. Stat. §10-16-104(i). As discussed above, ABA behavioral health treatment is distinct from the educational interventions generally provided by school personnel.

[14] *A.F. v. Providence Health Plan*, 35 F. Supp. 3d 1298, 1314-15 (D. Or. 2014) (holding that treatment limitation on ABA for child with ASD violated MHPAEA). A number of states' DOI Bulletins have held that ABA treatment exclusions for ASD violate federal law. *See, e.g.*, North Dakota Insurance Department Bulletin 2018-1, available at https://www.nd.gov/ndins/sites/www/files/documents/Bulletins/2018/20180711%20Bulletin%202018-1.pdf; Wyoming Insurance Department, Bulletin 01-2019, available at http://doi.wyo.gov/legal/memorandum; Idaho Department of Insurance, Bulletin 18-02, available at https://doi.idaho.gov/DisplayPDF?Id=4924.

[15] The Division is "charged with the execution of the laws relating to insurance and has a supervising authority over the business of insurance" in Colorado. Colo. Rev. Stat. §10-1-103.

responsible state agencies is the least burdensome and most expeditious way to accomplish this.

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