AUTISM LEGAL
RESOURCE CENTER

# National Academies of Science, Engineering and Medicine
# Applied Behavior Analysis
# Autism Care Demonstration Project
# Policy and Mental Health Parity

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# Policy

- The military provides healthcare to “create and maintain high morale in the uniformed services by providing an improved program of medical ... care,” 10 U.S.C. 10 U.S.C. § 1071
- Military beneficiaries should receive services of at least the same quality and comprehensiveness as civilian counterparts
- Program administration should be geared toward promoting servicemember retention, readiness, and productivity

# Applied Behavior Analysis (ABA)

- Tiered ABA is the standard accepted treatment for ASD across all civilian funding streams and institutions.
- Since the 2014 initiation of the Autism Care Demonstration (ACD) program after the remand in *Berge v. United States:*
- All states now mandate coverage of ABA as medical treatment in all or part of their regulated markets
- The U.S. Department of Labor and other agencies that oversee healthcare coverage not regulated by states and courts have uniformly rejected attempts by health plans to exclude coverage of ABA as experimental. *See, e.g., Doe v. United Behavioral Health*, 523 F. Supp. 3d 1119 (N.D. Cal. 2021) (holding ABA is the "core treatment" and "primary treatment modality" for ASD and exclusion violated the Federal Mental Health Parity Act--MHPAEA).

# Applied Behavior Analysis (ABA)

- Civilian Federal Employee Health Benefit Benefits (FEHB) Program covers ABA as part of standard benefits package.
- All states' Medicaid programs now cover ABA as Medical Assistance, which, along with physicians, hospitals, and other healthcare services, must be available to all Medicaid-eligible children under 21 years of age. Experimental or investigative treatments cannot be covered as Medicaid Assistance.
- Category 1 Current Procedural Terminology (CPT) Codes for ABA were adopted by the American Medical Association in 2019. Category 1 CPT Codes can only be promulgated for treatments that are safe, effective, and consistent with current medical practice.

# Access to Services of Same Comprehensiveness and Quality as Civilians

- Generally Accepted Standards of Care
  - Council of Autism Services providers/Behavior Analyst Certification Board Practice Guidelines Other Sources identified in case law and statutes (e.g., California SB 855)
- Mental Health Parity and Addiction Equity Act (MHPAEA)
  - Helps ensure that coverage of mental health conditions (historically subject to limited and discriminatory coverage is on par with medical/surgical coverage)
  - Broad Application: fully funded plans, ACA plans, self-funded plans, FEHB, Medicaid
- Consideration of these factors is appropriate to evaluation of DOD coverage.
  - While the MHPAEA statute does not directly apply to DOD, DOD is to comply with the intent of MHPAEA. The provisions of MHPAEA and PPACA served as models for TRICARE in proposing changes to existing benefit coverage. 81 F.R. 6106168 (Sept. 2, 2016); Joint Fact Sheet, DoD and VA Take New Steps to Support the Mental Health Needs of Service Members and Veterans (Aug. 26, 2014.)
  - “Medically or psychologically necessary” is defined by the TRICARE regulation as “[t]he frequency, extent, and types of medical services or supplies which represent appropriate medical care and that are generally accepted by qualified professionals to be reasonable and adequate for the diagnosis and treatment of illness, injury, pregnancy, and mental disorders.” 32 CFR § 199.2(b).

# Access to Services of same scope and quality as Civilians

- Some Key Aspects of Generally Accepted Standards of Care for ABA Treatment of ASD
  - Effective across lifespan
  - Full range of debilitating ASD symptoms subject to treatment to maximize functioning
  - Treatment across settings that will maximize treatment outcomes, maintenance, and generalization for an individual.
  - Sufficient service hours for assessment, analysis, protocol evaluation, integrity and modification, and direct treatment.
  - Range of assessment tools and treatment modalities individualized to the patient.

# Mental Health Parity (MHPAEA)

- [T]reatment limitations applicable to such mental health or substance use disorder benefits are no more restrictive than the predominant treatment limitations applied to substantially all medical and surgical benefits covered by the plan (or coverage), and there are no separate treatment limitations that are applicable only with respect to mental health or substance use disorder benefits. 29 U.S.C. § 1185a(a)(3)(A)(ii)
- The definition of a mental health condition must be consistent with generally recognized independent standards of current medical practice, such as the Diagnostic and Statistical Manual of Mental Disorders.(DSM) 29 C.F.R. § 2590.712(a). Per the DSM, Autism Spectrum Disorder is a Mental Health Disorder. Therefore, benefits for the treatment of ASD, including ABA treatment, are subject to mental health parity protections

# Mental Health Parity (MHPAEA)

- **No treatment limits are applicable only** to mental health or only to a specific mental health condition (e.g., **ASD, ABA for ASD**). 29 U.S.C. § 1185a(a)(3)(A)

# MHPAEA Quantitative Treatment Limits (QTLs)

- No QTLs unless no more restrictive than the predominant QTL applied to substantially all medical/surgical coverage in the same statutory classification (outpatient). 29 C.F.R. §2590.712 (c)(1)(iii)
- Dollar caps*, hour caps, visit limits, age caps.
- CPT 97151 Hard caps on assessment hours impermissible QTLs. Daily caps on 97155 protocol modification. (MUE issues)
- The “substantially all” test must be applied to any treatment of the MH condition. The focus is on the nature of the condition being treated (MH or Med/Surg), not the nature of treatment. Even if the treatment might also be used for medical conditions (e.g. , ST, OT), if it is being used to treat a mental health condition, the “substantially all” test applies.

# MHPAEA Nonquantitative Treatment Limitations (NQTLs)

- MHPAEA Prohibits non-quantitative treatment limitations that limit the scope or duration of treatment of mental health benefits unless as written and in operation they are comparable to, and 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 classification (e.g., outpatient). 29 C.F.R. § 2590.712(c)(4)(ii).
- Examples: prior authorization, medical necessity criteria, progress standards, access to treatment (gatekeeping) requirements,
- Others relevant to ABA: location exclusions, limitations on treatment targets, symptoms treated, requirements to access treatment, parent participation requirements, treatment plan requirements, billing, and coding limitations.

# Examples of program restrictions contrary or potentially contrary to GASC or MHPAEA

- Not covering all medically necessary services as reflected in AMA CPT codes
- Not allowing concurrent billing contemplated by AMA CPT codes
- Limitations on coverage of medically necessary services in school settings and other community locations.
- Not allowing coverage of treatment to maintain function/prevent deterioration
- Not allowing coverage of treatment targets directed to ameliorating functional behaviors and skills impaired by ASD (e.g., Activities of Daily Living (ADLs), communication skills).

# Program Administration Issues and Effects on Readiness and Productivity

- Because of mobility, a robust provider network is even more critical for servicemembers' families.
- Servicemember identified issues: authorization periods not linked to EFMP status, deployment cycle, etc., creates significant family stress, as do numerous edits and returns of a child's Treatment Plan during authorization and intrusive questions imposed as condition of service not required of civilians. Not receiving the same care as civilian counterparts being served by the same provider.
- Immediate consequences to families when coverable treatments change, or there are differing interpretations by MCOs impacting family capabilities, retention, and productivity (e.g. , addressing skills and behaviors in community settings, ADLs, communication skills).

# Program Administration Issues and Readiness and Productivity

- Per provider reports, more and more providers are discontinuing serving TRICARE because of disparate and onerous administrative burdens on documentation requirements, audits, payment delays, and recoupments.
- Program administration procedures that are inconsistent with general healthcare industry standards for ABA reduce the pool of providers.
  - Restrictions on care compounded by procedures that prevent secondary billing
  - Different, more restrictive interpretation of billing codes (97155)
  - Rigid recoupment processes for what are perceived as technical errors, even where effective services by qualified personnel have been provided