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Ninth Circuit Decision Rules That Residential Treatment for Anorexia Nervosa Is Covered Under State Mental Health Parity

Healthcare Law Newsletter

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Late last week, the U.S. Court of Appeals for the Ninth Circuit in *Harlick v. Blue Shield of California* issued a significant published opinion holding that California's Mental Health Parity Act requires insurers to cover medically necessary treatment of nine enumerated severe mental illnesses, including anorexia nervosa and autism, under the same financial terms as those applied to physical illnesses. What is striking about the holding is that it creates an affirmative mandate to cover all "medically necessary" services for severe mental illness even when the plan excludes or otherwise specifically does not cover the particular service in question, such as "residential care." While this holding is limited to the application of the scope of mental health parity legislation in California, it is an indication of how courts in other jurisdictions may broaden the mandate for coverage of certain costly mental health care services. Most notable are trends in litigation across the country involving disputes over coverage for eating disorders and autism.

The case involved Jeanene Harlick's more than eight-month-long admission to a residential treatment facility for management of her anorexia nervosa. The plaintiff had a more than 20-year history of eating disorders and her treating physicians believed she required a higher level of care than what could be provided in an outpatient setting. Upon her admission, her body weight was only at 65 percent of ideal, and she required a feeding tube at one point during her admission to increase her caloric intake. The facility was licensed as a residential treatment facility under state law and specialized in treating eating disorders. However, the facility was not a medical facility, had no licensed nurses on staff and did not meet the definition of a skilled nursing facility.

Blue Shield's policy of coverage contained an express exclusion for "residential treatment facilities." Notwithstanding the fact that the applicable evidence of coverage clearly excluded coverage for residential treatment facilities, the Ninth Circuit interpreted California's Mental Health Parity Act to be an affirmative mandate for plans to cover "all medically necessary services" for the severe mental illnesses listed in the Act.

Blue Shield argued that it need not cover all "medically necessary treatment" for the listed severe mental illnesses in the parity legislation. In support of such position, Blue Shield argued that the Knox-Keene Act—which regulates health care service plans in California—does not require that plans cover all medically necessary treatments for physical illnesses either, but only those medically necessary services that are also defined as "basic health care services"

as defined by the enabling legislation under the Knox-Keene Act or other services the plan has voluntarily chosen to cover. Accordingly, Blue Shield argued that because treatment at a residential facility for an eating disorder was not a basic health care service and it had not agreed to extend coverage for "residential treatment" for physical illnesses, therefore, it did not need to cover residential treatment for an eating disorder.

The court disagreed, noting that it was not supported by the language of the parity legislation and that:

> Blue Shield's argument also lacks any support in common sense. Some medically necessary treatment for severe mental illnesses have no analogue in treatments for physical illnesses. For example, it makes no sense in a case such as [plaintiff's] to pay for 100 days in a Skilled Nursing Facility -- which cannot effectively treat her anorexia nervosa -- but not to pay for time in a residential treatment facility that specializes in treating eating disorders."

The court also borrowed reasoning from a recent California Court of Appeal opinion in *Arce v. Kaiser Foundation Health Plan, Inc.*, 181 Cal. App 4th 471 (2010), holding that a categorical denial of costly applied behavioral analysis for the treatment of autism violated California's mental health parity laws. [In that case, the court held that the plaintiff could pursue a class action for the categorical denial of autism treatments that could otherwise qualify as medically necessary services.]

The court in *Harlick* also addressed numerous arguments relating to the relevance and weight of agency interpretations of the law. Namely, the state agency in California that regulates health care service plans—the Department of Managed Health Care (DMHC)— authored several interpretations concerning the scope of coverage under the parity legislation. The Ninth Circuit commented that the DMHC's position should be given little deference, especially here where the agency adopted a "litigating position" as a party in litigation claiming the Parity Act did not require coverage of treatment for autism where the provider was unlicensed, even if the treatment was "medically necessary." [See *Consumer Watchdog, No. BS121397 (Super. Ct. Cal. Aug. 7, 2009*).]

During the administrative appeals procedure in this ERISA case, Blue Shield never said that it was denying the residential treatment for anorexia because the treatment was not "medically necessary." The court concluded in this case that Blue Shield forfeited its ability to assert a "medical necessity" defense in this litigation because it did not assert such in the administrative appeals process nor in its rationale with the DMHC. Blue Shield relied on the argument that the residential services at issue were simply not a covered benefit during the administrative process. Because Blue Shield did not dispute the treatment was medically necessary until supplemental briefing filed after oral argument, the Ninth Circuit stated "we need not decide that [medical necessity] question."

This decision is bound to have ramifications in the insurance and health plan industry in the way in which benefit designs are written and communicated to its enrollees. Instead of relying on exclusionary language for certain types of treatment, this decision will now require a case-by-case analysis of medical necessity in California for the coverage of treatment for severe mental illnesses, regardless of the venue where care is delivered. Independent medical review will likely now have to be expanded to include certain mental health care services that may have previously been categorically excluded from coverage. Courts across the country will also most certainly continue to address the scope of mental health parity legislation as emerging treatments for such disorders are developed.

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