



Mental Health Parity: Are You Compliant?

Current Trends in Plan Auditing and Behavioral Health Litigation

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Topics

- Overview of The Mental Health Parity and Addiction Equity Act (the “Parity Act”)
- Recent Agency Auditing Activity—Determining if plans comply with parity laws
- Federal and State Parity Litigation Trends
- Trending Areas of Litigation over Behavioral Health Benefits:
 - Wilderness Therapy Coverage Disputes
 - Applied Behavioral Analysis Coverage Litigation

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October 3, 2018: 10th Anniversary of the Parity Act

- 10th Anniversary of the Act being signed into law by President George W. Bush was October 3, 2018.

The Mental Health Parity and Addiction Equity Act 10th Anniversary, PARITY TRACK, <https://www.paritytrack.org/mhpaea-10th-anniversary/> (last visited Oct. 14, 2019); see also *10th Anniversary of Mental Health Parity and Addiction Equity Act*, ABA (Oct. 11, 2018), https://www.americanbar.org/groups/health_law/section-news/2018/10/10th-anniversary/.

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10th anniversary report concluded with the following statement in bold letters:

- **Particularly with the concurrent alcohol, opioid and suicide epidemics ravaging states across the country, states must make parity enforcement a priority in order to increase access to critically needed treatment. Robust state parity enforcement will save not only lives but also benefit state budgets by encouraging commercial insurers to pay for treatment to which beneficiaries are entitled, reducing costly late interventions and cost shifts to payers such as Medicaid.**

Evaluating State Mental Health and Addiction Parity Statutes: A Technical Report, The Kennedy Forum (2018), https://chp-wp-uploads.s3.amazonaws.com/www.paritytrack.org/uploads/2018/09/KF-Evaluating-State-Mental-Health-Report-0918_web.pdf.

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Current state of mental health parity

- Milliman Report (2017) found that reimbursement rates for mental health and substance use disorder treatment providers were much lower than reimbursement rates for other medical providers.
- It also found that patients used out-of-network providers for a substantially higher proportion of behavioral health care than they did for medical/surgical care.

Stephen P. Melek et al., *Addiction and Mental Health vs. Physical Health: Analyzing disparities in network use and provider reimbursement rates*, MILLIMAN RESEARCH REPORT (Dec. 2017), <http://www.milliman.com/uploadedFiles/insight/2017/NQTLDisparityAnalysis.pdf>.

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Overview of The MHPAEA

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The Mental Health Parity and Addiction Equity Act (the “Parity Act”)

What are the requirements?

- Requires insurers to cover mental illnesses (e.g., depression, PTSD, autism, addiction, eating disorders, etc.).
- With no more restrictions than their coverage of physical illnesses (e.g., diabetes, cancer, etc.).

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Parity for Treatment Limitations

- Quantitative Treatment Limitations (QTLs)
 - numerical
- Non-Quantitative Treatment Limitations (NQTLs)
 - non-numerical: scope, duration, etc.

Warning Signs- Plan or Policy Non-Quantitative Treatment Limitations (NQTLs) that Require Additional Analysis to Determine Mental Health Parity Compliance, DEPT OF LABOR, <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/mental-health-parity/warning-signs-plan-or-policy-nqtl-that-require-additional-analysis-to-determine-mhpaea-compliance.pdf> (last visited Jan. 3, 2020).

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Quantitative Treatment Limitation Examples

- Limit on the number of outpatient visits
- Limit on the number inpatient treatment days covered

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Non-Quantitative Treatment Limitation Examples

- Pre-authorization requirements
- Medical necessity determinations
- Experimental exclusions

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Compliance Warning Signs (requiring investigation)

- Pre-authorization requirements
- Fail-first protocols
- Probability of improvement requirements
- Written treatment plan requirements
- Geographic limits
- Facility licensure requirements

Stop Sign

- When the above requirements are not applied in the same way for the corresponding medical/surgical benefits

See *Warning Signs - Plan or Policy Non-Quantitative Treatment Limitations (NQTLs) that Require Additional Analysis to Determine Mental Health Parity Compliance*, DEPT OF LABOR, <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/mental-health-parity/warning-signs-plan-or-policy-nqtl-that-require-additional-analysis-to-determine-mhpaea-compliance.pdf> (last visited Jan. 3, 2020).

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Parity and the Affordable Care Act

- The ACA expanded parity requirements to apply to small group and individual health insurance plans.
- All plans under the ACA cover treatment for mental health and substance use disorders and cannot deny coverage of these pre-existing conditions.

What is Mental Health Parity? A Consumer Guide to the Evaluating State Mental Health and Addiction Parity Statutes Report, THE KENNEDY FORUM (2018), https://chp-wp-uploads.s3.amazonaws.com/www.paritytrack.org/uploads/2018/09/KF-Evaluating-State-Mental-Health-Consumer-Brief-0918_web.pdf; see also Kirsten Beronio et al., *Affordable Care Act Expands Mental Health and Substance Use Disorder Benefits and Federal Parity Protections for 62 Million Americans*, U.S. DEPT OF HEALTH & HUMAN SERVICES (Feb. 20, 2013), <https://aspe.hhs.gov/report/affordable-care-act-expands-mental-health-and-substance-use-disorder-benefits-and-federal-parity-protections-62-million-americans#>.

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Application of the Parity Act

- The Parity Act only applies to health plans that provide mental health and substance use disorder benefits.

Substance Abuse and Mental Health Services Administration, *Parity of Mental Health and Substance Use Benefits with Other Benefits: Using Your Employer-Sponsored Health Plan to Cover Services*, HHS Publication No. SMA-16-4937, Rockville, MD; Substance Abuse and Mental Health Services Administration, 2016.; see also *Parity of Mental Health and Substance Use Benefits with Other Benefits: Using Your Employer-Sponsored Health Plan to Cover Services*, U.S. DEPT OF LABOR, <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/mental-health-parity/parity-of-mental-health-and-substance-use-benefits-with-other-benefits.pdf> (last visited Jan. 3, 2020).

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When Parity Rules Apply

- Most employer-based health plans offer mental health benefits, and thus must be in compliance.
 - Private employer-based plans with 51 or more employees. (Parity Act)
 - Private employer-based plans with less than 51 employees. (ACA)
 - Individual plans sold through the health insurance marketplace. (ACA)

Parity of Mental Health and Substance Use Benefits with Other Benefits: Using Your Employer-Sponsored Health Plan to Cover Services, U.S. DEPT OF LABOR, <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/mental-health-parity/parity-of-mental-health-and-substance-use-benefits-with-other-benefits.pdf> (last visited Jan. 3, 2020).

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When Parity Rules Apply

Insurance + Health Plan Market	Does the Parity Act apply?
Self-insured Health Benefits Plans (ERISA Governed)	Yes (cost + size exemptions may apply)
Fully-insured Health Benefits Plans (ERISA Governed)	Yes (cost + size exemptions may apply)
State-Regulated Group & Individual Insurance Markets	Yes
Medicaid Fee-for-Service	No (CMS Medicaid standards apply)
Medicaid Managed Care	Yes
Medicaid Benchmark Plans	Yes
Separately Administered CHIP Plans	Yes
Medicare Fee-for-Service Market	No (CMS Medicare standards apply)
Medicare Advantage	No (CMS Medicare standards apply)
State Health Insurance Exchanges	Yes
Federal Employees Health Benefits Program	Essentially (FEHBP has explicitly adopted MHPAEA)
TriCare	No
Church Plans	No
Non-Federal Public Employee Health Benefit Plans	Yes, but plan sponsors may opt out

Adapted from resources provided by the Office of Personnel Management.

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State Parity Laws

- After the passing of the federal Parity Act, many states enacted laws requiring mental health insurance providers to offer coverage of mental health benefits on par with physical health benefits.

Mandated benefits in Tennessee — See *Parity Report for Tennessee*, PARITY TRACK, <https://www.paritytrack.org/report/tennessee/> (last visited Jan. 13, 2020).

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State Report Cards

- Illinois ranked the highest with a score of 100%.
- Tennessee, Maine, and Alabama also received high scores.
- 32 states were issued failing grades for their parity statutes.
- High scoring states are:
 - Making more plans subject to the state parity law
 - Including forceful compliance language

What is Mental Health Parity? A Consumer Guide to the Evaluating State Mental Health and Addiction Parity Statutes Report, THE KENNEDY FORUM (2018), https://chp-wp-uploads.s3.amazonaws.com/www.paritytrack.org/uploads/2018/09/KF-Evaluating-State-Mental-Health-Consumer-Brief-0918_web.pdf.

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Regulatory Activity

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State Regulatory Activity

- January 2019- Pennsylvania Insurance Department found Aetna in violation of state parity statute and federal parity statute.
- Violations:
 - Unequally applying QTLs
 - Using more stringent NQTLs on scope and duration of treatment for behavioral health benefits
- Fine: \$190,000

Harold Bruebaker, *Aetna fined \$190,000 by Pennsylvania over opioid treatment coverage*, Philadelphia Inquirer, January 8, 2019, <https://www.inquirer.com/business/aetna-health-insurance-opioids-autism-treatment-violations-20190108.html>; Commonwealth of Pennsylvania Insurance Department, Market Conduct Examination Report of Aetna Health Insurance Company, 70, 79 (November 5, 2018).

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State Regulatory Activity

- October 2019- Pennsylvania found United Healthcare in violation of both parity statutes.
- Violations Include:
 - Unequally applying QTLs
 - Disparity in NQTLs- more restrictive and limiting standards on mental health and substance use disorder claims
- Fine: \$1,000,000
 - Must spend \$800,000 to educate consumers about benefits
 - Must pay for wrongfully denied claims

Commonwealth of Pennsylvania Insurance Department, Market Conduct Examination Report of UnitedHealthcare Insurance Company, 12 (October 3, 2019); Harold Bruebaker, *United Healthcare fined \$1 million by Pennsylvania for violations of mental-health law*, Philadelphia Inquirer, November 4, 2019, <https://www.inquirer.com/business/health/unitedhealthcare-fine-1-million-pennsylvania-insurance-department-20191104.html>.

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Recent Federal Agency Auditing Activity

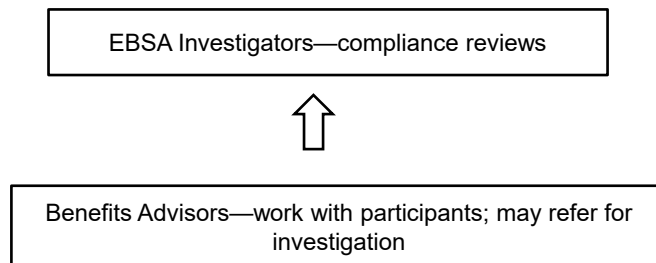
- Federal Parity Act regulations took effect in 2014.
- Increase in enforcement actions.
- Audits.
 - DOL—Employee Benefit Security Administration (EBSA)
 - Jurisdiction over private-sector ERISA plans.
 - HHS—
 - Jurisdiction over non-federal governmental plans.

Mental Health Parity: Uptick in Audits and Litigation, CBIZ.COM (Apr. 5, 2018), <https://www.cbiz.com/insights-resources/details/articleid/6452/mental-health-parity-uptick-in-audits-and-litigation-article>.

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EBSA Enforcement Activities—Two-tiered enforcement process:



MHPAEA Enforcement Fact Sheet, U.S. DEP'T OF LABOR (Jan. 2016), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/mhpaea-enforcement.pdf>.

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EBSA Agency Auditing—2018 Highlights

Closed 285 investigations

- Total of 3,571 since 2011

115 investigations

21 violations (18%)

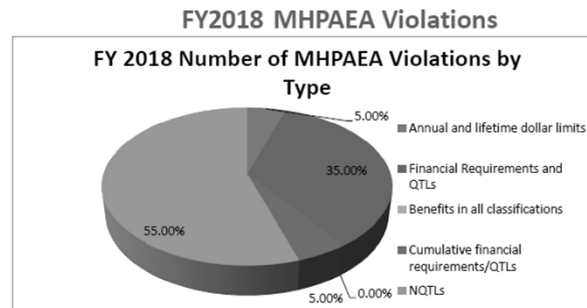
- Significant decrease in violations

Fact Sheet: FY 2018 MHPAEA Enforcement, U.S. DEPT OF LABOR (2018), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/mhpaea-enforcement-2018.pdf>.

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MHPAEA Violation Statistics



Fact Sheet: FY 2018 MHPAEA Enforcement, U.S. DEPT OF LABOR (2018), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/mhpaea-enforcement-2018.pdf>.

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Penalties for Violations

- Removal of plan language
- Payment of improperly denied benefits
- Global compliance corrections

MHPAEA Enforcement Fact Sheet, U.S. DEP'T OF LABOR (Jan. 2016), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/mhpaea-enforcement.pdf>.

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Litigation Trends

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Emerging Litigation Trends: Mental Health Benefits

507 managed care litigation cases were filed in 2014.	• 16 (3%) contested coverage of mental health benefits.
498 managed care litigation cases were filed in 2015.	• 34 (7%) contested coverage of mental health benefits.
499 managed care litigation cases were filed in 2016.	• 76 (15%) contested coverage of mental health benefits.
646 managed care litigation cases were filed in 2017.	• 77 (12%) seeking coverage for mental health benefits.
597 managed care litigation cases were filed in 2018.	• 87 (15%) seeking coverage for mental health benefits.
566 managed care litigation cases were filed in 2019.	• 110 (19%) seeking coverage for mental health benefits.

Source: Managed Care Litigation Update®, www.managedcarelitigationupdate.com, with permission; Jonathan M. Herman, 143 Managed Care Litigation Update 1, 5 (2020).

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Notable Trends from this Data:

Significant activity in the 10th Circuit

Claims involving wilderness therapy

Mental Health Parity Act claims

Coverage for autism

Coverage for ABA

Eating disorders

Source: Managed Care Litigation Update®, www.managedcarelitigationupdate.com, with permission.

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Wit v. United Behavioral Health

- Application of care and coverage guidelines
 - breaches of fiduciary duty and
 - wrongful denial of benefits under ERISA
- Plans required medical care to be “consistent with generally accepted standards of care.”
- Guidelines did not comply with plans’ terms because were not in line with behavioral health standards of care

Wit v. United Behavioral Health, Case No. 14-cv-02346-JCS, 2019 WL 1033730, at *1, *51-*55 (N.D. Cal. March 5, 2019).

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Impact of *Wit*?

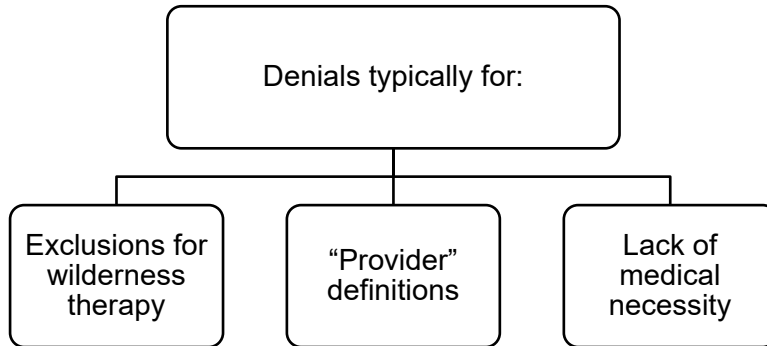
- Five courts have cited to *Wit* when deciding ERISA claims.
- *S.B. v. Oxford Health Insurance, Inc.*- denial arbitrary and capricious due to administrator’s level of care guidelines requiring that medical care meet more rigorous standards than required under the plan.
- Plaintiffs are filing complaints making similar arguments and citing to *Wit*.

S.B. v. Oxford Health Ins., Inc., Case No. 3:17-CV-1485 (MPS), 2019 WL 5726901 (D. Conn. Nov. 5, 2019).

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Wilderness Therapy Litigation



Jacklyn Wille, *Hiking and Camping for \$500 Per Day? Let Me Call My Insurer*, BLOOMBERG BNA (Apr. 27, 2017), <https://www.bna.com/hiking-camping-500-n57982087225/>.

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Therapy?



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32 Wilderness Cases Filed in 2019

According to Lex Machina, 32 cases were filed in 2019 that reference the Parity Act statute and "wilderness."

Courts

D.Utah	29	91%
N.D.Ill.	1	3%
W.D.Mo.	1	3%
S.D.N.Y.	1	3%



District Judges

Howard Curtis ...	8	25%
Dee Vance Ben...	7	22%
Clark Waddoups	4	13%
Robert James S...	4	13%
Tena Campbell	2	6%
7 Other Judges		

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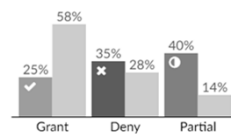
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Wilderness Therapy: 2019 Litigation Trends

- Motion Practice- defendants have a high chance of losing motions to dismiss

Dismiss (Contested)
■ Compared to National Average



Graph produced by Lex Machina

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Wilderness Therapy: 2019 Litigation Trends

- Uncertainty
- District court splits
- Courts have been unpredictable in granting or denying defendants' motions to dismiss in the context of wilderness therapy coverage litigation. If Plaintiffs prevail, the implications are:
 - Litigation continues
 - Costly discovery
 - Increased plaintiff confidence
 - Plaintiff gains leverage in settlement talks

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June 2019- Utah Federal District Court

- Court denied defendant plan administrator's motion for judgment on the pleadings.
- Plaintiffs sufficiently plead that the plan's exclusion of wilderness treatment therapy violated the Parity Act.
- Plan defined residential treatment facility for mental health as "not a wilderness treatment program."
- Plan excluded both "wilderness treatment program" and "treatment in wilderness programs."

Timothy D. v. Aetna Health and Life Ins. Co., Case No. 2:18CV753DAK, 2019 WL 2493449, at * 1 (D. Utah June 14, 2019).

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As Applied Wilderness Therapy Claims

- Majority of wilderness therapy claims are as applied claims.
- Plaintiff must identify medical/surgical care that is analogous to the denied mental health or substance abuse care, then “allege that there is a disparity in their limitation criteria.”
- Wilderness Therapy Claims:
 - Medical/Surgical Analogues Commonly Alleged: skilled nursing facilities, inpatient hospice care, and rehabilitation facilities
 - Disparities Commonly Alleged: more licensing requirements, categorical exclusion of programs, and use of acute care requirements instead of subacute

Michael W. v. United Behavioral Health, Case No. 2:18-cv-00818-JNP, 2019 WL 4736937 at *1 (D. Utah Sept. 27, 2019) (plaintiff brought as applied Parity Act claim); K.H.B. ex. rel. D.B. v. United Healthcare Ins. Co., 2019 WL 4736801, Case No. 2:18-cv-000795-DN, at *1, *5 (D. Utah Sept. 27, 2019)(same); David S. v. United Healthcare Ins. Co., Case NO. 2:18-cv-803, 2019 WL 4393341, at *1, *4 (D. Utah Sept. 13, 2019) (same).

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September 2019—Utah Federal District Court

- Plaintiff survived motion to dismiss parity claim
- Claim to proceed against a third-party administrator for disparately adopting more licensure requirements for wilderness therapy programs than their medical/surgical analogues

K.H.B., 2019 WL 4736801 at *1.

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KHB: Plaintiff's Argument and Court's Analysis

- Plaintiff's As-Applied Claim:
 - Medical/surgical analogue to wilderness therapy program: nursing facilities and rehabilitation hospitals
 - Disparity: difference in licensing requirements
- Court's Analysis: Plaintiff provided enough fact-based allegations to survive motion to dismiss.

K.H.B., 2019 WL 4736801 at *1.

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September 2019—Utah Federal District Court

- Plaintiff's claim survived motion to dismiss
- Claims to proceed for using *acute* NQTLs for wilderness therapy program while only using *sub-acute* NQTLs for the medical/surgical analogue.

David S., 2019 WL 4393341 at *4.

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David S.: Plaintiff's Argument and Court's Analysis

- Plaintiff's As-Applied Claim:
 - Medical/surgical analogue to wilderness therapy program: skilled nursing facility
 - Disparity: application of acute versus sub-acute NQTLs
- Court's Analysis: Plaintiff provided enough fact-based allegations to survive motion to dismiss.

David S., 2019 WL 4393341 at *4.

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Lessons Learned—What NOT to do.

- Do not deny wilderness therapy coverage when analogous medical/surgical treatment is offered in skilled nursing facilities or rehabilitation hospitals.
- Do not arbitrarily group wilderness therapy programs with recreational programs (as opposed to therapeutic programs) when the same is not done for medical/surgical services provided in other residential settings.
- Do not rely on facially neutral plans for protection against parity violations because parity can be violated by disparate application of a neutral plan to exclude wilderness therapy coverage.

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Lessons Learned—What NOT to do.

- Do not have more stringent licensing requirements for wilderness therapy programs than skilled nursing facilities or rehabilitation hospitals.
- Do not have a policy of excluding wilderness therapy programs without an express plan exclusion.
- Do not use acute care requirements for coverage determinations involving wilderness therapy and sub-acute care requirements for coverage determinations involving skilled nursing facilities and rehabilitation hospitals.

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Lessons Learned—What TO do.

- Expressly exclude wilderness therapy from coverage and also provide residential treatment services for mental health disorders that are analogous to any medical/surgical residential treatment services covered under the plan.

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Autism Spectrum Disorder: Applied Behavioral Analysis Coverage Litigation

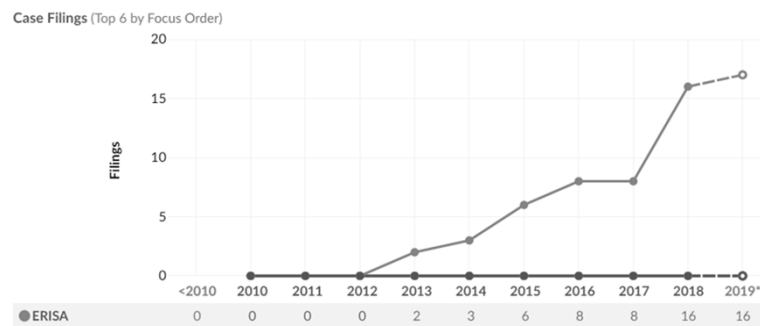
Another area of mental health benefit litigation.

Increase recent activity in case law.

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Cases filed referencing 29 U.S.C. § 1185a and autism from 2016-2019.



Lex Machina

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Autism and Other Behavioral Health Services Suits

- Medical services for ASDs are covered
- ABA often excluded as:
 - Experimental
 - Habilitative/non-restorative
 - Non health care (educational)
 - Not provided by licensed providers
- ST/OT treatments for ASD often excluded as:
 - Habilitative/non-restorative
 - Non health care (educational)

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ABA Aspect of *Wit*

- The plan administrator decided against amending coverage guidelines to include ABA based on concerns of increased costs.
- Based on this, the court applied a more rigorous legal standard and found the plan administrator in breach of its fiduciary duties.

Wit, 2019 WL 1033730 at *48, *53-54.

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ABA Recent Settlements: \$800,000 ABA Settlement

- \$800k reimbursement fund.
- Eliminating the following exclusions:
 - Age
 - Habilitative
 - Treatment
 - Educational
 - Experimental
- 4 other settlements in 2019.

Agreement to Settle Claims at *3 and *7, *J.R. v. Blue Cross & Blue Shield of Ill.*, No. 2:18-cv-01191-JLR (W.D. Wash. Nov. 11, 2019); Notice of Settlement at 1, *Scott F. v. United Healthcare Ins. Co.*, Civil No. 2:18-cv-00520 PMW (D. Utah July 15, 2019); Joint Notice of Settlement at 1, *Kenneth P. v. Blue Shield of Cal.*, Case No. 4:18-cv-03550 JSW (N.D. Cal. Sept. 27, 2019); Notice of Settlement at 1, *Shay M. v. Blue Cross & Blue Shield of Ariz.*, Civil No. 2:18-cv-00922 PMW (D. Utah August 6, 2019); Notice of Settlement at 1, *Melissa P. v. Aetna Life Ins. Co.*, Civil No. 2:18-cv-00216 RJS (D. Utah June 13, 2019).

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Other Trending Areas of Litigation

- Eating disorder benefits
- Residential treatment facility coverage

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Questions?