

Mental Health Parity: Are You Compliant?:
Current Trends in Plan Auditing and Behavioral Health Litigation

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Breakout Session: Behavioral Health and Substance Abuse Benefit Litigation

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I. Introduction

This presentation provides an overview of the Mental Health Parity and Addiction Equity Act (the “Parity Act”) and reviews recent agency auditing activities to determine whether plans comply with parity laws. It also discusses trends in federal and state parity litigation. The presentation covers trending areas of litigation over mental health benefits, including wilderness therapy coverage disputes and applied behavior analysis coverage litigation.

II. Mental Health Parity Overview and The Parity Act

A. Current Healthcare Policy Discussions

The “Iron Triangle” of healthcare presents concerns over the tension between healthcare costs, quality, and access. If there is an increase in healthcare quality and/or quantity, then costs will inevitably increase. Conversely, to get healthcare costs down, there is inevitably a decrease in the quality and/or quantity of healthcare. See Elmer Philip Lehman IV, *The health care ‘iron triangle’ and the Patient Protection and Affordable Care Act*, 82 CLEVELAND CLINIC J. MED. 73, 78-80 (Feb. 2015).

B. Federal and State Parity Laws

1. Current State of Behavioral Health Parity

Historically, benefit plans have provided more restrictive coverage limitations to behavioral health and substance abuse services as compared to physical health services. A study cited in the Milliman Report (2017) found that reimbursement rates for behavioral 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 care than 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>.

2. The Parity Act’s 10th Anniversary

On October 3, 2018, the Parity Act celebrated its 10th anniversary of being signed into law by President George W. Bush. See *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. 1, 2018), https://www.americanbar.org/groups/health_law/section-news/2018/10/10th-anniversary/. A report published in conjunction with the 10th anniversary of the Parity Act 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, 1, 3(2018), https://chp-wp-uploads.s3.amazonaws.com/www.paritytrack.org/uploads/2018/09/KF-Evaluating-State-Mental-Health-Report-0918_web.pdf.

3. The Parity Act

The Parity Act was enacted as sections 511 and 512 of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008. The Departments of the Treasury, Labor, and Health and Human Services issued final regulations implementing the Parity Act on November 8, 2013. The final regulations became applicable for plan years beginning on or after July 1, 2014 (published in 78 F.R. 68240 on November 13, 2013). *Mental Health Parity Provisions*, U.S. DEP'T OF LABOR, <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publication/s/compliance-assistance-guide-mhpaea.pdf> (last visited Nov. 19, 2018). The Act 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.).

There are also certain rules for determining parity with respect to financial requirements and treatment limitations. Treatment limitations include: (1) Quantitative Treatment Limitations (QTLs), which include numerical limitations, such as visit limits and day limits; and (2) Non-Quantitative Treatment Limitations (“NQTLs”), which include limitations like medical management, step therapy, and pre-authorization. The rules that apply to each of these various limitations differ, so it is important that providers are aware of the differences in order to comply with parity requirements. *See Warning Signs - Plan or Policy Non-Quantitative Treatment Limitations (NQTLs) that Require Additional Analysis to Determine Mental Health Parity Compliance*, DEP'T OF LABOR, <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/warning-signs-plan-or-policy-nqtls-that-require-additional-analysis-to-determine-mhpaea-compliance.pdf> (last visited January 3, 2020).

4. The Affordable Care Act

Behavioral health parity is also addressed under the Affordable Care Act (“ACA”). 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. *See 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. DEP'T 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#>.

Mental health parity laws only apply to health plans that provide mental health and substance use disorder benefits. See 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. DEP'T 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 January 3, 2020).

Most employer-based health plans offer mental health benefits and thus must be in compliance. The Parity Act applies to private employer-based plans with 51 or more employees. The ACA requires mental health parity for private employer-based plans with less than 51 employees and individual plans sold through the health insurance marketplace. See *Parity of Mental Health and Substance Use Benefits with Other Benefits: Using Your Employer-Sponsored Health Plan to Cover Services*, U.S. DEP'T 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 January 3, 2020).

5. State Parity Laws

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

a) Evaluating State Parity Statutes: State Report Cards

On the 10th Anniversary of the Parity Act, a report was issued grading the parity laws of each state. *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. For example, Tennessee (79) and Alabama (74) placed in the top five highest grade point average of all fifty states. *Id.* Tennessee is ranked second behind Illinois (100), and Alabama is ranked fourth behind Maine (76) for the states with the strongest parity statutes. *Id.* 32 states were issued failing grades for their parity statute. *Id.* The states with the lowest scores are: Wyoming (10); Arizona (26); Idaho (36); and Indiana (38). *Id.* New York (53) and California (51) were also given failing scores. *Id.*

Illinois scored a 100 on its report card. The report listed the following strengths of Illinois' parity law: (1) it increased the number of people receiving parity protection by expanding the types of health plans subject to state parity laws, including municipal, county and school district plans, which are all able to opt out of complying with the federal Parity Act; and (2) it uses strong

compliance and enforcement language. The report also noted an area in which Illinois' law still needs improvement. The Illinois' law does not require plans to publicly report data comparing mental health claims and physical health claims. *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.

III. Recent Agency Auditing Activity

A. State Regulatory Activity

In January of 2019, the Insurance Department of the Commonwealth of Pennsylvania fined Aetna \$190,000 for violations of state and federal law including violations of both the Pennsylvania parity statute and the federal parity statute. 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>. Aetna violated both parity statutes by applying a quantitative treatment limit for behavioral health coverage that was not applied for medical health coverage. Commonwealth of Pennsylvania Insurance Department, Market Conduct Examination Report of Aetna Health Insurance Company, 70, 79 (November 5, 2018). Aetna also violated parity laws by using a non-quantitative treatment limit on “the scope and duration of treatment” that was “applied more stringently [for behavioral health benefits] than medical/surgical benefits within the classification.” *Id.* at 70.

Ten months later, the Pennsylvania Insurance Department also found United Healthcare to be in violation of both parity statutes for having more severe quantitative and nonquantitative treatment limitations for mental health and substance use disorder benefits. Commonwealth of Pennsylvania Insurance Department, Market Conduct Examination Report of UnitedHealthcare Insurance Company, 12 (October 3, 2019). Further, United Healthcare also improperly placed nonquantitative treatment limitations that restricted “the scope and duration of treatment for certain mental health and [substance use disorder] claims in a manner that was applied more stringently than medical/surgical benefits within the classification.” *Id.* at 13. United Healthcare was fined \$1 million for these statutory violations along with other non-parity related violations. 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>. United must also pay for incorrectly denied claims and spend \$800,000 to educate consumers about their benefits. *Id.*

B. Federal Regulatory Activity

Since the federal Parity Act regulations took effect in 2014, there has been an increase in enforcement actions by governing agencies. Audits of benefit plans are being initiated by the Department of Labor's (“DOL”) Employee Benefit Security Administration (“EBSA”) and the Department of Health and Human Services (“HHS”). EBSA has jurisdiction over private-sector ERISA plans. HHS has jurisdiction over non-ERISA plans (*e.g.*, non-federal governmental plans), but its enforcement guidance may be a useful resource for ERISA-covered 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>.

EBSA has a two-tiered enforcement process. First, Benefits Advisors work with participants. If the problem may affect multiple participants and/or the plan doesn't voluntarily comply, then the Benefits Advisor will refer the matter for investigation. Then, EBSA Investigators conduct compliance reviews. *Fact Sheet: FY 2018 MHPAEA Enforcement*, U.S. DEP'T OF LABOR (2018), at 3, <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/mhpaea-enforcement-2018.pdf>.

Some highlights noted by EBSA during its agency auditing in 2018 include closing 285 investigations, with a total of 3,571 since 2011. Of the 115 plans subject to the Parity Act that were investigated in 2018, EBSA cited 21 violations (18%). The number of violations decreased significantly in 2018. *Fact Sheet: FY 2018 MHPAEA Enforcement* at 2.

EBSA also published the following statistics regarding federal Parity Act violations in 2018:

- 55% were due to NQTLs.
- 35% were due to financial requirements and QTLs.
- 5% were due to cumulative financial requirements/treatment limitations.
- 5% were due to annual and lifetime dollar limits.
- 0% were due to benefits in all classifications.

Fact Sheet: FY 2018 MHPAEA Enforcement at 2.

If violations are found by EBSA Investigators during compliance reviews, then the plan must remove any offending provisions and pay improperly denied benefits. Investigators will generally seek a global compliance correction. *Fact Sheet: FY 2018 MHPAEA Enforcement* at 3.

Some results of uncovering violations during compliance reviews are as follows:

- EBSA aided in the removal of a preauthorization requirement and visit limit threshold for outpatient mental health and substance use disorder benefits. The plan re-adjudicated 174 claims and paid \$20,075 to those affected by the offending requirements.
- An EBSA investigation uncovered an impermissible in-network mental health and substance use disorder outpatient co-pay that was double the corresponding medical/surgical outpatient co-pay cost. The plan refunded the difference to the plan participants paying \$26,000 total.

- EBSA found a plan had more strict requirements for positive responses to mental health and substance use disorder treatment. The plan was required to remove these stringent requirements.

Fact Sheet: FY 2018 MHPAEA Enforcement at 4-5.

IV. Federal and State Parity Litigation Trends

In 2016, 76 new cases were filed involving disputes over mental health benefits. Jonathan M. Herman, 143 *Managed Care Litigation Update* 1, 5 (2020). 14 of the 76 cases alleged violations of federal and/or state mental health parity laws. *Id.* In 2017, 77 new cases were filed involving disputes over mental health benefits. *Id.* 17 of the 77 cases alleged violations of federal and/or state mental health parity laws. *Id.* In 2018, 87 new cases were filed involving disputes over mental health benefits. *Id.* 39 of the 87 cases alleged violations of federal and/or state mental health parity laws. *Id.* In 2019, 110 cases were filed regarding benefits for mental health with 63 involving allegations of violations of federal and/or state mental health parity laws. *Id.*

A. Emerging Litigation Trends: Mental Health Benefits

In 2014, 507 managed care litigation cases were filed. *Managed Care Litigation Update*®, www.managedcarelitigationupdate.com, with permission. 16 (3%) of them involved contested coverage of mental health benefits. *Id.* In 2015, 498 managed care litigation cases were filed. *Id.* 34 (7%) of them involved contested coverage of mental health benefits. In 2016, 499 managed care litigation cases were filed. Jonathan M. Herman, 143 *Managed Care Litigation Update* 1, 5 (2020). 76 (15%) of them involved contested coverage of mental health benefits. *Id.* In 2017, 646 managed care litigation cases were filed. *Id.* 77 (12%) of them were seeking coverage for mental health benefits. *Id.* In 2018, 597 managed care litigation cases were filed. *Id.* 87 (15%) of them were seeking coverage for mental health benefits. *Id.* In 2019, 566 managed care litigation cases were filed. 110 (19%) of them involved mental health benefits. *Id.*

The notable trends from this data include: (1) significant activity in the 10th Circuit; (2) claims involving wilderness therapy; (3) mental health parity claims; (4) coverage for autism; (5) coverage for ABA; and (6) coverage for eating disorders. *Managed Care Litigation Update*®, www.managedcarelitigationupdate.com, with permission.

1. *Wit v. United Behavioral Health*

In March of 2019, the Northern District of California issued an opinion with a potentially far-reaching impact. *Wit v. United Behavioral Health*, Case No. 14-cv-02346-JCS, 2019 WL 1033730, at *1, *51-*55 (N.D. Cal. March 5, 2019). In *Wit*, the court held that utilization of care and coverage guidelines by a health insurance plan administrator constituted a breach of fiduciary duty and caused the wrongful denial of plaintiffs' mental health and substance use disorder benefits under ERISA. *Wit*, 2019 WL 1033730, at *51-*55. The health insurance plans all included the requirement that medical care "must be consistent with generally accepted standards of care" in order to be covered. *Id.* at *13. The court determined the care and coverage guidelines did not comply with the plans' terms because they were not in line with behavioral health standards of care in multiple respects. *Id.* at *51-*55.

Five other courts have cited to *Wit* when deciding ERISA claims. *Michael W. v. United Behavioral Health*, 2019 WL 4736937, Case No. 2:18-cv-00818-JNP (D. Utah Sept. 27, 2019)(holding case not precluded by *Wit*); *Andrew C. v. Oracle American Inc. Flexible Benefit Plan*, 2019 WL 1931974, at *1, *4 n.8 (N.D. Cal. May 1, 2019) (holding *Wit*'s findings of fact did not support the plaintiff's motion to remand to plan administrator); *Dominic W. v. Northern Trust Co. Employee Welfare Benefit Plan*, 392 F. Supp.3d 907, 922 (N.D. Ill. 2019) (citing to *Wit* to note that the evaluation of plan administrator guidelines would be very fact intensive); *Charles W. v. Regence BlueCross BlueShield of Oregon*, 2019 WL 4736932, at *1, *7 n.5 (D. Utah Sept. 27, 2019) (relying on the definition of PHP in *Wit* to determine that a partial hospitalization program has distinct treatment goals from a residential treatment center); and *S.B. v. Oxford Health Ins., Inc.*, Case No. 3:17-CV-1485 (MPS), 2019 WL 5726901 (D. Conn. Nov. 5, 2019). *S.B.* cited to *Wit* when analyzing whether a health insurance plan administrator's denial of coverage was arbitrary and capricious. *S.B.*, 2019 WL 5726901 at * 12. In *S.B.*, the court held the denial was arbitrary and capricious due to the administrator's level of care guidelines requiring the medical care meet more rigorous standards than required under the plan. *Id.* at *13.

Following *Wit*'s success, plaintiffs are filing claims making similar arguments. Complaint at *5, *7, *Amy F. v. Cal. Physicians' Serv. dba Blue Shield of Cal.*, No. 3:19-cv-06078-JCS (N.D. Cal. Sept. 25, 2019) (arguing the denial of residential mental health treatment was based on care guidelines that "do not reflect reasonable standards in the medical community"); Complaint at *3-*4, *8, *11, *Tomlinson v. United Behavioral Health*, Case No. 3:19-cv-6999 (N.D. Cal., Oct. 25, 2019) (citing *Wit* and alleging breach of ERISA fiduciary duties for UBH plan members who were denied care under the same guidelines but were not included in the original class); Complaint at *4-5, *10, *17, *Pamela Smith et al., v. Health Care Serv. Corp.*, No. 19-cv-7162, (N.D. Ill. Oct. 31, 2019) (alleging the plan administrator used coverage guidelines that were not in line with the standards of medical care required by the plan to wrongfully deny coverage of benefits).

2. Wilderness Therapy Litigation

Denials of coverage for wilderness therapy are typically due to plan exclusions for wilderness therapy, "provider" definitions, or lack of medical necessity. See 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/>.

The current trends in wilderness therapy litigation center on motion practice. In 2018, defendants began filing motions to dismiss and citing *Roy C. v. Aetna Life Insurance Company*, a Utah case dismissing a wilderness therapy Parity Act claim. No. 2:17cv1216, 2018 WL 4511972 (D. Utah Sept. 20, 2018) (granting defendant plan's motion to dismiss wilderness therapy Parity Act claim); See Def. United Healthcare Ins. Co.'s Mot. to Dismiss Pl.'s 1st Am. Compl.; Mem. of P. & A. in Supp. Thereof at 16-18, *K.H.B. v. United Healthcare Ins. Co.*, No. 2:18-cv-000795-RJS (D. Utah Nov. 2, 2018), ECF No. 73 (citing *Roy* to argue plaintiff's Parity Act claim must be dismissed). In 2019, wilderness therapy litigation trends showed uncertainty, district court splits, and that plaintiffs prevail (more often than defendants) on motions to dismiss wilderness therapy parity claims and motions for judgment on the pleadings of such claims. *But see A.G. v. Community Ins. Co.*, 363 F.Supp.3d 1311 (S.D. Ohio 2019) (dismissing plaintiffs' wilderness therapy Parity Act claims). Lex Machina reported only 25% of motions to dismiss were granted

in cases citing the Parity Act and wilderness therapy.¹ 35% of motions to dismiss were denied, and 40% had a partial outcome.² The implications of wilderness therapy parity claims surviving these motions include: continued litigation, costly discovery, increased plaintiff confidence, and increased leverage for plaintiffs in settlement talks.

In June of 2019, in a claim alleging a facial Parity Act violation regarding wilderness therapy benefits, a Utah federal district court denied a motion for judgment on the pleadings, thus allowing discovery to proceed. *Timothy D. v. Aetna Health and Life Ins. Co.*, Case No. 2:18CV753DAK, 2019 WL 2493449, at * 1 (D. Utah June 14, 2019). The plan defined a residential treatment facility for mental health as “not a wilderness treatment program.” *Id.* at *2. “Wilderness treatment program” and “treatment in wilderness programs” were also listed as plan exclusions. *Id.* The *Timothy D.* court reasoned that the plaintiffs sufficiently alleged that “the Plan [] impose[s] more restrictive treatment limitations on mental health and substance abuse benefits than it does on medical/surgical benefits.” *Id.* at *4. Further, the court noted that Parity Act claims necessitate discovery to determine “whether there is a disparity between the availability of treatments” *Id.*; *But see Roy C.*, 2018 WL 4511972 (D. Utah Sept. 20, 2018) (granting defendant plan’s motion to dismiss when plan contained a clear and express exclusion of wilderness therapy coverage and provided coverage of mental health services “for hospitalization, residential treatment, partial hospitalization, and intensive outpatient treatment.”).

Most of the wilderness therapy cases decided in 2019 involved “as applied” claims brought based on the way plans were being applied even though the plan terms were facially neutral. *See generally 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). In order to bring an as applied claim, the 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.” *K.H.B.*, 2019 WL 4736801 at *1. Plaintiffs bringing as applied claims relating to wilderness therapy typically alleged the medical/surgical analogues of: skilled nursing facilities, inpatient hospice care, and rehabilitation facilities. *See generally Michael W.*, 2019 WL 4736937 at *20. The disparity asserted has included that plans have more licensing requirements for wilderness therapy, that there was a categorical exclusion for outdoor behavioral health programs, and that acute care requirements instead of sub-acute care requirements are applied to wilderness therapy. *K.H.B.*, 2019 WL 4736801 at *5; *Michael W.*, 2019 WL 4736937 at *20; *David S.*, 2019 WL 4393341 at *4.

In September of 2019, another Utah court denied a motion to dismiss a Parity Act claim for wilderness therapy benefits because the plaintiff had provided enough fact-based allegations to bring an as applied claim against the defendant plan administrator. *K.H.B.*, 2019 WL 4736801 at *1. The plaintiff argued that nursing facilities and rehabilitation hospitals were the

¹ Lex Machina Motion Metrics Report on cases produced by searching 2019 federal cases using the following search: [“29 U.S.C. §1185a” and “wilderness”~5 therapy].

² *Id.*

medical/surgical analogues of the wilderness therapy program. *Id.* at *5. The alleged Parity Act violation was that the plan’s term “Alternate Facility” was disparately applied because the defendant plan administrator did “not adopt extra-licensure requirements for medical analogues of wilderness therapy programs” *Id.* at *5.

Another Utah court denied a motion to dismiss an as applied Parity Act claim for wilderness therapy benefits in September of 2019. *David S.*, 2019 WL 4393341 at *4. The *David S.* plaintiff alleged a skilled nursing facility as a medical/surgical analogue to a wilderness therapy program. *Id.* at *4. The plaintiff argued that the defendant used acute nonquantitative treatment limits for the mental health facility and only used sub-acute nonquantitative treatment limits for a skilled nursing facility. *Id.* at *4. The court held such allegations were enough to survive a motion to dismiss. *Id.* at *4.

Some lessons to be learned from these cases are:

- (1) Do not deny wilderness therapy coverage when analogous medical/surgical treatment is offered in skilled nursing facilities or rehabilitation hospitals.
- (2) 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.³
- (3) Do not rely on facially neutral plans for protection against parity violations because parity can be violated by disparate application of a neutral plan.
- (4) Do not have more stringent licensing requirements for wilderness therapy programs than skilled nursing facilities or rehabilitation hospitals.
- (5) Do not have a policy of excluding wilderness therapy programs without an express plan exclusion.
- (6) 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.

³ In July of 2018, a Massachusetts federal district court denied a motion to dismiss, thus allowing discovery to proceed. *Vorpahl v. Harvard Pilgrim Health Ins. Co.*, No. 17-cv-10844-DJC, 2018 WL 3518511 (D. Mass July 20, 2018). The plan language at issue in *Vorpahl* excluded coverage for: “Health Resorts, recreational programs, camps, wilderness programs, outdoor skills programs, relaxation or lifestyle programs, including services provided in conjunction with, or as a part of, such programs.” *Id.* The *Vorpahl* court reasoned that the plaintiffs sufficiently alleged “analogous medical/surgical treatment ... is offered in other residential settings, like skilled nursing facilities or rehabilitation hospitals.” *Id.* It further concluded that the plaintiffs sufficiently claimed “that by ‘arbitrarily grouping outdoor/wilderness behavioral healthcare programs’ with ‘programs [that] are recreational rather than therapeutic in nature,’... the reasonable inference [is] that the same is not done with medical/surgical services provided in other residential settings.” *Id.*

- (7) 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.

3. Autism Spectrum Disorder (“ASD”): Applied Behavioral Analysis (“ABA”) Coverage Litigation

ABA coverage is another trending area of mental health benefit litigation, and there has been an increase in recent cases filed relating to autism, the Parity Act, and ERISA. According to one research database, in 2017, only 8 cases were filed.⁴ In 2018, 16 cases were filed, and, in 2019, 17 cases were filed.⁵ Issues often litigated in autism and other behavioral health services suits include: (1) medical services for ASD that are covered; (2) ABA often excluded as experimental, habilitative/non-restorative, or non-health care (educational), or excluded because it is not provided by licensed providers; and (3) ST/OT treatments for ASD often excluded as habilitative/non-restorative or non-health care (educational).

Wit addressed ABA coverage. The plan administrator decided against amending coverage guidelines to include ABA based on concerns of increased costs. *Wit*, 2019 WL 1033730 at *48. The court relied on this decision to apply a more rigorous legal standard and find the plan administrator had breached its duty of loyalty, duty of care, and “duty to comply with plan terms by adopting Guidelines that are unreasonable and do not reflect generally accepted standards of care.” *Id.* at *53-54.

Recently, there have been some reported settlements around ABA and autism spectrum disorder benefits. For example, there was an \$800,000 settlement in November of 2019 where a health plan agreed to cover autism spectrum disorder benefits until 2021 and pay denied claims from 2012-2018. 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). In this case, a motion for preliminary approval of settlement agreement was filed that included an agreement by the plan not to use age exclusions, habilitative exclusions, educational exclusions, experimental exclusions, and other exclusions. *Id.* Further, the plan agreed not to use treatment limitations prohibited by the Parity Act. *Id.*

There were four other recent settlements involving coverage disputes over autism spectrum disorder benefits in 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).

⁴ Lex Machina search of 2016-2019 federal cases using the following search: [“29 U.S.C. §1185a” and autism].

⁵ Lex Machina search of 2016-2019 federal cases using the following search: [“29 U.S.C. §1185a” and autism].

V. Conclusion

Behavioral health and substance abuse litigation is a fluid and dynamic area of the law. In the 11 years since the Parity Act was passed, states have enacted their own parity laws requiring providers of insurance for behavioral health services to offer them on par with benefits for physical health services. There has also been an increase in parity enforcement actions by governing agencies. Nevertheless, litigation trends and reports published during the Parity Act's 10th anniversary celebration suggest that there is still room for improvement in achieving behavioral health parity.