



NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Benjamin M. Lawsky
Superintendent

**Insurance Circular Letter No. 6 (2014)
October 10, 2014**

TO: All Insurers Authorized to Write Accident and Health Insurance in New York State, Article 43 Corporations, Health Maintenance Organizations, Student Health Plans Certified Pursuant to Insurance Law § 1124, and Municipal Cooperatives (collectively, “insurers”)

RE: Standards for Insurance Coverage for Applied Behavior Analysis

STATUTORY AND REGULATORY REFERENCES: N.Y. Ins. Law §§ 3216(i)(25), 3221(l)(17), and 4303(ee); N.Y. Educ. Law Title VIII; Chapter 554 of the Laws of 2013, as amended by Chapter 8 of the Laws of 2014 (N.Y. Educ. Law Art. 167); and 11 NYCRR 440 (Insurance Regulation 201)

Introduction

The purpose of this circular letter is to explain to insurers how the Superintendent reads the provisions of Insurance Law §§ 3216(i)(25), 3221(l)(17), and 4303(ee) that concern coverage for applied behavior analysis (“ABA”) consistently with a new Article in the Education Law that establishes a licensure and certification scheme for individuals who provide ABA.

Background

N.Y. Ins. Law §§ 3216(i)(25), 3221(l)(17), and 4303(ee) (“autism mandate”) require that insurance policies and contracts that provide coverage for physician services, medical, or major medical or similar comprehensive-type coverage must also provide coverage for the screening, diagnosis, and treatment of autism spectrum disorder (“ASD”). The autism mandate, among other things, includes coverage for 680 hours of applied behavior analysis (“ABA”) treatment per policy or calendar year per covered individual diagnosed with ASD. ABA is defined in the autism mandate as “the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior.” Ins. Law §§ 3216(i)(25)(C)(ii), 3221(l)(17)(C)(ii), and 4303(ee)(3)(B). For purposes of the autism mandate, ABA is a type of behavioral health treatment, for which insurance coverage is mandated, when it is provided or supervised by a behavior analyst certified pursuant to the Behavior Analyst Certification Board (“BACB”), a national professional credentialing body. The autism mandate directs the Superintendent, in consultation with the Commissioners of Health and Education, to promulgate regulations setting forth standards of professionalism, supervision, and relevant

experience for individuals who provide behavioral health treatment under the supervision of a certified behavior analyst. In furtherance of this directive, the Superintendent promulgated a regulation on an emergency basis, 11 NYCRR 440 (Insurance Regulation 201).

Chapter 554 of the Laws of 2013, as amended by Chapter 8 of the Laws of 2014, added new Article 167 to Title VIII of the Education Law. Article 167 establishes a new credentialing scheme for the provision of ABA. Specifically, Article 167 creates the statuses of “licensed behavior analyst” (“LBA”) and “certified behavior analyst assistant” (“CBAA”). Both LBAs and CBAAAs may provide ABA. However, a CBAA must be supervised by an LBA. Article 167 also describes some of the education, experience, and other requirements an individual must meet to become an LBA or a CBAA, and directs the Commissioner of Education to promulgate regulations to further describe the qualifications required to become licensed or certified, as well as to set standards for the supervision of CBAAAs by LBAs. Additionally, Article 167 describes the types of treatment these individuals may and may not provide and describes the circumstances under which individuals may be exempt from the law. Further, the law specifically provides that only a person licensed, certified, or exempt under Article 167 may practice ABA. Education Law § 8803. Article 167 became fully effective on July 1, 2014.

Analysis

The Insurance Law’s autism mandate, enacted before New York had a statutory scheme for credentialing individuals who provide ABA, uses different terminology and recognizes a different credentialing body for providers of ABA than does Article 167. The autism mandate recognizes behavior analysts certified by the BACB and individuals who provide ABA under the supervision of a BACB-certified behavior analyst. As described above, Article 167 recognizes “licensed behavior analysts” and “certified behavior analyst assistants” credentialed by the State Education Department (“SED”).

Under New York law, when two statutes have conflicting provisions, they are to be harmonized to the greatest extent possible. N.Y. Statutes § 391. To the extent that the statutory provisions are so inconsistent that they cannot both be given effect, then the provisions in the later enactment will prevail. N.Y. Statutes § 398.

The references to LBAs and CBAAAs credentialed by SED in Article 167, which was enacted after the Insurance Law’s autism mandate, are irreconcilable with the autism mandate’s reference to behavior analysts credentialed by the BACB, and their supervisees. Therefore, construing the autism mandate in a manner as consistent as possible with Article 167, after October 11, 2014, the date Insurance Regulation 201 expires, a person providing ABA, unless otherwise authorized to do so pursuant to Education Law Title VIII, must be either an LBA or a CBAA under the supervision of an LBA, as those terms are defined in Article 167 and any regulations promulgated thereunder, for the person’s services to be eligible for health insurance coverage. The services of an individual who performs tasks requiring no professional skill or judgment that are necessary to the provision of ABA under the ultimate supervision and direction of an LBA or other authorized supervisor should also be covered provided that such tasks and services are consistent with Article 167 and any regulations promulgated thereunder.

In addition, the direction in the autism mandate’s ABA credentialing provisions that the Superintendent promulgate regulations setting forth standards for individuals who provide behavioral

health treatment under the supervision of a certified behavior analyst does not square with Article 167's establishing some of the education, experience, and other requirements an individual must meet to become an LBA or a CBAA, and directing the Commissioner of Education to promulgate regulations to further describe the qualifications required to become licensed or certified, as well as to set standards for the supervision of CBAA's by LBAs. Given that Article 167 was enacted later than the autism mandate, there is no need for the Superintendent to repromulgate Insurance Regulation 201 after it expires on October 11, 2014.

Conclusion

The autism mandate, read together with Article 167, requires that after October 11, 2014, insurers cover ABA services provided in New York by persons acting pursuant to Education Law Title VIII and any regulations promulgated thereunder, as well as services provided by individuals that are necessary to the provision of ABA and not inconsistent with Article 167 and its implementing regulations.

Please direct any questions regarding this circular letter to Thomas Fusco, Supervising Insurance Attorney, by mail at Health Bureau, New York State Department of Financial Services, Walter J. Mahoney Office Building, 65 Court Street, Room 7, Buffalo, New York 14202, or by e-mail at thomas.fusco@dfs.ny.gov.

Very truly yours,

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Bureau Chief, Health Bureau