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BULLETIN NO: 10-02

TO: ALL HOSPITAL, MEDICAL AND HEALTH SERVICE CORPORATIONS, HEALTH INSURANCE COMPANIES AND HEALTH MAINTENANCE ORGANIZATIONS DELIVERING OR ISSUING FOR DELIVERY A HEALTH BENEFITS PLAN IN NEW JERSEY

FROM: NEIL N. JASEY, COMMISSIONER

RE: IMPLEMENTATION OF P.L. 2009, C. 115 WITH RESPECT TO CERTAIN BENEFITS FOR TREATMENT OF AUTISM AND OTHER DEVELOPMENTAL DISABILITIES

On August 13, 2009, P.L. 2009, c. 115 ("Chapter 115") was enacted. The new law is variously codified.¹ The law requires that carriers provide:

1. Coverage for expenses incurred in screening and diagnosing autism or another developmental disability;
2. Coverage for expenses incurred for medically necessary physical therapy, occupational therapy and speech therapy services for the treatment of autism or another developmental disability;
3. Coverage for expenses incurred for medically necessary behavioral interventions based on the principles of applied behavioral analysis (ABA) and related structured behavioral programs for treatment of autism in individuals under 21 years old; and
4. A benefit for the coverage of the "Family Cost Share" expense incurred for certain health care services obtained through the New Jersey Early Intervention System (NJEIS).

In addition, carriers must provide the required coverage without consideration of whether the services are restorative or have a restorative effect.

¹ Statutory codification of Chapter 115 is as follows: N.J.S.A. 17:48-6ii (applying to hospital service corporations); N.J.S.A. 17:48A-7ff (applying to medical service corporations); N.J.S.A. 17:48E-35.33 (applying to health service corporations); N.J.S.A. 17B:26-2.1cc (applying to insurers); N.J.S.A. 17B:27-46.1ii (applying to insurers); N.J.S.A. 17B:27A-7.16 (applying to all carriers offering individual health benefits plans); N.J.S.A. 17B:27A-19.20 (applying to all carriers offering small employer health benefits plans); N.J.S.A. 26:2J-4.34 (applying to HMOs and all HMO coverage); N.J.S.A. 52:14-17.29p (regarding the State Health Benefits Plan); and, N.J.S.A. 52:17.46.6b (regarding the School Employees' Health Benefits Plan).

Chapter 115 becomes effective on February 9, 2010. The Department of Banking and Insurance (DOBI) will not be able to adopt rules implementing and interpreting the provisions of Chapter 115 prior to February 9, 2010. Accordingly, the DOBI is issuing this bulletin to provide guidance for health service corporations, hospital service corporations, medical service corporations, health insurance companies, and health maintenance organizations (collectively, “carriers”) in their efforts to comply with Chapter 115 in a timely manner.²

Scope of Chapter 115’s Applicability

Chapter 115 applies to all health insurance policies issued or renewed on or after February 9, 2010 that provide hospital and medical expense benefits, including all health maintenance organization and all health service corporation contracts.

Definition of Developmental Disability

Chapter 115 does not define the term “developmental disability.” However, the New Jersey Developmentally Disabled Rights Act at N.J.S.A. 30:6D-1 et seq. defines the term at N.J.S.A. 30:6D-3 to mean:

...a severe, chronic disability of a person which:

- (1) is attributable to a mental or physical impairment or combination of mental or physical impairments;
- (2) is manifest before age 22;
- (3) is likely to continue indefinitely;
- (4) results in substantial functional limitations in three or more of the following areas of major life activity, that is, self-care, receptive and expressive language, learning, mobility, self-direction and capacity for independent living or economic self-sufficiency; and
- (5) reflects the need for a combination and sequence of special inter-disciplinary or generic care, treatment or other services which are of lifelong or extended duration and are individually planned and coordinated. Developmental disability includes but is not limited to severe disabilities attributable to mental retardation, autism, cerebral palsy, epilepsy, spina-bifida and other neurological impairments where the above criteria are met[.]

The DOBI believes this definition should be used in implementing Chapter 115.

Definition of Autism

The DOBI interprets “autism” as used in Chapter 115 to mean autism and related conditions often included under the phrase “Autism Spectrum Disorder.” In current clinical terms, this would include several conditions classified under “Pervasive

² This bulletin should not be construed to provide any guidance with respect to the State Health Benefits Plan or the School Employee’s Health Benefits Plan, to which Chapter 115 also applies, but which are outside the DOBI’s regulatory authority.

Developmental Disorder.” The DOBI considers diagnostic codes using 299, as set forth in the Diagnostic and Statistical Manual of Mental Health Disorders, Fourth Edition, Text Revised (DSM IV-TR) or International Classification of Disease (ICD), to be “autism” for purposes of complying with Chapter 115. However, because not all clinicians consider Childhood Disintegrative Disorder (CDD) and Rett’s Disorder to be included under Autism Spectrum Disorder, it is acceptable for carriers to choose to exclude 299.1 and 299.8 when it is clear the diagnosis is for CDD or Rett’s Disorder, respectively.^{3,4}

Coverage of Applied Behavioral Analysis

Chapter 115 requires that carriers provide coverage for expenses incurred by an individual who is under 21 years of age and diagnosed with autism for medically necessary treatments of the autistic condition based on the principles of applied behavioral analysis (ABA) and related structured behavioral programs.

Behavioral Interventions based on ABA and Related Structured Behavioral Programs

“Behavioral interventions based on ABA” are interventions or strategies based upon learning theory that are intended to improve socially important behavior of an individual using instructional and environmental modifications that have been evaluated through scientific research using reliable and objective measurements, including the empirical identification of functional relations between behavior and environmental factors. Behavioral intervention strategies based on ABA include, but are not limited to:

1. chaining;
2. functional analysis;
3. functional assessment;
4. functional communication training;
5. modeling, including video modeling (also known as imitation training);
6. procedures designed to reduce challenging and dangerous behaviors (e.g., differential reinforcement, extinction, time out, and response cost);
7. prompting; and
8. reinforcement systems, including differential reinforcement, shaping and strategies to promote generalization

“Related structured behavioral programs” are services delivered by a qualified practitioner that are comprised of multiple intervention strategies (that is, behavioral intervention packages) based upon the principles of ABA. These packages may include but are not limited to:

1. activity schedules;
2. discrete trial instruction;
3. incidental teaching;

³ The DSM IV-TR and ICD-9’s 299 code (Pervasive Developmental Disorder) includes: autistic disorder, Asperger’s disorder, Rett’s disorder, childhood disintegrative disorder and pervasive developmental disorder-not otherwise specified.

⁴ Although a carrier may not consider a diagnosis of CDD or Rett’s disorder to be “autism,” carriers should still consider whether such diagnoses meet the criteria for developmental disability at N.J.S.A. 30:6D-3.

4. natural environment training;
5. picture exchange communication system;
6. pivotal response treatment;
7. script and script-fading procedures; and
8. self-management

Qualified Practitioners of ABA

The DOBI is aware that carriers define an eligible provider of health care services as a practitioner acting within the scope of his or her license in the state in which the license is issued. The DOBI is also aware that most states, including New Jersey, have no professional license for ABA practitioners. There are, however, voluntary credentials that practitioners of ABA may obtain through the national Behavior Analyst Certification Board upon satisfaction of one or more very robust sets of standards. The DOBI does not construe Chapter 115 as requiring carriers to pay for services for the treatment of autism without regard to practitioner qualifications. Consequently, the DOBI believes carriers should consider behavioral interventions based on ABA and related structured behavior program services eligible for benefits if administered directly by or under the direct supervision of an individual who is credentialed by the national Behavior Analyst Certification Board as either:

- a Board Certified Behavior Analyst - Doctoral (BCBA-D); or
- a Board Certified Behavior Analyst (BCBA)

Carriers will need to modify their forms and protocols to accommodate this exception for the delivery of behavioral interventions based on ABA and related structured behavior programs in those jurisdictions lacking a requisite license for practitioners. Carriers may amend the definition of practitioner as part of form filings, including rider filings, to add the coverage required by Chapter 115.

Calendar Year Benefit Maximum

Group health plans: Although DOBI recognizes that the Legislature intended to limit coverage of ABA services for persons under age 21 diagnosed with autism spectrum disorder to \$36,000 per calendar year, carriers may not be able to limit the benefit as described. The federal Mental Health Parity and Addiction Equity Act of 2008, Pub. Law 110-343, sec. 512 (MHPAEA), generally prohibits group health plans, other than small employer group health plans, from having more restrictive benefits or services for treatment of mental illness than are applicable to treatment of physical conditions. MHPAEA states that the term mental illness is defined under the terms of the plan and in accordance with applicable Federal and State law. New Jersey law requires health coverage issued for delivery in this State to provide benefits or services for biologically-based mental illnesses, and specifically includes pervasive developmental disorders (autism) in this classification. Carriers providing biologically-based mental illness benefits in group health plans as required by New Jersey law must comply with both MHPAEA and Chapter 115⁵. The federal law preempts New Jersey state law when there

⁵ MHPAEA (sec 29 U.S.C. 1185a) does not require coverage for treatment of mental health conditions, but requires equitable benefits if coverage of mental health conditions is provided. However, MHPAEA also has exemption provisions that permit a plan's mental health coverage not to comply with parity

is a conflict between the two. Chapter 115's limit of \$36,000 per calendar year for ABA-related treatment of a condition classified in New Jersey law as a mental illness conflicts with federal provisions prohibiting such limits on treatment of mental health conditions in group health plans. Thus, as the law is currently written, the ABA-related benefit limitation established in Chapter 115 in group health plans subject to MHPAEA may not be applied unless the employer obtains an exemption under MHPAEA for its group health plan based on the "1% cost increase." To resolve this conflict and preserve the original legislative intent of limiting these benefits to \$36,000 per calendar year, the Legislature could enact necessary legislation to address this issue. Were such legislation to be enacted, the DOBI would provide additional guidance to carriers.

Federal mental health parity laws do not apply to group plans that are not "group health plans" as that term is defined in HIPAA.

Nongroup health plans: Federal mental health parity laws do not apply to coverage offered and renewed in the individual market. Accordingly, carriers may apply Chapter 115's per calendar year per person benefit limit for ABA-related treatment of autism when the coverage involved is under a nongroup policy.

Early Intervention Family Cost Share Expense Benefit

Carriers must provide benefits for the coverage of the "Family Cost Share" expense incurred by covered persons for the provision of certain health care services obtained in accordance with a treatment plan developed as a result of, or in conjunction with, an Individualized Family Service Plan (IFSP) for a child determined eligible for early intervention services through the New Jersey Early Intervention System (NJEIS).⁶ Chapter 115 establishes limits for the Family Cost Share expense benefit, as follows:

- Carriers are only required to provide a benefit for the Family Cost Share expense associated with the provision of physical therapy, occupational therapy, speech therapy and behavioral interventions based on ABA or related structured behavior services.⁷
- Carriers are only required to provide a benefit for the Family Cost Share expense when the service in question is provided to a child diagnosed with autism or other developmental disability.
- Carriers cannot deny benefits for the Family Cost Share expense on the basis that treatment with any of the Chapter 115-identified therapies is not restorative.

Family Cost Share Participation Statement

Families that are responsible for the NJEIS Family Cost Share receive monthly invoices from NJEIS and submit payments to NJEIS. Families may then seek reimbursement for the expense from the carrier. Initially, Family Cost Share Participation (FCSP) statements detail health care services using Current Procedural

requirements if it can be shown actuarially that compliance would result in an increase in actual total costs for the plan of 1% (2% initially).

⁶ See <http://www.state.nj.us/health/fhs/eis/index.shtml> for more information regarding NJEIS. NJEIS' rules are at N.J.A.C. 8:17.

⁷ There is no Family Cost Share expense for ABA at this time; however, DOBI has been advised that NJEIS will be making systemic improvements to ensure that families have access to related structured behavioral interventions.

Terminology – CPT – codes. After several months, the FCSP statement only provides a summary of the total cost share due. Because a family’s Family Cost Share may be related to services other than those for which carriers are required to provide a benefit under Chapter 115, carriers may request that families submit the more detailed FCSP statement on a continuing basis, and documentation of payment of the Family Cost Share to NJEIS.

Diagnosis Codes

The FCSP statement may not identify the child as having a diagnosis of a developmental disability, and NJEIS does not limit eligibility for early intervention services to children diagnosed with a developmental disability. Given that Chapter 115 is specific to developmental disabilities, the DOBI recognizes that there may be instances in which a family may incur a covered Family Cost Share expense, but will receive no benefit because the child has not been diagnosed with a developmental disability. Nevertheless, carriers should request more information from the family regarding diagnosed developmental disabilities when the benefits for the Family Cost Share expense are in question to avoid inappropriate denials of benefits with respect to physical therapy, occupational therapy, speech therapy and ABA-related behavioral interventions.

NJEIS Providers and Practitioners

NJEIS clients generally do not choose the practitioners that will deliver services. The practitioners that deliver early intervention services to NJEIS clients through NJEIS-contracted provider agencies may or may not also contract with carriers through other means. The practitioners will, however, be in the NJEIS “network.” Through a vendor, NJEIS verifies the credentials of practitioners before practitioners are eligible to deliver services to NJEIS clients. DOBI’s position is that Chapter 115 requires that carriers cover the Family Cost Share expense benefit without regard to whether the delivery of the service is rendered by a practitioner in the carrier’s network, so long as the service is provided through NJEIS.

Additional Family Cost Share Benefit Information

1. As explained in the Family Cost Participation Handbook issued by NJEIS, a Family Cost Statement (bill) is sent to families on a monthly basis and payment is required within 30 days of receipt of the Family Cost Statement. After families have made payment, families may seek reimbursement for the eligible portions of the Family Cost Share from their insurance carriers. In all instances, carriers should be reimbursing families for the Family Cost Share expense the families paid to the NJEIS. Families do not pay practitioners, and practitioners do not bill families for any portion of the cost associated with the health care services provided through the NJEIS. There is no assignment of benefits involved.
2. The FCSP statement will identify a family’s cost share per service hour as well as the maximum monthly cost share the family could incur. Expenses are incurred on a 15 minute basis. Chapter 115 does not impose an obligation on carriers to provide a benefit that exceeds a family’s maximum monthly Family Cost Share expense.

3. Family cost shares may change annually. The NJEIS posts the Family Cost Share formula and table on its web pages. However, it is reasonable for carriers to rely upon the Family Cost Share expense set forth in the FCSP statement.
4. Carriers may make the Family Cost Share expense benefit subject to a plan's deductible and coinsurance or copayment requirements. Eligible Family Cost Share expenses should be applied toward any out-of-pocket maximum limit established under the plan. The DOBI does not believe a carrier may establish a separate deductible, coinsurance, copayment or out-of-pocket maximum for the Family Cost Share expense benefit.

Limitations on Therapy Services

Chapter 115 states that coverage for physical therapy, occupational therapy, speech therapy and behavioral interventions based on ABA provided to treat a developmental disability should not limit benefits otherwise available to a covered person. Accordingly, carriers may not reduce the physical therapy, occupational therapy, speech therapy or behavioral therapy benefit(s) available under the contract for treatment of other illnesses, injuries and conditions based upon the provision of such services to treat autism or another developmental disability. Carriers may establish a separate set of benefits for these services for purposes of treating autism and other developmental disabilities, but the separate benefit must be subject to terms and conditions that are the same as or more favorable than the terms and conditions applicable to the benefits for treatment of other illnesses, injuries or conditions. The DOBI will not approve limits for physical therapy, occupational therapy or speech therapy for treatment of autism or other developmental disabilities that establish a maximum number of days of therapy measured from the date of diagnosis or inception of treatment, or benefit limits established on a per illness or injury basis.

Questions regarding this bulletin and implementation of Chapter 115 should be submitted by electronic mail to legsregs@dobi.state.nj.us. If warranted, the DOBI will issue additional guidance, and may post responses to frequently asked questions to the DOBI's website at <http://www.state.nj.us/dobi/index.html>.

January 14, 2010
Date


Neil N. Jasey, Commissioner