

DATE: August 27, 2012

ACTION: Notice of Decision on Petition for Rulemaking Action

SUBJECT: Petition by Kaiser Foundation Health Plan, Inc. Requesting Initiation of Formal Rulemaking and Promulgation of Regulations Related to Senate Bill 946

PETITIONER

The Kaiser Foundation Health Plan, Inc. (Kaiser) petition for rulemaking action (Petition) was received by the Department of Managed Health Care (Department) on June 27, 2012. The parties entered into an agreement on July 24, 2012, extending the date the Department has to respond to the Petition until August 27, 2012.

Pursuant to the requirements of Government Code Section 11340.7, the Department provides this response to the Petition.

CONTACT PERSON

Inquiries concerning this decision may be directed to Emilie Alvarez, Regulations Coordinator, Department of Managed Health Care, Office of Legal Services, by mail at: 980 9th Street, Suite 500, Sacramento, CA 95814, by telephone at: (916) 322-6727, or by e-mail at: ealvarez@dmhc.ca.gov or regulations@dmhc.ca.gov.

AVAILABILITY OF PETITION

The Petition for the adoption of regulations is available upon request directed to the Department's Contact Person.

AUTHORITY

Under authority established in the Knox-Keene Health Care Service Plan Act of 1975 (the Knox-Keene Act)¹, including but not limited to Health and Safety Code Sections 1343, 1344 and 1346, the Department may adopt, amend and rescind regulations as necessary to carry out the provisions of the Knox-Keene Act.

¹ Health and Safety Code Section 1340 *et seq.*

DETERMINATION ON THE PETITION

On October 9, 2011, Governor Brown signed into law Senate Bill 946 (SB 946), which added Section 1374.73 to the Knox-Keene Act in the Health and Safety Code. Beginning July 1, 2012, Section 1374.73 allows health plans to provide medically necessary behavioral health treatment (BHT), including applied behavior analysis (ABA), to individuals with autism or pervasive developmental disorder (PDD), by non-licensed professionals in compliance with detailed criteria set forth in the statute. While Section 1374.73 states that its provisions do not apply to Healthy Families Program (HFP) enrollees and CalPERS members, it also specifically states that it does not affect, reduce, or limit the health plans' obligations to cover medically necessary treatment, including BHT, under the state's pre-existing mental health parity law, Section 1374.72 of the Health and Safety Code.

Kaiser indicates in its Petition that there is confusion among health plans as to their obligations to cover BHT, including ABA, for HFP enrollees and CalPERS members with autism or PDD under existing mental health parity law, subsequent to the implementation date of Section 1374.73. The Petition requests that the Department promulgate regulations to clarify Section 1374.73, and, more specifically, the following:

- “(1) Whether contracts between health care service plans and the Board of Administration of the California Public Employees Retirement System (“CalPERS”) and the Healthy Families Program (“Healthy Families”) administered by the California Managed Risk Medical Insurance Board (collectively referred to herein as the “Public Purchasers”) must include coverage of Behavioral Health Treatment (BHT), including Applied Behavioral Analysis (“ABA”) defined in Health & Safety Code § 1374.73 (“S.B. 946”);
- (2) If DMHC requires coverage of BHT in health care service plan contracts with Public Purchasers, the licensure and certification requirements for individuals who provide BHT;
- (3) The ongoing statutory obligations of the Regional Centers to provide BHT to enrollees of the Public Purchasers pursuant to the Regional Centers' contracts with the State of California for services governed by the Lanterman Act (Cal. Welfare & Institutions Code § 4500 et seq.) and the Intervention Services Act (Cal. Government Code § 95000 et seq.) in light of the statutory exemption contained in S.B. 946 for health care service contracts with the Public Purchasers.”

For the reasons discussed below, the Department grants the Petition in part and denies the Petition in part.

1. The Department Grant's the Petitioner's Request to Initiate Rulemaking Proceedings to Establish whether Health Plans Continue to be Required to Cover BHT, including ABA, for CalPERS Members and HFP Enrollees with Autism or PDD Subsequent to the Enactment of Section 1374.73.

Government Code Section 11342.2 establishes the necessity standard for rulemaking actions "... no regulation adopted is valid or effective unless . . . reasonably necessary to effectuate the purpose of the statute [it is implementing, interpreting, making specific or otherwise carrying out.]" SB 946, which was recently signed into law by Governor Brown, added Health and Safety Code Section 1374.73 to the Knox-Keene Act. Section 1374.73 allows health plans to provide medically necessary BHT, including ABA, for individuals with autism and PDD, beginning July 1, 2012, by non-licensed professionals in compliance with detailed criteria set forth in the statute.

Section 1374.73, states its requirements do not apply to Medi-Cal participants, HFP enrollees and CalPERS members. However, the legislation also specifically states that it does not affect, reduce, or limit the health plans' obligations to cover medically necessary treatment, including BHT, under existing mental health parity law, which is contained in Section 1374.72 of the Knox-Keene Act. Specifically, Section 1374.73(a)(1) provides:

Every health care service plan contract that provides hospital, medical, or surgical coverage shall *also provide coverage for behavioral health treatment* for pervasive developmental disorder or autism no later than July 1, 2012. The coverage shall be provided in the same manner and *shall be subject to the same requirements as provided in Section 1374.72.* (Section 1374.73(a)(1), emphasis added.)

The statutory language of SB 946 contains the same general mandate for mental health benefits that are contained in the original mental health parity law.²

California passed a mental health parity law in 1999. Section 1374.72 of the Knox-Keene Act requires health plans to provide coverage for the diagnosis and medically necessary treatment of specified severe mental illnesses, including PDD or autism, under the same terms and conditions applied to other medical conditions.³ Section 1374.72 requires all full-service health plan contracts to "provide coverage for the diagnosis and medically necessary treatment of severe mental illness [SMI] of a person of any age, and of serious emotional disturbances of a child" [SED]. SMI is specifically defined to include PDD and autism. SB 946 specifically references the mental health parity law in Section 1374.73(e) and states, "nothing in this section shall be construed to limit the obligation to provide services under Section 1374.72."⁴

Kaiser has stated in its Petition that the health plans, as well as CalPERS and the Managed Risk Medical Insurance Board (MRMIB), which administers the HFP, are unclear whether the

² Health and Safety Code Section 1374.72.

³ Health and Safety Code Section 1374.72(a).

⁴ Health and Safety Code Section 1374.73(e).

implementation of SB 946 relieved them of the coverage requirements for BHT, including ABA, under the mental health parity law effective July 1, 2012. Kaiser further states that it is essential for the health plans, MRMIB and CalPERS to know whether coverage for BHT, including ABA, is required when negotiating premium rates based on the scope of contractually covered services.

Based upon the confusion regarding the effect of SB 946 on existing mental health parity law for CalPERS members and HFP enrollees with PDD or autism, the Department grants the Kaiser Petition to begin rulemaking proceedings to implement, interpret and/or make specific Health and Safety Code Section 1374.73.

On August 20, 2012, the Department initiated an emergency rulemaking action by noticing the public five working days in advance of submitting an emergency rulemaking action to the Office of Administrative Law (OAL) for review and approval pursuant to Government Code Section 11346.1. The subject of the proposed emergency rulemaking action is “Pervasive Developmental Disorder and Autism Coverage,” contained in new Section 1300.74.73 of Title 28 of the California Code of Regulations. This emergency regulation is intended to implement, interpret, and/or make specific Health and Safety Code Section 1374.73 by ensuring health plans understand the requirements for uniform and timely application of the Knox-Keene Act related to coverage of medically necessary health care services, including BHT and ABA, for health plan enrollees with PDD or autism.

2. The Department Denies that Portion of the Petition to Initiate Rulemaking Proceedings to Establish the Licensure and Certification Requirements for Individuals Who Provide BHT to HFP and CalPERS Enrollees.

As previously discussed, the mental health parity law requires that health plans cover the diagnosis and medically necessary treatment of severe mental health conditions, including PDD and autism. The Department promulgated an administrative regulation regarding the mental health parity law.⁵ This regulation provides that, “[t]he mental health services required for the diagnosis, and treatment of conditions set forth in Health and Safety Code Section 1374.72 shall include, when medically necessary, all health care services required under the Act including, but not limited to, basic health care services within the meaning of Health and Safety Code Sections 1345(b) and 1367(i), and section 1300.67 of Title 28.”⁶ The regulation also states that a health plan “shall provide coverage for the diagnosis and medically necessary treatment of conditions set forth in Health and Safety Code section 1374.72 through health care providers within the meaning of Health and Safety Code section 1345(i), which requires licensure, who are 1) acting within the scope of their licensure; and 2) acting within their scope of competence, established by education, training and experience . . .”⁷

The Knox-Keene Act provides that services under the Knox-Keene Act are to be furnished by “any professional person, organization, health facility, or other person or institution licensed by

⁵ Cal. Code Regs., tit. 28, § 1300.74.72.

⁶ Cal. Code Regs., tit. 28, § 1300.74.72(a).

⁷ Cal. Code Regs., tit. 28, § 1300.74.72(b).

the State to deliver or furnish health care services.”⁸ The Knox-Keene Act also provides that “[pe]rsonnel employed by or under contract to the plan shall be licensed or certified by their respective board or agency, where licensure or certification is required by law.”⁹ Business and Professions Code Section 2052 provides that only licensed individuals can diagnose or treat a person for any physical or mental condition unless the Legislature provides an exception to the prohibition. The California Supreme Court has stated that the Knox-Keene Act does not exempt a provider from the licensing requirements of the Business and Professions Code. *People v. Cole* (2006) 38 Cal.4th 964, 985. Because Business and Professions Code Section 2052 requires a license or a legislative exemption from licensure requirements to provide diagnosis or treatment of any mental condition, such as that created by SB 946, the Legislature, not the Department, is the appropriate entity to establish licensure and certification requirements for individuals who provide BHT.

For these reasons, the Petitioner’s request for rulemaking to establish licensing and certification requirements for individuals providing BHT to HFP enrollees and CalPERS members with autism or PDD is denied.

3. The Department Denies that Portion of the Petition to Initiate Rulemaking Proceedings to Establish the Statutory Obligations of the Regional Centers to Provide BHT to CalPERS Members and HFP Enrollees pursuant to their Contracts with the State of California because of Inappropriate Jurisdiction.

The Department administers state law applicable to health care service plans as set forth under the Knox-Keene Act. The regulations that implement, interpret, make specific and otherwise carry out the provisions of the Knox-Keene Act are contained in Title 28 of the California Code of Regulations.

The Regional Centers are under the jurisdiction of the California Department of Developmental Services (DDS). The Department does not administer or enforce laws that govern the DDS and the Regional Centers with which DDS contracts, and, therefore, does not adopt regulations to implement, interpret and/or make specific those laws. The DDS has the authority to adopt regulations establishing the statutory obligations of the Regional Centers. DDS regulations are contained in Title 17 of the California Code of Regulations.

Since the Department does not promulgate regulations to clarify provisions of law that are outside of the Knox-Keene Act, the Department denies that portion of the Petition to initiate rulemaking proceedings to establish the statutory obligations of the Regional Centers to provide BHT to CalPERS members and HFP enrollees.

CONCLUSION

For the reasons set forth above, the Department has initiated a rulemaking action to adopt an emergency regulation clarifying whether CalPERS members or HFP enrollees are entitled to

⁸ Health and Safety Code Section 1345(i).

⁹ Health and Safety Code Section 1367(b).

receive coverage for BHT, including ABA, by health plans under the provisions of the Knox-Keene Act. Petitioner's request to establish the licensure and certification requirements for individuals who provide BHT is denied as more appropriately the province of the Legislature. Petitioner's request to define the statutory and regulatory obligations of the Regional Centers is denied as the more appropriate jurisdiction of DDS.

The Petitioner's interest in the Department's rulemaking process is appreciated.