

# COMMONWEALTH OF VIRGINIA



SCOTT A. WHITE  
COMMISSIONER OF INSURANCE  
STATE CORPORATION COMMISSION  
BUREAU OF INSURANCE

P.O. BOX 1157  
RICHMOND, VIRGINIA 23218  
1300 E. MAIN STREET  
RICHMOND, VIRGINIA 23219  
TELEPHONE: (804) 371-9741  
scc.virginia.gov

April 19, 2022

## Administrative Letter 2022-02

- TO: All Carriers Licensed to Write Accident and Sickness Insurance in Virginia, All Health Services Plans and Health Maintenance Organizations Licensed in Virginia and Interested Persons**
- RE: Treatment for Autism Spectrum Disorder – Requirements and Enforcement of §§ 38.2-3412.1 and 38.2-3418.17 of the Code of Virginia  
Withdrawal of Administrative Letter 2020-03 Dated April 22, 2020**

**Administrative Letter 2020-03 is hereby withdrawn.**

This replacement Administrative Letter provides guidance to health carriers regarding the requirements and enforcement of § 38.2-3418.17 of the Code of Virginia (Code) and the federal Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) in accordance with § 38.2-3412.1 B of the Code.

The following significant changes are made with this letter:

- 1. Autism Spectrum Disorder (ASD) is defined in Virginia law as a mental health condition.**
- 2. Applied Behavioral Analysis (ABA) services for treatment of ASD are Essential Health Benefits (EHB).**
- 3. Benefits required under applicable state mandates are not in addition to EHB nor subject to state defrayal of cost.**

Explanations for these revised determinations are provided below.

### **Background and Analysis**

As explained in AL 2020-03, treatment for ASD is an essential health benefit (EHB)

set forth in Virginia's EHB benchmark plan (benchmark plan).<sup>1</sup> At the time benchmark plan was chosen however, the policy was silent pertaining to coverage of ABA services specifically. The Bureau researched the coverage details of the policy and learned that the issuing carrier excluded ABA services for treatment of ASD. Therefore, the Bureau identified ABA as an excluded service on the Bureau's EHB forms review checklist.

In addition, AL 2020-03 reflected the Bureau's understanding that § 38.2-3418.17 of the Code did not clearly define ASD; as such, the Bureau advised that plans could choose to define ASD as either a mental health or medical/surgical condition.

Recent guidance from CMS, combined with the Bureau's enhanced understanding of MHPAEA, have caused the Bureau to reconsider the above-stated positions. In late 2021, CMS informed the Bureau that the reference to the Diagnostic and Statistical Manual of Mental Disorders (DSM) in § 38.2-3418.17 of the Code firmly defines ASD as a mental health condition under Virginia law.<sup>2</sup> Further, because MHPAEA requires coverage of mainstream, first-line treatments for mental health conditions in parity with medical/surgical conditions, ABA services – as a mainstream, first-line treatment for ASD – cannot be excluded for any individual or group health insurance coverage without violating MHPAEA.<sup>3</sup> Finally, in order for QHPs to satisfy the requirement to provide EHB, mental health and substance use disorder services, including behavioral health treatment services, must be provided in a manner that complies with MHPAEA; in other words, compliance with MHPAEA is an EHB in and of itself.<sup>4</sup>

Given the above, in accordance with MHPAEA and Virginia law, carriers must (1) define ASD as a mental health condition exclusively, and (2) cover ABA services as EHB. Carriers are reminded that in no case may individual or group health insurance coverage that uses the benchmark plan impose the annual dollar limits identified in § 38.2-3418.17 K of the Code on ABA services. In addition, other treatment for ASD, including medically necessary behavioral health treatment, pharmacy care, psychiatric care, psychological care, and therapeutic care, remains required under the benchmark plan.

Finally, the Bureau notes that compliance with the requirements of § 38.2-3418.17 of the Code is not subject to state defrayal pursuant to 45 CFR 155.170. Section 38.2-3418.17 L of the Code saves the state from defrayal costs by providing that where the application of the section exceeds the requirements of EHB, those provisions will not apply to QHPs. Via this letter, however, the Bureau advises that it considers all requirements of § 38.2-3418.17 of the Code applicable to QHPs pursuant to MHPAEA, § 38.2-3412.1 of the Code, and the benchmark plan.

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<sup>1</sup> The benchmark plan chosen for Virginia was subject to the coverage requirements of §§ 38.2-3412.1 and 38.2-3412.1:01 of the Code. Section 38.2-3412.1:01 of the Code, since repealed, required group policies to cover biologically-based mental illness, which included ASD. Section 38.2-3412.1 of the Code required individual policies to cover treatment for mental illness described in § 38.2-3412.1:01 of the Code.

<sup>2</sup> Previous guidance from CMS indicated that the reference to the DSM did not conclusively define ASD as a mental health condition.

<sup>3</sup> The only exception being grandfathered small group health insurance coverage, which is not subject to MHPAEA requirements.

<sup>4</sup> 45 CFR 156.115(a)

If a carrier maintains that § 38.2-3418.17 D of the Code requires the provision of benefits beyond those required by MHPAEA, QHPs are not required to provide benefits without visit limits and may impose separate cost sharing if they can maintain compliance with MHPAEA and Virginia law in doing so. Nonetheless, carriers are cautioned that the imposition of visit limits and separate cost sharing are unlikely to pass the required thresholds permitted under MHPAEA. Visit limits will likely need to be waived for physical, occupational, and speech therapy, and separate cost sharing likely cannot be imposed on any of the treatments for ASD required under § 38.2-3418.17 of the Code.

### **Application Timeframe**

In accordance with Virginia law, health insurance coverage may only be modified at the time of coverage renewal. Any individual or group policy issued or renewed on or after January 1, 2023 must comply with the positions outlined in this letter that ASD must be defined as a mental health condition and that ABA services are EHB.

### **Other Resources**

Any questions concerning this Administrative Letter may be addressed to:

Brant Lyons  
Principal Insurance Market Examiner  
Life & Health Division  
Bureau of Insurance  
[Brant.Lyons@scc.virginia.gov](mailto:Brant.Lyons@scc.virginia.gov)  
(804) 371-9490

Cordially,



Scott A. White  
Commissioner of Insurance