

**Private Insurance or Special Education:  
Who Pays for a Child's Mental Health Needs?<sup>1</sup>**

The Massachusetts Mental Health Parity Law (MHPL) requires private insurers to cover treatment of certain mental health conditions on a non-discriminatory basis.<sup>i</sup> Special protections apply to coverage of children with mental health needs. In theory, an insurer should pay for all of a child's mental health treatment that is required to be covered by the MHPL and is medically necessary.

Many children in Massachusetts that require mental health treatment qualify for special education services. One problematic aspect of the MHPL is its intersection with Massachusetts' special education law, Mass. Gen. Laws ch. 71B. The MHPL exempts insurers from having to pay for services that a school committee must provide under ch. 71B. Section 5 of the special education statute in turn excuses a school committee from paying for "health care goods or services to the extent that such goods or services constitute medically necessary treatment for disease, illness, injury or bodily dysfunction which would be covered by a third party payor but for a school-aged child's eligibility for such goods and services under [ch. 71B]." (Emphasis added.)

When is a mental health service sufficiently "medical" to require coverage by a private insurer? Conversely, when is mental-health related treatment sufficiently "educational" to trigger entitlement under special education laws? There is no clear answer to these questions. This article reviews key aspects of the MHPL and ch. 71B in an attempt to shed some light on this dilemma.

**Private insurance coverage of medically necessary mental health treatment for a child**

**Massachusetts Mental Health Parity Law: Key mandated benefits for children**

Health plans subject to the MHPL may not have annual or lifetime limits, in dollars or service units, for the diagnosis and treatment of specified mental disorders, which are lower than the limits on coverage for diagnosis and treatment of physical conditions. The following "biologically-based" mental disorders are entitled to full parity under the MHPL: schizophrenia, schizoaffective disorder, major depressive disorder, bipolar disorder, paranoia and other psychotic disorders, obsessive-compulsive disorder, panic disorder, delirium, dementia, and affective disorders.<sup>ii</sup> Medically necessary psychopharmacological services and neuropsychological assessments must be covered and treated as medical benefits.

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Children under 19 are entitled to additional protections under the MHPL.<sup>iii</sup> Plans must cover the diagnosis and treatment of non-biologically based mental, behavioral, and emotional disorders in children on an equal basis with physical conditions, if the disorder “substantially interferes with or limits” the child’s functioning and social interactions. A physician or licensed mental health professional may document that a child meets these criteria. The child’s disorder may also be evidenced by conduct, including an inability to attend school, the need to be hospitalized, or a pattern of behavior which poses a danger to the child or others.

Under the MHPL, plans must provide access to a range of inpatient, intermediate, and outpatient services that permit “medically necessary, active and non-custodial treatment” to take place in the “least restrictive clinically appropriate setting.” The law gives examples in each category:

- 1) Inpatient services: general hospital, Department of Mental Health (DMH) facility, private psychiatric hospital, and DPH-licensed substance abuse facility.
- 2) Intermediate services: Level III community-based detoxification, acute residential treatment, partial hospitalization, day treatment, and crisis stabilization.
- 3) Outpatient services provided by a licensed mental health professional in a hospital, mental health or substance abuse clinic, public community mental health center, professional office, or at home.

Insurers that offer mental health benefits through a network of providers must ensure "adequate access" to the full range of behavioral health services required by the MHPL, including the settings above.<sup>iv</sup>

**Enforcing a child’s right to medically necessary mental health care covered by the MHPL**

A "licensed mental health professional" may deny insurance coverage for MHPL-mandated mental health services on the basis of medical necessity.<sup>v</sup> To be "medically necessary," health care services must be “consistent with generally accepted principles of professionally medical practice.”<sup>vi</sup> A child in a plan subject to the MHPL (except for a GIC plan) may enforce her right to medically necessary, covered mental health treatment using the grievance and appeal provisions of Mass. General Laws ch. 176O.

Those provisions require private insurers to have a formal internal grievance procedure.<sup>vii</sup> Grievances can be made orally or in writing and must be resolved in writing within 30 days. If the grievance concerns coverage of an "immediate and urgently needed" service, the insurer must expedite the process. Moreover, if the grievance relates to termination of an ongoing course of treatment, treatment must be continued pending completion of the internal review. The insurer’s denial must explain the medical basis for the decision; identify supporting information; specify alternative covered treatments; and explain how to request external review.

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If the grievance is not resolved in the child's favor, further, external review is available via the Department of Public Health's Office of Patient Protection (OPP).<sup>viii</sup> Review must be requested within 45 days of receiving the insurer's final decision. If OPP determines that the benefit is covered by the plan, it refers the grievance to an external review agency. In most cases, this must happen within five business days; if expedited review is approved, the appeal is referred in 48 hours.

An external review panel of clinicians determines whether the requested treatment is medically necessary. If the appeal concerns an ongoing course of treatment, the external reviewers may allow continued coverage during the review process, based on substantial harm or other good cause. In general, the panel must resolve the grievance within 60 days, unless the review is expedited, in which case a written resolution must issue within five days of receipt by the panel. The decision of the review panel is binding.

**Provision of mental health services under Special Education**

There is no bright line test to determine when a school committee must provide a service for a child with a mental health-related disability as part of the "free and appropriate public education" required under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., and state special education law, Mass. Gen. Laws ch. 71B. However, "education" under the IDEA is broadly defined. See *Timothy W. v. Rochester N.H. Sch. Dist.*, 875 F.2d 954, 970 (1st Cir. 1989).

Moreover, the First Circuit has held that behavioral disturbances that interfere with a child's ability to learn must be addressed as special education needs. *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29, 33 n. 3 (1st Cir.2001). Yet in some cases, services that address a child's mental health needs have been found not to serve an education-related purpose. See e.g., *Medford Pub. Schs.*, BSEA 98-1166, 27 IDELR 1020 (1998) (13-year-old with post-traumatic stress disorder, depression, bipolar disorder and behavior problems required residential placement for social, safety and medical reasons, not educational reasons); *Belchertown Pub. Schs.* BSEA 97-1510, 26 IDELR 961 (1997) (private counseling of 15-year-old with Post Traumatic Stress Disorder, auditory and memory problems was not education-related).

The following is a brief review of some key elements of Mass. Gen. Laws ch. 71B (and regulations thereunder), as they relate to children with mental health-related disabilities.<sup>ix</sup>

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**Assessment of eligibility**

A school committee must provide a child referred for a special education evaluation:

- 1) An assessment of the child's current educational status by a representative of the local school department;
- 2) An assessment by a classroom teacher who has dealt with the child in the classroom;
- 3) A complete medical assessment by a physician;
- 4) An assessment by a psychologist; and
- 5) An assessment by a nurse, social worker, guidance or adjustment counselor of the home situation and family history.<sup>x</sup>

Further assessments by specialists may be required, including but not limited to an assessment by: a neurologist; an audiologist; an ophthalmologist; a specialist competent in speech, language and perceptual factors; and a psychiatrist.<sup>xi</sup>

**Eligibility in general**

A child will be found eligible for special education services if:

- (1) s/he has a disability (as defined in 603 CMR 28.02(7)), including an “emotional impairment,” and
- (2) as a result of the disability (or disabilities), the student is unable to progress effectively in the general education program
  - a) without the provision of specially designed instruction, or
  - b) is unable to access the general curriculum without the provision of one or more related services.<sup>xii</sup>

**Eligibility based on “emotional impairment”**

Under special education law, a student will be found to have an “emotional impairment” if s/he exhibits one or more of the following characteristics over a long period of time and to a marked degree that adversely affects educational performance:

- 1) an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- 2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- 3) inappropriate types of behavior or feelings under normal circumstances;
- 4) a general pervasive mood of unhappiness or depression; or
- 5) a tendency to develop physical symptoms or fears associated with personal or school problems.<sup>xiii</sup>

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There is substantial overlap between the definitions of “emotional impairment” for special education purposes and a mental, emotional or behavioral disorder that is entitled to parity coverage under the MHPL (i.e., that substantially limits a child’s functioning or social interactions).

**Related services**

If a child is eligible for special education services, the assessment team must devise an individualized education program (IEP).<sup>xiv</sup> As part of that program, a student may be entitled to receive related services needed to benefit from special education or to access the general curriculum. “Related services” include services that private insurers arguably have to cover under the MHPL if medically necessary: psychological services; counseling services; and medical services for diagnostic or evaluation purposes.<sup>xv</sup> Private insurance plans generally exclude services they deem “educational” or as treating “school performance” problems. Yet determining the purpose of a mental health-related service for a child with an emotional impairment -- whether educational or not -- is rarely clear-cut.

**Rights to independent evaluation and due process**

The parents or guardians of a student have the right to obtain an independent evaluation if they disagree with the school’s assessment. If dissatisfied with the IEP, the parents or guardians may pursue dispute resolution or an administrative hearing through the Bureau of Special Education Appeals.<sup>xvi</sup> In a non-expedited case, a hearing should be scheduled within 20 days of receipt of a written request; 10 days for an expedited case. Decisions must be issued within 45 days of receipt of the request; pending the decision, the student generally must remain in the current placement.

**Cost of special education plan**

An assessment must identify special education services solely based on a child’s unique needs and cannot consider the cost of services. In a special education due process proceeding, other state agencies may be joined and ordered to provide appropriate services to the eligible child, thereby spreading the cost.<sup>xvii</sup> Yet the special education statute provides no clear mechanism for a school committee to seek reimbursement from a private health insurer, when appropriate.

**Conclusion**

The laws governing private mental health insurance benefits and special education requirements are complex. Private insurers and public school systems may point a finger at each other when it comes to paying for children’s mental health services. Disabled students’ legal entitlement to free and appropriate special education services must be preserved. Developing better mechanisms to ensure that both school systems and private insurers fulfill their obligations to provide mental health services to children will avoid unduly burdening a strained public system.

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**Endnotes**

<sup>i</sup> The law also applies to plans issued to state employees and retirees by the Group Insurance Commission. See Chapter 80 of the Acts of 2000, An Act Relative to Mental Health Benefits, codified at Mass. Gen. Laws ch. 32A, § 22; ch. 175, §47B; ch. 176A, §8A; ch. 176B, §4A, ch. 176G, §4M.

<sup>ii</sup> The Commissioners of Mental Health and Insurance may expand this list to other scientifically recognized, biologically-based mental disorders listed in the current edition of the Diagnostic and Statistical Manual of the American Psychiatric Association ("DSM").

<sup>iii</sup> The MPHIL requires that coverage continue after a child turns 19, when the child is receiving ongoing treatment for a mental disorder covered by the law. The insurer may charge a premium for continuing coverage. DOI Bulletin No. 2000-10.

<sup>iv</sup> DOI Bulletin No. 2002-07 (February 15, 2002).

<sup>v</sup> Licensed mental health professionals include psychiatrists, psychologists, independent clinical social workers, mental health counselors, and mental health clinical specialist nurses.

<sup>vi</sup> Mass. Gen. Laws ch. 176O, § 1. Under 105 CMR 128.020, medical necessity is further determined by whether the service: (1) is the most appropriate available supply or level of service; and (2) is known to be effective in improving health outcomes or, for services and interventions not in widespread use, is based on scientific evidence.

<sup>vii</sup> See Mass. Gen. Laws ch. 176O § 13.

<sup>viii</sup> Mass. Gen. Laws ch. 176O, § 14.

<sup>ix</sup> For a comprehensive treatment of special education law and rights, see *Legal Requirements of Special Education*, by Tim Sindelar, Esq., in *Legal Rights of Individuals with Disabilities*, S. Eichner and C. Griffin, Eds. (MCLE, 2002), Chapter 6. The author thanks Tim Sindelar for providing helpful information about special education law for her preparation of this article, and takes complete responsibility for any errors in her presentation of this information.

<sup>x</sup> Mass. Gen. Laws ch. 71B, § 3.

<sup>xi</sup> *Id.*

<sup>xii</sup> 603 CMR 28.02(21).

<sup>xiii</sup> 603 CMR 28.02(7)(f).

<sup>xiv</sup> See 603 CMR 28.05.

<sup>xv</sup> 603 CMR 28.02(18) (incorporating definition of “related services” in 34 CFR 300.24 (IDEA regulations)).

<sup>xvi</sup> 603 CMR 28.05, 28.08.

<sup>xvii</sup> 603 CMR 28.08(3).