STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
300 CAPITOL MALL, SUITE 1700
SACRAMENTO, CA 95814
(916) 492-3500
www.insurance.ca.gov

Dave Jones, *Insurance Commissioner*

June 26, 2013

Senator Jim Beall
Chair
Select Committee on Mental Health
State Capitol Room 4085
Sacramento, CA 95814

RE: Request for Information regarding Mental Health Parity, California's Essential Health Benefits, and the California Insurance Code

Dear Senator Beall:

Thank you for your letter inquring as to how the California Department of Insurance, in implementing the essential health benefits provisions of state law and the federal Affordable Care Act, will comply with the Paul Wellstone and Pete Domenici Mental Health Service Act of 2008, California's Mental Health Parity Act, and provisions of AB 1453 (Monning) and SB 951 (Hernandez) of 2012. As California moves toward full implementation of the Affordable Care Act, the California Department of Insurance will continue efforts to ensure that consumers have access to mental health services in compliance with the law. I appreciate the opportunity to brief you on the Department's position and legal analysis.

Current Mental Health Parity Law

The federal Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) requires that health care service plans and health insurance issued to large groups and individuals ensure that financial requirements (such as co-pays and deductibles) and treatment limits applicable to mental health or substance use disorder benefits are no more restrictive than the predominant requirements or limitations applied to substantially all medical/surgical benefits. 42 USC §300gg-26(a)(3)(A). Additionally, the MHPAEA requires parity with respect to aggregate lifetime and annual dollar limits for mental health and substance use disorder benefits. 42 USC §300gg-26(a)(1) and (2). The MHPAEA applies to large groups, both fully insured and self-insured, and individual and family health plans and health insurance products. Note that the MHPAEA does not require health plans and health insurers to cover or offer to cover mental health and substance use disorder services or benefits, it simply requires that if those benefits are covered, they must be covered consistent with the MHPAEA.

California's Mental Health Parity Act (MHPA), as codified in Insurance Code §10144.5, requires that all comprehensive health insurance policies provide coverage for the diagnosis and medically necessary treatment of severe mental illness of a person of any age, and of serious emotional disturbance of a child under the same terms and conditions applied to other medical conditions. The MHPA further provides that insurers must at least provide benefits for

outpatient services, inpatient hospital services, partial hospital services, and prescription drugs for severe mental illness and serious emotional disturbance of a child. IC §10144.5(b). The relevant terms and conditions which must be applied equally to physical and mental conditions are those financial terms, such as lifetime limits, copayments and coinsurance, and deductibles which apply equally to all benefits under the policy. IC §10144.5(c). The MHPA defines "severe mental illness" with a non-exhaustive list of conditions: schizophrenia, schizoaffective disorder, bipolar disorder, major depressive disorders, panic disorder, obsessive-compulsive disorder, pervasive developmental disorder or autism, and bulimia nervosa. IC §10144.5(d).

California's MHPA differs from the federal MHPAEA in that California's law applies to all sizes of employer groups and it requires that severe mental illness and serious emotional disturbance of a child be covered. However, the MHPA does not require parity of coverage for substance use disorders.

After the passage of SB 946 (Steinberg) in 2011, CDI continued to receive complaints about insurers denying claims for autism-related services and treatment. After examining the claims denials and concluding that they violated both SB 946 (Chapter 650 of 2011) and California's MHPA, CDI issued an emergency regulation, 10 CCR §2562.4, which was approved by the Office of Administrative Law (OAL) on March 13, 2013. CDI's emergency regulation prohibits insurers from denying claims for medically necessary treatment for autism on the following bases:

- A claimed need for IQ or cognitive testing;
- On the grounds that the treatment is experimental, investigational, or educational;
- On the grounds that behavioral health treatment is not being, will not be, or was not, provided or supervised by a licensed person, entity or group when the provider or supervisor in question is certified by a national entity, such as the Behavior Analyst Certification Board, that is accredited by the National Commission for Certifying Agencies.

In addition to the emergency regulation, CDI intends to promulgate a permanent mental health parity regulation that is substantially similar to the emergency regulation.

In summary, the federal and state laws contain different consumer protections relating to mental health and substance use disorders and it is this combination of protections that are referenced in California's Essential Health Benefit law (SB 951) and CDI's Essential Health Benefits (EHB) Emergency Regulations approved by OAL on June 13, 2013.

California's Essential Health Benefits Law

California's EHB law (SB 951 - Chapter 866 in 2012) applies to non-grandfathered individual and small group health insurance policies issued, amended or renewed on or after January 1, 2014. California's EHB law incorporates the requirements from both the MHPAEA and the MHPA, the 2011 law pertaining to pervasive developmental disorder or autism (Chapter 650 of 2011), as well as offering coverage of mental health outpatient services for mental disorders not otherwise required to be covered by law that are in the Benchmark Plan selected by California. Specifically, it covers the diagnosis and treatment of "mental disorders" as identified in the DSM IV that result in clinically significant distress or impairment of mental, emotional, or behavioral

functioning. The benchmark does not cover conditions that the DSM identifies as something other than a "mental disorder," for example, relational problems.

It is worth noting that the Affordable Care Act has made the annual and lifetime limits requirement of both the state and federal parity laws moot. Currently, no lifetime limits can be imposed in any health insurance policy for any reason and annual limits have been restricted by the Affordable Care Act. Starting on January 1, 2014 annual limits will, like lifetime limits, be prohibited entirely.

Jeanene Harlick vs. Blue Shield of California

CDI filed an amicus curiae brief in which CDI argued that health insurers should be required to cover all medically necessary treatment for severe mental illnesses, subject only to financial terms and conditions, such as deductibles and copays which are equally applicable to all benefits under the policy. The Ninth Circuit Court of Appeals agreed with these arguments. The plaintiff in the case, Jeanene Harlick, was a patient covered under a Blue Shield health plan. She was treated for anorexia at a residential care facility. Although anorexia is categorized as a severe mental illness under California's MHPA, Blue Shield denied coverage. The Ninth Circuit held that despite the exclusion of residential treatment in three places in the policy, the Mental Health Parity Act mandated coverage.

Consumer Watchdog vs. the Department of Managed Health Care (DMHC)

The Court of Appeal in Consumer Watchdog vs. DMHC invited CDI to submit an amicus curiae brief in Consumer Watchdog vs. DMHC case. In our amicus brief submitted to the Court of Appeal this week, CDI argues that the California Mental Health Parity Act (Ins. Code § 10144.5 and Health & Safety Code § 1374.72) does not require a provider of applied behavioral analysis ("ABA"), a treatment for autism, to be licensed. Rather, so long as a provider is certified by a recognized organization, an insurer must cover ABA treatment if it is medically necessary. Nothing on the face of the Mental Health Parity Act permits an insurer to restrict autism treatment to licensed providers, and that is specifically prohibited by SB 946, codified as Insurance Code section 10144.51 and Health & Safety Code section 1374.74 . Further, there is no licensure in California for ABA therapy. Imposing a licensure requirement would significantly reduce the availability of ABA therapy, and substantially increase its expense.

While Senate Bill 946 (Steinberg, 2011) clarified that insurers may not impose a licensure requirement on ABA providers, CDI required health insurers to provide coverage for ABA treatment prior to the enactment of that bill, even when the provider was not licensed because the Mental Health Parity Act already prohibited insurers from imposing a licensure requirement.

CDI Review and Enforcement

The following information is responsive to your questions relating to CDI's review of health insurance policy forms and the Enforcement work of the Department. CDI reviews all non-grandfathered comprehensive health insurance policies for compliance with California's EHB law. CDI attorneys look carefully for compliance with the MHPAEA, the MHPA, SB 946 and any additional coverage requirements for mental disorders based upon what was in the Benchmark plan selected in the EHB law. Both the narrative language of the insurance policy

and the cost sharing provisions are examined to ensure that the contract itself complies with all relevant laws and regulations.

CDI's Consumer Services Division assists consumers with inquiries and complaints about all aspects of their insurance policies. In 2012, CDI received 184 complaints regarding mental health coverage, almost all of which included a claims denial. Also in 2012, CDI sent 153 claim denials about mental health coverage through the Independent Medical Review process for resolution, 80 of which saw the insurer's decision fully or partially overturned.

CDI's also conducts market conduct examinations to assess whether an insurer is complying with the law while conducting its business. This includes ensuring that enrollment, treatment authorization, claims practices, and other activities are conducted in compliance with the law. In my tenure as Commissioner, I have directed CDI staff to conduct market conduct exams of most of the major health insurers in California. Among the issues examined in a Market Conduct Exam include compliance with the MHPA and, in particular, coverage for treatment of Autism Spectrum Disorder. Once the Market Conduct exams are completed, they will be publically available on the Department's web site. The Exam process is extensive, but the reports are expected to start becoming available this summer.

The Department's enforcement bureau also takes legal action against insurers that have failed to comply with the law. After a careful analysis of the facts, I have directed Department staff to file several enforcement actions against insurers who are in violation of the MHPA. For example, in July 2011, CDI filed an enforcement action against Blue Shield of California Life and Health Insurance Company for denial of autism treatment. The action came after the parents of two autistic children sought the Department's assistance when Blue Shield refused to approve coverage for Applied Behavior Analysis (ABA) therapy recommended by their children's physicians. CDI was able to negotiate a settlement that required coverage with Blue Shield and then entered into similar agreements with other major health insurers in California. Again, information about those actions can be found on CDI's web site.

As California's Insurance Commissioner, I will continue to fully enforce the law so that California consumers have access to mental health services without delay or denial.

Sincerely,

DAVE JONES
Insurance Commissioner

cc: Members of the Select Committee on Mental Health