April 1, 2022

The Honorable Marty Walsh  
Secretary  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, DC 20210

The Honorable Xavier Becerra  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Ave SW  
Washington, DC 20201

Dear Secretary Walsh and Secretary Becerra,

We write to you as organizations deeply concerned about a recent decision from a three-judge panel of the U.S. Ninth Circuit Court of Appeals that threatens to have devastating effects on Americans' ability to access medically necessary mental health and substance use disorder (MH/SUD) services covered by commercial health plans. We request that the Departments of Labor and Health and Human Services file an amicus brief in this case to support *en banc* review before the entire Ninth Circuit.

In *Wit v. United Behavioral Health* (UBH), the U.S. District Court for the Northern District of California issued two 100+ page decisions that described in exhaustive detail how UBH, the country’s largest mental health insurer, made medical necessity determinations for MH/SUD care (i.e., outpatient, intensive outpatient, and residential treatment) based on their own criteria “infected” by financial self-interests. The District Court found that the plans UBH administers required it to make medical necessity determinations in accordance with generally accepted standards of care. After extensive expert testimony from MH/SUD professionals, the District Court described eight generally accepted standards of MH/SUD care1 that medical evidence requires. These standards are supposed to govern the medical necessity determinations UBH makes—standards that the District Court said are *required* by the plans UBH administers to effectively treat patients with MH/SUDs.

The District Court found that UBH created its own flawed medical necessity criteria that were far more restrictive than these generally accepted standards of care—and thus “result[ed] in a significantly narrower scope of coverage” than the coverage provided by the plans UBH administers—and used them to deny medically necessary MH/SUD coverage to more than 65,000 Americans, half of whom were children and adolescents.

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1 These eight standards, with which neither UBH in its appeal nor the Ninth Circuit disagreed are: 1) Treat underlying conditions—including chronic conditions—not only current, acute symptoms; 2) Treat co-occurring conditions; 3) Treat at the least intensive level of care that is safe and just as effective as a higher level of care (i.e., that UBH cannot sacrifice effectiveness because different treatment is equally “safe”); 4) Err on the side of caution by treating at a higher level of care when there is ambiguity about the most appropriate level of care; 5) Allow for treatment to prevent deterioration and maintain function; 6) Determine duration of treatment based on the individual’s needs, without arbitrary time limits; 7) Account for the unique needs of children/adolescents; 8) Use a multidimensional assessment (i.e., of risk, functional impairment, comorbidities, resilience, motivation, and recovery environment) to determine the appropriate level of care (e.g., The ASAM Criteria).
To remedy these harms, the District Court ordered UBH, among other things, to adopt and apply medical necessity criteria consistent with generally accepted standards of MH/SUD care, including criteria from the American Society of Addiction Medicine (ASAM), American Academy of Child and Adolescent Psychiatry, and the American Association of Community Psychiatrists.

The three-judge panel of the U.S. Court of Appeals for the Ninth Circuit, however, reversed the District Court decision on March 22, 2022. In a single paragraph on the last page of a seven-page decision, the appellate panel held that it is “not unreasonable” for health insurers’ coverage determinations to be inconsistent with generally accepted standards of MH/SUD care—even though that was precisely the standard required by the class members’ plans. As patient advocates and medical professional organizations, we urge your support for an en banc hearing to ensure that, when children, adolescents and adults need MH/SUD services, their health plan is required to make medical necessity determinations consistent with generally accepted standards of care.

While we strongly believe that few things could be more unreasonable than using self-serving criteria to make coverage determinations that profoundly impact the course of a person’s life, we also note that the panel got the basic legal issue of the case wrong. Its ruling that health plans are not obligated to cover all treatment consistent with generally accepted standards of MH/SUD care grossly misstates the premise of the case. The plaintiffs never argued that UBH must cover all services consistent with generally accepted standards of MH/SUD care. Rather, the plaintiffs simply argued that, if services like outpatient, intensive outpatient, and residential treatment are covered benefits (and they were all indisputably covered by UBH’s plans), UBH must make medical necessity determinations that are consistent with generally accepted standards of MH/SUD care, because that is the standard the plans required for those decisions.

The panel did not cite a single holding of the trial court, or a single fact from the case, despite the trial court’s exhaustive findings. It also ignored other important issues, including the trial court’s holding that UBH violated multiple states’ laws that mandate use of non-profit professional association guidelines like The ASAM Criteria and lied to state regulators about its own guidelines being equivalent to The ASAM Criteria.

The Ninth Circuit’s deeply flawed ruling profoundly impairs Americans’ rights under both ERISA and the Affordable Care Act. The decision, as it stands, gives United, other insurers and plan administrators carte blanche to adopt any restrictive internal guidelines they wish for making medical necessity determinations, even if they are blatantly contrary to generally accepted standards of MH/SUD care or state law or otherwise contrary to plan terms. Insurers can now argue that their plans do not “mandate coverage for all treatment that is consistent with GASC [generally accepted standards of care]” and therefore assert that they are entitled to complete deference to decide what is medically necessary, regardless of plan language. Without reversal by the full Ninth Circuit, patients will be subject to additional harm because health plans will continue to deny care based on the flawed reasoning of the three-judge panel’s support for being inconsistent with generally accepted standards of care.
The panel’s ruling also fundamentally guts UBH’s fiduciary duty under ERISA (29 U.S.C. § 1104(a)(1)), which provides that “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and plan beneficiaries.” The trial court found that UBH, in making medical necessity determinations for covered benefits, violated its duty of loyalty, duty of due care, and duty to comply with plan terms, as required by 29 U.S.C. § 1104(a)(1). Specifically, the trial court found that the content of UBH’s guidelines was actually influenced by UBH’s financial interests, including UBH’s desire to mitigate the effect of the Mental Health Parity and Addiction Equity Act on UBH’s bottom line. If the panel’s ruling is allowed to stand with its deeply flawed premise, it will have a chilling effect to access to care by allowing plan fiduciaries to prioritize their own interests over the interests of Americans in ERISA plans.

This ruling also serves to undermine the Affordable Care Act’s essential health benefit (EHB) requirements for mental health and addiction services in small group ERISA plans subject to EHB requirements. After all, having mental health and addiction services be “covered benefits” means little if plans can simply deny coverage using medical necessity criteria that are much more restrictive than generally accepted standards.

We have seen the consequences for families of insurers’ arbitrary denials. Families are forced to take on extreme medical debt to continue treatment or individuals experience frequent crises and hospitalizations, because they were denied services or prematurely terminated from them. We have seen families face extraordinary anxiety and despair when their loved ones are denied care. And we have seen families watch helplessly as their children’s MH/SUDs worsen. The flawed and incomplete legal reasoning of the three-judge panel must be reversed. In the State of the Union address, President Biden announced his goal to ensure all Americans can get the MH/SUD care they need as part of his unity agenda. The three-judge panel’s decision places that goal out of reach for the millions of Americans with private insurance plans.

For these reasons, we call upon both of your Departments to file an amicus supporting en banc review. We simply cannot go backwards—in a time of a mental health pandemic—to protect the bottom line of a for-profit insurance company whose parent (UnitedHealth Group) reports annual profits in the tens of billions of dollars. Equal access to medically necessary care for mental health and substance use conditions should be enforceable under ERISA and is a matter of fundamental fairness. This ruling is on the wrong side of history.

Sincerely,

The Kennedy Forum
Mental Health America
A New PATH (Parents for Addiction Treatment & Healing)
AFSCME
American Academy of Addiction Psychiatry
American Association for Psychoanalysis for Clinical Social Work
American Association of Child and Adolescent Psychiatry (AACAP)
American Association of Community Psychiatrists
American Association on Health and Disability
American Foundation for Suicide Prevention
American Osteopathic Academy of Addiction Medicine
American Medical Association
American Psychiatric Association
The American Psychoanalytic Association
American Psychological Association
American Society of Addiction Medicine
Council of Autism Service Providers
CTABA
Eating Disorders Coalition for Research, Policy & Action
Faces & Voices of Recovery
Inseparable
International OCD Foundation
Lakeshore Foundation
Legal Action Center
The National Alliance to Advance Adolescent Health
National Alliance for Medication Assisted Recovery
National Alliance on Mental Illness
National Association for Behavioral Healthcare
National Association for Children’s Behavioral Health
National Association of Addiction Treatment Providers
National Autism Law Center
National Council for Mental Wellbeing
National Federation of Families
NHMH – No Health Without Mental Health
Project HEAL
Psychotherapy Action Network
REDC Consortium
SMART Recovery
Steinberg Institute
Treatment Advocacy Center
The Voices Project
Well Being Trust
Young People in Recovery
Individual MHSUD / Autism Providers

A Piece of the Puzzle Behavioral Interventions LLC
ABA Solutions LLC
ABLE
Advanced Behavioral Care, LLC
Aspen Behavioral Consulting
Atlantic Autism Services Inc.
Autism Alliance of MI
Autism Legal Resource Center LLC
Behavior All-Stars
Behavior Change Institute
Benhaven
Bright Futures Learning Services
Children’s Autism Center
Collaborative Behavior Solutions
Comprehensive Autism Partnership Inc.
Comprehensive Billing Consultants
CORE ABA
Cornerstone Behavioral Analysis
Coryell Autism Center
Creating Brighter Futures
Cultivate BHE
DATA Group Central
Early Interventions LBA NY
EASTCONN Regional Education Service Center
Empower Behavioral Health
Evident Behavioral Consulting
FamilyWise, LLC
Graham Behavior Services
Great Lakes Behavior Analysis, Inc.
The Growing Tree Institute, LLC
Jumpstart Autism Center
Little Stars ABA Therapy and Counseling Center
May Center for ABA Services – VA
Metro West Learning Center
The Missing Piece Autism Therapy Center
Over the Rainbow Behavioral Consulting
Prism Autism Education & Consultation
SOAR Behavior Services
Utah Behavior Services, Inc.
Willow ABA Services