

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 care<sup>1</sup> 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.

---

<sup>1</sup> 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