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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

NATHAN W., individually and on behalf of B.W., a minor, Plaintiffs, v. ANTHEM BLUECROSS BLUESHIELD OF WISCONSIN, *et al.*, Defendants.	**MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' PARTIAL MOTION TO DISMISS** Case No. 2:20-cv-00122-JNP-JCB District Judge Jill N. Parrish

Defendants Blue Cross Blue Shield of Wisconsin, doing business as Anthem Blue Cross and Blue Shield ("Anthem"), Aurora Health Care, Inc. ("Aurora"), and Advocate Aurora Health Care, Inc. Health and Welfare Plan (collectively, "Defendants") bring this Partial Motion to Dismiss Plaintiffs' Second Cause of Action for violation of the Mental Health Parity and Addiction Equity Act of 2008 (the "Parity Act"), an amendment to ERISA codified at 29 U.S.C. § 1185a and enforced through 29 U.S.C. § 1132(a)(3). ECF. No. 9. For the following reasons, the court denies Defendants' Partial Motion to Dismiss.

BACKGROUND

The Advocate Aurora Health Care, Inc. Health and Welfare Plan (the "Plan") is a self-funded employee welfare benefits plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Anthem is a member of the Blue Cross Blue Shield network of providers and was the third-party claims administrator for the Plan. Aurora primarily

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handled all claims and appeals associated with this case. Nathan and his son, B.W. (collectively, "Plaintiffs"), were and continue to be Plan participants and beneficiaries.

I. B.W.'s Behavioral History and Outpatient Care

From an early age, B.W. has received therapy for concerning behavior. When he was five years old, B.W. lost all contact with his biological father and began to say that he wanted to kill himself when he became angry. He was taken to therapy and given a psychological evaluation. B.W.'s therapist advised that he continue to be monitored. B.W. and his family moved to Wisconsin, and Nathan eventually formally adopted B.W.

In school, B.W. struggled to make and keep friends and was physically and verbally aggressive with other students when playing sports. B.W. would also cry easily when frustrated and would often slam his bedroom door, pull his hair, and scratch his face and pick at his skin when anxious. In one fit of rage, B.W. carved deep gouges in his bedframe. This fit prompted B.W. to resume outpatient therapy. After a neuropsychological evaluation at the recommendation of his pediatrician, B.W. was diagnosed with severe attention deficit hyperactivity disorder with a high anxiety component and began taking medication.

B.W. attended a new school but was bullied in-person and online. He felt unsafe at school and transferred to a different school. An attempt to homeschool B.W. failed because of his resistance to the instruction. B.W. also continued to exhibit severe mood swings, anxiety, and behavioral issues during this time and continued to work with a variety of mental health outpatient treatment providers. B.W. again threatened suicide. Police were called but determined that B.W. did not pose an imminent threat to his own safety and that he should remain home with supervision.

B.W. was later transferred to a private catholic school, where he would often fake injuries for attention. His academic performance was also poor. In another neuropsychological exam, B.W.

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performed exceptionally poorly in short-term recall, at a level equivalent to that of an individual who had suffered from a traumatic brain injury. B.W. began refusing to take his medications, stealing from others, vaping an unknown substance, experiencing heightened depression and anxiety, and making concerning statements like, "maybe I just won't be here anymore." B.W. also behaved inappropriately toward girls, often soliciting nude photos and then lying about his behavior. B.W. was suspended from school for three days for insubordination, and, upon his return, was reported for allegedly providing a vaping device to another student. In response, B.W. threatened that he would "find the snitch and put a bullet in his head." The school told Nathan that B.W. was considered a high-risk individual and thus had two options: either voluntarily withdraw from the school, or be expelled. B.W. chose the former.

II. Denial of Coverage for Elevations Treatment

When outpatient intervention proved to be unsuccessful and B.W.'s behavior worsened, he was admitted to Elevations Residential Treatment Center ("Elevations"). Elevations is a licensed treatment facility located in Utah that provides sub-acute inpatient treatment to adolescents with mental health, behavioral, and/or substance abuse problems. B.W. received medical care and treatment at Elevations from January 21, 2019 to March 27, 2019.

On January 23, 2019, Nathan received a letter from Aurora informing him that, based on an evaluation from external reviewer AllMed, coverage for B.W.'s treatment at Elevations would be denied. Aurora explained that it did not appear that B.W. had tried lower levels of care, such as an intensive outpatient program ("IOP") or a partial hospitalization program ("PHP"), or that there

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was imminent harm necessitating residential care. Accordingly, Aurora wrote[1] that B.W. "can be appropriately managed at a lower level of care," and "[t]he requested level of care is not identified to be medically necessary at this time." ECF No. 2 ¶ 21.

Nathan appealed this denial on April 23, 2019. Nathan objected that he had not been given the copy of the reviewer report that he had requested and argued that Aurora's guidelines violated generally accepted standards of medical practice by requiring patients to exhibit acute psychiatric symptoms to qualify for sub-acute care. Nathan also objected to Aurora's "fail-first" protocol, which required B.W. to first attempt a lower level of treatment before attempting residential treatment. Citing the Parity Act, Nathan argued that the denial amounted to a non-quantitative treatment limitation, that Aurora did not require the acute or "fail-first" criteria for analogous medical/surgical care at skilled nursing facilities and inpatient rehabilitation centers, and so Aurora therefore could not impose such requirements on intermediate level mental health treatment programs. Moreover, Nathan argued that B.W.'s treatment met the definition of medical necessity as defined by the Plan based on his continued behavioral struggles and discharge summary from Elevations. Nathan also stated that Elevations was the most cost-effective option for the level of care that B.W. needed and was necessary to prevent further escalation of B.W.'s behaviors and more intensive treatment in the future. If the denial was upheld, Nathan requested that he be provided with "a copy of the documents under which the Plan was operated, including the specific reasons for the determination, any corresponding supporting evidence, any administrative service

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[1] In deciding a motion to dismiss for failure to state a claim, the court may consider "documents that are referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) (citation omitted). For these reasons, the court considers the benefits denial correspondence excerpted by Plaintiffs in deciding the pending motion.

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agreements that existed, any clinical guidelines or medical necessity used to evaluate the claim, the Plan's criteria for skilled nursing, hospice, and inpatient rehabilitation facilities, and any report from any physician or other professional concerning the claim" (collectively, the "Plan Documents"). ECF No. 2 ¶ 30.

Following an independent review organization's evaluation of Nathan's appeal, Aurora upheld the denial of coverage for B.W.'s treatment. The organization found that B.W.'s treatment at Elevations was not medically necessary because there was a "lack of evidence of symptom severity at the time of admission that would require the use of residential treatment in a 24 hour a day setting." ECF No. 2 ¶ 32. The organization also stated that there was "a lack of detail" as to whether B.W.'s reported symptoms were present at the time of or immediately preceding his admission to Elevations. *Id.* In particular, the organization concluded that there was "no indication of ongoing plans or intent to harm others," B.W.'s "level of impulsivity appears to be of moderate level," there was "no current history of significant aggression or other inappropriate behaviors of a severity that would require observation and treatment around the clock," and there was "no evidence of severe depression or anxiety, and no evidence of recent deterioration of functioning." *Id.* For these reasons, the organization found that "the recommended level of care would be either [IOP] or [PHP]." *Id.* ¶ 31.

III. Denial of Coverage for DRA Treatment

On March 27, 2019, B.W. began treatment at Diamond Ranch Academy ("DRA"). Like Elevations, DRA is a licensed treatment facility located in Utah that provides sub-acute inpatient treatment to adolescents with mental health, behavioral, and/or substance abuse problems. As it did with Elevations, Aurora denied coverage for B.W.'s treatment at DRA. In its April 17, 2019 denial letter, Aurora stated that two unidentified external reviewers found that B.W.'s treatment

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