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## Biden HHS Pick Is A Shot In The Arm For Mental Health Parity

By **Emily Brill**

Law360 (March 11, 2021, 7:32 PM EST) -- The federal government has taken major steps to boost insurers' coverage of mental health and substance abuse treatment in recent years, and if California Attorney General Xavier Becerra is confirmed to lead the U.S. Department of Health and Human Services next week as expected, that trend will likely continue.

Throughout his two decades in Congress and four years as California's top cop, Becerra has revealed himself as a strong supporter of mental health parity laws who is unafraid to take on health care giants, signaling he'd likely act on a stated commitment to enforcing those laws as HHS secretary.

Such action would place Becerra's HHS in lockstep with a U.S. Department of Labor whose potential leader, Boston Mayor Marty Walsh, has promised to enforce employee benefit plans' compliance with mental health parity laws, and President Joe Biden, who has made mental health initiatives a priority throughout his time in government.

It would also reflect a broader shift by an array of government players, from federal courts to state legislatures, toward holding insurers accountable for covering mental health and substance abuse treatment — enforcement that has ramped up in intensity since the federal parity law's 1996 passage.

"It's just a huge issue in this country right now that needs to be addressed," said Judith Wethall, a benefits partner at McDermott Will & Emery LLP. "And it's one of those issues where, if you're in Congress or running for president, and you say, 'I'm out here to support mental health,' no one's going to say, 'Oh, you're horrible.'"

Here, Law360 recounts where Becerra stands on mental health parity and how the legal landscape has changed on this issue over the years.

### **Becerra's Track Record**

Becerra, who is on track to lead HHS after securing the support of more moderate Sens. Joe Manchin, D-W.Va., and Susan Collins, R-Maine, has a long history of advocacy in the mental health arena.

After graduating from Stanford Law School in 1984, he spent a year working in legal aid in Massachusetts, focusing on cases involving clients with mental health issues.

As a member of the U.S. House of Representatives in the 1990s and 2000s, he voted yes on two mental health parity laws, which require insurers to provide similar amounts of coverage for mental health and substance abuse treatment as they do for medical and surgical treatment.

And as California attorney general, a position he assumed in 2017, he made attacking anti-consumer behavior in health care a priority. In 2019, his office secured a \$575 million settlement with Sutter Health after suing the Sacramento-based hospital chain over anti-competitive contracting practices. That deal is **inching toward approval**.

Mental Health America CEO Paul Gionfriddo cited Becerra's years of engagement with health care — and mental health issues, specifically — in a February letter to the Senate Finance Committee supporting his nomination for HHS secretary. And he echoed those comments when telling Law360 that he's "optimistic" about what Becerra would do with the leadership role.

"He has shown a willingness to not settle for the status quo," Gionfriddo said. "You pass a law and figure it's all done. He's shown a willingness to recognize that there are often years of implementation activities that need to take place afterward — litigation, enforcement."

### "We've Just Got to Enforce" Parity Laws

If confirmed as HHS secretary, Becerra would be responsible for enforcing mental health parity law compliance for non-federal governmental health plans and helping states enforce compliance for insurance companies. He could also issue regulations and guidance regarding mental health parity compliance alongside the DOL and the U.S. Department of the Treasury.

Becerra expressed his commitment to taking action on mental health parity compliance at his confirmation hearing before the Senate Health Committee.

"We have laws in place — we've just got to enforce them," Becerra said, in response to a question from Sen. Chris Murphy, D-Conn. "We have to do the oversight, and there, I would look forward to working with you to do that oversight, to make sure that the stakeholders in our health system are applying the law correctly."

Seyfarth Shaw LLP benefits partner Kathleen Cahill Slaughter said she anticipates Becerra, a Democrat, would "continue to toe the party line" when it comes to "making sure insurance companies provide the maximum benefits possible" to patients, through both enforcement and regulatory activities.

Phyllis Borzi, a former Labor Department official under President Barack Obama who's worked with Becerra, said she "knows he's very committed to this stuff" but is skeptical of how much he'll be able to get done.

Administration officials are pulled in many directions at once, and they're constrained by their department's budget, so even if the commitment is there, action doesn't always follow, Borzi said.

"If they started aggressively going after insurance companies on this issue, that would be terrific," Borzi said. "But I'll believe it when I see it."


### The Broader Landscape

A variety of government players have focused on ensuring health insurers cover mental health treatment like physical health treatment over the past two decades, with that attention increasing as Americans face large-scale mental health challenges brought on by the novel coronavirus pandemic.

Since 2019, a California federal court has handed two major wins to mental health parity advocates, ruling that UnitedHealth's **guidelines for processing** behavioral health claims and **refusal to cover** a popular autism treatment flouted mental health parity laws. As a result, the company's behavioral health unit **must reprocess roughly 67,000 claims** originally administered using those guidelines.

Last year, both state and federal governments passed laws on mental health parity.

**California adopted** a three-part test that insurers must follow when determining whether a mental health or substance abuse treatment is medically necessary, while the federal government **required employers** to analyze whether their health plans make it harder to access mental health and substance abuse treatment than medical and surgical treatment.

Meanwhile, the DOL has stepped up enforcement of mental health parity laws for employee health plans, while HHS released an "action plan for enhanced enforcement of mental health and substance use disorder coverage" in 2018, as required by the **21st Century Cures Act** , passed in late 2016.

Mental health parity has long been seen as a bipartisan issue, with both Republican and Democratic

presidential administrations taking action on it. But Gionfriddo, the mental health advocate, said the Biden administration may be uniquely positioned to act.

"Based on some of these appointments, and those people's willingness to specifically call out the importance of mental health, plus some of what we've seen in the past year (with the pandemic), I think they're going to continue and accelerate the trend," Gionfriddo said.

--Editing by Nicole Bleier and Neil Cohen.

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