STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
DIVISION OF FINANCIAL REGULATION

In the Matter of: PROVIDENCE HEALTH PLAN,
Respondent.

Case No. INS-17-0032

FINAL ORDER TO CEASE AND DESIST AND ORDER ASSESSING CIVIL PENALTIES, ENTERED BY CONSENT

WHEREAS, the Director of the Department of Consumer and Business Services for the State of Oregon ("Director"), acting in accordance with Oregon Revised Statutes ("ORS") chapters 731, 732, 733, 734, 735, 737, 742, 743, 743A, 743B, 744, 746, 748 and 750 ("Insurance Code"), has conducted an investigation of Providence Health Plan ("Respondent") regarding violations of the Insurance Code; and

WHEREAS Respondent wishes to resolve this matter with the Director;

NOW THEREFORE, as evidenced by the signatures subscribed in this Order, Respondent hereby CONSENTS to entry of this Order upon the Director’s Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Director FINDS that:

1. Respondent has been licensed by the Director, by and through the Division of Financial Regulation, previously known as the Insurance Division (collectively the “Division”), as a health care service contract since September 5, 1984. Respondent’s National Association of Insurance Commissioners company number is 95005.

2. Respondent is a health care service contractor that, at relevant times, provided health benefit plans to Oregon consumers through individual and group plans.
3. Autism Spectrum Disorders ("ASDs") are a group of neurodevelopmental disorders that include Autistic Disorder, Asperger’s Disorder, and Pervasive Developmental Disorder, that can impair a child’s physical, social, and/or behavioral development.

4. Applied Behavior Analysis ("ABA") is a broad term describing techniques that apply principles of learning and motivation from behavior analysis to assess, treat, and prevent challenging behaviors and promote new desired behaviors. ABA is commonly used in intensive therapy programs for the treatment of ASD. The benefits of ABA therapy can be significantly greater for individuals responsive to the treatment with early intervention.

5. Until sometime in 2012, Respondent denied members’ claims for ABA therapy on the basis, among others, that the treatment was “experimental and investigational” (hereinafter the “Experimental Exclusion”) under its internal policy governing its analysis of new and emerging treatments. A consumer that receives a denial based on the Experimental Exclusion has the opportunity to pursue both internal and external review of the decision. External review occurs after completion of the internal review process and upon filing an appeal with an independent review organization ("IRO").

6. Two members’ claims for ABA therapy that Respondent denied on the basis of the Experimental Exclusion and other alternative grounds were externally appealed in 2007 and 2011. Both were overturned through IRO. These individual IRO decisions stated that the reviewing physician did not believe ABA therapy was experimental, and thus determined that Respondent’s denial on the basis of the Experimental Exclusion should be overturned and the members’ ABA claims covered. Respondent disagreed with the IRO reviewing physicians’ opinion on the state of medical evidence regarding the efficacy of ABA therapy, but more so with the failure to consider and account for the
other contractual bases for the denials of the ABA claims upon which Respondent had relied in its claim denials. Respondent nevertheless complied with the IRO decisions and provided the requested coverage in those instances.

I. **ABA Denials - Developmental Disability Exclusion:**

7. At all relevant times herein, Respondent’s commercial health benefit plan covered treatments for individuals with ASD, yet also included a contractual exclusion for services related to developmental disabilities, developmental delays or learning disabilities including, but not limited to, education services (hereinafter the “**Developmental Disability Exclusion**”).

8. In or around July 2012, Respondent temporarily discontinued its reliance upon the Experimental Exclusion to deny claims for ABA therapy, and denied two claims for ABA therapy on the basis of the Developmental Disability Exclusion exclusively.

9. The two minor Oregon consumers whose claims for ABA therapy Respondent denied based exclusively on the Developmental Disability Exclusion have been identified publicly only as “**AF**” and “**AP**.”

10. Unlike with the Experimental Exclusion, claims for ABA therapy that were denied exclusively on the basis of the Developmental Disability Exclusion were not entitled to external review through an IRO. Accordingly, AF and AP were unable to appeal the ABA denials through IRO, and the only way for AF and AP to seek external review of the denials was to file a lawsuit.

II. **The Lawsuit:**

11. On or around May 8, 2013, AF and AP filed a civil lawsuit against Respondent in the U.S. District Court of Oregon, referred to as **A.F., et al. v. Providence Health Plan**, Case No. 3:13-cv-00776-SI (D. Or. 2013) (the **“Lawsuit”**). The Lawsuit generally sought an injunction to prevent Respondent from relying on the Developmental Disability Exclusion for the denial of ABA therapy, the recovery of out of pocket
expenses for ABA therapy, and “other equitable relief” on the basis of Respondent’s denial of ABA therapy.

12. As part of the Lawsuit, a plaintiff took a deposition of a representative of Respondent. The representative testified that in or around July 2012, Respondent stopped using the Experimental Exclusion to deny claims for ABA therapy, and instead began using the Developmental Disability Exclusion, specifically in order to avoid IRO review. The representative testified about the various reasons Respondent had for making this change, which included, among other reasons: Respondent’s disagreement with the individual IRO decisions overturning Respondent’s denials of ABA therapy; Respondent’s position that the IRO reviewers ignored other appropriate bases for Respondent’s denials of ABA claims that independently supported the denial of services; and that Respondent knew that IRO reviews may continue to overturn its ABA therapy denials despite these concerns.

13. Despite Respondent’s decision to abandon the Experimental Exclusion as a basis for denial, the representative testified that Respondent continued to believe that ABA therapy was experimental and investigational at this time. The representative also testified that Respondent knew that by eliminating a basis for external IRO review, consumers would have no other option than to file a lawsuit in court, as specifically provided for in ERISA, in order to have ABA therapy denials externally reviewed, and to ultimately receive the services requested if they prevailed in the litigation.

14. AF and AP’s claims against Respondent relating to ABA coverage have been fully resolved by the settlement of the Lawsuit in March 2017.

IV. Division of Financial Regulation Bulletins

15. On November 14, 2014, the Division issued two bulletins relating to ASD, ABA therapy and mental health parity (INS 2014-1 and INS 2014-2).
16. In bulletin INS 2014-2, the Division stated its position that: ABA therapy is a medical service for purposes of ORS 743A.190 (the Oregon PDD statute); that the Oregon PDD statute requires all medically necessary treatment for ASD; that an insurer may not categorically deny treatment for ABA therapy on the basis that the treatment is experimental or investigational; and that an insurer may not apply a categorical exclusion (such as exclusions for developmental, social or educational therapies) that results in a denial of all ABA or other medically necessary treatment. By the time the Division issued this bulletin and no later than February 2014, Respondent was routinely covering ABA therapy.

CONCLUSIONS OF LAW

The Director CONCLUDES that:

17. Pursuant to ORS 731.252(1), whenever the Director has reason to believe that any person has been engaged or is engaging or is about to engage in any violation of the Insurance Code, the Director may issue an order to discontinue or desist from such violation or threatened violation.

18. Under ORS 743A.190(1), a health benefit plan, as defined in ORS 743B.005, must provide coverage for a child enrolled in the plan who has been diagnosed with ASD all medically necessary services that are otherwise covered under the plan.

19. Prior to February 2014, Respondent’s health benefit plan covered treatments for individuals diagnosed with ASD, yet included the Developmental Disability Exclusion that Respondent relied upon to deny coverage for ABA services to individuals diagnosed with ASD, in violation of ORS 743A.190(1).

20. Under ORS 746.230(1)(f), no person shall commit or perform the following unfair claim settlement practice: not attempting, in good faith, to promptly and equitably settle claims in which liability has become reasonably clear.

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21. Respondent violated ORS 746.230(1)(f) when it: (1) abandoned the Experimental Exclusion to deny claims for ABA therapy, and instead denied two ABA therapy claims under the Developmental Disability Exclusion rather than the Experimental Exclusion for the purpose of avoiding IRO review and forcing AF and AP to file a lawsuit, when in fact Respondent believed at that time that ABA therapy was an experimental treatment and knew that a denial under the Experimental Exclusion may be overturned at IRO review.

22. Under ORS 731.988(1), the Director may assess a civil penalty of up to $10,000 against any person that violates a provision of the Insurance Code or any lawful rule or final order of the Director. Each violation is a separate offense.

ORDERS

Now therefore, the Director issues the following Orders:

23. As authorized by ORS 731.252(1), the Director ORDERS Respondent to CEASE AND DESIST from violating any provision of the Insurance Code or the administrative rules promulgated thereunder.

24. As authorized by ORS 731.988(1), the Director hereby assesses CIVIL PENALTIES against Respondent in the total amount of One Hundred Thousand Dollars ($100,000) for the violations of the Insurance Code more fully described in Paragraphs 18 through 21 above.

25. The $100,000 CIVIL PENALTY assessed above is due and payable at the time this Consent Order is returned to the Division.

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26. This Order is a “Final Order” under ORS 183.310(6)(b). Subject to that provision, entry of this Order in no way limits or prevents further remedies, sanctions, or actions which may be available to the Director under Oregon law to enforce this Order, for violations of this Order, for conduct or actions of Respondent that are not covered by this Order, or against any party not covered by this Order.

SO ORDERED this 23rd day of August, 2017.

PATRICK M. ALLEN, Director
Department of Consumer and Business Services

_/s/ David Tatman
David C. Tatman, Chief of Enforcement
Division of Financial Regulation
CONSENT TO ENTRY OF ORDER

I, Carrie Smith, state that I am an officer of Providence Health Plan ("Respondent"), and that I am authorized to act on its behalf; that I have read the foregoing Order and that I know and fully understand the contents hereof; that I have been advised of Respondent’s right to a hearing in this matter; that Respondent has been represented by counsel in this matter; that Respondent voluntarily and without any force or duress, consents to the entry of this Order, expressly waiving any right to a hearing in this matter; that Respondent executes this Order as a settlement of the matters referred to in the foregoing Order; that Respondent understands that the Director reserves the right to take further actions to enforce this Order or to take appropriate action upon discovery of other violations of the Insurance Code by Respondent, and; that Respondent will fully comply with the terms and conditions stated herein.

Respondent understands that this Order is a public document.

_/s/ Carrie Smith________________
Signature
_Carrie Smith________________
Printed name
_Chief Compliance and Risk Officer
Office held

State of OREGON
County of Washington

There appeared before me this 17th day of August, 2017, Carrie Smith, and stated that he/she was and is an officer of Respondent, and that he/she is authorized and empowered to sign this Order on behalf of Respondent, and to bind it to the terms hereof.

_/s/ Amy E. Laird___________
Notary Public - State of Oregon
Commission Expires April 23, 2021