

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

In the Matter of:

Case No. INS-17-0032

PROVIDENCE HEALTH PLAN,

Respondent.

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 contractor 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.

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387





1 3. Autism Spectrum Disorders (“*ASDs*”) are a group of neurodevelopmental
2 disorders that include Autistic Disorder, Asperger’s Disorder, and Pervasive
3 Developmental Disorder, that can impair a child’s physical, social, and/or behavioral
4 development.

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

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

19 6. Two members’ claims for ABA therapy that Respondent denied on the basis
20 of the Experimental Exclusion and other alternative grounds were externally appealed in
21 2007 and 2011. Both were overturned through IRO. These individual IRO decisions
22 stated that the reviewing physician did not believe ABA therapy was experimental, and
23 thus determined that Respondent’s denial on the basis of the Experimental Exclusion
24 should be overturned and the members’ ABA claims covered. Respondent disagreed
25 with the IRO reviewing physicians’ opinion on the state of medical evidence regarding
26 the efficacy of ABA therapy, but more so with the failure to consider and account for the

1 other contractual bases for the denials of the ABA claims upon which Respondent had
2 relied in its claim denials. Respondent nevertheless complied with the IRO decisions and
3 provided the requested coverage in those instances.

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

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

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

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

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

21 **II. The Lawsuit:**

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



1 expenses for ABA therapy, and “other equitable relief” on the basis of Respondent’s
2 denial of ABA therapy.

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

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

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

23 **IV. Division of Financial Regulation Bulletins**

24 15. On November 14, 2014, the Division issued two bulletins relating to ASD,
25 ABA therapy and mental health parity (INS 2014-1 and INS 2014-2).

26 ///

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387



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

10 CONCLUSIONS OF LAW

11 The Director CONCLUDES that:

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

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

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

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

26 ///

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387



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

8 22. Under ORS 731.988(1), the Director may assess a civil penalty of up to
9 \$10,000 against any person that violates a provision of the Insurance Code or any lawful
10 rule or final order of the Director. Each violation is a separate offense.

11 **ORDERS**

12 Now therefore, the Director issues the following Orders:

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

16 24. As authorized by ORS 731.988(1), the Director hereby assesses CIVIL
17 PENALTIES against Respondent in the total amount of One Hundred Thousand Dollars
18 (\$100,000) for the violations of the Insurance Code more fully described in Paragraphs
19 18 through 21 above.

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

22 ///
23 ///
24 ///
25 ///
26 ///

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387



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

6 SO ORDERED this 23rd day of August, 2017.

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

9
10 /s/ David Tatman
11 David C. Tatman, Chief of Enforcement
12 Division of Financial Regulation

13
14
15
16
17
18
19
20
21
22
23
24
25
26

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

Division of Financial Regulation
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387

