STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF PSYCHOLOGY,	)	
Petitioner,	)	
vs.	)	Case No. 11-5995PL
NETTA SHAKED, PH.D,	)	
Respondent.	)	

RECOMMENDED ORDER

A final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings, on March 28 and 29, 2012, by video teleconference at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Adrienne C. Rodgers, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Mark Thomas, Esquire
Dell Graham, P.A.
203 Northeast First Street
Gainesville, Florida 32601

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the allegations contained in the Administrative Complaint, and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On September 28, 2011, Petitioner, Department of Health, Board of Psychology, filed a two-count Administrative Complaint ("Complaint") against Respondent, Dr. Netta Shaked. Petitioner alleged, in Count One of the Complaint, that Respondent made disparaging and non-therapeutic comments to patients C.H. and J.H. during marital therapy sessions, and therefore failed to meet the minimum standards of performance, in violation of section 490.009(1)(r), Florida Statutes. In Count Two, Petitioner asserted that Respondent violated the same statutory provision by the manner in which she terminated C.H. and J.H. as patients in August 2010.

Respondent timely requested a formal hearing to contest the allegations, and, on November 21, 2011, the cause was referred to the Division of Administrative Hearings ("DOAH") and assigned to Administrative Law Judge John G. Van Laningham. On March 26, 2012, Judge Van Laningham transferred the instant matter to the undersigned.

Prior to the final hearing, Petitioner filed a unilateral prehearing stipulation, wherein it announced its intention to abandon Count One of the Complaint.

As noted above, the final hearing was held on March 28 and 29, 2012, during which Petitioner presented the testimony of C.H., J.H., Dr. Charles Golden, and Respondent. Petitioner

introduced three exhibits into evidence, numbered 2, 3, and 4. Respondent testified on her own behalf, presented the testimony of Dr. Stephen Ragusea, and introduced one exhibit, identified as Respondent's Exhibit 1. The parties also introduced five joint exhibits, numbered 1-5.

The final hearing transcript was filed with DOAH on April 23, 2012. Subsequently, on April 25, 2012, Respondent filed an unopposed motion to extend the deadline for the submission of proposed recommended orders to May 11, 2011, which the undersigned granted. Both parties thereafter submitted timely proposed recommended orders that the undersigned has considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. Petitioner Department of Health has regulatory jurisdiction over licensed psychologists such as Respondent. In particular, Petitioner is authorized to file and prosecute an administrative complaint, as it has done in this instance, when a panel of the Board of Psychology has found probable cause exists to suspect that the psychologist has committed one or more disciplinable offenses.

2. At all times relevant to this proceeding, Respondent was a licensed psychologist in the State of Florida, having been issued license number PY7699. Respondent first became licensed

in Florida on March 21, 2008, and has not been the subject of prior disciplinary action by the Board of Psychology.

B. Treatment of C.H. and J.H.

3. As noted previously, the allegations in this cause relate to Respondent's provision of marital therapy to patients C.H. and J.H.

4. In or around May 2010, C.H. decided that it would be beneficial to attend marital (i.e., "couples") therapy sessions with her husband, J.H., to whom she had been married for approximately one year. To that end, C.H. researched nearby providers and thereafter scheduled an office appointment with Respondent.

5. Respondent conducted an intake session with C.H. and J.H. on May 24, 2010. Consistent with standard practice, Respondent asked C.H. and J.H. to complete new client intake forms, which were intended to gather information about the patients' current and previous relationships, family backgrounds, prior mental health treatment, educational backgrounds, and histories of abuse, if any. While J.H. completed the form in its entirety, C.H. refused on the basis that some of the questions were, in her opinion, too personal and insulting. Respondent was surprised by C.H.'s reaction, as no client had ever voiced any objection to the intake questions,

which Respondent believed——correctly——were necessary and appropriate.

6. At the conclusion of the initial session, Respondent had significant doubts about whether a viable therapeutic relationship could be forged in light of C.H.'s refusal to complete the intake form, as well as other comments made by C.H. and J.H. that reflected a mistrust of the process. Nevertheless, Respondent and the couple subsequently agreed to a prepaid package of 10 therapy sessions, with each appointment valued at the discounted rate of $140.

7. Respondent's next session with C.H. and J.H. was held on June 15, 2010, during which Respondent suggested, among other things, that the patients would benefit from individual therapy and that J.H.——who had been out of work for over two years——ramp up his efforts to find employment. Needless to say, C.H. reacted negatively to Respondent's advice, as did J.H., who otherwise had been silent during the session. At that, Respondent broached the issue of whether she was a "good fit" for the couple and provided them with the names of two colleagues who offered marital therapy.[1/] C.H. and J.H. elected, nevertheless, to continue their professional relationship with Respondent.

8. C.H. and J.H.'s following session with Respondent was conducted on July 2, 2010. During the appointment, the couple

complained that they had made no progress in therapy, which prompted Respondent to discuss, once again, the possible termination of their professional arrangement. Respondent also provided, for a second time, C.H. and J.H. with the names of several local practitioners who offered couples therapy. Notwithstanding the discussion of termination, C.H. and J.H. decided to forge ahead with Respondent.

9. The next session was held on July 7, 2010. During the appointment, C.H. and J.H. were largely non-responsive, which caused Respondent to raise, for the third time, the issue of a possible better fit with another therapist. Later in the session, Respondent, in an effort to engage C.H. and J.H. in the process and move the therapy forward, challenged them to explain why they should remain married——a strategy that angered the couple profoundly, but was not expressed until the following visit.

10. C.H. and J.H.'s next office appointment was on July 14, 2010, at the outset of which the couple——who, in Respondent's words, were "pissed off"——demanded an apology and threatened to terminate the therapy. Surprised, Respondent explained that her strategy during the previous session was to elicit a reaction from them regarding the positive attributes of their relationship. Respondent also offered, for the fourth time in as many visits, to terminate the therapy. The couple

again decided, however, to maintain their professional relationship with Respondent.

11. After a comparatively uneventful follow-up visit the following week, C.H. and J.H. appeared at Respondent's office on August 2, 2010, for what would prove to be their final session. During the appointment, Respondent was troubled by C.H.'s repeated inquiries about her personal life, notwithstanding Respondent's explanation that the disclosure of such information would not be appropriate. Respondent was also bothered by J.H.'s behavior toward her, which she construed as demeaning. Although Respondent was inclined at that point to terminate C.H. and J.H. as clients, she did not do so because their session had run late (another patient was waiting) and she wished to consider the matter further.

12. Several days later, on August 4, 2010, Respondent took a scheduled vacation, of which C.H. and J.H. had been informed previously. Respondent also advised C.H. and J.H. (as well as her other patients) that she could be reached by telephone or e-mail should she be needed.

13. On August 15, 2010 (two days before Respondent was set to return), C.H. sent Respondent an e-mail, wherein she inquired about the number of sessions that remained in the prepaid package. Later that day, Respondent replied by e-mail that C.H.

should check the account statement that had been mailed to her at the end of July or early August.

14. Two days later, on August 17, 2010, C.H. sent another e-mail to Respondent, which read:

> Yes, I received one statement from you at some point in July. We have had a number of sessions since then, and what I'm asking for is an updated record – namely, how many sessions remain in our prepaid package.

15. Having fully considered the matter of termination during her vacation, Respondent decided, on August 18, 2010, to end her professional relationship with C.H. and J.H. On that date, Respondent sent an e-mail reply to C.H., which provided, in relevant part:

> Attached is your statement of account.
>
> Based on [C.H.'s August 17 e-mail], and in addition to other therapeutic factors, I do not believe we have a viable therapeutic relationship. As such, I think it would be best if we discontinue our work together. Effective today, I am terminating our professional relationship.
>
> I am refunding the balance of your account by check. You have used six of the 10 session package, at the full rate of $165 per session, yielding $410 to you.

16. During the final hearing, Respondent testified credibly that she terminated the therapy for a variety of reasons, such as her poor working alliance with the patients, and that she ended the relationship by e-mail because she

believed that the patients' reaction to the news would be one of relief:

> And I had given the matter a lot of thought over two weeks, I discussed this matter a lot with colleagues, and I . . . decided that based on the poor working alliance, the mistrust, the criticism and the later conversations, the email about again the patient telling me she wants to be seen individually when I don't see patients individually and this is already something we discussed about my rules in the first session, and again, micromanaging me and telling me how to provide their therapy for them and again being dissatisfied that I won't see her individually, I decided you know what? This is really -- this can't go on any longer.
>
> * * *
>
> And then came the question what do I do. Does it make sense to bring them in after not seeing them -- it would have been now two and a half weeks and I hadn't seen them face to face -- just to break up with them, just to say goodbye, just to say come back in but just kidding, don't come back in . . . . Again, I really thought they would be so relieved.
>
> * * *
>
> So I thought this was going to be . . . thank God you're not making us come in anymore, goodbye, see you later.

Final Hearing Transcript, pp. 471-473.

17. Unfortunately for all involved, C.H. and J.H. were not relieved——but rather incensed——by Respondent's notice of termination. On August 19, 2010, J.H. advised Respondent by e-mail that he and C.H. felt "hurt and confused" by the termination and that he did not agree with the manner in which

the refund had been calculated (J.H. believed that the "used" sessions should have been valued at the discounted price of $140 per visit, as opposed to Respondent's customary rate of $165).

18. Approximately 15 minutes later, Respondent e-mailed a reply to J.H., wherein she explained that the possibility of termination had been "brewing" over the past several weeks and that she ended the relationship by e-mail (instead of calling) so C.H. and J.H. could both read the message. In addition, Respondent offered a free office visit to discuss the matter.

19. C.H. and J.H. did not avail themselves of the offer of a free office visit, and, from what can be gleaned from the record, had no further communication with Respondent. C.H. and J.H. did, however, receive a refund from Respondent that valued the used sessions at $140——as J.H. had requested.

C. Expert Witness Testimony

20. During the final hearing, Petitioner presented the testimony of Dr. Charles Golden, an expert in the field of psychology, who opined that Respondent departed from the standard of care in two respects: termination of the therapy by a means other than a face-to-face conversation; and her purported failure to provide C.H. and J.H. with appropriate pre-termination counseling——i.e., it did not appear, based on his review of Respondent's records, that Respondent gave C.H. and J.H. the names of other marital counselors.

21. Dr. Golden's opinion is rejected as to both points because it is apparent, based upon the excerpt of his cross-examination testimony quoted below, that he has held Respondent to a "best practice" standard that is more stringent than the minimum level of performance required by law:

> Q. So how is it that Dr. Shaked practiced beneath the minimum standard?
>
> A. By using an email termination with clients she was seeing in face-to-face therapy without properly preparing them and dealing with the psychological issues that arise from termination that have to be anticipated regardless of whether or not you expect them. And the difference here is we don't follow -- we follow the rules of best practice. We do termination face to face, in a face-to-face client not because we always anticipate there will be bad things but because that is the best practice in terms of doing termination.

Final Hearing Transcript, p. 282 (emphasis added).[2/]

22. Further, Dr. Golden's opinion with respect to the issue of pre-termination counseling suffers from an additional flaw: it assumes that Respondent never provided C.H. and J.H. with the names of other marital therapy providers prior to termination——a premise contrary to Respondent's final hearing testimony, which the undersigned has credited.

23. For these reasons, Petitioner has failed to adduce clear and convincing evidence that the manner in which Respondent handled the termination of C.H. and J.H. fell below

the minimum standard of performance. Accordingly, Respondent is not guilty of violating section 490.009(1)(r), Florida Statutes.

CONCLUSIONS OF LAW

A. Jurisdiction

24. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

B. The Burden and Standard of Proof

25. This is a disciplinary proceeding in which Petitioner seeks to discipline Respondent's license to practice psychology. Accordingly, Petitioner must prove the allegations contained in Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

26. Clear and convincing evidence:

> [R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

C. Petitioner's Authority to Impose Discipline; The Charges Against Respondent

27. Section 490.009, Florida Statutes, authorizes the Board of Psychology to impose penalties that range from the issuance of a letter of concern to revocation of a psychologist's license to practice in Florida if a psychologist commits one or more acts specified therein.

28. As noted previously, Petitioner has abandoned Count One of the two-count Administrative Complaint filed in this cause. Accordingly, the undersigned need only address Count Two, wherein Petitioner alleges that Respondent violated section 490.009(1)(r), which subjects a psychologist to discipline for:

> Failing to meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance, including the undertaking of activities for which the licensee is not qualified by training or experience.

(emphasis added).

29. Specifically, Petitioner asserts that Respondent violated the foregoing statutory provision in that she:

> [T]erminated therapy in an email; [] did not provide pretermination counseling, nor did she suggest alternative service providers as appropriate; [] informed on client without informing the other until a later time.

(emphasis added).

30. As discussed in the findings of fact contained herein, Respondent's guilt has not been demonstrated by clear and

convincing evidence due to Petitioner's failure to articulate, through the testimony of its expert witness (Dr. Golden), the minimum standard of performance against which Respondent's actions should be measured. Instead, Petitioner has attempted to hold Respondent to Dr. Golden's formulation of what "best practice" requires of a psychologist in the termination context——a standard inconsistent with, and more exacting than, the plain language of 490.009(1)(r). Indeed, it is well-settled that a healthcare provider does not depart from the standard of care——i.e., commit malpractice——simply because the "best practice" was not followed. See Fitzgerald v. Manning, 679 F.2d 341, 347 (4th Cir. 1982)(holding that a physician does not violate the standard of care simply because an expert disagrees as to "what is the best or better approach"); Hudson v. United States, 636 F. Supp. 2d 827, 831 (W.D. Wis. 2009)(noting that a healthcare practitioner is not guilty of malpractice merely by failing to use the highest degree of care, skill, and judgment); Bellomy v. United States, 888 F. Supp. 760, 765 (S.D. W. Va. 1995)(holding that a healthcare provider "is not bound to provide the patient with the highest degree of care possible"); East v. United States, 745 F. Supp. 1142, 1149 (D. Md. 1990) ("The degree of care and skill required . . . in the treatment of . . . patients is not the highest degree of care and skill known to the profession"); Rogers v. Okrin, 478 F. Supp. 1342,

1385 (D. Mass. 1979)("A malpractice case is not made out because an expert disagrees as to what is the best . . . approach"), rev'd in part on other grounds, 634 F.2d 650 (1st Cir. 1980); Matthews v. Aganad, 914 N.E.2d 1233, 1240 (Ill. App. Ct. 2009) (holding that the burden of proof as to standard of care is not met where a plaintiff merely presents "expert testimony which offers an opinion as to correct procedure or which suggests, without more, that the witness would have conducted himself differently than the defendant"); Smethers v. Campion, 108 P.3d 946, 949 (Az. Ct. App. 2005)("While the standard clearly is not the 'highest degree' of care or skill . . . it is at least a minimum level of skill and care"); Beckham v. St. Paul Fire & Marine Ins. Co., 614 So. 2d 760, 764 (La. Ct. App. 1993) (observing that malpractice does not occur simply because a healthcare provider fails to exercise the "highest degree of care possible"); Bernard v. Block, 575 N.Y.S.2d 506, 509 (N.Y. App. Div. 1991)("The [malpractice] standard does not require the very highest degree of care"); Brown v. Koulizakis, 331 S.E.2d 440, 445 (Va. 1985)(stating that a healthcare provider is "not an insurer of the success of his diagnosis . . . nor is he held to the highest degree of care known to his profession"); Froman v. Ayars, 85 P. 14, 16 (Wash. 1906)("He was neither required to exercise the highest degree of skill nor the highest degree of

care, but only such as are recognized as ordinary and reasonable by the standards of his profession").

31. As the opinion of Petitioner's expert witness has been rejected, Respondent cannot be convicted of a violation of section 490.009(1)(r); the Administrative Complaint should therefore be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Board of Psychology dismissing the Administrative Complaint.

DONE AND ENTERED this 23rd day of May, 2012, in Tallahassee, Leon County, Florida.

EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2012.

ENDNOTES

[1/] Although it is disputed whether Respondent provided the names of other marital therapists C.H. and J.H. prior to the

termination of their professional relationship, the undersigned credits Respondent's testimony over that of the patients.

[2/] These are not isolated references to a "best practice standard," as demonstrated by the following excerpt of Dr. Golden's testimony on direct examination:

> You have a responsibility to patients, especially people you are looking at in doing face-to-face therapy, to terminate them face to face, to explain the reasons, to let them vent on you . . . so that again it is as best a psychological experience as possible.

Final Hearing Transcript, p. 273 (emphasis added).

COPIES FURNISHED:

Adrienne C. Rodgers, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

Mark Thomas, Esquire
Dell Graham, P.A.
203 Northeast First Street
Gainesville, Florida 32601

Jennifer A. Tschetter, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399

Allen Hall, Executive Director
Board of Psychology
Department of Health
4052 Bald Cypress Way, Bin C-05
Tallahassee, Florida 32399

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.