STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Petitioner,

Case No. 19-3229MPI

vs.

ADVANCED BEHAVIORAL ASSOCIATION,
LLC,

Respondent.
_______________________________/

RECOMMENDED ORDER

The case came before Administrative Law Judge June C. McKinney of the Division of Administration Hearings ("DOAH") for final hearing on October 7, 2019, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Kimberly Murray, Esquire
Ryan McNeill, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

For Respondent: Varinia F. Cabrera, Psy.D., pro se
Advanced Behavioral Association, LLC
7925 Northwest 12th Street, Suite 118
Doral, Florida 33216-1820

STATEMENT OF THE ISSUES

Whether five employees meet the required criteria to be eligible to provide behavior analysis services; and, if not, what is the Medicaid overpayment amount Respondent owes to Petitioner.

PRELIMINARY STATEMENT

Petitioner, Agency for Health Care Administration ("AHCA"), conducted a Medicaid audit of Respondent, Advanced Behavioral Association, LLC ("ABA" or "Respondent"), a Medicaid provider. The Medicaid audit reviewed Respondent's dates of service from November 1, 2017, through July 31, 2018. On or about April 30, 2019, AHCA issued a Final Audit Report ("FAR") dated April 18, 2019, which advised Respondent it had been overpaid by the amount of $852,043.63 for paid claims that, in whole or in part, the Medicaid program did not cover.

AHCA initiated this action to recover the amount of the overpayment. AHCA also sought to sanction Respondent in the form of an administrative fine, as well as recover investigative costs for conducting the Medicaid audit.

Respondent filed a petition for a formal administrative hearing to dispute the factual allegations of the audit and to request a formal hearing to address the allegations. On June 13, 2019, the case was then referred to DOAH. The hearing was continued on July 18, 2019, and ultimately rescheduled to October 7 through 9, 2019. The hearing was held on October 7, 2019.

Following the issuance of the FAR, AHCA reduced the overpayment amount to $207,082.92 and alleged sanctions and costs in the amount of $2,500.00.

On October 2, 2019, the parties stipulated to facts in the Joint Pre-hearing Stipulation, and the relevant facts stipulated therein are accepted and made part of the Findings of Fact below.

At hearing, Petitioner presented the testimony of two witnesses: Robi Olmstead, AHCA administrator; and Jennifer Ellingsen, Medicaid health program analyst. Petitioner's Exhibits 1 through 27 were admitted into evidence. Respondent testified on her own behalf. Respondent's Exhibits A through O were admitted into evidence.

The proceedings of the hearing were recorded and transcribed. A one-volume Transcript of the hearing was filed at DOAH on October 22, 2019. Both parties timely filed proposed recommended orders which were duly considered in the preparation of this Recommended Order.

Unless otherwise indicated, all statutory references are to the codification in effect at the time of the alleged overpayment.

FINDINGS OF FACT

1. AHCA is designated as the single state agency authorized to make payments for medical assistance and related services under Title XIX of the Social Security Act, otherwise known as the Medicaid program. See § 409.902(1), Fla. Stat.

2. As part of its duties, AHCA oversees and administers the Florida Medicaid Program and attempts to recover Medicaid overpayments from Medicaid providers.

3. At all times material to this case, ABA was licensed to provide healthcare services to Medicaid recipients under a contract with AHCA as a Medicaid provider. As provider number 019514000, ABA participated in the Medicaid program from November 1, 2017, through July 31, 2018 ("audit period").

4. AHCA's Bureau of Medicaid Program Integrity ("MPI") is the unit within AHCA that oversees the activities of Florida Medicaid providers and recipients. MPI ensures that providers abide by Medicaid laws, policies, and rules. MPI is responsible for conducting audits, investigations, and reviews to determine possible fraud, abuse, overpayment, or neglect in the Medicaid program. See § 409.913, Fla. Stat.

5. ABA signed a provider agreement and agreed to abide by the handbook and policies. As a Medicaid provider, ABA was subject to the enacted federal and state statutes, regulations, rules, policy guidelines, and Medicaid handbooks incorporated by reference into the rule, which were in effect during the audit period.

6. Behavior analysis is a treatment that improves the lives of those individuals with mental health conditions such as developmental and intellectual disabilities. Up until

approximately 2014, behavior analysis services had been covered under the developmental disabilities waiver program.

7. In October 2017, the Florida Medicaid Behavior Analysis Services Coverage Policy ("Handbook") was promulgated, which placed the services under the state plan, expanded the population, and detailed the eligibility categories and criteria to provide behavior analysis services.

8. This case arose when MPI decided to audit all the Medicaid behavior analysis service providers. AHCA reviewed the employee qualifications for every enrolled behavior analysis provider. After the review, approximately 600 audit cases were opened.

The Preliminary Audit and Final Audit

9. ABA was one of the providers MPI reviewed. On December 6, 2017, MPI issued ABA a request for records seeking supporting documentation about the qualifications of employees providing behavior analysis services.

10. ABA submitted the first set of employees' records in response to AHCA's request the same month.

11. Karen Kinzer ("Kinzer"), investigative analyst, was assigned to oversee and conduct ABA's employee eligibility determination audit. On or about September 14, 2018, Kinzer reviewed the billing logs and requested additional employee records, which ABA then submitted.

12. Kinzer reviewed each ABA employee and their behavior assistant qualifications based on the requirements of the Handbook.

13. Rules applicable to the claims reviewed in this case are enumerated in the Handbook and include the following requirements in policy 3.2:

> Behavior assistants working under the supervision of a lead analyst and who meet one of the following:
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> -Have a bachelor's degree from an accredited university or college in a related human services field; are employed by or under contract with a group, billing provider, or agency that provides Behavior Analysis; and, agree to become a Registered Behavior Technician credentialed by the Behavior Analyst Certification Board by January 1, 2019.
>
> -Are 18 years or older with a high school diploma or equivalent; have at least two years of experience providing direct services to recipients with mental health disorder, developmental or intellectual disabilities; and, complete 20 hours of documented in-service trainings in the treatment of mental health, developmental or intellectual disabilities, recipient rights, crisis management strategies and confidentiality.

14. Kinzer determined that overpayments were made to ABA because numerous behavior analysis services had been performed by ineligible employees, which were not covered by Medicaid.

15. Kinzer prepared the Preliminary Audit Report ("PAR") after reviewing ABA's employee records and conducting an audit of

paid Medicaid claims for behavior analysis services to Medicaid recipients.

16. MPI issued the PAR dated November 26, 2018. The report detailed the Medicaid policy violations, overpayment amounts, and provided ABA the opportunity to submit additional documentation for consideration. The overpayment amount totaled $1,215,281.09, and the report also notified ABA that an FAR would be issued identifying the amount of overpayment due.

17. Each time ABA supplied additional records, MPI reviewed the supporting documentation provided from the employment files to evaluate if the employees met the minimum qualifications to perform behavior analysis services pursuant to policy 3.2.

18. On February 11, 2019, MPI issued an Amended Preliminary Audit Report ("APAR") that reduced ABA's overpayment amount to $977,539.52. Attached to the APAR was a list of specific employees who were ineligible to perform behavioral analysis services. The list also detailed how much billing was credited to each of the ineligible employees. The APAR allowed ABA the opportunity to submit additional documentation for consideration.

19. On April 18, 2019, AHCA concluded the audit and issued an FAR on or about April 30, 2019, alleging that Respondent was overpaid $852,043.63 for behavior analysis services that were not covered by Medicaid. The overpayment was calculated based on the

determination that 20 ABA employees were ineligible according to policy 3.2 of the Handbook.

20. The FAR included employee overpayment and claim reports as well as claim bills by ABA for the 20 ineligible employees. Also listed was the total amount for the audit period.

21. AHCA informed ABA by the FAR that it was seeking to impose a fine of $172,908.73 and costs in the amount of $461.50 for a total amount of $1,025,413.86. An additional fine of $2,500.00 as a sanction was also included.

22. Additionally, the FAR detailed ABA's violations in Finding 1, which stated, in pertinent part:

> The Florida Medicaid Provider General Handbook, page 1-2, states that only health care providers that meet the conditions of participation and eligibility requirements and are enrolled in Medicaid Behavior Analysis Services Coverage Policy, Rule 59G-4.125, F.A.C., Section 3.0, states that providers must meet the qualifications specified in this policy in order to be reimbursed for Florida Medicaid BA [behavior analysis] services. Payments for Florida Medicaid Behavior Analysis Services rendered by an individual determined not to meet the qualifications or for whom documentation was insufficient to determine eligibility are considered an overpayment.

23. After the April 18, 2019, FAR was issued, 15 of ABA's employees obtained their registered behavior technician ("RBT") certifications, which made them eligible under policy 3.2. AHCA reduced the number of ineligible ABA employees from 20. After

the reduction, MPI concluded that five ABA employees still did not meet the minimum legal requirements to perform behavior assistant services during the audit period under policy 3.2.

Employee No. 1

24. MPI discovered ABA violated policy by billing Medicaid $3,803.28 for behavior analysis services conducted by Erica del Sodorro Lebron Diaz ("Lebron Diaz"). Lebron Diaz's computer engineering degree failed to be in the required human services field. Additionally, she neither had an RBT certificate nor had two years' experience providing direct services to recipients with mental health disorders, developmental or intellectual disabilities ("target population"). Instead, Lebron Diaz only had one month direct service experience in 2019 as a home health aide that could be verified.

Employee No. 2

25. MPI discovered ABA violated policy by billing Medicaid $44,737.30 for behavior analysis services conducted by Herman Chavez ("Chavez"). Chavez lacks a bachelor's degree, does not have an RBT certificate, and his work history only had nine months' work experience with the required target population, which is 15 months short of the minimum requirements of the Handbook.

Employee No. 3

26. MPI discovered ABA violated policy by billing Medicaid $79,551.14 for behavior analysis services conducted by Mairelis Gonzalez Rodriguez ("Rodriguez"). Rodriguez lacks a bachelor's degree and has a high school diploma, but does not have an RBT certificate and does not have the two years' work experience with the required target population.

Employee No. 4

27. MPI discovered ABA violated policy by billing Medicaid $44,737.30 for behavior analysis services conducted by Nury Grela Dominguez ("Dominguez"). Dominguez lacks a bachelor's degree and has a high school diploma, but does not have an RBT certificate. She also does not have two years of work experience with the target population.

Employee No. 5

28. MPI found ABA violated policy by billing Medicaid $48,272.40 for behavior analysis services conducted by Yoiset Orive ("Orive"). Orive neither has a bachelor's degree nor the RBT certificate that is required with a high school diploma. Additionally, she only has 19 months' direct work experience with the target population instead of the required 24 months.

Hearing

29. At the final hearing, the parties announced and stipulated that only five ABA employees', Lebron Diaz, Chavez,

Rodriguez, Dominguez, and Orive's ("disputed employees"), eligibility is contested for the determination of Medicaid overpayment in this matter. AHCA is seeking an overpayment of $207,082.92 and sanctions and costs in the amount of $2,500.00 for the disputed employees.

30. At hearing, Jennifer Ellingsen ("Ellingsen"), AHCA's Medicaid health program analyst, testified that she was assigned ABA's case after Kinzer retired. Ellingsen worked for AHCA as an analyst on audits of Medicaid providers for 12 years.

31. Ellingsen reevaluated the eligibility of the disputed employees. During her review, Ellingsen assessed all the records supplied by ABA. She looked at the complete employment files of the disputed employees including applications, resumes, and references. She also attempted to verify credentials by calling references when the employee files did not contain the required information.

32. During the review, Ellingsen researched previous employers listed on the resumes to confirm periods of employment and whether work duties were with the required target population. Some letters of reference were character references, which she was not able to use toward eligibility because the letters did not relate to work history.

33. Ellingsen also faced challenges verifying backgrounds for the disputed employees when some phone numbers were not in

service, she could not find current numbers or locations for the entity listed, or people did not return her calls. Several of the employee reference letters also failed to have any notation that Respondent attempted to verify the letters. Ellingsen made numerous attempts to verify that each of the disputed employees had previously worked with the target population, but was unable to confirm the two years' direct care service for all of the disputed employees.

34. Ellingsen credibly summarized the verification process, background research results, and concluded that each of the disputed employees were ineligible to perform behavior analysis services because they did not meet the criteria in policy 3.2. She testified that the disputed employees' ineligibility was because all five lacked college degrees in a human services-related field, none had RBT certifications, and each lacked the verifiable two years of direct care services experience with the target population, which the Handbook required.

35. Ellingsen added up ABA's Medicaid overpayments owed from the disputed employees for a total of $207,082.92.

36. At hearing, Robi Olmstead ("Olmstead") explained that section 409.913, Florida Statutes, and Florida Administrative Code Rule 59G-9.070(7) require that sanctions be applied in the amount of $1,000.00 per claim, which would have been over approximately $3,000,000.00 in this case. However, Olmstead

testified that, in this case, AHCA implemented the cap that reduced ABA's sanctions and costs to $2,500.00.

37. Respondent, Varinia Cabrera ("Cabrera"), ABA owner, testified that she interviewed and checked the references of all of the disputed employees. Cabrera believed that each of the disputed employees met the requirements of policy 3.2 before she hired them to perform behavior analysis services at ABA.

38. Cabrera also maintained that since AHCA provided each of the disputed employees in question with a Medicaid Provider ID number, she believed AHCA had also validated and approved the disputed employees to work for her performing behavior analysis services.

39. A Medicaid Provider ID number is a number assigned to employees and contractors of Medicaid providers to track and bill for claims. The provision of a Medicaid Provider ID number does not substitute for any Medicaid provider ensuring that its employees or subcontractors have the required credentials to perform the services to which they are billing.

CONCLUSIONS OF LAW

40. DOAH has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019).

41. AHCA is empowered to "recover overpayments and impose sanctions as appropriate." § 409.913, Fla. Stat. An overpayment

"includes any amount that is not authorized to be paid by the Medicaid program whether paid as a result of inaccurate or improper cost reporting, improper claiming, unacceptable practices, fraud, abuse, or mistake." § 409.913(1)(e), Fla. Stat.

42. As the party asserting the overpayment, AHCA bears the burden of proof to establish the alleged overpayment by a preponderance of the evidence. Southpointe Pharmacy v. Dep't of HRS, 596 So. 2d 106, 109 (Fla. 1st DCA 1992).

43. Section 409.913(7)(e) details a provider's responsibility when filing a Medicaid claim and states, in pertinent part:

> (7) When presenting a claim for payment under the Medicaid program, a provider has an affirmative duty to supervise the provision of, and be responsible for, goods and services claimed to have been provided, to supervise and be responsible for preparation and submission of the claim, and to present a claim that is true and accurate and that is for goods and services that:
>
> (e) Are provided in accord with applicable provisions of all Medicaid rules, regulations, handbooks, and policies and in accordance with federal, state, and local law.

44. In this case, AHCA established and proved by a preponderance of the evidence that it paid ABA for claims that failed to comply with the Handbook. The evidence demonstrates that the disputed employees were ineligible to provide behavior

analysis services. Consequently, AHCA is entitled to reimbursement for the improper claims.

45. Applying the foregoing principles to the Findings of Fact contained herein, the undersigned concludes that Respondent was overpaid with respect to the following disputed employees:

- Employee No. 1: $3,803.28
- Employee No. 2: $44,737.30
- Employee No. 3: $79,551.14
- Employee No. 4: $30,718.80
- Employee No. 5: $48,272.40

ABA's overpayment totals $207,082.92.

46. Section 409.913(11) mandates that repayment is a provider's responsibility when filing an inappropriate Medicaid claim and states, in pertinent part:

> (11) The agency shall deny payment or require repayment for inappropriate, medically unnecessary, or excessive goods or services from the person furnishing them, the person under whose supervision they were furnished, or the person causing them to be furnished.

47. Accordingly, AHCA prevails in its claim to seek reimbursement of the overpayment in the amount of $207,082.92 for the disputed employees and the $2,500.00 for sanctions and costs.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care Administration enter a final order directing Advanced Behavioral Association, LLC, to repay $207,082.92 for the claims found to be overpayments and $2,500.00 in sanctions and costs.

DONE AND ENTERED this 20th day of November, 2019, in Tallahassee, Leon County, Florida.

JUNE C. MCKINNEY
Administrative Law Judge
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Filed with the Clerk of the
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this 20th day of November, 2019.

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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.