Via U.S. Mail and Email (Sarah.Delone2@CMS.HHS.gov)

March 30, 2021

Ms. Sarah deLone, Director
Children & Adult Health Programs Group
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244

Re: Second Complaint against Texas Medicaid for Failing to Cover Intensive Behavioral Intervention Services for EPSDT Beneficiaries with Autism Spectrum Disorder and Request for CMS Assistance and Intervention

Dear Director deLone,

Disability Rights Texas[1] (DRTX) and Texas RioGrande Legal Aid[2] (TRLA) write on behalf of its constituents and clients, Texas Medicaid beneficiaries under the age of 21 who have been diagnosed with autism spectrum disorder (ASD). Texas Medicaid is denying these children and young adults medically necessary intensive behavioral intervention (IBI) services. Disability Rights Texas and TRLA are joined in this filing by eight state and national advocacy groups in raising the concern that Texas continues to fail to comply with CMS's guidance on the Medicaid program's obligation to provide medically necessary behavioral treatments to children with ASD.

Medicaid Programs must provide all medically necessary services for children as part of the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) Program. Therefore, Texas Medicaid must provide this service to each child who has a medical need for it, as described further below. Indeed, in CMS's July 14, 2014 Informational Bulletin entitled "Clarification of Medical Coverage of Services to Children with Autism," CMS reaffirmed that EPSDT is "intended to ensure a comprehensive, high-quality health care benefit for eligible individuals under the age of 21, including for those with ASD, based on individual determinations of medical necessity." Nevertheless, Texas Medicaid continues to refuse to provide IBI, which includes applied behavior analysis (ABA), to children who need it. As such, we again ask CMS to enforce the EPSDT provisions of the Medicaid Act and require Texas Medicaid to provide beneficiaries under 21 with medically necessary IBI, in compliance with the EPSDT requirement and your July 14, 2014 Informational Bulletin.

Children with ASD Have a Medical Need for IBI-ABA

IBI-ABA is medically necessary for many children who have ASD. According to the Centers for Disease Control and Prevention,

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[1] Disability Rights Texas is the congressionally-mandated protection and advocacy agency for Texans with disabilities.
[2] Founded in 1970 to represent Texas farm workers, TRLA has grown into the nation's second largest legal provider and the largest in Texas. TRLA provides free civil legal services to residents in 68 Southwest Texas counties.

> A notable treatment approach for people with ASD is called applied behavior analysis (ABA). ABA has become widely accepted among healthcare professionals and used in many schools and treatment clinics. ABA encourages positive behaviors and discourages negative behaviors to improve a variety of skills. The child's progress is tracked and measured.[3]

According to the U.S. Preventative Services Task Force, "Among the behavioral interventions, those based on applied behavior analysis have the highest-quality data supporting their effects on cognitive and language development."[4] Indeed, the American Psychological Association "affirms that … ABA … [is] … well-grounded in psychological science and evidence-based practice."[5] As the American Academy of Pediatrics notes, "[m]ost evidence-based treatment models are based on principles of ABA." Young children are more likely to achieve their individual goals with "more hours per week of ABA. More intense ABA therapy was associated with achieving optimal developmental outcomes."[6]

In 2016, Texas Medicaid told the Texas Legislature that ABA "is a treatment that uses behavioral principles to evaluate and teach socially relevant behavior and new skills and decrease undesirable behaviors through positive reinforcement. It is the most recommended, evidence-based treatment" for autism spectrum disorder.[7] Among children with autism, Applied Behavior Analysis has been shown to improve global function in the areas of communication, interpersonal relationships, learning, self-regulation, adaptability, and lessening of maladaptive behaviors. If children receive Applied Behavior Analysis for long enough, some can function without other support in school, at home, and in the community."[8]

Despite these commendations, even by the Texas Medicaid Program itself five years ago, Texas Medicaid continues to fail to provide this important service to children who need it.

Long History of Efforts to Get Texas Medicaid to Provide IBI-ABA as an EPSDT benefit

2015

On September 28, 2015, almost 14 months after CMS issued its Information Bulletin on Medical Coverage for Children with Autism, Disability Rights Texas, on behalf of its client, N.D., wrote to Texas Medicaid's

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[3] CDC, Treatment and Intervention Services for People with Autism, available at https://www.cdc.gov/ncbddd/autism/treatment.html.

[4] U.S. Preventive Services Task Force, Autism Spectrum Disorder in Young Children: Screening, Final Recommendation Statement (2016), available at https://www.uspreventiveservicestaskforce.org/uspstf/document/RecommendationStatementFinal/autism-spectrum-disorder-in-young-children-screening

[5] American Psychological Association, APA Policy adopted in 2017, available at https://www.apa.org/about/policy/applied-behavior-analysis

[6] Hyman, Levy, Myers and COUNCIL ON CHILDREN WITH DISABILITIES, SECTION ON DEVELOPMENTAL AND BEHAVIORAL PEDIATRICS, Identification, Evaluation, and Management of Children With Autism Spectrum Disorder, Pediatrics January 2020, 145 (1) e20193447; DOI: https://doi.org/10.1542/peds.2019-3447.

[7] Available at https://hhs.texas.gov/sites/default/files/documents/about-hhs/communications-events/news/fy18-19-lar.pdf *at* 310 of 2548. Board Certified Behavior Analysts (BCBAs) and Assistant BCBAs provide ABA and are licensed to practice in Texas. See 16 Tex. Admin. Code §§ 121.10, 121.21, 121.22, 121.70, and 121.75.

[8] See Texas Medicaid's statement to the Texas Legislature, cited *supra*.

State Medicaid Director asking for "a list of Medicaid ABA providers in Houston, the largest city in Texas and fourth largest in the United States."[9] N.D. was a three-year old Medicaid beneficiary who was diagnosed with ASD. N.D.'s neurologist, the Director of the Autism Center at the Children's Learning Institute at the University of Texas Health Science Center at Houston, ordered ABA therapy for N.D. because it is medically necessary for him. Nevertheless, despite N.D.'s medical need for ABA, Texas Medicaid responded by suggesting only that N.D. try a non-Medicaid-funded pilot program run by another agency. That program, however, did not provide the full scope of services that N.D. needed.

Because Texas Medicaid failed to provide a list of Medicaid-funded ABA providers in Houston, Disability Rights Texas sent the Texas Medicaid Director a follow-up letter on September 30, again requesting information on how N.D. could get the ABA services his neurologist had determined were medically necessary for him.[10]

In his November 2015 response, the Texas Medicaid Director refused to provide the treatment that N.D. needed, stating that "ABA is not currently a defined benefit in the Texas Medicaid program."[11] The Texas Medicaid Director explained that Texas Medicaid had determined that ABA is a "new service," and as such Texas Medicaid must get budget authority from the Texas Legislature before it will authorize the service for any beneficiary, even if it is medically necessary. The Texas Medicaid Director concluded that "[a]s with all new benefits, should HHSC be directed by the Legislature to offer intensive behavior therapy in Medicaid," stakeholders would have opportunities to comment on the new benefit's development.[12]

2016

On January 28, 2016, Texas Medicaid reiterated its position that it would not cover medically necessary ABA for beneficiaries under the age of 21, despite such services being within the scope of the EPSDT benefit. In a meeting of the IDD System Redesign Advisory Committee, Kellie Dees, the STAR Kids[13] specialist with Texas Medicaid, was asked whether Texas Medicaid was going to provide ABA services for children with ASD through the EPSDT benefit. In response, Ms. Dees stated unequivocally that ABA is "not a coverable Medicaid benefit." Ms. Dees further advised that for children with ASD, the emphasis was on physical, occupational, and speech therapies, and that beneficiaries "should really try their best within the Medicaid-covered services."[14]

In response to Texas Medicaid's refusal to provide ABA to EPSDT beneficiaries with ASD who have medical need for it, Disability Rights Texas and National Health Law Program filed a complaint with CMS on March 21, 2016. Unfortunately, at this time your agency merely instructed Texas Medicaid to

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[9] September 28, 2015, letter from Disability Rights Texas to Texas Medicaid's Medicaid Director seeking Medicaid ABA providers, Exhibit B.
[10] September 30, 2015, follow-up letter from Disability Rights Texas to HHSC's Medicaid Director, Exhibit C.
[11] November 5, 2015, letter, Exhibit A.
[12] *Id.*
[13] STAR Kids is Texas Medicaid's managed care program for children with disabilities.
[14] Video of IDD System Redesign Advisory Committee meeting, January 28, 2016. Ms. Dee's testimony on ABA from 29:50 to 31:20. http://texashhsc.swagit.com/play/01282016-675

reach out to DRTX to try to resolve the complaint. Ultimately, Texas Medicaid decided to continue to refuse to cover ABA.

On December 6, 2016, DRTX and TRLA, on behalf of three Medicaid-eligible children with ASD and in medical need of ABA, filed suit in federal district court alleging that Texas Medicaid was violating the EPSDT provision by failing to provide ABA as a Medicaid benefit.[15] Texas Medicaid quickly settled the case by agreeing to provide ABA to the three plaintiffs; however, Texas Medicaid did not agree to provide ABA to any other EPSDT beneficiaries with ASD who had a medical need for ABA.

2018

With no change in policy or position by Texas Medicaid, in November of 2018 TRLA and DRTX served Texas Medicaid with a demand letter on behalf of three more Medicaid-eligible children with ASD who had a medical need for ABA. As before, Texas Medicaid quickly settled by agreeing to provide ABA to these three potential plaintiffs; however, Texas Medicaid again would not agree to provide ABA to any other EPSDT beneficiaries with ASD who had a medical need for ABA.

2019

In April of 2019, TRLA and DRTX served yet another demand letter on Texas Medicaid on behalf of another Medicaid-eligible child with ASD in need of ABA. Once again, Texas Medicaid agreed to provide ABA to the child, but not to any other EPSDT beneficiaries with ASD with a medical need for ABA.

In July of 2019, DRTX tried again, this time serving a demand on behalf of yet another Medicaid-eligible child with ASD in need of ABA. Once again, Texas Medicaid agreed to provide ABA to the child, but it continued to refuse to provide ABA to any other EPSDT beneficiaries with ASD with a medical need for ABA.

Following these 2019 individual settlements, it appeared that Texas Medicaid might finally join the 47 or so other states that properly cover IBI-ABA for EPSDT beneficiaries diagnosed with ASD. During its 2019 session, the Texas Legislature adopted Rider 32 (Art. II of HB 1).[16] Rider 32 authorized Texas Medicaid to provide intensive behavioral intervention services, which include ABA, thus hopefully making such services finally available to Medicaid beneficiaries under the age of 21 with ASD. Texas Medicaid asserted that it would begin providing IBI-ABA April 2020, but this did not happen.

In preparation for rolling out its IBI-ABA coverage, in September 2019, Texas Medicaid solicited comments to its draft "Autism Services Policy." In response, individuals and organizations, including DRTX and TRLA submitted more than 400 comments. While Texas Medicaid stated that "responses to comments [would be] forthcoming,"[17] no responses have ever been issued.

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[15] Cause No. 5:16-CV-1235 (U.S. District Court, W.D. Tex.).
[16] Available at https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB00001F.pdf, page II-60.
[17] Available at https://hhs.texas.gov/sites/default/files/documents/about-hhs/communications-events/meetings-events/policy-council-children-family/sept-2019-pccf-agenda-item-5.pdf.

Because Texas Medicaid stated that it would finally be covering IBI-ABA for EPSDT beneficiaries by April 2020, TRLA and DRTX advised its clients and constituents of this change in policy, and withheld serving any additional demands to Texas Medicaid seeking IBI-ABA for individual clients.

2020

Despite Texas Medicaid's assertion that IBI-ABA coverage would be available by April 2020, it did not provide IBI-ABA in 2020. Instead, in August of 2020, Texas Medicaid sent a letter to the Budget and Policy Director for the Office of the Governor and the Director of the Legislative Budget Board "requesting approval of the establishment of reimbursement rates for behavioral intervention for people with Autism."[18] As with the Texas Medicaid's draft "Autism Services Policy," many interested organizations (including DRTX)[19] submitted letters contesting the proposed reimbursement rates as woefully too low. Texas Medicaid would simply not be able to actually provide ABA to children because the reimbursement rate would prevent the recruitment of a sufficient number of ABA providers.

2021

We are now three months into 2021, and the Texas Medicaid Program still does not provide IBI-ABA to children with ASD who need it. There is still not a single mention of IBI-ABA in Texas Medicaid's 1,612-page Provider Procedures Manual, a "provider's principle source of information about Texas Medicaid"—not in the Nursing or Therapy Handbooks, the Behavioral Health and Case Management Services Handbook, or the Children's Services Handbook.[20] It is five and half years after CMS issued its Informational Bulletin, and almost four and half years since DRTX, TRLA, and other Texas advocacy groups began trying to get Texas Medicaid to comply with the Medicaid Act and provide IBI-ABA to EPSDT beneficiaries with ASD who have a medical need for the service. In sum, despite repeated efforts, Texas Medicaid still fails to provide medically necessary IBI-ABA to the children and young adults who desperately need it.

As of the filing of this complaint, the only step Texas Medicaid has taken this year is to hold a rate hearing on March 16, 2021. A variety of witnesses testified at the hearing, including parents of children with ASD, representatives of ABA providers, professors who teach ABA, and representatives of Texas Medicaid health plans. There was overwhelming objection to the proposed reimbursement rates for two primary reasons: (1) Texas Medicaid will not be able to develop a robust network to provide proper, quality ABA because the rates are too low, and (2) Texas Medicaid should begin the IBI-ABA benefit as soon as possible, instead of waiting until 2022 to initiate it.

Based on the history set forth above, however, we have no confidence that Texas Medicaid will follow through in actually providing ABA. As such, we must again ask CMS to compel Texas Medicaid to *swiftly* comply with the EPSDT provisions of the Medicaid Act and CMS's guidance by covering IBI-ABA when medically necessary.

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[18] August 21, 2020, letter, Exhibit D.

[19] DRTX's September 14, 2020, letter, Exhibit E.

[20] See the Texas Medicaid Provider Procedures Manual, available online at https://www.tmhp.com/resources/provider-manuals/tmppm.

Even if we take the rate hearing notice at face value, and Texas Medicaid actually does proceed with implementing the program, it does not plan to begin to provide IBI-ABA until February 2022. This delay is typical of Texas Medicaid's ongoing failure to provide IBI-ABA that children need, but this delay is not acceptable. Children with ASD should not have to suffer even more delays before they can start to get treatment that they need.

Case law also supports CMS's guidance that ABA is within the scope of the EPSDT benefit

It is well-settled that once a state like Texas has chosen to participate in the federal Medicaid program, it must comply with federal Medicaid statutory and regulatory requirements. *Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1981); *S.D. v. Hood*, 391 F.3d 581, 586 (5th Cir. 2004). The Medicaid Act "requires that each state plan provide EPSDT health care and services as a mandatory category of medical assistance." *S.D.*, 391 F.3d at 586. In addition to "early and periodic screening, diagnostic, and treatment services," the Act further defines EPSDT services as "[s]uch other necessary health care, diagnostic services, treatment and other measures described in [§ 1396d(a)] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan. 42 U.S.C. § 1396d(r)(5)." *Id.*

In examining the scope of the EPSDT benefit, the Fifth Circuit Court of Appeals in *S.D. v. Hood*, 391 F.3d 581 (5th Cir. 2004) found that every Circuit that has considered the issue "has recognized that states must cover every type of health care or service necessary for EPSDT corrective or ameliorative purposes that is allowable under 1396d(a)." *Id.* at 590, *citing Collins v. Hamilton*, 349 F.3d 371, 376, n. 8 (7th Cir. 2003) ("a state's discretion to exclude services deemed 'medically necessary' . . . has been circumscribed by the express mandate of the statute"); *Pittman by Pope v. Sec'y Fla. Dep't of Health and Rehab.*, 998 F.2d 887, 892 (11th Cir. 1993) (1989 amendment adding § 1396d(r)(5) took away any discretion state may have had to exclude organ transplants from the treatments available to individuals under twenty-one); *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 293 F.3d 472, 480-81 (8th Cir. 2002) (state must provide EPSDT coverage for "early intervention day treatment" as part of § 1396(a)(13)'s "rehabilitative services" category because program was structured to ameliorate conditions and strengthen skills children learn in therapy); *Pereira v. Kozlowski*, 996 F.2d 723, 725-26 (4th Cir. 1993) ("[i]n section 1396d(r)(5), the Congress imposed on the states, as a condition of their participation in the Medicaid program, the obligation to provide children under the age of twenty-one all necessary services.").

As the court in *Garrido v. Dudek* explained, "in determining if [Florida Medicaid's] decision not to cover ABA for children with autism and ASD violates the EPSDT provisions in the Medicaid Act, [the] statutory framework presents two questions: (1) is ABA among those services which can be covered under 42 U.S.C. § 1396d(a), and (2) is ABA necessary to correct or ameliorate an illness for a Medicaid recipient under age 21?" *Garrido v. Dudek*, 864 F.Supp.2d 1314, 1318 (S.D. Fla. 2012), *aff'd* 731 F.3d 981 (11th Cir. 2013), *on remand* F.Supp.2d 1275, 1280 (S.D. Fla. 2013) (permanent injunction). The *Garrido* court answered both questions in the affirmative, finding that ABA falls within the scope of 42 U.S.C. § 1396d(a)(13) (as a preventative or rehabilitative service) and that ABA is "an effective and significant treatment to prevent disability and restore developmental skills to children with autism and ASD." *Id.* at 1280, 1287. Similarly, the court in *Chisholm ex rel. CC v. Kliebert,* 2013 WL 3807990, at *22 (E.D. La. July 18, 2013), found that "ABA therapy, when recommended by a physician or licensed psychologist, constitutes 'medical assistance' under Section 1396d(a)(13) . . ." and that "ABA therapy is medical

assistance that was necessary to correct or ameliorate the debilitating effects of [the plaintiffs'] autism." *See also Parents League for Effective Autism Treatment v. Jones-Kelly*, 339 Fed. App'x 542 (6th Cir. 2009) (affirming preliminary injunction holding that ABA was likely mandated in Ohio EPSDT as either a rehabilitative or preventative service); *Hummel v. Ohio Dep't of Job & Family Servs.*, 844 N.E.2d 360 (Ohio App. 6th 2005) (ABA must be covered by Medicaid when medically necessary).

Because ABA falls within the scope of 42 U.S.C. § 1396d(a)(13) as a preventative or rehabilitative service and is an effective and significant treatment to prevent disability and restore developmental skills to children with autism and ASD, Texas Medicaid simply lacks the discretion to deny coverage of ABA to Medicaid beneficiaries under the age of 21 who have a medical need for such therapy. Nevertheless, Texas Medicaid is flatly refusing to cover ABA for ASD in violation of the EPSDT provisions of the Medicaid Act and CMS's guidance.

Some 60,000 Beneficiaries under the age of 21 in Texas are being denied medically necessary IBI-ABA services

TRLA and Disability Rights Texas represent eight Medicaid beneficiaries between the ages of five and thirteen whose medical professionals have prescribed ABA as medically necessary. In addition to these eight children, according to a 2014 report by the Texas Council on Autism and Pervasive Developmental Disorders: "The Texas Health and Human Services Commission (HHSC) Center for Strategic Decision Support (SDS), using Centers for Disease Control and Prevention (CDC) prevalence data and U.S. Census Bureau information, estimated in 2014 that 399,915 Texans have an ASD diagnosis, including 130,316 children below 22 years of age."[21] The number of children with ASD has certainly risen since 2014, and there can be no doubt that a large percentage of those children are Texas Medicaid beneficiaries and have a medical need for ABA. Indeed, according to the CDC, 1 in 54 children have ASD, which is about 1.8%.[22] In October 2020, Texas Medicaid claimed there were 3,427,519 Texans under the age of 21 with Medicaid,[23] which means that there are currently about 60,000 children with Medicaid and ASD in Texas.

Request for assistance and intervention

For the reasons set forth above, TRLA and DRTX, as well as the other advocacy groups who have joined this filing, request that CMS compel Texas Medicaid to comply with the EPSDT provisions of the Medicaid Act and CMS's guidance by covering IBI-ABA when medically necessary. As CMS has previously found, "The goal of EPSDT is to assure that individual children get the health care they need when they need it—the right care to the right child at the right time in the right setting."[24] Texas is falling far short of that goal. CMS should require Texas Medicaid to promptly engage in corrective action by developing and implementing coverage for, and timely providing, medically necessary IBI-ABA through its EPSDT benefit.

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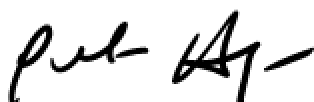
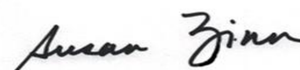
[21] http://www.dars.state.tx.us/autism/AutismReport2014/spectrum.html
[22] www.cdc.gov/ncbddd/autism/data.html
[23] https://hhs.texas.gov/about-hhs/records-statistics/data-statistics/healthcare-statistics
[24] "Centers for Medicare & Medicaid Services, *EPSDT-A Guide for States: Coverage in the Medicaid Benefit for Children and Adolescents,* 1 (June 2014), https://www.medicaid.gov/sites/default/files/2019-12/epsdt_coverage_guide.pdf.

In issuing its permanent injunction, the court in *Garrido* recognized that it was imperative that children with ASD in Florida "receive ABA immediately to prevent irreversible harm to these children's health and development." *Garrido*, 864 F.Supp.2d at 1327. Children with ASD in Texas will suffer similar irreversible harm if Texas Medicaid is permitted to continue to deny such children medically necessary IBI-ABA.

Thank you for your time and consideration of this issue. We would appreciate CMS setting up a time to meet with us to discuss our concerns in more detail. You can reach us at the contact information listed below.

Respectfully submitted,





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Disability Rights Texas
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phofer@drtx.org

Susan Zinn
Staff Attorney
Texas RioGrande Legal Aid
210.212.3710
Szinn@trla.org

Together with:

The Autism Society of Texas (AST) works to improve the quality of life for all Texans with autism by offering innovative, person-centered support to people impacted by autism and their families. Autism is a lifelong developmental disability that affects 1 in 54 Texans, as well as their parents, caregivers and friends. We offer assistance through a myriad of services and programs related to advocacy, recreation, education and support. We work in partnership with our community, seeking input from individuals with autism to advise our decision-making and offering comprehensive education and training so that communities may become more inclusive.

The Council of Autism Service Providers (CASP) is a non-profit association of organizations committed to providing evidence-based care, e.g., applied behavior analysis (ABA), to individuals with autism. CASP represents the autism provider community to the nation at large, including government, payers, and the general public. We serve as a force for change, providing information and education and promoting standards that enhance quality.

The Autism Legal Resource Center, LLC (ALRC) is a national law and consulting firm serving individuals with autism and their families and autism healthcare providers, associations and other stakeholders seeking access to autism treatment. The ALRC has worked on Medicaid EPSDT coverage of Applied Behavior Analysis in states across the country and provides trainings and workshops to professionals and community groups and information and analysis to state Medicaid agencies and state legislatures on issues impacting the autism community.

The National Autism Law Center (NALC) is a nonprofit advocacy organization dedicated to enforcing and expanding the legal rights of individuals on the autism spectrum and serving as a resource for such individuals and their families, as well as the service providers and attorneys who support them.

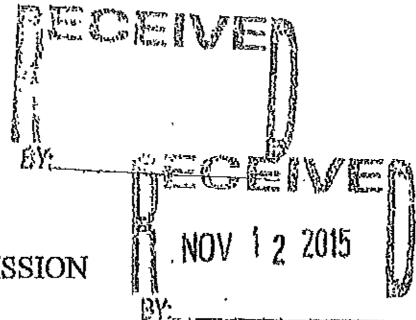
Founded in 1978 by people with disabilities, the **Coalition of Texans with Disabilities (CTD)** is a statewide cross-disability non-profit organization. Its mission is to ensure that people with disabilities may live, learn, work, play and participate fully in their community of choice.

Protect Texas Fragile Kids (PTFK) is a nonprofit organization founded and run by parents of medically fragile Texas children. PTFK's stated mission is to give a voice to Texas' most fragile citizens; to inform, educate, and support families of children with disabilities; to fight for what is right for children with special medical needs and disabilities; to champion public policy which supports and protects the well-being of children with disabilities and complex medical needs; to monitor existing and proposed legislation impacting children with disabilities; and to empower families with children who have disabilities and complex medical needs to connect with elected officials to promote understanding of this life.

Family to Family Network creates success for children/youth with disabilities by empowering their families with information, training, referrals and support as they navigate the complex education, health care and social service systems.

Texas Parent to Parent provides support, information and education to families of children and adults with disabilities, chronic and mental health conditions and other health needs.

cc: Cecile Erwin Young, Executive Commissioner, Texas Health and Human Services Commission
Stephanie Stephens, Texas Medicaid Director, Texas Health and Human Services Commission



TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHRIS TRAYLOR
EXECUTIVE COMMISSIONER

November 5, 2015

Peter Hofer
Disability Rights Texas
2222 W. Braker Lane
Austin, Texas 78758

Dear Mr. Hofer:

Thank you for your September 28 and September 30, 2015, letters to Kay Ghahremani requesting a list of Medicaid Applied Behavior Analysis (ABA) providers in Houston for Disability Rights Texas client [redacted] and further inquiring about ABA coverage in Texas Medicaid. As the new Associate Commissioner for Medicaid and CHIP, I am responding to your inquiry.

With respect to [redacted] you describe how he has been diagnosed with Autism Spectrum Disorder (ASD), among other diagnoses, and that his neurologist has ordered ABA services. You state that "As a Medicaid beneficiary under the age of 21, [redacted] is legally entitled to all medically necessary ASD-related services, including ABA therapy, through the EPSDT benefit." You support this statement by citing guidance provided by the Centers for Medicare and Medicaid Services (CMS) in an Informational Bulletin dated July 7, 2014. You further request that your client receive a list of Medicaid ABA providers in Houston.

In response to your contention that the July 2014 CMS guidance requires that HHSC provide ABA to your client, Texas Medicaid respectfully must disagree with your conclusion. On September 24, 2014, CMS issued a Frequently Asked Questions (FAQ) clarification to the July 2014 Informational Bulletin. The FAQ specifically states that CMS has not mandated ABA services for children under 21 with ASD. The fact that CMS is not mandating coverage of ABA underpins my collective response to the questions you posed in your letters.

The September 2014 CMS FAQ states: "Applied Behavior Analysis (ABA) is one treatment modality for ASD. CMS is not endorsing or requiring any particular treatment modality for ASD. State Medicaid agencies are responsible for determining what services are medically necessary for eligible individuals." In response to this guidance, Texas Medicaid analyzed services available to clients with ASD. Texas Medicaid currently provides medically-necessary services to children with ASD, such as physical, occupational, and speech therapy and nutrition counseling. The providers of children seeking medically necessary services for ASD should follow the procedures detailed in the

EXHIBIT A

Texas Medicaid Provider Procedures Manual for clients who are in traditional Medicaid. For managed care clients, providers should follow the processes detailed by the client's managed care organization.

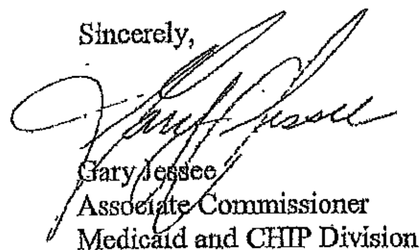
Several of your questions pertain to development of policies and rules specifically related to ASD. It is not typical practice for HHSC to promulgate rules relating to specific conditions. The services clients with ASD currently access also are available to clients with medical necessity who do not have ASD; therefore, it is not the agency's intent to promulgate specific rules related to ASD.

With respect to ABA, it is my utmost priority to safeguard the health of the clients Texas Medicaid serves. ABA is not currently a defined benefit in the Texas Medicaid program. When the state evaluates new benefits, Texas Medicaid must ascertain if medical evidence supports the efficacy of an intervention. The state Medicaid agency also must evaluate service providers and the appropriate provider structure for safe and effective oversight of services.

In Texas, the Medicaid agency must have budget authority granted by the legislature and approved by the Legislative Budget Board to cover new services with potentially extensive costs that do not have associated appropriations. If HHSC were to receive appropriations to establish an intensive behavior therapy benefit, the benefit would encompass findings of clinical studies on intensive behavior therapy as a practice and assess how to ensure client safety, given that behavior analysts are not licensed in this state. The Texas legislature considered, but did not pass, legislation that would have established licensure for behavior analysts (House Bill 2703, 84th Legislature, Regular Session, 2015). As with all new benefits, should HHSC be directed by the Legislature to offer intensive behavior therapy in Medicaid, there would be opportunities publicized for stakeholders to comment on the benefit's development.

While we are unable to provide a list of Medicaid ABA providers in response to your request, HHSC will have a case manager contact your client's legally authorized representative to identify if there are other services that are available to [REDACTED] that he is not accessing. Thank you for your letter and request. If you have any other questions or need any more information, Carisa Magee, a Special Policy Advisor in the Medicaid/CHIP Division, serves as lead in this matter. She can be reached at (512) 707-6106 or by email at Carisa.Magee@hhsc.state.tx.us.

Sincerely,



Gary Jessee
Associate Commissioner
Medicaid and CHIP Division

GJ:cm

EXHIBIT A

2222 W. Braker Lane
Austin, Texas 78758
MAIN OFFICE 512.454.4816
TOLL-FREE 800.315.3876
FAX 512.454.3999

Via U.S. Mail and Facsimile 512.730.7453

September 28, 2015

Ms. Kay Ghahremani
State Medicaid Director
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

Re: [redacted]; Medicaid No. [redacted]; ABA services

Dear Ms. Ghahremani:

Disability Rights Texas represents [redacted], a two-year old Medicaid beneficiary who has a medical need for Applied Behavior Analysis (ABA) services. We write on [redacted]'s behalf to obtain a list of Medicaid ABA providers in Houston.

[redacted] has been diagnosed with Autism Spectrum Disorder, Encephalopathy, and other neurological disorders. [redacted]'s neurologist, Dr. [redacted], who is the Director of the Autism Center at the Children's Learning Institute at the University of Texas Health Science Center at Houston, has ordered ABA services for [redacted], but [redacted] cannot find a Medicaid ABA provider in Houston, despite it being the largest city in Texas and the fourth largest in the country.

As you know, Texas Medicaid must provide medically necessary services, such as ABA, for the treatment of Autism Spectrum Disorder (ASD). Over 14 months ago, on July 7, 2014, CMS issued an Informational Bulletin informing state Medicaid programs that ASD-related services should be provided through the Medicaid state plan for EPSDT-age individuals.[1] As CMS noted, the "goal of EPSDT is to assure that children get the health care they need, when they need it—the right care to the right child at the right time in the right setting." CMS added that "the role of states is to make sure that all covered services are available as well as to assure that families of enrolled children, including children with ASD, are aware of and have access to a broad range of services to meet the child's needs. . . ." So that N[redacted] can be aware of and access the medically necessary ABA services he needs to treat his ASD, please provide a list of Medicaid ABA providers in Houston.

In addition to a list of ABA providers in Houston, we also request information on the status of Texas Medicaid's ABA coverage:

Precisely how do ABA providers get credentialed by Texas Medicaid?

---

[1] Federal courts have likewise held that ABA is a covered service under EPSDT. *See, e.g., Garrido v. Dudek*, 731 F.3d 1152 (11th Cir. 2013); *Chisholm ex rel. CC, MC v. Kliebert*, 2013 WL 3807990 at *22 (E.D. La. July 18, 2013). In addition, Louisiana and Washington, for example, amended their state Medicaid plan in 2014 to include coverage and reimbursement for ABA services.

EXHIBIT B

Is there a way to expedite the process for providers to be credentialed?
When will interim and final policies for ASD-related services be published?
When will rules for ASD-related services be promulgated?
When will stakeholders be invited to join in the process of establishing policies and rules related to ASD-related services?
How do beneficiaries under the age of 21 get ASD-related services (including ABA services) now?
Who should a beneficiary seeking ASD-related services, including ABA, contact at Texas Medicaid to access the medically necessary service?

Thank you for your time and consideration in this important matter. I look forward to the Commission's response by October 9, 2015.

Sincerely,

Attorney for [redacted]

cc: Laurie Van Hoose, HHSC (via email)

EXHIBIT B

2222 W. Braker Lane
Austin, Texas 78758
MAIN OFFICE 512.454.4816
TOLL-FREE 800.315.3876
FAX 512.454.3999

Via U.S. Mail and Facsimile 512.730.7453

September 30, 2015

Ms. Kay Ghahremani
State Medicaid Director
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

Re: [redacted]; Medicaid No. [redacted]; ABA services

Dear Ms. Ghahremani:

Two days ago I sent you a letter requesting a list of Medicaid ABA providers in Houston for my client, two-year old [redacted], who has Autism Spectrum Disorder.

As a Medicaid beneficiary under the age of 21, [redacted] is legally entitled to all medically necessary ASD-related services, including ABA therapy, through the EPSDT benefit. CMS and federal case law have confirmed that ASD-related services, including ABA therapy, are to be provided through the Medicaid state plan for EPSDT-age individuals.

As such, I was surprised to receive a call from Joshua Haley with TMHP, who, in a voicemail, informed me that, "Texas Medicaid does not enroll ABA providers," and that I should contact the Department of Assistive and Rehabilitative Services (DARS). Mr. Haley also emailed me a list of service providers in the DARS Autism pilot program, which listed the Harris County MHMRA as the only ABA provider in Houston. To be clear, I was not and am not requesting a list of non-Medicaid ABA providers through a DARS' pilot program, but rather Medicaid ABA providers. As for Mr. Haley's statement that Texas Medicaid does not enroll ABA providers, it conflicts with my understanding that Texas Medicaid has indeed enrolled ABA providers, at least using "single-case agreements." Also, are any of the providers in the DARS' program Medicaid providers?

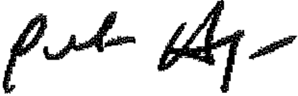
Besides a list of Medicaid ABA providers in Houston, I also await answers to the other questions presented in my September 28 letter. Those other questions, again, are:

Precisely how do ABA providers get credentialed by Texas Medicaid?
Is there a way to expedite the process for providers to be credentialed?
When will interim and final policies for ASD-related services be published?
When will rules for ASD-related services be promulgated?
When will stakeholders be invited to join in the process of establishing policies and rules related to ASD-related services?
How do beneficiaries under the age of 21 get ASD-related services (including ABA services) now?
Who should a beneficiary seeking ASD-related services, including ABA, contact at Texas Medicaid to access the medically necessary service?

EXHIBIT C

I look forward to the Commission's response by October 9, 2015.

Sincerely,



Attorney for [redacted]

cc: Laurie Van Hoose, HHSC (via email)

EXHIBIT C

TEXAS
Health and Human
Services

Texas Health and Human Services Commission

Cecile Erwin Young
Executive Commissioner

August 21, 2020

Ms. Sarah Hicks
Budget and Policy Director
Office of the Governor
1100 San Jacinto Blvd., 4th Floor
Austin, Texas 78701

Mr. Jerry McGinty
Director
Legislative Budget Board
1501 North Congress Ave., 5th Floor
Austin, Texas 78701

Subject: Request for Approval of a Rate for behavioral intervention, for the treatment of autism spectrum disorder. (HHSC-2020-A-641)

Dear Ms. Hicks and Mr. McGinty:

In accordance with the 2020-21 General Appropriations Act, House Bill (H.B.) 1, 86th Legislature, Regular Session, 2019 (Article II, Special Provisions Relating to Health and Human Services Agencies, Section 14(d)), the Health and Human Services Commission (HHSC) is requesting approval of the establishment of reimbursement rates for behavioral intervention for people with Autism.

H.B. 1, (Article II, Health and Human Services Commission, Section 32) authorizes HHSC to expend funds appropriated in Strategy A.1.5., Children, to reimburse for provision of intensive behavioral intervention (IBI) services, but it does not make a specific appropriation for implementation of the services. The estimated cost of implementing rates for these services will exceed $500,000 general revenue. H.B. 1 (Article II, Special Provisions Relating to All Health and Human Services Agencies, Section 14(d)) prohibits HHSC from "implementing a rate that would result in expenditures that exceed, in any fiscal year, the amounts appropriated."

Therefore, HHSC is requesting approval to implement reimbursement rates and make expenditures that exceed the appropriations from Strategy A.1.5. If approved, we estimate that the estimated appropriations shortfall in that strategy will increase by $7,874,619 General Revenue ($20,859,918 All Funds) for the remainder of the 2020-21 biennium. The annual cost for treatment for a full fiscal year once the services are fully implemented and utilized at expected levels is approximately $101,502,021 GR ($263,299,666 AF), which results in a biennial cost of approximately $198,998,113 GR ($516,207,817 AF).

EXHIBIT D

Background

Autism spectrum disorder (ASD) is a developmental disability that can cause significant social, communication, and behavioral challenges. People with ASD may repeat certain behaviors and not want change in their daily activities. Many people with ASD also have different ways of learning, paying attention, or reacting. Signs of ASD begin during early childhood and typically last throughout a person's life.

Behavior analysis is the scientific study of the principles of learning and behavior, specifically about how behavior affects and is affected by past and current environmental events in conjunction with biological variables. Applied behavior analysis (ABA) refers to the application of principles of behavior analysis by a provider, such as a licensed and certified behavior analyst, trained in this intervention. This treatment modality targets the core deficits of ASD: restricted, repetitive patterns of behaviors, activities, or interests and persistent difficulties with social communication and social interaction.

The intervention is designed to reduce in frequency and intensity as behavior skills are generalized into natural contexts. The level and intensity of services should be driven by the child's needs.

Proposed Rates

Rates will be established for seven reimbursable procedure codes. The primary utilization is anticipated to be associated with procedure code 97153, which is billed for the adaptive behavior treatment by protocol as performed by a Registered Behavior Technician. The full list of proposed reimbursement rates can be found in Attachment 1.

Cost Estimate

Due to an estimated implementation date of March 1, 2021, and estimated ramp up in utilization, we anticipate that the cost of implementing the rates in the first years will be less than the annual cost in future years. Table 1 identifies the estimated cost of implementation by fiscal year with no cost offsets.

EXHIBIT D

Table 1. Cost of Implementation by Fiscal Year

	SFY 2021[1]	SFY 2022	SFY 2023	SFY 2024	SFY 2025
Estimated Monthly Utilizers	1,622	3,617	8,255	8,951	9,098
Cost, GR	$8,114,264	$36,668,918	$85,866,724	$97,496,092	$101,502,021
Cost, FF	$13,380,475	$58,525,572	$136,874,454	$155,412,059	$161,797,644
Cost, AF	**$21,494,739**	**$95,194,490**	**$222,741,179**	**$252,908,151**	**$263,299,666**

The annual cost for treatment for a full fiscal year once the rates are fully implemented and utilized at expected levels is approximately $101,502,021 GR ($263,299,666 AF), which results in a biennial cost of approximately $198,998,113 GR ($516,207,817 AF).[2]

Cost Offsets

The services are targeted to individuals with an autism diagnosis and can be paired with other medical and behavioral interventions. HHSC anticipates that there will be cost offsets as defined below in Table 2.

Table 2. Client Services Cost Savings (Existing Costs)

	SFY 2021[3]	SFY 2022	SFY 2023	SFY 2024	SFY 2025
Cost Savings, GR	$(239,645)	$(1,604,748)	$(1,686,298)	$(1,770,613)	$(1,859,144)
Cost Savings, FF	$(395,176)	$(2,561,265)	$(2,688,016)	$(2,822,417)	$(2,963,538)
Cost Savings, AF	**$(634,821)**	**$(4,166,014)**	**$(4,374,314)**	**$(4,593,030)**	**$(4,822,682)**

[1] Assumes Effective Date of March 1, 2021

[2] This fiscal impact assumes that the indications and eligible diagnoses will not change from the planned policy guidance. HHSC anticipates that actual utilization and costs may vary from the estimated fiscal impact but provides this estimate as the best available estimate at this time.

[3] Assumes Effective Date of March 1, 2021

EXHIBIT D

The net fiscal impact can be found in Attachment 2. The services will not be included in the capitation rates for managed care organizations (MCOs) as HHSC plans to reimburse MCOs through a non-risk reimbursement model.

Please let us know if you have any questions or need additional information. Victoria Grady, Director of Provider Finance, serves as the lead staff on this matter and can be reached by telephone at (512) 730-7450 or by email at victoria.grady@hhsc.state.tx.us.

Sincerely,

Trey Wood
Chief Financial Officer

Attachments

cc: Mr. Rob Coleman, Office of the Comptroller of Public Accounts

EXHIBIT D

Autism Services - Rates for Proposal at Public Rate Hearing

TOS*	Procedure Code	Long Description	Modifier	Age Range	Provider Type/ Provider Specialty	Non-Facility (N)/ Facility (F)	CURRENT: Current Medicaid Fee	CURRENT: Current Adjusted Medicaid Fee	For Proposal at Rate Hearing: Proposed Medicaid Fee	For Proposal at Rate Hearing: Proposed Adjusted Medicaid Fee	Percent Change from Current Medicaid Fee
1	97151	behavior identification assessment, administered by a physician or other qualified health care professional, each 15 minutes of the physician's or other qualified health care professional's time face-to-face with patient and/or guardian(s)/caregiver(s) administering assessments and discussing findings and recommendations, and non-face-to-face analyzing past data, scoring/interpreting the assessment, and preparing the report/treatment plan	HO	0-20			$0.00	$0.00	$24.71	$24.71	100.00%
1	97153	adaptive behavior treatment by protocol, administered by technician under the direction of a physician or other qualified health care professional, face-to-face with one patient, each 15 minutes		0-20			$0.00	$0.00	$7.58	$7.58	100.00%
1	97154	group adaptive behavior treatment by protocol, administered by technician under the direction of a physician or other qualified health care professional, face-to-face with two or more patients, each 15 minutes		0-20			$0.00	$0.00	$1.26	$1.26	100.00%
1	97155	adaptive behavior treatment with protocol modification, administered by physician or other qualified health care professional, which may include simultaneous direction of technician, face-to-facewith one patient, each 15 minutes	HO	0-20			$0.00	$0.00	$21.06	$21.06	100.00%
1	97155	adaptive behavior treatment with protocol modification, administered by physician or other qualified health care professional, which may include simultaneous direction of technician, face-to-facewith one patient, each 15 minutes	HM	0-20			$0.00	$0.00	$16.85	$16.85	100.00%
1	97156	family adaptive behavior treatment guidance, administered by physician or other qualified health care professional (with or without the patient present), face-to-face with guardian(s)/caregiver(s), each 15 minutes	HO	0-20			$0.00	$0.00	$20.00	$20.00	100.00%
1	97156	family adaptive behavior treatment guidance, administered by physician or other qualified health care professional (with or without the patient present), face-to-face with guardian(s)/caregiver(s), each 15 minutes	HM	0-20			$0.00	$0.00	$16.00	$16.00	100.00%
1	97158	group adaptive behavior treatment with protocol modification, administered by physician or other qualified health care professional, face-to-face with multiple patients, each 15 minutes	HO	0-20			$0.00	$0.00	$3.51	$3.51	100.00%
1	97158	group adaptive behavior treatment with protocol modification, administered by physician or other qualified health care professional, face-to-face with multiple patients, each 15 minutes	HM	0-20			$0.00	$0.00	$2.81	$2.81	100.00%
1	99366	Medical team conference with interdisciplinary team of health care professionals, face-to-face with patient and/or family, 30 minutes or more, participation by nonphysician qualified health care professional		0-20	03, 10, 11, 16, 18, 22/70, 31, 34, 35, 44, 50, 66, 86, 97, 98	N	$0.00	$0.00	$9.54	$9.54	100.00%
1	99366	Medical team conference with interdisciplinary team of health care professionals, face-to-face with patient and/or family, 30 minutes or more, participation by nonphysician qualified health care professional		0-20	03, 10, 11, 16, 18, 22/70, 31, 34, 35, 44, 50, 60, 61, 62, 65, 66, 86, 97, 98	F	$0.00	$0.00	$8.98	$8.98	100.00%

*Type of Service (TOS)	
1	*Medical Services*
**RVU	Relative Value Unit
Modifier	
HO	Licensed behavior analyst
HM	Licensed assistant behavioral analyst
HN	Behavior technician
Provider Type / Provider Specialty	
03	COUNTY INDIGENT HEALTH CARE PROGRAM
10	PHYSICIAN ASST/NURSE PRACT/CLINICAL NURSE SPEC
11	EARLY CHILDHOOD INTERVENTION
16	LICENSED PROFESSIONAL COUNSELOR
18	LICENSED CLINICAL SOCIAL WORKER (LCSW)
22/70	CLINIC/GROUP PRACTICE
31	PSYCHOLOGIST
34	PHYSICAL THERAPIST
35	OCCUPATIONAL THERAPIST
44	HOME HEALTH AGENCY
50	CCP PROVIDER
60	HOSPITAL - LONG TERM, LIMITED, OR SPECIALIZED CARE
61	HOSPITAL - PRIVATE FULL CARE
62	HOSPITAL - PRIVATE, O/P SERVICE/EMERGENCY CARE ONLY
65	REHABILITATION CENTERS
66	TEXAS HEALTH STEPS - MEDICAL
86	LICENSED BEHAVIOR ANALYST
97	PSYCHOLOGY GROUP
98	PHYSICAL THERAPY GROUP

EXHIBIT D

Medicaid Applied Behavior Analysis Services

	Begins March 2021 **SFY 2021**	**SFY 2022**	**SFY 2023**	**SFY 2024**	**SFY 2025**
Client Services Cost					
Estimated Monthly Utilizers	1,622	3,617	8,255	8,951	9,098
New Benefit Cost, AF	$ 21,494,739	$ 95,194,490	$ 222,741,179	$ 252,908,151	$263,299,666
New Benefit Cost, GR	**$ 8,114,264**	**$ 36,668,918**	**$ 85,866,724**	**$ 97,496,092**	**$101,502,021**
Client Services (Savings)					
Therapy Offsets, AF	$ (560,686)	$ (3,679,500)	$ (3,863,475)	$ (4,056,649)	$ (4,259,481)
Therapy Offsets, GR	$ (211,659)	$ (1,417,343)	$ (1,489,370)	$ (1,563,838)	$ (1,642,030)
Drug Savings, AF	$ (74,135)	$ (486,514)	$ (510,839)	$ (536,381)	$ (563,201)
Drug Savings, GR	$ (27,986)	$ (187,405)	$ (196,929)	$ (206,775)	$ (217,114)
Client Service (Savings), AF	$ (634,821)	$ (4,166,014)	$ (4,374,314)	$ (4,593,030)	$ (4,822,682)
Client Service (Savings), GR	**$ (239,645)**	**$ (1,604,748)**	**$ (1,686,298)**	**$ (1,770,613)**	**$ (1,859,144)**
Net Cost/(Savings)					
Client Services Cost/(Savings), AF	$ 20,859,918	$ 91,028,476	$ 218,366,864	$ 248,315,121	$258,476,984
Client Services Cost/(Savings), GR	$ 7,874,619	$ 35,064,169	$ 84,180,426	$ 95,725,479	$ 99,642,877
Net AF Cost/(Savings) to HHSC	$ 20,859,918	$ 91,028,476	$ 218,366,864	$ 248,315,121	$258,476,984
Net GR Cost/(Savings) to HHSC	**$ 7,874,619**	**$ 35,064,169**	**$ 84,180,426**	**$ 95,725,479**	**$ 99,642,877**
Additional Premium Tax Revenue	$ -	$ -	$ -	$ (2,869,773)	$ (7,363,540)
Net GR Cost/(Savings) to State	**$ 7,874,619**	**$ 35,064,169**	**$ 84,180,426**	**$ 92,855,706**	**$ 92,279,337**

Assumes effective date of March 1, 2021.

Additional client service expenditures due to addition of Applied Behavior Analysis services for clients with Autism Spectrum Disorder (ASD).

Population potentially eligible for services based on clients with more than one ASD diagnosis during FY2018, using claims/encounters with diagnosis codes F840 or F845. Data provided by Center for Analytics and Decision Support.

Population take-up rate assumption of 8% in first year and 25% in year 2 (monthly ramp up included for benefit year 1 and 2) forward based on experience from Michigan benefit implementation.

Service utilization rates for 3 age categories assume annual treatment of 45 weeks and duration of 2.5 years for age 2-6, 2 years for age 7-12, and 1 year for age 13-20 (younger children as higher utilizers). With hours and treatment assumptions as follows:

- Individual Treatment - age 2-6 @ 18 hours/week, age 7-12 @ 15 hours/week, age 13-20 @ 4 hours/week (85% attendance rate assumed for all ages)
- Group Treatment - age 2-6 @ 1 hour/week, age 7-12 @ 2 hours/week, age 13-20 @ 2 hours/week
- Family Treatment - age 2-6 @ 1 hour/week, age 7-12 @ 1 hour/week, age 13-20 @ 0.5 hours/week (90% attendance rate assumed for all ages)
- Assumes all ages receive 6 hour evaluation twice per year and 75% of clients will also receive medical team conference visit twice per year.
- Assumes 5% of the utilizing population will receive Maintenance of 3 individual hours per month after completion of ABA plan, still receive 2 evals and 1 conference visit per year.

Rates for ABA procedure codes used based on treatment setting and type as well as provider certification (licensed behavior analyst, licensed assistant behavior analyst, behavior technician) developed by Rate Analysis Dept.

Assumes carve-out of benefit from managed care until FY2024 due to experience needed for capitation development. However, variable admin of 5.75% included for MCO benefit coordination in year 1 forward. Risk margin and premium tax included for assumed carve-in FY2024 forward.

Premium tax revenue collected by the state included due to carve-in of services in managed care in FY2023, delay due to timing of payment and revenue collection schedule.

Assumptions provided by Medical Benefits staff and data analysis in conjunction with Center for Analytics and Decision Support and Rate Analysis.

2222 W. Braker Lane
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TOLL-FREE 800.315.3876
FAX 512.454.3999

Sent by FedEx

September 14, 2020

Ms. Sarah Hicks
Budget and Policy Director
Office of the Governor
1100 San Jacinto Blvd., 4th Floor
Austin, Texas 78701

Mr. Jerry McGinty
Director
Legislative Budget Board
1501 N. Congress Ave., 5th Floor
Austin, Texas 78701

Re: HHSC's August 21, 2020 Request for Approval of a Rate for Behavioral Intervention for the treatment of Autism Spectrum Disorder

Dear Ms. Hicks and Mr. McGinty:

During its 2019 session, the Texas Legislature adopted Rider 32 (Art. II of HB 1), which authorized HHSC to extend funds to reimburse for the provision intensive behavioral intervention services, which include applied behavioral analysis (ABA), thus making such services available to Medicaid beneficiaries under the age of 21 who are diagnosed with autism spectrum disorder (ASD). While Disability Rights Texas appreciates that the Legislature supported adding IBA/ABA as a covered service, ABA should have been available years ago. This is because ABA is part of the EPSDT Medicaid benefit for children and young adults under the age of 21 who have Medicaid. ABA meets the definition in 42 U.S.C. § 1396d(a)(13) of a preventative or rehabilitative service and it is an effective and significant treatment to prevent disability and restore developmental skills to children with ASD. Because ABA falls within the scope of 42 U.S.C. § 1396d(a)(13), Texas Medicaid simply lacks the discretion to deny coverage of ABA to Medicaid beneficiaries under the age of 21 who have a medical need for such therapy.

In its letter dated August 21, 2020, HHSC requests approval to implement reimbursement rates so that HHSC can begin implementation of the benefit on March 1, 2021. We are concerned that the reimbursement rates proposed by HHSC, however, are too low to provide an adequate network of providers to meet the expected medical needs of beneficiaries under 21 who have ASD.

For example, pursuant to its August 21 letter, HHSC proposed a reimbursement rate for treatment by a Behavior Technician at $30.32 an hour, which we understand is well below the typical average of around $58 per hour. With Medicaid beneficiaries competing for providers with children covered by private

EXHIBIT E

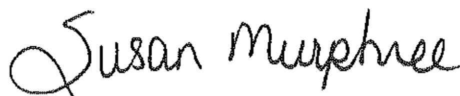
insurance, the difference in reimbursement rates would most likely result in Medicaid beneficiaries being unable to find providers at all, or at least without lengthy waits, during which their conditions would worsen.

A second concern is that it appears that HHSC's assumptions of expected future cost savings may be too low given that ABA, when provided early and in the appropriate amount, duration and scope, can result in long-term benefits to individuals and off-set or save future costs for Texas. We ask that the future cost savings assumptions made by HHSC be reviewed and analyzed.

Beneficiaries with ASD urgently need access to a functioning ABA benefit. In 2019, HHSC stated that the ABA benefit would be up and running by April 2020. It circulated draft policies for the benefit, and received numerous comments in response, in October 2019. Now, almost a year later, HHSC is stating that it now intends to implement the benefit on March 1, 2021. It is long overdue.

We ask that you approve the initial request and direct HHSC to avoid further delay in moving forward, while carefully scrutinizing HHSC's proposal. HHSC should be directed to quickly hold a rates hearing and adopt final rates necessary to create a sufficient network of providers that results in access to ABA services.

Respectfully submitted,



Susan Murphree
Sr. Policy Specialist
Disability Rights Texas
smurphree@drtx.org

ccs: Cecile Erwin Young, Health and Human Services Executive Commissioner

EXHIBIT E