

October 3, 2012

Ronald R. Ross, Ph.D., CPM  
Executive Director  
State Board of Psychology  
77 South High Street, Suite 1830  
Columbus, Ohio 43215-6108

SYLLABUS:

2012-033

1. A person who renders or offers to render applied behavior analysis in the treatment of an individual with an autism spectrum disorder is (1) engaged in “the practice of psychology,” as defined in R.C. 4732.01(B), and (2) required to be licensed by the State Board of Psychology when he provides the treatment for compensation or other personal gain unless he is exempt from licensure under R.C. 4732.22 or performs the treatment in accordance with R.C. 4732.23.
2. R.C. 4732.06 authorizes the State Board of Psychology to adopt an administrative rule that identifies applied behavior analysis as a psychological procedure when used in the treatment of an individual with an autism spectrum disorder.
3. Pursuant to R.C. 4732.06 and R.C. 4732.23(C), the State Board of Psychology, in the reasonable exercise of its discretion, may adopt an administrative rule determining that applied behavior analysis is a serious hazard to mental health requiring professional expertise in psychology when used in the treatment of an individual with an autism spectrum disorder.



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OPINION NO. 2012-033

Ronald R. Ross, Ph.D., CPM  
Executive Director  
State Board of Psychology  
77 South High Street, Suite 1830  
Columbus, Ohio 43215-6108

Dear Executive Director Ross:

You have requested an opinion concerning the authority of the State Board of Psychology (Board) to require a person who treats an individual with an autism spectrum disorder (ASD) to be licensed by the Board.<sup>1</sup> Your particular question is whether the Board may adopt administrative rules specifying that the use of applied behavior analysis (ABA) in the treatment of an individual with an ASD constitutes “the practice of psychology,” as defined in R.C. 4732.01(B).

### **Background on Applied Behavior Analysis**

Applied behavior analysis is described as “the science in which tactics derived from the principles of behavior are applied systematically to improve socially significant behavior and

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<sup>1</sup> Autism spectrum disorder (ASD), or more generally autism, is a blanket term that refers to pervasive developmental disorders that are characterized by sustained impairments in social interaction, sustained impairments in verbal and nonverbal communication skills, and restricted, repetitive, or stereotyped patterns of behaviors and interests. *See Handbook of Applied Behavior Analysis* 402 (Wayne W. Fisher et al. eds., 2011); *2 Handbook of Clinical Psychology* 904-22 (Michel Hersen & Alan M. Gross eds., 2008); Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders, Text Revision* 69-84 (4th ed. 2000); Pauline A. Filipek et al., *The Screening and Diagnosis of Autistic Spectrum Disorders*, 29 J. Autism and Developmental Disorders 439, 439-49 (1999). Specific disorders included under the term ASD include Autistic Disorder, Rett’s Disorder, Childhood Disintegrative Disorder, Asperger’s Disorder, and Pervasive Developmental Disorder Not Otherwise Specified. *See Handbook of Applied Behavior Analysis* 402 (Wayne W. Fisher et al. eds., 2011); *2 Handbook of Clinical Psychology* 904-22 (Michel Hersen & Alan M. Gross eds., 2008); Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders, Text Revision* 69-84 (4th ed. 2000); Pauline A. Filipek et al., *The Screening and Diagnosis of Autistic Spectrum Disorders*, 29 J. Autism and Developmental Disorders 439, 439-49 (1999).

experimentation is used to identify the variables responsible for behavior change.” John O. Cooper et al., *Applied Behavior Analysis* 20 (2d ed. 2007). The six key components of ABA are as follows:

First, the practice of [ABA] is guided by the attitudes and methods of scientific inquiry. Second, all behavior change procedures are described and implemented in a systematic, technological manner. Third, not any means of changing behavior qualifies as [ABA]: Only those procedures conceptually derived from the basic principles of behavior are circumscribed by the field. Fourth, the focus of [ABA] is socially significant behavior. The fifth and sixth parts of the definition specify the twin goals of [ABA]: improvement and understanding. [ABA] seeks to make meaningful improvement in important behavior and to produce an analysis of the factors responsible for that improvement.

*Id.*; see 1 *Handbook of Clinical Psychology* 161-70 (Michel Hersen & Alan M. Gross eds., 2008); 1 *Encyclopedia of Psychology* 218-20 (Alan E. Kazdin ed., 2000).

Applied behavior analysis involves the application of behavioral principles to produce socially significant change in human behavior. See 1 *Handbook of Clinical Psychology* 161 (Michel Hersen & Alan M. Gross eds., 2008); 2 *Handbook of Clinical Psychology* 231 (Michel Hersen & Alan M. Gross eds., 2008); 1 *Encyclopedia of Psychology* 218 (Alan E. Kazdin ed., 2000); David A. Wilder et al., *Applying Behavior Analysis in Organizations: Organizational Behavior Management*, 6 *Psychological Services* 202, 202 (2009); see also *Berge v. United States*, Civil Action No. 10-0373 (RBW), 2012 U.S. Dist. LEXIS 104401, at \*\*73-74 (D.D.C. July 26, 2012); *McHenry v. Pacificsource Health Plans*, 679 F. Supp. 2d 1226, 1231 (D. Or. 2010). It generally “focuses on ‘the use of rewards or reinforcement to encourage desired [behaviors] and the elimination or reduction of unwanted [behaviors] by removing their positive consequences by means of’” punishment. *Berge v. United States*, 2012 U.S. Dist. LEXIS 104401, at \*74, quoting Kostas Francis, *Autism Interventions: A Critical Update*, 47 *Developmental Med. & Child Neurology* 493, 495 (2005); see also *McHenry v. Pacificsource Health Plans*, 679 F. Supp. 2d at 1231.

Applied behavior analysis “is used in a wide range of settings to address a wide range of problem behaviors,” including the treatment of mental disorders and specific behaviors in settings “ranging from psychiatric and medical hospitals, to schools, to businesses, to athletic training centers.” 1 *Handbook of Clinical Psychology* 161 (Michel Hersen & Alan M. Gross eds., 2008); see 2 *Handbook of Clinical Psychology* 242-49 (Michel Hersen & Alan M. Gross eds., 2008). As explained in John O. Cooper et al., *Applied Behavior Analysis* 22 (2d ed. 2007):

Even an informal, cursory survey of the research published in [ABA] reveals studies investigating virtually the full range of socially significant human behavior from A to Z and almost everywhere in between: AIDS prevention ... conservation of natural resources ... education ... gerontology ... health and exercise ... industrial safety ... language acquisition ... littering ... medical procedures ... parenting ... seat-belt use ... sports ... and zoo management and care of animals[.]

### **Use of Applied Behavior Analysis in the Treatment of an Individual with an Autism Spectrum Disorder**

The Board's primary concern, as evidenced by your question, is the use of ABA as a treatment methodology for an ASD. It is generally understood that "there is no one treatment that has been shown to be universally effective in the full remediation of [an] ASD." 2 *Handbook of Clinical Psychology* 922 (Michel Hersen & Alan M. Gross eds., 2008); see *McHenry v. Pacificsource Health Plans*, 679 F. Supp. 2d at 1231. Research indicates, however, that ABA "is an effective treatment for remediating many of the behavioral deficits and excesses associated with an ASD." *Handbook of Applied Behavior Analysis* 404-05 (Wayne W. Fisher et al. eds., 2011); accord 2 *Handbook of Clinical Psychology* 923 (Michel Hersen & Alan M. Gross eds., 2008); see also *K.G. v. Dudek*, Case No. 11-20684-CIV, 2012 U.S. Dist. LEXIS 59579, at \*38 (S.D. Fla. Mar. 26, 2012) ("there exists in the medical and scientific literature a plethora of peer-reviewed meta-analyses, studies, and articles that clearly establish ABA is an effective and significant treatment to prevent disability and restore developmental skills to children with autism and [an] ASD"); *McHenry*, 679 F. Supp. 2d at 1232 ("multiple studies over the past two decades have confirmed [the] findings that ABA is generally beneficial to children diagnosed with [pervasive developmental disorders]").

According to your letter, when ABA is used to treat an individual with an ASD, the treatment may be provided by a technician or consultant. As explained further in your letter, in the field of ABA,

technicians are delivering the implementation of plans that they themselves do not develop, and are typically overseen by the ABA expert. The technicians often have no college degree or a bachelor's degree, and do not hold themselves out as anything more than aides to the family. It is not uncommon for the family members themselves to provide that aspect of the program, a model often employed in the homes of children with [an] ASD within which the parents are trained to implement behavior plans at home.

See also *Berge v. United States*, 2012 U.S. Dist. LEXIS 104401, at \*76 ("family members of an affected child become a core component of the [ABA] intervention because they must invest a substantial amount of time at home reinforcing the therapy so that the 'gains made by the child with his therapist are not lost'" (quoting *C.M. ex rel. J.M. v. Bd. of Educ. of Henderson County*, 85 F. Supp. 2d 574, 585 (W.D.N.C. 1999))); *McHenry v. Pacificsource Health Plans*, 679 F. Supp. 2d at 1232 ("[f]amily involvement in [ABA therapy] is a critical component, and it is common for parents to be trained in its methods to continue its application at home").

In contrast, consultants have a more predominant role in the ABA therapy process. As stated in your letter:

In the case of the ABA services about which the Board is concerned, a vastly more psychological protocol is involved. The term applied to the ABA expert is most often either "behavioral consultant" or "ABA consultant." The term itself implies a level of expertise and supervisory status not implied by the technicians on the front

line. The “consultants” conduct the assessments of the child, the environment, and the behaviors. They render opinions and conclusions about the psychological behavioral factors “causing” the problems to be targeted for intervention. They often render informal, or sometimes formal ... diagnoses such as Autism or Pervasive Developmental Disorder [Not Otherwise Specified]. These individuals create behavioral psychological interventions that manipulate the environmental factors and employ reinforcement or reward strategies. In their work to ameliorate the symptoms of [an] ASD through their interventions, they oversee the technicians and other “team” members and advise those paraprofessionals on the use of environmental manipulation and use of rewards.

In Ohio, a person who provides ABA therapy to an individual with an ASD is not required to be licensed as a technician or consultant by the state. However, in order for such therapy to be effective, it must be provided by a person who understands and is able to implement the tenets of ABA to improve human behavior. *See Berge v. United States*, 2012 U.S. Dist. LEXIS 104401, at \*75 (ABA therapy is a specialized intervention administered by a person formally trained in behavioral analysis); *McHenry v. Pacificsource Health Plans*, 679 F. Supp. 2d at 1232 (a “defining feature of ABA intervention is treatment directed by a professional with advanced formal training in behavioral analysis”); 2 *Handbook of Clinical Psychology* 923 (Michel Hersen & Alan M. Gross eds., 2008) (“[t]here are guidelines for selecting qualified behavior analysts that provide interventions for individuals with [an] ASD”).

The preeminent, national certifying body in the field of ABA is the Behavior Analyst Certification Board (BACB).<sup>2</sup> *See Berge v. United States*, 2012 U.S. Dist. LEXIS 104401, at \*75; *K.G. v. Dudek*, 2012 U.S. Dist. LEXIS 59579, at \*14 n.12; *McHenry v. Pacificsource Health Plans*, 679 F. Supp. 2d at 1232; *see also 2 Handbook of Clinical Psychology* 923 (Michel Hersen & Alan M. Gross eds., 2008) (the BACB “provides certification for behavior analysis practitioners”). The BACB certifies a person to practice as a Board Certified Behavioral Analyst (BCBA) or Board Certified Assistant Behavioral Analyst (BCaBA). To be certified as a BCBA, a person must (1) possess a master’s degree in an approved area, (2) meet certain training and experience requirements, and (3) pass the behavior analyst certification examination. *See* <http://www.bacb.com/index.php?page=1> (last visited Sept. 26, 2012); <http://www.bacb.com/index.php?page=158> (last visited Sept. 26, 2012); <http://www.bacb.com/index.php?page=69> (last visited Sept. 26, 2012). To be certified as a BCaBA, a person must (1) possess a bachelor’s degree in an approved area, (2) complete 135 hours of classroom instruction in certain content areas, (3) meet certain experience standards, and (4) pass the assistant behavior analyst certification examination. *See* <http://www.bacb.com/index.php?page=1> (last visited

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<sup>2</sup> The Behavior Analyst Certification Board (BACB) “is a nonprofit 501(c)(3) corporation established in 1998 to meet professional credentialing needs identified by behavior analysts, governments, and consumers of behavior analysis services. The BACB adheres to the national standards for boards that grant professional credentials.” *See* <http://www.bacb.com/index.php?page=1> (last visited Sept. 26, 2012).

Sept. 26, 2012); <http://www.bacb.com/index.php?page=52> (last visited Sept. 26, 2012); <http://www.bacb.com/index.php?page=68> (last visited Sept. 26, 2012).

The BACB is a private board with no authority to administer or enforce Ohio law. *See* note 2, *supra*. In addition, unless ABA therapy is being performed by a statutorily-licensed professional (such as a psychologist), the practice of ABA remains unregulated in Ohio. Thus, nothing in Ohio currently prevents a person from holding himself out as a “behavior analyst” (or some derivation thereof), rendering ABA services (or some derivation thereof), and charging excessive fees for those services.<sup>3</sup>

### **Meaning of the Term “the Practice of Psychology”**

Pursuant to R.C. Chapter 4732, the practice of psychology in Ohio is regulated by the State Board of Psychology. R.C. 4732.01(B) defines “the practice of psychology” as the “rendering or offering to render to individuals, groups, organizations, or the public any service involving the application of *psychological procedures* to assessment, diagnosis, prevention, treatment, or amelioration of psychological problems or emotional or mental disorders of individuals or groups; or to the assessment or improvement of psychological adjustment or functioning of individuals or groups, whether or not there is a diagnosable pre-existing psychological problem.” (Emphasis added.) For purposes of R.C. 4732.01(B), the term “[p]sychological procedures” is defined as follows:

“Psychological procedures” include but are not restricted to application of principles, methods, or procedures of understanding, predicting, or influencing behavior, such as the principles pertaining to learning, conditioning, perception, motivation, thinking, emotions, or interpersonal relationships; the methods or procedures of verbal interaction, interviewing, counseling, behavior modification, environmental manipulation, group process, psychological psychotherapy, or hypnosis; and the methods or procedures of administering or interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions, or motivation.

R.C. 4732.01(C). Hence, pursuant to R.C. 4732.01(B)-(C), a person is engaged in “the practice of psychology” when he renders or offers to render an individual a service involving the application of principles, methods, or procedures pertaining to understanding, predicting, or influencing behavior or methods or procedures of behavior modification to treat or ameliorate an individual’s psychological problems or emotional or mental disorders.

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<sup>3</sup> This opinion does not address whether the performance of applied behavior analysis (ABA) therapy by an unqualified individual constitutes common law fraud or violates Ohio’s Consumer Sales Practices Act, which is set forth in R.C. Chapter 1345.

As demonstrated above, existing legal authorities and scholarly literature have determined that ABA therapy involves the application of scientific principles and methodology to understand and influence the behavior of individuals when it is used to treat an individual with an ASD. See *Handbook of Applied Behavior Analysis* 402-14 (Wayne W. Fisher et al. eds., 2011); 1 *Handbook of Clinical Psychology* 161 (Michel Hersen & Alan M. Gross eds., 2008); 2 *Handbook of Clinical Psychology* 231, 904-29 (Michel Hersen & Alan M. Gross eds., 2008); 1 *Encyclopedia of Psychology* 218-20 (Alan E. Kazdin ed., 2000); David A. Wilder et al., *Applying Behavior Analysis in Organizations: Organizational Behavior Management*, 6 *Psychological Services* 202, 202 (2009); see also *Berge v. United States*, 2012 U.S. Dist. LEXIS 104401, at \*\*72-76; *McHenry v. Pacificsource Health Plans*, 679 F. Supp. 2d at 1231-32. In addition, ABA therapy when used to treat a person with an ASD involves methods or procedures of behavior modification to treat or ameliorate psychological problems or a mental disorder. See *Handbook of Applied Behavior Analysis* 402-14 (Wayne W. Fisher et al. eds., 2011); 1 *Handbook of Clinical Psychology* 161 (Michel Hersen & Alan M. Gross eds., 2008); Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Text Revision* 69-84 (4th ed. 2000); Pauline A. Filipek et al., *The Screening and Diagnosis of Autistic Spectrum Disorders*, 29 *J. Autism and Developmental Disorders* 439, 466 (1999); *K.G. v. Dudek*, 2012 U.S. Dist. LEXIS 59579, at \*\*9-12; *McHenry*, 679 F. Supp. 2d at 1230-32; *Parents League for Effective Autism Servs. v. Jones-Kelley*, 565 F. Supp. 2d 905, 907-08 (S.D. Ohio 2008), *aff'd*, 339 Fed. Appx. 542 (6th Cir. 2009).

Accordingly, when ABA therapy is used to treat a person with an ASD, the therapy involves the application of principles, methods, or procedures pertaining to understanding or influencing behavior or methods or procedures of behavior modification to treat or ameliorate an individual's psychological problems or an emotional or mental disorder and constitutes "the practice of psychology," as defined in R.C. 4732.01(B). This means that a person who renders or offers to render ABA in the treatment of an individual with an ASD is engaged in "the practice of psychology," as defined in R.C. 4732.01(B). See Pauline A. Filipek et al., *The Screening and Diagnosis of Autistic Spectrum Disorders*, 29 *J. Autism and Developmental Disorders* 439, 466 (1999) ("[b]ehavioral assessment by direct observation is used to address specific learning and behavior problems, to establish the functional or controlling relations of inappropriate behavior, to track behavioral progress, and to document the effectiveness of intervention. These are specialized psychological services, requiring appropriate training and experience"); see also *Handbook of Applied Behavior Analysis* 1 (Wayne W. Fisher et al. eds., 2011) ("[b]ehavior analysis began as a school or subfield within the discipline of psychology"); 2 *Handbook of Clinical Psychology* 228 (Michel Hersen & Alan M. Gross eds., 2008) ("[t]he perspective on which [ABA] is based is behaviorism. The term behaviorism can be used to refer to a philosophy of science or to a general approach to the scientific study of psychology").

### **Regulation of "the Practice of Psychology"**

Pursuant to R.C. 4732.21-23, a person who engages in "the practice of psychology," as defined in R.C. 4732.01(B), by rendering or offering to render ABA in the treatment of an individual with an ASD for compensation or other personal gain is required to be licensed by the Board unless he is exempt from licensure under R.C. 4732.22 or performs the treatment in accordance with R.C.

4732.23. *See* R.C. 4732.13 (a current, valid psychologist license issued by the Board authorizes the holder to practice psychology); *see also* R.C. 4732.24 (the Board may seek an injunction to prevent unlicensed individuals from engaging in the practice of psychology); 1977 Op. Att’y Gen. No. 77-026 (syllabus, paragraph 2) (the Board “has exclusive authority, pursuant to R.C. 4732.24, to seek injunctive relief against those engaged in the unauthorized practice of psychology”). In this regard, R.C. 4732.21(A) states that “[o]n and after December 1, 1972, no person who is not a licensed psychologist shall offer or render services as a psychologist or otherwise engage in the practice of psychology for a compensation or other personal gain.”

R.C. 4732.22, however, exempts the following persons in certain instances from the licensing requirements of R.C. Chapter 4732: (1) a certified school psychologist may practice school psychology within the scope of his employment and in accordance with the law; (2) a nonresident of the state may render psychological services for thirty days or less a year if the person is licensed in his home country or state and, in the Board’s opinion, otherwise meets the standards in R.C. 4732.10(B); (3) a person employed by a licensed psychologist may carry out specific tasks “under the licensee’s supervision, as an extension of the licensee’s legal and ethical authority,” so long as the employee uses a title “that clearly implies [his] supervised or training status;” (4) an unlicensed person holding a master’s degree or doctoral degree in psychology may work under the supervision of a licensed psychologist; (5) a student in an accredited educational institution may carry out activities of a prescribed course of study, provided such activities are supervised by a professional person who is qualified to perform such activities and is properly licensed or exempted from licensure; (6) an ordained minister functioning in his ministerial capacity; and (7) a qualified social worker acting in his capacity as a social worker.

And, R.C. 4732.23 enumerates specific instances in which a person may engage in the practice of psychology without violating R.C. Chapter 4732:

Nothing in [R.C. Chapter 4732] shall:

(A) Be construed to limit the activities, services, and use of official title on the part of a person in the employ of the federal government insofar as such activities are a part of the duties in his position;

(B) Restrict persons licensed, certified, or registered under any other provision of the Revised Code from practicing those arts and utilizing psychological procedures that are allowed and within the standards and ethics of their profession or within new areas of practice that represent appropriate extensions of their profession, provided they do not hold themselves out to the public by the title of psychologist;

(C) Restrict any person in any capacity from offering services of a psychological nature, provided they neither hold themselves out to the public by the title of psychologist or school psychologist nor utilize psychological procedures that the state board of psychology judges by uniform rule in accordance with [R.C. Chapter 119] to be a serious hazard to mental health and to require professional expertise in psychology;

(D) Be construed as restricting the use of the term “social psychologist” by any person who has an earned doctoral degree in social psychology or in sociology

with a social psychology major, from a sociology or social psychology department of an educational institution accredited or recognized by national or regional accrediting agencies as maintaining satisfactory standards, and who has filed with the state board of psychology the facts demonstrating his possession of such a degree.

On the basis of R.C. 4732.21-23, a person who renders or offers to render ABA in the treatment of an individual with an ASD is required to be licensed by the Board when he provides the treatment for compensation or other personal gain unless he is exempt from licensure under R.C. 4732.22 or performs the treatment in accordance with R.C. 4732.23. Accordingly, a person who renders or offers to render ABA in the treatment of an individual with an ASD is (1) engaged in “the practice of psychology,” as defined in R.C. 4732.01(B), and (2) required to be licensed by the Board when he provides the treatment for compensation or other personal gain unless he is exempt from licensure under R.C. 4732.22 or performs the treatment in accordance with R.C. 4732.23.

### **Board’s Authority to Adopt Rules Regarding “the Practice of Psychology”**

In order to enforce the provisions of law governing the unlicensed practice of psychology, the Board may adopt administrative rules to clarify which psychological procedures constitute engaging in “the practice of psychology,” as defined in R.C. 4732.01(B). R.C. 4732.06; R.C. 4732.23(C); *see also* 2003 Op. Att’y Gen. No. 2003-009 at 2-64 n.4 (“[a]dministrative rules may provide for the implementation of statutory powers”). *See generally* 2011 Op. Att’y Gen. No. 2011-022 at 2-178 (the State Board of Optometry’s (SBO) rulemaking authority is tied to the term “practice of optometry,” as defined in R.C. 4725.01, because only persons engaged in the practice of optometry need to be licensed by the SBO and are subject to the SBO’s discipline). R.C. 4732.06 states that the Board may adopt “such rules as are necessary to conduct its business.” R.C. 4732.23(C) declares further that the Board may determine by administrative rule the psychological procedures that are a “serious hazard to mental health” requiring “professional expertise in psychology.”<sup>4</sup> *See generally* 1977 Op. Att’y Gen. No. 77-026 at 2-98 (“R.C. 4732.23(C) and the Rules promulgated pursuant thereto exempt from the licensure mandated by R.C. 4732.21 certain persons whose practices do not endanger the public’s mental health. Thus, Rules 4732-05-01 [and] 4732-5-02 ... merely define certain procedures which, when practiced for compensation, make the alleged psychologist subject to R.C. 4732.21. Conversely, as provided by R.C. 4732.23(C), if the practitioner neither holds himself out to the public as a psychologist nor employs psychological procedures in a manner defined by the Rules, he need not be licensed”). Thus, pursuant to R.C. 4732.06 and R.C. 4732.23(C), the Board has the authority to adopt an administrative rule identifying specific psychological procedures that are (1) included in the

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<sup>4</sup> R.C. 4732.23(C) provides that a person who is not licensed as a psychologist under R.C. Chapter 4732 may perform services of a psychological nature, so long as that person does not utilize any psychological procedure that the State Board of Psychology (Board) has determined by administrative rule to be a “serious hazard to mental health” requiring “professional expertise in psychology.” *See* 11A Ohio Admin. Code 4732-5-01; 11A Ohio Admin. Code 4732-5-02(B)(8).

definition of “the practice of psychology,” as defined in R.C. 4732.01(B), or (2) a serious hazard to mental health requiring professional expertise in psychology.<sup>5</sup>

The power of the Board in this regard is not unlimited, however, as the Board may adopt only rules that “are not unreasonable or in clear conflict with statutory enactments.” 1998 Op. Att’y Gen. No. 98-035 at 2-208; *accord Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St. 3d 376, 2007-Ohio-2201, 865 N.E.2d 1259, ¶17; 2011 Op. Att’y Gen. No. 2011-022 at 2-176 and 2-177. As explained in *Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St. 3d 376, at ¶17: “[A]n administrative rule may not add to or subtract from a legislative enactment. If it does, it creates a clear conflict with the statute, and the rule is invalid.” (Citation omitted.) See 2005 Op. Att’y Gen. No. 2005-010 at 2-105 (“[a]s an administrative agency, the [State Board of Cosmetology] may exercise only those powers that are granted by statute, and may not expand its statutory authority through rule-making or otherwise”).

In your particular situation, we determined earlier that a person who renders or offers to render ABA in the treatment of an individual with an ASD performs a psychological procedure and is engaged in “the practice of psychology,” as defined in R.C. 4732.01(B). An administrative rule adopted by the Board to expressly prescribe that the use of ABA therapy in the treatment of an individual with an ASD is a psychological procedure thus would not be unreasonable, conflict with R.C. 4732.01(B), or expand upon the powers and duties granted to the Board. Therefore, R.C.

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<sup>5</sup> In accordance with its authority under R.C. 4732.06 and R.C. 4732.23(C), the Board has adopted rule 4732-5-01(B) to designate the following psychological procedures as a serious hazard to mental health requiring professional expertise in psychology:

- (1) Psychological and school psychological diagnosis
- (2) Psychological and school psychological prescription
- (3) Psychological and school psychological client supervision
- (4) Sensitivity training
- (5) Confrontation groups
- (6) Hypnotic techniques for diagnostic, treatment, or other psychotherapeutic purposes
- (7) Individual intelligence testing, assessment of cognitive processing, or determination of individual intelligence
- (8) Personality evaluation
- (9) Individual and group psychological psychotherapy
- (10) Psychological behavior psychotherapy such as, but not limited to, implosive therapy, aversive therapy, and desensitization
- (11) Couples and family psychological psychotherapy
- (12) Psychological psychotherapy for sexual dysfunctions or disorders.
- (13) Psychological pharmacological consultation, as defined by procedures specified in [Ohio Admin. Code 4732-3-01(C)(3)].

4732.06 authorizes the Board to adopt an administrative rule that identifies ABA as a psychological procedure when used in the treatment of an individual with an ASD.

Moreover, the General Assembly has explicitly vested the Board with the authority to determine by administrative rule whether a specific psychological procedure is a serious hazard to mental health requiring professional expertise in psychology. R.C. 4732.23(C); *see* R.C. 4732.06. Pursuant to this grant of authority, the Board, rather than the Attorney General, may, in the reasonable exercise of its discretion, determine that ABA is a serious hazard to mental health requiring professional expertise in psychology when used in the treatment of an individual with an ASD.<sup>6</sup> *See generally* 2003 Op. Att’y Gen. No. 2003-001 at 2-6 n.7 (“[w]hether particular consulting activities fall within the practice of school psychology depends on the nature of the particular activities. It is beyond the scope of an opinion of the Attorney General, however, to make such factual determinations”); 2000 Op. Att’y Gen. No. 2000-016 at 2-97 n.6 (“[i]t is beyond the scope of an Attorney General opinion to determine whether there are tasks that fall within the practice of respiratory care and also within the practice of nursing as a registered nurse. Those matters are better resolved by the Ohio Respiratory Care Board and the Board of Nursing to whose expertise the General Assembly has delegated the regulation of the respective practices” (citations omitted)); 1998 Op. Att’y Gen. No. 98-035 at 2-209 (“[q]uestions of reasonableness may be raised and deliberated through the statutorily-established rulemaking process,” but such determinations “ultimately are left to the courts”); 1983 Op. Att’y Gen. No. 83-012 at 2-53 (“[w]hether a particular rule or regulation is unreasonable or an abuse of discretion is, of course, a question which only a court may ultimately determine”). Accordingly, pursuant to R.C. 4732.06 and R.C. 4732.23(C), the Board, in the reasonable exercise of its discretion, may adopt an administrative rule determining that ABA is a serious hazard to mental health requiring professional expertise in psychology when used in the treatment of an individual with an ASD.

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<sup>6</sup> An administrative rule adopted by the Board determining that ABA is a serious hazard to mental health requiring professional expertise in psychology when used in the treatment of an individual with an ASD is “presumed reasonable, and the burden is on the party challenging the rule to establish by a preponderance of substantial, probative, and reliable evidence that the rule is unreasonable.” 2011 Op. Att’y Gen. No. 2011-022 at 2-184; *see also* 1998 Op. Att’y Gen. No. 98-098-035 at 2-209 (when determining the reasonableness of an administrative rule, courts “give deference to the expertise of the agency that adopted the rule”); 1983 Op. Att’y Gen. No. 83-012 at 2-53 (when assessing the reasonableness of an administrative rule, courts “have required only a rational connection between the interest sought to be protected and the measures adopted to safeguard that interest”). *See generally* *Leon v. Ohio Bd. of Psychology*, 63 Ohio St. 3d 683, 687, 590 N.E.2d 1223 (1992) (“courts must accord due deference to the State Board of Psychology in its interpretation of R.C. Chapter 4732 and the relevant provisions of the Ohio Administrative Code, given that the General Assembly has deemed it to be the proper forum to determine licensure matters concerning psychologists”).

### **Conclusions**

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. A person who renders or offers to render applied behavior analysis in the treatment of an individual with an autism spectrum disorder is (1) engaged in “the practice of psychology,” as defined in R.C. 4732.01(B), and (2) required to be licensed by the State Board of Psychology when he provides the treatment for compensation or other personal gain unless he is exempt from licensure under R.C. 4732.22 or performs the treatment in accordance with R.C. 4732.23.
2. R.C. 4732.06 authorizes the State Board of Psychology to adopt an administrative rule that identifies applied behavior analysis as a psychological procedure when used in the treatment of an individual with an autism spectrum disorder.
3. Pursuant to R.C. 4732.06 and R.C. 4732.23(C), the State Board of Psychology, in the reasonable exercise of its discretion, may adopt an administrative rule determining that applied behavior analysis is a serious hazard to mental health requiring professional expertise in psychology when used in the treatment of an individual with an autism spectrum disorder.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General