

STATE OF FLORIDA  
AGENCY FOR HEALTH CARE ADMINISTRATION  
OFFICE OF FAIR HEARINGS



FILED

Feb 15, 2023, 1:23 pm

OFFICE OF FAIR HEARINGS

[REDACTED],

PETITIONER,

AHCA Case No.: 22-FH1518

vs.

AGENCY FOR HEALTH CARE  
ADMINISTRATION,

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on December 7, 2022, at 1:00 p.m. Eastern Standard Time ("EST").

**APPEARANCES**

For the Petitioner:

[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Lee Ann Williams  
Medical/Health Care Program Analyst  
Agency for Health Care Administration

**STATEMENT OF ISSUE**

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent's decision to deny Petitioner's request for Behavior Analysis ("BA" or "ABA") services was incorrect.

### **PRELIMINARY STATEMENT**

All parties appeared telephonically. Petitioner's Authorized Representative ("██████████") appeared on behalf of Petitioner. Vanessa Alfonso, ("Ms. Alfonso"), Petitioner's Board Certified Behavioral Analyst ("BCBA") provider, appeared as a witness for Petitioner.

Lee Ann Williams, Medical Health Care Analyst for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared on behalf of Respondent. Dr. Melissa Switzer, ("Dr. Switzer"), Board Certified Behavior Analyst at the doctoral level and Clinical Reviewer for eQHealth Solutions, Inc. appeared as a witness for Respondent.

Petitioner did not introduce any exhibits at the hearing. Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred forty-five (145) page evidence packet and a forty-nine (49) page evidence packet. The evidence packets appear in the Office of Fair Hearings document management system as "██████████ FH 10.25.2022 1-92.pdf" and "██████████ FH 10.25.2022 93-145.pdf", and "22-FH1518 AHCA Evidence Packet 49 pages.pdf" respectively. Absent an objection from the Petitioner, the undersigned admitted the (49)-page evidence packet into evidence as Respondent's Composite Exhibit 1 ("RCE 1") and one hundred seven-nine (145)-page evidence packet into evidence as Respondent's Composite Exhibit 2 ("RCE 2").

### **FINDINGS OF FACT**

1. Petitioner receives Medicaid services on a fee-for-service basis from the Agency. eQHealth Solutions is a Quality Improvement Organization (QIO) contracted by the agency to review prior authorization requests for services. See page 2 of RCE 2.

2. At the time of the hearing, Petitioner is a [REDACTED] [REDACTED] year old [REDACTED]. See page 16 of RCE 1. [REDACTED] is diagnosed with [REDACTED]. *Id.* [REDACTED] has engaged in Behavior Analysis (“BA”) services since [REDACTED] with little change in units requested or signs of progress within the last authorization period. *Id.* at 18 RCE 2. The provider requested an increase in services from approved 29 hours to 35 hours per week to be used in the home, community, and school (IEP submitted). *Id.* at 23-32. Petitioner requested BA services, specifically 52 units of code H2019, 416 units of code H2012, and 3,120 units of code H2014. *Id.* at 23, 27, and 30.

3. In a Notice of Outcome – Partial Denial (“NOO”) dated July 19, 2022, Respondent denied 832 units under code H2014 of Petitioner’s request for continued Behavior Analysis service and reduced the number of hours received. See page 23-32 of Respondent’s Composite Exhibit 2. The NOO explained the basis for the denial as follows:

The request for services is denied in whole or in part because they are not medically necessary as defined in Rule 59G-1.010, Florida Administrative Code. Specifically, the requested services are not medically necessary under the following standards: Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patients’ needs.

Page 23, 27, and 30 of RCE 2.

The NOO further provided: The rationale for our decision is as follows: Submitted information does not support the medical necessity for requested frequency and/or duration. PR Clinical Rationale- Denial: According to Behavior Analysis Services Coverage Policy request for services must be based on medical necessity of the recipient’s maladaptive behaviors. The recipient is engaging in problem behaviors that threaten access to typical environments and negatively affects activities of daily living. However, the intensity of the recipient’s maladaptive behaviors does not justify the intensity of services requested. The provider is using a tiered service delivery model and has not made compelling justification for services at the intensity requested. The Requested hours of BA services are in excess of medical necessity.

Page 23-24, 27-28, and 30-31 of RCE 2.

4. Petitioner requested reconsideration of the Respondent's decision. In a Notice of Reconsideration Determination ("NRD"), dated July 20, 2022, Respondent upheld its decision. *Id.* at 34 – 43 of RCE 2. The NRD explained the basis of the decision as follows:

PR Recon Determination: At reconsideration all documents were carefully reviewed. The provider did not submit any new documentation that supports the medical necessity of this request. According, to the Behavior Analysis Services Coverage Policy, (page 6, 9.0. c-d) the recipient of ABA therapy services must engage in maladaptive behaviors that interferes with the recipient's daily functioning. Although, the recipient is engaging in topographies of maladaptive behaviors, the frequency and intensity of the maladaptive [behaviors] do not support the request for services. The recipient has made progress on all goals targeted for improvement during the previous authorized period and this request is in excess of medical necessity. The partial denial is upheld.

Page 19, 32, 35, and 39 of RCE 2.

5. On August 5, 2022, Petitioner requested a Fair Hearing to challenge the denial of additional behavioral analysis services. On November 18, 2022, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for December 7, 2022, at 1:00 p.m., Eastern Standard Time.

6. [REDACTED] testified to the following:

- a. Petitioner has [REDACTED] and [REDACTED]. [REDACTED] does not allow the primary caregiver out of [REDACTED] sight.
- b. The Petitioner has gotten [REDACTED] since DCF involvement in [REDACTED] family's life. Although, [REDACTED] has been recommended for [REDACTED] the [REDACTED] has not placed [REDACTED] in therapy. The environmental changes in the home have led the

child to have [REDACTED] and [REDACTED] is [REDACTED] ([REDACTED] [REDACTED]) and exhibiting [REDACTED] like [REDACTED] [REDACTED]

- c. The Petitioner [REDACTED]. He traditionally listened to Ms. Alfonso regarding eating but since [REDACTED] turned [REDACTED] [REDACTED] is more [REDACTED] and [REDACTED].
- d. The petitioner has been in therapy for a long time. [REDACTED] is a very smart [REDACTED] and has made a lot of progress within the last six (6) months overall, but [REDACTED] is starting to have [REDACTED]
- e. [REDACTED] does not misbehave at school, the behaviors occur at home.

7. Ms. Alfonso is a Board-Certified Behavioral Analyst Provider (“BCBA”), Ms. Alfonso, testified to the following:

- a. Ms. Alfonso provides direct services, as well as RBT, family training, and supervision.
- b. Petitioner has made progress and is doing well in school but lately due to the DCF case, [REDACTED] and the [REDACTED] have concerns regarding the Petitioner’s maladaptive behaviors. Petitioner has shown an increase in [REDACTED] and [REDACTED].

8. Dr. Switzer is a Medical Director for eQHealth. Dr. Switzer testified to the following:

- a. Medical necessity is decided based on the data submitted in the plan. eQHealth Solution determined that the Petitioner did not meet the requirement for increased services of treatment.
- b. According, to the Florida Behavior Analysis Services Coverage Policy, which is used to determine the appropriate intensity of analytic services hours as a rule, that a

higher number of maladaptive behaviors, higher severity and frequency of behaviors, would justify a high number of services hours. ■ must have functional impairment in the following areas: safety causes a risk to ■ or others; deficient of self-care abilities; lack of communication skills; self-stimulating; and other behaviors not identified pervious.

- c. The provider reported the reason for referral was due to an increase in services from previously approved 29 hours to now 35 hours per week to be used in the home, community, and school.
- d. The intensity of the recipient's maladaptive behaviors does not meet the criteria for an increase in service hours. It is in excess of medical necessity, there has been no fading or reduction of unit of services since ■ began behavioral analysis services.
- e. ■ targeted maladaptive behaviors have all decreased. ■ replacement goals and current skill sets have all been reached or mastered. All of ■ goals are in the long-term status or nearing mastery.
- f. All the graphs submitted by ■ provider indicate progress is being made with a downward trend showing significant progress being made and noted from baseline. Based on medical necessity the increase in services should be denied.
- g. The caregiver training goals are all being made moderate.
- h. There are no reports of maladaptive behaviors that are severe or interfering with ■ education. The only report from the school is regarding ■.



for [REDACTED], Petitioner's incidents remained at less than [REDACTED] for [REDACTED] [REDACTED], Petitioner reduced [REDACTED] incidents from [REDACTED] to approximately [REDACTED] for [REDACTED] Petitioner's incidents remained at approximately [REDACTED] for [REDACTED], Petitioner's incidents remained at approximately [REDACTED] and for [REDACTED], Petitioner's incidents reduced from approximately [REDACTED] to approximately [REDACTED]

### CONCLUSIONS OF LAW

10. The Agency's Office of Fair Hearings has jurisdiction over the subject matter of this proceeding and the parties pursuant to section 409.285(2), Florida Statutes (2019). This order is the final administrative decision of AHCA under section 409.285(2)(a).

11. This hearing was held as a *de novo* proceeding pursuant to Fla. Admin. Code R. 59G-1.100(17)(b).

12. Because Petitioner is requesting additional services, Fla. Admin. Code R. 59G-1.100(17)(g) assigns the burden of proof to the Petitioner. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" (Black's Law Dictionary at 1201, 7th Ed.)

13. The Florida Medicaid Behavior Analysis Services Coverage Policy (October 2017) ("BA Policy"), incorporated by reference in Fla. Admin. Code. R. 59G-4.125, governs BA services available under Florida Medicaid. The BA Policy provides as follows:

#### **1.0 Introduction**

Behavior analysis (BA) services are highly structured interventions, strategies, and approaches provided to decrease maladaptive behaviors and increase or reinforce appropriate behaviors.

...

#### **1.4.5 Medically Necessary/Medical Necessity**

As defined in Rule 59G-1.010, F.A.C.

...

#### **4.0 Coverage Information**

##### **4.1 General Criteria**

Florida Medicaid covers services that meet all of the following:

- Are determined medically necessary
- Do not duplicate another service
- Meet the criteria as specified in this policy

##### **4.2 Specific Criteria**

Florida Medicaid covers the following BA services in accordance with the applicable Florida Medicaid fee schedule(s), or as specified in this policy:

###### **4.2.1 Behavior Assessment**

One per fiscal year, per recipient, when completed within 30 days of the start of the assessment.

###### **4.2.2 Behavior Analysis**

Up to 40 hours per week, per recipient, consisting of services identified on the recipient's behavior plan in order to reduce maladaptive behaviors and to restore the recipient to his or her best functional level. Services include:

- Implementing behavior analysis interventions, and monitoring and assessing the recipient's progress towards goals in the behavior plan
- Behavior analysis interventions, for example, discrete trial teaching, task analysis training, differential reinforcement, non-contingent reinforcement, conducting task analyses of complex responses, and teaching using chaining, prompting, fading, shaping, response cost, and extinction
- Training the recipient's family, caregiver(s), and other involved persons on the implementation of the behavior plan and intervention strategies (the recipient must be present when clinically appropriate)

...

##### **4.3 Early and Periodic Screening, Diagnosis, and Treatment**

As required by federal law, Florida Medicaid provides services to eligible recipients under the age of 21 years, if such services are medically necessary to correct or ameliorate a defect, a condition, or a physical or mental illness. Included are diagnostic services, treatment, equipment, supplies, and other measures described in sectioned 1905(a) of the Social Security Act, codified in Title 42 of the United States Code 1396d(a). As such, services for recipients under the age of 21 years exceeding the coverage described within this policy or the associated fee schedule may be approved, if medically necessary. For more information, please refer to Florida Medicaid's General Policies on authorization requirements.

14. Appendix 9.0 of the BA Policy provides Review Criteria for Behavior Analysis Services.

These Review Criteria state as follows:

## **Review Criteria for Behavior Analysis Services**

Behavior analysis (BA) services are considered as either the treatment of choice or as an adjunct treatment modality for a variety of conditions and disorders where maladaptive behaviors are part of the recipient's clinical presentation, including behavioral manifestations of diagnoses such as Autism Spectrum Disorder and other behavioral health conditions.

### **Critical Elements Necessary for ANY Type of Behavior Analysis Service:**

The following critical elements **MUST** be satisfied to qualify for BA services:

- a. Eligibility – The recipient must meet all criteria for BA services as outlined in the Behavior Analysis Services Coverage Policy, Rule 59G-4.125, F.A.C.
- b. Medical necessity – The recipient must meet medical necessity criteria as outlined in Rule 59G-1.010, F.A.C.
- c. The recipient currently engages in maladaptive behaviors
- d. These maladaptive behaviors interfere with the recipient's daily functioning.

**1. Criteria for Initial Behavior Analysis Assessment - BOTH** of the following **MUST** be satisfied:

- a. **ALL** critical elements are met
- b. Provide submits a valid written physician's order as stipulated in the Behavior Analysis Services Coverage Policy, Rule 59G-4.125, F.A.C.

**2. Criteria for Behavior Analysis Services and Reassessments – ALL** of the following **MUST** be satisfied:

- a. **ALL** critical elements are met
- b. An assessment or, if applicable, a reassessment, authored by a lead analyst, is provided. An assessment of the maladaptive behavior(s) is a necessary element of the process of identifying the frequency and magnitude of the behaviors as well as the variables associated with the occurrence of the maladaptive behavior(s). This helps in defining what are the functional consequences of the problem behavior(s) so that an adequate behavior plan can be implemented. This (re)assessment **MUST** include, at a minimum, **ALL** of the following:
  - i. A clear operational description of the maladaptive behavior(s)
  - ...
- c. A behavior plan authored or updated by a lead analyst. The behavior plan is the cornerstone of the delivery of behavior analysis services and it is based on the information obtained in the assessment. It proposes specific interventions to reduce or eliminate the maladaptive behavior. These interventions take into consideration the variables, both present before the behavior, as well as after the behavior, that influence the occurrence of the maladaptive behavior(s). This plan also includes

replacement appropriate behaviors for the recipient to engage in instead of the maladaptive behaviors in order to obtain the same function. The plan must be detailed enough to warrant the requested services and include mechanisms to monitor its effectiveness. This **MUST** include, at a minimum, **ALL** of the following:

- i. Observable and measurable descriptions of the maladaptive behavior(s)
- ii. Identified function of the maladaptive behavior(s) behavior as a result of the assessment or reassessment conducted
- iii. Goals and strategies for changing the maladaptive behavior(s)
- iv. Written detailed description of when, where, and how often these goals will be addressed and proposed strategies will be implemented
- v. System for monitoring and evaluating the effectiveness of the plan
- vi. Safety and crisis plan, if applicable
- vii. Summary and recommendations
- viii. Discharge criteria
- ix. Transition plan (if applicable)

NOTE: Although the assessment and behavior plan were addressed separately in section 2, both of them can be submitted as a single document.

**3. Criteria for Continuation of Treatment at the Present Level and/or Using Current Methods:** Providers must ensure that ALL of the following criteria are met to request continuation of treatments at the present level or using the current methods. If criteria for 3a is met, but criteria for 3b and/or 3c are not met, then a reduction of the treatment level and/or change of treatment methods may be warranted.

- a. ALL criteria listed in 2a, 2b, and 2c regarding critical elements, assessment or reassessment, and behavior plan, are met.
- b. The data provided must show evidence that the frequency of the maladaptive behavior(s) has decreased since the last review and, if not, that there is a modification of the behavior plan.
- c. The level of functional impairment justifies continuation of BA services. The reviewer utilizes the information provided below as a guide as it relates to the level of functional impairment as expressed through the following behaviors:
  - i. Safety – aggression, self-injury, property destruction, elopement
  - ii. Communication – problems with expressive/receptive language, poor understanding or use of non-verbal communications, stereotyped, repetitive language
  - iii. Self-stimulating, abnormal, inflexible, or intense preoccupations

- iv. Self-care – difficulty recognizing risks or danger, grooming, eating, or toileting
- v. Other – behaviors not identified above

15. States must provide Early and Periodic Screening, Diagnostic, and Treatment (“EPSDT”) services to Medicaid-eligible children under age 21 when requested under the Medicaid state plan. *See* 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(a)(4). According to 42 U.S.C. § 1396d(r)(5), EPSDT services mean, in relevant part, the following items and services:

Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illness and conditions discovered by the screen services, whether or not such services are covered under the state plan.

16. Petitioner is under age [REDACTED] and therefore EPSDT applies to [REDACTED] request for services. However, a state may place medical necessity limitations on EPSDT services. *See* 42 C.F.R. §§ 440.230(a), (b), (d). Fla. Stat. § 409.905(2) limits EPSDT services with a medical necessity standard:

The [Agency] shall pay for early and periodic screening and diagnosis of a recipient under age 21 to ascertain physical and mental problems and conditions and all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems and conditions, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

17. The Definitions Policy, incorporated by reference in Fla. Admin. Code R. 59G-1.010, defines “Medically Necessary” or “Medical Necessity” as follows:

The medical or allied care, goods, or services furnished or ordered must meet the following conditions:

- Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate pain
- Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient’s needs

- Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational
- Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide
- Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider

The fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service.

18. Petitioner requested ABA services, specifically 52 units of code H2019, 416 units of code H2012, and 3,120 units of code H2014. See ¶ 2. Respondent approved all but 832 units of code H2014. See ¶ 3. Respondent explained that Respondent's request for 3,120 units was not "individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment" and was "in excess of the patient's needs." *Id.*

19. As provided by EPSDT requirements, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. See ¶ 15. As provided in Section 2.83 of the Definitions Policy, a component of medical necessity is that services must be "[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs." As shown by the testimony, Petitioner is not engaging in maladaptive behaviors at school or at high intensity or frequency warranting an increase in services. See ¶¶ 8-9. Here, based on record and testimony, it appears that Petitioner's services do not need to be increased "because the recipient has made improved significantly from baseline or mastered most of ■■■ treatment goals. See ¶ 7 and 8. Furthermore, Dr. Switzer provided credible testimony that there is no recommendation for one-on-one services at school

and all of the data presented by [REDACTED] provider indicate [REDACTED] has mastered or at least progressed significantly regarding [REDACTED] treatment goals. See ¶ 8. Moreover, Petitioner's recent behaviors are due to trauma regarding abuse, abandonment, or neglect within [REDACTED] family unit. See ¶ 6. Although, DCF has recommend [REDACTED] the Petitioner has not had the opportunity to meet [REDACTED] emotional and mental needs by engaging in them. See ¶ 6. As such, Petitioner did not show that it was medically necessary to receive the entirety of the services that were requested but rather the contrary.

20. Upon consideration of the testimony provided, evidence submitted, and applicable polices, the undersigned concludes that Petitioner did not prove by a preponderance of the evidence that 3,128 units of code H2014 was medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner did not demonstrate that the requested units of service, based on the behavior plan at issue in this case, is necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, Petitioner did not prove by a preponderance of the evidence that Respondent's denial of 832 units of code H2014 was incorrect.

**IT IS HEREBY ORDERED AND ADJUDGED THAT:**

Respondent's denial of BA services is **AFFIRMED**. Petitioner's appeal based on Respondent's denial is **DENIED**.

**DONE AND ORDERED** this 15th day of February, 2023 in Tallahassee, Leon County, Florida.



Digitally signed by  
JaQuetta Johnson  
Reason: 22-FH1518  
Date: 2023.02.15  
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**JAQUETTA JOHNSON, Hearing Officer**  
**Agency for Health Care Administration**  
**Office of Fair Hearings**  
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**NOTICE OF A RIGHT TO JUDICIAL REVIEW**

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

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