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

FILED

Feb 16, 2023, 11:01 am

OFFICE OF FAIR HEARINGS

[redacted],

PETITIONER, AHCA Case No.: 22-FH1960

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 21, 2022, at 1:30 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 Respondent 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, [redacted] [redacted] ("[redacted]"), appeared on behalf of Petitioner. Morgan Fisher, ("Ms. Fisher"), Board Certified Behavioral Analyst ("BCBA") provider, appeared on behalf of Petitioner.

Doris Rivera, Medical Health Care Program Analyst for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared on behalf of Respondent. Dr. Joseph Darling, ("Dr. Darling"), Board Certified Behavior Analyst at the doctoral level and Clinical Reviewer for eQHealth Solutions, Inc. ("eQHealth") appeared as a witness for Respondent.

Sandra Durden Medical Health Care Analyst and Fair Hearing Liaison with the Agency, appeared as an observer.

Petitioner sent to the Office of Fair Hearings and Respondent a thirty-six (36)-page evidence packet and a ten (10)-page evidence packet. The evidence packets appear in the Office of Fair Hearings document management system as "22-FH1960- Pet evidence.pdf" and "22-FH1960- Pet evidence02.pdf" respectively. Absent an objection from the Petitioner, the undersigned admitted the thirty-six (36)-page evidence packet into evidence as Petitioner's Composite Exhibit 1 ("PCE 1") and ten (10)-page evidence packet into evidence as Petitioner's Composite Exhibit 2 ("PCE 2").

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a seventy-two (72) 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 "[redacted] FH 21.21.2022.pdf" and "22-FH1960 Agency evidence BA 49 pgs.pdf" respectively. Absent an objection from the Petitioner, the undersigned admitted the seven-two (72)-page evidence

packet into evidence as Respondent's Composite Exhibit 1 ("RCE 1") and (49)-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 an [redacted]. *See* page 16 RCE 1. [redacted] is diagnosed with [redacted]. *Id*. at 18. [redacted] maladaptive behaviors meet the rubric criteria for up to 25 hours per week. *Id.*

3. Petitioner requested the following ABA services: 3,634 units of code 97153; 312 units of code 97155; and 104 units of code 97156. *Id.* at 22. In a Notice of Outcome – Partial Denial ("NOO") dated August 18, 2022; Respondent denied 832 units under code 97153 of Petitioner's request for additional Behavior Analysis service hours but approved the remainder of the request. *See* page 22-31 of Respondent's Composite Exhibit 1. 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.

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 22-23, 26-27, and 29-30 of RCE 1.

4. Petitioner requested reconsideration of the Respondent's decision. In a Notice of Reconsideration Determination ("NRD"), dated October 26, 2022, Respondent upheld its decision. *Id.* at 33 – 43 of RCE 1. 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 34 of RCE 1.

5. On October 25, 2022, Petitioner requested a Fair Hearing to challenge the reduction of behavioral analysis services. On November 29, 2022, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for December 21, 2022, at 1:30 p.m., Eastern Standard Time.

6. [redacted] testified to the following:

a. The Petitioner is home school and unable to be in traditional school due to [redacted] maladaptive behaviors for [redacted], [redacted], and [redacted] [redacted].

b. The Registered Behavior Technicians ("RBT") are not adequately documenting things, which is unfortunate for the recipient, but [redacted] does need services.

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

a. The lack of proficiency training on the RBT to show low performance and lack of data collection is something she needs to work on.

b. Petitioner's treatment team started tracking the frequency of crisis intervention and duration started tracking of crisis behaviors in November. [redacted] behaviors varies across each day but occur at least weekly. On one occasion, [redacted] had a crisis lasting over 150 minutes; however, the crisis intervention is at the same rate of the original base line.

c. The skills assessment for replacement behaviors was not included in the initial treatment plan. The provider will include more data and working on accurately documenting [redacted] progress and needs.

d. The Petitioner's BCBA level services were changed to RBT services at the beginning of [redacted] initial treatment plan.

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

a. Medical necessity is decided based on the date 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, 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 himself 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 27 hours to now 39 hours per week for continued stay.

d. ■ treatment plan did not was consistent with generally accepted medical standards nor was it reflective of the services needed to be effective. The treatment plan as written does not justify the increase in service hours. The treatment plan was reviewed according to the generally accepted BA standards. The amount of units requested is not supported by the treatment plan. There is a need for BA services. However, when determining the appropriate number authorized hours, the intensity of ■ maladaptive behaviors must be considered. The components in the treatment plan needed to be completed. ■ graphs show low rates of maladaptive behaviors, but the provider is requesting 39 hours of services per week. Specifically, 104 units of code 97156, 312 units of code 97155,

and 3,640 units of code 971534. The intensity of the recipient's maladaptive behaviors does not meet the criteria for an increase in service hours.

e. Visual determination based on the graphs submitted regarding each maladaptive behavior shows a general decline indicating effective treatment from Feb. 17, 2022 – July 26, 2022. There is a reduction and decrease in maladaptive behaviors.

f. [redacted] adaptive or replacement behaviors have increased. Overall, looking at the plan there are fewer behaviors that are needed to be reduced and a few behaviors that are being tracked to increase.

g. There are 9 maladaptive behaviors and 12 replacement behaviors. It should be noted that there was an assessment of maladaptive behaviors was done but not adaptive behaviors. Typically, there is an assessment of adaptive behaviors it is important to assess that to shape and reinforce appropriate behaviors. Therefore, 27 hours a week to implement this plan should be effective.

h. In the reconsideration phase, a description of behavior submitted to show there is more going on that is not being reported in the treatment plan. Specifically, it mentions [redacted] has [redacted] and [redacted] which is a higher intensity is not adequately reflected in the treatment plan. The frequency is not indicated or provided. Additionally, in the summary statement provided it stated, "on a weekly basis [Petition's Name] was in a crisis behavior that lasting on average of 35 minutes compared to base line of over one hour. That is a summary statement but was not included in the initial plan. there is not much information here other than behavior analysis is needed.

i. In the documents provided by the Petitioner there were more updated, daily data submitted from July 22, 2022, through December 19, 2022. It shows a lower trend of data for frequency of [redacted] and [redacted]. However, it does not show the other dimension of [redacted] behavior that is not clear. There was a spike around Thanksgiving in [redacted] in the clinic environment, but it appears to be going down.

j. [redacted] is considered an academic goal which is implicitly what the school or educational environment should do and considered duplication of services in violation of the 4th prong of medical necessity, "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." Academic skills are done more effective and cost effectively in the school system. Additionally, [redacted] is also another academic goal that typically would not be approved in a treatment plan.

k. Regarding the psychological evaluation, it is good to determine a need for services, but it is just an assessment of the child, but it does not address what it would take to effectively implement a treatment plan.

CONCLUSIONS OF LAW

9. 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).

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

11. Because Petitioner is requesting a new service, 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.)

12. 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 no 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.

13. 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 than 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

14. 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.

15. Petitioner is under age 21, 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.

16. 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 104 units of code 97156, 312 units of code 97155, and 3,640 units of code 971534. *See* ¶ 2. Respondent approved all but 832 units of code 97153. *See* ¶ 3. Respondent explained that Respondent's request for 3,640 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's maladaptive behaviors are not adequately tracked or reflected in the treatment plan and Petitioner is not engaging in maladaptive behaviors at school or at high intensity or frequency warranting an increase in services. *See* ¶ 7 and 8. 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" and "there is no evidence to support a request for an increase." *See* ¶ 6 - 8. Furthermore, Dr. Darling provided credible testimony that the graphs show low rates of maladaptive behaviors. *See* ¶ 8. [redacted] conceded that the submitted documents does not accurate reflect the recipient's maladaptive behaviors. *See* ¶ 6. Unfortunately, there was no data submitted to justify an increase of RBT services. Although, there may be a need of services the current treatment plan does not support it at this time. The approved 27 hours should be adequate to implement the plan as submitted. As such, Petitioner did not show that it was medically necessary to receive the entirety of the services that were requested.

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 3,640 units of code 97153 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 97153 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 16th day of February, 2023 in Tallahassee, Leon County, Florida.

Digitally signed by JaQuetta Johnson
Reason: 22-FH1960
Date: 2023.02.16 09:23:43 -05'00'

JAQUETTA JOHNSON, Hearing Officer
Agency for Health Care Administration
Office of Fair Hearings
2727 Mahan Drive, Mail Stop # 11
Tallahassee, FL 32308-5407

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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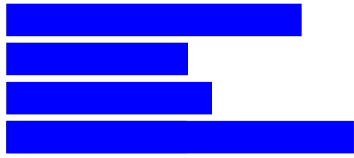

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