

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



FILED

Feb 23, 2023, 9:41 am

OFFICE OF FAIR HEARINGS

[REDACTED],
PETITIONER,

AHCA Case No.: 22-FH2013

vs.

AGENCY FOR HEALTH CARE
ADMINISTRATION,

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on January 11, 2023, at 9:00 a.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 and witnesses appeared telephonically. Petitioner's Authorized Representative and [REDACTED], [REDACTED] (" [REDACTED] "), appeared on behalf of Petitioner. The following

attended as witnesses for Petitioner: [REDACTED], Petitioner's [REDACTED]; Maleidy Acedo ("Ms. Acedo"), Board Certified Behavior Analyst ("BCBA"); and Dr. Eileen Calderon ("Dr. Calderon"), Psychologist with [REDACTED].

Lee Ann Williams, Medical/Health Care Program Analyst for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared on behalf of Respondent. Dr. David Bicard ("Dr. Bicard"), BCBA at the Doctoral level and Director of Clinical Operations for eQHealth Solutions Inc. ("eQHealth") appeared as a witness for Respondent.

George, interpreter number 31578792, of Global Interpreting Network, appeared to offer translation services for Petitioner.

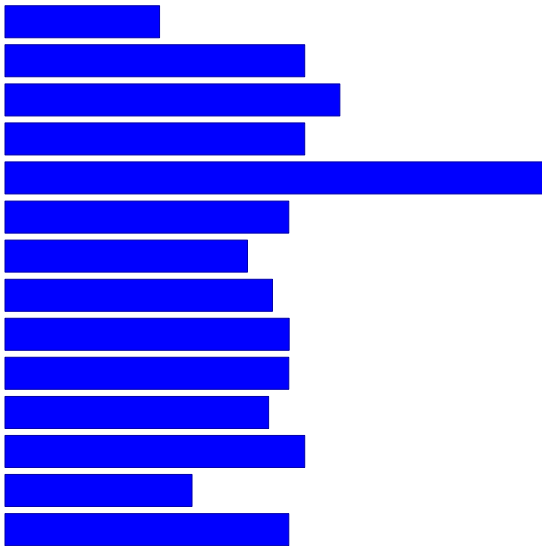
Petitioner did not introduce any exhibits at the hearing. Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner an eighty-four (84)-page evidence packet and a forty-nine (49)-page evidence packet. The eighty-four (84)-page evidence packet appears in the Office of Fair Hearings' document management system as the file title "[REDACTED] FH 01.11.2023.pdf". The forty-nine (49)-page evidence packet appears in the Office of Fair Hearings' document management system as the file title "22-FH22013 AHCA Evidence Packet.pdf". Absent an objection from the Petitioner, the undersigned admitted the eighty-four (84)-page evidence packet into evidence as Respondent's Composite Exhibit 1 ("RCE 1") and the forty-nine (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 is a Quality Improvement Organization contracted by the Agency to review prior authorization requests for services. See page 2 of RCE 2.

2. Petitioner is [REDACTED]. See page 21 of RCE 1. Petitioner is diagnosed with [REDACTED]. *Id.* at 21. Petitioner has an IEP at school. *Id.* at 51.

3. In July 2022, Petitioner’s parents and teacher completed the Conners Questionnaire. *Id.* at 56. The Conners scores are as follows:



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4. On March 13, 2022, Marilyne Christian, MD (“Dr. Christian”), issued a referral for ABA therapy for Petitioner. *Id.* at 46. Dr. Christian explained as follows:

[Petitioner] has a diagnosis of [REDACTED], [REDACTED] and it is deemed medically necessary to receive Applied Behavior Analysis (ABA) Therapy with a certified behavior analyst. Please evaluate to determine the number of treatment hours needed.

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5. Petitioner requested a Behavior Analysis Behavior Assessment (“assessment”). In a Notice of Outcome (“NOO”), dated August 19, 2022, Respondent denied Petitioner’s request for BA services. *Id.* at 27 – 28. The NOO explained the basis for the denial as follows:

[T] [REDACTED] requested services are not medically necessary under the following standard(s):

Consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational.

...

The NOO further provided:

PR Clinical Rationale – Denial: According to The Florida Medicaid Behavior Analysis Services Coverage Policy (page 6, 9.0.c-d) the recipient of ABA therapy services must engage in maladaptive behavior that interferes with the recipient’s daily functioning for which ABA therapy is medically necessary. There is no submitted evidence that the recipient is engaging in behaviors for which ABA therapy is medically necessary under Florida Medicaid Rules, or the proper treatment modality given the diagnosis and presenting maladaptive behaviors. The request for services is denied.

...

Page 27 of RCE 1.

6. Petitioner requested reconsideration of the Respondent’s decision. In a Notice of Reconsideration Determination (“NRD”), dated September 12, 2022, Respondent upheld its decision. *Id.* at 42 – 44. The NRD stated as follows:

PR Recon Determination: At reconsideration all documents were carefully reviewed. According to The Florida Medicaid Behavior Analysis Services Coverage Policy (page 6, 9.0.c-9) the recipient of ABA therapy services must engage in maladaptive behavior that interferes with the recipient’s daily functioning for which ABA therapy is medically necessary. There is no submitted evidence that the recipient is engaging in behaviors for which ABA therapy is medically necessary under Florida Medicaid Rules. This reconsideration request has been reviewed, reconsidered and the denial is upheld.

...

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7. Ramzy Medaa, MD (“Dr. Medaa”), wrote a Letter of Medical Necessity for Petitioner that stated as follows:

On behalf of my patient . . . who will need the assistance of your specialties. Patient has been referred for an [REDACTED] evaluation and Applied Behavior Analysis (ABA), in which I believe the patient will benefit from to a great extent. My patient

is experiencing [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] most likely meet the [REDACTED]. My patient is to attend these therapies listed above to ensure [REDACTED] safety, development and, medical diagnosis.

...

Page 83 of RCE 1.

8. On October 26, 2022, Petitioner requested a Fair Hearing regarding the denial of an assessment. On November 30, 2022, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for January 11, 2023, at 9:00 a.m. EST.

9. Ms. Acedo testified to the following:

a. In the request, submitted around March 2022, one of the first requests was denied due to lack of documentation. Petitioner has since undergone a comprehensive diagnostic evaluation by a neurologist.

b. Petitioner is engaging in the following maladaptive behaviors: [REDACTED]; [REDACTED]; and [REDACTED]. Ms. Acedo believes that those behaviors are impacted Petitioner's [REDACTED]

[REDACTED]

10. Dr. Calderon testified to the following:

a. Petitioner has participated in regular therapy before. Petitioner was referred for ABA because previous therapy was not successful.

b. Petitioner is likely on the [REDACTED].

c. Petitioner [REDACTED], is [REDACTED], and has [REDACTED].

11. [REDACTED] testified to the following:

- a. Petitioner has difficulty [REDACTED], [REDACTED] has trouble [REDACTED], [REDACTED] [REDACTED], [REDACTED] does not [REDACTED], [REDACTED] is [REDACTED] [REDACTED], [REDACTED] has [REDACTED], and has [REDACTED].

12. Dr. Bicard is a BCBA at the doctoral level and the Director of Clinical Operations for eQHealth. Dr. Bicard’s testimony provided the following facts:

- a. Petitioner appears to have [REDACTED], and those types of behaviors are not well treated with ABA.
- b. Petitioner’s maladaptive behaviors do not interfere with daily functioning.
- c. Regarding the Conners Questionnaire, Petitioner is shown to be below the threshold for [REDACTED]. Petitioner is not shown to be engaging in [REDACTED], [REDACTED], [REDACTED], or [REDACTED].
- d. There’s no other information submitted that suggests that Petitioner needs ABA.
- e. There are other more conservative or less costly treatments available. For example, parent/child interaction therapy, cognitive behavior therapy, and medical management.

CONCLUSIONS OF LAW

13. 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).

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

15. Because Petitioner requested 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.)

16. The 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
- 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 be 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 year 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.

17. 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. Provider 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 treatment 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

18. 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.

19. 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.

20. 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.

21. In the instant case, Petitioner requested a BA assessment. In an NOO, dated August 19, 2022, Respondent denied Petitioner’s request for an assessment. See ¶ 5. Respondent determined that Petitioner’s request was not “[c]onsistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational.” *Id.* The Respondent further explained that there was no evidence “that the recipient is engaging in behaviors for which ABA therapy is medically necessary under Florida Medicaid Rules” *Id.*

22. As Petitioner bears the burden of proof, the Petitioner must show that it is medically necessary for Petitioner to receive the requested service. As explained in Appendix 9.0 of the BA Policy the following are critical elements for ABA services: 1) engaging in maladaptive behaviors; that 2) interfere with a recipient's daily functioning. See ¶ 17. Here, the record shows that Petitioner engages in the following maladaptive behaviors: [REDACTED]; [REDACTED]; [REDACTED]; and [REDACTED]. See ¶ 9. However, as testified to by Dr. Bicard, there is no evidence that those maladaptive behaviors interfere with Petitioner's daily functioning. See ¶ 12. Ms. Acedo testified that Petitioner's maladaptive behavior interfere with [REDACTED] social communication, see ¶ 9, but there is no other evidence to support that [REDACTED] maladaptive behaviors interfere with [REDACTED] daily functioning. Moreover, Dr. Bicard provided credible testimony that Petitioner's [REDACTED] are not well treated with ABA, and that there are more conservative or less costly treatments available for Petitioner. See ¶ 12.

23. Lastly, the record reflects that Petitioner's provider believe that ABA services are medically necessary. See ¶¶ 4 and 7. However, 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." See ¶ 20.


24. Upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Petitioner did not prove by a preponderance of the evidence that an assessment was medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner has not demonstrated that the assessment is necessary

to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, Petitioner did not show that Respondent's denial of an assessment was incorrect.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

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

DONE and **ORDERED** this 23rd day of February, 2023, in Tallahassee, Leon County, Florida.

 Joseph Mabry
22-FH2013
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JOSEPH MABRY, 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.

Copies Furnished To:



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