

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



FILED

Apr 12, 2023, 11:55 am

OFFICE OF FAIR HEARINGS

[REDACTED],

PETITIONER,

AHCA Case No.: 23-FH0071

vs.

AGENCY FOR HEALTH CARE
ADMINISTRATION,

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, Hearing Officer Jaquetta Johnson convened a telephonic Fair Hearing on the instant case on February 23, 2023, at 9:30 a.m. 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 terminate Petitioner's behavior analysis ("BA") services was correct.

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. Petitioner's Authorized Representative, [REDACTED] ([REDACTED] Board Certified Behavior Analyst ("BCBA") with [REDACTED] appeared on behalf of the Petitioner. [REDACTED] ([REDACTED]), Petitioner's [REDACTED] attended as a witness for Petitioner.

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 ("BCBA-D") and Director of Clinical Operations for eQHealth Solutions, Inc. ("eQHealth"), attended as a witness for Respondent.

George, interpreter ID number 31578792 with Global Interpreting Network, provided translation services for the Petitioner.

Prior to the hearing, Petitioner sent to the Office of Fair Hearings a two (2)-page document. The document appears in the Office of Fair Hearings' case management system as "23-FH0071 Supporting Document.pdf." Absent an objection from Respondent, the undersigned admitted the two (2)-page document into evidence as Petitioner's Exhibit 1.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred and seventy-eight (278)-page evidence packet. The packet appears in the Office of Fair Hearings' case management system as "[REDACTED] FH 02.23.2023 1-164.pdf" and "[REDACTED] FH 02.23.2023 165-278.pdf." Absent an objection from the Petitioner, the undersigned admitted the evidence packet into evidence as Respondent's Composite Exhibit 1.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a forty-nine (49)-page evidence packet. The packet appears in the Office of Fair Hearings' case management system as "23-FH0071-AHCA Evidence Packet.pdf." Absent an objection from the

Petitioner, the undersigned admitted the evidence packet into evidence as Respondent's Composite Exhibit 2.

FINDINGS OF FACT

1. Petitioner receives Medicaid services on a fee-for-service basis from the Agency. eQHealth is a Quality Improvement Organization ("QIO") contracted by the agency to review prior authorization requests for services. See Respondent's Composite Exhibit 2 at page 2.

2. Petitioner is [REDACTED] ([REDACTED]-[REDACTED]) old. See Respondent's Composite Exhibit 1 at page 21. Dr. Bicard established that Petitioner has participated in BA services with the current provider, [REDACTED] [REDACTED], for approximately [REDACTED] ([REDACTED]-[REDACTED]).

3. Petitioner requested the continuation of the following BA services: 3,120 units of code 97153, 312 units of code 97155, and 208 units of code 97156. On December 12, 2022, Respondent sent Petitioner's provider a Request for Additional Information letter requesting additional information in such areas as data on behaviors targeted for reduction, clarification of procedural modifications, and clarification of punishment procedures. *Id.* at 51.

4. In a Notice of Outcome ("NOO"), dated December 21, 2022, Respondent terminated Petitioner's BA services. *Id.* at 28-29. The NOO explained the basis for the termination as follows:

[T]he 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:

Requested services are denied because documentation is neither showing [i]mprovement nor support for maintenance.

PR Clinical Rationale – Denial: The documentation does not conform to the standards of applied behavior analysis. The plan includes procedures that include punishment (pg 62 [REDACTED]). The provider was requested to describe the need for the use of punishment based on medical necessity, all previous reinforcement based treatment that has failed, the punishment procedures in detail, the procedural safeguards in place to protect the recipient and others from trauma, and write a punishment fading plan. The provider provided a vague statement that previous reinforcement strategies had failed without sufficient detail regarding previous ineffective reinforcement strategies or data. The provider did not provide the procedural safeguards in place to protect the recipient and others from trauma, or write a punishment fading plan. This punishment plan is not empirically valid. The information submitted does not support the continuation of BA services. This request for BA services is denied.

Id. at 29.

5. Petitioner requested reconsideration of the Respondent’s decision. In a Notice of Reconsideration Determination (“NRD”), dated January 13, 2023, the Respondent upheld its decision. *Id.* at 39-40. The NRD states, in pertinent part as follows:

At reconsideration all documents were carefully reviewed. The supporting documentation does not meet generally accepted practices within the field of applied behavior analysis and standards set in the Florida behavior Analysis Services Coverage Policy (Pages 6-7). Specifically, the provider has failed to write an intervention plan that upholds the standards of care of applied behavior analysis. The Plan lists procedures that include punishment and has not exhausted reinforcement-based strategies. This request for services is denied.

Id. at 40.

6. Dr. Bicard established that eQHealth reviews behavior analysis cases to ensure that providers are giving quality care consistent with the standards enumerated in the BA Policy as well as professional medical standards of applied behavior analysis (“ABA”). eQHealth reviewed the treatment plan submitted in this case to determine whether all five (5) conditions of medical necessity are met. Dr. Bicard asserted that Petitioner’s request for continuation of service was

denied because the treatment plan is not consistent with generally accepted professional medical standards as determined by the Medicaid program.

7. For example, the treatment plan contains unsupported punishment procedures. Dr. Bicard established the standards of care for punishment procedures. He testified that punishment procedures are considered a “default technology” within ABA meaning that they should only be used when all other treatments have failed. Further, punishment procedures should only be implemented by a highly qualified provider. A Registered Behavior Technician (“RBT”) is not qualified to implement punishment procedures according to the requirements of the Behavior Analysis Certification Board, which is the organization that certifies RBTs and BA providers to practice. Punishment procedures are potentially dangerous if not done correctly. To be effective, a punishment procedure must be implemented immediately after the behavior, it must be implemented at a high intensity, and it must be implemented consistently by a highly qualified provider. Punishment procedures have a suppressive effect but do not eliminate the behavior. The behavior will re-occur when the person who implemented the procedure is no longer around. Punishment procedures have potentially problematic side effects such as unwanted emotional behavior, a high potential for punishment-induced aggression, the recipient may experience trauma that could cause other problems, it may break down the relationship between the therapist and the recipient, and there are better research-based strategies for reducing maladaptive behaviors. Consequently, punishment procedures are only used to treat life threatening maladaptive behaviors. According to treatment plan at issue, the recipient is not engaging in life threatening behaviors. To meet standards of care, the treatment plan must contain explicit instructions on how the punishment procedure is implemented. There must be

an identified fading plan, specific safeguards to protect the recipient from trauma, and there must be specific criteria for the onset and offset of the procedure.

8. In this case, the request for BA services was pended to give the provider an opportunity to remove punishment procedures from the treatment plan. The provider responded with a letter which again indicated that punishment procedures would be used. *Id.* at 200. Specifically, the provider proposed punishment procedures to treat the maladaptive behavior of [REDACTED], which is not a life threatening behavior as described in the treatment plan. Dr. Bicard established that no information was given on how side effects, such as unwanted emotional behavior, would be prevented. The treatment plan indicates that the person implementing the punishment procedures is an RBT, and they are not qualified according to the Behavior Analysis Certification Board. Finally, the provider has requested a total of thirty (30) hours of BA therapy per week for which twenty-seven (27) of those hours would be provided by a RBT administering punishment procedures. For these reasons, Dr. Bicard asserted that the treatment plan does not meet ABA standards for procedural safeguards and therefore Petitioner would not benefit from continuing under the treatment plan.

9. Additionally, Dr. Bicard established that the provider has mis-applied and mis-labelled interventions for *all* maladaptive behaviors identified in the treatment plan. *Id.* at 258-263. For example, “[REDACTED]” could be considered an antecedent intervention, but [REDACTED] and [REDACTED] are consequence interventions. Further, the intervention [REDACTED] is not a recognized intervention in ABA. Finally, interventions such as [REDACTED] and [REDACTED] are contradictory interventions that cannot be implemented simultaneously. If the interventions are implemented,

the recipient will be allowed to escape in some instances and other times ■ will be punished. Dr. Bicard argued that such inconsistent treatment does not meet standards of care within BA and Petitioner would receive no benefit from continuing such treatment.

10. Finally, the treatment plan contains no information that the Lead Analyst is reviewing the RBT's work to ensure integrity with the treatment plan. In other words, there is no indication that the person would be implementing punishment procedures and interventions would be pwithin standards of care in ABA.

CONCLUSIONS OF LAW

11. 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).

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

13. Because Respondent terminated a previously approved service, Fla. Admin. Code R. 59-1.100(17)(g) assigns the burden of proof to the Respondent. 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.).

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).

15. 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. A state may place medical necessity limitations on EPSDT services. *See* 42 C.F.R. §§ 440.230(a), (b), (d).

17. Section 409.905(2), Florida Statutes, 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.

18. The Florida Medicaid 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

19. 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.

...

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

20. 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

...

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:
- 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 Self-stimulating, abnormal, inflexible, or intense preoccupations Self-care - difficulty recognizing risks or danger, grooming, eating, or toileting
 - iii. Other- behaviors not identified above

Respondent’s Composite Exhibit 2 at pages 45-47.

21. The Florida Medicaid Authorization Requirements Policy (“Authorization Requirements Policy”) (June 2016), incorporated by reference in Fla. Admin. Code R. 59G-1.053, provides general requirements for providers to obtain authorization to render Florida Medicaid services.

The Authorization Requirements Policy states, in pertinent part:

3.0 Determination Process

3.1 Review Criteria

The QIO may use a national standardized set of criteria, or other set of criteria, approved by AHCA, as a guide for authorizations performed at the first review level. If services cannot be approved at the first level review, the QIO’s physician peer reviewer will determine medical necessity using his or her clinical judgment, acceptable standards of care, state and federal laws, and AHCA’s medical necessity definition.

3.2 Review Process

The QIO will review each authorization request and will approve, deny, or request additional information. The QIO may deny a portion of the requested units of service if it cannot substantiate medical necessity based upon the information submitted.

3.2.1 Continued Authorization Requests

The QIO shall not deny or reduce the amount, frequency, or duration of a service that is already being provided, unless:

- The reduction is to correct for factual errors or omissions in prior certifications.
- There is a documented improvement in the recipient's medical condition.
- There is a documented change in the recipient's circumstances.
- The reviewing physician determines the recipient will not gain any additional benefit by continuing services at the current level.

Florida Medicaid Authorization Requirements Policy at pages 1-3.

22. In this case, Respondent denied Petitioner's request for continuation of BA services. The NOO and NRD explained that Petitioner's request for continuation of services did not meet medical necessity as the treatment plan was not "[c]onsistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational." See supra ¶ 4-5.

23. As provided in the BA policy (Appendix 9.0, section (a)), and the EPSDT requirements, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. A component of medical necessity is that services must be "consistent with generally accepted professional medical standards." As outlined above, Dr. Bicard provide credible and persuasive testimony identifying several instances where the revised treatment plan did not follow generally accepted standards of BA. For example, the provider failed to describe the need for the use of punishment for non life threatening behaviors, show how all previous reinforcement based treatment has failed, describe the punishment procedures in detail, establish procedural safeguards to protect the recipient from trauma, and write a punishment fading plan. See supra ¶ 4, 6-9. Punishment procedures are implemented by an RBT, and they are not qualified according to the Behavior Analysis Certification Board. See supra ¶ 8. Additionally, the provider mis-applied and mis-labelled interventions for *all* maladaptive behaviors identified

in the treatment plan. *See supra* ¶ 9. The provider provided a vague statement that previous reinforcement strategies had failed without sufficient detail regarding [previous ineffective reinforcement strategies or data. The provider did not provide the procedural safeguards in place to protect the recipient and others from trauma, or write a punishment fading plan. The interventions are contradictory and will lead to inconsistent treatment. *See supra* ¶ 9. Finally, there is no information that they are reviewing the RBT's work to ensure integrity with the treatment plan. Thus, Respondent demonstrated that, based on the information in the record, the requested services are not "consistent with generally accepted professional medical standards." Because the services are not consistent with generally accepted professional medical standards, the recipient will not gain any additional benefit by continuing services at the current level.

24. In this case, Petitioner's provider recommended the continuation of BA services. 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 supra* ¶ 20.

25. Accordingly, Respondent met their burden of proof to show that the requested BA services are no longer medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, the requested additional BA services at issue are not necessary to correct or ameliorate a defect or a physical and mental illness or condition.

26. Upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned finds that Respondent proved by a preponderance of the evidence that Respondent's termination of BA services was correct.

DECISION

Respondent's termination of Behavior Analysis services is **AFFIRMED**. Petitioner's appeal based on Respondent's termination of Behavior Analysis services is **DENIED**.

DONE and ORDERED this 12th day of April 2023, in Tallahassee, Leon County, Florida.

Laura Gallagher

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LAURA GALLAGHER, 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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