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May 12, 2023, 10:59 am

OFFICE OF FAIR HEARINGS

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

[REDACTED]

PETITIONER,

AHCA Case No.: 23-FH0262

vs.

**AGENCY FOR HEALTH CARE
ADMINISTRATION,**

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on April 4, 2023, at 1:09 p.m. Eastern Standard Time ("EST").

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Chrissie Simmons
Medical/Health Care Program Analyst and Fair Hearing
Liaison
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" or "ABA") services was correct.

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. Petitioner's Authorized Representative and [REDACTED], [REDACTED] (" [REDACTED]"), appeared on behalf of Petitioner. Petitioner's [REDACTED], [REDACTED] (" [REDACTED]"), attended as a witness for Petitioner. Lucilene Cataldo ("Ms. Cataldo"), BCABA for [REDACTED], attended as a witness for Petitioner.

Chrissie Simmons, Medical/Health Care Program Analyst and Fair Hearing Liaison for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared on behalf of Respondent. Dr. David Bicard ("Dr. Bicard"), Board Certified Behavior Analyst ("BCBA") and Director for Clinical Operations for eQHealth Solutions Florida ("eQHealth"), attended as a witness for Respondent.

Dr. Alyssa Conway, BCBA, Second Level Reviewer for eQHealth attended as an observer.

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

Prior to the hearing, Petitioner sent to the Office of Fair Hearings and Respondent a sixty (60)-page evidence packet. The evidence packet appears in the Office of Fair Hearings document management system as the file title "23-FH0262 Faxed DAR & Evidence.pdf". Absent an objection from the Respondent, the undersigned admitted the sixty (60)-page evidence packet into evidence as Petitioner's Composite Exhibit 1 ("PCE 1").

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a [REDACTED] hundred and sixty-nine (169)-page evidence packet and a forty-nine (49)-page evidence packet. The [REDACTED] hundred and sixty-nine (169)-page packet appears in the Office of Fair Hearings document management system as the file titles "[REDACTED] FH 04.04.2023 1-91.pdf" and "[REDACTED] FH 04.04.2023 92- 169.pdf". The forty-nine (49)-page evidence packet appears in

the Office of Fair Hearings document management system as the file title “23-FH0262 AHCA Evidence.pdf”. Absent an objection from the Petitioner, the undersigned admitted [REDACTED] hundred and sixty-nine (169)-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.

3. As provided in the Behavior Analysis Reassessment (“Treatment Plan”), Petitioner is engaging in the following maladaptive behaviors: [REDACTED], [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *Id.* at 64–[REDACTED].

4. Petitioner engages in [REDACTED] replacement behaviors, for the period of May 2022 to [REDACTED] 2022, at the following rates: [REDACTED], Petitioner’s incidents remained between [REDACTED] [REDACTED]; for [REDACTED], Petitioner’s incidents decreased below [REDACTED] for [REDACTED] [REDACTED], Petitioner’s incidents decreased to approximately [REDACTED] for [REDACTED], Petitioner’s incidents decreased to approximately [REDACTED] for [REDACTED], Petitioner’s incidents decreased below [REDACTED] for [REDACTED], Petitioner’s incidents

increased to above [REDACTED] for [REDACTED], Petitioner's incidents decreased below [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 remained at approximately [REDACTED] *Id.* at 105 – 109.

5. Petitioner requested continuation of BA services; specifically, 2,600 units of code 97153; 416 units of code 97155; and 208 units of code 97156. In a Notice of Outcome (“NOO”), dated January 11, 2023, Respondent terminated Petitioner’s ABA services. *Id.* at 28 – 30. The NOO explained the basis for the termination 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:

Requested services are denied because documentation is neither showing improvement nor support for maintenance.

PR Clinical Rationale - Denial: This recipient has received services since [REDACTED] [REDACTED]. According to The Florida Behavior Analysis Services Coverage Policy (9.5.c), [REDACTED] of the criteria for discharge from behavior analysis services is that data provided shows the recipient has made no progress toward any goals in the last 12 consecutive months. A review of the treatment plans from the previous 12 months shows no progress. The current data show increasing trends across the last two review periods, with most maladaptive behaviors currently at levels identical to initial baseline in [REDACTED]. Skill replacement programs have been in treatment since [REDACTED] with minimal mastery and current trends demonstrating regression. The information submitted does not support the continuation of BA services. This request for BA services is denied.

...

See pages 28 – 29 of RCE 1.

6. Petitioner requested reconsideration of the Respondent’s decision. In a Notice of Reconsideration Determination (“NRD”), dated February 7, 2023, Respondent upheld its decision. *Id.* at 40 – 42. The NRD explained the basis for the decision as follows:

PR Recon Determination: At reconsideration all documents were carefully reviewed. According to the Florid Medicaid State Plan (Appendix 9.3.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. The recommendations for procedural modifications include: additions/changes to treatment plan to impact behaviors targeted for reduction. Procedural modifications should include [REDACTED] or more of the following: antecedent manipulation modifications, modifications of prompting procedures used in acquisition, modifications in consequence-based strategies-- ones that either reduce maladaptive behavior or reinforce replacement behavior (e.g., manipulation of reinforcement schedules, switch to a different decelerative procedure), or if lack of progress was due to therapist error (e.g., poor data collection or poor training on intervention methods), how the provider will address human error. The recommendations are insufficient to support continued care. This reconsideration request has been reviewed, reconsidered and the denial is upheld.

...
Id. at 41.

7. On February 6, 2023, Petitioner requested a Fair Hearing to challenge the termination of ABA services. On March 13, 2023, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for April 4, 2023, at 1:00 p.m. EST.

8. Dr. Bicard is Board Certified Behavior Analyst and Director for Clinical Operations. Dr. Bicard testified to the following:

- a. Dr. Bicard believes the issue in this case is not about recipient’s fitness for BA services, but it is about the substandard care given to recipient. The lack of recipient’s progress and lack of changes to the Treatment Plan do not meet the standards of care for BA and are not compatible with the BA coverage policy.

- b. The Behavior Analysis Coverage policy criteria for continuation of treatment for using current methods or present level requires that all criteria must be met. *Id.* at 46. If criteria for 3a is met, but 3b or 3c are not met, then a reduction of treatment level or change of treatment method may be warranted. *Id.* Criteria 3a outlines that a recipient has a valid diagnosis, engages in maladaptive behaviors, and the maladaptive behaviors are interfering with daily functioning. *Id.* This criteria was met. However, criteria 3b was not met. Criteria 3b requires that the data provided must show evidence that the frequency of maladaptive behaviors have decreased from the last review, and if not, that modification of behavior plan is created. The criteria for discharge from BA services under Criteria 5c states that data shows recipient has not made any progress towards any goals in the last 12 months. *Id.* at 47. Review of the provider's Treatment Plan shows Recipient has been working on the same objectives for [REDACTED] with no progress.
- c. The first maladaptive behavior was labeled [REDACTED]. *Id.* at 82. This recipient participated in BA services with this provider since [REDACTED]. At that time, the provider stated the baseline level of [REDACTED] was [REDACTED] per week on average. *Id.* at 90. Petitioner is currently engaging in approximately [REDACTED] per week on average which shows no improvement. *Id.* Recipient has been working on this goal since at least [REDACTED]. *Id.* The [REDACTED] is a relatively new goal the provider identified. *Id.* At baseline, Petitioner was engaging in this behavior with about [REDACTED] per week average and currently engaged in [REDACTED]

incidents per week which shows no improvement. *Id.* at 82-83. The goal identified for [REDACTED] behavior is also a relatively new goal with no progress. *Id.* at 83. The goal identified for [REDACTED] shows the recipient has been working on this same goal since at least [REDACTED]. *Id.* at 84. The goal identified for [REDACTED] shows that although the information suggests mastery, [REDACTED] behavior during this authorization period is worse on average than was on baseline. *Id.* at 85. At baseline Petitioner was averaging about [REDACTED] per week and is currently averaging about [REDACTED] although this is slightly worse, it is roughly the same level since [REDACTED]. *Id.* The goal identified for [REDACTED] shows Petitioner has been working on this same goal since [REDACTED] which is no improvement over baseline. *Id.* The goal identified for [REDACTED] shows Petitioner has been working on this goal since at least [REDACTED]. *Id.* at 86. The goal identified for [REDACTED] [REDACTED] show Petitioner made progress but the corresponding graph shows no progress, so there is conflicting information here. *Id.* The goal identified for [REDACTED] shows this behavior improved over baseline but Petitioner has been working on this goal since [REDACTED]. *Id.* at 87. The goal identified for [REDACTED] shows Petitioner has made no progress since initiation on [REDACTED]. At baseline [REDACTED] was averaging [REDACTED] per week and is currently averaging about [REDACTED] per week. *Id.* at 88. The goal identified for [REDACTED] is a relatively new goal, but Petitioner has made no progress during the authorization period. *Id.* at 89.

- d. In reading the graph data for the current authorization for [REDACTED], from left to right, the dots and lines should move in a downward direction. In Dr. Bicard's medical opinion, the data shows the behavior is getting worse during the authorization period. *Id.* at 90. There are no proposed modifications for this behavior during the authorization. *Id.* The graph data for [REDACTED] show has not improved since baseline data was collected and is at the same level. *Id.* The graph data for [REDACTED] behavior show there is no improvement, and for [REDACTED], the behavior has gotten worse during the authorization. *Id.* at 91. The graph data for [REDACTED] and [REDACTED] got worse as the authorization went along. *Id.* at 92. The graph data for [REDACTED] and [REDACTED] – the behavior has gotten slightly worse and [REDACTED] has gotten about [REDACTED] as worse since the beginning of the authorization period. *Id.* at 93. The graph data for [REDACTED] and [REDACTED] show the data are at the same level or gotten slightly worse during the authorization. *Id.* at 94. The last graph data for [REDACTED] shows that Petitioner's behavior remained roughly the same and at baseline levels. *Id.* at 95. Based on these graphs, there has been no intervention to change the trajectory of the maladaptive behaviors during the authorization. *Id.* at 90 – 95. Dr. Bickard asserts that this does not meet standards of care within the field of behavior analysis, or within the Behavior Analysis Coverage Policy.
- e. The graph data for recipient shows improvement skills that the provider worked on to improve Petitioner's behavior by percentage rate. *Id.* at 105 – 109. Anything

at or below 50% is considered chance data. If recipient's behavior is recorded between 0-50% this means [REDACTED] improvement could have happened by chance, and the provider has not identified environmental events that would improve the behavior. Replacement graphs should move in an upward direction. After [REDACTED] of therapy with this provider, the graph data recorded here are not in an upwards direction but are all flat with the exception of [REDACTED] behavior. *Id.* The only behavior identified showing improvement is [REDACTED]. But even here, the data shows no improvement or intervention. *Id.* at 107. The treatments for Petitioner's maladaptive behaviors were identified by provider and reported in a table. All of the replacements and interventions were a general listing of procedures that may be used within BA but are not individualized or specific for recipient. *Id.* at 71-77. Behavior analysis is defined by seven characteristics, two of which are "effective", i.e., the procedures employed will produce meaningful change in behavior, and the other is "generality", i.e., the meaningful behavior will spread to new environments and new people. This Treatment Plan submitted does not meet those defining characteristics, is below standards of care within the field of BA services, and does not meet criteria within the BA coverage policy. For this reason, services were denied and the denial upheld at reconsideration.

- f. Based on documents submitted and Ms. Cataldo's testimony, *see infra* ¶ 11, the treatment for recipient is below standards of care within the field of behavior analysis. Children who participate in behavior analysis therapy are entitled to

effective care. Petitioner's family has the option to seek BA services from a different provider. Recipient clearly has behavior problems and skill deficits that require BA therapy. When performed appropriately, BA therapy is a powerful tool to empower children with [REDACTED].

9. [REDACTED] is Petitioner's [REDACTED]. [REDACTED] testified to the following:

- a. Based on Petitioner's diagnosis from an early age and [REDACTED] despite evolution or progress, [REDACTED] believes Petitioner needs to continue getting these services. [REDACTED] believes Respondent's decision was not correct. Petitioner was making certain improvements, but although they are not at the highest level, the provider recommended these services. Petitioner's improved behavior is observed in family settings. For example, there has been improvements in [REDACTED] [REDACTED]. The improvements are in simple things like [REDACTED] which used to be difficult. Petitioner has also experienced different situations within the last year in the family, and has also been [REDACTED]. When Petitioner was [REDACTED]. Something [REDACTED] finds remarkable is how Petitioner has been [REDACTED]. Before Petitioner did not [REDACTED]. Sometimes [REDACTED] has to be motivated, but once engaged, [REDACTED] participates. Everyone can tell from what [REDACTED] has been before. [REDACTED] argues that the family has a lot to go through to help Petitioner's improvement. [REDACTED]

provided supervision for Ms. Cataldo usually about once to [REDACTED] per month. When the lead analyst provided supervision to Ms. Cataldo during those times, [REDACTED] provided suggestions for interventions but was mainly focused on controlling the environmental changes taking place at the moment. Ms. Cataldo is unable to verify the lead analyst's supervision of the Registered Behavior Technician (RBT) or state how often it occurred. Ms. Cataldo agrees that Petitioner has not shown expected progress these last few months or even the last years as mentioned. Due to several environmental changes since the last authorization period, the provider increased work with Petitioner which resulted in more collected data on the impact on [REDACTED] maladaptive behaviors. Ms. Cataldo believes the traumatic event Petitioner experienced when [REDACTED] [REDACTED] [REDACTED] was of most importance.

- b. The data table accompanying the provider's reconsideration letter highlights data for the month [REDACTED], noting that the data collected during [REDACTED] was when the Petitioner had a controlled environment and stable hours. The data tends to fluctuate due to the number of service hours provided on a monthly basis. The maladaptive behaviors show more pronounced with more hours of service and reduced with less hours. This tends to appear as though the maladaptive behaviors are increasing but the increase is due to the increased sample of data with increased hours. See page 3 of PCE 1. The modification of the plan is also included as part of the reconsideration letter. *Id.* at 4. The list of replacement behaviors and interventions are individualized for Petitioner and includes the approach to the interventions and how to supervise the RBT. See supra RCE 1, at

110-117. Otherwise, Ms. Cataldo believes Petitioner is still a teachable child and has the capacity to learn but is just a slow learner. Ms. Cataldo believes this plan might not have been the best possible, but the provider can create new plans for Petitioner to receive the needed services.

12. Petitioner's service provider, [REDACTED], wrote a reconsideration letter dated January 29, 2023, in support of Petitioner's request for ABA services. The letter states as follows:

Environmental Changes that affect [Petitioner]'s progress:

- Summer vacation: [Petitioner] experienced changes on [REDACTED]
[REDACTED]
[REDACTED]
- RBT's vacation: Requested by [Petitioner]'s [REDACTED] a substitute RBT covers three weeks' vacation. This affects [REDACTED] responses to the implementation of intervention due of acquiring of stimulus control by the new RBT. When the original RBT returns from her vacation there was detection of loss of stimulus control that needed to be addressed.
- School year started: [Petitioner] faced another change on [REDACTED] daily schedule that impacted negatively on [REDACTED] behaviors/responses to the ABA intervention. [REDACTED] was required to adapt into a new schedule, new teacher, teacher assistant and classmates.

After [Petitioner] witnessed [REDACTED] [REDACTED]'s traumatic episode, [REDACTED] [REDACTED] and teachers reported that [Petitioner] is covering [REDACTED]
[REDACTED]
[REDACTED].

[Petitioner] showing [REDACTED]
[REDACTED]
[REDACTED].

Data showed an increase across all maladaptive behaviors after sickness of [REDACTED] [REDACTED].

All those behaviors are directly correlated with [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] diagnoses.

...

See pages 21 – 22 of PCE 1.

13. Petitioner’s neurologist, [REDACTED] wrote a letter dated February 27, 2023, in support of Petitioner’s request for ABA services. The letter states as follows:

It is medically necessary for [Petitioner] to receive Behavior Analysis Services (ABA therapy). This is an effective course of treatment for children with [REDACTED] and Related disorders to maximize their developmental potential. Consultation with a certified behavior analyst is recommended to determine the number of hours needed. The amount of Early Intensive Behavior Intervention hours will vary depending on each child's needs.

...

Id. at 12.

CONCLUSIONS OF LAW

14. 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).

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

16. Because Respondent terminated a previously approved service, Fla. Admin. Code R. 59G-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.)

17. 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.

18. 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

...

5. Criteria for Discharge from Behavior Analysis Services - ONE or MORE of the following MUST be satisfied:

- a. The critical elements are no longer met.
- b. The data provided shows that the frequency and severity of maladaptive behavior(s) has declined to the point that they no longer pose a barrier to the child’s ability to function in his/her environment.
- c. The data provided shows the recipient has made no progress toward any goals in the last 12 consecutive months.
- d. The level of functional impairment as expressed through behaviors no longer justifies continued BA services.
- e. Parent/guardian withdraws consent for treatment.

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

...

See *supra* RCE 2 at 45 – 47.

19. 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.

20. 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.

21. 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.

22. The Florida Medicaid Authorization Requirements Policy (“Authorization Policy”), incorporated by reference in Fla. Admin. Code R. 59G-1.053, provides as follows:

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 error 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.

23. In the instant case, Petitioner is under 21 years of age and is diagnosed with [REDACTED]. See ¶ 2. Petitioner requested continuation of ABA services. In a NOO, dated January 11, 2023, Respondent terminated the services. See ¶ 5. Respondent cited to the medical necessity criteria as the basis for their decision, specifically that the requested hours of BA services be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational. *Id.* Respondent has burden of proof to show by a preponderance of evidence that the Respondent’s determination was correct. See ¶ 16.

24. The record shows that Petitioner requires ABA services as medically necessary. See ¶¶ 8 - 11. The Petitioner’s maladaptive behaviors as indicated in the Behavioral Analysis Assessment include [REDACTED], [REDACTED]

[REDACTED]
[REDACTED] See ¶ 4. The

parties agree that Petitioner engages in maladaptive behaviors that interfere with [REDACTED] daily functioning. See ¶ 8 – 11. The Behavior Analysis Coverage Policy criteria for continuation of treatment at the present level and/or using current methods requires that providers must ensure

that all criteria are met. See ¶ 18. However, review of the Treatment Plan submitted by Petitioner's provider reveals criteria 3a was met but 3b and 3c were not met, and thus termination of treatment was warranted. See ¶ 8.

25. The Behavior Analysis Coverage Policy criteria for discharge from behavior analysis services outlines that one or more of the criteria must be satisfied. See ¶ 18. One of the criteria, *supra*, maintains that data provided shows the recipient has made no progress toward any goals in the last 12 consecutive months. Based on Ms. Cataldo's testimony, recipient has experienced several environmental changes within the last year which affected recipient's progress. See ¶ 11. Moreover, the lead analyst provided suggestions for interventions during this time but was primarily focused on addressing Petitioner's environmental changes. See *supra*. The reconsideration letter from Petitioner's provider reflects the same occurrences. See ¶ 12. However, even in the light most favorable to Petitioner, according to Dr. Bicard's testimony, Petitioner's goals showed very little to no progress with incidents of maladaptive behaviors at or near baseline for [REDACTED]. See ¶ 8. The graph data for recipient shows improvement skills that the provider worked on to improve Petitioner's behavior by percentage rate. See *supra*. After [REDACTED] of therapy with this provider, graph data recorded here are not in an upwards direction but are all flat with the exception of [REDACTED] behavior. See *supra*. The only behavior identified showing improvement is [REDACTED]. But even here, the data shows no improvement or intervention. See *supra*. The undersigned finds highly plausible that several environmental changes occurred during the authorization period that affected [REDACTED] progress towards [REDACTED] goals. However, the undersigned finds that the data demonstrates the provider's lack


of intervention or modification to the Treatment Plan, and Petitioner's lack of progress in the last 12 consecutive months. Therefore, this criteria for discharge from BA services is warranted.

26. Upon consideration of the testimony provided, evidence submitted, and applicable polices, the undersigned concludes that Respondent proved by a preponderance of the evidence that the termination of ABA services was correct. Looking at all the evidence relevant to the particular needs of Petitioner, Respondent has demonstrated that the previously authorized services, based on the Treatment Plan at issue in this case, are not consistent with generally accepted professional medical standards as determined by the Medicaid program. Accordingly, Respondent proved by a preponderance of the evidence that Respondent's termination of ABA services was correct.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

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

DONE AND ORDERED this 12th day of May, 2023 in Tallahassee, Leon County, Florida.


Kimberly Roche
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KIMBERLY ROCHE, 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:

[REDACTED]
[REDACTED]
[REDACTED]

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