



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

FILED

May 26, 2023, 8:43 am

OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 23-FH0414

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 11, 2023, at 9:00 a.m. Eastern Standard Time (“EST”).

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner’s Authorized Representative

For the Respondent:

Marielisa Amadour

Medical Healthcare Program Analyst for AHCA

STATEMENT OF ISSUE

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent’s decision to deny Petitioner’s 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.

Marielisa Amadour, Medical/Health Care Program Analyst for the Agency for Health Care Administration (“Agency” or “AHCA”) and Dr. David Bicard (“Dr. Bicard”), Medical Director for eQHealth Solutions Inc. (“eQHealth”) appeared as a witness for Respondent.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Respondent a fifty-five-page (55) evidence packet. The 55-page evidence packet appears in the Office of Fair Hearings’ document management system as the file title “[REDACTED] FH 04.11.2023.pdf”. Absent an objection from the Petitioner, the undersigned admitted the 55-page evidence packet into evidence as Respondent’s Composite Exhibit 1 (“RCE 1”). Respondent submitted a forty-nine (49) page evidence packet. The 49-page packet appears in the Office of Fair Hearings’ document management system as the file title “23-FH0414 AHCA Evidence (Pages 1-49).pdf”. Absent an objection from the Petitioner, the undersigned admitted the 49-page evidence packet into evidence as Respondent’s Composite Exhibit 2 (“RCE2”).

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 16 of RCE 1. Petitioner is diagnosed with [REDACTED]. *Id.*
3. Petitioner requested BA services; specifically, 264 units of code 97153; 88 units of code 97155; and 176 units of code 97156. In a Notice of Outcome (“NOO”), dated February 14, 2023, Respondent denied Petitioner’s request for BA services. The NOO explained the basis for the denial 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:

PR Clinical Rationale – Denial: This plan does not conform to the Florida Medicaid State Plan (Appendix 9.2.c iii.i v.v) Please submit an updated BASP with strategies for changing the maladaptive behavior(s), written detailed description of when, where, and how often these goals will be addressed. And proposed strategies will be implemented, System for monitoring and evaluating the effectiveness of the and a plan to fade BA services. The provider was requested to provide strategies for changing the maladaptive behavior(s), Written detailed description of when, where, and how often these goals will be addressed and proposed strategies will be implemented, System for monitoring and evaluating the effectiveness of the and a plan to fade BA services. The provider did not amend the treatment plan 9in relation to the lack of progress. The information submitted does not meet standards of care within the field of behavior analysis. The request is denied.

...

Pages 22 – 23 of RCE 1.

4. Petitioner requested reconsideration of the Respondent’s decision. In a Notice of Reconsideration Determination (“NRD”), dated March 1, 2023, Respondent upheld its decision.

Id. at 33-34. The NRD explained the basis for the decision as follows:

PR Recon Determination: At reconsideration all documents were carefully reviewed. The [provider] did not submit a treatment plan that conforms to the standard of care within the field of behavior analysis or criteria specified in the Behavior Analysis Service Coverage Policy. This request for services denial is upheld.

...

Pages 33-34 of RCE 1.

5. An initial BA assessment was completed [REDACTED], by evaluator Kurtis S.

The assessment notes:

a. Referral was made for recipient due to [REDACTED] maladaptive behavior.

b. Recipient engaged in maladaptive behaviors [REDACTED] times during observation periods. Recipient presented with [REDACTED].

c. Reinforcers that were identified for recipient included [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

d. Recipients maladaptive behaviors were defined as:

(1) [REDACTED].

(2) [REDACTED].

e. When recipient was with was [REDACTED], recipient engaged in [REDACTED]. Recipient will be provided with [REDACTED].

f. [REDACTED] suggested treatment goals were listed on the report.

g. [REDACTED] separate discharge criteria were listed on the report

See RCE1 47-54

6. On February 28, 2023, Petitioner requested a Fair Hearing to challenge the denial of BA services. On March 16, 2023, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for April 11, 2023, at 9:00 a.m. EST.

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

- a. Petitioner is [REDACTED].
- b. From the ages [REDACTED] Petitioner received behavior analysis services.
- c. Petitioner started full time school this year, and the services were voluntarily stopped.
- d. Petitioner began exhibiting [REDACTED]
[REDACTED].
- e. Petitioner's speech therapist made a referral for BA services after the therapist observed Petitioner [REDACTED]. The request was made for 6 hours so Petitioner could continue to attend school full time.
- f. Services were denied. [REDACTED] was told by "Kurtis" the BA analyst that the denial was due to the low number of hours requested in comparison to the 40 hours Petitioner had been receiving previously.
- g. Kurtis observed Petitioner for 30 minutes to an hour for the BA assessment.
- h. [REDACTED] does not want the [REDACTED]
[REDACTED]

8. Dr. David Bicard is a Board Certified Behavior Analyst and the medical director for eQ Health. Dr. Bicard testified to the following:

- a. In order to be medically necessary, services must meet all 5 criteria as listed on page 7 of RCE 2.
- b. Two levels of review were conducted on the Petitioner's request.
- c. The treatment plan and assessment submitted with the request was not consistent with general standards of care in the field of Behavior Analysis.
- d. The plan was deficient and is not a complete treatment plan. The plan did not include: goals in regard to standards of care, maladaptive behavior intervention plan or observational data.
- e. Dr. Bicard opined that this was the worst treatment plan he has seen.
- f. Most assessments take at least six hours to complete and 1 hour is not nearly enough time to complete a full assessment.
- g. Without an assessment that complies with the BA standards of care, services cannot be approved.

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 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.)

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 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.

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 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.

- 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.

17. In the instant case, Petitioner was referred for an assessment for BA services See ¶6. Upon Petitioner's request for BA services, the assessment was reviewed by Respondent See ¶7. Respondent reviewed the assessment and found that it did not comply with the medically necessary criteria of being "consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational". See ¶3, 16.

18. As provided by the EPSDT requirements, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. As provided in section 2.83 of the Definitions Policy, a component of medical necessity is that services must be "consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigation." As shown by the record, Petitioner's ABA assessment was completed after less than an hour of observation. See ¶ 7. As testified to by Dr. Bicard the assessment should have taken at least 6 hours to complete. Further, Dr. Bicard testified that the assessment was incomplete, for example, the treatment plan did not address goals in regards to standards of care, maladaptive behavior interventions, and plan or observational data See ¶ 8. See ¶7. As Dr. Bicard is a BCBA at the doctoral level, his determination the assessment was not in accordance with the standards of care in the field of Behavior Analysis is credible. See ¶7 and ¶12.

19. 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 the denial of BA services was incorrect. Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner did not demonstrate that the requested ABA services, based on the treatment plan at issue, are 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 BA services 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 26th day of May 2023, in Tallahassee, Leon County, Florida.



LYNNE RINGERS
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NOTICE OF A RIGHT TO JUDICIAL REVIEW

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

Copies Furnished To:

[REDACTED]
[REDACTED]
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