



**FILED**

Jun 26, 2023, 9:00 am

OFFICE OF FAIR HEARINGS

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

████████████████████,

**PETITIONER,**

**AHCA Case No.: 23-FH0571**

**vs.**

**AGENCY FOR HEALTH CARE  
ADMINISTRATION,**

**RESPONDENT.**

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on May 2, 2023, at 10:06 a.m. and May 9, 2023, at 1:03 p.m. Eastern Standard Time (“EST”).

**APPEARANCES**

For the Petitioner:

████████████████████

Petitioner’s Authorized Representative

For the Respondent:

Marielisa Amador  
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” or “ABA”) services was correct.

**PRELIMINARY STATEMENT**

All parties and witnesses appeared telephonically. Petitioner’s Authorized Representative and ██████████ ██████████ (“████████”), appeared at the Fair Hearing on behalf of

Petitioner. Lusiana Robello (“Ms. Robello”), Advocate for [REDACTED], appeared at the Fair Hearing as a witness for Petitioner. Taina Toussaint (“Ms. Toussaint”), Board Certified Behavior Analyst (“BCBA”) for [REDACTED], appeared at the Fair Hearing as a witness for Petitioner.

Lee Ann Williams, Medical/Health Care Program Analyst and Fair Hearing Liaison for the Agency for Health Care Administration (“Agency” or “AHCA”), appeared on behalf of Respondent during the Fair Hearing convened on May 2, 2023. Marielisa Amador, Medical/Health Care Program Analyst for the Agency for Health Care Administration (“Agency” or “AHCA”), appeared on behalf of Respondent during the Fair Hearing convened on May 9, 2023. Dr. Joseph Darling (“Dr. Darling”), Board Certified Behavior Analyst (“BCBA”) at the doctoral level, Second Level Reviewer for eQHealth Solutions Florida (“eQHealth”), attended the Fair Hearing as a witness for Respondent.

The following attended as observers: Diana Hearod, Health Care Program Analyst and Fair Hearing Liaison for AHCA; and Georgia Rogers, AHCA intern.

The following appeared to offer translation services for the Petitioner: Silvio, interpreter number 68009883 of Global Interpreting Network, appeared during the hearing convened on May 2, 2023. Jonas, interpreter number 8027 of Global Interpreting Network, appeared during the hearing convened on May 9, 2023.

Prior to the hearing, Petitioner sent to the Office of Fair Hearings and Respondent a thirty-four (34)-page evidence packet. The evidence packet appears in the Office of Fair Hearings document management system as the file title “23-FH0571 Email Correspondence.pdf”. Absent an objection from the Respondent, the undersigned admitted the thirty-four (34)-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 one hundred and sixty-five (165)-page evidence packet and a forty-nine (49)-page evidence packet. The one hundred and sixty-five (165)-page packet appears in the Office of Fair Hearings document management system as the file title "[REDACTED] FH 05.02.2023.pdf". The forty-nine (49)-page evidence packet appears in the Office of Fair Hearings document management system as the file title "23-FH0571 AHCA Evidence packet 49 pages.pdf". Absent an objection from the Petitioner, the undersigned admitted one hundred and sixty-five (165)-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] ([REDACTED]-[REDACTED]) old. 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]. *Id.* at 86. The graph data in the Treatment Plan, for the period between [REDACTED]

and [REDACTED], indicated the following regarding Petitioner's incidents of maladaptive

behaviors: for [REDACTED], Petitioner's incidents remained at about [REDACTED] per week; for [REDACTED],

Petitioner's incidents remained at about [REDACTED] per week; for [REDACTED], Petitioner's

incidents remained at about █ per week; for █, Petitioner's incidents decreased from about █ per week to about █ per week; for █, Petitioner's incidents increased from about █ per week to about █ per week; for █, Petitioner's incidents decreased from about █ per week to about █ per week; for █, Petitioner's incidents remained at about █ per week; for █, Petitioner's incidents remained at about █ per week; and for █, Petitioner's incidents remained at about █ per week. *Id.* at 69. For the period between █ and █, the graph data indicate the following: for █, Petitioner's incidents decreased from █ per week to █ per week; for █, Petitioner's incidents decreased from █ per week to █ per week; for █, Petitioner's incidents decreased from █ per week to █ per week; for █, Petitioner's incidents decreased from █ per week to █ per week; for █, Petitioner's incidents increased from █ per week to █ per week; for █, Petitioner's incidents decreased from █ per week to █ per week; for █, Petitioner's incidents increased from █ per week to █ per week; for █, Petitioner's incidents decreased from █ per week to █ per week; and for █ behavior, Petitioner's incidents decreased from █ per week to █ per week. *Id.* at 104 – 108.

4. In the Treatment Plan, for the period between █ and █, the graph data indicates the following rates of Petitioner's successful response in replacement behaviors: for █, Petitioner's response increased from about █ to about █ for █, Petitioner's response remained at about █ for █, █, Petitioner's response remained at about █ for █, █, Petitioner's response remained at about █ for █, █, Petitioner's

response increased from about [REDACTED] to about [REDACTED] for [REDACTED], Petitioner's response increased from about [REDACTED] to about [REDACTED] for [REDACTED], Petitioner's response increased from about [REDACTED] to about [REDACTED] for [REDACTED], Petitioner's response increased from about [REDACTED] to about [REDACTED] for [REDACTED], Petitioner's response increased from about [REDACTED] to about [REDACTED] for [REDACTED], Petitioner's response remained at about [REDACTED] for [REDACTED], Petitioner's response increased from about [REDACTED] to about [REDACTED] and for [REDACTED], Petitioner's response increased from about [REDACTED] to about [REDACTED] *Id.* at 77 – 78; 117 – 121.

5. Petitioner requested continuation of BA services; specifically, 2,808 units of code 97153; 416 units of code 97155; and 104 units of code 97156. In a Notice of Outcome (“NOO”), dated March 7, 2023, Respondent terminated Petitioner’s ABA services. *Id.* at 28 – 30. 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 improvement nor support for maintenance.

PR Clinical Rationale - Denial: This recipient has received services since [REDACTED] [REDACTED] and [REDACTED] with the current provider. According to The Florida Behavior Analysis Services Coverage Policy (9.5.c), one 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 level trends in treatment goals. Maladaptive behavior goal STOs have been in progress since at least [REDACTED] with no mastery or progress. The

information submitted does not support the continuation of BA services. This request for BA services is denied.

...

*Id.* at 28 – 29.

6. Petitioner requested reconsideration of the Respondent’s decision. In a Notice of Reconsideration Determination (“NRD”), dated March 17, 2023, Respondent upheld its decision.

*Id.* at 39 – 41. 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 one 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 40.

7. On March 16, 2023, Petitioner requested a Fair Hearing to challenge the termination of ABA services. On April 10, 2023, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for May 2, 2023, at 9:30 a.m. EST. On May 3, 2023, the undersigned issued an Order Granting Continuance and a separate Order Rescheduling Fair Hearing, setting the hearing for May 9, 2023, at 1:00 p.m. EST.

8. Dr. Darling established the following:

- a. The standards used when reviewing a treatment plan are based on the generally accepted professional medical standards, which are founded on reliable scientific evidence recognized by the medical community, peer-reviewed literature, or practitioner specialty associations' recommendations. See page 28 of RCE 2. Additionally, the Behavior Analysis Certification Board developed practice guidelines for applied behavior analysis when reviewing for effectiveness of a treatment plan. *Id.* While the reviewers determined it is medically necessary for Petitioner to receive ABA therapy, Dr. Darling contends the three treatment plans submitted show ineffective treatment according to the standards for applied behavior analysis and, therefore, the services were denied.
- b. According to standards in BA, in reading graph data from left to right, if behavior trends are not moving downward after three data points, then there should be modification in the treatment plan as the current treatment methods are not working. There are nine behaviors under treatment which Dr. Darling asserts show no decrease in maladaptive behaviors and there are no changes in the six-month period to help with reduction of these behaviors. See ¶ 3. In Dr. Darling's medical opinion, since these graphs show no effective treatment for the previous six months and there were no modifications shown to impact ineffective treatment, the continued treatment was denied. Dr. Darling points out the provider's statement in the Treatment Plan which purports proposed changes as "[d]uring the next authorization period, Lead Analyst will increase supervision and parent training to ensure treatment fidelity". See RCE 1 at page 99. Dr. Darling contends

that this proposed change should always occur during therapy, but it is unlikely to help in this case since it was not previously done in the past [REDACTED]. The paragraph following this statement lists general changes, but it does not state how or with what changes will be made or indicate why the changes were not done in the previous [REDACTED]. *Id.* This paragraph explains changes for one behavior, [REDACTED], but does not specify changes for the other 8 behaviors under treatment. *Id.*

- c. Dr. Darling contends, as an example, the graph for [REDACTED] shows an upwards data trend but shows no changes in procedures specific to this behavior. *Id.* at 104. Dr. Darling contends, as an example, the graph for [REDACTED] shows no notable trend decrease and no improvement in its frequency. *Id.* Dr. Darling contends, as an example, the graph for [REDACTED] shows a decreasing trend. *Id.* at 105. Dr. Darling contends, as an example, the graph for [REDACTED] shows no change in frequency and no effective decrease. *Id.*
- d. Replacement behaviors are those designed to increase appropriate skills in order to decrease the frequency of maladaptive behaviors. There are twelve identified replacement behaviors which Dr. Darling contends show relatively no change for the six-month period. *See* ¶ 4. Dr. Darling contends that these graphs show no progress for any replacement behavior within the [REDACTED] of therapy delivered.
- e. In this case, Dr. Darling contends that item 5(c) of the BA Policy, *infra* ¶ 16, which requires data show recipient has made no progress towards any goals in the last 12 months, was not met and the denial was based on ineffective treatment in the last [REDACTED]. Dr. Darling asserts that each specific behavior should have a specific

procedure attached to it and changes should be specific as to indicate whether they are going to be effective. Dr. Darling asserts that since each behavior has the same intervention, there is no indication why only one behavior, [REDACTED] has decreased. Dr. Darling contends that the decrease in [REDACTED] cannot be attributed to ABA therapy because the rest of the data does not support the reason for the decrease.

9. Ms. Toussaint testified to the following:

- a. Ms. Toussaint is the Lead Analyst who updated the Petitioner's Treatment Plan dated [REDACTED]. The highlighted portions in the updated Treatment Plan were intended to be generalized for all of the maladaptive behaviors, not just for [REDACTED] behavior as written. Some changes to the Treatment Plan involve using high interest materials for the client during non-preferred activities, providing frequent breaks and visuals, and using a visual schedule. Ms. Toussaint asserts that Petitioner has made progress with [REDACTED] goals for [REDACTED] by decreasing its frequency per week. The current frequency for [REDACTED] is [REDACTED] incidents per week, down from about [REDACTED] incidents per week at baseline.

10. Ms. Robello testified to the following:

- a. Ms. Robello has been Petitioner's advocate since [REDACTED] Ms. Robello works with [REDACTED] family and attends [REDACTED] school individual education plan ("IEP") meetings. See PCE 1 at pages 4 – 34. Ms. Robello witnessed the collaborations between the BCBA and RBT during these meetings where they provide strategies to assist Petitioner achieve progress in [REDACTED] maladaptive behavior in school. Ms. Robello has observed

Petitioner's progress since [REDACTED] and believes Petitioner needs to continue receiving ABA support, especially in school, in addition to previous support provided.

11. [REDACTED] testified to the following:

a. As Petitioner's [REDACTED] [REDACTED] believes the therapy sessions are working. [REDACTED]

[REDACTED] has observed Petitioner's progress in various parts of [REDACTED] life, especially in social, familial, academic, and community settings. Petitioner has been able to reach many goals in school, but [REDACTED] believes Petitioner's issue is that [REDACTED] is very easily distracted, and there is difficulty getting [REDACTED] to completely grasp concepts.

#### **CONCLUSIONS OF LAW**

12. 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).

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

14. 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.)

15. 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.

16. Appendix 9.0 of the BA Policy provides Review Criteria for Behavior Analysis Services. *Id.*

at 45 – 47. 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.

17. 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.

18. Petitioner is under age 21, and therefore EPSDT applies to ■■■ 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.

19. 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.

20. The Florida Medicaid Authorization Requirements Policy (June 2016) (“Authorization Policy”), incorporated by reference in Fla. Admin. Code R. 59G-1.053, provides general requirements for providers to obtain authorization to render Florida Medicaid services. See RCE 2 at pages 30 – 36. The Authorization Policy states as follows:

### **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 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.

21. In the instant case, Petitioner is under 21 years of age and is diagnosed with [REDACTED]. See ¶ 2. In a NOO, dated March 7, 2023, Respondent terminated Petitioner’s ABA services. See ¶ 5. Respondent cited to the medical necessity criteria as the basis for their decision, specifically that the services must 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 ¶ 14.

22. The Petitioner’s maladaptive behaviors as indicated in the Treatment Plan include [REDACTED]  
[REDACTED]  
[REDACTED] See ¶ 3. The parties agree that Petitioner engages in maladaptive behaviors that interfere with [REDACTED] daily functioning. See ¶ 8 – 11.

23. Appendix 9.0 of the BA Policy maintains criteria for continuation of treatment at the present level and/or using current methods which requires that providers must ensure that all criteria are met. See ¶ 16. Criteria 3(b) requires that 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.” See ¶ 16. At Fair Hearing, Dr. Darling’s testimony identified several instances where the revised Treatment Plan at issue did not follow generally accepted professional medical standards for behavior analysis. See ¶ 8. Dr. Darling emphasized the following examples: the graph for [REDACTED] shows an upwards data trend but shows no changes in procedures specific to this behavior; the graph for [REDACTED] shows no

notable trend decrease and no improvement in its frequency; the graph for [REDACTED] shows no change in frequency and no effective decrease; and the twelve identified replacement behaviors show relatively no change for the six-month period. See ¶ 8. According to Ms. Toussaint's testimony, the highlighted portions in the updated Treatment Plan were intended to be generalized for all of the maladaptive behaviors, not just for the [REDACTED] behavior as written. See ¶ 9. In review of the Treatment Plan along with consideration of the testimony given, the undersigned finds that the record reveals that criteria 3(b) was not met due to relatively no progress made in Petitioner's maladaptive behaviors in the previous authorization periods. See ¶ 3 – 4. Therefore, continuation of treatment using the current methods was not warranted.

24. Appendix 9.0 of the BA Policy maintains criteria for discharge from BA services which requires that one or more of the criteria must be satisfied. See ¶ 16. 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. Dr. Darling provided persuasive testimony, as shown by the record, a demonstration that Petitioner's goals showed very little to no progress with incidents of maladaptive behaviors, remaining at or near baseline for [REDACTED]. See ¶ 8. After [REDACTED] of therapy with this provider, the graph data recorded here do not follow in an upwards direction but remain collectively level with the exception of one behavior. See ¶ 8. The only behavior identified showing improvement is [REDACTED]. See ¶ 8, 9. But even here, the data shows no modifications or intervention to attribute the improvement to the ABA therapy. See ¶ 8. The testimony by Ms. Toussaint, Ms. Robello, and [REDACTED] all reference progress Petitioner has made in [REDACTED] maladaptive behaviors while under ABA therapy. See ¶ 9 – 11. 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. Thus, this criteria was met and termination of treatment was warranted.


25. The Authorization Policy under Section 3.2 for the Review Process states that "the QIO may deny a portion of the requested units of service if it cannot substantiate medical necessity based upon the information submitted." As discussed, Dr. Darling established that the three treatment plans submitted show ineffective treatment according to the standards for applied behavior analysis and, therefore, the services were denied. See ¶ 23 – 24. Accordingly, Respondent has met their burden of proof to show that the requested ABA services with this provider are no longer medically necessary.

26. Upon consideration of the testimony provided, evidence submitted, and applicable policies, 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 necessary to correct or ameliorate a defect or a physical and mental illness or condition. 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 26th day of June, 2023 in Tallahassee, Leon County, Florida.

 Kimberly Roche  
23-FH0571  
2023.06.26  
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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:**



**AHCA Medicaid Hearing Unit**  
**MedicaidHearingUnit@ahca.myflorida.com**