



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

FILED

Sep 06, 2023, 11:07 am

OFFICE OF FAIR HEARINGS

[REDACTED],

PETITIONER,

AHCA Case No.: 23-FH0726

vs.

AGENCY FOR HEALTH CARE
ADMINISTRATION,

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on July 19, 2023, at 1:00 p.m. Eastern Standard Time ("EST").

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Lee Ann Williams
Medicaid Program Analyst
Agency for Health Care Administration

STATEMENT OF ISSUE

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent's decision to deny Petitioner's request for additional Behavior Analysis ("BA" or "ABA") services was incorrect.

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. [REDACTED] (" [REDACTED]"), Petitioner's Authorized Representative and [REDACTED] appeared on behalf of Petitioner.

Lee Ann Williams, Medical/Health Care Program Analyst for the Agency for Health Care Administration (“Agency” or “AHCA”) appeared on behalf of Respondent. Dr. Joseph Darling (“Dr. Darling”), Board Certified Behavior Analyst (“BCBA”) at the doctoral level and Second Level Reviewer for eQHealth Solutions Inc. (“eQHealth”), appeared as a witness for Respondent.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a three hundred forty-one (341)-page evidence packet and a forty-nine (49)-page evidence packet. The three hundred forty-one (341)-page packet appears in the Office of Fair Hearings’ document management system as the file titles “[REDACTED] FH 06.02.2023 1-154.pdf”; “[REDACTED] FH 06.02.2023 155-259.pdf.”; “[REDACTED] FH 06.02.2023 260-296.pdf”; “[REDACTED] FH 06.02.2023 297-335.pdf”; and “[REDACTED] FH 06.02.2023 336-341.pdf.” The forty-nine (49)-page evidence packet appears in the Office of Fair Hearings’ document management system as the file title “Agency Evidence Legal Authorities 23-FH0726.pdf”. Absent an objection from the Petitioner, the undersigned admitted the three hundred forty-one (341)-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] old. *See* page 18 of RCE 1. Petitioner is diagnosed with the following: [REDACTED] *Id.* The Behavior Analysis Re-Assessment-Behavior Plan (corrected [REDACTED]) (“treatment plan”) at issue identifies the following maladaptive behaviors for treatment: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. *Id.* at 142.

3. Treatment plan data graphs show the following for maladaptive behaviors: [REDACTED]
[REDACTED] have decreased from approximately [REDACTED] to [REDACTED]
[REDACTED] have decreased from approximately [REDACTED] to [REDACTED] [REDACTED] have decreased from [REDACTED]
to [REDACTED] incidents of [REDACTED] [REDACTED] have decreased from approximately [REDACTED] to [REDACTED] incidents of [REDACTED]
[REDACTED] have decreased from approximately [REDACTED] to [REDACTED] incidents for [REDACTED] [REDACTED] have decreased
from approximately [REDACTED] to [REDACTED] incidents of [REDACTED] [REDACTED] have decreased from approximately [REDACTED] to [REDACTED]
incidents of [REDACTED] [REDACTED] have decreased from approximately [REDACTED] to [REDACTED] incidents
of [REDACTED] [REDACTED] have decreased from approximately [REDACTED] to [REDACTED] incidents of
[REDACTED] [REDACTED] have decreased from approximately [REDACTED] to [REDACTED] incidents of [REDACTED]
[REDACTED] have decreased from approximately [REDACTED] to [REDACTED] and incidents of [REDACTED] [REDACTED] have decreased
from approximately [REDACTED] to [REDACTED]. *Id.* at 182-189.

4. Treatment plan data graphs show the following for replacement behaviors: [REDACTED]
[REDACTED] increased from [REDACTED] to [REDACTED] [REDACTED] increased from [REDACTED] to
[REDACTED] [REDACTED] increased from [REDACTED] to [REDACTED] [REDACTED] increased from [REDACTED] to [REDACTED] [REDACTED]
[REDACTED] increased from [REDACTED] to [REDACTED] [REDACTED] increased from [REDACTED] to [REDACTED] [REDACTED]
[REDACTED] increased from [REDACTED] [REDACTED] [REDACTED] increased from [REDACTED] [REDACTED]
[REDACTED] increased from [REDACTED] [REDACTED] [REDACTED] increased
from [REDACTED] to [REDACTED] [REDACTED] increased from [REDACTED] to [REDACTED] [REDACTED] increased
from [REDACTED] to [REDACTED] [REDACTED] increased from [REDACTED] to [REDACTED]

Pages 25-26 of RCE 1.

6. Petitioner requested reconsideration of the Respondent's decision. In a Notice of Reconsideration Determination ("NRD"), dated March 27, 2023, Respondent upheld its decision.

Id. at 36-37. 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 any new documentation that supports the medical necessity of this request. According to The Behavior Analysis Services Coverage Policy, (page 6, 9.0 c-d) the recipient of ABA therapy services must engage in maladaptive behavior that interferes with the recipient's daily functioning. Although the recipient is engaging in topographies of maladaptive behaviors, the frequency and intensity of the maladaptive do not support the request for services. This reconsideration request has been reviewed, reconsidered and the partial denial is upheld.

...

Pages 36-37 of RCE 1.

7. On April 4, 2023, Petitioner requested a Fair Hearing to challenge the denial of additional ABA services. On April 21, 2023, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for June 2, 2023, at 1:00 p.m. EST. Petitioner failed to appear, and the hearing was rescheduled for July 19, 2023, at 1:00 p.m. EST.

8. [REDACTED] testified to the following:

- a. [REDACTED] feels Petitioner needs more hours of BA therapy .
- b. [REDACTED] child will "[REDACTED]
[REDACTED]"
- c. [REDACTED] has concerns for [REDACTED] child's safety.

9. Dr. Darling is a Board-Certified Behavior Analyst at the doctoral level. Dr. Darling testified to the following:

- a. The treatment plan was reviewed for the purpose of determining how many hours per week it would take to implement as written.
- b. An effective treatment plan is built around maladaptive behaviors which decrease throughout the course of treatment and replacement behaviors that increase throughout the course of treatment. Progress is determined based on the data graphs contained in the treatment plan.
- c. eQHealth requested changes to Petitioner's treatment plan and changes were submitted by the provider in this case.
- d. Based on a review of all the documentation, the hours/units requested were approved at the same level as the prior authorization period, but the remaining 832 units, or eight hours, were denied. eQHealth determined that the additional requested services are not medically necessary.
- e. Referring to page 182 of RCE 1, regarding [REDACTED], Dr. Darling testified that the data graphs show a slow decrease in [REDACTED] and thus, continued services are justified because the treatment plan is effective. RCE 1 at 182.
- f. Further, the data graphs on pages 183-184 of RCE 1 show that the maladaptive behaviors of [REDACTED] are also slowly decreasing over the course of treatment.
- g. Updates to the treatment plan on page 190 of RCE 1 show that the provider updated goals for replacement behaviors only after a request from eQHealth. Standards of care in the field of ABA reflect that it is the BA provider's

responsibility to introduce interventions or modify a treatment plan to address any lack of progress.

- h. Regarding replacement behaviors, the data graphs on page 219-227 of RCE 1 show that Petitioner is making progress; however, the progress is slow and the provider should have updated the treatment goals sooner.

CONCLUSIONS OF LAW

10. 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).

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

12. Because Petitioner is requesting additional services, 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.)

13. 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.

14. 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

15. 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.

16. 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.

17. 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.

18. 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.

19. In the instant case, Petitioner’s provider submitted a request to eQHealth for 832 additional units of code 97153 Behavior Analysis services for the certification period of February 18, 2023. through August 16, 2023. See ¶ 5. As established on the record by the evidence and testimony, eQHealth denied Petitioner’s request for additional BA services because Petitioner’s provider failed to submit sufficient documentation to establish that the requested services were medically necessary. See ¶ 5 and 6.

20. Pursuant to the BA Policy, the critical elements necessary to qualify for any type of BA service are: (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 in Rule 59G-1.010, F.A.C; (c) the recipient currently engages in maladaptive behaviors; and (d) these maladaptive behaviors interfere with the recipient’s daily functioning. *See* ¶ 13.

21. In this case, the BA provider requested an increase of 832 units of code 97153. However, the fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service. *See* ¶ 17.

22. The NRD, issued March 27, 2023, explained that the requested additional BA services were denied because they are in excess of the Petitioner’s needs based on the documentation provided in this case. The NRD explained as follows: “[a]ccording to Behavior Analysis Services Coverage Policy requests for services must be based on the medical necessity of the recipient’s maladaptive behaviors and skill deficits. The recipient is engaging in problem behaviors that threaten access to typical environments and negatively affects activities of daily living. However, the frequency intensity, or severity of recipient’s maladaptive behaviors does not justify the requested units of services.” *See* ¶ 4 and 5.

23. As Dr. Darling testified the requested increase in BA services is “in excess of” Petitioner’s needs because Petitioner has made progress with the currently authorized level of BA services. *See* ¶ 9. A review of the data graphs in RCE 1 shows that during the prior authorization period, the Petitioner made progress in reducing maladaptive behaviors such as [REDACTED]

[REDACTED]

[REDACTED]. *See*

¶ 3 and 9. Further, Petitioner made progress on the following replacement behaviors: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. See ¶ 4 and 9. Petitioner also

mastered [REDACTED] and [REDACTED]. See ¶ 4.

24. Based on the foregoing, the record demonstrates that the Petitioner is making progress under the treatment plan with the currently approved level of BA services. In light of the documented improvement, the undersigned finds Dr. Darling’s testimony to be credible and persuasive that the requested units of additional BA services are “in excess of” Petitioner’s needs. Further, the Petitioner did not provide evidence to show that the requested increase in hours was not in excess of Petitioner’s needs or otherwise incorrectly denied. See ¶ 6. Under the current treatment plan, Petitioner is making significant progress increasing replacement behaviors and reducing maladaptive behaviors. Therefore, based upon the persuasive testimony of Dr. Darling, the requested increase was shown to be in excess of Petitioner’s needs. See ¶ 9.

25. Upon consideration of the testimony provided, evidence submitted, and applicable polices, the undersigned concludes that Petitioner has not proven by a preponderance of the evidence that the additional ABA services at issue are medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner has not demonstrated that the requested additional services, based on the treatment plan at issue in this case, are necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly,

Petitioner has not proven by a preponderance of the evidence that Respondent's denial of additional ABA services was incorrect.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

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

DONE and ORDERED this 6th day of September, 2023, in Tallahassee, Leon County, Florida.



LYNNE RINGERS
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LYNNE RINGERS, Hearing Officer
Agency for Health Care Administration
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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:



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