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

[redacted],

PETITIONER, **AHCA Case No.: 23-FH0924**

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION,

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on June 13, 2023, at 9:00 a.m. Eastern Standard Time ("EST").

APPEARANCES

For the Petitioner: [redacted]
Petitioner's Authorized Representative

For the Respondent: Sandra Durden
Medical/Health Care 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 Behavior Analysis ("BA" or "ABA") services was incorrect.

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. Petitioner's Authorized Representative and Board Certified Behavior Analyst ("BCBA"), [redacted] ("[redacted]"), appeared on behalf of Petitioner.

Sandra Durden, Medical/Health Care Program Analyst for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared on behalf of Respondent. Dr. David Bicard ("Dr. Bicard"), BCBA at the doctoral level and Director of Clinal Operations 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 111-page evidence packet and a forty-nine (49)-page evidence packet. The 111-page packet appears in the Office of Fair Hearings document management system as the file title "[redacted] FH 06.13.2023.pdf". The forty-nine (49)-page evidence packet appears in the Office of Fair Hearings document management system as the file title "23-0924 BA AHCA EVIDENCE PACKET.pdf". Absent an objection from the Petitioner, the undersigned admitted 111-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").

At the Fair Hearing, the record was held open to allow Petitioner to submit documents. On June 16, 2023, Petitioner timely submitted thirty-nine (39)-pages of documents. The thirty-nine (39)-page packet appears in the Office of Fair Hearings' document management system as file title "23-FH0924 Supporting Documents.pdf". Absent an objection from the Respondent, the undersigned admitted the thirty-nine (39)-page evidence packet into evidence as Petitioner's Composite Exhibit 1 ("PCE 1").

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 16 of RCE 1. Petitioner is diagnosed with [redacted]. *Id.*

3. Petitioner requested the following ABA services: 3,084 units of code 97153; 308 units of code 97155; 103 units of code 97156; and 617 units of code 97155 (HN). *Id.* at 75.

4. Petitioner's provider explained the need for 617 hours of 97155 (HN) as follows:

> BCaBA hours are also used for Program Modification and Supervision which allows the BCaBA to be more involved in the therapeutic outcome. The BCaBA will implement program for up to 6 hours a week because of the intensity of the client's behavior and to further promote progress with functional communication skills and functional living skills. The BCaBA will assist in developing protocols for [redacted]. Due to the severity of maladaptive behaviors across all settings and the dangers of [redacted], and, more BCaBA hours have been requested to work on reduction of these behaviors. The BCaBA will be responsible for the direct implementation of behavior-analytic services outlined in the behavior plans utilizing a combination of discrete trial training and natural environment teaching arrangements. Data will be taken through direct observation on skill acquisition goals and behaviors targeted for decrease.
> . . .

Pages 101 – 102 of RCE 1.

5. In a Notice of Outcome ("NOO"), dated January 20, 2023, Respondent approved 2,600 units of code 97153; 308 units of code 97155; 308 units of code 97155 (HN); 103 units of 97156, but denied the remaining units. *Id.* at 26 – 28. The NOO explained the basis for the denial as follows:

> [T]he requested services are not medically necessary under the following standard(s):
>
> 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.

The NOO further provided:

> PR Clinical Rationale – Denial: According to Behavior Analysis Services Coverage Policy requests for services must be based on the medical necessity of the recipient's maladaptive behaviors. The recipient is engaging in problem behaviors that threaten access to typical environments and negatively affects activities of daily living. However, the intensity of the recipient's maladaptive behaviors does not justify the intensity of services requested. The provider is using a tiered service delivery model and has not made a compelling justification for services at the intensity requested. The requested hours of BA services are in excess of medical necessity.
> . . .

Pages 26 – 27 of RCE 1.

6. Petitioner requested reconsideration of the Respondent's decision. In a Notice of Reconsideration Determination ("NRD"), dated February 28, 2023, Respondent upheld its decision. *Id.* at 38 – 40. 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 38 – 39 of RCE 1.

7. On April 24, 2023, Petitioner requested a Fair Hearing to challenge the denial of ABA services. On May 16, 2023, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for June 13, 2023, at 9:00 a.m. EST.

8. [redacted] is Petitioner's BCBA. [redacted] testified to the following:

   a. After completing an initial assessment in [redacted], Petitioner received a partial denial of the services that were requested.

b. The request for 97155HN was due to Petitioner's lack of skill acquisition skills. When [redacted] first began treatment with [redacted], Petitioner had [redacted] – [redacted] communicated [redacted]. Petitioner had a [redacted].

c. Petitioner exhibits [redacted] towards peers.

d. [redacted] acknowledged that the request for BCABA hours is greater than what is typically approved, but explained that it was requested due to the intensity of the behaviors presented. The BCABA collaborates with [redacted], including [redacted]. The request is also to assist with data collection.

e. There are three (3) RBTs that rotate on the case due to the intensity of the maladaptive behaviors.

9. Dr. Bicard is a BCBA at the doctoral level. Dr. Bicard testified to the following:

a. The amount of case management requested was more than what is recommended by the BA Certification Board.

b. The Petitioner has participated in ABA services since [redacted]. Petitioner is [redacted] by [redacted] diagnosis.

c. Nine (9) hours of case management is far outside the recommendations and what is medically necessary. The provider is attempting to use the 97155 HN code inappropriately, by using it to delivery therapy.

d. The 97155 (HN) code is to intended to be used for modifications – not for supervision. The statement the "the BCaBA will implement program for up to 6

hours a week because of the intensity of the client's behavior and to further promote progress with functional communication skills and functional living skills" does not justify additional services under code 97155 (HN), rather this explanation is better suited to justify services under 97153. Dr. Bicard identified this as "up-billing".

e. The VB-Mapp assessment used by the provider is inappropriate for a [redacted] old – it's intended for [redacted] children.

f. Dr. Bicard believes that the Petitioner's skill acquisition goals can be accomplished with the amount of hours that are approved.

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 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.)

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 no 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.
. . .

Pages 1 – 3 of BA Policy.

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 than 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

. . .
Pages 6 – 8 of BA Policy.

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 the 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. In the instant case, Petitioner requested the following ABA services: 3,084 units of code 97153; 308 units of code 97155; 103 units of code 97156; and 617 units of code 97155 (HN). *See* ¶ 3. Respondent largely approved Petitioner's request but denied the following units: 484 units of code 97153 and 309 units of code 97155. *See* ¶ 5. Respondent explained that the denied units were not medically necessary for Petitioner – specifically that they were not "individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment" and were "in excess of the patient's needs". *Id.*

19. 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 *"*[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs*"*. Here, [redacted] conceded that the number of units requested for 97155 (HN) were greater than what is typically approved but argued that the intensity of the Petitioner's behaviors justified the increase in services. *See* ¶ 8. However, Dr. Bicard provided credible testimony that intensity of behavior is a justification for more services under code 97153. *See* ¶ 9. As explained by Dr. Bicard, the service code 97155 (HN) is for use of modifications to treatment – not for delivery therapy. *Id.* Lastly, Dr. Bicard provided credible testimony that the amount of units approved for code 97153 were appropriate for Petitioner. *Id.* As Dr. Bicard is a BCBA at the doctoral level, his testimony was given significant weight. In all, Petitioner did not show that the denied units were not "[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs*"*.

20. 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 denied units of ABA services were necessary. Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner has not demonstrated that the denied units, 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 ABA services was incorrect.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

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

DONE and **ORDERED** this 24th day of July, 2023, in Tallahassee, Leon County, Florida.

Joseph Mabry
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JOSEPH MABRY, Hearing Officer
Agency for Health Care Administration
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2727 Mahan Drive, Mail Stop # 11
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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]

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