

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



FILED

Jul 25, 2023, 9:50 am
OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

vs.

AHCA Case No.: 23-FH1116

AGENCY FOR HEALTH CARE
ADMINISTRATION,

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned Hearing Officer convened a telephonic Fair Hearing on the instant case on July 10, 2023, at 10:00 a.m. EST.

APPEARANCES

For the Petitioner: [REDACTED]
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") services was correct.

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. Petitioner's Authorized Representative and Case Administrator at [REDACTED], [REDACTED]

██████████ (“██████████”) appeared on behalf of the Petitioner. ██████████ (“██████████”), the Petitioner’s ██████████, appeared as a witness for Petitioner.

Diana Hearod, Medical Health Care Program Analyst for the Agency for Health Care Administration (“Agency” or “AHCA”), appeared on behalf of Respondent. Dr. Alissa Conway (“Dr. Conway”), Board Certified Behavior Analyst, attended as a witness for Respondent.

Two (2) Spanish translators provided translation services throughout the hearing, first by Ariana, Translator Identification Number 411926, and then followed by Maggie, Translator Identification Number 406513.

Petitioner sent to the Office of Fair Hearings and Respondent a twenty (20) page proposed evidence package that included a two (2)-page May 5, 2023, letter from Roberto Lopez Alberola, M.D., of ██████████, and a May 4, 2023, ██████████ Public Schools Individualized Education Plan for the Petitioner. The Petitioner’s proposed evidence was admitted into evidence without objection, is herein identified as “Petitioner’s Composite Exhibit 1”, and appears in the Office of Fair Hearings’ case, management system as “23-FH1116 Petitioner Correspondence – Fax.pdf”.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred and thirty-eight (238)-page evidence packet that was admitted into evidence without objection, is herein identified as “Respondent’s Composite Exhibit 1”, and appears in the Office of Fair Hearings’ case management system as “██████████ FH 07.10.2023 1-209.pdf” and “██████████ FH 07.10.2023 210-238.pdf”. In addition, the Respondent submitted a forty-nine (49) page evidence package consisting of legal authorities that was admitted into evidence without objection, is identified herein as “Respondent’s Composite Exhibit 2”, and appears in the Office

of Fair Hearings' case management system as "23-FH1116_ACHA EVIDENCE PACKET_[Petitioner].pdf".

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* Respondent's Composite Exhibit 2, page 2.

2. Petitioner is [REDACTED]. *See* Respondent's Composite Exhibit 1 at page 16. Ms. Conway established that Petitioner has participated in BA services with the current provider, [REDACTED], since [REDACTED]. *Id.* at 19. The Functional Behavioral Re-assessment, dated April 21, 2023 ("Treatment Plan"), identified the following maladaptive behaviors: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. *See* Respondent's Composite Exhibit 1, page 176. In addition, the undated request for reconsideration in response to the initial denial of BA services identified the following additional maladaptive behaviors: [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. *See* Respondent's Composite Exhibit 1, page 231.

3. Petitioner requested the continuation of the following BA services: 2,392 units of code 97153, 208 units of code 97155 and 52 units of code 97156 for the certification period of December 7, 2022, through June 4, 2023. *Id.* at 19-20. On May 2, 2023, Respondent sent Petitioner's provider a Request for Additional Information letter requesting additional information and clarification of the request for continued services. *Id.* at 46-47. Specifically, the letter requested more information on social narratives and social stories. *Id.*

There are no interventions or modifications on the graphs reflecting replacement behaviors to address the lack of progress. *Id.*

6. On May 11, 2023, the Respondent issued a Notice of Outcome (“NOO”), terminating Petitioner’s BA services. See Respondent’s Composite Exhibit 1, pages 23-27. The NOO explained the basis for the termination as follows:

PR Principal Reason – Denial:

Submitted information does not support the medical necessity for requested frequency and/or duration.

[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 under treatment, and not in excess of the patient’s needs.

...

Id. The NOO further provided:

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

PR Clinical Rationale – Denial: The recipient has been in services with this provider since [REDACTED]. The recipient has not made progress across the past two authorizations. The provider did not make significant modifications. According to the Florida 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 consequent-based strategies-ones that either reduce maladaptive behavior or reinforcement 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 you will address human error. The provider has not addressed the lack of progress during the last observation period and did not amend the treatment plan in 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.

Id. at 23-24.

7. Petitioner requested reconsideration of the Respondent's decision. On January 6, 2023, Respondent issued a Notice of Reconsideration Determination ("NRD") upholding its decision. See Respondent's Composite Exhibit 1, pages 35-38. The NRD states, in pertinent part as follows:

The reason for the denial is that the services are not medically necessary as defined in 59G-1.010, Florida Administrative Code. Specifically, the services must be:

Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs.

The rationale for our decision is as follows:

PR Recon Determination: At reconsideration all documents were carefully reviewed. According to the Florida 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.

8. Dr. Conway established that eQHealth reviews behavior analysis cases to ensure that providers are giving quality care consistent with the standards enumerated in the BA Policy as

well as professional medical standards of applied behavior analysis (“ABA”). eQHealth reviewed the Treatment Plan submitted in this case to determine whether all five (5) conditions of medical necessity are met. Dr. Conway asserted that Petitioner’s services were terminated because the Treatment Plan is not consistent with generally accepted professional medical standards as determined by the Medicaid program.

9. Dr. Conway asserted that the Treatment Plan does not show evidence that the frequency of Petitioner’s maladaptive behaviors has decreased and does not show that there was a modification or intervention to address Petitioner’s lack of progress. She testified that the provider had an opportunity to provide the necessary information upon request of eQHealth and on reconsideration but failed to do so. Dr. Conway asserted that the data graphs show that there has been no improvement for over a year on maladaptive behaviors or replacement behaviors and no interventions to address the lack of progress. Therefore, according to Dr. Conway, the Treatment Plan does not meet standards of care in ABA and is not effective.

10. Dr. Conway established that an effective treatment plan is built around maladaptive behaviors (which decrease in frequency) and skills to be acquired (which increase in frequency) over the course of treatment. The effectiveness of a treatment plan is determined by reference to data, which is visually depicted in graphs showing a recipient’s progress through treatment. Further, standards of care in ABA require an intervention or modification of the treatment plan if there is no progress after 3-6 weeks of treatment. An intervention is shown by a vertical line on the data graph marking its start point so that progress can be evaluated.

11. Referring to the data graphs in Petitioner’s most recently submitted Treatment Plan, Dr. Conway established that none of Petitioner’s maladaptive behaviors have shown significantly

measurable improvement during the latest three (3) authorization periods, and the provider has not implemented any interventions to address the lack of progress. See Respondent's Composite Exhibit 1, pages 181-200. With regard to the data graphs for replacement behaviors, Dr. Conway asserted that the data graphs for Petitioner's replacement behaviors show that every behavior targeted for improvement has not significantly improved, and no intervention was made to change Petitioner's trajectory. See Respondent's Composite Exhibit 1, pages 202-219. Dr. Conway testified that it is the responsibility of the provider to make modifications to the Treatment Plan to ensure that progress is made throughout the course of treatment. Further, as changes in environment and medical conditions arise, it is the responsibility of the BA provider to anticipate and effectively treat Petitioner. Based on the documentation provided, Dr. Conway opined that Petitioner would not gain any additional benefit from continuing treatment under the Treatment Plan at issue.

12. [REDACTED] testified that Petitioner began BA services in [REDACTED] and that there have been some decreases in certain maladaptive behaviors, such as [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] testified that changes in the Petitioner's medications and environmental factors have had a negative impact on the results, should be considered when evaluating the data, and makes the data appear there are little results of behavior analysis therapy. [REDACTED] further testified that positive reinforcement is a goal for the Petitioner.

13. The Petitioner's [REDACTED] testified that [REDACTED] has seen progress in reducing [REDACTED] child's maladaptive behaviors, but that [REDACTED] progress fluctuates because of environmental factors,

including a [REDACTED] performed on the Petitioner, changes in medications, the Petitioner's aging, and a new baby in the house.

CONCLUSIONS OF LAW

14. The Agency's Office of Fair Hearings has jurisdiction over the subject matter of this proceeding and the parties pursuant to section 409.285(2), Florida Statutes (2019). This order is the final administrative decision of AHCA under section 409.285(2)(a).

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

16. Because Respondent terminated a previously approved service, Fla. Admin. Code R. 59-1.100(17)(g) assigns the burden of proof to the Respondent. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" (Black's Law Dictionary at 1201, 7th Ed.).

17. 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).

18. 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.

19. A state may place medical necessity limitations on EPSDT services. *See* 42 C.F.R. §§ 440.230(a), (b), (d).

20. Section 409.905(2), Florida Statutes, limits EPSDT services with a medical necessity standard:

The [Agency] shall pay for early and periodic screening and diagnosis of a recipient under age 21 to ascertain physical and mental problems and conditions and all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems and conditions, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

21. The Florida Medicaid 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.

Respondent’s Composite Exhibit 2 at page 23

22. The 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.

...

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
- Meet the criteria as specified in this policy

Respondent's Composite Exhibit 2 at page 40, 42.

23. 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

...

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:

- 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 treatment 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 Self-stimulating, abnormal, inflexible, or intense preoccupations Self-care - difficulty recognizing risks or danger, grooming, eating, or toileting
 - iii. Other- behaviors not identified above

Respondent's Composite Exhibit 2 at pages 45-47.

24. The Florida Medicaid Authorization Requirements Policy ("Authorization Requirements Policy") (June 2016), incorporated by reference in Fla. Admin. Code R. 59G-1.053, provides general requirements for providers to obtain authorization to render Florida Medicaid services.

The Authorization Requirements Policy states, in pertinent part:

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 errors 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.

Respondent's Composite Exhibit 2 at pages 32-34.

25. In this case, Respondent terminated Petitioner's BA services. The NOO and NRD explained that Petitioner's request for continuation of services did not meet medical necessity as the treatment plan was not "[c]onsistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational." See supra ¶ 6-7.

26. As provided in the BA policy (Appendix 9.0, section (a)), and the EPSDT requirements, the recipient must meet the meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. A component of medical necessity is that services must be "consistent with generally accepted professional medical standards." As outlined above, Dr. Conway provided credible and persuasive testimony identifying several instances where the revised Treatment Plan did not follow generally accepted standards of BA. For example, the Treatment Plan does not show evidence that the frequency of Petitioner's maladaptive behaviors has decreased and does not show that there was a modification or intervention to address Petitioner's lack of progress. See supra ¶ 8-11. The data graphs for maladaptive behaviors show that incidents of maladaptive behavior have little evidence of progress over the authorization period and reflect a high frequency of variability that make the results less reliable. See supra ¶ 4. With regard to the data graphs for replacement behaviors, The Treatment Plan data graphs for replacement behaviors show a constant [REDACTED] level of [REDACTED] throughout the authorization period when the trends should be increasing for all the skills acquisition and/or replacement goals. See supra ¶ 5. There are no interventions or modifications on the graphs reflecting replacement behaviors to address the lack of progress. *Id.* Thus, Respondent demonstrated that, based on the

information in the record, the requested BA services are not “consistent with generally accepted professional medical standards.” Because the services are not consistent with generally accepted professional medical standards, the critical element of medical necessity is not met and, as Dr. Conway testified, the recipient will not gain any additional benefit by continuing services at the current level. *See supra* ¶¶ 8-11.

27. In this case, Petitioner’s provider recommended the continuation of BA services. 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 supra* ¶ 21.

28. Accordingly, Respondent met their burden of proof to show that the requested BA services are no longer medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, the BA services at issue are not necessary to correct or ameliorate a defect or a physical and mental illness or condition.

29. Upon consideration of the testimony provided, Respondent’s Composite Exhibit 1, Respondent’s Composite Exhibit 2, Petitioner’s Composite Exhibit 1, and the applicable law and policies, the undersigned finds that Respondent proved by a preponderance of the evidence that Respondent’s termination of BA services was correct.

DECISION

Respondent’s termination of Behavior Analysis services is **AFFIRMED**. Petitioner’s appeal based on Respondent’s termination of Behavior Analysis services is **DENIED**.

DONE and **ORDERED** this 25th day of July 2023, in Tallahassee, Leon County, Florida.

Alan J. Leifer
Alan J. Leifer
23-FH1116
2023.07.25
09:38:34 -04'00'

ALAN LEIFER, Hearing Officer
Agency for Health Care Administration
Office of Fair Hearings
2727 Mahan Drive, Mail Stop # 11
Tallahassee, FL 32308-5407

NOTICE OF A RIGHT TO JUDICIAL REVIEW

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

Copies Furnished To:

[REDACTED]

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com