



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

FILED

Sep 08, 2023, 11:32 am

OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 23-FH1429

vs.

AGENCY FOR HEALTH CARE
ADMINISTRATION,

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on August 2, 2023, at 10:01 a.m. Eastern Standard Time (“EST”).

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner’s Authorized Representative

For the Respondent:

Suzanne Chillari
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 denial of Petitioner’s 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 for the Fair Hearing on

behalf of Petitioner. Nija Barkley, Clinical ABA Director and Board Certified Behavior Analyst (“BCBA”) for [REDACTED], appeared for the Fair Hearing as a witness for Petitioner.

Suzanne Chillari, Medical/Health Care Program Analyst for the Agency for Health Care Administration (“Agency” or “AHCA”), appeared for the Fair Hearing as representative for Respondent. Dr. Alyssa Conway (“Dr. Conway”), BCBA and Second Level Reviewer for eQHealth Solutions Florida (“eQHealth”), appeared for the Fair Hearing as a witness for Respondent.

Prior to the hearing, the Office of Fair Hearings received a thirty-five (35)-page evidence packet from Petitioner. The thirty-five (35)-page packet appears in the Officer of Fair Hearings document management system as the file title “23-FH1429 Evidence - Faxed.pdf.” Absent an objection from Respondent, the undersigned admitted the thirty-five (35)-page evidence packet into evidence as Petitioner’s Composite Exhibit 1 (“PCE 1”).

Prior to the hearing, the Office of Fair Hearings received a one hundred and thirty-four (134)-page evidence packet and a forty-nine (49)-page evidence packet from Respondent. The one hundred and thirty-four (134)-page packet appears in the Office of Fair Hearings document management system as the file titles “[REDACTED] FH 08.02.2023 1-105.pdf” and “[REDACTED] FH 08.02.2023 106-134.pdf”. The forty-nine (49)-page evidence packet appears in the Office of Fair Hearings document management system as the file title “Agency Evidence Packet 21-FH1429 (002).pdf¹.” Absent an objection from the Petitioner, the undersigned admitted one hundred and thirty-four (134)-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”).

¹ This file was received on August 1, 2023.

FINDINGS OF FACT

1. Petitioner receives Medicaid services on a fee-for-service basis from the Agency. eQHealth is a Quality Improvement Organization (“QIO”) contracted by the Agency to review prior authorization requests for services. See RCE 2 at page 2.

2. Petitioner is [REDACTED]. See RCE 1 at page 16. 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], [REDACTED], [REDACTED], and [REDACTED]. *Id.* at 63 – 68 and PCE 1 at 16 – 22.

4. In the initial opportunity for correction, Petitioner’s provider, [REDACTED], included the following procedures for Petitioner’s maladaptive behaviors, in pertinent part:

For [REDACTED]:

Antecedent Interventions

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

Differential Reinforcement of Alternative Behaviors

1. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

...
See RCE 1 at 108.

For [REDACTED]:

Antecedent Interventions

[Redacted text block]

- [Redacted list item 1]
- [Redacted list item 2]
- [Redacted list item 3]
- [Redacted list item 4]
- [Redacted list item 5]
- [Redacted list item 6]
- [Redacted list item 7]
- [Redacted list item 8]

...
Id. at 109.

For [Redacted]:

Antecedent Interventions

[Redacted text block]

- [Redacted list item 1]
- [Redacted list item 2]
- [Redacted list item 3]
- [Redacted list item 4]

...
Id. at 110.

For [Redacted]:

Antecedent Interventions

[Redacted text block]

[REDACTED]

[REDACTED]

...
Id. at 111.

5. Petitioner requested BA services for the certification period of April 28, 2023, to October 24, 2023; specifically, 3,120 units of code 97153; 624 units of code 97155; and 208 units of code 97156. *Id.* at 20, 25. Respondent issued a request for information (“PEND”) to Petitioner’s provider stating as follows:

Provider, the justification for this request for services is not clear. The treatment plan includes a listing of procedures for treatment that includes punishment. Punishment is a default technology and should only be attempted when all reinforcement-based procedures have failed. In order to use punishment procedures, you must describe the need for the use of punishment based on medical necessity, all previous reinforcement-based treatment that has failed, the punishment procedures in detail, the procedural safeguards in place to protect the recipient and others from trauma and write a punishment fading plan.
Reviewer# 186326, Ph.D., BCBA-D, 5.17.2023

...
Id. at 19 – 20.

6. In a Notice of Outcome (“NOO”), dated May 22, 2023, Respondent denied Petitioner’s requested ABA services. *Id.* at 25 – 26. 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 under treatment, and not in excess of the patient’s needs.

Consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational.
Necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain.

The NOO further provided:

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

PR Clinical Rationale - Denial: Provider, the wording was slightly adjusted for interventions, but the procedures still include punishment. The supporting documentation does not meet generally accepted practices within the field of applied behavior analysis and standards set forth in the Florida Behavior Analysis Services Coverage Policy (Pages 6-7). Specifically, the provider has failed to write an intervention plan that upholds the standards of care of applied behavior analysis. The plan lists procedures that include punishment and has not exhausted reinforcement-based strategies. There is no procedural safeguard or fading plan. The provider was requested to provide a justification for punishment in the plan. The provider did not respond to the request. This request for services is denied.

...

Id.

7. Petitioner requested reconsideration of the Respondent's decision. In a Notice of Reconsideration Determination ("NRD"), dated May 30, 2023, Respondent upheld its decision.

Id. at 37 – 38. The NRD explained the basis for the decision as follows:

PR Recon Determination: At reconsideration all documents were carefully reviewed. The supporting documentation does not meet generally accepted practices within the field of applied behavior analysis and standards set forth in the Florida Behavior Analysis Services Coverage Policy (Pages 6-7). Specifically, the provider has failed to write an intervention plan that upholds the standards of care of applied behavior analysis. The plan lists procedures that include punishment and has not exhausted reinforcement-based strategies. There is no procedural safeguard for using punishment and no punishment fading plan. [Additionally], the justification submitted with this treatment is insufficient given the requested units and the recipient's maladaptive behaviors and skill deficits addressed in this treatment plan. This reconsideration request has been reviewed, reconsidered and the denial is upheld.

...

Id.

8. On June 14, 2023, Petitioner requested a Fair Hearing to challenge the denial of ABA services. On July 18, 2023, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for August 2, 2023, at 10:00 a.m. EST.

9. Petitioner's provider, [REDACTED], provided an updated Treatment Plan as of August 1, 2023, and included the following procedures for Petitioner's maladaptive behaviors, in pertinent part:

For [REDACTED]:

Antecedent Interventions

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

Differential Reinforcement of Alternative Behaviors

1. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

...
See PCE 1 at 16.

For [REDACTED]:

Antecedent Interventions

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[Redacted text block]

...
Id. at 17.

For [Redacted]:

Antecedent Interventions

[Redacted text block]

[Redacted text block]

...
Id. at 18.

For [Redacted]:

Antecedent Interventions

[Redacted text block]

[Redacted text block]

6. [REDACTED]
[REDACTED]
[REDACTED]

...
Id. at 21.

10. Ms. Barkley testified to the following at Fair Hearing:
 - a. eQHealth returned the first Treatment Plan for correction on May 4, 2023, and the correction was subsequently made. Ms. Barkley asserts that on May 17, 2023, another correction was made with the exception of one sentence, by oversight, that needed removal. Ms. Barkley asserts that this sentence “if [REDACTED] continues, safely shoulder guide to designated room and close door, hold door closed” needed removal and is the reason for this Fair Hearing. *See* RCE 1 at 109.
 - b. The updated and most recent Treatment Plan submitted no longer includes this sentence and, as Ms. Barkley contends, no longer contains a punishment procedure. *See* PCE 1 at 18. This new Treatment Plan is signed and agreed to by Petitioner’s parents.
11. Dr. Conway established the following at Fair Hearing:
 - a. EQHealth reviews requests for services based on medical necessity. *See* RCE 2 at 7. eQHealth reviews behavior analysis cases to ensure ABA services are consistent with the standards enumerated in the Behavior Analysis Coverage Policy as well as professional medical standards of behavior analysis. To meet standards of care in the field of behavior analysis, positive reinforcement strategies are used and exhausted first before implementing any punishment procedures.

- b. In this case, Dr. Conway contends that the provider included multiple punishment procedures without first exhausting reinforcement-based strategies. For the [REDACTED] behavior, the provider lists a reinforcement procedure as “[a]pply consequence interventions for each maladaptive behavior” that Dr. Conway argues is not clear in meaning and could apply to many consequence interventions. See ¶ 5. Moreover, Dr. Conway contends the procedures for [REDACTED] are forms of punishment. See ¶ 5. For the [REDACTED] behavior, the provider included restitution after response blocking and deferential reinforcement of alternatives (“DRA”), although as Dr. Conway explains, restitution is a punishment procedure and is aversive to decrease behavior. See ¶ 5. For the [REDACTED] behavior, the provider lists response blocking, followed by functional communication training (“FCT”), then positive practice although this is a punishment procedure requiring the individual to engage in the correct behavior multiple times after the maladaptive behavior. See ¶ 5. Dr. Conway contends that although the provider removed the positive practice label, the procedures remained the same. See ¶ 10.
- c. Dr. Conway emphasized that at reconsideration the provider’s included procedure for the [REDACTED] behavior (i.e., “apply consequence intervention”) remained unchanged and still is unclear. See ¶ 5 and RCE 1 at 128. Moreover, Dr. Conway argues that the provider only modified the procedure for the [REDACTED] behavior to include “and leave the room” but the procedure essentially remained (i.e., “if [REDACTED] continues, safely shoulder guide to designated room...”) See ¶ 5 and

RCE 1 at 129. The restitution strategy was removed for the [REDACTED] behavior; however, the provider's most recent Treatment Plan reincluded the procedure. See RCE 1 at 130 and ¶ 10. Further, the label "positive practice" for the [REDACTED] behavior was removed and was modified to include "for FCT error correction" but the procedure is now made unclear and unspecified since it does not explain that error correction included multiple trials of repeating the behavior. See RCE 1 at 131 and ¶ 10.

- d. Dr. Conway argues that the most recent plan still includes punishment and does not include function-base interventions to support decrease maladaptive behaviors and increase skill acquisition behaviors that are individualized to the recipient. Dr. Conway asserts that the [REDACTED] behavior procedures contain unclear strategies for "apply consequence interventions". See ¶ 10. Moreover, restitution was reinserted into the [REDACTED] procedures after it was previously removed as a form of punishment since the recipient would have to restore the environment after an incident of this behavior. See ¶ 5 and 10. The [REDACTED] strategies remained the same and cycles through the steps which make them unclear when the procedure ends. See ¶ 10. For [REDACTED], the original strategies were removed but since "stepping away" appears to be a punishment procedure this needs clarification to ensure whether this is a "time out". See ¶ 10.

- e. In an initial assessment, the expectation for behavior analysis services is even if punishment procedures are included there should be safeguards in place to address any potential traumas that may occur; none were included in this plan.

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 Petitioner requested new ABA 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.)

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 ABA 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.

...

See RCE 2 at 38 – 44.

16. 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

...

4. Criteria to Assess the Intensity of Behavior Analysis Services: Providers may request up to 40 hours of BA services per week, per recipient, based upon the following:

As a rule, higher number of maladaptive behaviors, higher severity and frequency of behaviors, as well as the multiplicity of settings where the behaviors occur, would usually justify a higher number of services hours. The greater the number of goals targeted to reduce maladaptive behaviors, the more the likelihood that a higher number of services hours could also be warranted.

Providers **MUST** ensure that proper justification for the requested hours of services is adequately documented in the behavior plan. Based on the information provided in the assessment, behavior plan, and any other supporting documentation, 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 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 [redacted] request for services. However, a state may place medical necessity limitations on EPSDT services. See 42 C.F.R. §§

440.230(a), (b), (d). Fla. Stat. § 409.905(2) limits EPSDT services with a medical necessity standard:

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

19. The Florida Medicaid Definitions Policy (August 2017) (“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 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.

...

Id. at 34.

21. In the instant case, Petitioner is under 21 years of age and is diagnosed with [REDACTED]. See ¶ 2. Petitioner requested ABA services. See ¶ 5. In a NOO, dated May 22, 2023, Respondent denied the services. See ¶ 6. Respondent cited to the medical necessity criteria as the basis for their decision, specifically that the requested hours of ABA services be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational. See ¶ 6. In addition, Respondent determined that the services

were not “Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient’s needs.” See ¶ 6. Petitioner has burden of proof to show by a preponderance of evidence that the Respondent’s determination was incorrect. See ¶ 14.

22. As provided by the EPSDT requirements, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. See ¶ 17 – 18. In the Definitions Policy, a component of medical necessity is that services must be “consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational.” See ¶ 19.

23. Section 9.0 of the BA Policy maintains that the “behavior plan is the cornerstone of the delivery of behavior analysis services.” See ¶ 16. The BA Policy criteria for continuation of treatment at the present level and/or using current methods requires that providers must ensure that all criteria are met. See ¶ 15. The criteria require that a behavior plan must be detailed enough to warrant the requested services and include mechanisms to monitor its effectiveness. See ¶ 15. The criteria for assessing the intensity of behavior analysis services, *supra*, requires that proper justification for the requested hours of services is adequately documented in the behavior plan.

24. As shown by the record, the provider’s Treatment Plan did not conform to standards of care within the field of behavior analysis. See ¶ 7, 11. The information submitted by the provider in the Treatment Plan as a part of the request for services did not include information to satisfy the medical necessity criteria for ABA services. See ¶ 4 – 7, 9. Dr. Conway provided testimony at Fair Hearing that Petitioner’s provider included multiple punishment procedures without first

exhausting reinforcement-based strategies. See ¶ 11. For an initial assessment such as the Treatment Plan at issue, Dr. Conway explains that the expectation for behavior analysis services is even if punishment procedures are included there should be safeguards in place to address any potential traumas that may occur. See ¶ 11. In the provider's Treatment Plan, the procedures for [REDACTED] included "Response Blocking → DRA (FCT/Compliance) → Restitution". See ¶ 4. According to Dr. Conway's testimony, restitution is a punishment procedure and is aversive to decrease behavior. See ¶ 11. In the provider's most recently submitted Treatment Plan, these procedures remained unchanged. See ¶ 9. Moreover, restitution was reinserted into the [REDACTED] [REDACTED] procedures after it was previously removed as a form of punishment. See ¶ 9, 11.

25. Further, Dr. Conway asserts that provider relabeled the strategies in the most recent Treatment Plan but still included the procedures in multiple opportunities to submit corrections, which led to the denial. See ¶ 11. In comparison of the Treatment Plans submitted, Dr. Conway argued that the provider initially modified the [REDACTED] behavior procedure to include "and leave the room" but the procedure essentially remained and in the most recent Plan, the wording "step away" appears to be a punishment procedure needing clarification to ensure whether this was a "time out". See ¶ 4, 9, 11. For the [REDACTED] behavior, the provider listed response blocking, followed by functional communication training ("FCT"), then positive practice although this is a punishment procedure requiring the individual to engage in the correct behavior multiple times after an incident of the maladaptive behavior. See ¶ 11. Compared to the most recent Treatment Plan, Dr. Conway explained that the [REDACTED] strategies remained the same and cycles through the steps which make them unclear when the procedure ends. See ¶ 11. The undersigned finds Dr. Conway's testimony persuasive and consistent with the evidence record to

demonstrate that the Treatment Plan was not consistent with generally accepted professional medical standards within the field of behavior analysis.


26. According to Ms. Barkley's testimony, corrections to the Treatment Plan were made with the exception of one sentence ("if [REDACTED] continues, safely shoulder guide to designated room and close door, hold door closed"), by oversight, that needed removal as it relates to the [REDACTED] behavior procedures. See ¶ 9, 10. The most recent Treatment Plan no longer includes this sentence. See ¶ 9, 10. It appears, perhaps, Petitioner's provider was mistaken as to the requirements to meet the generally accepted standards of care to justify approval of services. As previously discussed, even the most recent Treatment Plan contained punishment procedures and unclear strategies for most of Petitioner's maladaptive behaviors. See ¶ 24 – 25. Therefore, Petitioner's provider failed to include the proposed changes to the Treatment Plan that conformed to standards of care within the field of behavior analysis. See ¶ 24 – 25. In the totality of the circumstances, Petitioner did not demonstrate that the requested ABA services are medically necessary. Thus, the undersigned finds that denial of the ABA services was warranted.

27. Upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Petitioner did not prove by a preponderance of the evidence that the denial of ABA services was incorrect. Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner has not demonstrated that the requested 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 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 BA services is **AFFIRMED**. Petitioner's appeal based on Respondent's denial is **DENIED**.

DONE and ORDERED this 8th day of September, 2023 in Tallahassee, Leon County, Florida.

Kimberly Roche
 23-FH1429
2023.09.08
10:41:11 -04'00'

KIMBERLY ROCHE, Hearing Officer
Agency for Health Care Administration
Office of Fair Hearings
2727 Mahan Drive, Mail Stop #11
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MedicaidHearingUnit@ahca.myflorida.com

Notice of Nondiscrimination Policy

The Agency for Health Care Administration (“AHCA”) is committed to providing all people with an equal opportunity to participate in its programs, services, and activities. AHCA complies with applicable Federal civil rights laws and does not exclude people or treat them differently in admission to, access to, or employment in its programs, services, or activities on the basis of race, color, national origin, age, disability, or sex. Communication aids and services, such as: qualified sign language interpreters, qualified foreign language interpreters, and written information in alternative formats (i.e.: Braille, large print, foreign language, etc.) are provided free of charge, in accordance with federal law, when necessary to ensure equal opportunity and effective communication.

This Notice is provided as required by Title II of the Americans with Disabilities Act of 1990, Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act and implementing regulations. This Notice is available, upon request, in alternative formats. Individuals who require free communication aids and services to effectively participate in AHCA’s programs, services, and activities are invited to make their requests to the Civil Rights Compliance Coordinator at the contact information listed below. If you believe that AHCA has failed to provide these services or discriminated in another way on the basis of race, color, national origin, age, disability, or sex you can file a grievance in person, by mail, or by telephone with:

Civil Rights Compliance Coordinator
2727 Mahan Drive, Mail Stop #3
Tallahassee, FL 32308
Voice: (850) 412-3661
TTY: (800) 955-8771



Spanish ATENCIÓN: si habla español, tiene a su disposición servicios gratuitos de asistencia lingüística. Llame al 1-(888) 419-3456 (TTY: 1-800-955-8771).

French Creole Atansyon: Si w pale Kreyòl Ayisyen, gen sèvis èd pou lang ki disponib gratis pou ou. Rele 1-(888) 419-3456 (TTY: 1-800-955-8771).

Vietnamese CHÚ Ý: Nếu bạn nói Tiếng Việt, có các dịch vụ hỗ trợ ngôn ngữ miễn phí dành cho bạn. Gọi số 1-(888) 419-3456 (TTY: 1-800-955-8771).

Portuguese ATENÇÃO: Se fala português, encontram-se disponíveis serviços linguísticos, grátis. Ligue para 1-(888) 419-3456 (TTY: 1-800-955-8771).

Chinese 注意 : 如果您使用繁體中文, 您可以免費獲得語言援助服務。請致電 1-(888) 419-3456 (TTY: 1-800-955-8771)

French ATTENTION: Si vous parlez français, des services d'aide linguistique vous sont proposés gratuitement. Appelez le 1-(888) 419-3456 (ATS: 1-800-955-8771).

Tagalog PAUNAWA: Kung nagsasalita ka ng Tagalog, maaari kang gumamit ng mga serbisyo ng tulong sa wika nang walang bayad. Tumawag sa 1-(888) 419-3456 (TTY: 1-800-955-8771).

Russian ВНИМАНИЕ: Если вы говорите на русском языке, то вам доступны бесплатные услуги перевода. Звоните 1-(888) 419-3456 (телетайп: 1-800-955-8771).

Arabic

ملحوظة: إذا كنت تتحدث العربية، فإن خدمات المساعدة اللغوية متاحة لك بالمجان. اتصل برقم 1-(888) 419-3456 (التحويلة: 1-800-955-8771)

Italian ATTENZIONE: In caso la lingua parlata sia l'italiano, sono disponibili servizi di assistenza linguistica gratuiti. Chiamare il numero 1-(888) 419-3456 (TTY: 1-800-955-8771).

German ACHTUNG: Wenn Sie Deutsch sprechen, stehen Ihnen kostenlos sprachliche Hilfsdienstleistungen zur Verfügung. Rufnummer: 1-(888) 419-3456 (TTY: 1-800-955-8771).

Korean 주의: 한국어를 사용하시는 경우, 언어 지원 서비스를 무료로 이용하실 수 있습니다. 1-(888) 419-3456 (TTY: 1-800-955-8771) 번으로 전화해 주십시오.

Polish UWAGA: Jeżeli mówisz po polsku, możesz skorzystać z bezpłatnej pomocy językowej. Zadzwoń pod numer 1-(888) 419-3456 (TTY: 1-800-955-8771).

Gujarati નોંધ: જો તમે ગુજરાતી બોલતા હો, તો નિ:શુલ્ક ભાષા સહાય સેવાઓ તમારા માટે ઉપલબ્ધ છે. ફોન કરો 1-(888) 419-3456 (TTY: 1-800-955-8771).

Thai 注意: หากคุณพูดภาษาไทย, เราให้บริการช่วยเหลือภาษาฟรี. โทร 1-(888) 419-3456 (TTY: 1-800-955-8771).