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

FILED
Oct 02, 2023, 10:10 am
OFFICE OF FAIR HEARINGS

[redacted],

PETITIONER, **AHCA Case No.: 23-FH1528**

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION,

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, the Office of Fair Hearings convened a telephonic Fair Hearing on the instant case on August 29, 2023, at 1:03 p.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 reduce Petitioner's behavior analysis ("BA") services was correct.

PRELIMINARY STATEMENT

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

Marielisa Amador, 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 at the doctoral level at eQHealth Solutions, Inc. ("eQHealth"), attended as a witness for Respondent.

Interpreter Daniel, with Language Line Solutions, provided translation services for Petitioner.

Prior to the hearing, Petitioner sent to the Office of Fair Hearings and Respondent a thirty-three (33)-page evidence packet. The packet appears in the Office of Fair Hearings' case management system as "23-FH1528 Evidence.pdf." Absent an objection from the Respondent, the undersigned admitted the evidence packet into evidence as Petitioner's Composite Exhibit 1.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred thirty-six (236)-page evidence packet. The packet appears in the Office of Fair Hearings' case management system as "[redacted] FH 08.29.2023 1-144" and "[redacted] FH 08.29.2023 145-236." Absent an objection from the Petitioner, the undersigned admitted the evidence packet into evidence as Respondent's Composite Exhibit 1.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a forty-nine (49)-page evidence packet. The packet appears in the Office of Fair Hearings' case management system as "AHCA Evidence (Pages 1-49 of 49).pdf." Absent an objection from the Petitioner, the undersigned admitted the evidence packet into evidence as Respondent's Composite Exhibit 2.

FINDINGS OF FACT

1. Petitioner receives Medicaid services on a fee-for-service basis from the Agency. *See* Respondent's Composite Exhibit 1 at page 21. eQHealth is a Quality Improvement Organization (QIO) contracted by the agency to review prior authorization requests for services.

2. Petitioner is [redacted] ([redacted]) old and diagnosed with [redacted]. *Id*.

3. Petitioner requested the continuation of the following BA services: 3,120 units of code 97153, 208 units of code 97155, and 104 units of code 97156 for the certification period of June 13, 2023, through December 9, 2023. *Id.* at 27. In a Notice of Outcome ("NOO") dated June 15, 2023, Respondent reduced Petitioner's BA services. Respondent approved 2,496 units of code 97153 instead of the requested 3,120 units. *Id.* at 27-28. 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 under treatment, and not in excess of the patient's needs.
> . . .

The NOA further provided:

> Submitted information does not support the medical necessity for requested frequency and\or duration.
>
> 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 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 the recipient's maladaptive behaviors does not justify the requested units of services. The requested units of BA services are in excess of medical necessity.

Id. at 27.

4. Petitioner requested reconsideration of the Respondent's decision. In a Notice of Reconsideration Determination ("NRD"), dated June 23, 2023, the Respondent upheld its decision. *Id.* at 38 - 40. The NRD provided, in pertinent part:

> 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.

Id.

5. Dr. Darling is a Board-Certified Behavior Analyst ("BCBA") at the Doctoral Level and second level reviewer at eQHealth. Dr. Darling established that eQHealth reviews behavior analysis cases to see if providers are giving quality care consistent with the standards enumerated in the BA Policy as well as professional medical standards of behavior analysis. eQHealth reviewed the original and revised treatment plans submitted in this case to ensure that all five (5) conditions of medical necessity policy are met. Petitioner's request for services was denied because the treatment plan at issue is not consistent with generally accepted professional medical standards as determined by the Medicaid program. Further, Dr. Darling argued that the services requested by the Petitioner were denied because they would be in excess of the patient's needs.

6. Dr. Darling testified that three BCBA's reviewed the treatment plan submitted by the Petitioner and compared it to standards of practice in the field of behavior analysis. Dr. Darling acknowledged that there was no question that the Petitioner needs BA services but stated that

the reduction was issued because the submitted treatment plan was "in excess of the Petitioner's needs."

7. The second-level reviewer who examined the Petitioner's case was a qualified BCBA at the doctoral level. The second-level reviewer found that the Petitioner engaged in behavior that was treatable by BA services, but that the nature of the Petitioner's behavior did not necessitate the requested amount of treatment. It was the conclusion of both the first and second reviewers that the treatment outlined within the treatment plan could be delivered utilizing fewer units of treatment than were requested by the Petitioner. *Id.* at 23. A third BCBA at the doctoral level reviewed the Petitioner's case after the provider submitted a revised treatment plan. The conclusion after this review was again that the submitted treatment plan could be delivered using a reduced number of units. *Id.*

8. Dr. Darling that the two most common objectives of behavior analysis therapy focus on decreasing maladaptive and problem behaviors and increasing replacement behaviors. Dr. Darling directed his testimony to a graph within the treatment plan that demonstrates the Petitioner's progress with BA services. *See* Respondent's Composite Exhibit 1 at 155. The graph demonstrates that despite multiple potential outside influences on the petitioner's treatment, the Petitioner continuously demonstrated improvement while receiving BA services. *Id.*

9. Dr. Darling noted that the treatment plan did not change during the Petitioner's treatment, but the Petitioner continued to make progress as the rate of problem behaviors decreased on a weekly basis. *Id.* at 157. Dr. Darling then proceeded to highlight the treatment plan for the Petitioner's [redacted] behaviors as demonstrative of the treatment plan's failure to meet BA practice standards. The current treatment plan addresses the Petitioner's [redacted] behaviors but

lacks an individualized intervention meant to address Petitioner's lack of progress. For this reason, the treatment plan is not drafted in accordance with practice standards with regard to [redacted] behavior treatment.

10. Subsequent data displayed within the treatment plan demonstrates that the Petitioner is making slow progress in the treatment of [redacted]. Dr. Darling acknowledged the Petitioner's progress and noted that the Petitioner does demonstrate slow but consistent improvement, despite the way that the treatment plan does not utilize interventions consistent with practice standards. To demonstrate the impact that the exclusion of individualized treatment has had on the Petitioner and is likely to have in the future, Dr. Darling directed his testimony to the area of the treatment plan outlining the treatment of Petitioner's [redacted]. The short-term objectives identified to improve the Petitioner's [redacted] used objective criteria disproportionate to the Petitioner's ability to increase [redacted] as displayed within treatment data. The treatment outlined by the submitted plan describes short-term outcomes that, research supports, can be met in a shorter period of time than described by the submitted plan.

11. Additionally, the treatment plan submitted does not demonstrate that the lead analyst involved in the Petitioner's treatment will be present for direct therapy for the time that BA practice standards suggest. The absence of the lead analyst in the implementation of the treatment plan does not support the approval of the units requested by the Petitioner. To conclude, Dr. Darling noted again that it was the conclusion of three behavior analysts who examined the submitted treatment plan that, as described, the treatment outlined could be delivered effectively in less time than was requested.

12. [redacted] opened by providing a brief description of the Petitioner's condition. [redacted] argued that the documentation within the evidence provided demonstrates the individualized nature of the services the Petitioner has requested. The Petitioner has been diagnosed with [redacted] [redacted] asserted that the requested treatment is necessary for the Petitioner's well-being.

13. [redacted] testified that began [redacted] testimony by briefly describing the petitioner's home life. [redacted] testified that Petitioner has only been receiving BA therapy for a limited amount of time and that [redacted] does not expect [redacted] results to look like the results of other children with similar conditions. [redacted] described some of the behaviors that [redacted] noticed were not included in [redacted] diagnosis. The Petitioner will [redacted]. Petitioner is currently taking medication to address [redacted] behaviors.

14. [redacted] testified that the Petitioner has made progress in a specialized classroom with assistance catered to [redacted] needs, but [redacted] is concerned that a reduction in BA services will negatively impact this progress. Behavior professionals at Petitioner's school concluded that the Petitioner would be best supported in the academic setting with constant assistance. Notably, the Petitioner's [redacted] necessitates the need for thorough support while in the academic setting. [redacted] acknowledged Dr. Darling's statement about the pace of the Petitioner's improvement but stressed that what improvement the Petitioner has experienced significantly impacts [redacted] daily life. [redacted] asserted that a reduction in services as it stands will have a large impact on [redacted]

CONCLUSIONS OF LAW

15. 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).

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

17. Because Respondent reduced 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.).

18. 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).

19. 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.

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

21. 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.

22. 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.

23. The 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.

. . .

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
- Meet the criteria as specified in this policy

24. 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 than 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

25. In this case, Respondent denied Petitioner's request for continuation of BA services at the current level and reduced Petitioner's BA services. The NOO explained that Petitioner's request for continuation of services did not meet medical necessity as the treatment plan was 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 supra* ¶ 3, 4. Dr. Darling testified that the treatment plan is also not consistent with generally accepted professional medical standards as determined by the Medicaid program. *See supra* ¶ 5.

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" and must not be "in excess of the recipient's needs." *See* supra ¶ 22. Although the provider recommended a continuation of the current level of services, 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 ¶ 22. As outlined above, *supra* ¶ 6-11. Dr.

Darling identified several instances where the revised treatment plan did not follow generally accepted standards of BA. The provider resubmitted a treatment plan for the Petitioner but did not include procedural adjustments to the treatment plan tailored to meet the Petitioner's needs. *See* supra ¶ 6. Dr. Darling provided credible and persuasive testimony that the submitted treatment plan could be delivered using a reduced number of units. *See* supra ¶ 7. Thus, Respondent demonstrated that, based on the information in the record, the requested services were shown to be in excess of Petitioner's needs and are not "consistent with generally accepted professional medical standards."

27. Upon consideration of the testimony provided, evidence submitted, and applicable polices, Respondent proved by a preponderance of the evidence that the BA services at issue no longer meet medical necessity criteria. Looking at all the evidence relevant to the particular needs of Petitioner, Respondent has demonstrated that the BA services, based on the Treatment Plan at issue in this case, are no longer necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, Respondent proved by a preponderance of the evidence that Respondent's reduction of BA services was correct.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

Respondent's reduction of Petitioner's Behavior Analysis services is **AFFIRMED**. Petitioner's appeal based on Respondent's reduction is **DENIED**.

DONE and **ORDERED** this 2nd day of October 2023, in Tallahassee, Leon County, Florida.

Laura Gallagher
23-FH1528
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LAURA GALLAGHER, 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
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