

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



FILED

Oct 12, 2023, 12:17 pm

OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

vs.

AHCA Case No.: 23-FH1781

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 August 24, 2023, at 9:00 a.m. EST.

**APPEARANCES**

For the Petitioner:

[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Marialisa Amador  
Medical Health Care Program Analyst  
and Fair Hearing Liaison  
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 the Petitioner's behavior analysis ("BA") services was correct.

**PRELIMINARY STATEMENT**

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

Marielisa Amador, Medical Health Care Program Analyst and Fair Hearing Liaison for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared on behalf of Respondent. Dr. Alisa Conway ("Dr. Conway"), a BCBA with eQHealth Solutions ("eQHealth") appeared as a witness for Respondent.

A Spanish translator, Leticia ID Number 364678 with Language Line Solutions, provided translation services for the Fair Hearing.

Prior to the Hearing, the Respondent sent the Office of Fair Hearings and Petitioner a two hundred and fourteen (214)-page evidence package and a forty-nine (49)-page evidence package that were both admitted into evidence without objection. The two hundred and fourteen (214)-page exhibit is herein identified as "Respondent's Composite Exhibit 1" and appears in the Office of Fair Hearings' case management system as "[REDACTED] FH 08.24.2023 1-129.pdf" and "[REDACTED] FH 08.24.2023 130-214.pdf". The forty-nine (49)-page exhibit is identified herein as "Respondent's Composite Exhibit 2" and appears in the Office of Fair Hearings' case management system as "23-FH1781 AHCA Evidence (Page 1-49 of 49).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.



- d. The maladaptive behavior of "[REDACTED]" reflects a baseline of [REDACTED] incidents per week at the beginning on [REDACTED], have been successfully reduced to [REDACTED] incidents per week as of [REDACTED] and are at low stable levels. See Respondent's Composite Exhibit 1, pages 70 and 71.
- e. The maladaptive behavior of "[REDACTED]" reflects a baseline of [REDACTED] incidents per week at the beginning on [REDACTED], have been successfully reduced to [REDACTED] incidents per week as of [REDACTED] and are at low stable levels. See Respondent's Composite Exhibit 1, pages 71 and 72.
- f. The maladaptive behavior of "[REDACTED]" reflects a baseline of [REDACTED] incidents per week at the beginning on [REDACTED], have been successfully reduced to [REDACTED] incidents per week as of [REDACTED] and are at low stable levels. See Respondent's Composite Exhibit 1, pages 72-73.
- g. The maladaptive behavior of "[REDACTED]" reflects a baseline of [REDACTED] incidents per week at the beginning on [REDACTED], have been successfully reduced to [REDACTED] incidents per week as of [REDACTED] and are at low stable levels. See Respondent's Composite Exhibit 1, pages 73 and 74.
- h. The maladaptive behavior of "[REDACTED]" reflects a baseline of [REDACTED] incidents per week at the beginning on [REDACTED], have been successfully reduced to [REDACTED] incidents per week as of [REDACTED] and are at low stable levels. See Respondent's Composite Exhibit 1, pages 74 and 75.
- i. The maladaptive behavior of "[REDACTED]" reflects a baseline of [REDACTED] incidents per week at the beginning on [REDACTED], have been successfully reduced to [REDACTED] incidents per week as of [REDACTED] and have steadily been reduced. See Respondent's Composite Exhibit 1, pages 75 and 76.
- J. The maladaptive behavior of "[REDACTED]" reflects a baseline of [REDACTED] incidents per week at the beginning on [REDACTED], have been successfully reduced to [REDACTED] incidents per week as of [REDACTED] and are at moderate levels that remain stable. See Respondent's Composite Exhibit 1, pages 76 and 78.
- k. The maladaptive behaviors of "[REDACTED]", "[REDACTED]", and "[REDACTED]" are newly added to the Treatment Plan so those graphs do not reflect sufficient data points to establish reliable patterns. See Respondent's Composite Exhibit 1, pages 79 and 80.

6. The Treatment Plan data graphs for replacement skills which are designed to replace the Petitioner's maladaptive behaviors with the goals of reflecting increasingly higher levels. In this

matter, the data reflects a constant high of level of independence and in some cases “mastery”, and more specifically includes the following:

- a. The replacement behavior goal of “[REDACTED]” shows an average of [REDACTED] levels. See Respondent’s Composite Exhibit 1, pages 86-87.
- b. The replacement behavior goal of “[REDACTED]” shows an average of [REDACTED] levels and reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, pages 87-88.
- c. The replacement behavior goal of “[REDACTED]” reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, pages 88-89.
- d. The replacement behavior goal of “[REDACTED]” reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, pages 88-89.
- e. The replacement behavior goal of “[REDACTED]” reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, page 90.
- f. The replacement behavior goal of “[REDACTED]” reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, page 91.
- g. The replacement behavior goal of “[REDACTED]” reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, page 92.
- h. The replacement behavior goal of “[REDACTED]” reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, page 93.
- i. The replacement behavior goal of “[REDACTED]” reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, pages 94.
- j. The replacement behavior goal of “[REDACTED]” reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, page 95.
- k. The replacement behavior goal of “[REDACTED]” reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, page 96.
- l. The replacement behavior goal of “[REDACTED]” reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, page 97.
- m. The replacement behavior goal of “[REDACTED]” reflects it was mastered in [REDACTED]. See Respondent’s Composite Exhibit 1, page 98.

7. On May 12, 2023, the Respondent issued a Notice of Outcome (“NOO”), reducing Petitioner’s requested BA services. See Respondent’s Composite Exhibit 1, pages 29-33. The NOO explained the basis for the termination as follows:

The request for services is denied in whole or in part because they are not medically necessary as defined in Rule 59G-1.010, Florida Administrative Code. Specifically, the 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 rationale for our decision is as follows:

PR Principal Reason - Denial:

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

*Id.* 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 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.*

8. The Petitioner requested reconsideration of the Respondent's decision. On June 14, 2023, Respondent issued a Notice of Reconsideration Determination ("NRD") partially denying its decision to reduce the requested BA service hours and amended its decision to add an additional three hundred and twelve (312) units of Code 97153. See Respondent's Composite Exhibit 1, pages 41-45. 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. Based on the information submitted for review at reconsideration, additional units of services are approved. However, although the recipient is engaging in topographies of maladaptive behaviors, the frequency and intensity of the maladaptive do not support the request for service. The current requested is in excess of medically necessary for BA services.

*Id.*

9. Dr. Conway testified that that the Petitioner's maladaptive behaviors have shown significant decreases over time and that new behaviors that have been recently added to the Treatment Plan, such as maintaining [REDACTED], do not have enough data points to show progress, are of low severity, are skill deficits, are not a behavior excess that behavior therapy seeks to decrease, and are treated through replacement skills. In addition, [REDACTED] described as the Petitioner covering [REDACTED] is an adaptive skill that BA doesn't seek to decrease.

10. Dr. Conway testified that new behavior replacement goals that have been added to the Treatment Plan, including [REDACTED] [REDACTED] are duplicate skills of those already mastered. Finally, Dr. Conway testified that the BA provider has added new maladaptive behavior and replacement skills that that do not meet that together are in excess of the BA hours requested.

11. [REDACTED] testified that the maladaptive behaviors and replacement skills that were added to the Petitioner's Treatment Plan do not overlap and are not duplicative of those in the Treatment Plan and are different concepts in [REDACTED] point of view. [REDACTED] also testified that many children may need BA services for a long time otherwise they'll have these maladaptive behaviors their entire life.

## 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 Respondent has 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.).

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).

16. 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.

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

18. 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.

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.

Respondent’s Composite Exhibit 2 at page 23

20. The Florida Medicaid Behavior Analysis Services Coverage Policy (“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.

21. 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.

22. 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.

23. In this case, Respondent reduced the Petitioner's BA services. The NOO and NRD explained that Petitioner's request for services did not meet medical necessity as the treatment plan was in excess of the Petitioner's needs and the excessive portion of the Treatment Plan was for the convenience of the provider and the primary caregiver. See supra ¶¶ 7 and 8.

24. As provided in the BA policy (Appendix 9.0, section (a)), and the EPSDT requirements, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. A component of medical necessity is that services must not be in excess of the Petitioner's needs and not be intended for the convenience of the provider or the primary caregiver. As outlined above, Dr. Conway provided credible and persuasive testimony to demonstrate that the frequency and severity of the Petitioner's maladaptive behaviors have been significantly reduced by the and through the BA services provided by [REDACTED], Inc. See supra ¶¶ 5, 9, and 10. In addition, the data graphs for replacement behaviors in the Treatment Plan reflect a constantly high levels of independence and mastery throughout the authorization period. See supra ¶¶ 6, 9, and 10. Thus, Respondent demonstrated that, based on the information in the record, the requested BA services are in excess of the Petitioner's needs.

25. In this case, Petitioner's provider recommended the continuation of the BA therapy at the levels previously approved and stated that these services are needed to ensure the maladaptive behaviors do not continue throughout the Petitioner's lifetime. See supra ¶ 11. However, the BA therapy services for this Petitioner will continue but just at a reduced weekly duration that is grounded on the success the Petitioner has experienced as a result of the provider's efforts.

26. Accordingly, Respondent has demonstrated by a preponderance of the evidence that the requested BA services with [REDACTED], Inc., do demonstrate the progress the Petitioner has achieved through BA therapy and that the current requested hours of services are in excess of the Petitioner's needs. See supra ¶¶ 18-22. Looking at all the evidence relevant to the particular needs of Petitioner, Respondent has not demonstrated that the BA services at issue are not necessary to correct or ameliorate a defect or a physical and mental illness or condition.

27. Upon consideration of the testimony provided, Respondent's Composite Exhibit 1, Respondent's Composite Exhibit 2, and the applicable law and policies, the undersigned finds that Respondent proved by a preponderance of the evidence that Respondent's reduction of the requested BA services with [REDACTED], Inc. was correct.

**DECISION**

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

**DONE** and **ORDERED** this 12th day of October 2023, in Tallahassee, Leon County, Florida.

Alan J. Leifer  
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**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]  
[REDACTED]

**AHCA Medicaid Hearing Unit**  
**MedicaidHearingUnit@ahca.myflorida.com**