



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

FILED

Oct 26, 2023, 11:00 am

OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 23-FH1913

vs.

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 September 14, 2023, at 9:00 a.m. Eastern Standard Time (“EST”).

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner’s Authorized Representative

For the Respondent:

Sandra Durden
Medical/Health Care Program Analyst
Agency for Health Care Administration

STATEMENT OF ISSUE

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent’s decision to deny Petitioner’s request for behavior analysis (“BA” or “ABA”) services was incorrect.

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. Petitioner’s Authorized Representative and [REDACTED] [REDACTED] (“[REDACTED]”), appeared on behalf of Petitioner. The following

attended as witnesses for Petitioner: Paula Galetto, Board Certified Behavior Analyst (“BCBA”) and Clinical Director for [REDACTED] (“provider” or “[REDACTED]”), and Yvette Llano, BCBA and Assistant Clinical Director for [REDACTED].

Sandra Durden, Medical/Health Care Program Analyst for the Agency for Health Care Administration (“Agency” or “AHCA”), appeared on behalf of Respondent. Dr. David Bicard (“Dr. Bicard”), BCBA at the doctoral level and Director of Clinical Operations for eQHealth Solutions Inc. (“eQHealth”) appeared as a witness for Respondent.

Prior to the Fair Hearing, Petitioner sent to the Office of Fair Hearings and Respondent a fifty-four (54)-page evidence packet and a two (2)-page evidence packet. The fifty-four (54)-page packet appears in the Office of Fair Hearings’ document management system as the file titled “23-FH1913 Supporting Documents.pdf”. The two (2)-page packet appears in the Office of Fair Hearings’ document management system as the file titled “23-FH1913 Evidence.pdf”. Absent any objections from Respondent, the undersigned admitted the fifty-four (54)-page evidence packet as Petitioner’s Composite Exhibit 1 (“PCE 1”) and the two (2)-page evidence packet as Petitioner’s Composite Exhibit 1 (“PCE 2”).

Prior to the Fair Hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred and forty-nine (149)-page evidence packet and a forty-nine (49)-page evidence packet. The one hundred and forty-nine (149)-page packet appears in the Office of Fair Hearings’ document management system as the file titled “[REDACTED] FH 09.14.2023.pdf”. The forty-nine (49)-page packet appears in the Office of Fair Hearings’ document management system as the file titled “23-FH1913 AHCA Evidence PKT.pdf”. Absent any objections from Petitioner, the undersigned admitted the one hundred and forty-nine (149)-page evidence packet as

Respondent's Composite Exhibit 1 ("RCE 1") and the forty-nine (49)-page evidence packet as Respondent's Composite Exhibit 2 ("RCE 2").

FINDINGS OF FACT

1. Petitioner receives Medicaid services on a fee-for-service basis through the Agency. See RCE 1 at page 16. eQHealth is a Quality Improvement Organization contracted by the Agency to review prior authorization requests for services. See RCE 2 at page 2.

2. Petitioner is [REDACTED] old. See RCE 1 at page 16. Petitioner is diagnosed with [REDACTED]. *Id.*

3. As provided in the Behavior Analysis Initial Assessment and Treatment Plan ("Treatment Plan"), dated [REDACTED], from Petitioner's provider, Petitioner is engaging in the following maladaptive behaviors: [REDACTED]

[REDACTED]. *Id.* 66 – 74. The provider submitted a second Treatment Plan with a report date of [REDACTED] and a report update date of [REDACTED]. See PCE 1 at 1 – 54. In the second Treatment Plan, the provider identified new maladaptive behaviors: [REDACTED]. *Id.* at 11 – 25.

4. As provided in the Treatment Plan reviewed for the reconsideration and dated [REDACTED], for the period from April of 2023 through May of 2023, Petitioner has made the following progress in reducing [REDACTED] maladaptive behaviors: for [REDACTED], Petitioner's incidents decreased from approximately [REDACTED] to approximately [REDACTED] for [REDACTED] Petitioner's incidents decreased from approximately [REDACTED] to approximately [REDACTED] for [REDACTED] Petitioner's incidents decreased from approximately [REDACTED] to approximately [REDACTED] for [REDACTED] Petitioner's incidents remained consistent at [REDACTED]

approximately [REDACTED] for [REDACTED], Petitioner's incidents increased from approximately [REDACTED] to approximately [REDACTED] for [REDACTED], Petitioner's incidents decreased from approximately [REDACTED] to approximately [REDACTED] for [REDACTED], Petitioner's incidents decreased from approximately [REDACTED] to approximately [REDACTED] and for [REDACTED] Petitioner's incidents decreased from approximately [REDACTED] to approximately [REDACTED]. See RCE 1 at 123 – 130.

5. As provided in the Treatment Plan, Petitioner's only replacement behavior is [REDACTED] which is a request. *Id.* at 138. The graph for [REDACTED] shows consistent progress. *Id.*

6. On April 5, 2023, Petitioner requested BA services; specifically, 3,120 units of code 97153; 312 units of code 97155; 312 units of code 97155 HN; 52 units of code 97156; and 52 units of code 97156 HN. See RCE 1 at 26. In a Notice of Outcome – Partial Denial (“NOO”), dated June 26, 2023, Respondent approved 2,496 units of code 97153; 260 units of code 97155; 260 units of code 97155 HN; 52 units of code 97156 HN; and 52 units of code 97156. *Id.* at 26 – 30. The NOO states as follows:

Code: 97153

Description: Intervention without protocol modification, per 15 minutes, Lead Analyst, BCaBA or RBT

From: 4/5/23

Thru: 10/1/23

Total Units: Denied 624

Approved 2,496

Code: 97155

Description: Intervention with protocol modification, per 15 minutes

From: 4/5/23

Thru: 10/1/23

Total Units: Denied 52

Approved 260

Code: 97155 HN

Description: Intervention with protocol modification, per 15 minutes

From: 4/5/23

Thru: 10/1/23
Total Units: Denied 52
Approved 260

Code: 97156
Description: Family training, per 15 minutes, Lead Analyst
From: 4/10/23
Thru: 10/6/23
Total Units: Approved 52

Code: 97156 HN
Description: Family training, per 15 minutes, Lead Analyst
From: 4/10/23
Thru: 10/6/23
Total Units: Approved 52

The NOO explained the basis for the reduction 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. Specially, 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 NOO further provided:

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.

PR Clinical Rationale – Partial 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.

...

RCE 1 at 26 – 27.

7. Petitioner requested reconsideration of the Respondent’s decision. *Id.* at 38. In a Notice of Reconsideration Determination (“NRD”), dated August 5, 2023, Respondent upheld its decision. *Id.* at 38 - 42. The NRD explained the basis for the decision 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 or injury under treatment, and not in excess of the patient’s needs.

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 [behavior] do not support the request for services. This reconsideration request has been reviewed, reconsidered and the partial denial is upheld.

...

RCE 1 at 38 – 39.

8. On August 4, 2023, Petitioner requested a Fair Hearing to challenge the partial denial of BA services. On August 18, 2023, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for September 14, 2023, at 9:00 a.m. EST.

9. [REDACTED] is Petitioner’s [REDACTED] and Authorized Representative. [REDACTED] testified to the following:

- a. Petitioner was diagnosed with [REDACTED] at [REDACTED] old. Petitioner switched providers from [REDACTED] to [REDACTED] because Petitioner was not showing any improvement with [REDACTED] behavior issues. Petitioner improved with [REDACTED]. [REDACTED] felt that there should

have been more years with [REDACTED] because petitioner was receiving forty (40) hours per week of intense therapy for over [REDACTED]

- b. [REDACTED] moved Petitioner from public school to private school. [REDACTED] did the initial assessment and some of the service hours were denied.
- c. Petitioner needs assistance with everything. Petitioner does not do things for [REDACTED] in regards to [REDACTED] etc.
- d. [REDACTED] has two other children, a [REDACTED] and a [REDACTED]. [REDACTED] is concerned that [REDACTED] have to witness the behavior and [REDACTED] of Petitioner.
- e. Petitioner is [REDACTED]. Petitioner shows [REDACTED] when [REDACTED] is not understood. [REDACTED] is concerned that when Petitioner becomes [REDACTED] [REDACTED] punches [REDACTED] [REDACTED] in the arm and does not understand [REDACTED] is hurting [REDACTED]
- f. [REDACTED] believes Petitioner is entitled to the maximum amount of service hours because Petitioner does not understand a lot of things.
- g. Petitioner does better at school when [REDACTED] receives [REDACTED] therapy at school.

10. [REDACTED] referred to a letter provided by Petitioner's special needs teacher, Elizabeth Flores of [REDACTED]. The letter stated as follows, in pertinent part:

This letter was asked by the [REDACTED], [REDACTED] of [REDACTED]. [REDACTED] arrived to my classroom in November of last year. [REDACTED] behavior did not let me get close to [REDACTED] because [REDACTED], [REDACTED] was also part of [REDACTED] behavior. [REDACTED] had a [REDACTED], and [REDACTED] would [REDACTED]. When [REDACTED] started receiving behavioral therapies, [REDACTED] behavior began to get better, the therapist working with [REDACTED] has made a big change in [REDACTED] for the better. Now [REDACTED] sits and follows instructions, [REDACTED] does not [REDACTED] and [REDACTED] when [REDACTED] therapist is with [REDACTED]

When [redacted] time with [redacted] therapist ends, [redacted] behavior changes again. [redacted] starts running around the classroom and we must move every lunch bag and backpack somewhere out of [redacted] reach, we also have to lock the classroom doors so [redacted] can't [redacted] and [redacted] gets under the desks. It would be good for [redacted] to have more therapy time to maintain good behavior during school hours, so [redacted] can keep learning academically and in [redacted] life skills.

...

PCE 2 at 2.

11. Ms. Llano is a BCBA with [redacted]. Ms. Llano testified to the following:
 - a. Petitioner is improved in school, but regresses to problem behaviors once [redacted] therapist leaves the room.
 - b. Petitioner engages in higher magnitudes of behaviors, such as [redacted] and [redacted] when [redacted] needs things such as medical attention.
 - c. [redacted] wants Petitioner to receive sufficient hours to be able to maintain the skills they are teaching Petitioner and so that therapy can be faded in the future when Petitioner develops independent skills.
 - d. In regard to Petitioner's [redacted], [redacted] is addressing some goals that deal with motor imitation. Petitioner struggles with imitating skills.

12. Ms. Galetto is a BCBA with [redacted]. Ms. Galetto testified to the following:
 - a. [redacted] requested thirty (30) hours of Registered Behavior Technician (RBT) services and were approved for twenty-four (24) hours per week. [redacted] feels limited in their help because they did not receive all of the requested hours.
 - b. [redacted] was only able to spend two (2) to (3) three hours per day with Petitioner.

- c. [REDACTED] felt the peer review with Dr. Joseph Darling was a short phone call.
- d. [REDACTED] updated the Treatment Plan with new graphs through the end of August with Petitioner's behaviors. Petitioner does have [REDACTED] [REDACTED] behaviors.
- e. Petitioner's mode of communication is [REDACTED] [REDACTED] is teaching Petitioner the [REDACTED] [REDACTED] is playing a guessing game in regards to Petitioner [REDACTED].
- f. Petitioner's services are given at the school setting; over the summer, Petitioner came to [REDACTED] office.
- g. Petitioner's global development delays are being addressed during school hours.
- h. There are some goals [REDACTED] cannot address at this time because of the lack of approved hours.
- i. In response to a question from Dr. Bicard, Ms. Galetto testified that all of the hours were approved for caregiver and teacher training. There were some hours denied for RBT and supervision.

13. Dr. Bicard is a BCBA at the doctoral level with eQHealth. Dr. Bicard testified to the following:

- a. eQHealth is the company contracted by AHCA to review requests for BA services for medical necessity. eQHealth uses a two-level review system. When a request comes in for BA services, the first reviewer is a BCBA who has a master's degree and cannot deny services; they can only approve services. If services cannot be approved based on medical necessity criteria and the BA Policy, the case is

reviewed by a BCBA at the doctoral level; this reviewer can approve or deny services. Here, the services were partially denied based on information submitted by the provider's Treatment Plan.

b. Petitioner's provider submitted additional documentation for reconsideration. It was determined that the services were in excess of medical necessity based on information submitted in the provider's Treatment Plan. Dr. Bicard agrees with the determination.

c. Dr. Bicard reviewed the medical necessity criteria. See RCE 2 at 7. The criteria was established by the legislature for Medicaid services. In order for any services to be medically necessary, the services must meet all of the following conditions:

1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and
3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
4. 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; and
5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

* * *

(c) 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.

Id.

- d. The Behavior Analysis Services Coverage Policy outlines the Criteria to Assess the Intensity of Behavior Analysis Services. The providers are required to submit the proper justification for the requested hours of service, and it must be adequately documented in the plan.
- e. A replacement skill is a skill a recipient is learning to engage in so they don't engage in the problem behaviors. Here, the provider only identified the replacement behavior of [REDACTED]. Services for Petitioner were approved at a level commiserate with what Petitioner was getting prior to the initiation of services with this provider, even though there is only one identified replacement skill.
- f. In the data provided by the provider, you want to see a downward trend regarding maladaptive behaviors.
- g. Regarding the maladaptive behavior of [REDACTED], the graph shows a downward trend for Petitioner. See RCE 1 at 123. Based on the services already approved, about twenty (24) hours of therapy and five (5) hours of case management activities, the services appear to be improving Petitioner's [REDACTED] [REDACTED].
- h. Regarding the maladaptive behavior of [REDACTED] the intervention appears to be incredibly effective in reducing and almost eliminating this behavior for Petitioner. See RCE 1 at 124.
- i. Regarding the maladaptive behavior of [REDACTED] there is the same general trend of dramatic reduction. See RCE 1 at 125.

- j. Regarding the maladaptive behavior of [REDACTED] there are long periods where the behavior does not occur and then some periods where the behavior is occurring. See RCE 1 at 126. It appears the provider has not implemented any interventions at this time.
- k. Regarding the maladaptive behavior of [REDACTED], there is not enough data collected to establish a trend for this behavior. See RCE 1 at 127.
- l. Regarding the maladaptive behavior of [REDACTED] (such as [REDACTED] [REDACTED]), the intervention is appropriate and is doing its job. See RCE 1 at 128.
- m. Regarding the maladaptive behavior of [REDACTED], the behavior is not really occurring much at all. See RCE 1 at 130.
- n. The replacement strategy for all of the maladaptive behaviors includes teaching Petitioner [REDACTED], which is what Respondent would want to see. The interventions are working at the level which was approved by Respondent's team.
- o. A [REDACTED] in behavior analysis is [REDACTED]. The provider is teaching Petitioner to [REDACTED] and it is being done through [REDACTED]. There are other skills that should be identified by the provider and placed in the treatment plan.
- p. It is not clear what is going on in terms of active treatment for Petitioner. There is a targeted treatment plan but a comprehensive request for services.
- q. Services for Petitioner were approved at the same level as the prior provider who had a comprehensive treatment plan for Petitioner.

- r. Dr. Bicard reviewed the additional documentation submitted by Petitioner's provider. The additional documentation still only shows one goal or skill that was identified for Petitioner: [REDACTED]. There are goals for family involvement, but it is not clear if the provider is working with the school.
- s. Overall, there is a treatment plan where Petitioner is engaging in several forms of maladaptive behaviors and there is one skill being worked on. The provider was given twenty-four (24) hours per week to work on that one skill. Based on the medical necessity criteria, Dr. Bicard agrees with the approved hours for Petitioner.

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

17. The Florida Medicaid Behavior Analysis Services Coverage Policy (October 2017) ("BA Policy"), incorporated by reference in Fla. Admin. Code. R. 59G-4.125, governs BA services available under Florida Medicaid. The BA Policy provides as follows:

1.0 Introduction

Behavior analysis (BA) services are highly structured interventions, strategies, and approaches provided to decrease maladaptive behaviors and increase or reinforce appropriate behaviors.

...

1.4.5 Medically Necessary/Medical Necessity

As defined in Rule 59G-1.010, F.A.C.

...

4.0 Coverage Information

4.1 General Criteria

Florida Medicaid covers services that meet all of the following:

- Are determined medically necessary
- Do 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.

...

RCE 2 at 40 – 41.

18. 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

...

RCE 2 at 41 – 46.

19. 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.

RCE 2 at 4 – 5.

20. Petitioner is under age 21, and therefore EPSDT applies to the request for services. However, a state may place medical necessity limitations on EPSDT services. *See* 42 C.F.R. §§ 440.230(a), (b), (d). Fla. Stat. § 409.905(2) limits EPSDT services with a medical necessity standard:

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

RCE 2 at 6.

21. The Definitions Policy, incorporated by reference in Fla. Admin. Code R. 59G-1.010, defines “Medically Necessary” or “Medical Necessity” as follows:

The medical or allied care, goods, or services furnished or ordered must meet the following conditions:

- Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate pain
- Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient’s needs
- Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational
- Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide
- Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient’s caretaker, or the provider

The fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service.

RCE 2 at 18.

22. In the instant case, Petitioner requested the following ABA services: 3,120 units of code 97153; 312 units of code 97155; 312 units of code 97155 HN; 52 units of code 97156; and 52 units of code 97156 HN. See ¶ 6. In the NOO, dated June 26, 2023, Respondent explained that the request for services did not meet the following criteria: “[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs.” See ¶ 6. Respondent further explained that “the frequency, intensity, or severity of the recipient’s maladaptive behaviors does not justify the requested units of services” and “[t]he requested units of BA services are in excess of medical necessity.” *Id.*

23. 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 ¶ 20. As provided in section 2.83 of the Definitions Policy, a component of medical necessity is that services must be “[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs.” See ¶ 6. This component was identified as not being met in the NOO and NRD. See ¶ 6 – 7. As shown by the record, Petitioner’s maladaptive behaviors are on a downward trend. See ¶ 4, 13. For example, the maladaptive behaviors of [REDACTED] [REDACTED] See ¶ 4. As testified by [REDACTED], Ms. Galetto, and Ms. Llano, Petitioner’s behavior has improved. See ¶ 9, 11 – 12. Dr. Bickard reviewed the graphs for Petitioner’s maladaptive behaviors noting the downward trends in frequency, that [REDACTED] has a dramatic reduction, [REDACTED] is almost eliminated, [REDACTED] has improved, and [REDACTED] has long periods of not occurring. See ¶ 13. Petitioner has failed to identify where the current approved hours of service are lacking. As such, Petitioner did not demonstrate that the partially denied service hours are not “not in excess of the patient's needs.”

24. Lastly, as Petitioner bears the burden of proof regarding the request for additional services, Petitioner must show that the request for the additional units of behavior analysis services were medically necessary. At the Fair Hearing, Ms. Galetto provided credible testimony that all of the hours were approved for caregiver and teacher training. See ¶ 12. Ms. Llano testified that Petitioner’s behavior is improved in school, even though Petitioner regresses once [REDACTED] therapist leaves the room. See ¶ 11. Next, [REDACTED] testified that Petitioner was not showing progression with [REDACTED] two (2) prior providers but is showing improvement with [REDACTED]

█. See ¶ 9. Couple with the graphs demonstrating an overall downward trend of maladaptive behaviors, Petitioner has failed to demonstrate that additional behavioral analysis services are medically necessary.

25. █ referred to a letter from provided by Petitioner's special needs teacher. See ¶ 10. However, as stated above, services may not be furnished in a manner primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider. See supra ¶ 13, 21.

26. Upon consideration of the testimony provided, Petitioner's Composite Exhibit 1, Petitioner's Composite Exhibit 2, Respondent's Composite Exhibit 1, Respondent's Composite Exhibit 2, and applicable laws and policies, the undersigned concludes that Petitioner did not prove by a preponderance of the evidence that the denied units of BA services are medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner has not demonstrated that the additional services based on this treatment plan, 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 partial denial of additional BA 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 26th day of October 2023, in Tallahassee, Leon County, Florida.



Laura Gallagher
for Kameisha Presley
23-FH1913
2023.10.26 10:30:10
-04'00'

KAMEISHA PRESLEY, 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:



AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com