FILED

Nov 27, 2023, 10:48 am

OFFICE OF FAIR HEARINGS

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

,

PETITIONER, **AHCA Case No.: 23-FH2139**

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 October 9, 2023, at 2:00 p.m. EST.

APPEARANCES

For the Petitioner:
Petitioner's Authorized Representative

For the Respondent: Marielisa Amador
Medical Health Care Program Analyst
Agency for Health Care Administration

STATEMENT OF ISSUE

The issue is whether Respondent proved by a preponderance of the evidence that Respondent's decision to terminate Petitioner's applied behavior analysis ("BA") services was correct.

PRELIMINARY STATEMENT

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

BCBA, Esq., of [redacted]. ("Ms. Cabrera") also appeared as a witness for 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"), BCBA at the Doctorate level and second level reviewer for eQHealth Solutions appeared as a witness for Respondent.

Claudia, a translator with Language Line Solutions, Identification Number 216398, provided translation services at the Fair Hearing.

Prior to the Fair Hearing, the Petitioner sent to the Office of Fair Hearings and the Respondent an eighty-three (83)-page proposed evidence package that was admitted into evidence without objection, is identified as the "Petitioner's Composite Exhibit 1" and is maintained in the Office of Fair Hearings' case management system as "23-FH2139 Evidence for Hearing.pdf".

Prior to the Hearing, the Respondent sent the Office of Fair Hearings and Petitioner a two hundred and fifty-nine (259) page proposed evidence package and a forty-nine (49)-page evidence package that were admitted into evidence without objection. The two hundred and fifty-nine (259)-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 10.03.2023 1-179.pdf" and "[redacted] FH 10.03.2023 180-259.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-FH2139 ACHA Evidence (Pages 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.

2. Petitioner is a [redacted] and has been diagnosed with [redacted] ("[redacted]"). *See* Respondent's Composite Exhibit 1, page 22. The Petitioner began receiving BA services for the first time [redacted] by and through [redacted]. *See* Petitioner's Composite Exhibit 1, page 24.

3. The Behavioral Analysis Reassessment, dated July 25, 2023, ("Treatment Plan"), identified the following maladaptive behaviors for the Petitioner: [redacted]; [redacted]; [redacted]; [redacted], [redacted]; [redacted]; and [redacted]. *See* Petitioner's Composite Exhibit 1, Page 46-48.

4. Petitioner requested the continuation of the following BA services: 3,120 units of code 97153, 312 units of code 97155 and 312 units of code 97156 for the certification period of August 12, 2023, through February 7, 2024. *See* Respondent's Composite Exhibit 1, page 28.

5. The July 25, 2023, Treatment Plan data for maladaptive behaviors show the following:

    a. Incidents of "[redacted]" show a decline of [redacted].

    b. Incidents of "[redacted]" show a decline of [redacted]

    c. Incidents of "[redacted]" show a decline of [redacted]

    d. Incidents of "[redacted]" show a decline of [redacted].

e. Incidents of "[redacted]" show a decline of [redacted].

f. Incidents of "[redacted]" show a decline of [redacted]

g. Incidents of "[redacted]" show a decline of [redacted].

See Petitioner's Composite Exhibit 1, pages 46-48.

6. The July 25, 2023, Treatment Plan data graphs for replacement behaviors designed to replace the Petitioner's maladaptive behaviors reflect increases in percentages to show independence through the Petitioner's entire treatment plan. More specifically, the replacement behavior graphs show as follows:

a. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 59.

b. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 60.

c. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 61.

d. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 62.

e. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 63.

f. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 64.

g. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 65.

h. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 66.

i. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 67.

j. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 68.

k. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 69.

k. The replacement behavior goal of "[redacted]" shows an increase in frequency between [redacted]. *See* Petitioner's Composite Exhibit 1, page 70.

l. The replacement behavior goal of "[redacted]" was added to the Treatment Plan in [redacted]. *See* Petitioner's Composite Exhibit 1, page 71.

m. The replacement behavior goal of "[redacted]" was added to the Treatment Plan in [redacted]. *See* Petitioner's Composite Exhibit 1, page 72.

7. On August 17, 2023, the Respondent issued a Notice of Outcome ("NOO"), terminating Petitioner's BA services. *See* Respondent's Composite Exhibit 1, pages 28-32. 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.

Id. The NOO further provided:

> The Rationale for our decision is as follows:
>
> PR Principal Reason – Denial
>
> Submitted information does not support the medically necessity for requested frequency and/or duration.
>
> The rationale for our decision is as follows:

> PR Clinical Rationale - Denial: According to the Florida Medicaid State Plan (Appendix 9.3.b), the data provided must show evidence that the frequency of the maladaptive behavior(s) has decreased since the last review and, if not, that there is a modification of the behavior plan. The recommendations for procedural modifications include: additions/changes to treatment plan to impact behaviors targeted for reduction. Procedural modifications should include one or more of the following: antecedent manipulation modifications, modifications of prompting procedures used in acquisition, modifications in consequence-based strategies--ones that either reduce maladaptive behavior or reinforce replacement behavior (e.g., manipulation of reinforcement schedules, switch to a different decelerative procedure), or if lack of progress was due to therapist error (e.g., poor data collection or poor training on intervention methods), how you will address human error. The provider has not addressed the lack of progress during the last observation period and did not amend the treatment plan in relation to the lack of progress. The information submitted does not meet standards of care within the field of behavior analysis. This request is denied.
>
> . . .

Id.

8. The Petitioner requested reconsideration of the Respondent's decision. On August 24, 2023, Respondent issued a Notice of Reconsideration Determination ("NRD") upholding its decision. *See* Respondent's Composite Exhibit 1, pages 40-43. 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.
>
> Consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational.
>
> The rationale for our decision is as follows:
>
> PR Recon Determination: At reconsideration all documents were carefully reviewed.. According to the Florida Medicaid State Plan (Appendix 9.3.b), the data provided must

> show evidence that the frequency of the maladaptive behavior(s) has decreased since the last review and, if not, that there is a modification of the behavior plan. The recommendations for procedural modifications include: additions/changes to treatment plan to impact behaviors targeted for reduction. Procedural modifications should include one or more of the following: antecedent manipulation modifications, modifications of prompting procedures used in acquisition, modifications in consequence-based strategies-- ones that either reduce maladaptive behavior or reinforce replacement behavior (e.g., manipulation of reinforcement schedules, switch to a different decelerative procedure), or if lack of progress was due to therapist error (e.g., poor data collection or poor training on intervention methods), how the provider will address human error. The recommendations are insufficient to support continued care.
>
> . . .

Id.

9. Dr. Darling testified for the Respondent and stated it is medically necessary for the Petitioner to obtain BA services, but because the current provider's Treatment Plan is ineffective, the Petitioner should obtain these services from a different provider. Dr. Darling stated that the Petitioner's Treatment Plan was terminated because it was not medically necessary in that it did not meet three (3) of the five (5) criteria of medical necessity and more specifically was not:

> 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.
>
> consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational.
>
> 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.

See Fla. Admin. Code R. 59G-1.010(166)(a), (c) at Respondent's Composite Exhibit 2, page 7.

10. Dr. Darling acknowledged that the Petitioner's Treatment Plan did show a decrease in the Petitioner's maladaptive behaviors but testified that the decrease was insignificant and that after

six (6) months of BA services, the decrease should have been greater. With respect to the replacement behaviors, Dr. Darling again testified that the success rate was again insignificant, and after six (6) months of BA services, should have been greater. Dr. Darling also took issue with the Petitioner's claim in the Treatment Plan that six (6) month of BA services is too short of a time period to judge the success of behavior analysis and stated that significant progress can be seen in only six (6) months of behavior analysis services if a treatment plan is effective, and that in this case the treatment plan is ineffective. Finally, Dr. Darling testified that whenever the data collected regarding a treatment plan reflects the behavior analysis services are ineffective, modifications to the treatment plan should be made. While Dr. Darling does acknowledge that modifications were in-fact made to the Petitioner's Treatment Plan, he testified that the modifications made were "too little" and "too late".

11. [REDACTED] testified that [REDACTED] has a "[REDACTED]", that [REDACTED] expresses [REDACTED], and is not [REDACTED]. [REDACTED] testified the goal of the BA therapy is to reduce bad behaviors and increase [REDACTED] social interaction both at home and at school so that [REDACTED] can improve academically.

12. Ms. Cabrera testified for the Petitioner and stated that as reflected in the Treatment Plan, the Petitioners maladaptive behaviors clearly exhibit a decreasing trend and the skills replacement or positive behaviors exhibit an increasing trend. *See also* Petitioner's Composite Exhibit 1, page 24, pages 40-41, 46-48 and 51-54. Ms. Cabrera also testified that the Treatment Plan does reflect that modifications were in-fact made in the effort to increase its effectiveness, including changes in staff to address the possibility of human error. *See* pages 24-25, 27-33, 35-37, 39-40, and 70-71. Next, Ms. Cabrera testified that the opinions of Dr. Darling regarding the

effectiveness of the Petitioner's Treatment Plan is a subjective opinion and that the data in the Treatment Plan objectively demonstrates the treatment is effective, but just not at a rate great enough to satisfy Dr. Darling. Finally, Ms. Cabrera testified that the Petitioner has only been receiving BA therapy services for approximately six (6) months and that at least a year of therapy is required to ascertain the validity of the data, and the trends reflecting whether a treatment plan is successful.

CONCLUSIONS OF LAW

13. 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).

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

15. The burden of proof in this proceeding is governed by Fla. Admin. Code R. 59G-1.100(17)(g), which provides as follows:

> The burden of proof is on the party asserting the affirmative of an issue, except as otherwise required by statute. The burden of proof is on the Agency or plan, whichever is applicable, when the issue presented is the suspension, reduction, or termination of a previously authorized service. The burden of proof is on the recipient or enrollee when the issue presented is the denial or a limited authorization of a service. The party with the burden of proof shall establish its position to the satisfaction of the Hearing Officer by a preponderance of the evidence.

16. Because Respondent terminated a previously approved service, Fla. Admin. Code R. 59-1.100(17)(g) assigns the burden of proof to the Respondent. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence

standard requires proof by “the greater weight of the evidence” (Black’s Law Dictionary at 1201, 7th Ed.).

17. States must provide Early and Periodic Screening, Diagnostic, and Treatment (“EPSDT”) services to Medicaid-eligible children under age 21 when requested under the Medicaid state plan. *See* 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(a)(4).

18. According to 42 U.S.C. § 1396d(r)(5), EPSDT services mean, in relevant part, the following items and services:

> Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illness and conditions discovered by the screen services, whether or not such services are covered under the state plan.

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

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

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

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

> The medical or allied care, goods, or services furnished or ordered must meet the following conditions:
>
> - Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate pain

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

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

Respondent's Composite Exhibit 2 at page 23.

22. The BA Policy, incorporated by reference in Fla. Admin. Code. R. 59G-4.125, governs BA services available under Florida Medicaid. The BA Policy provides as follows:

1.0 Introduction
Behavior analysis (BA) services are highly structured interventions, strategies, and approaches provided to decrease maladaptive behaviors and increase or reinforce appropriate behaviors.
. . .
4.0 Coverage Information
4.1 General Criteria
Florida Medicaid covers services that meet all of the following:

- Are determined medically necessary
- Do no duplicate another
- Meet the criteria as specified in this policy

Respondent's Composite Exhibit 2, pages 40 and 42.

23. Appendix 9.0 of the BA Policy provides Review Criteria for Behavior Analysis Services. These Review Criteria state as follows:

Review Criteria for Behavior Analysis Services
Behavior analysis (BA) services are considered as either the treatment of choice or as an adjunct treatment modality for a variety of conditions and disorders

where maladaptive behaviors are part of the recipient's clinical presentation, including behavioral manifestations of diagnoses such as Autism Spectrum Disorder and other behavioral health conditions.

Critical Elements Necessary for ANY Type of Behavior Analysis Service:
The following critical elements **MUST** be satisfied to qualify for BA services:

a. Eligibility – The recipient must meet all criteria for BA services as outlined in the Behavior Analysis Services Coverage Policy, Rule 59G-4.125, F.A.C.
b. Medical necessity – The recipient must meet medical necessity criteria as outlined in Rule 59G-1.010, F.A.C.
c. The recipient currently engages in maladaptive behaviors
d. These maladaptive behaviors interfere with the recipient's daily functioning

. . .

2. Criteria for Behavior Analysis Services and Reassessments – ALL of the following **MUST** be satisfied:

a. **ALL** critical elements are met
b. An assessment or, if applicable, a reassessment, authored by a lead analyst, is provided. An assessment of the maladaptive behavior(s) is a necessary element of the process of identifying the frequency and magnitude of the behaviors as well as the variables associated with the occurrence of the maladaptive behavior(s). This helps in defining what are the functional consequences of the problem behavior(s) so 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

. . .

5. Criteria for Discharge from Behavior Analysis Services - ONE or **MORE** of the following **MUST** be satisfied:

a. The <u>critical elements</u> are **no longer met.**

b. The data provided shows that the frequency and severity of maladaptive behavior(s) has declined to the point that they no longer pose a barrier to the child's ability to function in his/her environment.

c. ***<u>The data provided shows the recipient has made no progress toward any goals in the last 12 consecutive months</u>***. (Emphasis added.)

d. The level of functional impairment as expressed through behaviors no longer justifies continued BA services.

e. Parent/guardian withdraws consent for treatment.

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

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

> **3.0 Determination Process**
> **3.1 Review Criteria**
> The QIO may use a national standardized set of criteria, or other set of criteria, approved by AHCA, as a guide for authorizations performed at the first review level. If services cannot be approved at the first level review, the QIO's physician peer reviewer will determine medical necessity using his or her clinical judgment, acceptable standards of care, state and federal laws, and AHCA's medical necessity definition.
>
> **3.2 Review Process**
> The QIO will review each authorization request and will approve, deny, or request additional information. The QIO may deny a portion of the requested units of service if it cannot substantiate medical necessity based upon the information submitted.
>
> **3.2.1 Continued Authorization Requests**
> The QIO shall not deny or reduce the amount, frequency, or duration of a service that is already being provided, unless:
> - The reduction is to correct for factual errors or omissions in prior certifications.
> - There is a documented improvement in the recipient's medical condition.
> - There is a documented change in the recipient's circumstances.

- The reviewing physician determines the recipient will not gain any additional benefit by continuing services at the current level.

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

25. In this case, Respondent terminated Petitioner's BA services. The NOO and NRD explained that Petitioner's request for continuation of services did not meet medical necessity as the treatment plan was ineffective, had insufficient modifications due to ineffectiveness, was not individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and does not meet the medical standards of care within the field of behavior analysis. *See* supra ¶ ¶ 7 and 8. In addition, the NRD, stated the modifications within the Treatment Plan are "… insufficient to support continued care." *See* supra ¶ 8.

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. Three (3) of the five (5) components of medical necessity that Dr. Darling testified are not met in this case are that the BA services are that the services 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;
>
> Consistent with generally accepted professional medical standards as determined by the Medicaid program; and
>
> 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.

See supra ¶ ¶ 10, 21 and 22.

27. Dr. Darling testified that the Treatment Plan was ineffective in that the decreases in maladaptive behaviors and increases in replacement behaviors were insufficient, and that modifications made to the Treatment Plan because of the ineffectiveness were "too little" and

"too late". *See* supra ¶ ¶ 9 and 10. However, the evidence in this matter reflects that there were consistent decreases in the Petitioner's maladaptive behaviors, consistent increases in the replacement behaviors, and that there were several modifications in the Petitioner's Treatment Plan intended to increases its' effectiveness, including modifications in staffing intended to address possible human error, modifications in the treatment protocol for the maladaptive behaviors, and modifications in the treatment protocol of replacement behaviors, including adding new replacement behaviors in . *See* supra ¶ ¶ 9, 10, and 12. While Dr. Darling testified that the treatment plan did not evidence enough progress, and any modifications were insufficient, Dr. Darlings opinions are subjective. The testimony of Dr. Darling fails to meet the burden of proof beyond the preponderance of the evidence that the Petitioner's Treatment Plan was not 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.

28. Dr. Darling testified that the Treatment Plan did not meet the generally accepted professional medical standards as determined by the Medicaid program because the Petitioner's Treatment Plan was ineffective, and even though the Petitioner had only recently begun BA services, there should have been more progress in the decrease of the Petitioner's maladaptive behaviors, and more progress in the increase of the Petitioner's replacement behaviors and skills. *See* supra ¶ ¶ 9 and 10. The evidence in this matter demonstrates that there were consistent decreases in the Petitioner's maladaptive behaviors, consistent increases in the replacement behaviors, and that there were several modifications in the Petitioner's Treatment Plan intended to increases its' effectiveness, including modifications in staffing intended to address possible human error, modifications in the treatment protocol for the maladaptive

behaviors, and modifications in the treatment protocol of replacement behaviors, including adding new replacement behaviors in [redacted]. *See* supra ¶ ¶ 9, 10 and 11. While Dr. Darling testified that the Petitioner's Treatment Plan should have been modified to in a fashion in accordance with accepted professional medical standards, he did not offer compelling evidence beyond a preponderance of the evidence that the Petitioner's Treatment Plan, including the modifications that were made, did not meet the professional medical standards in the field of behavior analysis.

29. Next Dr. Darling testified that the Petitioner's Treatment Plan is not 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. *See* supra ¶ ¶ 9 and 10. However, Dr. Darling did not provide any compelling testimony to support the conclusion that the Petitioner's Treatment Plan is not 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. As such, the Respondent did not satisfy their burden of proof to provide compelling testimony that the Petitioner's Treatment Plan is not 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.

30. The Petitioner's Treatment Plan and testimony argues that six (6) months of BA results are insufficient to conclude that a treatment plan and the BA therapy results are ineffective. *See* supra ¶ 12. Dr. Darling testified that six (6) months of BA services is sufficient time to generate enough data to conclude that a plan of treatment is ineffective and that a different BA provider is appropriate. However, Appendix 9 of the BA policy provides review criteria for the discharge

and termination for BA services and specifically providers that termination is appropriate when the data demonstrates that there has been no progress in the recipient's progress for a twelve month (12) month period. *See* supra ¶ 23. Appendix 9 of the BA policy provides the criteria for the discharge from BA services and states discharge is appropriate when one or more of the following are met:

a. The critical elements of BA services, including eligibility, medical necessity, and the existence of maladaptive behaviors that interfere with the recipient's daily functioning are no longer met;
b. That the data shows the frequency of the maladaptive behaviors has declined to the point that they no longer pose a barrier to the child's ability to perform in their environment;
c. That the recipient has made no progress towards any goals in the last twelve consecutive months;
d. That the level of functional impairment as expressed through behaviors no longer justifies continued BA services; and/or
e. That the parent has withdrawn their consent for treatment.

Id. There is no compelling evidence in this matter that any of these five (5) criteria for the termination of BA services has been met or satisfied in this matter. The Respondent has not provided any compelling testimony beyond a preponderance of the evidence that six (6) months of BA services is sufficient to ascertain BA services for a recipient are ineffective or insufficient.

31. The Respondent has not demonstrated by a preponderance of the evidence that the requested BA services with [REDACTED], is not medically necessary. Examining all the evidence relevant to the particular treatment plan of the Petitioner, a continuation the BA services with [REDACTED]. shall not be terminated pursuant to the Behavior Analysis Services Coverage Policy, Review Criteria for the Continuation of Treatment at the Present Level and/or using Current Methods. *See* supra ¶ 23.

32. Upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Respondent has not proved by a preponderance of the evidence that the termination of ABA services was appropriate. Looking at all the evidence relevant to the particular needs of Petitioner, the Respondent has not demonstrated that the previously authorized services, based on the Treatment Plan at issue in this case, are not necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, Respondent has not demonstrated by a preponderance of the evidence that Respondent's termination of ABA services was correct.

DECISION

Respondent's termination of Behavior Analysis services is **REVERSED**. Petitioner's appeal based on Respondent's termination of Behavior Analysis services is **GRANTED**.

DONE and **ORDERED** this 27th day of November 2023, in Tallahassee, Leon County, Florida.

Alan J. Leifer
23-FH2139
2023.11.27
08:26:57 -05'00'

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

NOTICE OF A RIGHT TO JUDICIAL REVIEW

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

Copies Furnished To:

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com