



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

FILED

Dec 14, 2023, 9:24 am

OFFICE OF FAIR HEARINGS

[REDACTED],

PETITIONER,

AHCA Case No.: 23-FH2221

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 26, 2023, at 9:28 a.m. Eastern Standard Time (“EST”).

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner’s Authorized Representative

For the Respondent:

Diana Hearod
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

[REDACTED] (“ [REDACTED] ”), [REDACTED]

open until November 2, 2023, at 5:00 p.m. Respondent had until November 9, 2023, at 5:00 p.m. to submit a response or objection to Petitioner’s doctors’ letters/documents. As of November 2, 2023, at 5:00 p.m., no additional information or documents were received from Petitioner or Petitioner’s Authorized Representative.

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 Provider’s most recent Behavior Analysis Services Plan (“Treatment Plan”), dated [REDACTED] Petitioner is engaging in the following maladaptive behaviors:

[REDACTED]
[REDACTED]. See PCE 1 at 5.

4. The treatment plan refers to Petitioner as [REDACTED] although that is not Petitioner’s name. See RCE 1 at 47.

5. On August 4, 2023, Petitioner requested BA services; specifically, 3,120 units of code 97153; 520 units of code 97155; and 52 units of code 97156. See RCE 1 at 23. In a Notice of Outcome – Partial Denial (“NOO”), dated August 14, 2023, Respondent partially denied the requested services. *Id.* 23 – 27. The NOO states as follows:

Code: 97153
Description: Intervention without protocol modification, per 15 minutes, Lead Analyst, BCaBA or RBT
From: 8/14/23

Thru: 2/9/24
Total Units: Denied 1,040
Approved 2,080

Code: 97155
Description: Intervention with protocol modification, per 15 minutes
From: 8/14/23
Thru: 2/9/24
Total Units: Denied 104
Approved 416

Code: 97156
Description: Family training, per 15 minutes, Lead Analyst
From: 8/14/23
Thru: 2/9/24
Total Units: Approved 52

The NOO explained the basis for the partial denial 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 –Denial: PR DETERMINATION: 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. The recipient is engaging in problem behaviors that threaten access to typical environments and negatively affects activities of daily living. The provider is using a tiered service delivery model and has not made a compelling justification for services at the intensity requested. The requested hours of BA services are more than medical necessity.

...
RCE 1 at 23 – 24.

6. Petitioner requested reconsideration of the Respondent’s decision. *Id.* at 37. In a Notice of Reconsideration Determination (“NRD”), dated September 6, 2023, Respondent upheld its decision. *Id.* at 35 – 38. 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.

The rationale for our decision is as follows:

PR Recon Determination: At reconsideration all documents were carefully reviewed. The provider did not submit any new documentation that supports the medical necessity of this request. According to The Behavior Analysis Services Coverage Policy, (page 6. 9.0.c-d) the recipient of ABA therapy services must engage in maladaptive behavior that interferes with the recipient’s daily functioning. Although the recipient is engaging in topographies of maladaptive behaviors, the frequency and intensity of the maladaptive do not support the request for services. This reconsideration request has been reviewed, reconsidered and the partial denial is upheld.

...
RCE 1 at 36.

7. On September 8, 2023, Petitioner requested a Fair Hearing to challenge the partial denial of BA services. On October 2, 2023, the undersigned issued an Amended Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for October 26, 2023, at 9:30 a.m. EST.

8. [REDACTED] is Petitioner’s [REDACTED]. [REDACTED] testified as follows:

- a. [REDACTED] referred to the Plan dated [REDACTED].
- b. A peer to peer evaluation was held on [REDACTED].

- c. [REDACTED] does not understand why the BA services were denied.
- d. Petitioner engages in problematic and destructive [REDACTED]
- e. ABA is an evidenced based practice and is an acceptable intervention for individuals diagnosed with [REDACTED]
- f. Provider submitted peer reviewed articles.
- g. [REDACTED] referred to a comparison analysis between Petitioner and a comparison child of the same age. See PCE 1 at 44. [REDACTED] surmised that a comparable child received more services with lesser issues than Petitioner.
- h. [REDACTED] read into the record a letter from Petitioner's [REDACTED] [REDACTED]. See PCE 1 at 80.
- i. [REDACTED] is the owner of the [REDACTED], where Petitioner was waiting to attend.

9. Ms. Hurley is the owner of [REDACTED]. Ms. Hurley testified as follows:

- a. Petitioner exhibits higher rates of behavior.
- b. Provider is struggling to understand overall what is necessary for one child over another child.
- c. Provider reviewed the treatment plan from Petitioner's previous provider.

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

- a. Dr. Bicard read the five (5) medically necessary criteria into the record.
 - 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.

- b. There were no replacement behaviors included in the Provider's treatment plan.
- c. The provider requested thirty (30) hours of therapy and twenty (20) hours were approved. The provider also requested 520 units of code 97155 and 416 were approved, which is within the guidelines of standard of care within the field of BA.
- d. Petitioner has been in BA services since [REDACTED]. The units of BA requested by the previous provider were never as high as the units requested by this provider.
- e. Dr. Bicard reviewed Provider's treatment plan. The plan states that Petitioner is moving to [REDACTED] in the upcoming school year. See RCE 1 at 47. This is not typical for a [REDACTED].
- f. The provider has a conflict because the school Petitioner will be going to is associated with the Provider. It is not clear what the relationship is in terms of

how the services will be provided and for what purpose. The information has not been transparently provided within the treatment plan.

- g. The provider stated Petitioner may have struggles to transfer to a novel school. See RCE 1 at 47. However, the provider also stated that one of Petitioner's strengths is that [REDACTED] easily [REDACTED]. See RCE 1 at 49.
- h. When Respondent is looking at Petitioner's maladaptive behaviors they are also looking at Petitioner's skill acquisition goals. The treatment for maladaptive behaviors is provided by teaching Petitioner functionally replacement behaviors.
- i. It is highly unusual for a recipient of BA services for as long as Petitioner has received services to not have any skills. The Provider has zero baselines for all of the replacement skills that were assessed. See RCE 1 at 57. Dr. Bicard does not believe that the data reported by the provider is accurate.
- j. The provider erroneously determined that the approved hours are not enough for Petitioner based on another request for different recipient. The comparison analysis is inappropriate because it is not clear if that recipient participated in BA therapy, the age of the recipient was not described, and the functioning level in terms of language and replacement skills was not described. The information is objectionable on its face and not relevant to this discussion.
- k. Dr. Bicard reviewed the Criteria to Assess the Intensity of Behavior Analysis Services. See RCE 2 at 47.
- l. Based on the information submitted by the provider and the history of Petitioner's treatment with other providers, Respondent determined that the requested hours

of services were in excess of Petitioner’s medical necessity and considered to be for the convenience of the provider.

CONCLUSIONS OF LAW

11. 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).

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

13. 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.)

14. 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 – 42.

15. 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 45 – 47.

16. 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.

17. 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.

18. Section 2.83 of 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 23.

19. In the instant case, Petitioner requested the following ABA services: 3,120 units of code 97153; 520 units of code 97155; and 52 units of code 97156. See ¶ 5. In the NOO, dated August 14, 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 ¶ 5. Respondent further explained that “[t]he provider is using a tiered service delivery model and has not made a compelling justification for services at the intensity requested” and “[t]he requested units of BA services are more than of medical necessity.” See ¶ 5.

20. As provided by the EPSDT requirements, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. See ¶ 17. 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 ¶ 18. This component was identified as not being met in the NOO and NRD. See ¶ 5, 6. ██████████ testified that ABA is an evidenced based practice and is an acceptable intervention for individuals diagnosed with ████████. See ¶ 8. Dr. Bicard

provided credible and persuasive testimony that there were no replacement behaviors included in the Provider's treatment plan, that it is highly unusual for a recipient of BA services for as long as Petitioner has received services to not have any skills, that the Provider has zero baselines for all of the replacement skills that were assessed, and that Dr. Bicard does not believe that the data reported by the provider is accurate. See ¶ 10. Ms. Hurley testified that Petitioner exhibits higher rates of behavior and ██████ testified that Petitioner engages in problematic and destructive ██████. See ¶ 8, 9. Petitioner has failed to identify where the current approved hours of service are lacking. As such, Petitioner did not demonstrate that the denied service hours are not "not in excess of the patient's needs."

21. 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. ██████ testified that Petitioner is engaging in more maladaptive behaviors when compared to a similarly aged child. See ¶ 10. However, Dr. Bicard provided credible and convince testimony that the comparison analysis is inappropriate because it is not clear if that recipient participated in BA therapy, the age of the recipient was not described, and the functioning level in terms of language and replacement skills was not described. See ¶ 12. Petitioner has failed to demonstrate that the additional behavioral analysis services requested are medically necessary.

22. The provider's treatment plan includes a statement that Petitioner needs the additional services because ██████ struggles with transitioning. However, Dr. Bicard testified that the provider also stated that one of Petitioner's strengths is that ██████.


See ¶ 12. 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 ¶ 21.

23. Upon consideration of the testimony provided, Petitioner's Composite Exhibit 1, Respondent's Composite Exhibit 1, the EPSDT policy, and all other 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 partial denial of BA services is **AFFIRMED**. Petitioner's appeal based on Respondent's denial is **DENIED**.

DONE and **ORDERED** this 14th day of December 2023, in Tallahassee, Leon County, Florida.

 Kameisha Presley
23-FH2221
2023.12.14
08:55:30 -05'00'

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:



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