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

FILED
Jan 19, 2024, 11:12 am
OFFICE OF FAIR HEARINGS

[redacted],

PETITIONER, **AHCA Case No.: 23-FH2386**

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION,

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on November 16, 2023, at 1:01 p.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 Respondent proved by a preponderance of the evidence that Respondent's decision to terminate Petitioner's Behavior Analysis ("BA" or "ABA") services was correct.

PRELIMINARY STATEMENT

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

Diana Hearod ("Ms. Hearod"), 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"), Board Certified Behavior Analyst and Director of Clinical Operations for eQHealth Solutions Inc. ("eQHealth"), appeared as a witness for Respondent.

Estefania, interpreter number 385219, appeared to offer translation services for the Petitioner.

Petitioner did not introduce any exhibits at the hearing. Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a three-hundred and nine (309)-page evidence packet and a forty-nine (49)-page evidence packet. The three-hundred and nine (309)-page evidence packet appears in the Office of Fair Hearings' document management system as the file titles "[redacted] FH 11.16.2023 1-181.pdf" and "[redacted] FH 11.16.2023 182-309.pdf". The forty-nine (49)-page evidence packet appears in the Office of Fair Hearings' document management system as the file title "23-FH2386 – AHCA BA 49 pgs .pdf". Absent an objection from the Petitioner, the undersigned admitted the three-hundred and nine (309)-page evidence packet into evidence as Respondent's Composite Exhibit 1 ("RCE 1") and the forty-nine (49)-page evidence packet into evidence as Respondent's Composite Exhibit 2 ("RCE 2").

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* page 2 of RCE 2.

2. Petitioner is [redacted]. *See* page 21 of RCE 1. Petitioner is diagnosed with [redacted]. *Id*.

3. As provided in the Functional Assessment and Behavior Analysis Service Plan ("treatment plan" or "behavior plan"), Petitioner is engaging in the following maladaptive behaviors: [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; and [redacted]. *Id.* at 53 – 57. The graphs of Petitioner's maladaptive behaviors showed the following: for [redacted], Petitioner's incidents remained at approximately [redacted]; for [redacted], Petitioner's incidents remained at approximately [redacted]; for [redacted] Petitioner's incidents remained at approximately [redacted]; for [redacted], Petitioner's incidents remained at approximately [redacted]; for [redacted], Petitioner's incidents remained at approximately [redacted]; for [redacted], Petitioner's incidents remained at approximately [redacted]; for [redacted], Petitioner's incidents remained at approximately [redacted]; for [redacted], Petitioner's incidents decreased from approximately [redacted] to approximately [redacted]; for [redacted], Petitioner's incidents remained at approximately [redacted]; for [redacted], Petitioner's incidents remained at approximately [redacted]; and for [redacted], Petitioner's incidents remained at approximately [redacted]. *Id.* at 58 – 60.

4. Petitioner requested continuation of BA services; specifically, 2,912 units of code 97153; 520 units of code 97155; and 208 units of code 97156. In a Notice of Outcome ("NOO"), dated July 3, 2023, Respondent terminated Petitioner's ABA services. *Id*. at 28. The NOO explained the basis for the termination as follows:

> [T]he requested services are not medically necessary under the following standard(s):

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

> PR Clinical Rationale – Denial: According to (the Florida Behavior Analysis Services Coverage Policy, page 6, 9.2.i), the behavioral definitions must be clear, complete, objective and free of unobservable intentional states. The behaviors should have clear boundaries, definite on-sets and off-sets, should not overlap with other target behaviors definitions, and not be a listing of behaviors that the recipient does not engaging in. The behavior definitions for [redacted] in this treatment plan do not conform to generally accepted standards of care within the field of applied behavior analysis. The provider was requested to review and amend the definitions and the provider did not respond to the request. Additionally, the data show minimal progress. This request is denied.
> . . .

Pages 28 – 29 of RCE 1.

5. Petitioner requested reconsideration of the Respondent's decision. In a Notice of Reconsideration Determination ("NRD"), dated September 22, 2023, Respondent upheld its decision. *Id.* at 40 – 41. The NRD explained the basis for the decision as follows:

> PR Recon Determination: At reconsideration all documents were carefully reviewed. The definitions do not meet standards of care in Behavior Analysis or the Florida Behavior Analysis Service Coverage Policy. 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.

. . .

Pages 40 – 41 of RCE 1.

6. On September 21, 2023, Petitioner requested a Fair Hearing to challenge the termination of ABA services. *Id*. at 8. On October 18, 2023, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for November 16, 2023, at 1:00 p.m. EST. *Id*.

7. Dr. Bicard is a Board Certified Behavior Analyst at the doctoral level. Dr. Bicard testified to the following at the Fair Hearing:

a. Petitioner has participated in ABA services with the current provider since [redacted]. The second level reviewer determined that Petitioner was not making progress on the identified goals for maladaptive behaviors and replacement skills, which does not meet medical necessity criteria and indicates the treatment is ineffective for Petitioner. It is a standard of care that the ABA provider must identify new interventions when behavior is not improving or when previous interventions were ineffective. Based on the treatment plan, Petitioner's behavior is not improving. The provider is not rendering a high enough quality of care, and Petitioner may seek services from a different ABA provider.

b. The graphs for maladaptive behaviors should be trending downwards to indicate improvement. A review of the last year of treatment shows that the data are unchanged, indicating ineffective treatment. There are readily available and effective treatments that the provider can implement to decrease both the [redacted] and [redacted]. *See* page 58 of RCE 1. Petitioner's levels of problem

behaviors are abnormally high after [redacted] years of therapy. There is no improvement in the behaviors of [redacted], [redacted], [redacted], [redacted], or [redacted]. *Id*. at 59. None of Petitioner's maladaptive behaviors exhibits improvement. *Id*. at 58-60 of RCE 1.

c. Dr. Bicard asserted that these maladaptive behaviors are not improving because the provider has not attempted to address replacement behaviors. Rather than functional replacement behaviors, Dr. Bicard stated the provider has identified skills that do not make clinical sense. After [redacted] years of therapy with this provider, these replacement behaviors are occurring at extremely low levels. *Id*. at 63. The provider has not attempted to make interventions for these behaviors. After [redacted] years of treatment, Petitioner is unable to [redacted], [redacted] [redacted]. *Id*. at 63, 64. The provider is also working on unrelated tasks, such as [redacted]. *Id*. at 65-67. These skills do not meet medical necessity criteria.

d. The treatment plan is not individualized for Petitioner, nor is it consistent with Petitioner's significant maladaptive behaviors and skill deficits. Treatment is ineffective and inappropriate. The provider has included a general listing of procedures and interventions that are not individualized for Petitioner. *Id*. at 100-104.

8. [redacted] is the [redacted] of Petitioner. [redacted] testified to the following at the Fair Hearing:

a. [redacted] stated that some of the data and information Dr. Bicard testified to are not correct. [redacted] stated Petitioner's behaviors change daily and are not constant, as well as that some of Petitioner's behaviors have improved little by little. [redacted] stated Petitioner also has new behaviors and needs therapy, as [redacted] has experienced regression without therapy. Petitioner also participates in [redacted], along with ABA therapy.

CONCLUSIONS OF LAW

9. 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).

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

11. Because Respondent terminated a previously approved service, Fla. Admin. Code R. 59G-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.)

12. 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 no 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.

13. 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 than 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

14. 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.

15. Petitioner is under age 21, and therefore EPSDT applies to [redacted] 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.

16. 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.

17. The Florida Medicaid Authorization Requirements Policy ("Authorization Policy"), incorporated by reference in Fla. Admin. Code R. 59G-1.053, provides as follows:

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 error 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.

18. In the instant case, Respondent terminated Petitioner's ABA services. *See* ¶ 3. In the NOO dated July 3, 2023, Respondent explained that continuing services at the prior level was not medically necessary, specifically, that it did not meet the requirements that services must be "consistent with generally accepted professional medical standards as determined by the

Medicaid program, and not experimental or investigational", as well as "individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs." *Id.* Respondent further explained that "the data show minimal progress." *Id.*

19. As provided by the EPSDT requirements, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. As provided in section 2.83 of the Definitions Policy, two components of medical necessity are that services must be "consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational", as well as "individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs." As shown by the record, Petitioner has not made progress regarding [redacted] maladaptive and replacement behaviors. *See* ¶¶ 3, 7. Dr. Bicard provided credible testimony that none of Petitioner's maladaptive behaviors is improving, asserting that Petitioner's levels of problem behaviors are abnormally high after [redacted] years of therapy. *Id*. Petitioner's replacement behaviors are also occurring at extremely low levels after [redacted] years of treatment, and the provider has not attempted to make interventions for these behaviors. *Id*. Dr. Bicard also testified that the treatment plan contains a general list of interventions which are not individualized for Petitioner, as well as skills that do not make clinical sense or meet medical necessity criteria. *Id*. As such, this provider is rendering ineffective treatment. *Id*. As Petitioner has not made progress over [redacted] years of therapy, and as the provider has not implemented proper intervention, the treatment plan is not "consistent with generally accepted professional medical standards." Furthermore, as the treatment plan contains a general listing of procedures

and behaviors that do not meet medical necessity, the treatment plan is not "individualized, specific, and consistent" with Petitioner's treatment needs. As such, Respondent demonstrated that it was not medically necessary to continue services with the current provider.

20. As QIO for the Agency, eQHealth is authorized to terminate services when "the reviewing physician determines the recipient will not gain any additional benefit by continuing services at the current level." *See* ¶ 17. As discussed, *supra* ¶ 19, Petitioner has not made progress in reducing [redacted] maladaptive behaviors, nor in improving [redacted] replacement behaviors. Here, Petitioner's lack of progress, the provider's lack of intervention, and the treatment plan's insufficiencies are well documented.

21. Upon consideration of the testimony provided, evidence submitted, and applicable polices, the undersigned concludes that Respondent proved by a preponderance of the evidence that the termination of ABA services was necessary. Looking at all the evidence relevant to the particular needs of Petitioner, Respondent has 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 proved by a preponderance of the evidence that Respondent's termination of ABA services was correct.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

Respondent's termination of ABA services is **AFFIRMED**. Petitioner's appeal based on Respondent's termination is **DENIED**.

DONE and **ORDERED** this 19th day of January, 2024, in Tallahassee, Leon County, Florida.

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

NOTICE OF A RIGHT TO JUDICIAL REVIEW

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

Copies Furnished To:

[redacted]

AHCA Medicaid Hearing Unit
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