FILED
Jan 16, 2024, 11:29 am
OFFICE OF FAIR HEARINGS

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

[redacted],

PETITIONER, **AHCA Case No.: 23-FH2552**

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 December 6, 2023, at 2:00 p.m. EST.

APPEARANCES

For the Petitioner: [redacted]
Petitioner's Authorized Representative

For the Respondent: Sandra Durden
Medical Health Care Program Analyst
and Fair Hearing Liaison
Agency for Health Care Administration

STATEMENT OF ISSUE

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

PRELIMINARY STATEMENT

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

[redacted], BCBA, ("[redacted]"), of [redacted], of [redacted], Florida, and [redacted], Waiver Support Coordinator through the Agency for Persons with Disabilities ("[redacted]") testified on behalf of the Petitioner.

Sandra Durden, Medical Health Care Program Analyst and Fair Hearing Laison for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared on behalf of Respondent. Dr. David Bicard ("Dr. Bicard"), Director of Clinical Operations for eQHealth Solutions appeared as a witness for Respondent. A Spanish interpreter was present for the Fair Hearing however the Petitioner elected to conduct the hearing in English and the translator was dismissed.

Prior to the Fair Hearing, the Petitioner sent to the Office of Fair Hearings and the Respondent an eighteen (18)-page package of proposed evidence that was admitted into evidence without objection, is identified as "Petitioner's Composite Exhibit 1", and is maintained in the Office of Fair Hearings document management system as "23-FH2552 Faxed Correspondence.pdf".

Prior to the Hearing, the Respondent sent the Office of Fair Hearings and Petitioner a two hundred and seventy-five (275)-page proposed evidence package and a forty-nine (49)-page evidence package that were both admitted into evidence without objection. The two hundred and seventy-five (275)-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 11.30.2023 1-76.pdf"; "[redacted] FH 11.30.2023 77-110.pdf"; "[redacted] FH 11.30.2023 111-144.pdf"; "[redacted] FH 11.30.2023 145-184.pdf"; "[redacted] FH 11.30.2023 185-218.pdf"; "[redacted] FH 11.30.2023 219-252.pdf"; and "[redacted] FH 11.30.2023 253-275.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-FH2252 AHCA Evidence.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 a [redacted] *See* Respondent's Composite Exhibit 1, page 21 and 172. The Petitioner has participated in BA services since [redacted] and with the current provider, [redacted], since [redacted]. *See* Respondent's Composite Exhibit 1, page 43.

3. The Behavioral Analysis Assessment, dated September 20, 2023 ("Treatment Plan"), identified the following maladaptive behaviors: [redacted]; re[redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; and [redacted]. *See* Respondent's Composite Exhibit 1, page 168 and pages 188-192.

4. The Petitioner requested the continuation of the following BA services: 2,808 units of code 97153, 208 units of 97155, and 104 units of code 97156 for the certification period of October 8, 2023, through April 4, 2024. *Id*. at 30.

5. The Treatment Plan data graphs for maladaptive behaviors show the following:

   a. Incidents of "[redacted]" are extremely high after [redacted] of BA services with [redacted], and reflects variability between [redacted], but essential

demonstrates no progress in reducing the frequency of [redacted] since [redacted]. *See* Respondent's Composite Exhibit 1, page 214.

b. Incidents of "[redacted]" are extremely high and well above [redacted] after [redacted] of behavior analysis services with [redacted], demonstrating essentially no progress in reducing the frequency of [redacted] since [redacted]. *See* Respondent's Composite Exhibit 1, page 215.
c. Incidents of "[redacted]" show variability in the frequency of the maladaptive behavior and remain above [redacted] after [redacted] of behavior analysis services with [redacted]. *See* Respondent's Composite Exhibit 1, page 216.
d. Incidents of ""[redacted]" demonstrate essentially no progress after [redacted] of behavior analysis services with [redacted], in reducing the maladaptive behavior since [redacted]. *See* Respondent's Composite Exhibit 1, page 218.
e. Incidents of "[redacted]" are extremely high and well above [redacted] after [redacted] of behavior analysis services with [redacted], demonstrating essentially no progress in reducing the frequency of [redacted] since [redacted]. *See* Respondent's Composite Exhibit 1, page 218.
f. Incidents of "[redacted]" demonstrates essentially no progress after [redacted] of behavior analysis services with [redacted], in reducing the maladaptive behavior since [redacted]. *See* Respondent's Composite Exhibit 1, page 220.
g. Incidents of "[redacted]" are extremely high and well above [redacted] after [redacted] of behavior analysis services with [redacted], demonstrating essentially no progress in reducing the frequency of the maladaptive behavior since [redacted]. *See* Respondent's Composite Exhibit 1, page 221.
h. Incidents of "[redacted]" demonstrates essentially no progress after [redacted] of behavior analysis services with [redacted], in reducing the maladaptive behavior since [redacted]. *See* Respondent's Composite Exhibit 1, page 222.
i. Incidents of "[redacted]" are extremely high and well above [redacted] after [redacted] of behavior analysis services with [redacted], demonstrating essentially no progress in reducing the frequency of the maladaptive behavior since [redacted]. *See* Respondent's Composite Exhibit 1, page 221.
j. Incidents of "[redacted]" are extremely high and well above [redacted] after [redacted] of behavior analysis services with [redacted], demonstrating essentially no progress in reducing the frequency of the maladaptive behavior since [redacted]. *See* Respondent's Composite Exhibit 1, page 224.

6. The Treatment Plan data graphs for replacement behaviors designed to replace the Petitioner's maladaptive behaviors show a constant low level of independence through the Petitioner's entire treatment plan and more specifically include the following:

a. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 226.
b. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 227.
c. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 229.
d. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 230.
e. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 232.
f. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 233.
g. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 235.
h. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 236.
i. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted]

[redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 238.

j. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 239.

k. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 240.

l. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 241.

m. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 243.

n. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 244.

o. The replacement behavior goal of "[redacted]" doesn't rise above [redacted] after [redacted] of behavior analysis services with [redacted], and demonstrates a very low level of progress since [redacted]. *See* Respondent's Composite Exhibit 1, page 246.

7. On September 28, 2023, the Respondent issued a Notice of Outcome ("NOO"), terminating Petitioner's BA services. *See* Respondent's Composite Exhibit 1, pages 30-35. 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):
>
> Consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational.

Id. The NOO further provided:

> The Rationale for our decision is as follows:
>
> PR Principal Reason – Denial
>
> Requested services are denied because documentation is neither showing Improvement nor support for maintenance.
>
> The rationale for our decision is as follows:
>
> PR Clinical Rationale - Denial: The information submitted does not meet standards of care within the field of behavior analysis. The provider has included treatment and/or baseline data and graphs for skill acquisition goals and maladaptive behaviors that were based on parent report (pg 4, 24), extrapolated average and/or sourced from indirect interview ; and were not directly observed or measured by the lead analyst as standards of care within the field of behavior analysis. Additionally, 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 or the proposed changes have little chance at improving behavior. 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. *See* Respondent's Composite Exhibit 1, pages 157-164. On October 5, 2023, Respondent issued a Notice of

Reconsideration Determination ("NRD") upholding its decision. *See* Respondent's Composite Exhibit 1, pages 42-45. The NRD states, in pertinent part as follows:

> The reason for the denial is that the services are not medically necessary as defined in 59G-1.010, Florida Administrative Code. Specifically the services must be:
>
> 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: The recipient has been in services with this provider since [redacted] and in ABA services since at least [redacted]. The recipient shows minimal to no progress across all behaviors and goals. The provider notes the caregiver data is included in the overall data. The data included should only include data from authorized sessions with the provider. 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. This reconsideration request has been reviewed, reconsidered and the denial is upheld.

Id.

9. Dr. Bicard established that eQHealth reviews behavior analysis cases to ensure that providers are giving quality care consistent with the standards enumerated in the Florida BA Coverage Policy as well as professional medical standards of applied behavior analysis ("ABA"). eQHealth reviewed the Treatment Plan submitted in this case to determine whether all five (5)

conditions of medical necessity are met. Dr. Bicard testified his opinion that it is medically necessary for the Petitioner to continue receiving BA services, however the Petitioner's BA services were terminated because the Treatment Plan is ineffective and not consistent with generally accepted professional medical standards as determined by the Medicaid program. Dr. Bicard testified that after [redacted] of BA services, a recipient should demonstrate a reduction of maladaptive behaviors well below [redacted] and the success rate of the replacement behaviors well above [redacted], and that anything contrary to these trends is reflective of ineffective behavior that is contrary to the established generally accepted medically professional standards of BA services.

10. Dr. Bicard asserted that the Treatment Plan does not show evidence that the frequency of Petitioner's maladaptive behaviors has decreased enough or that the replacement behaviors have increased enough to justify the continuation of BA services with [redacted]. Dr. Bicard asserted that the data graphs show that there has been insufficient improvement in the maladaptive behaviors or the replacement behaviors for the current certification period or over the entire time the Petitioner has received BA services from [redacted]. Therefore, according to Dr. Bicard, the Treatment Plan does not meet standards of care in ABA and is not effective.

11. Dr. Bicard established that an effective treatment plan is built around maladaptive behaviors which measurably decrease in frequency and skills to be acquired increase in frequency over the course of treatment. The effectiveness of a treatment plan is determined by reference data, which is visually depicted in graphs showing a recipient's progress through treatment.

12. Referring to the data graphs in Petitioner's most recently submitted Treatment Plan, Dr. Bicard established that none of Petitioner's maladaptive behaviors have shown measurable improvement as required by the Florida Behavior Analysis Services Coverage Policy throughout the entire time the Petitioner was being treated by the current provider. *See* Respondent's Composite Exhibit 1, pages 188–192 and 226-246. With regards to the data graphs for replacement behaviors, Dr. Bicard asserted that the data graphs for Petitioner's replacement behaviors after [redacted] of BA services with [redacted], should reflect a percentage significantly higher than the reflected [redacted] in the Treatment Plan, and that every behavior targeted for improvement has not demonstrated required measurable improvement required by the Florida Behavior Analysis Services Coverage Policy, demonstrating "ineffective treatment". *See* Respondent's Composite Exhibit 1, pages 226-246. Based on the documentation provided, Dr. Bicard opined that the Petitioner would not demonstrate measurable progress and improvement from continuing treatment by [redacted], and under the current Treatment Plan in this matter.

13. [redacted] testified that [redacted] is "100%" satisfied with the BA services that [redacted] is receiving from [redacted], and that it is a parent's "right" to choose which provider provides medically necessary BA services to their child. [redacted] further testified that it is medically necessary for [redacted] to receive BA services, that [redacted] Treatment Plan is individualized, and that anything to the contrary is offensive.

14. [redacted] testified that the Petitioner has made a lot of progress, in part to the efforts of a multidisciplinary team. [redacted] further testified that there has been improvement in the

maladaptive behaviors of the Petitioner and that applied analysis behavior is necessary to protect the life of the Petitioner.

15. [redacted] testified there are physician recommendations in evidence that it is medically necessary for the Petitioner to receive applied behavior analysis services. [redacted] further testified that [redacted] recommendation is that BA services continue with this provider at a frequency of at least the existing twenty-eight (28) hours per week.

16. [redacted], M.D. has submitted an October 9, 2023, letter stating that "… it is medically necessary for [the Petitioner] to receive applied behavior analysis services." *See* Petitioner's Composite Exhibit 1, page 4.

CONCLUSIONS OF LAW

17. 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).

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

19. The burden of proof in this proceeding is governed by Florida Administrative Code, Rule. 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.

20. 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.).

21. 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).

22. 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.

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

24. 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.

25. 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.

26. 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 at page 40, 42.

27. 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

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

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

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

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

29. In this case, Respondent terminated Petitioner's BA services with [redacted]. The NOO and NRD explained that Petitioner's request for continuation of services did not meet one of the five (5) the requirements of medical necessity as the treatment plan was not "[c]onsistent with generally accepted professional medical standards as determined by the Medicaid program..." because the data in the Treatment Plan does not show that the frequency

of the maladaptive behaviors have demonstrated a measurable decrease since the last review. *See* supra ¶ ¶ 7 and 8.

30. 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. A component of medical necessity is that services must be "consistent with generally accepted professional medical standards." As outlined above, Dr. Bicard provided credible and persuasive testimony identifying instances where the Treatment Plan did not follow generally accepted professional medical standards of BA. For example, the Treatment Plan demonstrates an insufficient reduction in the frequency of Petitioner's maladaptive behaviors and an insufficient increase in the success in the replacement behaviors. *See* supra ¶ ¶ 5, and 11-13. The data graphs for maladaptive behaviors show that incidents of maladaptive behavior have little evidence of progress over the authorization period. *See* supra ¶ 5. In addition, the data graphs for replacement behaviors in the Treatment Plan reflect a constant level of [redacted] or lower, with insufficient evidence of improvement over the prior authorization period, when the trends should be increasing at a significantly higher percentage for all the skills acquisition and/or replacement goals. *See* supra ¶ ¶ 6 and 9-11. Thus, Respondent demonstrated that, based on the information in the record, the requested BA services are not "consistent with generally accepted professional medical standards". Because the services are not consistent with generally accepted professional medical standards, a critical element of medical necessity is not met and, as Dr. Bicard testified, the recipient will not gain any additional benefit by continuing services at the current level with the current provider. *See* supra ¶ ¶ 9-11.

31. In this case, Petitioner's provider recommended the continuation of BA services due to medically necessity. There is no dispute in this matter that applied BA services is medically necessary for the Petitioner in this matter. *See* supra ¶ 6. However, 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 covered service with the current provider, [redacted]. *See* supra ¶ 25.

32. The Petitioner's Authorized Representative testified that it is the "right" of a parent to choose which provider they want to provide applied behavior analysis services to their child. The Petitioner's Authorized Representative is correct in [redacted] assertion, however, in order to be a covered service, the BA services must meet the general criteria in the BA Policy, which requires that the services must meet medical necessity criteria. *See* supra ¶ 26. Further, Criteria 3.b in Appendix 9.0 of the BA Policy requires that there must be measurable progress demonstrated in order to continue treatment under current methods.. *See* supra ¶ 27.

33. Both [redacted] and [redacted] testified to their belief that it is medically necessary for the Petitioner to continue receiving applied BA services. However, as previously stated, Respondent does not dispute that Petitioner needs Applied BA services, but rather this case focuses solely on the continuation of BA services with an ineffective BA provider under an ineffective Treatment Plan.

34. Accordingly, Respondent has demonstrated by a preponderance of the evidence that the requested BA services with [redacted], no longer meets the medical necessity criteria. Looking at all the evidence relevant to the particular needs of Petitioner, the BA services

at issue are not necessary to correct or ameliorate a defect or a physical and mental illness or condition.

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

DECISION

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

DONE and **ORDERED** this 16th day of January 2024, in Tallahassee, Leon County, Florida.

Alan J. Leifer
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ALAN LEIFER, Hearing Officer
Agency for Health Care Administration
Office of Fair Hearings
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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
MedicaidHearingUnit@ahca.myflorida.com