



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

FILED

Jan 16, 2024, 11:48 am

OFFICE OF FAIR HEARINGS

[REDACTED],

PETITIONER,

vs.

AHCA Case No.: 23-FH2596

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 January 8, 2024, at 10:02 a.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 the Petitioner's behavior analysis services ("BA") services was correct.

PRELIMINARY STATEMENT

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

Sandra Durden, (“Ms. Durden”) Medical Health Care Program Analyst and Fair Hearing Liaison for the Agency for Health Care Administration (“Agency” or “AHCA”), appeared on behalf of Respondent. Dr. David Bicard, (“Dr. Bicard”), a Board Certified Behavior Analyst (“BCBA”) at the Doctorate level and second level reviewer with eQHealth Solutions (“eQHealth”) appeared as a witness for Respondent.

Prior to the Hearing, the Respondent sent the Office of Fair Hearings and Petitioner a one hundred and ninety-four (194)-page evidence package and a forty-nine (49)-page evidence package that were both admitted into evidence without objection. The one hundred and ninety-four (194)-page exhibit is herein identified as “Respondent’s Composite Exhibit 1” and appears in the Office of Fair Hearings’ case management system as follows: “[REDACTED] FH 12.07.2023.pdf”. The Respondent’s forty-nine (49)-page exhibit was admitted into evidence without objection, is identified herein as “Respondent’s Composite Exhibit 2” and appears in the Office of Fair Hearings’ case management system as “23-FG2596 AHCA BA Evidence 49 pages.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 16. The Petitioner is currently receiving BA services with [REDACTED], in [REDACTED] Florida (“BA Provider”). See Respondent’s Composite Exhibit 1, page 47.

3. The Petitioner’s Functional Behavior Reassessment and Treatment Plan (“Treatment Plan”) dated July 21, 2023, identified “[REDACTED]” as the Petitioner’s only [REDACTED]. See Respondent’s Composite Exhibit 1, page 145.

4. Petitioner requested the continuation of the following BA services: 1,560 units of code 97153, 48 units of code 97156, and 572 units of code 97155, for the certification period of July 27, 2023, through January 22, 2024. See Respondent’s Composite Exhibit 1, pages 24-28.

5. The Treatment Plan includes replacement skills or replacement behaviors which are designed to replace the Petitioner’s maladaptive behavior with the goals of reflecting increasingly higher levels. The Treatment Plan includes the following replacement behaviors: [REDACTED];

[REDACTED]; [REDACTED]; [REDACTED]; [REDACTED];

[REDACTED]; [REDACTED]; [REDACTED];

[REDACTED]; [REDACTED]; [REDACTED]

[REDACTED]; [REDACTED]; [REDACTED]

[REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]

[REDACTED]; [REDACTED]; [REDACTED]

[REDACTED]; [REDACTED]; [REDACTED]; and [REDACTED]

[REDACTED]. See Respondent’s Composite Exhibit 1, pages 151-180.

6. On July 21, 2023, the Respondent issued a Request for Additional Information seeking the following:

Please submit graphs of directly observed behavior data gathered during the continued stay period that you are adding to the behavior plan. For the following: Parent training skills.

See Respondent’s Composite Exhibit 1, page 47.

7. On August 2, 2023, the Respondent issued a Notice of Outcome (“NOO”), terminating the Petitioner’s BA services. See Respondent’s Composite Exhibit 1, pages 24-28. The NOO explained the basis for the reduction as follows:

The request for services is denied in whole or in part because they are not medically necessary as defined in Rule 59G-1.010, Florida Administrative Code. Specifically, the requested services are not medically necessary under the following standard(s):

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.

Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs.

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.

Id. The NOO further provided:

PR Clinical Rationale - Denial: The provider has proposed goals in this treatment plan that do not meet medical necessity criteria ([REDACTED]). According to the Behavior Analysis Services Coverage Policy (5.1, page 3), these goals are not necessary to protect life, to prevent significant illness, significant disability, or to alleviate severe pain. That are not consistent with the symptoms of any diagnosis for which ABA is medically necessary. These are skills that do not require a behavior analyst to teach. They can be learned in a less costly and equally effective manner by someone not specifically trained in ABA. They are furnished in a manner primarily intended for the convenience of recipient, the recipient's caretaker, or the provider.

According to The Florida Medicaid 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 for which ABA therapy is medically necessary. The recipient is reported to engage in [REDACTED]

[REDACTED]) There is no submitted evidence that the recipient is engaging in behaviors for which ABA therapy is medically necessary under Florida Medicaid Rules, or the proper treatment modality given the recipient's diagnosis and presenting maladaptive behaviors. The request for services is denied.

...

Id.

8. The Petitioner requested reconsideration of the Respondent's decision. On August 28, 2023, Respondent issued a Notice of Reconsideration Determination ("NRD") upholding its decision to terminate the requested BA services. See Respondent's Composite Exhibit 1, pages 36-39. The NRD states, in pertinent part as follows:

The reason for the denial is that the services are not medically necessary as defined in 59G-1.010, Florida Administrative Code. Specifically the services must be:

Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs.

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.

The rationale for our decision is as follows:

PR Recon Determination: At reconsideration all documents were carefully reviewed. The provider has proposed goals in this treatment plan that do not meet medical necessity criteria ([REDACTED]). According to the Behavior Analysis Services Coverage Policy (5.1, page 3), these goals are not necessary to protect life, to prevent significant illness, significant disability, or to alleviate severe pain. That are not consistent with the symptoms of any diagnosis for which ABA is medically necessary. These are skills that do not require a behavior analyst to teach. They can be learned in a less costly and equally effective manner by someone not specifically trained in ABA. They are furnished in a manner primarily intended for the convenience of recipient, the recipient's caretaker, or the provider. According to The Florida Medicaid 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 [sic] daily functioning for which ABA therapy is medically necessary. The recipient is reported to engage in [REDACTED]

[REDACTED]) There is no

submitted evidence that the recipient is engaging in behaviors for which ABA therapy is medically necessary under Florida Medicaid Rules, or the proper treatment modality given the recipient's diagnosis and presenting maladaptive behaviors. This denial is upheld

...

Id.

9. Dr. Darling testified that maladaptive behaviors are not listed in the Treatment Plan and that the Treatment Plan is “prompt dependent” which is evidence of substandard treatment. Dr. Darling further testified that the BA Provider has not identified maladaptive behaviors or replacement behaviors for which BA services are medically necessary, and that the replacement behaviors that are listed in the Treatment Plan can be addressed by someone other than a behavior therapist at a significantly lower cost. Dr. Darling further testified that a speech therapist or a language pathologist is the most appropriate professional to teach the Petitioner the listed replacement behaviors. Next, Dr. Darling testified the Treatment Plan does not identify behaviors that “interfere with daily functions, do not interfere with the activities of daily living, are necessary to protect life or prevent disability, or create pain or suffering.” Finally, Dr. Darling testified that a diagnosis of autism alone is not sufficient to justify BA services and the goals within the Treatment Plan are more “academic goals” versus behavioral in nature.

10. The Petitioner’s [REDACTED] and Authorized Representative testified that the speech therapy has not helped the Petitioner and that the BA services are necessary to teach the Petitioner the difference between safe and unsafe activities.

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. 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.

14. Because Respondent has reduced 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.).

15. 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).

16. 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.

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

18. 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.

19. The Florida Medicaid Definitions Policy (August 2017) (“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.

20. The Florida Medicaid Behavior Analysis Services Coverage Policy (“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 not duplicate another
- Meet the criteria as specified in this policy

Respondent’s Composite Exhibit 2 at page 40, 42.

21. 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 that an adequate behavior plan can be implemented. This (re)assessment **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)
- 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.

22. 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.

23. In this case, the Respondent terminated the Petitioner's BA services because the service were not individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs and were reflective of the level of service for which an equally effective, more conservative, and less costly treatment is available statewide. *See supra* ¶¶ 7 and 8.

24. As provided in the BA policy (Appendix 9.0, section (a)), and the EPSDT requirements, the level of requested services for a recipient must meet the meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. Two components of medical necessity is that the services be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs, and are not reflective of the level of service for which an equally effective, more conservative, and less costly treatment is available statewide. *See supra* ¶¶ 20 and 21.

25. As outlined above, Dr. Darling provided credible and persuasive testimony to demonstrate that the Petitioner's BA services are not individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, are in excess of the patient's needs, and are not reflective of the level of service for which an equally effective, more

conservative, and less costly treatment is available statewide. See supra ¶¶ 3, 5, 7, 8, and 9. Thus, Respondent demonstrated that, based on the information in the record, the requested BA services are not individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, are in excess of the patient's needs, and are reflective of the level of service for which an equally effective, more conservative, and less costly treatment is available statewide.

26. Accordingly, the Respondent has demonstrated by a preponderance of the evidence that the BA services with [REDACTED], do not meet medical necessity criteria. See supra ¶¶ 19-22. Looking at all the evidence relevant to the particular needs of Petitioner, Respondent has demonstrated that the requested BA services at issue are not necessary to correct or ameliorate a defect or a physical and mental illness or condition.

27. 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 the requested 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
Alan J. Leifer
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ALAN LEIFER, Hearing Officer
Agency for Health Care Administration
Office of Fair Hearings
2727 Mahan Drive, Mail Stop # 11
Tallahassee, FL 32308-5407

NOTICE OF A RIGHT TO JUDICIAL REVIEW

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

Copies Furnished To:

[REDACTED]
[REDACTED]

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com