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

FILED

Feb 08, 2024, 9:04 am

OFFICE OF FAIR HEARINGS

[redacted],

PETITIONER,

AHCA Case No.: 23-FH2774

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION,

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on December 14, 2023, at 10:24 a.m. Eastern Standard Time ("EST").

APPEARANCES

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

For the Respondent: Linda Latson
Registered Nurse Specialist
Agency for Health Care Administration

STATEMENT OF ISSUE

The issue is whether Respondent proved by a preponderance of the evidence that Respondent's termination of Petitioner's behavior analysis ("BA" or "ABA") services was correct.

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. [redacted] ("[redacted]"), Petitioner's Authorized Representative and [redacted], appeared for the Fair Hearing to provide testimony on behalf of Petitioner.

Linda Latson, Registered Nurse Specialist for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared for the Fair Hearing as representative for Respondent. Dr. Melissa Switzer ("Dr. Switzer"), Board Certified Behavior Analyst at the doctoral level and Second Level Reviewer for eQHealth Solutions Florida ("eQHealth"), appeared for the Fair Hearing as a witness for Respondent.

Petitioner did not introduce any exhibits at the hearing.

Prior to the hearing, the Office of Fair Hearings received a two hundred and sixteen (216)-page evidence packet and a forty-nine (49)-page evidence packet from Respondent. The two hundred and sixteen (216)-page packet appears in the Office of Fair Hearings document management system as the file titles "[redacted] FH 12.14.2023 1-119.pdf" and "[redacted] FH 12.14.2023 120-216.pdf." The forty-nine (49)-page evidence packet appears in the Office of Fair Hearings document management system as the file title "23-FH2774 AHCA Evidence BA Svcs 49 Pages.pdf." Absent an objection from the Petitioner, the undersigned admitted the two hundred and sixteen (216)-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 ("QIO") contracted by the Agency to review prior authorization requests for services. *See* RCE 2 at page 2.

2. Petitioner is [redacted]. *See* RCE 1 at page 21. Petitioner is diagnosed with [redacted] and [redacted] ("[redacted]"). *Id.* Petitioner receives ABA therapy at

[redacted]. *Id*. As provided in the Behavior Analysis Reassessment ("Treatment Plan"), Petitioner is engaging in the following maladaptive behaviors: [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] ("[redacted]"), [redacted], [redacted], and [redacted]. *Id*. at 158-159, 166-169. As provided in the Treatment Plan, Petitioner's incidents of maladaptive behaviors, for the period of [redacted], are as follows: for [redacted], Petitioner's incidents decreased from about [redacted] per week; for [redacted], Petitioner's incidents decreased from about [redacted] per week; for [redacted], Petitioner's incidents decreased from about [redacted] per week; for [redacted], Petitioner's incidents decreased from about [redacted] per week; for [redacted], Petitioner's incidents decreased from about [redacted] per week; for [redacted], Petitioner's incidents decreased from about [redacted] per week; for [redacted], Petitioner's incidents decreased from about [redacted] per week; for [redacted], Petitioner's incidents decreased from about [redacted] per week; for [redacted], Petitioner's incidents decreased from about [redacted] per week; for [redacted], Petitioner's incidents decreased from about [redacted] per week; for [redacted], Petitioner's incidents decreased from about [redacted] per week; and for [redacted], Petitioner's incidents decreased from about [redacted] per week. *Id*. at 182-187.

3. Petitioner engages in [redacted] replacement behaviors, for the period of [redacted], at the following rates: [redacted] Petitioner

increased from approximately [redacted] for [redacted], Petitioner increased from approximately [redacted] for [redacted] Petitioner increased from approximately [redacted] for [redacted], Petitioner increased from approximately [redacted] for [redacted], Petitioner increased from approximately [redacted] for [redacted], Petitioner increased from approximately [redacted] for [redacted], Petitioner increased from approximately [redacted] for [redacted] for [redacted], Petitioner increased from approximately [redacted] for [redacted], Petitioner increased from approximately [redacted]; for [redacted] Petitioner increased from approximately [redacted] and for the period of [redacted], for [redacted], Petitioner increased from approximately [redacted] *Id*. at 188-198.

4. Petitioner requested recertification of ABA services for the period of September 15, 2023, to March 10, 2024; specifically, 3,120 units of code 97153; 312 units of code 97155; and 208 units of code 97156. *Id*. at 29. On September 19, 2023, Respondent requested additional information ("PEND") from the ABA provider concerning the Treatment Plan. *Id*. at 24-25, 52. In response to the request, the provider stated as follows:

> While undergoing ABA therapy, [Petitioner] has shown improvement in reducing maladaptive behaviors and achieving skill acquisition goals. It is imperative to address this lack of progress in ABA therapy to ensure [Petitioner]'s well-being and development.
> After a thorough review of the Reassessment, several modifications were introduced to the therapy plan. These changes aim to secure approval for the requested service hours and expedite [Petitioner]'s progress towards mastering all the goals outlined in the plan.

> Antecedent manipulation reduces the likelihood of undesirable behavior occurring, prompting modification aids in skill acquisition, and consequence-based strategies reinforce desired behaviors and reduce problem behaviors. Together, they form a comprehensive approach to behavior modification and skill development in individuals with developmental or behavioral challenges, promoting their well-being and enhancing their quality of life.
> Parent training is crucial in ABA therapy because it enhances consistency, generalization, and individualization of interventions, ensures ongoing support, and empowers parents to be active partners in [Petitioner]'s development and treatment journey.
> In the first two pages of the Reassessment document, you will find highlighted changes that have been made to the plan.
> On pages 11 to 14, you will see highlighted details regarding the interventions, replacements, and skill development strategies that are going to be put in place to reduce maladaptive behaviors based on their functions.
> From pages 23 to 29 of the Reassessment, you will come across graphs depicting the progress of [Petitioner]'s behavior. Additionally, pages 35 to 40 include graphs showing progress in replacements, pages 41 to 42 contain graphs demonstrating advancements in skill acquisitions, and finally, pages 44 to 46 display graphs illustrating the progress of parent training.
> It is crucial to approve the provision of behavior services for [Petitioner] to support [redacted] in reducing [redacted] maladaptive behaviors and preventing any regression in [redacted] developmental progress.
> It is paramount to bear in mind that [Petitioner] stands as the primary beneficiary of any decision made in this regard. [redacted] meets the criteria for Medical Necessity as stipulated by Florida Medicaid Coverage Policy and necessitates the requested hours of service. Your decision holds significant implications for [redacted] well-being and progress.

Id. at 24-25.

5. In a Notice of Outcome ("NOO"), dated September 29, 2023, Respondent terminated Petitioner's requested ABA services. *Id.* at 29-31. 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:

> Submitted information does not support the medical necessity for requested frequency and\or duration.
> Requested services are denied because documentation is neither showing improvement nor support for maintenance.
>
> PR Clinical Rationale - Denial: The provider submitted graphs that indicate no progress and the scales of the graphs are inappropriate (y-axis starts above 0). The graphs do not meet the standard of care in the field of ABA. 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.

6. Petitioner requested reconsideration of the Respondent's decision. In a Notice of Reconsideration Determination ("NRD"), dated November 2, 2023, Respondent upheld its decision. *Id.* at 41-42. The NRD explained the basis for the decision as follows:

> PR Recon Determination: At reconsideration all documents were carefully reviewed. The request was denied for lack of progress. The provider submitted additional documents including data in graphs that are not consistent with data that are typically reported in behavior analytic treatment. Many of the graphs for maladaptive behavior and skill acquisition show the same general pattern, level, and trend in the data. These data do not appear to have been accurately reported

or observed and measured according to standards of care within the field of behavior analysis. This denial is upheld.

Id.

7. On October 30, 2023, Petitioner requested a Fair Hearing to challenge the termination of ABA services. On November 15, 2023, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for December 14, 2023, at 10:00 a.m. EST.

8. Dr. Switzer is a BCBA and Second Level Reviewer at eQHealth. Dr. Switzer established the following at Fair Hearing:

a. EQHealth reviews requests for services based on medical necessity. *See* RCE 2 at 7. eQHealth reviews behavior analysis cases to ensure ABA services are consistent with the standards enumerated in the Behavior Analysis Coverage Policy as well as professional medical standards of behavior analysis. *Id*. at 28.

b. Dr. Switzer argued that the final Treatment Plan showed no sufficient progress in Petitioner's behaviors and a lack of interventions to address this lack of progress. Three eQHealth reviewers found that the Treatment Plan submitted did not meet the second and third criteria for medical necessity. *See* ¶ 4.

c. The provider requested to continue at the same level of services as previously received in the previous authorization period. *See* ¶ 4.

d. Dr. Switzer emphasized that the behaviors show the same pattern of minimal to no clinically significant progress with a lack of modifications that is inconsistent with ABA standards. The graphs for [redacted], [redacted], and [redacted], show low frequencies per week, however, the beginning values in [redacted]

compared to the end values in [redacted] indicate a reduction of [redacted] occurrences across a [redacted] period with no mastery. *See* ¶ 3.

e. Further, the y-axis scales on graphs such as for [redacted], [redacted], [redacted], and [redacted], should begin at 0 but have been stretched to change the visual data interpretation. *See* RCE 1 at 127-132.

f. Dr. Switzer argued that all graphs for maladaptive behaviors and replacement behaviors follow a similar overlapping data path with no variability as expected with human behavior. Dr. Switzer contended that Petitioner's behaviors do not appear to have been accurately recorded or measured as it is unlikely that the behaviors would trend perfectly simultaneously. *Id*. at 128-131.

g. Dr. Switzer argued that the graphs and procedures for Petitioner's replacement skills show no clinically significant progress and no indication the proposed interventions would be effective. For example, the [redacted] graph and the [redacted] graph show minor increasing trend but, similar to the maladaptive behavior graphs, the beginning and ending values for the replacement skills differ only by [redacted]%. In the field of behavior analysis, [redacted]% successful responding, or the equivalent of about a [redacted] increase per week, is not clinically significant progress. *See* ¶ 4.

h. The provider's final Treatment Plan included five new proposed treatment interventions: [redacted], [redacted], [redacted], [redacted], and [redacted]. *Id*. at 104, 158-159. Dr. Switzer argued that these interventions are not consistent with accepted

standards of care in the field of ABA because all do not align with the listed functions and antecedents for each behavior. *Id*. at 104, 114-117. These proposed modifications do not address consequence behaviors or maintain with skill acquisition goals. *See* RCE 1 at 173-174.

9. [redacted] is Petitioner's [redacted]. [redacted] testified to the following at Fair Hearing:

a. [redacted] asserted that because Petitioner is [redacted], [redacted] such as [redacted].

b. [redacted] believes Petitioner should continue with services for monitoring the possibility of [redacted].

CONCLUSIONS OF LAW

10. 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 (2022). This order is the final administrative decision of AHCA under section 409.285(2)(a).

11. This hearing was held as a *de novo* proceeding pursuant to Rule 59G-1.100(17)(b), Florida Administrative Code ("Fla. Admin. Code R.").

12. 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.)

13. The Florida Medicaid Behavior Analysis Services Coverage Policy (October 2017) ("BA Policy"), incorporated by reference in Fla. Admin. Code. R. 59G-4.125, governs ABA 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.

. . .

See RCE 2 at 38-44.

14. 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

. . .

4. Criteria to Assess the Intensity of Behavior Analysis Services: Providers may request up to 40 hours of BA services per week, per recipient, based upon the following:

As a rule, higher number of maladaptive behaviors, higher severity and frequency of behaviors, as well as the multiplicity of settings where the behaviors occur, would usually justify a higher number of services hours. The greater the number of goals targeted to reduce maladaptive behaviors, the more the likelihood that a higher number of services hours could also be warranted.

Providers **MUST** ensure that proper justification for the requested hours of services is adequately documented in the behavior plan. Based on the information provided in the assessment, behavior plan, and any other supporting documentation, 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

. . .

See RCE 2 at 45-47.

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). 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.

16. 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). 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.

17. 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.

Definitions Policy at page 7.

18. The Florida Medicaid Authorization Requirements Policy (June 2016) ("Authorization Policy"), incorporated by reference in Fla. Admin. Code R. 59G-1.053, provides general requirements for providers to obtain authorization to render Florida Medicaid services. *See* RCE 2 at 30-36. The Authorization Policy states as follows:

> **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 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.

Id. at 34.

19. In the instant case, Petitioner is under 21 years of age and is diagnosed with [redacted] and [redacted]. *See* ¶ 2. Petitioner requested recertification of ABA services. *See* ¶ 4. In a NOO, dated September 29, 2023, Respondent terminated the services. *See* ¶ 5. Respondent cited to the medical necessity criteria as the basis for their decision, specifically that the services were not "consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational." *See* ¶ 5-6. Respondent has burden of proof to show by a preponderance of evidence that the Respondent's determination was correct. *See* ¶ 12.

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* ¶ 15-16. In the Definitions Policy, a component of medical necessity is that services must be "consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational." *See* ¶ 17.

21. Section 9.0 of the BA Policy maintains that the "behavior plan is the cornerstone of the delivery of behavior analysis services." *See* ¶ 14. The BA Policy criteria for continuation of treatment at the present level and/or using current methods requires that providers must ensure that all criteria are met. *See* ¶ 14. The criteria require that a behavior plan must be detailed enough to warrant the requested services and include mechanisms to monitor its effectiveness. *See* ¶ 14. The criteria for assessing the intensity of behavior analysis services requires that proper

justification for the requested hours of services is adequately documented in the behavior plan. *See* ¶ 14.

22. As shown by the record, the provider's Treatment Plan did not conform to standards of care within the field of behavior analysis. *See* ¶ 4-6, 8. The information submitted by the provider in the Treatment Plan as a part of the request for services did not include information to satisfy the medical necessity criteria for ABA services. *See* ¶ 2-6, 8. Petitioner has requested the same level of services as in the previous authorization period. *See* ¶ 4, 8. According to the BA Policy, effectiveness of treatment is determined by the supporting information within a treatment plan to show the frequency of maladaptive behaviors decreasing and the frequency of replacement skills increasing over the course of treatment. *See* ¶ 14-15. Dr. Switzer established at Fair Hearing that the behavior graphs show the same pattern of minimal to no clinically significant progress in addition to a lack of modifications which are inconsistent with ABA standards. *See* ¶ 8. The graphs for [redacted], [redacted], and [redacted], show low frequencies per week, however, the beginning values in [redacted] compared to the end values in [redacted] indicate a reduction of [redacted] occurrences across a [redacted] period with no mastery. *See* ¶ 8. In the provider's Treatment Plan, the y-axis scales on several maladaptive behavior graphs such as for [redacted], [redacted], [redacted], and [redacted], should begin at 0 but appear to be stretched to change the visual data interpretation. *See* ¶ 8. Further, Dr. Switzer described a similar pattern in Petitioner's replacement skills graphs and procedures as showing no clinically significant progress and no indication the proposed interventions would be effective. *See* ¶ 8. A pattern of overlapping data paths with no account for human variability is shown in the Petitioner's replacement skills graphs demonstrating that the data do not appear to have been

accurately recorded or measured as it is unlikely that the behaviors would trend so perfectly simultaneously. *See* ¶ 8. Finally, Dr. Switzer used as examples, the [redacted] graph and the [redacted] graph show minor increasing trend but, the beginning and ending values for the replacement skills differ only by [redacted]%. *See* ¶ 8. As testified by Dr. Switzer, in the field of behavior analysis, [redacted]% successful responding, or the equivalent of about a [redacted] increase per week, is not clinically significant progress. *See* ¶ 8. Petitioner has not shown a mastery of any long-term goals since the last authorization period. *See* ¶ 3-4, 8.

23. Petitioner's [redacted], [redacted], argued that Petitioner should continue with services for monitoring the possibility of [redacted], among other behaviors Petitioner continues to engage in. *See* ¶ 9. In the final Treatment Plan the provider included five new proposed treatment interventions. *See* ¶ 5, 8. Dr. Switzer pointed out several discrepancies with these proposed interventions, such as the lack of addressing consequence behaviors or maintaining with skill acquisition goals; also, all interventions do not align with the listed functions and antecedents for each behavior. *See* ¶ 8. Dr. Switzer established that these interventions are not consistent with accepted standards of care in the field of behavior analysis. *See* ¶ 8, 13-14, 17-18.

24. Based on the foregoing pattern of a lack of effectiveness of therapy throughout the course of treatment, the record reflects that the Treatment Plan was not consistent with generally accepted professional medical standards and was not detailed enough to warrant the requested services. *See* ¶ 23. 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* ¶ 18. As discussed, Petitioner's lack of progress in

reducing [redacted] maladaptive behaviors or improving [redacted] replacement behaviors is clearly documented. *See* ¶ 22-23. The Treatment Plan does not meet standards of care in the field of BA because the effectiveness of treatment could not be determined with the information provided and Petitioner will not gain any additional benefit by continuing services at the current level.

25. 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 consistent with generally accepted professional medical standards as determined by the Medicaid program. In the totality of the circumstances, *supra* ¶ 15-16, Respondent has demonstrated that the requested ABA services 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 8th day of February, 2024 in Tallahassee, Leon County, Florida.

Kimberly Roche
23-FH2774
2024.02.08 08:27:11
-05'00'

KIMBERLY ROCHE, 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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