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

FILED

Feb 02, 2024, 1:29 pm

OFFICE OF FAIR HEARINGS

,

PETITIONER, AHCA Case No.: 23-FH2812

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 January 10, 2024, at 1:26 p.m. EST.

APPEARANCES

For the Petitioner:

Petitioner's Authorized Representative

For the Respondent: Diana Hearod
Medical Health Care Program Analyst
Agency for Health Care Administration

STATEMENT OF ISSUE

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

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. Petitioner's Authorized Representative and , (""), appeared on behalf of the Petitioner. Yessenia Duran, M.S., BCBA with appeared as a witness for Petitioner.

Diana Hearod, Medical Health Care Program Analyst for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared on behalf of Respondent. Dr. Alissa Conway, ("Dr. Conway"), Board Certified Behavior Analyst at the doctoral level ("BCBA-D") and second level reviewer of eQHealth Solutions, Inc. ("eQHealth"), attended as a witness for Respondent.

Prior to the hearing, Petitioner sent to the Office of Fair Hearings and Respondent an eighty-one (81) page evidence packet. The packet appears in the Office of Fair Hearings' case management system as "23-FH2812 Supporting Documents.pdf." Absent an objection from the Respondent, the undersigned admitted the evidence packet into evidence as Petitioner's Composite Exhibit 1.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a three hundred and thirty-nine (339)-page evidence packet. The packet appears in the Office of Fair Hearings' case management system as " FH 01.10.2024 1-74.pdf", " FH 01.10.2024 75-106.pdf", " FH 01.10.2024 107-146.pdf", " FH 01.10.2024 147-179.pdf", " FH 01.10.2024 180-224.pdf", " FH 01.10.2024 225-268.pdf", " FH 01.10.2024 269-300.pdf", and " FH 01.10.2024 301-339.pdf." Absent an objection from the Petitioner, the undersigned admitted the evidence packet into evidence as Respondent's Composite Exhibit 1.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a forty-nine (49)-page evidence packet. The packet appears in the Office of Fair Hearings' case

management system as "23-FH2812 BA AHCA Evidence 49 PGS (recipient).pdf." Absent an objection from the Petitioner, the undersigned admitted the evidence packet into evidence as Respondent's Composite Exhibit 2.

FINDINGS OF FACT

1. Petitioner receives Medicaid services on a fee-for-service basis from the Agency. eQHealth is a Quality Improvement Organization contracted by the Agency to review prior authorization requests for services. *See* Respondent's Composite Exhibit 2 at page 2.

2. Petitioner is . *See* Petitioner's Composite Exhibit 1 at page 2. Dr. Conway testified that the Petitioner had started services with the provider in . The Petitioner's diagnosis is . *Id.* at 16.

3. Petitioner requested the continuation of the following BA services: 2,600 units of code 97153, 208 units of code 97155, 312 units of code 97155 HN, and 26 units of code 97156 HN for the certification period of September 21, 2023, through March 18, 2024. *Id*. at 19-20. On September 14, 2023, Respondent sent Petitioner's provider a Request for Additional Information letter requesting additional information. Specifically, the letter requested the current school year IEP (individualized education plan) and a schedule of services being implemented. *Id*. at 47. A second request for additional information was made on September 22, 2023. The eQHealth reviewer sought more information on , , and listed in the treatment plan. *Id*. at 46.

4. On October 3, 2023, Respondent issued a Notice of Outcome ("NOO"), terminating Petitioner's BA services. *Id.* at 23-24. The NOO explained the basis for the termination as follows:

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

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

The NOO further provided:

> Submitted information does not support the medical necessity for requested frequency and\or duration.
>
> PR Clinical Rationale – Denial: [redacted] is not an empirically supported procedures within the conceptual system of behavior analysis for treating the functions of maladaptive behavior. According to Behavior Analysis Services Coverage Policy (pages 6-7), treatment that does not meet generally accepted standards of care within the field of applied behavior analysis are not covered under the behavior analysis service coverage policy. The justification submitted with this treatment is insufficient given the requested units and the recipient's maladaptive behaviors and skill deficits addressed in this treatment plan. This request for ABA services is denied.

Id. at 23-24.

5. Petitioner requested reconsideration of the Respondent's decision. On November 3, 2023, Respondent issued a Notice of Reconsideration Determination ("NRD") upholding its decision. *Id.* at 34-35*.* The NRD states, in pertinent part as follows:

> Specifically the services must be:
>
> 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.
> **. . .**
> At reconsideration, all documents were carefully reviewed. The provider changed the name of non-covered services but did not remove the services. The services [redacted] and [redacted] are not procedures that are empirically supported for the treatment of the functions of maladaptive behavior within the conceptual system of behavior analysis and were previously denied. The denial is upheld.

Id. at 34-35.

6. Dr. Conway established that eQHealth reviews behavior analysis cases to ensure that providers are giving quality care consistent with the standards enumerated in the BA 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. Conway asserted that Petitioner's services were terminated because the treatment plan is not consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational and that the treatment plan 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.

7. Dr. Conway testified that the provider had an opportunity to remove the strategies that did not meet the medical necessity criteria upon request of eQHealth and on reconsideration the provider had not removed the strategies but merely re-labled them. Therefore, according to Dr. Conway, the Treatment Plan does not meet standards of care in ABA and is not effective.

8. Dr. Conway began her review of the treatment plan with the maladaptive behaviors. The maladaptive behavior of begins on page 266 of Respondent's Composite Exhibit 1. Dr. Conway testified that the Treatment Plan failed to identify the function for this behavior. Dr. Conway stated that establishing the function is necessary to insure that a correct treatment plan is established and the plan will be individualized and specific as opposed to a generalized treatment. The provider's treatment plan includes proactive strategies for the of and . *Id*. at 266. Dr. Conway testified that these strategies are not an empirically support practice and evidence-based practice. The provider was afforded an opportunity to remove the strategies and failed to do so.

The graph of the [redacted] is highly variable with no progress indicated. *Id*. at 267. Dr. Conway testified that the strategies of [redacted] and [redacted] have nothing to do with the topography of this behavior.

9. The next maladaptive behavior is identified as [redacted] *Id.* at 267. The treatment plan includes intervention strategies of [redacted] and [redacted]. *Id.* at 268. These strategies are not an empirically supported practice and evidence-based practice. The data summary and the graph for this behavior shows that the behavior has been increasing. *Id.* at 268-269. The data summary and the graph demonstrate that the strategies are unsuccessful, and the Petitioner has shown an increase in serious maladaptive behavior.

10. The next maladaptive behavior for review is [redacted]. As stated previously in regards to the [redacted], the provider has failed to properly include and identify the function for this behavior. Without a defined function, the treatment plan will not be individualized and specific to this Petitioner. The treatment plan again includes [redacted] as a strategy for this behavior, and as previously stated such strategy is not an empirically supported and evidence-based practice. *Id.* at 272. The graph for [redacted] shows that this behavior is on an increasing trend. *Id.* at 273-274.

11. Before addressing the modified treatment plan submitted by the provider, Dr. Conway noted that the strategies requested to be removed from the treatment plan were outside the ABA treatment system and could be provided in a less costly manner.

12. The provider submitted a modified treatment plan which was reviewed by Dr. Conway. Beginning on page 55 of Respondent's Composite Exhibit 1, for [redacted] ([redacted]), the provider removed [redacted] and replaced it with [redacted]

. *Id.* Dr. Conway testified that the strategy was the same, only the name had been changed and this strategy does not match the topography of the behavior. This strategy must be removed from the treatment plan. The provider did remove the from the strategy.

13. Upon review of the treatment plan referring to , Dr. Conway noted that the listed strategy of was the same strategy as the and had been simply re-named. In addition, this strategy does not match the topography of this behavior. *Id*. page 57. The provider also included . The provider identified the as . *Id.* Dr. Conway testified that the patient was engaged in and and that was not a in this circumstance.

14. For the behavior of , the provider indicated in the plan update that was still being used as a strategy. *Id.* page 62. Thus, the strategy is still being utilized without a clear indication that the strategy meets a function of the behavior.

15. In summary, Dr. Conway found that the treatment plan contained strategies that had been requested to be removed and did not meet the standard of care in ABA. While the recipient may meet the medical necessity criteria, the current treatment plan does not meet medical necessity based upon the standards of ABA.

16. , M.S., BCBA with appeared as a witness for the Petitioner. acknowledged that the Recipient had been with since , however, did not become lead analyst until . stated that the progress of addressing the maladaptive behavior had been gradual over the past . submitted various supplemental treatment plans as a result of the termination

of the services, however, the reconsideration of the decision to terminate services was upheld. acknowledged that the "function" element was omitted from a few of the maladaptive behavior treatment areas. testified that the strategies questioned by Dr. Conway had been removed although the witnesses disagreed as to whether those strategies were re-named and continued in place. Further, Dr. Conway sought clarification of the planned ignoring strategy in the maladaptive behavior of as the treatment plan indicated that had been discontinued. *Id.* 57. Dr. Conway testified that ignoring could result in serious injury to the Recipient. stated that was still part of the treatment although the plan stated otherwise.

17. , and authorized representative for the Recipient also testified. testified that had seen some progress in behaviors and that was pleased with the services that had been providing. 's primary objective was to obtain the services necessary for to continue to improve in behaviors. did not believe that discontinuing services was the correct decision.

CONCLUSIONS OF LAW

18. 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).

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

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. <u>Eligibility</u> – 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. <u>Medical necessity</u> – The recipient must meet medical necessity criteria as outlined in Rule 59G-1.010, F.A.C.
c. The recipient currently engages in <u>maladaptive behaviors</u>
d. These <u>maladaptive behaviors interfere with the recipient's daily functioning</u>

. . .

2. Criteria for Behavior Analysis Services and Reassessments – ALL of the following **MUST** be satisfied:

a. **ALL** critical elements are met
b. An <u>assessment</u> or, if applicable, a <u>reassessment</u>, 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 <u>minimum</u>, **ALL** of the following:
c. A <u>behavior plan</u> 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

. . .

5. Criteria for Discharge from Behavior Analysis Services - ONE or **MORE** of the following **MUST**

be satisfied:

a. The critical elements are **no longer met.**
b. The data provided shows that the frequency and severity of maladaptive behavior(s) has declined to the point that they no longer pose a barrier to the child's ability to function in his/her environment.
c. The data provided shows the recipient has made no progress toward any goals in the last 12 consecutive months.
d. The level of functional impairment as expressed through behaviors no longer justifies continued BA services.
e. Parent/guardian withdraws consent for treatment.

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. The NOO and NRD explained that Petitioner's request for continuation of services did not meet medical necessity as the treatment plan was not "[c]onsistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational." *See* supra ¶ 4-5.

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. Conway provided credible and persuasive testimony identifying several instances where the revised Treatment Plan did not follow generally accepted standards of BA. For example, the Treatment Plan fails to contain the function for maladaptive behaviors. Without the stated function, the correct strategies cannot be properly determined. The provider acknowledged the missing information. Further, the evidence does not show that the frequency of Petitioner's maladaptive behaviors has decreased. *See* supra ¶ 9-10. 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, the critical element of medical necessity is not met. *See* supra ¶ 7.

31. In this case, Petitioner's provider recommended the continuation of BA services. 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 medical necessity or a covered service. *See* supra ¶ 25.

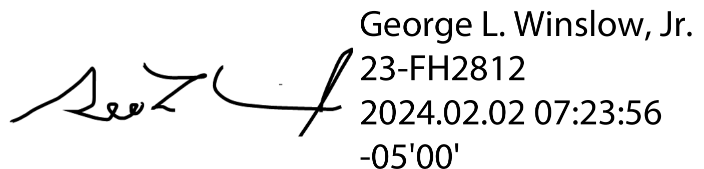
32. Accordingly, Respondent met their burden of proof to show that the requested BA services are no longer medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, the BA services at issue are not necessary to correct or ameliorate a defect or a physical and mental illness or condition.

33. Upon consideration of the testimony provided, Respondent's Composite Exhibit 1, Respondent's Composite Exhibit 2, Petitioner's Composite Exhibit 1, 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 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 2nd day of February 2024, in Tallahassee, Leon County, Florida.



GEORGE WINSLOW, 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:

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com