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

FILED

Feb 14, 2024, 9:29 am

OFFICE OF FAIR HEARINGS

[redacted],

PETITIONER,

AHCA Case No.: 23-FH2845

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 27, 2023, at 10:00 a.m. and January 25, 2024, at 10:01 a.m. Eastern Standard Time ("EST").

APPEARANCES

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

For the Respondent: Chrissie Simmons
Medical/Health Care Program Analyst
Agency for Health Care Administration

STATEMENT OF ISSUE

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent's denial of Petitioner's request for additional behavior analysis ("BA" or "ABA") services was incorrect.

PRELIMINARY STATEMENT

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

Chrissie Simmons, Medical/Health Care Program Analyst and Fair Hearing Liaison for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared for the Fair Hearing on January 25, 2024, as representative for Respondent. Linda Latson, Registered Nurse Specialist for AHCA, appeared for the Fair Hearing on December 27, 2023, as representative for Respondent. Dr. Kathy Hurley ("Dr. Hurley"), Board Certified Behavior Analyst ("BCBA") at the doctoral level, Florida Licensed Mental Health Counselor, and Second Level Reviewer for eQHealth Solutions Florida ("eQHealth"), appeared for both Fair Hearings as a witness for Respondent.

Prior to the hearing, the Office of Fair Hearings received a seven (7)-page evidence packet from Petitioner. The seven (7)-page evidence packet appears in the Office document management system as the file title "23-FH2845 Additional Evidence.pdf[1]." Absent an objection from the Respondent, the seven (7)-page evidence packet was admitted into evidence as Petitioner's Composite Exhibit 1 ("PCE 1").

Prior to the hearing, the Office of Fair Hearings received a one hundred and ninety-two (192)-page evidence packet and a forty-nine (49)-page evidence packet from Respondent. The one hundred and ninety-two (192)-page packet appears in the Office of Fair Hearings document management system as the file titles "[redacted] FH 12.27.2023 1-73.pdf," "[redacted] FH 12.27.2023 74-111.pdf," "[redacted] FH 12.27.2023 112-183.pdf," and "[redacted] FH 12.27.2023 184-192.pdf." The forty-nine (49)-page evidence packet appears in the Office of Fair Hearings

[1] This file was received on December 27, 2023.

document management system as the file title "23-FH2845 AHCA Evidence BA Svcs 49 Pages.pdf." Absent an objection from the Petitioner, the undersigned admitted the one hundred and ninety-two (192)-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 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]. *Id.*

3. As provided in the Behavior Analysis Assessment and Behavior Plan ("Treatment Plan") submitted by [redacted], Petitioner is engaging in the following maladaptive behaviors: [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted]. *Id*. at 88-92. As provided in the Treatment Plan, Petitioner's incidents of maladaptive behaviors, for the period of April 30, 2023 to August 27, 2023, 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; and for [redacted], Petitioner's incidents decreased from about [redacted] per week. *Id*.

4. Section 2 of the Treatment Plan titled "Reason for Reassessment" includes an "August 2023 Update." The section states the following, in pertinent part:

> [Petitioner] has shown considerable improvements in [redacted] behaviors during this approval period. In terms of behavioral advancements, [Petitioner] has exhibited significant growth in [redacted] social skills and [redacted] given that during this last month [redacted] has been traveling to [redacted] occasionally for short periods of time to be introduced regularly and spent time with family member. Some of these members were already familiar to [redacted] and, as per parent report, [redacted] has met some new faces as well. This has impacted [redacted] behavior at home and at school, even when being back to [redacted] regular school routines and being at home with [redacted] as usual as well.
>
> Even when [Petitioner's] progress is palpable in all settings our behavior plan focuses in areas of genuine concern for [redacted] safety and overall well-being. [redacted] can potentially slow down [redacted] learning curve, which, in turn, might impede [redacted] journey to greater [redacted]. To address this, strategies like using visual aids and framing tasks around [redacted] interests are going to be employed. [redacted], especially in unfamiliar settings, is another behavior that needs constant monitoring and intervention.

Id. at 64.

5. Petitioner requested ABA services for the certification period of October 9, 2023, to April 5, 2024; specifically, 3,120 units of code 97153; 416 units of code 97155; and 208 units of code 97156. *Id*. at 24-25, 27. In a Notice of Outcome ("NOO"), dated October 12, 2023, Respondent approved 2,288 units of code 97153, 312 units of code 97155, 208 units of code 97156, and

denied the remaining ABA services. *Id.* at 27-28. The NOO explained the basis for the denial 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:

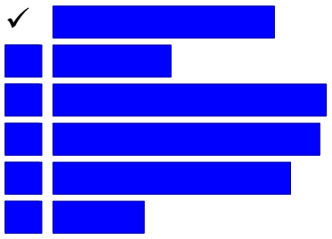
> Submitted information does not support the medical necessity for requested frequency and\or duration.
>
> PR Clinical Rationale - Denial: According to The Behavior Analysis Services Coverage Policy, (page 3, 1.1) the recipient of ABA therapy services must engage in maladaptive behavior that interferes with the recipient's daily functioning. Although the recipient is engaging in topographies of maladaptive behaviors, the frequency and intensity of the maladaptive do not support the request for services. This request for behavior analysis services is in excess of medical necessity. Behavior analysis services are approved, but at a lower level than what the provider requested.

Id. at 27-28.

6. Petitioner's pediatric neurologist, [redacted], M.D. ("[redacted]") of [redacted], wrote a reconsideration letter dated October 20, 2023, in support of Petitioner's request for additional ABA services. The letter states as follows:

> [Petitioner] is under my care for the following diagnosis:
>
> [redacted]
>
> **Parent Interview:** [redacted] reported patient's behavior fluctuates. Sometimes [redacted]

There is concern for multiple **maladaptive behaviors including:**



[Petitioner] has the above diagnosis and it is deemed medically necessary for [Petitioner] to receive Applied Behavior Analysis services. [redacted] currently receives ABA therapy for 23 hours a week; however due to the increase in violent behaviors it is medically necessary for [redacted] to receive 30 hours per week. Please provide accommodations.

See PCE 1 at 4.

7. Petitioner's BCBA, [redacted] with [redacted], wrote a reconsideration letter in support of Petitioner's request for additional ABA services. The letter states, in pertinent part, as follows:

[Petitioner] faces profound challenges in processing various sensory stimuli, frequently leading to heightened irritability and disruptive behaviors. [redacted]

At the adolescent stage, [Petitioner] displays conspicuous impairments in socialization, as well as in [redacted].

> [Petitioner]'s [redacted] is profoundly concerned about [redacted] tendency to [redacted]
>
> Recently one of this particularly distressing incident involved an episode of severe [redacted] that escalated into [redacted] and [redacted], culminating in a serious injury to [redacted]. [redacted] was compelled to seek urgent medical attention and was subjected to various diagnostic tests, including X-rays, due to [redacted] Unfortunately, this situation is not isolated, given [Petitioner]'s [redacted].
>
> It is crucial to underscore that [Petitioner]'s overall health and development are complicatedly linked to the total number of hours of ABA therapy [redacted] receives. Being subject to therapies not only teaches [redacted] to control [redacted] behaviors and tolerate changes surrounding [redacted] but keeps [redacted] in a controlled state where [redacted] feels [redacted] can deal with external challenges. [redacted] is not near a position where services can be reduced without becoming a harm for [redacted] and others. Deprived of this essential therapy, [Petitioner] encounters formidable barriers to [redacted] development and quality of life. [redacted] ability to acquire fundamental skills requisite for [redacted], [redacted], [redacted], and an improved quality of life hinges on the consistent and comprehensive provision of ABA therapies.

See PCE 1 at 5-6 and RCE 1 at 150-151.

8. Petitioner requested reconsideration of the Respondent's decision. In a Notice of Reconsideration Determination ("NRD"), dated November 9, 2023, Respondent upheld its decision. *See* RCE 1 at 39-40. The NRD explained the basis for the decision as follows:

> PR Recon Determination: At reconsideration all documents were carefully reviewed. The provider did not submit any new documentation that supports the medical necessity of this request. According to The Behavior Analysis Services Coverage Policy, (page 3, 2.2) the recipient of ABA therapy services must engage

> in maladaptive behavior that interferes with the recipient's daily functioning. Although the recipient is engaging in topographies of maladaptive behaviors, the frequency and intensity of the maladaptive do not support the request for services. This reconsideration request has been reviewed, reconsidered and the partial denial is upheld.

Id. at 40.

9. On November 9, 2023, Petitioner requested a Fair Hearing to challenge the denial of additional ABA services. On December 6, 2023, the undersigned issued, to all parties of record, an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for December 27, 2023, at 10:00 a.m. EST. On January 8, 2024, the undersigned issued an Order Granting Continuance rescheduling the Fair Hearing to be convened by telephone on January 9, 2024, at 1:00 p.m. EST. At Petitioner's request, the undersigned issued a notice rescheduling the Fair Hearing to be convened by telephone on January 25, 2024, at 10:00 a.m. EST.

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

a. The letters from Petitioner's neurologist indicate [redacted] needs ABA therapy. *See* ¶ 6.

b. When the registered behavior technician ("RBT") is not there at school, [redacted] receives letters and calls from Petitioner's teacher due to [redacted] behavior. When Petitioner is unable to go to school and during the summer, [redacted] RBT comes to the house which makes a difference in [redacted] behavior.

c. [redacted] believes Petitioner does not receive enough therapy per session.

d. [redacted] is not able to control Petitioner's behavior and has been seriously injured due to [redacted]. *See* ¶ 6, 7.

11. Dr. Hurley is a BCBA at the doctoral level, Florida Licensed Mental Health Counselor, and Second Level Reviewer for eQHealth. Dr. Hurley established the following at Fair Hearing:

a. eQHealth is hired by AHCA to provide assurance of quality services to Medicaid recipients by following the five (5) "medically necessary" criteria. *See* RCE 2 at page 7. EQHealth uses a two-level peer review process to determine if the requested ABA services meet the medically necessary criteria. *See* RCE 1 at 23-24.

b. Dr. Hurley contended that Petitioner's requested services were in excess of Petitioner's needs; therefore, the additional ABA services were not medically necessary. *See* RCE 2 at 7.

c. Petitioner has shown a decrease in frequency and good progress with [redacted] maladaptive behaviors, such as [redacted], [redacted], [redacted], [redacted], and [redacted]. *See* ¶ 3, 4. The [redacted] and [redacted] behaviors show decreases in frequency but are still areas of concern. *See* ¶ 3-4.

d. Dr. Hurley explained that the ABA provider can include magnitude of behaviors in each goal as well as their frequency. Dr. Hurley argued that the Treatment Plan does not appear to adequately indicate the magnitude or intensity of each maladaptive behavior in alignment with the "August 2023 Update" statements and letter submitted by the BCBA. *See* ¶ 4.

e. Dr. Hurley argued that the data in the Treatment Plan did not align with the additional environmental circumstances mentioned in the provider's reconsideration letter such as Petitioner's "[redacted]" due to challenges in processing various sensory stimuli and [redacted]'s concern of Petitioner's tendency toward [redacted]. *See* ¶ 7.

f. Dr. Hurley argued that the additional concerns raised may be part of caregiver training since the circumstances at home are slightly different than what is included in the Treatment Plan.

CONCLUSIONS OF LAW

12. 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).

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

14. Because Petitioner requested additional ABA services, Fla. Admin. Code R. 59G-1.100(17)(g) assigns the burden of proof to the Petitioner. 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. 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.

16. 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 <u>evidence that the frequency of the maladaptive behavior(s) has decreased</u> since the last review and, if not, that there is a <u>modification of the behavior plan.</u>
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.

17. 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.

See RCE 2 at 4-5.

18. 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.

See RCE 2 at 13.

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.

See RCE 2 at 23.

20. 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.

See RCE 2 at 34.

21. In the instant case, Petitioner is under 21 years of age and is diagnosed with [redacted]. *See* ¶ 2. Petitioner requested ABA services. *See* ¶ 5. In a NOO, dated October 12, 2023, Respondent approved 2,288 units of code 97153, 312 units of code 97155, 208 units of code 97156, and

denied the remaining units of ABA services. *See* ¶ 5. Respondent cited the lack of medical necessity as the basis for their decision, specifically that the requested ABA 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." *See* ¶ 5, 8, 11, 19. The Definitions Policy defines a component of medical necessity as "individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment", and "not in excess of the patient's needs." *See* ¶ 19. As provided by the EPSDT requirements, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. *See* ¶ 17-18. Petitioner has burden of proof to show by a preponderance of evidence that the Respondent's determination was incorrect. *See* ¶ 14.

22. The record shows that Petitioner engages in maladaptive behaviors that qualify for ABA services. *See* ¶ 3-4, 6-7. The Petitioner's maladaptive behaviors as indicated in the Treatment Plan include [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted]. *See* ¶ 3. As testified by [redacted], Petitioner engages in maladaptive behaviors in the school classroom and at home. *See* ¶ 10. When Petitioner is unable to go to school and during the summer, [redacted] RBT provides therapies in the home which makes a difference in [redacted] behavior. *See* ¶ 10. [redacted] argued that Petitioner does not receive enough therapy per session. *See* ¶ 10. [redacted] testified that [redacted] is not able to control Petitioner's behavior and has been seriously injured due to [redacted]. *See* ¶ 6, 7, 10. Section 9.0 of the BA Policy maintains that the "behavior plan is the cornerstone of the delivery of behavior analysis services." *See* ¶ 16. The criteria for behavior analysis services require that a behavior plan must be detailed enough to warrant the requested

services and include mechanisms to monitor its effectiveness. *See* ¶ 16. 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* ¶ 16. The provider's BCBA letter indicates "Petitioner's overall health and development are complicatedly linked to the total number of hours of ABA therapy [redacted] receives." *See* ¶ 7. During testimony, Dr. Hurley contended that the Treatment Plan does not appear to adequately indicate the magnitude or intensity of each maladaptive behavior as described by [redacted] and Petitioner's BCBA. *See* ¶ 11. Dr. Hurley argued that the data in the Treatment Plan did not align with the additional environmental circumstances mentioned in the provider's reconsideration letter such as Petitioner's "[redacted]" due to challenges in processing various sensory stimuli and [redacted]'s concern of Petitioner's tendency toward [redacted]. *See* ¶ 11. It is clear between the testimony by [redacted] and the letters by Petitioner's ABA provider and neurologist that Petitioner's maladaptive behaviors occur at magnitudes that interfere with [redacted] daily functioning. *See* ¶ 6, 7, 10. However, the evidence of these occurrences are not adequately demonstrated within the treatment goals and graphs designed to address Petitioner's progress. *See* ¶ 11. Dr. Hurley explained that the ABA provider can include magnitude of behaviors in each goal as well as their frequency. *See* ¶ 11. The record does not show detailed interventions to address the intensity and magnitude of Petitioner's maladaptive behaviors. *See* ¶ 7, 11. As established by Dr. Hurley, the concerns raised of Petitioner's behaviors may have been part of caregiver training since the circumstances at home are different than what is included in the Treatment Plan. *See* ¶ 11. Based on these discrepancies, the undersigned finds that the requested services to implement ABA therapy as demonstrated in the Treatment Plan appears to be "in

excess of Petitioner's needs." *See* ¶ 16, 19. All in all, the undersigned concludes that the request for additional ABA services was not supported by the submitted Treatment Plan. *See* ¶ 3-5, 8, 11.

23. Upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Petitioner did not prove by a preponderance of the evidence that the additional ABA services at issue are medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner has not demonstrated that the requested services, based on the Treatment Plan at issue in this case, are necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, Petitioner did not prove by a preponderance of the evidence that Respondent's denial of additional ABA services was incorrect.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

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

DONE AND ORDERED this 14th day of February, 2024 in Tallahassee, Leon County, Florida.

Kimberly Roche
23-FH2845
2024.02.14
08:42:04 -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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