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

FILED

Feb 08, 2024, 9:58 am

OFFICE OF FAIR HEARINGS

[redacted],

PETITIONER,

AHCA Case No.: 23-FH2877

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION,

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, the undersigned Hearing Officer convened a telephonic Fair Hearing on the instant case on December 28, 2023, at 9:34 a.m. Eastern Standard Time ("EST").

APPEARANCES

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

For the Respondent: Doris Rivera
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 termination of Petitioner's behavior analysis ("ABA" or "BA") services was correct.

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. [redacted] ("[redacted]"), Petitioner's Authorized Representative and [redacted], appeared for the Fair Hearing on behalf of Petitioner. [redacted] ("[redacted]"), Board-Certified Behavior Analyst ("BCBA") with [redacted]

[redacted] ("the provider"), and [redacted], BCBA with the provider, appeared for the Fair Hearing as witnesses for Petitioner.

Doris Rivera, Medical Health Care Program Analyst and Fair Hearing Liaison for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared for the Fair Hearing as a representative for Respondent. Dr. David Bicard ("Dr. Bicard"), Board-Certified Behavior Analyst at the Doctoral Level ("BCBA-D") and Director of Clinical Operations for eQHealth Solutions, appeared for the Fair Hearing as a witness for Respondent.

Prior to the hearing, Petitioner sent to the Office of Fair Hearings and Respondent a fifty-two (52)-page evidence packet and a two (2)-page evidence packet. The fifty-two (52)-page packet appears in the Office of Fair Hearings' Case Management system as the file titled "23-FH2877 Evidence.pdf". The two (2)-page packet appears in the Office of Fair Hearings' Case Management system as the file titled "23-FH2877 Evidence (2).pdf." Absent an objection from Respondent, the undersigned admitted the fifty-two (52)-page packet into evidence as Petitioner's Composite Exhibit 1 ("PCE 1") and the two (2)-page packet into evidence as Petitioner's Composite Exhibit 2 ("PCE 2").

Prior to the Fair Hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred and sixty-one (161)-page evidence packet and a forty-nine (49)-page evidence packet. The one hundred and sixty-one (161)-page packet appears in the Office of Fair Hearings' document management system as the files titled "[redacted] FH 12.28.2023.pdf". The forty-nine (49)-page packet appears in the Office of Fair Hearings' document management system as the file titled "23-FH2877 -AHCA evidence 49 pgs.pdf". Absent any objections from Petitioner, the undersigned admitted the one hundred and sixty-one (161)-page evidence packet as

Respondent's Composite Exhibit 1 ("RCE 1") and the forty-nine (49)-page evidence packet as Respondent's Composite Exhibit 2 ("RCE 2").

FINDINGS OF FACT

1. Petitioner receives Medicaid services on a fee-for-service basis through the Agency. *See* RCE 1 at 16. eQHealth is a Quality Improvement Organization contracted by the Agency to review prior authorization requests for services. *See* RCE 2 at 2.

2. As of the date of the Fair Hearing, Petitioner was [redacted]. *See* RCE 1 at 16. Petitioner is diagnosed with [redacted], and [redacted]. *Id*. at 16.

3. Petitioner's provider provided an updated Intervention Plan ("Treatment Plan" or "behavior plan"), dated September 19, 2023, for the authorization period of October 15, 2023, through April 11, 2024. *Id*. at 46 – 97. According to the Treatment Plan, Petitioner is engaging in the following maladaptive behaviors: [redacted], and [redacted]. *Id*. at 47. The data graphs for Petitioner's maladaptive behaviors show the following: for [redacted], Petitioner's incidents decreased from approximately [redacted]; for [redacted], Petitioner's incidents increased from approximately [redacted]; for [redacted], Petitioner's incidents increased from approximately [redacted]; for [redacted], Petitioner's incidents increased from approximately [redacted]; for [redacted], Petitioner's incidents increased from approximately [redacted]; for [redacted], Petitioner's incidents increased from

approximately [redacted]; for [redacted], Petitioner's incidents increased from approximately [redacted]; for [redacted], Petitioner's incidents decreased from approximately [redacted]; for [redacted], Petitioner's incidents decreased from approximately [redacted]; and for [redacted], Petitioner's incidents decreased from approximately [redacted]. *Id.* at 126 – 131. The data graph for the maladaptive behavior of [redacted] has few data points. *Id.* at 130.

4. Petitioner is learning the following replacement behaviors: [redacted], [redacted], [redacted], [redacted], and [redacted]. 151 – 155.

5. On October 10, 2023, Petitioner requested continuation of BA services; specifically, 2,456 units of code 97153; 307 units of code 97155; and 205 units of code 97156. *See* RCE 1 at 22. In a Notice of Outcome ("NOO"), dated October 24, 2023, Respondent denied Petitioner's request, terminating BA services for Petitioner. *Id.* at 22 – 26. The NOO states as follows:

> Code: 97153 Intervention without protocol modification, per 15 minutes, Lead Analyst, BCaBA, or RBT
> From: 10/15/23
> Thru: 4/11/24
> Total Units: Denied 2,456
>
> Code: 97155 Intervention without protocol modification, per 15 minutes
> From: 10/15/23
> Thru: 4/11/24
> Total Units: Denied 307
>
> Code: 97156 Family training, per 15 minutes, Lead Analyst
> F From: 10/15/23
> Thru: 4/11/24
> Total Units: Denied 205

The NOO explained the basis for the termination as follows:

> The request for services is denied in whole or in part because they are not medically necessary as defined in Rule 59G-1.010, Florida Administrative Code.

> Specially, the requested services are not medically necessary under the following standard(s):
>
> Consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational.
>
> 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:

> The rationale for our decision is as follows:
>
> PR Principal Reason – Denial:
>
> Submitted information does not support the medical necessity for requested frequency and/or duration.
>
> PR Clinical Rationale – Denial: According to the Florida Medicaid State Plan (page 8, 6.2.3), 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 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.
> . . .

RCE 1 at 22 – 23.

6. In a Notice of Reconsideration Determination ("NRD"), dated November 13, 2023, Respondent upheld its decision. *Id*. at 34 – 37. The NRD explained the basis for the decision as follows:

> PR Recon Determination: At reconsideration all documents were carefully reviewed. According to the Florida Medicaid State Plan (page 8, 6.2.3), 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 of progress was due to therapist error (e.g., poor data collection or poor training on intervention methods), how the provider will address human error. The 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 denial is upheld.
>
> . . .

RCE 1 at 39.

7. On November 9, 2023, Petitioner requested a Fair Hearing to challenge the termination BA services. On November 29, 2023, the Office of Fair Hearings issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for December 28, 2023, at 9:30 a.m. EST.

8. Dr. Bicard is a BCBA-D and Director of Clinical Operations for eQHealth. Dr. Bicard testified as follows:

a. eQHealth is the quality improvement organization ("QIO") contracted by Florida to review requests for BA services for medical necessity. In order for BA services to be medically necessary, the services must meet all five (5) of the medical necessity conditions. Dr. Bicard read the five (5) medical necessity criteria into the record. *See* RCE 2 at 7.

b. Petitioner has participated in BA therapy with this provider since [redacted], for almost [redacted] years.

c. According to standards of care, a lead analyst or BCBA is required to monitor a case. The provider was approved for approximately two (2) hours per week to observe Petitioner and make interventions when Petitioner's behavior does not respond to treatment. There is ample evidence that Petitioner's maladaptive behaviors did not respond to treatment during the last authorization period. The time to make changes to a treatment plan is during the authorization period and not at the end when the case is denied.

d. The provider did not address the lack of progress during the last observation period, did not amend the treatment plan in relation to the lack of progress or the proposed changes have little chance at improving behavior. *See* RCE 1 at 17.

e. Dr. Bicard agrees with the previous reviewers in this case. The provider has not done the things they should have been doing during the authorization period and therefore services should be denied.

f. Petitioner's maladaptive behaviors and skill deficits appear to meet medically necessary criteria. Petitioner may qualify for behavior analysis services. A lack of progress is not necessarily a reason to deny services. The issue is that the services here do not meet minimal quality standards within the field of behavior analysis services.

g. When behavior does not improve, the provider must make changes to the treatment plan. The changes should be noted in the treatment plan and made on the graphs or charts.

h. The data graph for [redacted] shows highly variable data and Petitioner's behavior appears to be getting worse at the end of the authorization period. *See* RCE 1 at 126. The data graph for [redacted] shows the same pattern of highly variable data and appears to be getting worse at the end of the authorization period. *See* RCE 1 at 126. The data graph for [redacted] also has the same pattern of variability and the graph does not show intervention. *See* RCE 1 at 127. The data graph for [redacted] shows the same general pattern of variability in the behavior and no intervention, which does not meet standards of care in the field of behavior analysis. *See* RCE 1 at 127. The data graph for [redacted] shows the same general pattern of variability in the behavior and it is not clear that the provider has identified the important environmental events surrounding this behavior. *See* RCE 1 at 128. The data graph for [redacted] shows the behavior is getting worse at the end of the authorization period. *See* RCE 1 at 128. The data for [redacted] shows the behavior is getting worse during the authorization period with a high level of variability. *See* RCE 1 at 129. The data graph for [redacted] shows the behavior is occurring at a low level and may not meet medically necessary criteria. *See* RCE 1 at 129. The data graph for [redacted] shows highly variable data with no intervention. *See* RCE 1 at 130. The behavior of [redacted] does not meet medically necessary criteria because it is not well treated with behavior analysis. *See* RCE 1 at 130. The data graph for [redacted] shows the same pattern of variability and no interventions related to the behavior. *See* RCE

1 at 131. Some of Petitioner's maladaptive behaviors are not threatening access to typical environments or significantly interfering with activities of daily living ("ADLs"). None of the maladaptive behaviors show improvement during the prior authorization period. There are no interventions identified during the authorization period.

i. The problem with the replacement behaviors graphs is that there is more than one behavior on a graph. The graphs do not meet standards of care within the field of behavior analysis. It is difficult to interpret exactly what is going on. *See* RCE 1 at 151 – 155.

j. Overall, after [redacted] years of therapy including case management, Petitioner may have maxed out of therapy with this provider. Petitioner's treatment falls well below the standards of care in the field of behavior analysis. The provider's treatment does not meet the Behavior Analysis Services Coverage Policy. *See* RCE 2 at 46.

9. [redacted], BCBA, testified as follows:

a. The provider agrees with Dr. Bicard's interpretation of the graphs.

b. [redacted] is supervising Ms. Cohen as a new BCBA. [redacted] had personal issues and did not review the initial plan during the authorization period.

c. Most of the issues with the treatment plan are due to human error.

d. The provider's company uses their own internal digital template and there are errors with it frequently. The provider is seeing this problem in other cases.

e. There was a [redacted] week disruption of service during the authorization period between June 27, 2023, through August 8, 2023. The barriers to treatment were significant. The barriers should have been identified in the treatment plan, but they were not.

10. [redacted], Petitioner's [redacted], testified as follows:

a. Petitioner has received BA service for years and it helps [redacted].

CONCLUSIONS OF LAW

11. The Agency's Office of Fair Hearings has jurisdiction over the subject matter of this proceeding and the parties pursuant to second 409.285(2), Florida Statutes (2019). This order is the final administrative decision of AHCA under section 409.285(2)(a).

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

13. Because Respondent terminated a previously approved service, Fla. Admin. Code R. 59G-1.100(17)(b) 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.).

14. The Florida Medicaid Behavior Analysis Services Coverage Policy (October 2017) ("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.

. . .

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 not 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 possible 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 section 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.

RCE 2 at 40 – 42.

15. 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 than 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. i. Safety - aggression, self-injury, property destruction, elopement
ii. ii. Communication - problems with expressive/receptive language, poor understanding or use of
iii. non-verbal communications, stereotyped, repetitive language
iv. iii. Self-stimulating, abnormal, inflexible, or intense preoccupations
v. iv. Self-care - difficulty recognizing risks or danger, grooming, eating, or toileting
vi. v. 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.

> 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
>
> When applicable, the recipient would be transitioned to other appropriate services.

. . .
RCE 2 at 45 – 46.

16. 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.

RCE 2 at 4 – 5.

17. 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). Fla. Stat. § 409.905(2) 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.

RCE 2 at 13.

18. Section 2.83 of the 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.

RCE 2 at 23.

19. The Florida Medicaid Authorization Requirements Policy ("Authorization Requirements Policy") incorporated by reference in Fla. Admin. Code R. 59G-1.053, provides as follows:

> **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.

RCE 2 at 34.

20. In the instant case, Respondent terminated Petitioner's ABA services. *See* ¶ 5. The data graphs did not show sufficient improvement in the maladaptive behaviors. *See* ¶ 3, 8. In the NOO dated October 24, 2023, Respondent explained that the BA services at issue were not medically necessary, specifically, that it did not meet the requirements that services must be "[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs" and "[c]onsistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigation." *See* ¶ 5. Respondent further explained that the "submitted information does not support the medical necessity for requested frequency and/or duration" and that "[t]he 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." *See* ¶ 5.

21. 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. As provided in section 2.83 of the Definitions Policy, a component of medical necessity is that services must be "[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs." *See* ¶ 18. As shown by the record, Petitioner's submitted treatment plan does not show sufficient improvement regarding the reduction of maladaptive behaviors and little improvement in increasing Petitioner's replacement behaviors. *See* ¶ 3 – 4, 8. As Dr. Bicard testified there has been insufficient progress over the course of [redacted]

[redacted] years of treatment and there is indication that the treatment plan is not effective for Petitioner. *See* ¶ 8. Further, Dr. Bicard testified that the maladaptive behaviors show either no change in the behavior or that the behavior got worse during the authorization period over the course of [redacted] years of treatment. *See* ¶ 8. As provided in the BA Policy Appendix, a criterion for behavior analysis services and reassessments is that the behavior plan includes replacement appropriate behaviors for the recipient to engage in instead of the maladaptive behaviors in order to obtain the same function and that the plan must be detailed enough to warrant the requested services and include mechanisms to monitor its effectiveness. *See* ¶ 15. However here, Dr. Bicard established that there is more than one replacement behavior on a graph, that the graphs do not meet standards of care within the field of behavior analysis, and that it is difficult to interpret exactly what is going on. *See* ¶ 8. Although Petitioner may need ABA therapy, there is ample evidence that Petitioner's maladaptive behaviors did not respond to treatment during the last authorization period. *See* ¶ 3, 8. In all, based on Dr. Bicard's credible and convincing testimony and the lack of progress in the treatment, Respondent demonstrated that the provider's treatment is not "[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs" and is not "consistent with generally accepted professional medical standards as determined by the Medicaid program."

22. 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* ¶ 19. As discussed, supra ¶ 20 – 21, the current treatment plan is ineffective. Petitioner's lack of improvement is well documented.

23. Upon consideration of the testimony provided, Petitioner's Composite Exhibit 1, Petitioner's Composite Exhibit 2, Respondent's Composite Exhibit 1, Respondent's Composite Exhibit 2, and the applicable law and polices, the undersigned concludes that Respondent proved by a preponderance of the evidence that the ABA services do not meet medical necessity criteria. Looking at all the evidence relevant to the particular needs of Petitioner, Respondent has demonstrated that the previously authorized services, based on the treatment plans at issue in this case, 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 BA services was correct.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

Respondent's termination of BA 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.

Kameisha Presley
23-FH2877
2024.02.08
08:49:42 -05'00'

KAMEISHA PRESLEY, 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
MedicaidHearingUnit@ahca.myflorida.com