



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

FILED

Mar 06, 2024, 8:19 am

OFFICE OF FAIR HEARINGS

[REDACTED],

PETITIONER,

AHCA Case No.: 23-FH2942

vs.

AGENCY FOR HEALTH CARE
ADMINISTRATION,

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on January 19, 2024, at 9:00 a.m. Eastern Standard Time ("EST").

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Marielisa Amador
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 applied behavior analysis ("BA" or "ABA") services was incorrect.

PRELIMINARY STATEMENT

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

attended as witnesses for Petitioner: [REDACTED], Petitioner's [REDACTED]; and [REDACTED] (" [REDACTED] [REDACTED]"), Board Certified Behavior Analyst at the doctoral level ("BCBA-D") at [REDACTED] [REDACTED].

Marielisa Amador, Medical/Health Care Program Analyst for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared on behalf of Respondent. Dr. David Bicard ("Dr. Bicard"), BCBA-D and Director of Clinical Operations for eQHealth Solutions Inc. ("eQHealth") appeared as a witness for Respondent.

Prior to the hearing, Petitioner sent to the Office of Fair Hearings and Respondent an 88-page evidence packet. The evidence packet appears in the Office of Fair Hearings document management system as the file titles "23-FH2942 Emailed Evidence". Absent an objection from the Respondent, the undersigned admitted the 88-page evidence packet into evidence as Petitioner's Composite Exhibit 1 ("PCE 1").

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner an 88-page evidence packet and a forty-nine (49)-page evidence packet. The 88-page packet appears in the Office of Fair Hearings document management system as the file title "[REDACTED] FH 01.19.204.pdf". The forty-nine (49)-page evidence packet appears in the Office of Fair Hearings document management system as the file title "23-FH2942 AHCA Evidence (Pages 1 – 49 of 49).pdf". Absent an objection from the Petitioner, the undersigned admitted 88-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 contracted by the Agency to review prior authorization requests for services. *See* page 2 of RCE 2.

2. Petitioner is [REDACTED]. *See* page 16 of RCE 1. Petitioner is diagnosed with [REDACTED]. *Id.*

3. Petitioner requested the following ABA services: 3,120 units of code 0373T; 3,120 units of code 97153; 832 units of code 97155; and 208 units of code 97156. *Id.* at 21 – 23. Petitioner’s request for two (2) Registered Behavior Technicians (“RBT”) was explained as follows:

Second Technician

- Provides assistance in implementing the prescribed protocol
- Collects data on environmental and physiological variables (e.g., temperature, sick symptoms, bowel movement type) that caregivers or physicians have reported interact with behavior
- Tracks the frequency and duration of all topographies of destructive behavior
- Instructs the first technician on what type of demand, prompt, or reinforcer to deliver
- Instructs the first technician to start or end a trial
- Per the behavior intervention plan, assists with blocking maladaptive behavior that interferes with the safety of the client or therapist
- Per the behavior intervention plan, assists with blocking access to unsafe stimuli
- Per the behavior intervention plan, assists with blocking access to preferred stimuli that the client should not have access to
- Assist with providing reinforcement-based procedures like continuous attention

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Page 74 of RCE 1.

4. Petitioner previously received ABA services through Behavioral Learning Systems. *See* pages 15 – 45 of PCE 1. As shown by the Behavior Reassessment and Behavior Plan (“treatment plan” or “behavior plan”), Petitioner did not reduce [REDACTED] maladaptive behaviors while under treatment. *Id.* at 34 – 37.

5. In a Notice of Outcome (“NOO”), dated September 28, 2023, Respondent denied the request for 3,120 units of code 0373T, but approved the remainder of the request. The NOO explained the basis of 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 or injury under treatment, and not in excess of the patient’s needs. Reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide.

The NOO further provided:

PR Principal Reason – Denial:

Submitted information does not support the medical necessity for requested frequency and/or duration.

PR Clinical Rationale – Denial: This request for 2:1 service is denied. The provider must have detailed protocols for each provider rendering services. Services cannot be approved solely to render crisis care in the event of a high intensity maladaptive behavior. The services described in the treatment plan do not require a specially trained person to implement the protocols for the second provider. This request does not meet medical necessity criteria. All other direct therapy services, protocol modification, and parent training are approved as requested.

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Pages 21 – 23 of RCE 1.

6. Petitioner requested reconsideration of the Respondent’s decision. In a Notice of Reconsideration Determination (“NRD”), dated *Date*, Respondent upheld its decision. *Id.* at 40 – 42. The NRD explained the basis for the decision as follows:

PR Recon Determination: At reconsideration all documents were carefully reviewed. This request for 2:1 service is denied. Services are approved only to render medically necessary behavior therapy. The protocols identified in this plan for the 2nd therapist can be rendered by someone without specific training in behavior analysis. This request does not meet medical necessity criteria. All other

services meet medical necessity criteria and are approved at the level requested.
This partial denial is upheld.

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Pages 33 – 35 of RCE 1.

7. On November 16, 2023, Petitioner requested a Fair Hearing to challenge the denial of ABA services. On December 19, 2023, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for January 19, 2024, at 9:00 a.m. EST.

8. [REDACTED] is a BCBA-D. [REDACTED] testified to the following:

- a. Petitioner has a longstanding history of severe destructive behaviors. This has led to [REDACTED] and removal from educational services. Petitioner currently has three (3) individuals work with [REDACTED] at school. See page 16 of PCE 1. Petitioner's parents have been required to pick Petitioner up early from school on a regular basis. Petitioner was only able to stay in school for less than half the school year. Petitioner has been deemed too aggressive to receive rehabilitative services such as physical therapy and ABA with one RBT.
- b. Petitioner has previously received services from only one RBT, and that service was not safe or effective. See page 21 of PCE 1. Petitioner was referred to [REDACTED] from [REDACTED] previous ABA provider. [REDACTED]'s clinic is specialized.
- c. [REDACTED] believes that two (2) RBTs are necessary to provide services due to the necessity of successfully implementing services with high fidelity during dangerous circumstances, maintaining high data collection, deescalating destructive behavior, and ensuring that the environment is safe.

- d. [REDACTED] explained that one RBT collects data and instructing the other RBT when to add or remove a stimulus from the environment and safely managing destructive behaviors. These protocols provide for high accuracy. It would be impossible for a single RBT to accurately collect data.
- e. [REDACTED] does not believe that a parent or teach that does not have RBT training could effectively perform the functions necessary to assist the RBT in administering treatment.
- f. [REDACTED] has trained parents on data collections and differential reinforcement, but only in cases where the recipient had successfully reduced maladaptive behaviors.

9. [REDACTED] is Petitioner's [REDACTED]. [REDACTED] testified to the following:

- a. Petitioner's behaviors were too intense for other therapies.
- b. Petitioner started ABA services in [REDACTED], and there was some improvement in school and at home.
- c. Petitioner moved to [REDACTED], and while there had a stay at [REDACTED].
- d. When Petitioner moved back to Florida, [REDACTED] sought services from [REDACTED] previous provider, however, they could not accommodate [REDACTED] due to [REDACTED] size and strength, and the intensity of [REDACTED] maladaptive behaviors.

10. Dr. Bicard is a BCBA-D and Director of Clinical Operations for eQHealth. Dr. Bicard testified to the following:

- a. Dr. Bicard previously a Director of four (4) inpatient units at a psychiatric hospital in Louisville, Kentucky. Dr. Bicard has experience with children who exhibit high level behaviors.
- b. Petitioner has been approved for a high level of services. Petitioner was approved for analyst services that are above what is recommended.
- c. Code 0373-T is a temporary code – it has not been established by the AMA. The code as written is adaptive behavior modification – which is used for when a BCBA is rendering services.
- d. RBTs go through a 40 hour course where they learn about the principles of behavior and administering therapies and pass an exam. It is a rigorous course of study. Components of that certification can be learned and implemented by someone who is not an RBT, including differential reinforcement and data collection, and many of the tasks that were outlined in the treatment plan.
- e. With regard to the list of tasks for the second RBT, *see supra* ¶ 3, Dr. Bicard opined the following:
 - i. The first bullet point is vague.
 - ii. The second and third bullet points are tasks that do not require an RBT.
 - iii. The fact that an RBT is instructing another is an unnecessary duplication.
- f. There is nothing in the protocols that show a second RBT is necessary to implement. Many parents or paraprofessional are trained to do these every day.
- g. Dr. Bicard does not believe that, based on the evidence presented, that two (2) RBTs are necessary to implement therapy.

CONCLUSIONS OF LAW

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

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

13. Because Petitioner requested a new service, 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.)

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.

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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 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.

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Pages 1 – 3 of BA Policy.

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 that an adequate behavior plan can be implemented. This (re)assessment **MUST** include, at a minimum, **ALL** of the following:
 - i. A clear operational description of the maladaptive behavior(s)
 - ...
- c. A behavior plan authored or updated by a lead analyst. The behavior plan is the cornerstone of the delivery of behavior analysis services and it is based on the information obtained in the assessment. It proposes specific interventions to reduce or eliminate the maladaptive behavior. These interventions take into consideration the variables, both present before the behavior, as well as after the behavior, that influence the occurrence of the maladaptive behavior(s). This plan also includes replacement appropriate behaviors for the recipient to engage in instead of the maladaptive behaviors in order to obtain the same function. The plan must be detailed enough to warrant the requested services and include mechanisms to monitor its effectiveness. This **MUST** include, at a minimum, **ALL** of the following:
 - i. Observable and measurable descriptions of the maladaptive behavior(s)
 - ii. Identified function of the maladaptive behavior(s) behavior as a result of the assessment or reassessment conducted

- iii. Goals and strategies for changing the maladaptive behavior(s)
- iv. Written detailed description of when, where, and how often these goals will be addressed and proposed strategies will be implemented
- v. System for monitoring and evaluating the effectiveness of the plan
- vi. Safety and crisis plan, if applicable
- vii. Summary and recommendations
- viii. Discharge criteria
- ix. Transition plan (if applicable)

NOTE: Although the assessment and behavior plan were addressed separately in section 2, both of them can be submitted as a single document.

3. Criteria for Continuation of Treatment at the Present Level and/or Using Current Methods: Providers must ensure that ALL of the following criteria are met to request continuation of treatments at the present level or using the current methods. If criteria for 3a is met, but criteria for 3b and/or 3c are not met, then a reduction of the treatment level and/or change of treatment methods may be warranted.

- a. ALL criteria listed in 2a, 2b, and 2c regarding critical elements, assessment or reassessment, and behavior plan, are met.
- b. The data provided must show evidence that the frequency of the maladaptive behavior(s) has decreased since the last review and, if not, that there is a modification of the behavior plan.
- c. The level of functional impairment justifies continuation of BA services. The reviewer utilizes the information provided below as a guide as it relates to the level of functional impairment as expressed through the following behaviors:
 - i. Safety – aggression, self-injury, property destruction, elopement
 - ii. Communication – problems with expressive/receptive language, poor understanding or use of non-verbal communications, stereotyped, repetitive language
 - iii. Self-stimulating, abnormal, inflexible, or intense preoccupations
 - iv. Self-care – difficulty recognizing risks or danger, grooming, eating, or toileting
 - v. Other – behaviors not identified above

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Pages 6 – 8 of BA Policy.

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.

17. Petitioner is under age 21, and therefore EPSDT applies to the 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.

18. 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.

19. The Florida Medicaid Authorization Requirements Policy (“Authorization 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 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.

...

Page 3 of Authorization Policy.

20. At issue here is the denial of 3,120 units of code 0373T. As explained in the NOO, Respondent determined that services rendered concurrently by two (2) RBTs was not medically necessary, specifically, that it did not meet the requirement that services are to 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.” See ¶ 5. Respondent explained that the “services described . . . do not require a specially trained person to implement protocols for the second provider.” *Id.*

21. As provided in the EPSDT requirements, and section 9.0 of the BA Policy, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. As provided in section 2.83 of the Definitions policy, a component of medical necessity is that services are to 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." As Petitioner is requesting a new service, Petitioner bears the burden of proof. As shown by the record, Petitioner is engaging in severe maladaptive behaviors, such that [REDACTED] requires three (3) individuals working with [REDACTED] in school. See ¶ 8. Despite that, Petitioner has still left school early for more than half of the school days. Further, Petitioner previously received services from a single RBT, but Petitioner did not make progress. See ¶ 4. [REDACTED] testified that it was [REDACTED] opinion that two (2) RBTs are medically necessary for Petitioner due to the necessity of successfully implementing services with high fidelity during dangerous circumstances, maintaining high data collection, deescalating destructive behavior, and ensuring that the environment is safe. See ¶ 8. Based on the severity of Petitioner's behaviors, [REDACTED]'s testimony is credible. Based on the testimony of [REDACTED], the undersigned concludes that the request 3,120 units of code 0373T was not "in excess of the patient's needs." As such, Petitioner demonstrated that the requested services were medically necessary.

22. Upon consideration of the testimony provided, evidence submitted, and applicable polices, the undersigned concludes that Petitioner proved by a preponderance of the evidence that the requested services were medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner has demonstrated that the requested services are necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, Petitioner proved by a preponderance of the evidence that Respondent's denial of ABA services was incorrect.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

Respondent's denial of ABA services is **REVERSED**. Petitioner's appeal based on Respondent's denial is **GRANTED**.

DONE and **ORDERED** this 6th day of March 2024, in Tallahassee, Leon County, Florida.

 Joseph Mabry
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JOSEPH MABRY, 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:




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