

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



FILED
Apr 11, 2024, 1:49 pm
OFFICE OF FAIR HEARINGS

[Redacted]

PETITIONER,

AHCA Case No.: 24-FH0033

vs.

**AGENCY FOR HEALTH CARE
ADMINISTRATION,**

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on February 22, 2024, at 10:03 a.m. Eastern Standard Time (“EST”) and March 11, 2024, at 1:03 p.m.

APPEARANCES

For the Petitioner:

[Redacted]

Petitioner’s Authorized Representative

For the Respondent:

Lee Ann Williams
Medical Health Care Program Analyst
Agency for Health Care Administration

STATEMENT OF ISSUE

The issue is whether Respondent proved by a preponderance of the evidence that Respondent’s decision to terminate Petitioner’s behavior analysis (“BA” or “ABA”) services was correct.

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. [REDACTED] (“[REDACTED]”), Petitioner’s Authorized Representative and legal guardian, appeared for both Fair Hearings to provide testimony on behalf of Petitioner. [REDACTED] (“[REDACTED]”), Board Certified Behavior Analyst (“BCBA”) for [REDACTED], appeared for both Fair Hearings as a witness for Petitioner.

Lee Ann Williams, Medical Health Care Program Analyst and Fair Hearing Liaison for the Agency for Health Care Administration (“Agency” or “AHCA”), appeared for the Fair Hearing held on March 11, 2024, as representative for Respondent. Linda Latson, Registered Nurse Specialist and Fair Hearing Liaison for the Agency, appeared for the Fair Hearing held on February 22, 2024, 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 an eighty-one (81)-page evidence packet, a six (6)-page evidence packet, and twenty-two (22)-page evidence packet from Petitioner. The eighty-one (81)-page evidence packet appears in the Office document management system as the file title “24-FH0033 Evidence.pdf”¹. The six (6)-page evidence packet appears in the Office document management system as the file title “24-FH0033 Evidence(2).pdf”². The twenty-two (22)-page evidence packet appears in the Office document management system as the file title “24-FH0033 Evidence(3).pdf”³. Absent an objection from the

¹ This file was received on February 14, 2024.

² This file was received on February 14, 2024.

³ This file was received on February 14, 2024.

Respondent, the eighty-one (81)-page evidence packet was admitted into evidence as Petitioner's Composite Exhibit 1 ("PCE 1"), the six (6)-page evidence packet was admitted into evidence as Petitioner's Composite Exhibit 2 ("PCE 2"), and the twenty-two (22)-page evidence packet was admitted into evidence as Petitioner's Composite Exhibit 3 ("PCE 3").

Prior to the hearing, the Office of Fair Hearings received a three hundred and seven (307)-page evidence packet and a fifty (50)-page evidence packet from Respondent. The three hundred and seven (307)-page packet appears in the Office of Fair Hearings document management system as the file titles "[REDACTED] FH 02.22.2024 1-164.pdf," "[REDACTED] FH 02.22.2024 165-213.pdf," "[REDACTED] FH 02.22.2024 214-279.pdf," and "[REDACTED] FH 02.22.2024 280-307.pdf." The fifty (50)-page evidence packet appears in the Office of Fair Hearings document management system as the file title "24-FH0033 AHCA Evidence BA Svcs 50 Pages.pdf." Absent an objection from the Petitioner, the undersigned admitted the three hundred and seven (307)-page evidence packet into evidence as Respondent's Composite Exhibit 1 ("RCE 1") and the fifty (50)-page evidence packet into evidence as Respondent's Composite Exhibit 2 ("RCE 2").

On March 11, 2024, Petitioner sent to the Office of Fair Hearings and Respondent, a ninety-nine (99)-page evidence packet. The ninety-nine (99)-page evidence packet appears in the Office of Fair Hearings document management system as the file title "24-FH0033 Emailed Supporting Documents.pdf." Absent an objection from the Respondent, the ninety-nine (99)-page evidence packet was admitted into evidence as Petitioner's Composite Exhibit 4 ("PCE 4").

The undersigned Hearing Officer held the record open until March 18, 2024, for Respondent to file a response to Petitioner's Composite Exhibit 4. As of the date of this Final

Order, Respondent did not file any documentation in response to Petitioner’s Composite Exhibit 4.

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 16. Petitioner is diagnosed with [REDACTED]
[REDACTED]
[REDACTED]. *Id.* at 16, 55. Petitioner receives ABA therapy at [REDACTED]. *Id.*

3. As provided in the Behavior Analysis Assessment and Behavior Plan (“Treatment Plan”), Petitioner is engaging in the following maladaptive behaviors: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. *Id.* at 215.

4. Petitioner requested recertification of ABA services for the period of November 16, 2023, to May 13, 2024; specifically, 3,016 units of code 97153; 104 units of code 97154; 208 units of code 97155; 520 units of code 97155HN; 104 units of code 97156; 104 units of 97156HN; and 104 units of code 97158. *Id.* at 19-21, 24. On November 21, 2023, eQHealth requested additional information from the ABA provider concerning the Treatment Plan. *Id.* at 17, 53.

5. In a Notice of Outcome (“NOO”), dated December 4, 2023, Respondent terminated Petitioner’s ABA services. *Id.* at 24-26. The NOO explained the basis for the denial as follows:

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

Consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational.

Not duplicative of services being rendered by another party.

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 service is denied because it duplicates services furnished by another provider. Requested services are denied because documentation is neither showing improvement nor support for maintenance.

PR Clinical Rationale - Denial: According to the Behavior Analysis Services Coverage Policy (page 5, 4.2.2), treatment for behaviors must be tied to the function of maladaptive behaviors. The treatment must be individualized, specific, and meet generally accepted standards of care within the field of behavior analysis. The provider has listed goals in this treatment plan (pg 11) that do not meet medical necessity criteria. According to the Behavior Analysis Services Coverage Policy (page 4, 4.1), these goals are not covered. The goals must be necessary to protect life, to prevent significant illness, significant disability, or to alleviate severe pain and be consistent with the symptoms of any diagnosis for which ABA is medically necessary. These are skills that do not require a behavior analyst to teach. They can be learned in a less costly and equally effective manner by someone not specifically trained in ABA. They are furnished in a manner primarily intended for the convenience of recipient, the recipient's caretaker, or the provider. The supporting documentation does not meet generally accepted practices within the field of applied behavior analysis and standards set forth in the Florida Behavior Analysis Services Coverage Policy. Specifically, the provider has failed to write an intervention plan that upholds the standards of care of applied behavior analysis. The plan lists procedures that include punishment and has not exhausted reinforcement-based strategies. There is no procedural safeguard or fading plan. Additionally, 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 on intervention methods), how you will

address human error. The provider has not addressed the lack of progress during the last observation period and did not amend the treatment plan in relation to the lack of progress or the proposed changes have little chance at improving behavior. The information submitted does not meet standards of care within the field of behavior analysis. This request is denied.

Id. at 25.

6. Petitioner requested reconsideration of the Respondent's decision. In a Notice of Reconsideration Determination ("NRD"), dated January 4, 2024, Respondent upheld its decision.

See RCE 1 at 36-39. The NRD explained the basis for the decision as follows:

PR Recon Determination: At reconsideration all documents were carefully reviewed. The provider has listed academic goals in this treatment plan ([REDACTED]). According to the Behavior Analysis Services Coverage Policy (page 4, 4.1), these goals are not covered. The goals are necessary to protect life, to prevent significant illness, significant disability, or to alleviate severe pain. That are not consistent with the symptoms of any diagnosis for which ABA is medically necessary. These are skills that do not require a behavior analyst to teach. They can be learned in a less costly and equally effective manner by someone not specifically trained in ABA. They are furnished in a manner primarily intended for the convivence of recipient, the recipient's caretaker, or the provider.

According to The Florida Medicaid 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 for which ABA therapy is medically necessary. There are behaviors that do not meet medical necessity criteria ([REDACTED]).

According to the Behavior Analysis Services Coverage Policy (page 5, 4.2.2), treatment for behaviors must be tied to the function of maladaptive behaviors. The treatment must be individualized, specific, and meet generally accepted standards of care within the field of behavior analysis. The provider includes a strategy of requiring the recipient to wear an [REDACTED]. This strategy is not a function based intervention.

The supporting documentation does not meet generally accepted practices within the field of applied behavior analysis and standards set forth in the Florida Behavior Analysis Services Coverage Policy. Specifically, the provider has failed to write an intervention plan that upholds the standards of care of applied behavior analysis. The plan lists procedures that include punishment ([REDACTED]) and has not exhausted reinforcement-based strategies. There is no procedural safeguard or fading plan.

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 on intervention methods), how you will address human error. The provider has not addressed the lack of progress during the last observation period and did not amend the treatment plan in relation to the lack of progress or the proposed changes have little chance at improving behavior. The information submitted does not meet standards of care within the field of behavior analysis. This denial is upheld.

Id. at 38.

7. On January 3, 2024, Petitioner requested a Fair Hearing to challenge the termination of ABA services. On January 30, 2024, the undersigned issued, to all parties of record, an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for February 22, 2024, at 10:00 a.m. EST. On February 23, 2024, the undersigned issued an Order Granting Continuance rescheduling the Fair Hearing to be convened by telephone on March 11, 2024, at 1:00 p.m. EST.

8. [REDACTED] submitted documentation of recent instances of Petitioner's dangerous behaviors which provides as follows:

[REDACTED]

[REDACTED]

See PCE 2 at 2.

9. Petitioner’s BCBA, [REDACTED], with [REDACTED], wrote a reconsideration letter dated February 27, 2024, explaining the reasons why progress was not made and proposed treatment changes. The letter states as follows:

I am writing this letter in response to [Petitioner]’s denial of ABA services in [REDACTED]. Please review the following documentation for [Petitioner]’s ABA consideration. We experienced human error with an employee working on [Petitioner]’s case. The Board Certified Assistant Behavior Analyst (BCaBA) that was working this case, is no longer working for the company. This BCaBA’s data may not be accurate and cannot be relied upon as [REDACTED] was undergoing professional training as indicated in our BACB ethics code. Human error observed includes: lack of phase change lines and descriptions of when changes/setting events occurred, lack of appropriate wording for goals related to [Petitioner]’s disability, missing description and detail in regards to definition of head holding, fading plan for [REDACTED], and including punishment which is not a consequence based intervention as described ([REDACTED]). [Petitioner] is in desperate need of ABA services. I am adding the following information to provide you with the changes that will be made going forward due to human error. I am hoping these changes will ensure that [Petitioner]’s progress is monitored regularly and appropriately modified to be individualized to [REDACTED]’s needs.

1. Case meetings- Due to the complexity of [Petitioner]'s needs, our company will be holding one case meeting per month to review [Petitioner]'s case with the entire ABA team including all ABA staff who have worked or may work on [redacted] case as fill ins on sick days. The parent is always invited to this meeting as well. This will provide the opportunity to practice training, review current programs together, discuss any behavior changes, and review intervention plan. Meeting minutes including a summary of meeting will be provided to all attendees of the meeting. If there are any tasks assigned, these will be stated and deadlines for completion (P. 92).
2. Monthly Progress Reports- Due to the complexity of [Petitioner]'s needs and increased severity of behavior since denial of ABA, monthly progress reports will be created and provided to the caregiver and reviewed at monthly caregiver training. Any questions regarding [redacted] maladaptive behavior can be addressed during this meeting alongside the acquisition goal for the parent (P. 92).
3. Weekly supervision with staff will continue to occur to ensure treatment fidelity is remaining at high levels by conducting an in-session competency with Interobserver agreement (IOA) collected on maladaptive behavior, skill acquisition and/or if intervention was implemented according to treatment plan. Graphs will be made of these separately for each staff member. These goals will be added (p. 90):
 - a. Staff will collect maladaptive behavior as it occurs with 100% fidelity for 2 consecutive observations. This goal will move to maintenance where it will be monitored for 3 months with at least one observation per month. Criteria for moving from maintenance to mastered is 6 months with 90% or higher IOA.
 - b. Staff will collect skill acquisition behavior data as it occurs with 100% fidelity for 2 consecutive observations. This goal will move to maintenance where it will be monitored for 3 months with at least one observation per month. The criteria for moving from maintenance to mastered is 6 months with 90% or higher IOA.
 - c. Staff will implement consequence interventions as directed in the treatment plan with 100% fidelity for 2 consecutive observations. This goal will move to maintenance where it will be monitored for 3 months with at least one observation per month. The criteria for moving from maintenance to mastered is 6 months with 90% or higher IOA.
4. [redacted] fading plan- Criteria for a fading protocol for [redacted] will be added to the treatment plan as follows: As behavior reaches zero levels for 1 month, [redacted] will be faded out to remove negative punishment and use positive reinforcement with the token economy only. As maladaptive behavior across all topographies demonstrates reduced levels to zero for 1 month, the token board will be faded out slowly by thinning the schedule of reinforcement (increasing the response effort

required for each token). If maladaptive continues to increase (demonstrating an increasing trend across 3 data points in an upward trend with no explanation and/or no explanation for variability) the [redacted] will be discontinued as this would demonstrate inadequate progress (p. 61, p. 68).

5. Maladaptive behavior- [redacted] definition will be updated to include more specific information: Any instance when [Petitioner] [redacted]
[redacted]
[redacted]
[redacted]
6. [redacted] will be removed from the treatment plan (p. 68) as this is not an ABA procedure. It is a safety protocol in the home for [Petitioner] but not an ABA intervention.
7. The following goals will be modified and upon next visit, baseline data will be collected.
 - a. [redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
8. [redacted] Currently, [Petitioner] is receiving Speech therapy, Occupational therapy, art therapy, music therapy, tumbling lessons and counseling services. We will continue to collaborate with all instructors working with [Petitioner] to ensure collaboration of [redacted] care including reviewing any behavioral excesses across environment. Currently, successful collaboration has occurred with music, speech and occupational therapies. [Petitioner]'s [redacted]
[redacted]
[redacted]. These professionals will be contacted once services resume to ensure a cohesive person-centered plan is created and each service is individualized to assist [Petitioner] become an independent [redacted]. This has been added to pg. 92.

See PCE 4 at 2-4.

10. 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 multi-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 ABA services were not “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” and “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.” *See* RCE 2 at 7.
- c. Dr. Hurley asserted that Petitioner has not shown progress with ■■■■ maladaptive behaviors and that the data graphs display large variability in occurrences. *See* ¶ 3.
- d. When the frequency of a behavior is not progressing, the BCBA must continually make modifications to treatment and reflect them on the graphs. *See* ¶ 16.
- e. Dr. Hurley argued that because Petitioner engages in high-risk behaviors, especially ■■■■, modifications to the treatment plan need to be made frequently. *See* ¶ 3, 6.
- f. Dr. Hurley testified that, based on the documentation provided, a modified reversal would reflect as follows: approve code 97153 at 3,016 units; approve code 97154 at 104 units; approve code 97155 at 208 units; deny code 97155 HN

at 520 units; approve code 97156 at 104 units; deny code 97156 HN at 104 units; approved code 97158 at 104 units.

11. [REDACTED] is Petitioner's legal guardian. [REDACTED] testified to the following at Fair Hearing:

- a. [REDACTED] argued that with ABA interventions Petitioner's behavior improved and [REDACTED]. Since the termination of ABA support Petitioner has been [REDACTED]. See ¶ 8.
- b. [REDACTED] contended that multiple less costly interventions have been used, but Petitioner's maladaptive behaviors continue. For example, Petitioner has a home health aide and a babysitter during the week. Petitioner has also tried attending school ([REDACTED]), but [REDACTED] argued that the letters from the school staff show this is unsuccessful. See PCE 1 at 2-15 and 20-22.
- c. [REDACTED] asserted that Petitioner's behavior hindered [REDACTED] access to education and puts [REDACTED] life at risk.

12. [REDACTED] is Petitioner's BCBA. [REDACTED] testified to the following at Fair Hearing:

- a. Petitioner's previous BCaBA is no longer with the provider and data may have been lost or may not have been accurately reflected in the Treatment Plan.
- b. [REDACTED] argued that in the opportunity for revision, the provider appropriately described the circumstances regarding poor data collection from the former BCaBA and included new modifications for future intervention. See ¶ 9.
- c. The provider does not have a replacement BCaBA.

CONCLUSIONS OF LAW

13. 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).

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

15. Because Respondent terminated a previously approved service, Fla. Admin. Code R. 59G-1.100(17)(g) assigns the burden of proof to the Respondent. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by “the greater weight of the evidence” (Black’s Law Dictionary at 1201, 7th Ed.)

16. The Florida Medicaid Behavior Analysis Services Coverage Policy (September 2023) (“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.

...

1.4.6 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 and Behavior Plan

A behavior assessment must be conducted prior to the initiation of behavior analysis interventions. The assessment must identify behavioral deficits that interfere with a major life activity including the events and subsequent interactions that elicit and sustain targeted behavior.

The initial assessment must include the administration, scoring, and reporting of two core standardized behavior instruments, as follows:

- Vineland-3 Comprehensive Parent Interview Form Including Maladaptive Behavior Domain, for all recipients
- Behavior Assessment System for Children, Third Edition, Parenting Relationship Questionnaire (BASC-3 PRQ), for all recipients 2 years old and less than 19 years old

The complete scoring report, including outcome measure scores, must be submitted with service prior authorization requests. Additional assessment tools may be used at the Lead Analyst's discretion.

The behavior plan identifies intervention strategies that are likely to eliminate, mitigate or replace the behavior to produce change sufficient to reengage the recipient in the major life activity. The plan must include specific behavior goal(s), intervention strategies for each goal, anticipated timeframes that are of sufficient duration to address the targeted behavior, and how the ongoing progress of intervention strategies will be reported.

The behavior plan must reflect the requested authorization period (up to six months).

A reassessment and updated behavior plan to renew prior authorization for continued services must be completed at least every six months. The core instruments must be included with reassessments every 12 months.

More frequent assessments must be conducted when:

- New behavior emerges that interferes with a recipient's participation in a major life activity
- Additional BA services are medically necessary and are likely to address the emergent behavior

A full assessment may be requested if there is a change in provider; however, a change of a practitioner status (e.g., an RBT becoming certified as a BCaBA) is not grounds for conducting a reassessment or updating a behavior plan.

4.2.2 Behavior Analysis Interventions

Florida Medicaid covers up to 40 hours per week of BA intervention services as indicated in the recipient's prior-authorized behavior plan.

These services must be delivered to reduce maladaptive behaviors and assist the recipient reach the best possible functional level for that individual. The recipient's parent or guardian should participate in treatment when possible and clinically appropriate. The provider must make every effort to accommodate parental participation and must document those efforts in treatment plan updates. If parent or guardian participation is not possible, the treatment plan and session notes must document the reasons for nonparticipation. Documentation should also explain potential impacts of nonparticipation and how potential impacts are being mitigated.

Services include:

- Adaptive behavior treatment by protocol – behavior analysis services provided according to the authorized treatment protocol
 - Services may be provided by Lead Analyst, BCaBA, or RBT
- Adaptive behavior treatment with protocol modification – behavior analysis services provided with modifications to the authorized treatment protocol to address behavior and/or response changes or progress
 - Services may be provided by Lead Analyst or BCaBA
- Group adaptive behavior treatment by protocol – behavior analysis services provided in a group setting according to the authorized treatment protocol
 - Maximum group size is six recipients
 - Services may be provided by Lead Analyst, BCaBA, or RBT
- Group adaptive behavior treatment with protocol modification – behavior analysis services provided in a group setting with modifications to the authorized treatment protocol to address behavior and/or response changes or progress
 - Maximum group size is six recipients
 - Services may be provided by Lead Analyst or BCaBA
- Family adaptive behavior treatment guidance – parent, guardian, and/or caregiver training on the implementation of the behavior plan and intervention strategies
 - The recipient may or may not be present depending upon clinical appropriateness
 - Services may be provided by Lead Analyst or BCaBA
 - The Lead Analyst may provide up to two hours per week of training to parents or guardians via telemedicine in accordance with Rule 59G-1.057, Florida Administrative Code (F.A.C.)

4.2.3 Supervision

Florida Medicaid requires supervision of BCaBAs and RBTs in accordance with certification board requirements and specified in the supervision plan of the approved behavior plan.

4.2.4 Discharge

Recipients receiving Florida Medicaid BA services who meet one or more of the following will be considered for discharge from services:

- The recipient is no longer eligible for BA services as outlined in the Florida Medicaid Behavior Analysis Services Coverage Policy, incorporated by reference in Rule 59G-4.125, F.A.C.
- The recipient no longer meets medical necessity criteria as defined in Rule 59G- 1.010, F.A.C.
- The recipient no longer engages in maladaptive behaviors.
- Data indicates the frequency and severity of maladaptive behavior(s) or level of functional impairment no longer poses a barrier to the recipient’s ability to function in his/her environment.
- The level of functional impairment as expressed through behaviors no longer justifies continued BA services.
- Parent or guardian withdraws consent for treatment

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 Authorization Requirements Policy.

...

6.2.2 Behavior Assessment and Behavior Plan

The behavior assessment and behavior plan must be signed by the Lead Analyst and the recipient’s parent or guardian. Each behavior assessment and behavior plan must include:

- Patient information
- Reason for referral
- Medical and developmental history, including medications prescribed to ameliorate behaviors
- Relevant family history
- Clinical interview
- Review of recent assessments/reports (file review)
- Assessment procedures and results
- Behavior plan

- Treatment setting(s)
- Proposed treatment targets, goals, and objectives related to medically necessary behavioral interventions
- For each:
 - Definition in observable, measurable terms
 - Direct observation and measurement procedures
 - Current level (baseline)
 - Behavior reduction or acquisition procedures
 - Condition(s) under which behavior is to be demonstrated and mastery criteria
 - Date of introduction
 - Estimated date of mastery
 - Plan for generalization
 - Timely reporting of progress, including statements as to whether goal or objective is met; not met; or, modified (with explanation)
- Parent/guardian/caregiver training
 - Proposed targets, goals, and objectives (as above)
 - Training procedures
 - Date of introduction
 - Estimated date of mastery
- Number of units requested
 - Number of units for each billing code
 - Medical necessity for units requested
- Supervision plan, including name(s) of authorized supervisor(s)
- Care coordination with parents/caregivers, schools, state disability programs, and others as applicable
- Transition (fading) plan
- Crisis management plan
- Discharge plan

6.2.3 Assessment and Behavior Plan for Reauthorization and Continuation of Services

In addition to the documentation requirements indicated in 6.2.2, subsequent assessments and behavior plans for reauthorization and continuation of services must include:

- Data reflecting progress of all behaviors targeted for improvement. Each behavior under treatment must have its own data table and corresponding graph.
- A narrative discussion of progress and a statement of justification for continuation of care at the intensity level requested.

If significant clinical progress is not made over the course of an authorization period, the provider must explain why clinically significant progress was not made and treatment changes to promote progress.

See RCE 2 at 41, 43-47.

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.

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.

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]

[REDACTED]. See ¶ 2. Petitioner requested recertification of ABA services. See ¶ 4. In a NOO, dated December 14, 2023, Respondent terminated the services. See ¶ 5. Respondent cited to the medical necessity criteria as the basis for their decision, specifically that the services were “duplicative of services being rendered by another party” and not “consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational.” See ¶ 5-6. 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. Respondent has the burden of proof to show by a preponderance of evidence that the Respondent's termination of BA services was correct. See ¶ 15.

22. The BA Policy maintains that the “[behavior] plan must include specific behavior goal(s), intervention strategies for each goal, anticipated timeframes that are of sufficient duration to address the targeted behavior, and how the ongoing progress of intervention strategies will be reported.” See ¶ 16. Behavior plans for reauthorization and continuation of services must also

include “a narrative discussion of progress and a statement of justification for continuation of care at the intensity level requested.” See ¶ 16.

23. Petitioner has requested the same level of services as in the previous authorization period. See ¶ 4. The eQHealth reviewers agreed that the information submitted by the provider in the Treatment Plan did not include information to satisfy the medical necessity criteria for ABA services. See ¶ 4-6, 20. At Fair Hearing, Dr. Hurley pointed out several discrepancies with the lack of Petitioner’s progress and the lack of interventions in the Treatment Plan as not consistent with accepted standards of care in the field of behavior analysis. See ¶ 10, 16, 19.

24. Petitioner is engaging in the following maladaptive behaviors: [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. See ¶

3. [REDACTED] argued that with ABA interventions Petitioner’s behavior improved but since the termination of services [REDACTED] behavior has worsened. See ¶ 8, 11. [REDACTED] asserted these behaviors include [REDACTED] that Petitioner continues to engage in at home and in the community. See ¶ 11. [REDACTED] further argued that multiple less costly methods have been used such as having a babysitter and home health aide, and attending school, which have been unsuccessful. See ¶ 11. Petitioner’s BCBA, [REDACTED], testified that Petitioner’s former BCaBA is no longer with this provider and data may have been lost or may not have been accurately reflected in the Treatment Plan. See ¶ 12.

25. In light of [REDACTED]’s and [REDACTED]’s testimony, Respondent requested revision of the Treatment Plan and an opportunity for review. With the additional evidence submitted, Dr. Hurley agreed to request a modified reversal of Respondent’s determination. As Dr. Hurley testified, the modified reversal would amount to a reduction rather than a termination of


Petitioner's ABA services. See ¶ 2-3, 8-12. The modified reversal would approve all requested services except code 97155HN at 520 units and code 97156HN at 104 units. Although eQHealth did not respond to Petitioner's Composite Exhibit 4, based on statement of the parties on the record, the undersigned anticipates that the parties will continue to confer regarding this matter.

26. Looking at all the evidence relevant to the particular needs of Petitioner, Respondent has not demonstrated that BA services, based on the Treatment Plan at issue in this case, are no longer medically necessary. Accordingly, Respondent did not prove by a preponderance of the evidence that Respondent's termination of ABA services was correct.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

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

DONE AND ORDERED this 11th day of April, 2024 in Tallahassee, Leon County, Florida.

 Kimberly Roche
24-FH0033
2024.04.11 08:25:36
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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]
[REDACTED]

AHCA Medicaid Hearing Unit
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