



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

FILED

Apr 26, 2024, 12:13 pm

OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 24-FH0044

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 February 21, 2024, at 10:04 a.m. EST.

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 applied behavior analysis ("ABA") services was correct.

PRELIMINARY STATEMENT

All parties and witnesses appeared telephonically. Petitioner's Authorized Representative and [REDACTED], [REDACTED] (" [REDACTED]"), appeared on behalf of the Petitioner. Lee Ann Williams, Medical Health Care Program Analyst for the Agency for Health Care Administration

("Agency" or "AHCA"), appeared on behalf of Respondent. Dr. Kathy Hurley, ("Dr. Hurley"), BCBA at the Doctorate level and second level reviewer for eQHealth Solutions, appeared as a witness for Respondent. Translation services were performed by Cynthia from Language Line Solutions, I.D. Number 424566.

Petitioner did not introduce any exhibits at the hearing.

Prior to the Hearing, the Respondent sent the Office of Fair Hearings and Petitioner a three hundred and fifty-two (352)-page proposed evidence package and a fifty (50)-page evidence package that were admitted into evidence without objection. The three hundred and fifty-two (352)-page exhibit is herein identified as "Respondent's Composite Exhibit 1" and appears in the Office of Fair Hearings' case management system as "[REDACTED] FH 01.21.24 1-164.pdf", "[REDACTED] FH 01.21.24 165-310.pdf", and "[REDACTED] FH 01.21.24 311-352.pdf". The fifty (50)-page exhibit is identified herein as "Respondent's Composite Exhibit 2" and appears in the Office of Fair Hearings' case management system as "24-FH0044 – Agency Evidence Legal Authorities 50 pgs.pdf".

FINDINGS OF FACT

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

2. Petitioner is a [REDACTED] and has been diagnosed with [REDACTED]
[REDACTED] See Respondent's Composite Exhibit 1, page 22. The Petitioner has been receiving ABA services with

- c. The Treatment Plan tracks the progress in reducing maladaptive behaviors on a weekly basis, which Dr. Hurley testified is contrary to the standard of care for ABA treatment that tracks data points and progress at every session. The weekly Treatment Plan Graph for the maladaptive behavior of "[REDACTED]" reflects minimal progress in reducing the maladaptive behavior and there are no modifications or changes reflected on the Graph in the Treatment Plan. See Respondent's Composite Exhibit 1, page 292.
- d. The Treatment Plan tracks the progress in reducing maladaptive behaviors on a weekly basis, which Dr. Hurley testified is contrary to the standard of care for ABA treatment that tracks data points and progress at every session. The weekly Treatment Plan Graph for the maladaptive behavior of "[REDACTED]" reflects minimal progress in reducing the maladaptive behavior and there are no modifications or changes reflected on the Graph in the Treatment Plan. See Respondent's Composite Exhibit 1, page 293. Dr Hurley testified this maladaptive behavior is very serious because it is a [REDACTED] that can lead to other deficiencies and [REDACTED] a week is very high. *Testimony of Dr. Hurley.*
- e. The Treatment Plan tracks the progress in reducing maladaptive behaviors on a weekly basis, which Dr. Hurley testified is contrary to the standard of care for ABA treatment that tracks data points and progress at every session. The weekly Treatment Plan Graph for the maladaptive behavior of "[REDACTED]" reflects minimal progress in reducing the maladaptive behavior and there are no modifications or changes reflected on the Graph in the Treatment Plan. See Respondent's Composite Exhibit 1, page 294.
- f. The Treatment Plan tracks the progress in reducing maladaptive behaviors on a weekly basis, which Dr. Hurley testified is contrary to the standard of care for ABA treatment that tracks data points and progress at every session. The weekly Treatment Plan Graph for the maladaptive behavior of "[REDACTED]" reflects minimal progress in reducing the maladaptive behavior and there are no modifications or changes reflected on the Graph in the Treatment Plan. See Respondent's Composite Exhibit 1, page 295.
- g. The Treatment Plan tracks the progress in reducing maladaptive behaviors on a weekly basis, which Dr. Hurley testified is contrary to the standard of care for ABA treatment that tracks data points and progress at every session. The weekly Treatment Plan Graph for the maladaptive behavior of "[REDACTED]" reflects minimal progress in reducing the maladaptive behavior, a high variability in the results, and there are no modifications or changes reflected on the Graph in the Treatment Plan. See Respondent's Composite Exhibit 1, page 297.
- h. The Treatment Plan tracks the progress in reducing maladaptive behaviors on a weekly basis, which Dr. Hurley testified is contrary to the standard of care for ABA treatment that tracks data points and progress at every session. The weekly Treatment Plan Graph for the maladaptive behavior

of "[REDACTED]" reflects minimal progress in reducing the maladaptive behavior and there are no modifications or changes reflected on the Graph in the Treatment Plan. See Respondent's Composite Exhibit 1, page 298.

- i. The Treatment Plan tracks the progress in reducing maladaptive behaviors on a weekly basis, which Dr. Hurley testified is contrary to the standard of care for ABA treatment that tracks data points and progress at every session. The weekly Treatment Plan Graph for the maladaptive behavior of "[REDACTED]" reflects minimal progress in reducing the maladaptive behavior and there are no modifications or changes reflected on the Graph in the Treatment Plan. See Respondent's Composite Exhibit 1, page 299.
- j. The Treatment Plan tracks the progress in reducing maladaptive behaviors on a weekly basis, which Dr. Hurley testified is contrary to the standard of care for ABA treatment that tracks data points and progress at every session. The weekly Treatment Plan Graph for the maladaptive behavior of "[REDACTED]" reflects minimal progress in reducing the maladaptive behavior, variability of success, and there are no modifications or changes reflected on the Graph in the Treatment Plan. See Respondent's Composite Exhibit 1, page 301.
- k. The Treatment Plan tracks the progress in reducing maladaptive behaviors on a weekly basis, which Dr. Hurley testified is contrary to the standard of care for ABA treatment that tracks data points and progress at every session. The weekly Treatment Plan Graph for the maladaptive behavior of "[REDACTED]" reflects minimal progress in reducing the maladaptive behavior and there are no modifications or changes reflected on the Graph in the Treatment Plan. See Respondent's Composite Exhibit 1, page 302.
- l. The Treatment Plan tracks the progress in reducing maladaptive behaviors on a weekly basis, which Dr. Hurley testified is contrary to the standard of care for ABA treatment that tracks data points and progress at every session. The weekly Treatment Plan Graph for the maladaptive behavior of "[REDACTED]" reflects minimal progress in reducing the maladaptive behavior and there are no modifications or changes reflected on the Graph in the Treatment Plan. See Respondent's Composite Exhibit 1, page 289.

6. The Treatment Plan data graphs for replacement behaviors designed to replace the Petitioner's maladaptive behaviors reflect increases in percentages to show independence through the Petitioner's entire treatment plan. More specifically, the replacement behavior graphs show as follows:

- a. The Treatment Plan reflects that the first of the Short Term Objectives (“STOs”) “... has not yet been reached in any of the targeted behaviors, indicating that the behaviors have not stabilized during the six consecutive weeks required by this first objective.” See Respondent’s Composite Exhibit 1, page 249. Dr. Hurley testified that this is significant because after [REDACTED] of therapy, the STOs should be at [REDACTED]. [REDACTED] further testified that every week in which there is not significant progress on reducing the targeted behaviors, revisions and/or modifications need to be made to avoid the maladaptive behaviors from becoming a habit.
- b. Dr. Hurley testified that the replacement behavior of “[REDACTED]” is beyond the scope of ABA and is contrary to professional standards of ABA therapy. See Respondent’s Composite Exhibit page 266. Dr. Hurley testified [REDACTED] is not scientific based in that it can not be objectively measured, and is considered a “side effect” of ABA therapy. Dr. Hurley further testified that [REDACTED] is something that can be accomplished with a less expensive therapy than ABA. See Respondent’s Composite Exhibit 2, page 7, paragraph 4.
- c. Dr. Hurley testified that the Treatment Plan with respect to “[REDACTED]” is not individualized or specific to the treatment of a [REDACTED] and is contrary to the Medicaid provisions of “medical necessity” that requires all treatment to be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment. See Respondent’s Composite Exhibit 2, page 7.
- d. The Treatment Plan refers to the Petitioner as a [REDACTED] and stated “... [REDACTED] [REDACTED]” See Respondent’s Composite Exhibit 1, page 280. Dr. Hurley testified that [REDACTED] a patient is alone sufficient to deny the continuation of a Treatment Plan and demonstrates that the treatment is not individualized for a [REDACTED].
- e. The Treatment Plan discusses new replacement behaviors that have been added to the ABA therapy of the Petitioner and again refers to the Petitioner as a [REDACTED]. See Respondent’s Composite Exhibit 1, pages 312 and 315. Again, Dr. Hurley testified that [REDACTED] a patient is alone sufficient to deny the continuation of a Treatment Plan and demonstrates that the treatment is not individualized for a [REDACTED].
- f. The Treatment Plan reflects a replacement behavior for instilling “[REDACTED]”. See Respondent’s Composite Exhibit 1, page 315. Dr. Hurley testified that “[REDACTED]” is not objective or measurable, and that there is a less costly therapy other than ABA that could help instill “[REDACTED]”.

7. On December 26, 2023, the Respondent issued a Notice of Outcome (“NOO”), terminating Petitioner’s BA services. See Respondent’s Composite Exhibit 1, pages 30-34. 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. Specifically, the requested services are not medically necessary under the following standard(s):

Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs.
Consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational.

Id. 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 inconsequence-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.

8. The Petitioner requested reconsideration of the Respondent's decision. On January 3, 2024, Respondent issued a Notice of Reconsideration Determination ("NRD") upholding its decision. See Respondent's Composite Exhibit 1, pages 42-46. The NRD states, in pertinent part as follows:

The reason for the denial is that the services are not medically necessary as defined in 59G-1.010, Florida Administrative Code. Specifically the services must be:

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

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

The rationale for our decision is as follows:

PR Recon Determination: At reconsideration, all documents were carefully reviewed. The treatment plan is not individualized to this recipient ([REDACTED]). Calming/coping/relaxation strategies, social stories, and sensory alternatives are not empirically supported procedures within the conceptual system of behavior analysis for treating the functions of maladaptive behavior. According to Behavior Analysis Services Coverage Policy (page 2, 1.1), treatment that does not meet generally accepted standards of care within the field of applied behavior analysis are not covered under the behavior analysis service coverage policy. The provider has listed goals in this treatment plan that do not meet medical necessity criteria ([REDACTED]). 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 the recipient, the recipient's caretaker, or

the provider. 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. The denial is upheld.

...

Id.

9. Dr. Hurley testified that ABA providers must stay within the scope of ABA therapy standards and, as reflected in the Treatment Plan, are not within the scope of ABA therapy in this case. Dr. Hurley further testified that the Petitioner has been receiving ABA therapy since [REDACTED] and that the therapy received by the Petitioner is ineffective, and that the record in this matter reflects the Petitioner could benefit from effective ABA therapy. Dr. Hurley further testified that the Treatment Plan for the Petitioner was terminated because it was not medically necessary in that it did not meet three (3) of the five (5) criteria of medical necessity. Specifically, the Treatment Plan was 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.

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.

See Fla. Admin. Code R. 59G-1.010(166)(a), (c) at Respondent's Composite Exhibit 2, page 7 and

Testimony of Dr. Hurley.

10. [REDACTED], the Petitioner's [REDACTED], testified that [REDACTED] has not had any "changes" since [REDACTED] has been receiving ABA therapy services from [REDACTED]. [REDACTED] also testified that [REDACTED] will soon obtain another assessment from [REDACTED] neurologist and that [REDACTED] is going to wait and see what that the assessment shows before making any decisions on the ABA care of [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 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. The burden of proof in this proceeding is governed by Fla. Admin. Code R. 59G-1.100(17)(g), which provides as follows:

The burden of proof is on the party asserting the affirmative of an issue, except as otherwise required by statute. The burden of proof is on the Agency or plan, whichever is applicable, when the issue presented is the suspension, reduction, or termination of a previously authorized service. The burden of proof is on the recipient or enrollee when the issue presented is the denial or a limited authorization of a service. The party with the burden of proof shall establish its

position to the satisfaction of the Hearing Officer by a preponderance of the evidence.

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

15. 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).

16. 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. A state may place medical necessity limitations on EPSDT services. *See* 42 C.F.R. §§ 440.230(a), (b), (d).

18. 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, incorporated by reference in Fla. Admin. Code R. 59G-1.010, defines “Medically Necessary” or “Medical Necessity” as follows:

The medical or allied care, goods, or services furnished or ordered must meet the following conditions:

- Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate pain
- Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient’s needs
- Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational
- Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide
- Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient’s caretaker, or the provider

The fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service.

Respondent’s Composite Exhibit 2 at page 23.

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

...

1.4.6 Medically Necessary/Medical Necessity

As defined in Rule 59G-1.010, F.A.C.

...

2.0 Eligible Recipient

...

2.2 Who Can Receive

Florida Medicaid recipients under the age of 21 years requiring BA services that are medically necessary to address behavior that impairs a recipient's ability to perform a major life activity. Such functional impairment is expressed through the following behaviors:

- Safety – aggression, self-injury, property destruction, elopement
- Communication – problems with expressive/receptive language, poor understanding or use of non-verbal communications, stereotyped, repetitive language
- Self-stimulating – abnormal, inflexible, or intense preoccupations
- Self-care – difficulty recognizing risks or danger, grooming, eating, or toileting
- Other behaviors not identified above but not limited to complexity of treatment, programming, or environmental variables

The recipient must be referred by an independent physician or practitioner qualified to assess and diagnose disorders related to functional impairment, including:

- Primary care physician with family practice, internal medicine, or pediatric specialty
- Board certified or board eligible physician with specialty in developmental behavioral pediatrics, neurodevelopmental pediatrics, pediatric neurology, adult or child psychiatry
- Child psychologist

The referral must include a comprehensive diagnostic evaluation (CDE) performed according to national evidence-based practice standards. CDEs may be performed by a multidisciplinary team or individual practitioner. In either case, the CDE must be led by a licensed practitioner working within their scope of practice. The CDE must include assessment findings and treatment recommendations appropriate to the recipient. For example, the CDE may include data from behavioral reports by parents, guardians, and/or teachers; diagnostic testing related to recipients' development, behavior, hearing, and/or vision; genetic testing; and/or other neurological and/or medical testing.

Some services may be subject to additional coverage criteria as specified in section 4.0.

...

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 reassessment 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 function level for that individual. Services include:

- Adaptive behavior treatment by protocol - behavior analysis services provided according to the authorized treatment protocol
 - o 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
 - o 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
 - o Maximum group size is six recipients
 - o 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
 - o Maximum group size is six recipients
 - o 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
 - o The recipient may or may not be present depending upon clinical appropriateness.
 - o Services may be provided by Lead Analyst or BCaBA
 - o 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.)

...

4.2.4 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 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 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 Authorization Requirements Policy.

...

5.0 Exclusion

5.1 General Non-Covered Criteria

Services related to this policy are not covered when any of the following apply:

- The service does not meet the medical necessity criteria listed in section 1.0
- The recipient does not meet the eligibility requirements listed in section 2.0
- The service unnecessarily duplicates another provider’s service

5.2 Specific Non-Covered Criteria

Florida Medicaid does not cover the following as part of this service benefit:

- Any procedure or physical crisis management technique that involves the use of seclusion or manual, technical, or chemical restraint utilized to control behaviors
- Services for the delivery of recipient supervision, personal care assistance (e.g., acting as a 1:1 aid), companion, chaperone, or shadow regardless of activity or setting. This may include supports and services that are reimbursed through a different Florida Medicaid service benefit or are able to be provided by individuals without professional skills or training.
- Caregiver or childcare services
- Psychological testing, neuropsychology, psychotherapy, cognitive therapy, sex therapy, psychoanalysis, hypnotherapy, or long-term counseling
- Services funded under section 110 of the Rehabilitation Act of 1973
- Services not listed on the fee schedule
- Services on the same day as behavioral health overlay services*
- Services on the same day as therapeutic behavioral on-site services*

- Services on the same day as therapeutic group care services*
- Services provided simultaneously by more than one BA provider, unless determined to be medically necessary, prior authorized, and indicated in the approved behavior plan
- Travel Time

* These services include behavior analysis treatment.

Florida Medicaid may cover some services listed in this section through a different service benefit.

6.0 Documentation

6.2 Specific Criteria

Providers must maintain the following documentation in the recipient's file:

6.2.1 Referral Information

Original referral documentation must be maintained in the recipient's medical record.

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 authorized period, the provider must explain why clinically significant progress was not made and treatment changes to promote progress.

...

Pages 1 – 8 of ABA Policy.

21. The Florida Medicaid Authorization Requirements Policy (“Authorization Requirements Policy”) (June 2016), incorporated by reference in Fla. Admin. Code R. 59G-1.053, provides general requirements for providers to obtain authorization to render Florida Medicaid services.

The Authorization Requirements Policy states, in pertinent part:

3.0 Determination Process

3.1 Review Criteria

The QIO may use a national standardized set of criteria, or other set of criteria, approved by AHCA, as a guide for authorizations performed at the first review level. If services cannot be approved at the first level review, the QIO's physician peer reviewer will determine medical necessity using his or her clinical judgment, acceptable standards of care, state and federal laws, and AHCA's medical necessity definition.

3.2 Review Process

The QIO will review each authorization request and will approve, deny, or request additional information. The QIO may deny a portion of the requested units of service if it cannot substantiate medical necessity based upon the information submitted.

3.2.1 Continued Authorization Requests

The QIO shall not deny or reduce the amount, frequency, or duration of a service that is already being provided, unless:

- The reduction is to correct for factual errors or omissions in prior certifications.
- There is a documented improvement in the recipient's medical condition.
- There is a documented change in the recipient's circumstances.
- The reviewing physician determines the recipient will not gain any additional benefit by continuing services at the current level.

Respondent's Composite Exhibit 2, pages 32-34.

22. In this case, Respondent terminated Petitioner's BA services. The NOO and NRD explained that Petitioner's request for continuation of services did not meet medical necessity as the Treatment Plan was ineffective and does not meet the medical standards of care within the field of behavior analysis. See supra ¶¶ 7 and 8.

23. As provided in the ABA policy and the EPSDT requirements, the services at issue must meet the medical necessity criteria outlined in Fla. Admin. Code R. 59G-1.010. Three (3) of the five (5) components of medical necessity that Dr. Hurley testified are not met in this case are that the BA services must 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;

Consistent with generally accepted professional medical standards as determined by the Medicaid program; and

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.

See supra ¶¶ 5 and 9.

24. Dr. Hurley established that the Treatment Plan was not individualized, specific, and consistent with the Petitioner's symptoms or confirmed diagnosis, not consistent with generally accepted professional medical standards as determined by the Medicaid program and not 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. As Dr. Hurley testified, the Treatment Plan is ineffective in that the decreases in maladaptive behaviors and increases in replacement behaviors were insufficient, and that there were no modifications to the Treatment Plan to address the lack of progress. See supra ¶¶ 5 and 9. The testimony of Dr. Hurley demonstrates by a preponderance of the evidence that the Petitioner's Treatment Plan was ineffective, did not meet the professional medical standards of ABA services, was not individualized, specific, and consistent with the Petitioner's symptoms or confirmed diagnosis, and that an equally effective and more conservative or less costly treatment is available.

25. Dr. Hurley established that the Treatment Plan did not meet the generally accepted professional medical standards as determined by the Medicaid program because the Petitioner's Treatment Plan was ineffective, and after [REDACTED] of ABA services with the current ABA Provider, there should have been significantly more progress in the decrease of the Petitioner's maladaptive behaviors, and more progress in the increase of the Petitioner's replacement behaviors and skills. See supra ¶¶ 5 and 10.

26. Dr. Hurley further established that the Petitioner’s Treatment Plan is not 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 supra ¶¶ 5 and 10.


27. For the foregoing reasons, the Respondent has demonstrated by a preponderance of the evidence that the requested BA services [REDACTED], do not meet medical necessity criteria.

28. Looking at all the evidence relevant to the particular needs of Petitioner, the Respondent has demonstrated that the previously authorized services, based on the Treatment Plan at issue in this case, are not necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, Respondent has demonstrated by a preponderance of the evidence that Respondent’s termination of ABA services was correct.

DECISION

Respondent’s termination of Behavior Analysis services is **AFFIRMED**. Petitioner’s appeal based on Respondent’s termination of Behavior Analysis services is **DENIED**.

DONE and **ORDERED** this 26th day of April 2024, in Tallahassee, Leon County, Florida.

Laura Gallagher
for Alan Leifer 24-
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ALAN LEIFER, 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]
[REDACTED]

AHCA Medicaid Hearing Unit
MedicaidHearingUnit@ahca.myflorida.com