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

FILED
May 09, 2024, 12:32 pm
OFFICE OF FAIR HEARINGS

[redacted],

PETITIONER, **AHCA Case No.: 24-FH0249**

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION,

RESPONDENT.
________________________________/

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on March 13, 2024, at 10:04 a.m. Eastern Standard Time ("EST").

APPEARANCES

For the Petitioner:	[redacted] Petitioner's Authorized Representative
For the Respondent:	Linda Latson Registered Nurse Specialist Agency for Health Care Administration

STATEMENT OF ISSUE

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent's decision to deny additional 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 for Fair Hearing to provide testimony on behalf of Petitioner. [redacted] ("[redacted]"), Board Certified Behavior Analyst ("BCBA") for [redacted] ("[redacted]"), appeared for Fair Hearing as a witness for Petitioner.

Linda Latson, Registered Nurse Specialist and Fair Hearing Liaison for the Agency for Health Care Administration ("Agency" or "AHCA"), appeared for Fair Hearing as representative for Respondent. Dr. Alyssa Conway ("Dr. Conway"), Board Certified Behavior Analyst ("BCBA") at the doctoral level and Second Level Reviewer for eQHealth Solutions Florida ("eQHealth"), attended as a witness for Respondent.

Petitioner did not introduce any exhibits at the hearing.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred thirty-six (136)-page evidence packet and a forty-nine (49)-page evidence packet. The one hundred thirty-six (136)-page packet appears in the Office of Fair Hearings document management system as the file title "[redacted] FH 03.13.2024 1-92.pdf" and "[redacted] FH 03.13.2024 93-136.pdf." The forty-nine (49)-page evidence packet appears in the Office of Fair Hearings document management system as the file title "24-FH0249 AHCA Evidence BA Svcs 49 Pages.pdf." Absent an objection from the Petitioner, the undersigned admitted the one hundred thirty-six (136)-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").

<u>FINDINGS OF FACT</u>

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 new requests for services. *See* RCE 2 at page 2.

2. Petitioner is [redacted]. *See* RCE 1 at 21. Petitioner is diagnosed with [redacted]. *Id.* Petitioner is [redacted]. *Id*. at 48-50.

3. As provided in the Behavior Analysis Treatment Plan ("Treatment Plan") submitted by [redacted], Petitioner is engaging in the following maladaptive behaviors: [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted]. *Id*. at 55-56. As provided in the Treatment Plan, Petitioner's incidents of maladaptive behaviors, for the period of June 2023 to November 2023, are as follows: for [redacted], Petitioner's incidents remained at [redacted]; for [redacted], Petitioner's incidents began and ended at [redacted]; for [redacted], Petitioner's incidents began and ended at [redacted]; for [redacted], Petitioner's incidents remained at [redacted]; for [redacted], Petitioner's incidents began and ended at [redacted]; for [redacted], Petitioner's incidents began and ended at [redacted]; and, for the period of October 23, 2023 to November 28, 2023, for [redacted], Petitioner's incidents began and ended at [redacted]. *Id.* at 65-68.

4. Petitioner requested additional ABA services for the certification period of December 10, 2023, to June 6, 2024; specifically, 2,080 units of code 97153; 520 units of code 97155; and 104 units of code 97156. *Id*. at 23. In a Notice of Outcome ("NOO"), dated December 22, 2023, Respondent approved 1,768 units of code 97153, 458 units of code 97155, and 104 units of code

97156, but denied the remaining units of codes 97153 and 97155. *Id.* at 23-25. The NOO explained the basis for the denial as follows:

> [T]he requested services are not medically necessary under the following standard(s):
>
> Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs.

The NOO further provided:

> PR Principal Rationale – Denial:
> Submitted information does not support the medical necessity for requested frequency and/or duration.
>
> PR Clinical Rationale - Denial:
> Partial Denial
> According to Behavior Analysis Services Coverage Policy page 3, 1.1 of the Policy, requests for services must be made based on the medical necessity of the recipient's maladaptive behaviors and skill deficits. The recipient is engaging in problem behaviors that threaten across to typical environments and negatively affects activities of daily living. However, the frequency, intensity, or severity of recipient's maladaptive behaviors does not justify the requested units of services. The requested units of BA services are in excess of medical necessity.

Id. at 23-24.

5. On January 22, 2024, Petitioner requested a Fair Hearing to challenge the denial of additional ABA services. On February 13, 2024, the undersigned issued an Order Scheduling Fair Hearing and Prehearing Instructions, setting the hearing for March 13, 2024, at 10:00 a.m. EST.

6. [redacted] is Petitioner's [redacted]. [redacted] testified to the following:

   a. ABA services are provided in the clinic setting where there is majority [redacted].

   b. [redacted] believes Petitioner has made incredible progress, especially in [redacted], because of [redacted] ABA therapy.

c. Petitioner started with a [redacted].

d. [redacted] argued that the request for additional hours is for Petitioner's and other's safety due [redacted]. *Id*. at 50.

e. [redacted] argued that Petitioner engages in [redacted]

f. [redacted] further argued that Petitioner looks forward to working [redacted] *Id*. at 52.

7. [redacted] is a BCBA at [redacted]. [redacted] testified to the following:

a. [redacted] explained that when Petitioner originally started with the provider, [redacted] had intense [redacted] that decreased over time while working with [redacted], [redacted] *Id*. at 51-52, 135.

b. [redacted] explained that if [redacted]

c. [redacted] argued that Petitioner is [redacted]. *Id*. at 52.

d. [redacted] further explained that Petitioner [redacted] at 51.

e. [redacted] argued that the reason for the requested increase is to start transitioning therapy with [redacted] technicians under code 97153 and increase the amount of corresponding supervision by the BCBA under code 97155 in case of [redacted] or [redacted]

f. [redacted] testified that treatment would implement communication goals to increase replacement skills and modifications to [redacted] behavior protocols [redacted]

8. Dr. Conway is a BCBA at the doctoral level for eQHealth. Dr. Conway testified to the following:

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. As Dr. Conway testified, eQHealth uses a multi-level peer review process to determine the level of services needed to effectively implement a treatment plan. *See* RCE 1 at 23-24. Three eQHealth reviewers found that the Treatment Plan submitted did not meet the second criteria for medical necessity. *See* ¶ 4.

b. Dr. Conway contended that no rationale was provided for the increase of hours in the submitted Treatment Plan.

c. Dr. Conway argued that Petitioner has shown good progress with [redacted] maladaptive behaviors and skill acquisitions. *See* ¶ 3-4.

d. Dr. Conway opined that these skills such as such as "[redacted]" or "[redacted]" can be worked on across different activities and settings. *Id*. at 79-82.

e. Dr. Conway argued that the Treatment Plan can be effectively implemented with the previously authorized level of services. *See* ¶ 5-6.

CONCLUSIONS OF LAW

9. 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).

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

11. Because Petitioner requested additional ABA services, Fla. Admin. Code R. 59G-1.100(17)(g) assigns the burden of proof to the Petitioner. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" (Black's Law Dictionary at 1201, 7th Ed.)

12. 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 no duplicate another service
- Meet the criteria as specified in this policy

4.2 Specific Criteria

Florida Medicaid covers the following BA services in accordance with the applicable Florida Medicaid fee schedule(s), or as specified in this policy:

4.2.1 Behavior Assessment 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:

- o Vineland-3 Comprehensive Parent Interview Form Including Maladaptive Behavior Domain, for all recipients
- o 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.

. . .

4.3 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.

. . .

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, mechanical, 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

. . .

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

See RCE 2 at 41, 43-47.

13. 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.

14. Petitioner is under age 21, and therefore EPSDT applies to [redacted] request for services. However, a state may place medical necessity limitations on EPSDT services. *See* 42 C.F.R. §§ 440.230(a), (b), (d). Fla. Stat. § 409.905(2) limits EPSDT services with a medical necessity standard:

> The [Agency] shall pay for early and periodic screening and diagnosis of a recipient under age 21 to ascertain physical and mental problems and conditions and all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems and conditions, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

15. 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.

See RCE 2 at 23.

16. In the instant case, Petitioner is under 21 years of age and is diagnosed with [redacted]. *See* ¶ 2. Petitioner requested additional ABA services. *See* ¶ 4. In a NOO, dated December 22, 2023, Respondent approved the units of service, except for 312 units of codes 97153 and 62 units of 97155. *See* ¶ 4. Respondent cited the lack of medical necessity criteria as the basis for their decision, specifically that the requested additional hours of ABA services are "in excess of [Petitioner]'s needs." *See* ¶ 4. Petitioner has the burden of proof to show by a preponderance of evidence that the Respondent's determination was incorrect. *See* ¶ 11.

17. The record shows that Petitioner engages in maladaptive behaviors that qualify for ABA services. *See* ¶ 3, 6-7. The Petitioner's maladaptive behaviors as indicated in the Treatment Plan include [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted]. *See* ¶ 3. At Fair Hearing, Petitioner's [redacted], [redacted] testified that Petitioner is currently receiving ABA services in the clinic setting. *See* ¶ 6. According to testimony by [redacted], a BCBA at [redacted], when Petitioner originally started with the provider in [redacted], [redacted] had intense [redacted] that decreased over time, but [redacted]. *See* ¶ 7. In that same time period, [redacted] *See* ¶ 7. [redacted] believes Petitioner has made progress, especially in [redacted], because of [redacted] ABA therapy, but also argued that Petitioner needs to work on integrating a connection with [redacted]. *See* ¶ 6.

18. [redacted] argued that the reason for the requested increase is to start transitioning Petitioner's therapy with [redacted] technicians under code 97153 and increase the amount of corresponding supervision by the BCBA under code 97155 in case of [redacted] or [redacted] *See* ¶ 7. [redacted] explained that Petitioner had a [redacted] *See* ¶ 7. The record shows Petitioner has made good progress with most of [redacted] maladaptive behaviors. *See* ¶ 3, 6, 8. Dr. Conway opined that skills such as such as "[redacted]" or "[redacted]" can be

worked on across different activities and settings. *See* ¶ 8. Petitioner is [redacted]. *See* ¶ 2. The record shows that Petitioner is [redacted]. *See* ¶ 2. Petitioner is not receiving other specialized therapies or outpatient counseling. *See* ¶ 2. [redacted]. *See* ¶ 6-7. The testimonies by [redacted] and [redacted] indicate that Petitioner has maladaptive behaviors and skill deficits that would require additional direct therapy. *See* ¶ 6-7. [redacted] testified that treatment would implement communication goals to increase replacement skills and modifications to [redacted] behavior protocols [redacted] *See* ¶ 7. All in all, the undersigned finds that the request for the additional hours of ABA services are not in excess of Petitioner's needs. *See* ¶ 15.

19. Upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned concludes that Petitioner proved by a preponderance of the evidence that the requested additional ABA services are medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner has demonstrated that the additional hours requested are medically 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 additional ABA services was incorrect.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

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

DONE AND ORDERED this 9th day of May, 2024 in Tallahassee, Leon County, Florida.

Kimberly Roche
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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]

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