RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

SHELLY EDGERTON
DIRECTOR

[redacted]

Date Mailed: July 20, 2016
MAHS Docket No.: 16-007245
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Robert J. Meade

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 upon Petitioner's request for a hearing.

After due notice, a hearing was held on July 19, 2016. [redacted], Petitioner's mother and guardian, appeared and testified on Petitioner's behalf.

[redacted], Fair Hearing Officer, represented Respondent, Community Mental Health Authority for Clinton, Eaton, Ingham Counties (Respondent or CMH). [redacted], Quality Improvement Specialist; [redacted], Adult Case Manager; [redacted], Coordinator for Life Consultations; [redacted], Supervisor for Life Consultations; and [redacted]; Program Director; appeared as witnesses for the CMH.

ISSUE

Did the CMH properly deny Petitioner's request for additional Community Living Supports (CLS) hours?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. Petitioner is an 18 year old Medicaid beneficiary, born [redacted], receiving services through CMH. (Exhibit B, p 1; Testimony)

2. CMH is under contract with the Department of Health and Human Services (MDHHS) to provide Medicaid covered services to people who reside in the CMH service area.

3. Petitioner is diagnosed with autism spectrum disorder; unspecified mood [affective] disorder; and epilepsy, unspecified, not intractable, without status epilepticus. (Exhibit B, p 10; Testimony)

4. Petitioner is 6'6" tall and weighs 230 pounds. Petitioner is fully ambulatory, but is completely non-verbal, communicating through gestures and vocalizations. (Exhibit B, p 11; Testimony)

5. Petitioner has tried many prescription medications for his autism in the past, but his doctor is concerned that the medications may affect his epilepsy. Petitioner is prescribed medication to control his seizures. (Exhibit B, p 2; Testimony)

6. Petitioner lives with his mother and has little contact with his father. Petitioner has few other informal supports in the area. (Exhibit B, p 11; Testimony)

7. Petitioner attends [redacted]), but only for three days per week for approximately three hours per day. (Exhibit B, pp 1, 11; Testimony)

8. Petitioner is currently authorized to receive 8 hours per day of Community Living Supports (CLS), plus 2 additional hours per day of CLS as an exception, for a total of 10 CLS hours per day. Petitioner also receives Targeted Case Management and Respite Services. (Exhibit C, p 5; Testimony)

9. Following Petitioner's Annual Assessment on [redacted], Petitioner's mother and guardian requested 20 additional CLS hours per week. (Exhibits A, 1; Testimony)

10. On [redacted], CMH sent Petitioner an Adequate Action Notice informing him that the request for 20 additional CLS hours per week had been denied. (Exhibit D, pp 1-5; Testimony)

11. Petitioner's request for hearing was received by the Michigan Administrative Hearing System on [redacted]. (Exhibit 1)

CONCLUSIONS OF LAW

The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). It is administered in accordance with state statute, the Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

> Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services.
>
> *42 CFR 430.0*

> The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program.
>
> *42 CFR 430.10*

Section 1915(b) of the Social Security Act provides:

> The Secretary, to the extent he finds it to be cost-effective and efficient and not inconsistent with the purposes of this subchapter, may waive such requirements of section 1396a of this title (other than subsection(s) of this section) (other than sections 1396a(a)(15), 1396a(bb), and 1396a(a)(10)(A) of this title insofar as it requires provision of the care and services described in section 1396d(a)(2)(C) of this title) as may be necessary for a State…

The State of Michigan has opted to simultaneously utilize the authorities of the 1915(b) and 1915(c) programs to provide a continuum of services to disabled and/or elderly populations. Under approval from the Centers for Medicare and Medicaid Services (CMS) the Department of Health and Human Services (MDCH) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver. CMH contracts with the Michigan Department of Health and Human Services to provide services under the waiver pursuant to its contract obligations with the Department.

Medicaid beneficiaries are entitled to medically necessary Medicaid covered services for which they are eligible. Services must be provided in the appropriate scope, duration, and intensity to reasonably achieve the purpose of the covered service. *See 42 CFR 440.230.*

The CMH is mandated by federal regulation to perform an assessment for the Petitioner to determine what Medicaid services are medically necessary and determine the amount or level of the Medicaid medically necessary services.

The Medicaid Provider Manual articulates Medicaid policy for Michigan. It states, in relevant part:

> **17.2 CRITERIA FOR AUTHORIZING B3 SUPPORTS AND SERVICES**
>
> The authorization and use of Medicaid funds for any of the B3 supports and services, as well as their amount, scope and duration, are dependent upon:
>
> - The Medicaid beneficiary's eligibility for specialty services and supports as defined in this Chapter; and
> - The service(s) having been identified during person-centered planning; and
> - The service(s) being medically necessary as defined in the Medical Necessity Criteria subsection of this chapter; and
> - The service(s) being expected to achieve one or more of the above-listed goals as identified in the beneficiary's plan of service; and
> - Additional criteria indicated in certain B3 service definitions, as applicable.

Decisions regarding the authorization of a B3 service (including the amount, scope and duration) must take into account the PIHP's documented capacity to reasonably and equitably serve other Medicaid beneficiaries who also have needs for these services. The B3 supports and services are not intended to meet all the individual's needs and preferences, as some needs may be better met by community and other natural supports. Natural supports mean unpaid assistance provided to the beneficiary by people in his/her network (family, friends, neighbors, community volunteers) who are willing and able to provide such assistance. It is reasonable to expect that parents of minor children with disabilities will provide the same level of care they would provide to their children without disabilities. MDCH encourages the use of natural supports to assist in meeting an individual's needs to the extent that the family or friends who provide the natural supports are willing and able to provide this assistance. PIHPs may not require a beneficiary's natural support network to provide such assistance as a condition for receiving specialty mental health supports and services. The use of natural supports must be documented in the beneficiary's individual plan of service.

Provider qualifications and service locations that are not otherwise identified in this section must meet the requirements identified in the General Information and Program Requirement sections of this chapter.

17.3.B. COMMUNITY LIVING SUPPORTS

Community Living Supports are used to increase or maintain personal self-sufficiency, facilitating an individual's achievement of his goals of community inclusion and participation, independence or productivity. The supports may be provided in the participant's residence or in community settings (including, but not limited to, libraries, city pools, camps, etc.).

Coverage includes:

- Assisting, (that exceeds state plan for adults) prompting, reminding, cueing, (revised 7/1/2011), observing, guiding and/or training in the following activities:

    - meal preparation

- laundry
- routine, seasonal, and heavy household care and maintenance
- activities of daily living (e.g., bathing, eating, dressing, personal hygiene)
- shopping for food and other necessities of daily living

CLS services may not supplant state plan services, e.g., Personal Care (assistance with ADLs in a certified specialized residential setting) and Home Help or Expanded Home Help (assistance in the individual's own, unlicensed home with meal preparation, laundry, routine household care and maintenance, activities of daily living and shopping). If such assistance is needed, the beneficiary, with the help of the PIHP case manager or supports coordinator must request Home Help and, if necessary, Expanded Home Help from the Department of Human Services (DHS). CLS may be used for those activities while the beneficiary awaits determination by DHS of the amount, scope and duration of Home Help or Expanded Home Help. The PIHP case manager or supports coordinator must assist, if necessary, the beneficiary in filling out and sending a request for Fair Hearing when the beneficiary believes that the DHS authorization amount, scope and duration of Home Help does not accurately reflect the beneficiary's needs based on findings of the DHS assessment.

- Staff assistance, support and/or training with activities such as:
  - money management
  - non-medical care (not requiring nurse or physician intervention)
  - socialization and relationship building
  - transportation from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence (transportation to and from medical appointments is excluded)

- participation in regular community activities and recreation opportunities (e.g., attending classes, movies, concerts and events in a park; volunteering; voting)

- attendance at medical appointments

- acquiring or procuring goods, other than those listed under shopping, and nonmedical services

➢ Reminding, observing and/or monitoring of medication administration

➢ Staff assistance with preserving the health and safety of the individual in order that he/she may reside or be supported in the most integrated, independent community setting.

CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, state plan Personal Care services. Transportation to medical appointments is covered by Medicaid through DHS or the Medicaid Health Plan. Payment for CLS services may not be made, directly or indirectly, to responsible relatives (i.e., spouses, or parents of minor children), or guardian of the beneficiary receiving community living supports.

Medicaid Provider Manual
Behavioral Health and Intellectual and
Developmental Disability Supports and Services
April 1, 2016, pp , 122-123
Emphasis added.

CMH's witnesses testified that the current amount of CLS authorized, plus the alternative options presented to Petitioner were sufficient in amount, scope and duration to meet Petitioner's needs. CMH's witnesses indicated that Petitioner has been offered speech therapy, occupational therapy, as well as an assessment for the new autism benefit, while he works towards transitioning to a group home placement. CMH's witnesses also indicated that they have worked with Petitioner's mother to better allocate the CLS hours currently authorized so that there is more consistent staffing in the home.

Petitioner's mother testified that Petitioner just turned 18 in [redacted] and is 6"6" tall and 230 pounds. Petitioner's mother indicated that Petitioner has severe autism, epilepsy, and is non-verbal. Petitioner's mother testified that she has been Petitioner's caregiver since his birth and he has exhibited numerous challenging behaviors over the years. Petitioner's mother testified that Petitioner was in a treatment center back in [redacted] and the center wanted to keep Petitioner there for a year to a year and a half, but that CMH pulled him out of the center after about 5 months. Petitioner's mother testified that they have tried to get Petitioner's behaviors under control, but it is very difficult. Petitioner's mother indicated that Petitioner's doctor has tried Petitioner on numerous medications for his behaviors, but that the doctor is afraid that the medications affect Petitioner epilepsy and cause him to have more seizures.

Petitioner's mother testified that she is trying to work with the school to get Petitioner in school more often and for longer days as he is currently only allowed to go three days per week for approximately three hours at a time. Petitioner's mother testified that CLS staff are currently in the home from 8:00 a.m. to 1:00 p.m., then from 5:00 p.m. to 10:00 p.m., and that she is looking for CLS staff between the hours of 1:00 p.m. to 5:00 p.m. Petitioner's mother indicated that it takes two people to work with and monitor Petitioner and that when the worker leaves at 1:00 p.m., Petitioner will not work on anything alone with her, and his difficult behaviors increase. Petitioner's mother testified that Petitioner also needs speech therapy because much of his frustration comes from his inability to verbalize his needs. Petitioner's mother indicated that Petitioner also becomes more aggressive or damages property when she is left alone with him. Petitioner's mother testified that she is working towards Petitioner's future placement in a group home and just needs a few additional hours until that time.

Petitioner bears the burden of proving by a preponderance of the evidence that an additional 20 hours of CLS per week are medically necessary. CMH provided sufficient evidence that it adhered to federal regulations and state policy when authorizing 10 hours per day of CLS for Petitioner, and in denying an additional 20 hours of CLS per week. Petitioner failed to prove by a preponderance of the evidence that an additional 20 hours per week of CLS was medically necessary.

As indicated above, B3 services are not intended to meet all of a consumer's needs and preferences. Here, Petitioner is currently receiving a very significant amount of CLS, 10 hours per day, and the CMH has offered Petitioner's mother alternatives to additional CLS hours, such as speech therapy, occupational therapy, and the autism benefit. Petitioner's mother is also working to get Petitioner into school more often and for longer periods. Furthermore, beneficiaries must access State Plan/Adult Home Help services prior to utilizing CMH services, so if Petitioner is not taking advantage of these services, he may look into those as well. Finally, the CMH must take into account its ability to serve other beneficiaries and if CMH was forced to provide its beneficiaries more than 10 CLS hours per day, it would likely have a negative effect on the CMH's ability to serve other beneficiaries. If Petitioner cannot safely be managed in his own home with 10 CLS hours per day, then a more restrictive environment, such as a group home, is probably the least restrictive environment for him. The parties indicated that

they are working towards this goal of a group home placement. In the meantime, Petitioner can take advantage of the alternatives to additional CLS offered by the CMH, such as speech therapy, occupational therapy, and the autism benefit. Based on the evidence presented, the current amount of CLS authorized is sufficient in amount, scope and duration to reasonably meet Petitioner's needs.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH properly denied Petitioner's request for an additional 20 CLS hours per week.

IT IS THEREFORE ORDERED that:

The CMH decision is AFFIRMED.

RM/cg

Robert J. Meade
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139

Petitioner [redacted]

DHHS -Dept Contact [redacted]

DHHS Department Rep. [redacted]