



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]

Date Mailed: March 19, 2020
MOAHR Docket No.: 19-012357
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

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

After due notice, a telephone hearing was held on January 16, 2020. [REDACTED], Petitioner's mother, appeared and testified on Petitioner's behalf. Petitioner also testified as a witness on his own behalf. Katherine Witkowski, Psychologist, appeared and testified on behalf of Respondent Northeast Michigan Community Mental Health, with Nena Sork, Respondent's Executive Director also present.

During the hearing, the following exhibits were entered into the record:

For Petitioner:

Exhibit #1: Petitioner's Evidence Packet
Exhibit #2: January 6, 2020 Letter
Exhibit #3: Request for Hearing

For Respondent:

Exhibit A: June 21, 2019 Psychological Assessment
Exhibit B: August 1, 2019 Plan of Service
Exhibit C: July 9, 2019 Letters of Guardianship
Exhibit D: July 9, 2019 Order on Appointment of Guardian
Exhibit E: DSM Intellectual Disability Criteria
Exhibit F: Excerpt from Mental Health Code
Exhibit G: Respondent's Policy #5510

ISSUE

Did Respondent properly decide to terminate Petitioner's services?¹

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 a [REDACTED] year-old Medicaid beneficiary who has been diagnosed with autism spectrum disorder and scoliosis. (Exhibit #1, page 12; Exhibit A, pages 1, 7).
2. He finished high school and was mainstreamed when doing so, but also received special education services and had the support of aides through the learning process. (Exhibit A, page 2).
3. Since 2008, Petitioner has received services through Respondent, including case management, supported employment, and community living supports. (Exhibit A, page 2).
4. He has also received vocational services through Michigan Rehabilitation Services (MRS). (Exhibit A, page 2).
5. On June 21, 2019, Respondent's representative/psychologist completed a Psychological Assessment with Petitioner. (Exhibit A, pages 1-8).
6. Petitioner presented to the assessment as part of the process of determining whether he needed a legal guardian. (Exhibit A, page 1).
7. During that assessment, the psychologist noted the following strengths and weaknesses for Petitioner:

In the communication domain, [Petitioner] is able to complete a task later in the day when he was reminded earlier, give complex directions, and fill out paperwork and electronic forms. He needs assistance paying attention to a show for at least 60 minutes and writing papers that are at least one page long. In the daily living skills domain, [Petitioner] is able to keep track of his medication and refill them when needed, prepare full meals, and pay his

¹ Petitioner's representative also indicated that another issue in this case was her attempt to re-obtain a full guardianship of Petitioner on the basis of Petitioner's developmental disability. However, as discussed during the hearing, the undersigned Administrative Law Judge does not have jurisdiction over that issue.

bills. He needs assistance with counting change after making a purchase. In the socialization domain, [Petitioner is able to talk with others about things they are interested in even if he is not, go places with people his age without supervision, and understands that a friendly acting person may want to take advantage of him. He needs assistance with doing things that his friends want to do even if he would rather do something else, staying out of a group when they let him know without words that he is not welcome, and coping others behavior when he is in a new situation and not sure how to act.

Exhibit A, page 7

8. With respect to the test results, she also wrote:

[Petitioner] completed the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV). On the WAIS-IV, [Petitioner] obtained a FSIQ of 81 which falls in the low average range and is consistent with previous testing. The Vineland Adaptive Behavior Scales – Third Edition (VABS-III) was completed with Mr. Josh Bristow serving as the respondent. On the VABS-III, [Petitioner] obtained scores in the average range in almost every domain and subdomain, with the exception of receptive communication where [Petitioner's] score is two standard deviations below the average range. Ge obtained an adaptive behavior composite of 84. The results of the assessment are consistent with previous evaluations.

Exhibit A, page 7

9. In her Diagnostic Summary, the psychologist wrote:

[Petitioner's] verbal skills fall in the borderline range, while most of his performance skills fall within the average range. His Verbal Comprehension Index score on the WAIS-IV was 44 points lower than his Processing Speed Index score which is an unusual difference that

occurred in only 0.9% of the overall standardization sample. [Petitioner] displayed relative strength within the areas of nonverbal reasoning, visual-motor coordination, and basic functional academics, while particular need was exhibited within the areas of verbal concept formation and general information. [Petitioner] scored higher on the subtests that measure innate abilities and lower on the tests that are affected by environment. The high variability in scores makes it not possible to meet enough of the diagnostic criteria for deficits in intellectual functioning therefore no diagnosis of intellectual disability is justified.

[Petitioner] is capable of independently attending to all self-care tasks including eating, bathing, toileting, and dressing. He is able to independently prepare his meals. [Petitioner] is capable of taking prescribed and over the counter medication as ordered and obtaining refills when needed. He is able to safely store money, appropriately purchase items, pay his bills and uses a savings account. For the past eight years, [Petitioner] has been his own guardian and he has operated satisfactorily are performing functions of everyday living. [Petitioner] continues to need assistance with some budgeting and receptive communication. [Petitioner] has been diagnosed with Autism Spectrum Disorder and this diagnosis will be maintained. However, his current Autism symptoms do not cause significant functional limitations to the degree of meeting mental health code criteria for a developmental disability.

Exhibit A, page 7

10. Overall, the Psychological Assessment found that there was insufficient evidence to support a guardianship; Petitioner did not meet the criteria for services through Respondent; and that he should be transitioned out. (Exhibit A, pages 7-8).
11. On July 9, 2019, Petitioner's representative was granted a limited guardianship to assist Petitioner with medical and financial issues. (Exhibit C, page 1; Exhibit D, page 1).

12. In July, Petitioner continued to receive assistance through Respondent with respect to, among other things, employment at [REDACTED] and community integration. (Exhibit #1, pages 105-113).
13. On August 1, 2019, a Plan of Service (POS) Meeting. (Exhibit #1, pages 23-28; Exhibit B, pages 1-7).
14. During that meeting, it was noted that, per the recommendations of the psychological assessment, Petitioner will be transitioned out of services over the next 3-6 months. (Exhibit #1, page 23; Exhibit B, page 1).
15. It was also noted that Petitioner planned to appeal that decision and he was subsequently sent notice of his appeal rights. (Exhibit #1, page 23; Exhibit B, pages 1, 5-7).
16. Petitioner's services were continued while his appeal is pending. (Testimony of Respondent's representative).
17. The goals in Petitioner's POS including him working on being more independent and improving his social life. (Exhibit #1, pages 24, 26)
18. Specific assistance included help with exercising proper social skills and practicing social cues in the community, especially with women; quarterly assistance with staying on track with workouts and losing weight; support with working; assistance with relaying necessary personal issues at doctor's appointments; and help with scheduling and coordinating Special Olympics participation. (Exhibit #1, pages 24-25).
19. Petitioner continued to receive assistance during August, September, October and November of 2019. (Exhibit #1, pages 60-104).
20. In August of 2019, Petitioner increased his hours at [REDACTED]. (Exhibit #1, page 29).
21. He continued to do well, and his supervisor determined that Petitioner knew his job well enough to not need a job coach. (Exhibit #1, page 28).
22. However, Petitioner did not do well once job coaching was decreased or removed, and it had to be reinstated. (Exhibit #1, pages 28-29, 92).
23. On September 17, 2019, Respondent sent written notice that Petitioner's Local Appeal had been denied and that the decision to terminate his services had been upheld. (Exhibit #3, pages 9-12).
24. On November 27, 2019, the Michigan Office Administrative Hearings and Rules (MOAHR) received the request for hearing filed in this matter regarding Respondent's decision to terminate Petitioner's services. (Exhibit #3, pages 1-13).

25. Petitioner continues to receive services through Respondent while this matter is pending. (Testimony of Respondent's representative).
26. In progress notes regarding such assistance, it was noted at various times that Petitioner went two months without sending his paystubs to the Social Security Administration as required; Petitioner was having difficulties setting up a visa card; and his weight is up. (Exhibit #1, pages 36-37, 40-41).
27. On January 6, 2020, the owner of [REDACTED] wrote a letter discussing how well Petitioner did with his job coach and the problems he had a couple weeks after working without a job coach, including issues staying on task and some occurrences of inappropriate behavior. (Exhibit #1, page 11).
28. On January 15, 2020, Petitioner's medical doctor wrote a letter stating in part:

It is my medical opinion that [Petitioner] continue with both rehabilitative and facilitative services provided through NEMCMH, without his Plan of service and specific goals if he fails to thrive. I also feel that [Petitioner] should continue with psychiatric help and physical therapy.

Exhibit #1, page 12

29. On January 18, 2020, a trainer at an athletic club Petitioner visits wrote a letter stating in part that Petitioner would not have been successful with meetings regarding his eating/shopping/cooking habits or his weight loss without supports from Respondent. (Exhibit #1, page 13).
30. On January 31, 2020, Dr. [REDACTED], Ph.D. and Fully Licensed Psychologist, completed a Psychological Consultation with respect to Petitioner. (Exhibit #1, pages 1-6).

31. As part of that consultation, Dr. [REDACTED] reviewed Respondent's findings and concluded in part:

The interpretations and conclusions regarding [Petitioner's] intellectual functioning are flawed and misleading. It is my opinion that significant misinterpretation of the test data has minimized [Petitioner's] intellectual deficits and failed to recognize his need for continued services from [Respondent] and also a guardianship because of his developmental disability.

Exhibit #1, page 2

32. He also concluded that there was sufficient supporting evidence from the previous psychological testing to indicate a developmental disability given the large discrepancy between Petitioner's verbal IQ and performance IQ. (Exhibit #1, pages 2-3).
33. According to Dr. [REDACTED], the large discrepancy also necessitated a computation of Petitioner's General Abilities Index, which is considered to be the most accurate measure of his intellectual functioning, and that Petitioner scored a 77, which was within the Borderline range of intelligence. (Exhibit A, page 3).
34. He also concluded that there was sufficient current information to support a finding of a developmental disability given Petitioner's recent testing and that:

Specifically, [Petitioner's] verbal ability to analyze and integrate information, vocabulary development, fund of information, attention span and arithmetic reasoning ability are within the Borderline range of intelligence and again significantly below his nonverbal intellectual functioning and processing speed. These significant deficits are indicative of a developmental disability. These intellectual deficits were concealed and not reported by the erroneous conclusion that there was not enough information to identify a developmental disability on the basis of the intellectual assessment.

Exhibit A, page 3

35. According to Dr. [REDACTED], the concealed intellectual deficits in verbal intelligence and working memory create significant impairments in Petitioner's adjustment in life. (Exhibit #1, page 3).
36. He further noted that there is no dispute about Petitioner being diagnosed with autism, but that the correct diagnosis would be autism or neurocognitive disorder due to autism and:

On the basis of this diagnosis and the interpretations made regarding his most recent intellectual functioning, I believe [Petitioner] needs ongoing services from [Respondent] and also needs a guardianship for a developmental disability.

Exhibit #1, page 3

37. Dr. [REDACTED] also wrote:

In addition to evaluating the psychological assessment used to eventually revoke CMH services and also to revoke the guardianship for a developmental disability, I also met and interviewed with [Petitioner]. He is reportedly is depressed over the possibility of losing his job coach. It was very apparent that he is proud and excited to work with his limitations. He discussed with me the services provided by CMH. He is afraid that without a job coach, he will not be able to maintain his employment. He stated that the "job coach makes me do things right". The job coach also motivates him. The job coach helps set boundaries such as "not hugging girls first or only on the side." He realizes the need for boundaries. He also is aware of needing directions. He also has a history of crying a lot. He also reported that he needs help with the shopping, cooking and deciding what to eat. He is afraid to be on his own. He does not drive.

* * *

Regarding his intellectual difficulties. He verbalized that it is hard for him to understand and concentrate. He emphasized that he has problems with focusing. He becomes very

anxious and has panic when he cannot solve problems. He is aware of having problems with poor boundaries. He is not able to read people's nonverbal cues effectively.

Exhibit #1, pages 4-5

38. Dr. [REDACTED] also had Petitioner's mother complete a Vineland-2 Adaptive Behavioral Scales and he determined that the results showed a significant impairment in his communication ability, especially in regard to his receptive and expressive communication ability. (Exhibit #1, page 5).
39. He further noted that the more recent tests indicated significant greater impairment than the results found by Respondent, and that the difference could be explained by the fact that Petitioner's mother may know Petitioner's deficiencies more efficiently or perceived Petitioner as less capable of functioning. (Exhibit #1, page 5).

CONCLUSIONS OF LAW

The Medical Assistance Program (MA) 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...

42 USC 1396n(b)

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 (DHHS) operates a section 1915(b) Medicaid Managed Specialty Services and Support program waiver in conjunction with a section 1915(c).

Eligibility for services through Respondent is set by Department policy as outlined in the Medicaid Provider Manual (MPM). Specifically, the applicable version of the MPM states in the pertinent part that:

1.6 BENEFICIARY ELIGIBILITY

A Medicaid beneficiary with mental illness, serious emotional disturbance or developmental disability who is enrolled in a Medicaid Health Plan (MHP) is eligible for specialty mental health services and supports when his needs exceed the MHP benefits. (Refer to the Medicaid Health Plans Chapter of this manual for additional information.) Such need must be documented in the individual's clinical record.

*MPM, July 1, 2019 version
Behavioral Health and Intellectual and Developmental Disability Support and Services
page 3*

The State of Michigan's Mental Health Code defines serious mental illness and serious emotional disturbance as follows:

(2) "Serious emotional disturbance" means a diagnosable mental, behavioral, or emotional disorder affecting a minor that exists or has existed during the past year for a period of time sufficient to meet diagnostic criteria specified in the most recent diagnostic and statistical manual of mental disorders published by the American psychiatric association and approved by the department and that has resulted in functional impairment that substantially interferes with or limits the minor's role or functioning in family, school, or community activities. The following disorders are included only if they occur in conjunction with another diagnosable serious emotional disturbance:

- (a) A substance abuse disorder.
- (b) A developmental disorder.
- (c) "V" codes in the diagnostic and statistical manual of mental disorders.

(3) "Serious mental illness" means a diagnosable mental, behavioral, or emotional disorder affecting an adult that exists or has existed within the past year for a period of time sufficient to meet diagnostic criteria specified in the most recent diagnostic and statistical manual of mental disorders published by the American psychiatric association and approved by the department and that has resulted in functional impairment that substantially interferes with or limits 1 or more major life activities. Serious mental illness includes dementia with delusions, dementia with depressed mood, and dementia with behavioral disturbance but does not include any other dementia unless the dementia occurs in conjunction with another diagnosable serious mental illness. The following disorders also are included only if they occur in conjunction with another diagnosable serious mental illness:

- (a) A substance abuse disorder.
- (b) A developmental disorder.
- (c) A "V" code in the diagnostic and statistical manual of mental disorders.

MCL 330.1100d

Additionally, with respect to developmental disabilities, the Mental Health Code also provides in part:

(25) "Developmental disability" means either of the following:

- (a) If applied to an individual older than 5 years of age, a severe, chronic condition that meets all of the following requirements:
 - (i) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.
 - (ii) Is manifested before the individual is 22 years old.
 - (iii) Is likely to continue indefinitely.
 - (iv) Results in substantial functional limitations in 3 or more of the following areas of major life activity:
 - (A) Self-care.
 - (B) Receptive and expressive language.
 - (C) Learning.
 - (D) Mobility.
 - (E) Self-direction.
 - (F) Capacity for independent living.
 - (G) Economic self-sufficiency.
 - (v) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

MCL 330.1100a(25)

Here, Respondent decided to terminate Petitioner's services pursuant to the above policies and statutes, and on the basis that Petitioner did not present as eligible for ongoing services through Respondent as a person with either a severe mental illness or a developmental disability.

In appealing that decision, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent erred. Moreover, the undersigned Administrative Law Judge is limited to reviewing the Respondent's decision in light of the information it had at the time it made that decision.

Given the record and available information in this case, the undersigned Administrative Law Judge finds that Petitioner has failed to meet that burden of proof and Respondent's decision must therefore be affirmed.

Both parties agreed that the sole issue in this case is whether Petitioner meets the criteria for having a developmental disability and, as discussed above, in order to meet that criteria, Petitioner must have a disability attributable to a mental or physical impairment, or a combination of mental and physical impairments, that manifested before he was 22 years old, that is likely to continue indefinitely, and that results in a substantial functional limitation in three or more areas of major life activity.

Moreover, it is also undisputed that Petitioner has a disability attributable to a mental or physical impairment, or a combination of mental and physical impairments, that manifested before he was 22 years old and that is likely to continue indefinitely; and that the only issue is whether Petitioner's disability results in substantial functional limitations in three or more of the listed areas of major life activity: self-care; receptive and expressive language; learning; mobility; self-direction; capacity for independent living; and economic self-sufficiency.

With respect to that dispute, the undersigned Administrative Law Judge first finds that Respondent erred with respect to its determination that Petitioner does not have a substantial functional limitation in economic self-sufficiency. The record is full of examples of Petitioner's difficulties in obtaining or maintaining employment and generating income, even with the supports he has been receiving. Moreover, Respondent's representative's testimony wrongly focused on Petitioner's ability to shop alone with cash or a Bridge card, which conflates economic self-sufficiency with the other areas of major life activity.

However, even considering that finding with respect to economic self-sufficiency, the undersigned Administrative Law Judge concludes that Petitioner did not meet his burden of proof as the record fails to support a determination that Petitioner has a substantial functional limitation in any other area of major life activity.

Respondent's representative thoroughly and credibly explained her findings in both the report issued following the psychological assessment and in her testimony during the hearing, and even Petitioner's representative conceded in her testimony that Petitioner is generally independent. Moreover, while it is clear that Petitioner has some limitations, the limitations do not appear to rise to the necessary levels outside of economic self-sufficiency, especially given Petitioner's primary focus on assistance with employment throughout the case.

Much of the evidence relied upon by Petitioner, including Dr. [REDACTED]'s more recent assessment and findings, is new and the undersigned Administrative Law Judge is limited to reviewing the Respondent's decision in light of the information it had at the time it made the decision.

In addition to providing new evidence, Dr. [REDACTED] did extensively discuss why he disagreed with Respondent's findings and why, just based on the information available at the time, Respondent erred. However, the undersigned Administrative Law Judge does not find that report alone to be persuasive without any other testimony from the doctor given Respondent's credible evidence, including specific testimony, and the reason Dr. [REDACTED] identified for the discrepancy in testing, *i.e.* that he had Petitioner's mother complete the testing. Petitioner's mother was not his guardian at the time of Respondent's decision and Respondent did not err by also relying on information from Petitioner and his direct support staff when making its decision.

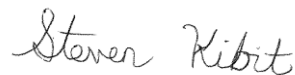
To the extent Petitioner and his representative have new or updated information to provide regarding his eligibility for services, then they can always re-request services again in the future. With respect to the decision at issue in this case however, Respondent's decision must be affirmed given the available information and applicable policies.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Respondent properly terminated Petitioner's services.

IT IS THEREFORE ORDERED that

- The Respondent's decision is **AFFIRMED**.



SK/sb

Steven Kibit
Administrative Law Judge
for Robert Gordon, 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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

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

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

DHHS Department Rep.

Nena Sork
Northeast Michigan CMH Authority
400 Johnson Street
Alpena, MI
49707

DHHS -Dept Contact

Belinda Hawks
320 S. Walnut St.
5th Floor
Lansing, MI
48913

Petitioner

[REDACTED]
[REDACTED]
[REDACTED], MI
[REDACTED]

Authorized Hearing Rep.

[REDACTED]
[REDACTED]
[REDACTED], MI
[REDACTED]