



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
MI [REDACTED]

Date Mailed: June 9, 2020
MOAHR Docket No.: 20-000987
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, 42 CFR 431.200 *et seq.* and 42 CFR 438.400 *et seq.* upon Petitioner's request for a hearing.

After due notice, a hearing began on May 12, 2020 and was completed on May 20, 2020. Attorney Tom Kendziorski appeared on Petitioner's behalf. [REDACTED], Petitioner's Mother; [REDACTED], Special Ed Teacher (only appeared at hearing on May 12, 2020); Justina Varthese, BCBA; Deborah Miller, Supervisor, Supports Coordinators, MORC; and Sheri Lynn Kruger, Unit Director, Supports Coordinators; appeared as witnesses for Petitioner.

Attorney Andrew Brege appeared on behalf of Respondent, Oakland Community Health Network (Respondent or CMH). Steffany Wilson, Clinical Director; Kara Woodliff, Clinical Diagnostician; Lauren Jacob, Clinical Diagnostician; and Benita Brown; Hearings Coordinator; appeared as witnesses for the CMH.

ISSUE

Did the Respondent properly determine that Petitioner was no longer eligible for Behavioral Health Treatment Services/Applied Behavior Analysis as a person with an Autism Spectrum Disorder (ASD)?

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, born July 25, 2013, who has been diagnosed with autism spectrum disorder. (Exhibit A, p 6; Testimony)
2. Petitioner resides with her parents in a single-family home in Troy,

Michigan. Petitioner attends school full-time, however due to the COVID-19 pandemic, Petitioner is currently being homeschooled. (Exhibit A, p 6; Testimony)

3. Petitioner has been receiving Behavioral Health Treatment (BHT), Applied Behavioral Analysis (ABA), Early Intensive Behavioral Intervention (EIBI) services through the Michigan Department of Health and Human Services (MDHHS) autism benefit since January 2017. (Exhibit A; Testimony)
4. On October 31, 2019, CMH's contractor completed an annual re-evaluation, including the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), the Developmental Disability Children's Global Assessment Scale (DD-CGAS), and a structured interview with Petitioner's parents to determine if Petitioner continued to be eligible for BHT/ABA. (Exhibit A; Testimony)
5. Following the annual re-evaluation, CMH's contractor concluded that Petitioner did not meet medical necessity for continued BHT/ABA, concluding, in part:

████ is a █ year, █-month-old female seen for annual reevaluation of autism spectrum disorder symptomatology and eligibility for the autism benefit. The results of this evaluation, including the information obtained from clinical observation and parent interview, indicate that █ no longer meets all the diagnostic criteria for continued eligibility for applied behavioral analysis (ABA) services.

████ did not demonstrate significant impairments in social communication, social interaction, or restricted repetitive behaviors during the assessment. She was engaged with the examiner, communicated easily, and shared her interests with the examiner. She displayed appropriate use of eye contact, socially directed facial expressions, and shared joy with the examiner throughout the assessment. █ did display restricted and repetitive make-believe play but was able to be redirected. She often like to control what type of play or activity she participated in, and her form of make-believe play did not differ. Although she was engaged throughout the duration of the assessment and communicated spontaneously, conversation often followed her own train of thought and topics of her choice. She was not observed to have frequent unusual physical mannerisms, engage in any repetitive use of items nor did she display any unusual sensory interests or aversions during the assessment. █ parents shares that she continues to display deficits in social skills and peer interactions and has

frequent meltdowns and temper tantrums. Although [REDACTED] no longer meets criteria for ABA therapy services, other services should be explored.

(Exhibit A, pp 8-9; Testimony)

6. On November 22, 2019, CMH sent Petitioner a Notice of Adverse Benefit Determination informing her that her ABA services would be terminated effective December 22, 2019. (Exhibit A, pp 10-12; Testimony)
7. On December 16, 2019, a separate CMH contractor conducted a Second Opinion evaluation of Petitioner's eligibility to receive BHT/ABA. Following the evaluation, this clinician also determined that Petitioner did not meet the medical necessity criteria for continued BHT/ABA. In conclusion, the clinician indicated:

This second opinion disposition confirms that [REDACTED] no longer meets criteria for ongoing eligibility for ABA therapy and the Autism Benefit. ABA has been beneficial for [REDACTED] and she has made improvements to the extent that alternative interventions could be provided to help resolve problem behaviors that continue to be reported. Her presentation is likely better explained by her previous diagnoses of mild intellectual disability, attention deficit/hyperactivity disorder, oppositional defiant disorder, mixed receptive-expressive language disorder, unspecified learning disorder. Based upon reported sleep difficulties, further evaluation is also warranted to determine if there is presence of a sleep disorder.

(Exhibit B, pp 13-19; Testimony)

8. On December 20, 2019, CMH sent Petitioner a Notice of Adverse Benefit Determination informing Petitioner that her ABA services were being terminated effective January 20, 2020. (Exhibit B, pp 20-22; Testimony)
9. On January 10, 2020, Petitioner filed a request for a Local Appeal and included additional information for the CMH to consider. (Exhibit D; Testimony)
10. On January 31, 2020, following the Local Appeal, the CMH informed Petitioner and her representative that the termination of Petitioner's ABA services was being upheld. (Exhibit C, pp 23-31; Testimony)
11. On February 18, 2020, Petitioner's request for hearing was received by the Michigan Office of Administrative Hearings and Rules. (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 applicable sections of the Medicaid Provider Manual (MPM) provide:

2.5 MEDICAL NECESSITY CRITERIA

The following medical necessity criteria apply to Medicaid mental health, developmental disabilities, and substance abuse supports and services.

2.5.A. MEDICAL NECESSITY CRITERIA

Mental health, developmental disabilities, and substance abuse services are supports, services, and treatment:

- Necessary for screening and assessing the presence of a mental illness, developmental disability or substance use disorder; and/or
- Required to identify and evaluate a mental illness, developmental disability or substance use disorder; and/or
- Intended to treat, ameliorate, diminish or stabilize the symptoms of mental illness, developmental disability or substance use disorder; and/or
- Expected to arrest or delay the progression of a mental illness, developmental disability, or substance use disorder; and/or
- Designed to assist the beneficiary to attain or maintain a sufficient level of functioning in order to achieve his goals of community inclusion and participation, independence, recovery, or productivity.

2.5.B. DETERMINATION CRITERIA

The determination of a medically necessary support, service or treatment must be:

- Based on information provided by the beneficiary, beneficiary's family, and/or other individuals (e.g., friends, personal assistants/aides) who know the beneficiary; and
- Based on clinical information from the beneficiary's primary care physician or health care professionals with relevant qualifications who have evaluated the beneficiary; and
- For beneficiaries with mental illness or developmental disabilities, based on person centered planning, and for beneficiaries with substance use disorders, individualized treatment planning; and
- Made by appropriately trained mental health, developmental disabilities, or substance abuse professionals with sufficient clinical experience; and
- Made within federal and state standards for timeliness; and
- Sufficient in amount, scope and duration of the service(s) to reasonably achieve its/their purpose.
- Documented in the individual plan of service.

2.5.C. SUPPORTS, SERVICES AND TREATMENT AUTHORIZED BY THE PIHP

Supports, services, and treatment authorized by the PIHP must be:

- Delivered in accordance with federal and state standards for timeliness in a location that is accessible to the beneficiary; and
- Responsive to particular needs of multi-cultural populations and furnished in a culturally relevant manner; and
- Responsive to the particular needs of beneficiaries with sensory or mobility impairments and provided with the necessary accommodations; and
- Provided in the least restrictive, most integrated setting. Inpatient, licensed residential or other segregated settings shall be used only when less restrictive levels of treatment, service or support have been, for that beneficiary, unsuccessful or cannot be safely provided; and
- Delivered consistent with, where they exist, available research findings, health care practice guidelines, best practices and

standards of practice issued by professionally recognized organizations or government agencies.

2.5.D. PIHP DECISIONS

Using criteria for medical necessity, a PIHP may:

- Deny services that are:
 - o deemed ineffective for a given condition based upon professionally and scientifically recognized and accepted standards of care;
 - o experimental or investigational in nature; or
 - o for which there exists another appropriate, efficacious, less-restrictive and cost effective service, setting or support that otherwise satisfies the standards for medically-necessary services; and/or
- Employ various methods to determine amount, scope and duration of services, including prior authorization for certain services, concurrent utilization reviews, centralized assessment and referral, gate-keeping arrangements, protocols, and guidelines.

A PIHP may not deny services based solely on preset limits of the cost, amount, scope, and duration of services. Instead, determination of the need for services shall be conducted on an individualized basis.

*Medicaid Provider Manual
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
October 1, 2019, pp 12-14*

SECTION 18 – BEHAVIORAL HEALTH TREATMENT SERVICES/APPLIED BEHAVIOR ANALYSIS

The purpose of this policy is to provide for the coverage of Behavioral Health Treatment (BHT) services, including Applied Behavior Analysis (ABA), for children under 21 years of age with Autism Spectrum Disorders (ASD). All children, including children with ASD, must receive EPSDT services that are designed to assure that children receive early detection and preventive care, in addition to medically necessary treatment services to correct or ameliorate any physical or behavioral conditions, so that health problems are averted or diagnosed and treated as early as possible.

18.4 MEDICAL NECESSITY CRITERIA

Medical necessity and recommendation for BHT services is determined by a physician or other licensed practitioner working within their scope of practice under state law. The child must demonstrate substantial functional impairment in social communication, patterns of behavior, and social interaction as evidenced by meeting criteria A and B (listed below); and require BHT services to address the following areas:

- A. The child currently demonstrates substantial functional impairment in social communication and social interaction across multiple contexts, and is manifested by all of the following:
 - 1. Deficits in social-emotional reciprocity ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation, to reduced sharing of interests, emotions, or affect, to failure to initiate or respond to social interactions.
 - 2. Deficits in nonverbal communicative behaviors used for social interaction ranging, for example, from poorly integrated verbal and nonverbal communication, to abnormalities in eye contact and body language or deficits in understanding and use of gestures, to a total lack of facial expressions and nonverbal communication.
 - 3. Deficits in developing, maintaining, and understanding relationships ranging, for example, from difficulties adjusting behavior to suit various social contexts, to difficulties in sharing imaginative play or in making friends, to absence of interest in peers.
- B. The child currently demonstrates substantial restricted, repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least two of the following:
 - 1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypes, lining up toys or flipping objects, echolalia, and/or idiosyncratic phrases).
 - 2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, and/or need to take same route or eat the same food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects and/or excessively circumscribed or perseverative interest).
4. Hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, and/or visual fascination with lights or movement).

*Medicaid Provider Manual
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
October 1, 2019, pp 147, 149-150*

CMH's witness testified that following two separate evaluations, it was determined that Petitioner no longer met the criteria for BHT/ABA services because she did not exhibit the presence of 3 specific deficits in social communication (e.g. nonverbal communication, reduced sharing of emotions/interests, difficulty with imaginative play, etc.) and 2 specific deficits in restricted, repetitive or stereotyped mannerisms (e.g. repetitive movements, insistence on sameness, highly restricted interests, hypo-/hyper-reactivity to sensory input, etc.) that are persistent across multiple contexts. CMH's witnesses noted that they made numerous recommendations to Petitioner's parents for other treatments that would be beneficial to Petitioner, but that Petitioner's parents indicated that they would like to wait for the conclusion of the appeal before pursuing those services.

Petitioner's Board Certified Behavior Analyst (BCBA) testified that she is employed by MORC and that she has worked with Petitioner in the evenings Monday through Thursday and one Saturday since the fall of 2018. Petitioner's BCBA testified that Petitioner's primary developmental disabilities involve deficits socially interacting with peers, rigidity in her routines, opposition to changes, behavioral issues (including hand clapping) and difficulty making inferences. Petitioner's BCBA noted that Petitioner has made progress in the past year as she has strengthened her interpersonal skills and become more independent. Petitioner's BCBA testified that Petitioner's ABA services were stopped the last week in January 2020 and that Petitioner was still showing deficits at that time. Petitioner's BCBA indicated that she has witnessed symptoms of anxiety with Petitioner in school and among her peers, including crying, hand-clapping and repeating herself. Petitioner's BCBA testified that Petitioner has a difficult time adapting to a group setting and keeping things in perspective. Petitioner's BCBA noted that Petitioner demonstrates difficulty with appropriate conversation skills, turn taking, and any changes to her routine.

Petitioner's BCBA testified that Petitioner has improved a lot since she began ABA services and that the progress has been gradual. Petitioner's BCBA indicated that she would not opine, however, that Petitioner has improved to the point that she no longer

needs ABA services. Petitioner's BCBA noted that Petitioner was only receiving ABA services for two hours in the evenings and had lots more room for improvement. Petitioner's BCBA testified that she has visited Petitioner at school and spoke with her teacher but has not been in Petitioner's home. Petitioner's BCBA indicated that services are provided at the Center and she has met Petitioner's parents there. Petitioner's BCBA noted that she is not trained to administer the ADOS-2 or the DD-CGAS autism tests.

Petitioner's Supports Coordinator Supervisor (SCS) testified that she directly supervises Petitioner's Supports Coordinator and has discussed Petitioner with the Supports Coordinator regularly. Petitioner's SCS indicated that she has reviewed Petitioner's records and met with her Supports Coordinator often during the appeal process. Petitioner's SCS testified that Petitioner is diagnosed with autism and speech delay, among other conditions. Petitioner's SCS noted that there is no record of a diagnosis of serious emotional impairment in Petitioner's records. Petitioner's SCS testified that she has met Petitioner in passing but not in a formal setting. Petitioner's SCS indicated that Petitioner last received ABA services on January 30, 2020, but that Petitioner continues to receive Supports Coordination and CLS and other psychological services have been offered. Petitioner's SCS indicated that she also is not trained to administer the tests for eligibility for the autism benefit.

Petitioner's mother testified that Petitioner has been receiving ABA services since January 2017 and that her last ABA services were received on January 30, 2020. Petitioner's mother indicated that she attends Petitioner's IPOS meetings in person and that she receives reports on Petitioner's ABA progress every month. Petitioner's mother testified that Petitioner is diagnosed with autism spectrum disorder and suffers from problems with comprehension, speech delay, occupational therapy and sensory issues. Petitioner's mother agreed that Petitioner has made a lot of progress since she began ABA services. Petitioner's mother noted that Petitioner was non-verbal when she started ABA but now can converse and understand others. Petitioner's mother indicated that Petitioner has been doing very good, she is more social with people, and she has improved. Petitioner's mother testified that ABA services are not offered through the school but that the school does provide speech and occupational therapy once per week.

Petitioner's mother testified that Petitioner still has behavioral difficulties including hand clapping every day, in home, at school, and while out in public. Petitioner's mother noted that if Petitioner's routine changes, she will start to cry and that transitions from one task to another are very difficult for Petitioner. Petitioner's mother testified that Petitioner still repeats herself every day, throughout the day, telling the same story over and over. Petitioner's mother indicated that the only interaction she has with other children is to do a "high-five"; she does not know how to otherwise communicate with other children. Petitioner's mother testified that Petitioner does not go to or have birthday parties, has no play dates, and cannot carry on a conversation. Petitioner's mother indicated that Petitioner has a very rigid routine every day, she gets upset if her routine is disturbed, and she cannot explain her emotions.

Petitioner's mother testified that Petitioner's last day in school was March 17, 2020 and she has been homeschooled since that time due to the COVID-19 pandemic. Petitioner's mother noted that Petitioner is not undergoing occupational therapy since the pandemic began but does get speech therapy once per week through Zoom. Petitioner's mother noted that Petitioner's neurologist has been seeing Petitioner since 2016 and she recommends that Petitioner continue with ABA services.

Based on the evidence presented, Petitioner did not prove, by a preponderance of the evidence, that the termination of BHT/ABA services was improper. Two thorough re-evaluations demonstrate that Petitioner does not show the presence of 3 specific deficits in social communication (e.g. nonverbal communication, reduced sharing of emotions/interests, difficulty with imaginative play, etc.) and 2 specific deficits in restricted, repetitive or stereotyped mannerisms (e.g. repetitive movements, insistence on sameness, highly restricted interests, hypo-/hyper-reactivity to sensory input, etc.) that are persistent across multiple contexts, as required by policy. The re-evaluations completed here are thorough and Petitioner's entire file relating to ABA was reviewed thoroughly during the internal appeal. Petitioner has not pointed to any specific issues with the evaluations or the testing completed with the evaluations. It is clear from the evidence presented, and all parties agree, that Petitioner has made significant improvements over the three year period she has received ABA services. Petitioner's remaining behavioral issues can likely be addressed by other services recommended by the CMH.

It bears noting that the fact that it has been determined that Petitioner is no longer eligible for ABA services paid for by Medicaid does not mean that Petitioner does not have autism or that she does not need additional help. It only means that Petitioner no longer needs the intensive level of services offered by ABA and her needs can be met by other, less intensive services.

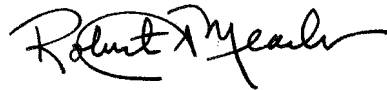
As such, CMH was correct in determining that Petitioner was not eligible for continued BHT/ABA services because she did not meet the medical criteria for those services. CMH did make further recommendations for Petitioner and Petitioner would still be eligible for those services. Accordingly, the CMH's termination of Petitioner's BHT/ABA services must be upheld.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly determined that Petitioner was no longer eligible for BHT/ABA services.

IT IS THEREFORE ORDERED that:

The Department's decision is **AFFIRMED**.



RM/sb

Robert J. Meade
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.

Benita Brown - 63
Oakland Community Health Network
5505 Corporate Drive
Troy, MI
48098

DHHS -Dept Contact

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

Counsel for Respondent

Andrew Brege
822 Centennial Way, Suite 270
Lansing, MI
48917

Petitioner

[REDACTED]
MI

Counsel for Petitioner

Thomas F. Kendziorski
1641 W. Big Beaver Road
Troy , MI
48084-3501