



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED], MI [REDACTED]

Date Mailed: June 29, 2020
MOAHR Docket No.: 20-002429
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 June 4, 2020. [REDACTED], Petitioner's mother/legal guardian, appeared and testified on Petitioner's behalf. [REDACTED], Petitioner's current Case Manager, and [REDACTED], Petitioner's former Case Manager, also testified as witnesses for Petitioner. Karen Thompson, Quality Improvement and Utilization Manager, appeared and testified on behalf of Respondent Northpointe Behavioral Health Services. Michelle Rexes, Self-Determination Coordinator, also testified as a witness for Respondent.

During the hearing, Respondent submitted eleven proposed exhibits that were admitted into the record as Exhibits #1-#11. Petitioner did not submit any proposed exhibits.

ISSUE

Did Respondent properly deny Petitioner's request for additional respite care services?

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] ([REDACTED]) year-old Medicaid beneficiary who has been diagnosed with, among other conditions, an intellectual disability; anxiety disorder; obsessive-compulsive disorder; monosomy 8 deletion with resulting mental and developmental delays; congenital single left kidney with hydronephrosis; and severe scoliosis. (Exhibit #1, pages 1, 10-11).

2. Petitioner needs total assistance in all areas of daily living; and she has a history of acting out at times, demonstrating self-defensive/coping behaviors of hitting, pinching, pulling hair if she becomes anxious, over-tired or over-stimulated. (Exhibit #1, page 2).
3. She is also extremely attached to her mother and has separation anxiety when away from her. (Exhibit #1, page 2).
4. Due to her medical conditions and need for assistance, Petitioner has been approved for 116 hours and 35 minutes per month of Home Help Services (HHS) through the Michigan Department of Health and Human Services (MDHHS). (Exhibit #6, page 1).
5. Petitioner's mother is an HHS provider for Petitioner. (Testimony of Petitioner's representative).
6. Petitioner has also been approved for services through Respondent, including supports coordination, respite care services, skill-building services, and Community Living Supports (CLS). (Exhibit #2, page 14).
7. On May 28, 2019, a meeting was held to complete Petitioner's Individual Plan of Services (IPOS) for the upcoming plan year, *i.e.* June 10, 2019 to June 9, 2020. (Exhibit #2, pages 1-19).
8. As part of that IPOS, it was noted that Petitioner had no self-injurious behaviors or aggression during the past year, except for picking and peeling skin due to her OCD. (Exhibit #1, page 2).
9. It was also noted that Petitioner lives with her mother, but that she spends time with her father a few times a month. (Exhibit #1, page 13).
10. Petitioner was again approved for respite care services in order to provide her mother with a periodic break from the demands of caring for Petitioner. (Exhibit #2, pages 5-6, 14).
11. Specifically, 520 hours of respite care were approved; and Petitioner's mother/guardian was to utilize it through self-determination, where she hires the workers directly and set the hours. (Exhibit #2, page 14).
12. Petitioner was also reauthorized for 315 hours per year of skill-building services and 4 hours per week of CLS. (Exhibit #2, pages 8, 10, 14).
13. On February 4, 2020, Petitioner's IPOS was amended in order to request additional respite care services. (Exhibit #5, page 1).

14. Specifically, that Addendum stated:

Due to continues [sic] medical concerns leaving [Petitioner] at home with her mother more frequently and unable to attend school and day programming with Northern Pines and Community Living Support [Petitioner's] mother has exhausted her allotted respite units resulting in a need for additional hours to fulfill the current plan of service. Goals and objectives to remain the same.

Exhibit #5, page 1

15. On February 25, 2020, Respondent sent Petitioner's guardian written notice stating that Respondent was denying Petitioner's request for additional respite care services on the basis that the services were not medically necessary given Petitioner's other services, her attendance at school full-time, and the shared parenting. (Exhibit #6, page 3).
16. Respondent did note that Petitioner could request an increase in her other services when school was out for the summer. (Exhibit #6, page 3).
17. Petitioner's guardian subsequently filed a local appeal with Respondent regarding that denial. (Exhibit #7, page 1).
18. On April 2, 2020, Respondent sent Petitioner written notice that Petitioner's local appeal was denied, and that Respondent was upholding its original decision. (Exhibit #8, pages 1-5).
19. As part of that notice, Respondent stated that the requested services were not clinically appropriate given Petitioner's current services; her time out of the home; and the fact that Petitioner has used many respite care hours for overnights while improperly billing for services during times the provider was sleeping. (Exhibit #8, pages 1-2).
20. On April 14, 2020, the Michigan Office Administrative Hearings and Rules (MOAHR) received the request for hearing filed in this matter regarding Respondent's decision to deny Petitioner's request for additional respite care services. (Exhibit #9, pages 1-4).
21. On May 26, 2020, Respondent authorized additional services for Petitioner due to Petitioner being out of school and at home more because of the COVID-19 pandemic. (Testimony of Self-Determination Coordinator).

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).

Here, as discussed above, Petitioner has been receiving respite care services through Respondent pursuant to the Habilitation Supports Waiver (HSW). With respect to services, the applicable version of the Medicaid Provider Manual (MPM) provides in part:

SECTION 15 – HABILITATION SUPPORTS WAIVER FOR PERSONS WITH DEVELOPMENTAL DISABILITIES

Beneficiaries with developmental disabilities may be enrolled in Michigan's Habilitation Supports Waiver (HSW) and receive the supports and services as defined in this section. HSW beneficiaries may also receive other Medicaid state plan or additional/B3 services. A HSW beneficiary must receive at least one HSW service per month in order to retain eligibility. Medical necessity criteria should be used in determining the amount, duration, and scope of services and supports to be used. The beneficiary's services and supports that are to be provided under the auspices of the PIHP must be specified in his individual plan of services developed through the person-centered planning process.

* * *

Respite care services are provided to a waiver eligible beneficiary on a short-term, intermittent basis to relieve the beneficiary's family or other primary caregiver(s) from daily stress and care demands during times when they are providing unpaid care. Relief needs of hourly or shift staff workers should be accommodated by staffing substitutions, plan adjustments, or location changes and not by respite care.

- "Short-term" means the respite service is provided during a limited period of time (e.g., a few hours, a few days, weekends, or for vacations).
- "Intermittent" means the respite service does not occur regularly or continuously. The service stops and starts repeatedly or with periods in between.
- "Primary" caregivers are typically the same people who

provide at least some unpaid supports daily.

- "Unpaid" means that respite may only be provided during those portions of the day when no one is being paid to provide the care, i.e., not a time when the beneficiary is receiving a paid State Plan (e.g., home help) or waiver service (e.g., community living supports) or service through other programs (e.g., school).

Since adult beneficiaries living at home typically receive home help services and hire their family members, respite is not available when the family member is being paid to provide the home help service but may be available at other times throughout the day when the caregiver is not paid.

Respite is not intended to be provided on a continuous, long-term basis where it is a part of daily services that would enable an unpaid caregiver to work full-time. In those cases, community living supports or other services of paid support or training staff should be used. The beneficiary's record must clearly differentiate respite hours from community living support services. Decisions about the methods and amounts of respite are decided during the person-centered planning process. Respite care may not be provided by a parent of a minor beneficiary receiving the service, the spouse of the beneficiary, the beneficiary's legal guardian, or the primary unpaid caregiver.

Respite services may be provided in the following settings:

- Waiver beneficiary's home or place of residence.
- Licensed foster care home.
- Facility approved by the State that is not a private residence, such as:
 - Group home; or
 - Licensed respite care facility.
- Home of a friend or relative (not the parent of a minor beneficiary or the spouse of the beneficiary served or the legal guardian) chosen by the beneficiary; licensed camp; in community settings with a respite worker training, if needed, by the beneficiary or family. These sites are approved by the beneficiary and identified in the IPOS.

Cost of room and board must not be included as part of the respite care unless provided as part of the respite care in a facility that is not a private residence. Respite provided in an institution (i.e., ICF/IID, nursing facility, or hospital) or

MDHHS approved day program site is not covered by the HSW. The beneficiary's record must clearly differentiate respite hours from community living support services.

*MPM, January 1, 2020 version
Behavioral Health and Intellectual and Developmental Disability Supports and Services
Pages 106, 121-122
(underline added for emphasis)*

Here, as discussed above, Respondent decided to deny Petitioner's request for additional respite care services. Petitioner then requested the administrative hearing in this matter.

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 the decision.

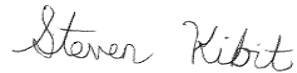
Given the record and applicable policies in this case, the undersigned Administrative Law Judge finds that Petitioner has failed to meet her burden of proof and Respondent's decision must therefore be affirmed. While Petitioner and her guardian may have exhausted her respite care services, Petitioner was authorized for a substantial amount of respite care and the authorization appears to have been sufficient to provide Petitioner's mother with short-term, intermittent relief from the daily stress and care demands during times when she is providing unpaid care, especially given Petitioner's other services and circumstances, which include CLS and skill-building services through Respondent; HHS through the DHHS; Petitioner's attendance at school; and her time at her father's home. Moreover, while Petitioner's mother credibly explained why she exhausted the respite care services months before the plan year finished, *i.e.* paying substantial amounts of overtime in order to have Petitioner stay with someone overnight and for longer time periods now that an overnight respite facility she previously used is closed and Petitioner's mother was advised by Petitioner's fiscal intermediary that she cannot pay a worker a per diem, the amount authorized was clear; it was ultimately Petitioner's guardian's responsibility, through self-determination, to manage those hours; and Petitioner's guardian's testimony shows that it was her choice in how she utilized the hours, rather than the authorization being insufficient, that lead to Petitioner's request for more additional services.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Respondent properly denied Petitioner's request for additional respite care 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.

Lisa Dionne
Northpointe Behavioral Health
715 Pyle Dr.
Kingsford, MI
49802

DHHS -Dept Contact

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

Petitioner

[REDACTED]
[REDACTED], MI
[REDACTED]

Authorized Hearing Rep.

[REDACTED]
[REDACTED], MI
[REDACTED]