



STATE OF MICHIGAN

GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

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

Date Mailed: July 16, 2020
MOAHR Docket No.: 20-003370
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 July 1, 2020. [REDACTED], Petitioner’s mother, appeared and testified on behalf of the minor Petitioner. [REDACTED], Petitioner’s father, also testified as a witness for Petitioner. Dorian Johnson, Appeals Coordinator, appeared and testified on behalf of the Respondent. James Kelly, Utilization Manager, also testified as a witness for Respondent.

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

- Exhibit #1: Request for Hearing
- Exhibit #2: Petitioner’s Evidence Packet

- Exhibit A: Medicaid Provider Manual (MPM), Behavioral Health and Intellectual and Developmental Disability Supports and Services, Section 14
- Exhibit B: PCP Sign-in Sheet
- Exhibit C: Adequate Action Notice
- Exhibit D: Community Resources
- Exhibit E: MPM, Behavioral Health and Intellectual and Developmental Disability Supports and Services, Section 14.3
- Exhibit F: MPM, Behavioral Health and Intellectual and Developmental Disability Supports and Services, Section 17.3.D
- Exhibit G: Notice of Appeal Denial
- Exhibit H: Original EMOD Documentation
- Exhibit I: Physician Letter
- Exhibit J: Updated EMOD Documentation

ISSUE

Did Respondent properly deny Petitioner's request for fencing?

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 [REDACTED]-year old Medicaid beneficiary who has been diagnosed with autistic disorder; cognitive impairment; development delay; speech apraxia; and seizure disorder. (Exhibit C, page 1; Exhibit H, pages 1, 17).
2. Due to his diagnoses and need for assistance, Petitioner has been approved for the Children's Home and Community Based Services Waiver Program (CWP) and services through Respondent. (Exhibit C, page 1; Testimony of Respondent's representative).
3. One of the goals of Petitioner's services is to increase his personal and community safety skills as he lacks such skills and currently needs to be monitored and kept within arms-reach while out in the community. (Exhibit #2, pages 4-5).
4. As part of that goal, Petitioner has been working on memorizing his demographic information, including his address and his mother's cell phone number. (Exhibit #2, page 5).
5. In 2019, Petitioner requested fencing through the CWP and Respondent. (Testimony of Utilization Manager).
6. The request included information from an Occupational Therapist (OT) discussing Petitioner's history of behavioral concerns, including climbing, a lack of safety judgment, impulsive behaviors, and running and not stopping with verbal prompting. (Exhibit H, page 13).
7. The OT also noted that Petitioner is at risk of entering streets without judgment and that he has eloped from his home before after climbing over the home's current fence. (Exhibit H, page 13).
8. The OT further stated that Petitioner continues to be at risk of elopement during sleeping periods and while his mother is doing laundry in the basement. (Exhibit H, page 13).
9. On December 18, 2019, Respondent sent Petitioner an Adequate Notice of Adverse Benefit Determination in which it stated that Petitioner's request had been denied. (Exhibit C, pages 1-7).

10. With respect to the reason for the decision, the notice stated:

This action is based on the following:

- Although there is a prescription for the OT evaluation, there does not appear to be a physician's prescription for the actual fence.
- There appears to be only one bid contained in the packet. Three are required.
- There is no evidence that alternative sources of funding have been pursued and denied.
- It appears ABA services which could address behavior(s) has been declined.
- Further, per the Medicaid Manual, exclusions include: "Adaptations or improvements to the home that are of general utility or cosmetic value and are considered to be standard housing obligations of the beneficiary. Examples of exclusions include, but are not limited to, carpeting (see exception above), roof repair, sidewalks, driveways, heating, central air conditioning, garages, raised garage doors, storage and organizers, landscaping and general home repairs."

Exhibit C, page 1

11. On February 14, 2020, Petitioner requested an Internal Appeal with Respondent regarding its decision. (Exhibit G, page 1).
12. Along with that appeal, Petitioner provided additional documentation in support of the request for fencing. (Exhibit J, pages 1-9).
13. On March 29, 2020, Respondent sent Petitioner a Notice of Appeal Denial. (Exhibit G, pages 1-6).
14. In that notice, Respondent stated that Petitioner's Internal Appeal was denied because "[t]he clinical documentation provided does not support medical necessity." (Exhibit G, page 1).
15. That same day, Respondent's representative also sent Petitioner a letter regarding the denial. (Exhibit #1, page 3).

16. In that letter, Respondent's representative stated that the Internal Appeal had been reviewed by a M.D./board-certified physician; and that the reviewer found that the requested fencing was not medically necessary given that the current treatment plan included provisions to help prevent elopement, such as door alarms, and that additional supportive measures, such as respite care, could be used to address elopement during nap times and times Petitioner's mother was doing the laundry. (Exhibit #1, page 3).
17. On June 2, 2020, the Michigan Office of Administrative Hearings and Rules (MOAHR) received the request for hearing filed in this matter with respect to Respondent's decision. (Exhibit #1, pages 1-5).

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).

As discussed above, Petitioner has been receiving services through Respondent pursuant to the CWP, and with respect to such services in general and fencing in particular, the applicable version of the Medicaid Provider Manual (MPM) states in part:

SECTION 14 – CHILDREN’S HOME AND COMMUNITY-BASED SERVICES WAIVER (CWP)

The Children’s Home and Community Based Services Waiver Program (CWP) provides services that are enhancements or additions to regular Medicaid coverage to children up to age 18 who are enrolled in the CWP.

The Children’s Waiver is a fee-for-service program administered by the CMHSP. The CMHSP will be held financially responsible for any costs incurred on behalf of the CWP beneficiary that were authorized by the CMHSP and exceed the Medicaid fee screens or amount, duration and scope parameters.

Services, equipment and Environmental Accessibility Adaptations (EAAs) that require prior authorization from MDHHS must be submitted to the CWP Clinical Review Team at MDHHS. The team is comprised of a physician, registered nurse, psychologist, and licensed master's social worker with consultation by a building specialist and an occupational therapist.

14.1 KEY PROVISIONS

The CWP enables Medicaid to fund necessary home- and community-based services for children with developmental disabilities who reside with their birth or legally adoptive parent(s) or with a relative who has been named legal guardian under the laws of the State of Michigan, regardless of their parent's income.

* * *

14.3 COVERED WAIVER SERVICES

Covered Medicaid services that continue to be available to CWP beneficiaries are listed in the Covered Services Section of this chapter. Refer to the Children's Waiver Community Living Support Services Appendix of this chapter for criteria for determining number of hours. Services covered under CWP include:

* * *

Fencing	Fencing may be approved with documentation that it is essential to achieve the outcomes specified in the child's individual plan of services and necessary to meet a child's health and safety needs. Authorization for fencing is for a maximum of 200 feet of standard chain link fence and one gate. If it is determined that chain link fencing will not meet the child's health and safety needs, a standard stockade fence may be
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	considered.
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*MPM, October 1, 2029 version
Behavioral Health and Intellectual and Developmental Disability Supports and Services
Pages 95-96, 98*

Moreover, regarding medical necessity, the MPM also provides:

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

- Responsive to particular needs of multi-cultural populations and furnished in a culturally relevant manner;
 - Responsive to the particular needs of beneficiaries with sensory or mobility impairments and provided with the necessary accommodations;
 - 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 deemed ineffective for a given condition based upon professionally and scientifically recognized and accepted standards of care;
 - that are experimental or investigational in nature; or
 - 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.

*MPM, October 1, 2029 version
Behavioral Health and Intellectual and Developmental Disability Supports and Services
Pages 14-15*

Here, as discussed above, Respondent denied a request for fencing for Petitioner. Petitioner then appealed that decision.

In doing so, 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 Respondent's decision in light of the information it had at the time the decision was made.

Given the record and applicable policies in this case, Petitioner has failed to meet that burden of proof and Respondent's decision must therefore be affirmed.

While any issues with documentation that lead to the initial denial appeared to have been resolved by the time of the decision on the Internal Appeal and are no longer the basis for Respondent's decision, Petitioner still does not meet the criteria for fencing outlined in the above policy.

Fencing through the CWP may only be approved with documentation that it is essential to achieve the outcomes specified in the child's individual plan of services and necessary to meet a child's health and safety needs.

Here, the Petitioner is an eleven-year-old boy with autism who has a history of elopement and can climb over the fence the family currently has. His IPOS includes working on his personal and community safety skills, and it is undisputed that it would be unsafe if he eloped given his cognitive issues, lack of judgment, and other issues.

However, it is also undisputed that the family home has alarms that can alert the parents or caregiver if Petitioner goes into the backyard and, consequently, while Petitioner cannot be in the backyard alone, the requested fencing is not essential as the current arrangement with the alarms is sufficient to prevent elopement.

Moreover, while Petitioner's parents testified that they want Petitioner to be able to go safely into the backyard by himself in order to work on his independence, there is no evidence in the record suggesting that such backyard play is a separate and distinct

goal in Petitioner's plan or that it is essential to achieve the goals that are in Petitioner's plan, especially given the CLS services that have been approve to help Petitioner with independence and Petitioner's opportunities to work on independence indoors.

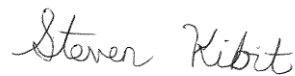
Accordingly, given the record and applicable policies, Petitioner has failed to meet his burden of proving by a preponderance of the evidence that Respondent erred and Respondent's decision to deny Petitioner's request for fencing must be affirmed.

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 fencing.

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 -Dept Contact

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

DHHS Department Rep.

Dorian Johnson
Wayne County CMH
707 West Milwaukee
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48202

Petitioner

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

Authorized Hearing Rep.

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