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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: March 19, 2021
MOAHR Docket No.: 20-007989
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 was held on March 18, 2020. [REDACTED] Petitioner's mother, appeared and testified on Petitioner's behalf.

Sarah Ameter, Manager, Customer Service, appeared on behalf of Respondent, Southwest Michigan Behavioral Health (SWMBH), the PIHP for St. Joseph County Community Mental Health (Respondent or CMH). Jeremy Franklin, Clinical Quality Specialist, SWMBH; Kathleen Morrill, Clinical Supervisor, St. Joseph CMH; Anna Farlay, Autism Case Manager; and Ashley Sattler, Clinical Fellow 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 January 26, 2017, who has been diagnosed with autism spectrum disorder. (Exhibit A, p 4; Exhibit A; pp 2, 13; Testimony)
2. Petitioner resides with her parents in a single-family home in [REDACTED] Michigan. (Exhibit A, p 3; Testimony)

3. Petitioner began receiving Applied Behavioral Analysis (ABA) services with Autism Spectrum Therapies through the Michigan Department of Health and Human Services' (MDHHS) Autism Benefit in November 2019. (Exhibit A, p pp 2-15; Testimony)
4. On March 9, 2020, CMH staff completed an annual re-evaluation of Petitioner, including the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), and the Developmental Disability Children's Global Assessment Scale (DD-CGAS), to determine if Petitioner continued to be eligible for BHT/ABA. (Exhibit A, p 16; Testimony)
5. Following the re-evaluation, CMH staff concluded that Petitioner did not meet medical necessity for continued BHT/ABA because Petitioner scored a "2" on the ADOS-2 and a score of "8" is required for continued eligibility. (Exhibit A, pp 17-19; Testimony)
6. On March 10, 2020, CMH sent Petitioner's mother a Notice of Adverse Benefit Determination informing them that Petitioner's ABA services would end March 24, 2020. (Exhibit A, pp 17-19; Testimony)
7. On March 17, 2020, CMH notified Petitioner's mother that they had received their request for a local appeal and request for a second opinion screening. However, because of COVID-19, a second opinion screening could not be conducted in a timely manner. (Exhibit A, p 20; Testimony)
8. On October 2, 2020, a Second Opinion evaluation of Petitioner's eligibility to receive BHT/ABA was conducted by Integrated Services of Kalamazoo. Following the evaluation, this clinician also determined that Petitioner did not meet the medical necessity criteria for continued BHT/ABA as Petitioner had an overall score of "3" and a comparative score of "1". In conclusion, the clinician indicated:

Based on the algorithm, ■■■ had a total overall score of 3 which places her in the non-Autism Classification with a comparison score of 1. This indicates that ■■■ falls in the minimal-to-no evidence of autism spectrum related symptoms and does not meet eligibility for continued ABA services through the Michigan Medicaid Autism Benefit. ■■■ had a total score of 1 in the Social Affect subscale and a total of 2 in the Restricted and Repetitive Behavior subscale. Some of ■■■ observed skills included effectively using eye contact to initiate social interaction, often utilizing three-point gaze shifts. She engaged in pointing and gesturing frequently and directed most of her verbalizations to the administrator and her mom. ■■■ was observed to smile often and directing most of her facial expressions towards this administrator. She appeared to enjoy all of the activities

presented. She did have some poor social overtures, including standing next to this writer while touching shoulders and grabbing items from her hand. ■■■ also used some odd phrasing, for example saying, “pretzel outside” to request more snack and using the third person to request more bubbles, “■■■ turn”. She also was observed peering at the bunny by holding it very close to her face and tilting her head slightly, and continuously rubbing her hands over the rough tabletop. ■■■ played appropriately with most toys including spontaneously pretending to feed the baby, saying “shh, shh” and patting the baby and saying, “sleep now” and covering with a blanket. She also handed this writer a car and said “race” then made a ramp out of the little board book.

Based on the total score of the ADOS-2 ■■■ does not meet continued eligible for the Autism Benefit.

(Exhibit A, pp 21-22; Testimony)

9. On October 6, 2020, CMH sent Petitioner’s mother Notice that Petitioner’s local appeal was complete and that based on the Second Opinion evaluation, Petitioner was not eligible for continued ABA services. (Exhibit A, pp 23-24; Testimony)
10. On December 29, 2020, Petitioner’s request for hearing was received by the Michigan Office of Administrative Hearings and Rules. (Exhibit A, p 25)
11. On February 17, 2021, in preparation for the hearing, CMH conducted a utilization and file review. The review supported the decision to terminate Petitioner’s ABA services. (Exhibit A, pp 26-34; Testimony)

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, 2020, 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).

CMH's witnesses testified that following two separate evaluations, plus a post evaluation utilization paper review, 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 recommendations to Petitioner's mother for other treatments that would be beneficial to Petitioner, such as speech and occupational therapy.

Petitioner's mother testified that Petitioner was not talking much when they first filed the appeal after the March 2020 re-evaluation, maybe speaking only about 20-40 words randomly. Petitioner's mother indicated that with ABA continuing during the appeal since that time, Petitioner is now talking up a storm. Petitioner's mother testified that Petitioner does still have problems with motor skills, and she is way behind where she should be for a four-year old. Petitioner's mother indicated that there is a lot they do in ABA that has helped Petitioner drastically, such as emotional learning, learning to deal with other children, and expanding her vocabulary. Petitioner's mother noted that Petitioner actually had a very large vocabulary when she was really young but at [REDACTED]-old, Petitioner's vocabulary shrank to almost nothing. Petitioner's mother testified that ABA has helped to get Petitioner's vocabulary back. Petitioner's mother indicated that the recent explosion in Petitioner's vocabulary is evidence that ABA is working, and that Petitioner needs continued ABA services. Petitioner's mother testified that there are a lot of developmental milestones that Petitioner has still not met. Petitioner's mother indicated that Petitioner likes the one-on-one aspect of ABA and it has done way more for her than preschool. Petitioner's mother testified that she does not want Petitioner to have to wait until she is 7 or 8 years old to go to kindergarten. Petitioner's mother indicated that Petitioner is very intelligent, she is just wired differently.

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 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 consistent with policy and Petitioner's entire file relating to ABA was reviewed thoroughly during a utilization review prior to the hearing. While Petitioner's mother disagrees with CMH's findings, Medicaid policy does not leave eligibility decisions up to the parents of beneficiaries. Instead, policy requires that evaluations be completed by individuals specifically trained to conduct such evaluations, which was done here. It is clear from the evidence presented, and all parties agree, that Petitioner has made significant improvements over the 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.

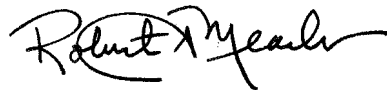
As such, CMH was correct in determining that Petitioner was not eligible for continued BHT/ABA services because she did not meet the medical criteria for those services. CMH did make further recommendations for Petitioner and Petitioner would still be eligible for those services. Accordingly, the CMH's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

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