

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]
[REDACTED] MI [REDACTED]

Date Mailed: September 29, 2020
MOAHR Docket No.: 20-005342
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Corey Arendt

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 commenced on September 22, 2020 and continued on September 24, 2020. [REDACTED], Authorized Hearing Representative appeared on behalf of Petitioner. [REDACTED], Supports Coordinator, and [REDACTED], Petitioner's legal guardian, appeared as witnesses for Petitioner. Leslie Garrisi, Clinical Supervisor, appeared on behalf of Respondent, [REDACTED] (Department).

Exhibits:

Petitioner	<ol style="list-style-type: none">1. PCP Meeting 1/20/202. Progress Notes3. Certificate of Need 10/2/184. Probate Court Order 10/9/185. Certificate of Need 1/30/156. Initial Intake 2/18/157. Initial Intake 1/30/128. Psychological Evaluation 9/12/169. Psychological Evaluation 10/3/1110. Level of Care Admission Criteria February 2017
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Department A. Hearing Summary

ISSUE

Did the Department properly deny Petitioner's request for specialized residential placement?

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 Medicaid beneficiary, born May 14, 1982, receiving services through Department. (Exhibit A, p 7; Testimony.)
2. Department is under contract with the Michigan Department of Health and Human Services (MDHHS) to provide Medicaid covered services to people who reside in the Department service area. (Exhibit A, p 1; Testimony.)
3. Petitioner is diagnosed with mild intellectual disability, bipolar disorder, attention deficit disorder, pulmonary fibrosis, IBS, obesity, and acid reflux. Petitioner has substantial limitations in the areas of learning, self-direction, capacity for independent living and economic self-sufficiency. Petitioner can complete most self-care tasks independently, including eating, dressing, toileting, grooming/hygiene, and bathing. (Exhibit A, pp 17, 18; Testimony.)
4. On October 3, 2011, Petitioner underwent a Psychological Evaluation. The evaluation was for the purpose of determining if Petitioner required the assistance of a guardian to manage her affairs. Testing indicated Petitioner functions in the moderately impaired range of cognitive ability with slightly better developed academic skills but poorly developed adaptive skills. (Exhibit 9.)
5. Since 2003, Petitioner has been receiving services from Department. (Exhibit 7; Exhibit A, p 62; Testimony.)
6. Since as early as 2012 and continuing, Petitioner has stolen money and cars from her parents; has displayed questionable decision making; and has been convicted of retail fraud. (Exhibit 6; Exhibit 7; Exhibit A p 18; Testimony.)
7. In 2015 and 2018, Petitioner requested specialized residential services. Both requests were denied and were not appealed. (Testimony.)
8. On August 28, 2016, Petitioner underwent a Psychological Evaluation. (Exhibit 8.)

9. On September 12, 2016, a Psychological Evaluation Report was issued. The report indicated Petitioner was in a borderline impaired range for adaptive behavior functioning and functioning in the mildly cognitively impaired range with respect to verbal comprehension, processing and/or overall knowledge and within the mildly cognitively impaired range with respect to her non-verbal comprehension and processing. (Exhibit 8; Testimony.)
10. On January 14, 2020, an Annual Assessment was completed. At the time of the assessment, Petitioner was living with her boyfriend. At the time of the assessment, no new medical issues or concerns were reported. Petitioner and Petitioner's father reported Petitioner over the past year has engaged in temper tantrums, disruptive behaviors, and stolen money and a car from her parents. During the assessment, Petitioner reported she was currently satisfied with services over the past year and had made progress in many areas of her life. (Exhibit A, pp 9, 15, 17; Testimony.)
11. On January 20, 2020, Petitioner, Petitioner's Parents (Guardians) and JOAK Macomb personnel, participated in a PCP meeting. During the assessment, it was indicated, Petitioner was able to feed, dress and toilet herself independently as well as bathe and complete grooming/hygiene tasks with prompting and occasional reminders. As a result of the meeting, referrals were made for the following:
 1. Support Coordination services in order for [Petitioner] to have her MI/DD support services linked, coordinated and monitored to ensure coordination of care and receipt of benefits. Support Coordinator will assist in the development of the IPOS utilizing the Person-Centered Planning process. Support Coordinator will provide health and safety monitoring. SC to assist w/ reapplying for food assistance.
 2. (Continued) Psychosocial Rehabilitative Programming in order for [Petitioner] to be provided with opportunities for positive peer socialization and to build skills in this area. She is not interested in Employment Services at this time.
 3. CLS services in order for [Petitioner] to function as independently as possible in the LRE and be provided with increased community inclusion activities to increase socialization skills. Also to work on safety skills, chores, community navigation, remembering to take medications etc.
 4. (Continued) Psychiatric services – Consumer is

diagnosed with Bipolar Disorder and ADD has a history of taking psychotropic medication. She currently receives psychiatric services from a private clinic and wishes to continue to see this doctor for medication management.

5. Behavioral Therapy Evaluation – consumer engages in challenging behaviors (hx verbal assaults, temper tantrums) and has a history of being overly trusting of strangers, being taken advantage of, etc.
6. Outpatient Counseling Services to address instances of sexual assault in the past. Consumer is not interested in this service.
7. Assistance with appointing a Public Guardian, per parent/co-guardian's request to step down as legal guardians. (Exhibit 1.)
12. Prior to February 2020, Petitioner's parents had custody of Petitioner and Petitioner had a valid Michigan Driver's License. (Testimony.)
13. In or around February 2020, ARC of [REDACTED] was appointed partial guardian. (Testimony.)
14. In or around February 2020, ARC of [REDACTED] determined Petitioner could continue living with her boyfriend and that the services in place were satisfactory to meet Petitioner's needs. (Testimony.)
15. At some point in time between February 2020, and May 30, 2020, Petitioner was involved in an automobile accident. Following the accident, ARC of [REDACTED] determined Petitioner could continue to have a Driver's License. (Exhibit A, p 43; Testimony.)
16. At some point in time following the accident occurring between February 2020 and May 30, 2020, ARC of [REDACTED] began to question whether Petitioner should continue living with her boyfriend and began looking into Adult Foster Care (AFC) homes. (Exhibit A, p 43; Testimony.)
17. On May 30, 2020, Petitioner was involved in a serious automobile accident that resulted in a closed head injury and rendered Petitioner unable to give herself injections. (Exhibit A, p 43; Testimony.)
18. Following the May 30, 2020 accident, Petitioner was hospitalized. While hospitalized, a treating physician petitioned the Secretary of State to dissolve Petitioner's Driver's License. (Testimony.)
19. The Secretary of State granted the petition to dissolve Petitioner's Driver's

License. (Testimony.)

20. Following the May 30, 2020 accident, Petitioner received inpatient treatment at Detroit Rehab. (Exhibit A, p 43.)
21. On June 8, 2020, Petitioner's Supports Coordinator contacted Department and indicated Petitioner was removed from a ventilator, able to be fed a soft diet but that Petitioner is not able to respond to questions and doesn't seem to understand what is being said. The Supports Coordinator also reported Petitioner did not seem to have control of her arms or legs. (Exhibit A, p 53.)
22. On June 24, 2020, ARC of [REDACTED] requested emergency residential placement services for Petitioner. At the time of the request, Petitioner had a July 2, 2020 expected discharge date from Detroit Rehab. As part of the request, ARC of [REDACTED] indicated Petitioner suffered a Traumatic Brain Injury due to a car accident on May 30, 2020 and requires 24 hour assistance due to impulsive behavior, lack of safety skills, incapable of feeding, clothing and bathing, and that Petitioner's boyfriend, a convicted felon, was trying to get Petitioner to come back and live with him. (Exhibit A, p 43; Testimony.)
23. On June 26, 2020, ARC of [REDACTED] followed up with the Department and reported Petitioner, due to the accident, was no longer able to give herself injections. (Exhibit A, p 43.)
24. On June 30, 2020, Department sent Petitioner a Notice of Adverse Benefit Determination. The notice indicated Petitioner's request for specialized residential treatment services was denied as the Petitioner did not appear to meet criteria for the requested service. (Exhibit A, pp 1-6; Testimony.)
25. On July 14, 2020, Department received from Petitioner, an internal appeal. (Exhibit A, p 57.)
26. On August 6, 2020, Department issued a Notice of Appeal Denial. The denial indicated Petitioner's appeal was thoroughly considered but denied. The notice stated specifically:

We denied your internal appeal for the service/item listed above because: the worsening of [Petitioner's] condition is the direct result of the TBI acquired in the auto accident in May of this year. The record is clear that, prior to this injury, [Petitioner] functioned quite independently, with minimal support. The changes in her functioning are the result of an additional physical injury and are not developmental; therefore she is not eligible for specialized residential services through MCCMH. (Exhibit A, p 57.)

27. On August 20, 2020, the Michigan Office of Administrative Hearings and Rules, received from Petitioner, a request for hearing. (See Hearing File.)

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.¹

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.²

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...

¹ 42 CFR 430.0.

² 42 CFR 430.10.

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 Michigan Department of Health and Human Services (MDHHS) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver. CMH contracts with MDHHS 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.³

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.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

³ See 42 CFR 440.230.

professionally recognized organizations or government agencies. (Emphasis added)

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;
- 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.

* * *

SECTION 11 – PERSONAL CARE IN LICENSED SPECIALIZED RESIDENTIAL SETTINGS

Personal care service are those services provided in accordance with an individual plan of service to assist a beneficiary in performing their own personal daily activities. For children with serious emotional disturbance, personal care services may be provided only in a licensed foster care setting or in a Child Caring Institution (CCI) if it is licensed as a "children's therapeutic group home" as defined in Section 722.111 Sec. 1(f) under Act No. 116 of the Public Acts of 1973, as amended. For children with intellectual/developmental disabilities, services may be provided only in a licensed foster care or CCI setting with a specialized residential program certified by the state. These

personal care services are distinctly different from the state plan Home Help program administered by MDHHS.

Personal care services are covered when authorized by a physician or other health care professional in accordance with an individual plan of services and rendered by a qualified person. Supervision of personal care services must be provided by a health care professional who meets the qualifications contained in this chapter.

11.1 SERVICES

Personal care services include assisting the beneficiary to perform the following:

- Assistance with food preparation, clothing and laundry, and housekeeping beyond the level required by facility licensure, (e.g., a beneficiary requires special dietary needs such as pureed food);
- Eating/feeding;
- Toileting;
- Bathing;
- Grooming;
- Dressing;
- Transferring (between bed, chair, wheelchair, and/or stretcher);
- Ambulation; and
- Assistance with self-administered medications.

“Assisting” means staff performs the personal care tasks for the individual; or performs the tasks along with the individual (i.e., some hands-on); or otherwise assists the individual to perform the tasks himself/herself by prompting, reminding, or by being in attendance while the beneficiary performs the task(s).⁴

The Department, in this case, argues Petitioner’s conditions worsened following the accident and are a direct result of the TBI acquired in the auto accident in May of 2020.

⁴ MPM, Behavioral Health and Intellectual and Developmental Disability and Services, April 1, 2020, pp 14-15, 78.

The Department went on to report that prior to the injury, Petitioner functioned quite independently, with minimal support. The Department also argued auto insurance carriers and their respective coverage policies are responsible for all damages resulting from the automobile accident and not the Department.

Petitioner agreed that the party responsible for damages resulting from the auto accident is the auto insurance carriers, but that in this case, Petitioner would have been eligible for specialized residential services prior to the accident. Petitioner attempted to support their argument by presenting documentation and testimony regarding Petitioner's conditions and behaviors prior to the accident. Outside of the occurrence of the auto accidents, however, there were no other specific conditions or behaviors that appeared to change between at least 2012 and May of 2020. Moreover, there is a record of at least two prior requests for specialized residential services that were denied with no appeal and no additional requests for services prior to May of 2020. Even after the Arc of [REDACTED] allegedly became concerned for Petitioner's well being following the first accident, the Arc of [REDACTED] failed to request additional services and failed to dissolve Petitioner's Driver's License. It was only after the Petitioner suffered TBI following the second accident and dramatic cognitive decline, did the Arc of [REDACTED] request additional services.

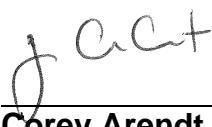
In this case, the decision to deny services should be based on the current conditions and circumstances. It is hard to speculate as to what services should have been or could have been provided months prior to the request for services. However, it is clear Petitioner's condition was relatively stable prior to the May 2020 accident and that only after the accident and corresponding TBI did Petitioner's needs change. Because there is no dispute, and the Petitioner agrees that the auto insurance carriers are responsible for the damages resulting from the auto accident, I find sufficient evidence to affirm the Department's decision to deny specialized residential services, as the Petitioner did not meet their burden of proving by a preponderance of the evidence that specialized residential services were medically necessary prior to the May 2020 accident.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Department properly denied Petitioner's request for specialized residential services.

IT IS THEREFORE ORDERED that:

The Department decision is AFFIRMED.



Corey Arendt
Administrative Law Judge
for Robert Gordon, Director
Department of Health and Human Services

CA/dh

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-Location Contact

David Pankotai
Macomb County CMHSP
22550 Hall Road
Clinton Township, MI 48036

Authorized Hearing Rep.

[REDACTED]
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[REDACTED] MI [REDACTED]

Petitioner

[REDACTED]
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