

GRETCHEN WHITMER  
GOVERNOR

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

ORLENE HAWKS  
DIRECTOR

MI [REDACTED]

Date Mailed: April 16, 2021  
MOAHR Docket No.: 20-000084  
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 and upon Petitioner's request for a hearing.

After due notice, a telephone hearing commenced on January 26, 2021. The hearing could not be completed in the scheduled time and was continued on March 2, 2021 and again on April 14, 2021.

[REDACTED] Petitioner's mother, appeared at the hearing on behalf of Petitioner. Anthony Holston, Assistant Vice President of Appeals, appeared on behalf of Respondent (Department).

Witnesses:

Petitioner:

[REDACTED]

Department: Angie Watkins  
Dr. Houser Betti

Exhibits:

Petitioner

1. Social Assessments and Misc. Records
2. Braintrust Assessments and Misc. Records
- 2.14. Braintrust Excel Grid
- 2.15. Core Deficit Assessment Excel Grid
- 2.25. Braintrust Excel Grid Incident Report
3. Divine Providence Academy Letter
4. January 10, 2021 Letter from Anne Smith

5. January 10, 2021 Letter from Gina Bouwhuis
6. Letter from Tara Lafferty
7. January 11, 2021 Letter from Jeannie Sokolowski
8. Letter from Elizabeth Watkoski
9. July 1, 2020 Incident Report jpg
10. January 12, 2021 Letter from Dr. Jeffrey VanWingen
11. All Belong Functional Behavior Assessment
12. St. Anthony Enrollment Criteria for 2020-2021
13. January 29, 2020 Letter from St. Anthony
14. September 7, 2018 Spectrum Screening
15. Exhibit List<sup>1</sup>
16. Weblink<sup>2</sup> (Demonstrative Purposes only)

Department:

- A. Hearing Summary
- B. Notice of Appeal Denial Beacon Health Options
- C. Local Appeal Request Form
- D. Notice of Action and Appeal Rights
- E. Center for Neuropsychology and Behavior Health Confidential Neuropsychological Evaluation
- F. Spectrum Community Services Individual/Family Plan of Service
- G. Lakeshore Regional Entity/Beacon Health Options ABA Approval Information
- H. Network 180 DD Proxy Measures
- I. Supplemental Testing Information needed for State of Michigan Website
- J. Developmental Enhancement Behavioral Health Autism Spectrum Disorder Evaluation

## **ISSUE**

Did Department properly terminate Petitioner's Behavioral Health Treatment (BHT)/Applied Behavior Analysis (ABA) 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 Medicaid beneficiary with a date of birth of [REDACTED] (Exhibit (Ex) A).
2. Following an October 1, 2018, Autism Spectrum Disorder Evaluation, Petitioner was diagnosed with Autism and approved for BHT ABA

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<sup>1</sup> Exhibit does not include Exhibits 14 and Exhibit 15

<sup>2</sup> [Diagnostic Criteria | Autism Spectrum Disorder \(ASD\) | NCBDDD | CDC](#) accessed April 14, 2021.

services. (Ex J; Testimony.) The October 1, 2018 evaluation noted the following:

... [REDACTED] ASD profile and current challenges require intensive treatment and demonstrates medical necessity for focused ABA-based therapies. (Ex J, p 5.)

3. On October 23, 2019, Petitioner was re-evaluated for BHT ABA services and underwent a Confidential Neuropsychological Evaluation. The evaluation was performed by Crystal Young, Ph.D. Ms. Young concluded Petitioner did not meet diagnostic criteria for ASD. (Ex E; Testimony.)
4. On November 18, 2019, Department issued a Notice of Action and Appeal Rights. The notice indicated Petitioner's ABA services were being terminated effective November 30, 2019 as Petitioner did not meet clinical eligibility criteria for services. The termination was based on the October 23, 2019 Neuropsychological Evaluation and the determination that Petitioner did not meet the diagnostic criteria for ASD. (Ex D; Testimony.)
5. On or around November 26, 2019, Petitioner requested a local appeal. (Ex C.)
6. On December 26, 2019, Department issued a Notice of Appeal Denial. The notice indicated the local appeal was denied. (Ex B.) The Notice stated the following:

...Applied Behavioral Analysis (ABA) treatment is not medically necessary to treat [Petitioner's] condition, and it is not clinically supported based on the results of his most recent clinical evaluation. (Ex B, p 1.)

7. On January 14, 2020, the Michigan Office of Administrative Hearings and Rules, received from Petitioner, a request for hearing.<sup>3</sup>

### **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:

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<sup>3</sup> The hearing was adjourned a couple of times at Petitioner's request and ultimately held in abeyance as a result of Petitioner's request to be in-person for hearing and the pending Covid "Stay-at-Home" orders. The parties eventually were amenable to moving forward with a ZOOM hearing in lieu of an "in-person" hearing.

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.<sup>4</sup>

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.<sup>5</sup>

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...<sup>6</sup>

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).

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<sup>4</sup> 42 CFR 430.0.

<sup>5</sup> 42 CFR 430.10.

<sup>6</sup> 42 USC 1396n(b).

In this case, as discussed above, Petitioner has been receiving BHT/ABA services through Respondent. With respect to services, the applicable version of the Medicaid Provider Manual (MPM) provides in part:

**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.

According to the U.S. Department of Health & Human Services, autism is characterized by impaired social interactions, problems with verbal and nonverbal communication, repetitive behaviors, and/or severely limited activities and interests. Early detection and treatment can have a significant impact on the child's development. Autism can be viewed as a continuum or spectrum, known as ASD, and includes Autistic Disorder, Asperger's Disorder, and Pervasive Developmental Disorder-Not Otherwise Specified (PDDNOS). The disorders on the spectrum vary in severity and presentation, but have certain common core symptoms. The goals of treatment for ASD focus on improving core deficits in communication, social interactions, and restricted behaviors. Changing these fundamental deficits may benefit children by developing greater functional skills and independence.

BHT services prevent the progression of ASD, prolong life, and promote the physical and mental health and efficiency of the child. *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.* Direct patient care services that treat or address ASD under the state plan are available to children under 21 years of age as required by the EPSDT benefit.

\* \* \*

## 18.5 DETERMINATION OF ELIGIBILITY FOR BHT

The following is the process for determining eligibility for BHT services for a child with a confirmed diagnosis of ASD. *Eligibility determination and recommendation for BHT must be performed by a qualified licensed practitioner through direct observation utilizing the ADOS-2 and symptom rating using the DD-CGAS.* BHT services are available for children under 21 years of age with a diagnosis of ASD from the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), and who have the developmental capacity to clinically participate in the available interventions covered by BHT services. A well-established DSM-IV diagnosis of Autistic Disorder, Asperger's Disorder or PDD-NOS should be given the diagnosis of ASD. Children who have marked deficits in social communication but whose symptoms do not otherwise meet criteria for ASD should be evaluated for social (pragmatic) communication disorder.

*The following requirements must be met:*

- Child is under 21 years of age.
- *Child received a diagnosis of ASD from a qualified licensed practitioner utilizing valid evaluation tools.*
- Child is medically able to benefit from the BHT treatment.
- Treatment outcomes are expected to result in a generalization of adaptive behaviors across different settings to maintain the BHT interventions and that they can be demonstrated beyond the treatment sessions. Measurable variables may include increased social-communication, increased interactive play/age-appropriate leisure skills, increased reciprocal communication, etc.
- Coordination with the school and/or early intervention program is critical. Collaboration between school and community providers is needed to coordinate treatment and to prevent duplication of services. This collaboration may take the form of phone calls, written communication logs, participation in team meetings (i.e., Individualized Education Plan/Individualized

Family Service Plan [IEP/IFSP], Individual Plan of Service [IPOS], etc.).

- Services are able to be provided in the child's home and community, including centers and clinics.
- Symptoms are present in the early developmental period (symptoms may not fully manifest until social demands exceed limited capacities, or may be masked by learned strategies later in life).
- Symptoms cause clinically significant impairment in social, occupational, and/or other important areas of current functioning that are fundamental to maintain health, social inclusion, and increased independence.
- A qualified licensed practitioner recommends BHT services and the services are medically necessary for the child.
- Services must be based on the individual child and the parent's/guardian's needs and must consider the child's age, school attendance requirements, and other daily activities as documented in the IPOS. Families of minor children are expected to provide a minimum of eight hours of care per day on average throughout the month.

\* \* \*

### **18.7 RE-EVALUATION**

*An annual re-evaluation by a qualified licensed practitioner to assess eligibility criteria must be conducted through direct observation utilizing the ADOS-2 and symptoms rated using the DD-CGAS. Additional tools should be used if the clinician feels it is necessary to determine medical necessity and recommended services. Other tools may include cognitive/developmental tests, adaptive behavior tests, and/or symptom monitoring.*

### **18.8 DISCHARGE CRITERIA**

*Discharge from BHT services is determined by a qualified BHT professional for children who meet any of the following criteria:*

- The child has achieved treatment goals and less intensive modes of services are medically necessary and appropriate.
- The child is either no longer eligible for Medicaid or is no longer a State of Michigan resident.
- The child has not demonstrated measurable improvement and progress toward goals, and the predicted outcomes as evidenced by a lack of generalization of adaptive behaviors across different settings where the benefits of the BHT interventions are not able to be maintained or they are not replicable beyond the BHT treatment sessions through a period of six months.
- Targeted behaviors and symptoms are becoming persistently worse with BHT treatment over time or with successive authorizations.
- *The child no longer meets the eligibility criteria as evidenced by use of valid evaluation tools administered by a qualified licensed practitioner.*
- The child and/or parent/guardian is not able to meaningfully participate in the BHT services, and does not follow through with treatment recommendations to a degree that compromises the potential effectiveness and outcome of the BHT service.<sup>7</sup>

Here, as discussed above, Petitioner is appealing Department's decision to terminate his BHT/ABA services.

In appealing the termination of services, Petitioner bears the burden of proving by a preponderance of the evidence that Department erred. Moreover, the undersigned Administrative Law Judge is limited to reviewing the Department'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 met his burden of proof and that Department's decision must therefore be reversed.

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<sup>7</sup> Medicaid Provider Manual, Behavioral Health and Intellectual and Developmental Disability Supports and Services, July 1, 2019, pp 153, 157-158.

As expressly described in the MPM, beneficiaries receiving BHT/ABA services must be reevaluated annually by a qualified licensed practitioner, through the use of direct observation and ADOS-2 and DD-CGAS assessments, and services must be terminated when a child no longer meets the applicable eligibility criteria.

Here, Petitioner was reevaluated as required but determined to no longer meet the eligibility criteria for BHT/ABA services because he no longer meets the criteria for a diagnosis for Autism Spectrum Disorder. The 2019 evaluation however, varied significantly from the conclusions reached just a year earlier in 2018. Moreover, while it is possible to see improvement and a reduction in need, the deviation from the 2018 findings is substantial. And while I do not necessarily agree with all of Petitioner's arguments<sup>8</sup>, the inclusion in the 2019 evaluation of particular findings is concerning. Particularly, the 2019 report mentioning Petitioner's mother as having smoked marijuana during her pregnancy with Petitioner. Understandably, the evaluation was later amended to correct the error, but it still seriously calls into question the credibility of the evaluation.

Based on the foregoing, I find Petitioner to have met his burden of proof and the Department must reinstate Petitioner's BHT/ABA services and conduct a new evaluation to determine Petitioner's eligibility for BHT/ABA services. The Evaluation **SHOULD BE** conducted by a new clinician if possible.

## **DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Department improperly terminated Petitioner's BHT/ABA services.

**IT IS THEREFORE ORDERED** that

- The Department's decision is **REVERSED**.
- The Department is ordered to reinstate Petitioner's BHT/ABA services and initiate a new evaluation to determine Petitioner's eligibility for BHT/ABA services. The Evaluation **SHOULD BE** conducted by a new clinician if possible.

CA/dh

*J. Arendt*  
**Corey Arendt**  
Administrative Law Judge  
for Elizabeth Hertel, Director  
Department of Health and Human Services

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<sup>8</sup> Some of the arguments presented were conclusions that lacked a factual foundation.

**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-Location Contact**

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48561 Alpha Dr Ste 150  
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**DHHS Department Rep.**

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**Petitioner**

[REDACTED]  
[REDACTED] MI [REDACTED]

**Authorized Hearing Rep.**

[REDACTED]  
[REDACTED] MI [REDACTED]