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Date Mailed: March 16, 2021
MOAHR Docket No.: 20-000181; 20-003514
Agency No.: 16945044
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.

Petitioner's request for hearing was received on January 16, 2020. On January 29, 2020, a Notice of Hearing was issued, scheduling an in-person hearing for March 4, 2020. The March 4, 2020 hearing was converted to a prehearing conference per Petitioner's request. Following the prehearing conference, an in-person hearing was scheduled for May 14, 2020. Due to the suspension of in-person hearings due to the COVID-19 pandemic, the May 14, 2020 hearing was adjourned. On June 8, 2020, Petitioner filed a new request for hearing, given Docket Number 20-003514, which was combined with this appeal. After due notice, another telephone prehearing conference was held on December 1, 2020, at which the parties agreed to proceed with the hearing via Zoom video conference. A Zoom video hearing began on January 20, 2021 and was completed on February 23, 2021.

Attorney Joelle Gurnoe-Adams appeared on behalf of Petitioner, Lauren Hendrick (Petitioner). [redacted], Petitioner's mother and [redacted], Petitioner's Case Manager, appeared as witnesses for Petitioner.

Attorney Steve Burnham appeared on behalf of Respondent, The Right Door for Hope, Recovery and Wellness, formerly Ionia County Community Mental Health (Respondent, CMH, The Right Door or Department). Kristin Hamilton, Program Manager; Amanda McPherson, Director of Children's Services; and Kerry Possehn, CEO, appeared as witnesses for Respondent.

ISSUE

Did the CMH properly authorize Petitioner's Community Living Supports (CLS) and/or Overnight Health and Safety Services (OHSS) upon her transition from the Children's Waiver to the Habilitation Supports Waiver?

EXHIBITS

Petitioner's Exhibits: 1-39

Respondent's Exhibits: A-W

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 [redacted], who has been receiving services through CMH since 2013. (Exhibit B, p 1; Testimony)

2. CMH is under contract with the Michigan Department of Health and Human Services (MDHHS) to provide Medicaid covered services to people who reside in the CMH service area.

3. Petitioner is diagnosed with Prader Willi Syndrome; mild, intellectual developmental disability; Bipolar I disorder, current or most recent episode hypomanic; pervasive developmental disorder, unspecified; unspecified mood (affective) disorder; overweight or obesity; and excoriation (skin-picking) disorder. (Exhibit C, p 20; Testimony)

4. Petitioner has struggled historically to manage her mood appropriately. This has led to verbal outburst, elopement, physical aggression, property destruction, and self-harm. With assistance of the Children's Waiver, Petitioner's outbursts have decreased significantly since 2011 and 2012. (Exhibit C, p 8; Testimony)

5. Petitioner's Prader Willi Syndrome creates an issue with hunger and how that is perceived by the brain. Individuals with Prader Willi Syndrome experience the feeling of hunger all the time, even when they have just eaten. Prader Willi also causes a person's metabolism to decrease significantly, causing individuals to burn fewer calories than an average individual. Over the last 5 years, Petitioner has gained 150 pounds. (Exhibit C, p 8; Testimony)

6. Petitioner is often able to make herself understood, she requires guidance and limited support with mobility, she requires extensive support with personal care and extensive involvement with daily emotional support and

relationships. Petitioner requires total, intermittent support for accommodating challenging behaviors. (Exhibit C, pp 9-10; Testimony)

7. Petitioner struggles with understanding safety and her role in maintaining safety in the community. Petitioner is a vulnerable individual and could easily be exploited without staff present. Petitioner is at risk in the community when needing to problem solve or if there are changes in routines or unexpected situations. (Exhibit C, p 16; Testimony)

8. Petitioner struggles with anxiety, which impacts her behavior. Petitioner consistently picks her skin. Petitioner can become destructive to others or property. Petitioner can engage in verbal insults, swearing, name calling, and elopement. Petitioner engages in risky behaviors, such as walking into traffic without looking, jumping into shallow ponds or lakes. Sometimes when Petitioner is in the community with staff, Petitioner's parents will have to retrieve Petitioner because Petitioner will not return with staff. (Exhibit C, p 17; Testimony)

9. On September 26, 2017, Respondent completed the most recent Behavioral Assessment for Petitioner outlining the above difficult behaviors. (Exhibit 18; Testimony) Petitioner has a behavior plan and all staff are trained on how to properly manage Petitioner's behaviors. (Exhibits 19; Testimony)

10. Petitioner does not have the capability to identify strangers at the door or know what to do if there is a fire or emergency in the home. Petitioner requires constant supervision 24/7 in her home. Petitioner does not know how to call 911. Petitioner is at high risk of using appliances. (Exhibit C, p 18; Testimony)

11. Petitioner loves to be in the community but struggles with reciprocal relationships. Because Petitioner's disability creates a fixation on fairness, she has a hard time when it appears that someone else is getting something she is not. Petitioner also enjoys going for long walks with her dogs, visiting with friends from work on group outings, making treats for her dogs, taking care of her birds, and making crafts. (Exhibit C, p 4; Testimony)

12. Beginning in 2015-2016, Petitioner was home schooled as Petitioner's parents realized that school was causing Petitioner more problems than it was helping her. Petitioner struggles with problem solving and has difficulty with complex ideas and instructions. Petitioner has a good long-term memory, but her short-term memory is a struggle. Petitioner requires repetition to remember things. (Exhibit C, pp 5-6; Testimony)

13. Since the fall of 2016, Petitioner has had a job at [redacted], a small weaving shop in [redacted] aimed at providing employment for those with

disabilities. Petitioner works 2x per week, 3 hours per shift and loves her job. The COVID-19 pandemic in 2020 most likely effected Petitioner's ability to go to work. (Exhibit C, p 6; Testimony)

14. Prior to turning [redacted], Petitioner lived in the family home with her parents and her brother in [redacted], Michigan. Petitioner's parents work full-time. Petitioner's brother left the family home in 2016 to attend college. (Exhibit C, p 4; Testimony)

15. Petitioner's parents first began discussing Petitioner's goal of moving out of the family home with Respondent in 2017. (Exhibit 16, p 1; Testimony). To that goal, Petitioner and her parents toured David's House, Benjamin's Hope, Elmhurst Home and Kinney Home, but none of the homes were going to work for Petitioner for different reasons. (Exhibit 17; Testimony)

16. Petitioner's parents have requested on several occasions that Petitioner be placed at Prader Willi Homes of [redacted] in [redacted], but Respondent had denied placement there several times. (Exhibit 17; Testimony)

17. Petitioner's February 21, 2019 PCP also mentions Petitioner's goal of moving out of the family home and mentions that Petitioner's parents had secured a rental property next door to their own home for Petitioner's use. (Exhibit 21, p 1; Testimony)

18. A Progress Note dated March 25, 2019 indicates that the family was planning Petitioner's move into the rental home, with a possible move date of October 1, 2019. (Exhibit 22, p 2; Testimony)

19. In May 2018, Respondent's Psychologist completed a Psychological Assessment of Petitioner which found that Petitioner's IQ was Extremely Low and her adaptive functioning was low. The Psychologist opined that Petitioner requires substantial assistance and supervision in all areas of her life. (Exhibit 23, p 4; Testimony)

20. On July 11, 2019, a person-centered planning meeting was held between Petitioner's family and CMH. The resulting Person-Centered Plan (PCP) mentions in numerous places Petitioner's plan to move out of the family home and her need then for 24/7 supervision. (Exhibit 4; Testimony)

21. A progress note dated August 5, 2019 indicates that Petitioner's mother was working with staff regarding their availability for 24/7 care for Petitioner when Petitioner moved out of the family home. (Exhibit 24, p 1; Testimony)

22. On August 5, 2019, Respondent began the process of transitioning Petitioner from the CSW to the Habilitation Supports Waiver (HSW).

(Exhibit 26; Testimony)

23. On September 9, 2019, 16 days before Petitioner turned 18, Petitioner had an incident of elopement when out with staff which required Petitioner's parents to intervene and arrange for the police to pick Petitioner up. (Exhibit 25, p 2; Testimony)

24. Six days before Petitioner was to turn 18, Respondent's Program Manager informed Petitioner's parents that Respondent would not be approving 24/7 care for Petitioner, or any additional CLS as it was deemed not medically necessary. (Exhibit 27, p 1; Testimony)

25. On [redacted], Petitioner's 18th birthday, Respondent issued a written denial of Petitioner's request for 24/7 care and supervision. (Exhibit 1; Testimony).

26. Following the denial, Petitioner's Biopsychosocial Assessment was completed on October 11, 2019, Petitioner's CLS Assessment was completed October 14, 2019 and Petitioner's PCP was updated October 14, 2019. The October 14, 2019 PCP still indicates in numerous places that Petitioner requires 24/7 care and supervision. (Exhibits 28, 29, and 30; Testimony)

27. Following the first denial, Petitioner's parents applied for Adult Home Help and additional help through the school district, as requested by Respondent, but Petitioner did not qualify for services through either entity. (Exhibits 35, 36; Testimony)

28. On October 23, 2019, Respondent issued a second Notice of Benefit Determination to Petitioner denying Petitioner's request for 24/7 CLS and authorizing 225 hours per month of CLS. (Exhibit A; Testimony).

29. On November 12, 2019, Petitioner requested an Internal Appeal. (Exhibit F; Testimony)

30. On December 5, 2019, the local appeal was completed, and the original denial was upheld. In summary, the local appeal stated:

> While it is clear that Lauren requires 24/7 supervision due to medical diagnosis and behavioral concerns, it appears that not all other avenues have been explored and/or tried to supplant Overnight Health and Safety. Because of this, at this time the appeal is denied. It is recommended that Lauren continue receiving her current amount of CLS hours per month until other avenues can be looked at to supplant OHSS. (Exhibit H; Testimony)

31. On January 19, 2020, Petitioner's request for hearing was received by the Michigan Office of Administrative Hearings and Rules. (Exhibit 1)

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 (MDHHS) 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 Medicaid Provider Manual articulates Medicaid policy for Michigan. It states, in relevant part:

> **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:
    - 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.

Medicaid Provider Manual
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
July 1, 2019, pp 12-14

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.

HSW beneficiaries must be enrolled through the MDHHS enrollment process completed by the PIHP. The enrollment process must include annual verification that the beneficiary:

- Has a developmental disability (as defined by Michigan law);
- Is Medicaid-eligible;
- Is residing in a community setting;
- If not for HSW services, would require ICF/IID level of care services; and
- Chooses to participate in the HSW in lieu of ICF/IID services.

The enrollment process also includes confirmation of changes in the beneficiary's enrollment status, including termination from the waiver, changes of residence requiring transfer of the waiver to another PIHP, and death. Termination from the HSW may occur when the beneficiary no longer meets one or more of the eligibility criteria specified above as determined by the PIHP, or does not receive at least one HSW service per month, or withdraws from the program voluntarily, or dies. Instructions for beneficiary enrollments and annual re-certification may be obtained from the MDHHS Bureau of Community Based Services. (Refer to the Directory Appendix for contact information.)

The PIHP shall use value purchasing for HSW services and supports. The PIHP shall assist beneficiaries to examine their first- and third-party resources to pursue all reimbursements to which they may be entitled, and to make use of other community resources for non-PIHP covered activities, supports or services.

Reimbursement for services rendered under the HSW is included in the PIHP capitation rate.

Beneficiaries enrolled in the HSW may not be enrolled simultaneously in any other §1915(c) waiver.

Habilitation services under the HSW are not otherwise available to the beneficiary through a local educational agency under the Individuals with Disabilities Education Act (IDEA) or the Rehabilitation Act of 1973.

15.1 WAIVER SUPPORTS AND SERVICES

Community Living Supports (CLS)

Community Living Supports (CLS) facilitate an individual's independence, productivity, and promote inclusion and participation. The supports can be provided in the beneficiary's residence (licensed facility, family home, own home or apartment) and in community settings (including, but not limited to, libraries, city pools, camps, etc.), and may not supplant other waiver or state plan covered services (e.g., out-of-home non-vocational habilitation, Home Help Program, personal care in specialized residential, respite). The supports are:

- Assisting (that exceeds state plan for adults), prompting, reminding, cueing, observing, guiding and/or training the beneficiary with:
  - Meal preparation;
  - Laundry;
  - Routine, seasonal, and heavy household care and maintenance (where no other party, such as a landlord or licensee, has responsibility for provision of these services);
  - Activities of daily living, such as bathing, eating, dressing, personal hygiene; and
  - Shopping for food and other necessities of daily living.
- Assisting, supporting and/or training the beneficiary with:
  - Money management;
  - Non-medical care (not requiring nurse or physician intervention);
  - Socialization and relationship building;
  - Transportation (excluding to and from medical appointments that are the responsibility of Medicaid through MDHHS or health plan) from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence);
  - Leisure choice and participation in regular community activities;
  - Attendance at medical appointments; and
  - Acquiring goods and/or services other than those listed under shopping and non-medical services.

- Reminding, observing, and/or monitoring of medication administration.

The CLS do not include the costs associated with room and board. Payments for CLS may not be made, directly or indirectly, to responsible relatives (i.e., spouses or parents of minor children) or the legal guardian.

For beneficiaries living in unlicensed homes, CLS assistance with meal preparation, laundry, routine household care and maintenance, ADLs, and/or shopping may be used to complement Home Help or Expanded Home Help services when the individual's needs for this assistance have been officially determined to exceed DHS's allowable parameters. Reminding, observing, guiding, and/or training of these activities are CLS coverages that do not supplant Home Help or Expanded Home Help. CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, State Plan coverage of Personal Care in Specialized Residential Settings.

If beneficiaries living in unlicensed homes need assistance with meal preparation, laundry, routine household care and maintenance, ADLs, and/or shopping, the beneficiary must request Home Help and, if necessary, Expanded Home Help from MDHHS. CLS may be used for those activities while the beneficiary awaits determination by MDHHS of the amount, scope and duration of Home Help or Expanded Home Help. If the beneficiary requests it, the PIHP must assist with applying for Home Help or submitting a request for a Fair Hearing when the beneficiary believes that the MDHHS authorization of amount, scope and duration of Home Help does not accurately reflect his or her needs. CLS may also be used for those activities while the beneficiary awaits the decision from a Fair Hearing of the appeal of a MDHHS decision.

Community Living Supports (CLS) provides support to a beneficiary younger than 18, and the family in the care of their child, while facilitating the child's independence and integration into the community. This service provides skill development related to activities of daily living, such as bathing, eating, dressing, personal hygiene, household chores and safety skills; and skill development to achieve or maintain mobility, sensory-motor, communication, socialization and relationship-building skills, and participation in leisure and community activities. These supports must be provided directly to, or on behalf of, the child. These supports may serve to reinforce skills or lessons taught in school, therapy, or other settings. For children and adults up to age 26 who are enrolled in school, CLS services are not intended to supplant services provided in school or other settings or to be provided during the times when the child or adult would typically be in school but for the parent's choice to home-school.

2.11 OVERNIGHT HEALTH AND SAFETY SUPPORT (OHSS) SERVICES [SUBSECTION ADDED 7/1/20]

NOTE: OHSS is not available for individuals residing in licensed non-community facilities or settings. Payment of OHSS may not be made directly or indirectly to responsible relatives (i.e., spouses or parents of minor children) or a legal guardian. **(text added per bulletin MSA 20-04)**

2.11.A. ELIGIBILITY [SUBSECTION ADDED 7/1/20]

To be eligible for OHSS, an individual must:

- Be Medicaid eligible;
- Be enrolled in one of the following waiver programs: CWP, HSW, or SEDW;
- Be living in a community-based setting (not in a hospital, Intermediate Care Facility for Individuals with Intellectual Disabilities [ICF/IID], nursing facility, licensed Adult Foster Care home, correctional facility, or child caring institution); and
- Require supervision overnight to ensure and maintain the health and safety of an individual living independently.

The need for OHSS must be reviewed and established through the person-centered planning process with the beneficiary's specific needs identified that outline health and safety concerns and a history of behavior or action that has placed the beneficiary at risk of obtaining or maintaining their independent living arrangement. Each provider of OHSS services will ensure the provision of, or provide as its minimum responsibility, overnight supervision activities appropriate to the beneficiary's needs to achieve or maintain independent living, health, welfare, and safety. **(text added per bulletin MSA 20-04)**

2.11.B. COVERAGE [SUBSECTION ADDED 7/1/20]

For purposes of this service, "overnight" includes the hours a beneficiary is typically asleep for no more than 12 hours in a 24-hour period

The purpose of OHSS is to enhance individual safety and independence with an awake provider supervising the health and welfare of a beneficiary overnight. OHSS is defined as the need for an awake provider to be present (i.e., physically on-site) to oversee and be ready to respond to a

beneficiary's unscheduled needs if they occur during the overnight hours when they are typically asleep.

OHSS services are generally furnished on a regularly scheduled basis, for multiple days per week, or as specified in the Individual Plan of Service (IPOS), encompassing both health and safety support services needed for the individual to reside successfully in their own home and community-based settings.

OHSS may be appropriate when:

- Service is necessary to safeguard against injury, hazard, or accident.

- A beneficiary has an evaluation that includes medical necessity that determines the need for OHSS and will allow an individual to remain at home safely after all other available preventive interventions/appropriate assistive technology, environmental modifications and specialty supplies and equipment (i.e., Lifeline, Personal Emergency Response System [PERS], electronic devices, etc.) have been undertaken to ensure the least intrusive and cost-effective intervention is implemented.

- A beneficiary requires supervision to prevent or mitigate mental health or disability related behaviors that may impact the beneficiary's overall health and welfare during the night.

- A beneficiary is non-self-directing (i.e., struggles to initiate and problem solve issues that may intermittently come up during the night or when they are typically asleep), confused or whose physical functioning overnight is such that they are unable to respond appropriately in a non-medical emergency (i.e., fire, weather-related events, utility failure, etc.).

- A beneficiary has a documented history of a behavior or action that supports the need to have an awake provider on-site for supported assistance with incidental care activities that may be needed during the night that cannot be pre-planned or scheduled.

- A beneficiary requires overnight supervision in order to maintain living arrangements in the most integrated community setting appropriate for their needs.

The following exceptions apply for OHSS:

- OHSS does not include friendly visiting or other social activities.

- OHSS is not available when the need is caused by a medical condition and the form of supervision required is medical in nature (i.e., nursing facility level of care, wound care, sleep apnea, overnight suctioning, end-stage hospice care, etc.) or in anticipation of a medical emergency (i.e., uncontrolled seizures, serious impairment to bodily functions, etc.) that could be more appropriately covered under PERS or medical specialty supplies.

- OHSS is not intended to supplant other medical or crisis emergency services to address acute injury or illness that poses an immediate risk to a person's life.

- OHSS is not available to prevent, address, treat, or control significantly challenging anti-social or severely aggressive individualized behavior.

- OHSS is not available for an individual who is anxious about being alone at night without a history of a mental health or disability related behavior(s) that indicates a medical need for overnight supports.

- OHSS is not intended to compensate or supplant services for the relief of the primary caregiver or legal guardian living in the same home or to replace a parent's obligations and parental rights of minor children living in a family home

- OHSS is not an alternative to inpatient psychiatric treatment or other appropriate levels of care to meet the beneficiary's needs and is not available to prevent potential suicide or other self-harm behaviors. **(text added per bulletin MSA 20-04)**

Medicaid Provider Manual
Behavioral Health and Intellectual
Disability Supports and Services
Children's Serious Emotional Disturbance
Home and Community-Based Services Waiver Appendix
July 1, 2020, pp B10-B12[1]

Petitioner argues that it is undisputed that Petitioner requires 24/7 care and supervision, and the only issue is the number of hours that Respondent will authorize for paid supports. Petitioner argues that records show that Petitioner meets the medical necessity goal for supervision 24/7 and without such support Petitioner is at risk for serious harm caused by her behaviors including overeating and eloping, and her inability to deal with unexpected situations. Petitioner argues that contrary to Respondent's assertion at the time of denial, there was a demonstrated change

[1] Effective October 1, 2019 per MSA Policy Bulletin 20-04

warranting additional CLS, namely that Petitioner was transitioning from CWS to HSW, that she was now an adult, and that she was moving out of her parent's home into her own home. Petitioner argues that Respondent's authorizations leave Petitioner without adequate staff assistance and force Petitioner to rely on natural supports for most of the day, contrary to policy. Petitioner's parents argue that they are not required to be Petitioner's direct caregivers now that she is an adult and, as Petitioner's guardians, they still do an enormous number of things to manage Petitioner's life.

Petitioner argues that at the time she requested 24/7 CLS, such services were available to preserve Petitioner's health and safety so that she could reside in the most integrated, independent community setting, i.e., her own home. Petitioner also argues that more recently, MPM policy allows HSW recipients to request Overnight Health and Safety Supports (OHSS) and Petitioner's needs could be met with a combination of CLS and OHSS.

Respondent argues that CLS hours are being properly authorized for Petitioner according to the medical necessity criteria and determination as defined in the MPM. Respondent argues that CLS is being provided to Petitioner as a way to help her maintain a sufficient level of functioning in order to achieve her goals of community inclusion and participation. Respondent argues that CLS is being provided to Petitioner according to the goals in her treatment plan as well as the hours found in the CLS Needs Assessment.

Respondent argues that Petitioner should try less restrictive services and supports such as natural supports, behavioral treatment services, a Personal Emergency Response System (PERS), further assistance through the local school district, occupational therapy, or living in a specialized residential setting. Respondent argues that Petitioner's parents have been resistant to these suggestions and are focused only on Petitioner receiving 24/7 care and supervision in her own home. (See Exhibits P, Q, R, S, T, U and V).

Finally, Respondent argues that they are unable to authorize OHSS until the service is medically necessary. Respondent argues that one of the criteria for OHSS is, ". . .a history of behavior or action that has placed the beneficiary at risk of obtaining or maintaining their independent living arrangement." Here, Respondent argues, they have not been provided specific dates or times when Petitioner has eloped or needed assistance overnight. Respondent also argues that Petitioner's home is near enough to her parent's home whereby she can notify her parents if she has any concerns at night.

Petitioner bears the burden of proving by a preponderance of the evidence that CMH erred in authorizing Petitioner's CLS and OHSS when she transitioned from CWS to HSW. Based on the evidence presented, Petitioner has met this burden.

In the years and months leading up to Petitioner's transition from CWS to HSW, Petitioner's case manager actively supported Petitioner's goal to move into her own apartment with 24/7 paid supports. However, once this plan was formally presented to the case manager's supervisor, a short time before Petitioner's 18th birthday, Petitioner

and her parents learned for the first time that such an authorization was not going to be approved. Based on the testimony of CMH's Program Manager, it is clear that the Program Manager believed that Petitioner's parents were going to continue to provide informal direct care to Petitioner after Petitioner turned 18 and moved into her own apartment. However, as the parties are aware, policy does not allow Respondent to force anyone to provide informal supports to a Medicaid beneficiary once that beneficiary turns 18 years old. Here, given the short time frame between the initial denial in September 2019 and the second denial in October 2019, and, to the present day, CMH has done exactly that: They have forced Petitioner's parents to provide direct informal support to Petitioner. As Petitioner's parents pointed out during their testimony, they now serve as Petitioner's legal guardians and provide a tremendous amount of support to Petitioner by managing much of Petitioner's life while both working full-time. And, since Petitioner no longer lives in the family home, Petitioner's parents are no longer able to rely on respite for any breaks. Petitioner's parents indicated that they have no other family to provide informal supports and no other community members can provide informal support.

CMH's arguments to the contrary are not persuasive. The issue of informal supports is addressed above. And, while Petitioner can certainly try a PERS unit, that unit should have been authorized with additional CLS hours for training to see if it would actually work, not raised as an argument against additional CLS. By the time of the October 2019 denial, Petitioner had already sought and been denied additional services through Adult Home Help and the local school district. Regarding occupational therapy, the undersigned fails to see how that would be of any assistance to Petitioner when alone in her own apartment at night trying to respond to an emergency. Regarding specialized residential homes, Petitioner has toured all available homes and, mostly due to her Prader Willie Syndrome, those homes were not a good fit. Finally, with regard to OHSS, it would appear that Petitioner does meet the criteria for these services as her entire record with CMH is replete with instances involving situations where Petitioner has eloped or otherwise put herself in danger. That history in and of itself should be sufficient to meet the OHSS criteria of being at risk of losing or maintaining her independent living arrangement.

Therefore, based on the evidence presented, CMH's decision was improper and should be reversed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH improperly authorized Petitioner's CLS and OHSS upon her transition from CWS to HSW.

IT IS THEREFORE ORDERED that:

The CMH decision is REVERSED.

Within 10 days of receipt of this Order, CMH should take steps to begin another assessment of Petitioner's needs consistent with this decision.

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

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