[redacted]
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Date Mailed: October 21, 2020
MOAHR Docket No.: 20-001178
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 October 20, 2020. [redacted] Petitioner's Mother, appeared and testified on Petitioner's behalf. Emily Grobhowalski, Petitioner's Supports Coordinator; Spectrum Community Services; appeared as a witness for Petitioner.

Anthony Holston, AVP, Appeals and Grievances appeared on behalf of Respondent, Beacon Health Options (Respondent or CMH). Amy Prins, Senior Appeals Coordinator, Beacon Health Options; Vernon Oard, Limited License Psychologist, Centria Healthcare; and Angie Watkins, Children's IDD Intake Manager, Network 180 appeared as witnesses for the CMH.

ISSUE

Did the Respondent properly determine that Petitioner was not 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 [redacted], who has been diagnosed with Attention Deficit/Hyperactivity Disorder. (Exhibit A, p 28; Testimony)

2. Petitioner resides with his mother and sister in Grand Rapids, Michigan. At the time of this appeal, Petitioner was in a [redacted]-grade special

education classroom at [redacted] Elementary School in [redacted], Michigan. (Exhibit A, p 29; Testimony)

3. In September 2019, Petitioner was referred for Behavioral Health Treatment (BHT), Applied Behavioral Analysis (ABA) services through the Michigan Department of Health and Human Services (MDHHS) autism benefit. (Exhibit A, p 28; Testimony)

4. On September 30, 2019, CMH's contractor, Centria Healthcare, completed an evaluation of Petitioner, which included the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), the Developmental Disability Children's Global Assessment Scale (DD-CGAS), and a structured interview with Petitioner's mother to determine if Petitioner was eligible for BHT/ABA. (Exhibit A, pp 28-35; Testimony)

5. Following the evaluation, CMH's contractor concluded that Petitioner did not meet medical necessity for BHT/ABA, concluding, in part:

> [redacted] is an [redacted]year-old male who was referred to Centria Healthcare for a diagnostic evaluation of Autism Spectrum Disorder (ASD) to determine eligibility for Autism Benefit Services. On a standardized diagnostic observation, [redacted] scores indicate Minimal-to-No Evidence of the presence of Autism Spectrum Disorder symptoms. Based on these results and information gathered during a clinical interview with his mother, [redacted] doesn't meet the diagnostic criteria for Autism Spectrum Disorder (DSM-V code 299.00). Overall, he displayed Moderate impairment based on the DD-CGAS.
>
> [redacted] was too excited and distracted to complete DAS-II cognitive testing activities. He failed all ten of the questions/tasks he attempted. As such, accurate information regarding [redacted]s cognitive functioning and abilities is not available. Given [redacted]s struggles with the materials he did complete, more thorough psychological/cognitive evaluation is recommended since some of [redacted]'s social and academic struggles may be attributable to cognitive deficits. [redacted] was very active and unfocused throughout all testing activities. However, he was pleasant throughout and was usually relatively easy to direct back to the task/activity at hand.
>
> (Exhibit A, pp 33-34; Testimony)

6. On November 22, 2019, CMH sent Petitioner a Notice of Adverse Benefit Determination informing Petitioner that his request for ABA services was denied. (Exhibit A, pp 22-25; Testimony)

7. On December 12, 2019, Petitioner filed a request for a Local Appeal. (Exhibit A, pp 26-27; Testimony)

8. On January 10, 2020, following the Local Appeal, the CMH sent Petitioner a Notice of Appeal Denial informing him that the denial of Petitioner's request for ABA services was being upheld. (Exhibit A, pp 4-21; Testimony)

9. On February 24, 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 (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:

    - 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 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.

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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).

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.

<u>The following requirements must be met</u>:

- Child is under 21 years of age.
- <u>Child received a diagnosis of ASD from a qualified licensed practitioner utilizing valid evaluation tools</u>.

- 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.

Medicaid Provider Manual
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
July 1, 2019, pp 147, 149-156
Emphasis added

CMH's witness testified that following the evaluation, it was determined that Petitioner did not meet the criteria for BHT/ABA services because he did not meet the criteria for a diagnosis of autism. CMH witnesses also noted that Petitioner 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 Limited License Psychologist (LLP) testified that he regularly conducts psychological evaluations for young people between the age of two and 21 to determine if those individuals qualify for ABA services. CMH's LLP indicated that he conducted the evaluation of Petitioner in this matter and determined that Petitioner did not meet the criteria for ABA services. CMH's LLP noted that while Petitioner was easily distracted, he did make good and appropriate eye contact throughout the testing and that when Petitioner did become distracted, he was easily redirected. CMH's LLP indicated that Petitioner showed a great deal of interest in him, which is unusual for persons with autism as autism is basically in impairment in social communication. CMH's LLP noted that Petitioner pointed at things while making eye contact with him to make sure that he also saw what Petitioner was pointing too. CMH's LLP noted that Petitioner played with a variety of toys in conventional ways and he noted no repetitive motor mannerisms in Petitioner.

CMH's Intake Coordinator testified that she is a Limited Master's Level Social Worker and has worked as the intake coordinator since 2001. CMH's Intake Coordinator indicated that when the State began its autism benefit in 2015, she was tasked with overseeing the benefit for the CMH. CMH's Intake Coordinator testified that she reviewed the records in Petitioner's case and determined that the evaluation conducted by CMH's LLP was valid and she had no concerns with the conclusions reached. CMH's Intake Coordinator noted that based on guidelines for ABA, an individual needs a diagnosis of autism to be considered for the benefit and Petitioner did not meet that criteria.

Petitioner's Supports Coordinator testified that she provides Petitioner case management services. Petitioner's Supports Coordinator indicated that her assessment shows that Petitioner shows functional impairments in four out of the five categories used to screen for developmental disability, so he clearly does not operate as a normal [redacted]-year-old. Petitioner's Supports Coordinator testified that Petitioner's communication is very limited, and it is very difficult to understand what he is saying. Petitioner's Supports Coordinator indicated that due to Petitioner's poor communication he struggles to have his needs met. Petitioner's Supports Coordinator testified that Petitioner has sensory processing issues and is very sensitive to sounds and touching. Petitioner's Supports Coordinator noted that Petitioner also lacks appropriate safety skills for a [redacted]-year-old. Petitioner's Supports Coordinator also noted that Petitioner will eat non-food items, such as paper, rubber, plastic, straws, and carpet. Petitioner's Supports Coordinator indicated that she is not licensed to perform autism assessments.

Petitioner's mother testified that Petitioner is in a self-control class at school with less than eight kids. Petitioner's mother indicated that Petitioner has a difficult time sitting still and is very difficult for her to deal with. Petitioner's mother testified that Petitioner has multiple issues such as anger, anxiety, depression, and learning disabilities. Petitioner's mother indicated that Petitioner hates light, many types of food and does chew on many non-food items. Petitioner's mother testified that Petitioner also occasionally throws his toys, once hitting his sister and giving her a black eye. Petitioner's mother testified that Asperger's Syndrome runs in her family and she really believes Petitioner has autism. Petitioner's mother testified that Petitioner has an IEP at school and receives both physical and speech therapy.

Based on the evidence presented, Petitioner did not prove, by a preponderance of the evidence, that the denial of BHT/ABA services was improper. A thorough evaluation of Petitioner indicates that Petitioner does not meet the criteria for a diagnosis of autism, which, as indicated above, is a prerequisite for receiving ABA services. In addition, Petitioner did 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 evaluation completed here is thorough and Petitioner's entire file relating to ABA was reviewed thoroughly during the internal appeal. Petitioner has not pointed to any specific issues with the evaluations or the testing completed with the evaluations. It is clear from the evidence presented that, while Petitioner has definite limitations and disabilities, he does not meet the criteria for a diagnosis of autism. Petitioner's remaining behavioral issues can likely be addressed by other services recommended by the CMH and services received through his school. This decision does not mean that Petitioner does not need any services, it only means that Petitioner does not need the intensive level of services offered by ABA and his needs can be met by other, less intensive services.

As such, CMH was correct in determining that Petitioner was not eligible for BHT/ABA services because he 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 denial of Petitioner's request for 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 not 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 Robert Gordon, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules
Reconsideration/Rehearing Request
P.O. Box 30763
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