[redacted]
MI [redacted]

Date Mailed: June 17, 2020
MOAHR Docket No.: 20-002266
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

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 was held on May 20, 2020. Attorney Kyle Williams appeared on behalf of Petitioner [redacted] ("Petitioner"). [redacted], Petitioner's mother and legal guardian, and [redacted] Petitioner's paid care provider, testified as witnesses for Petitioner. Susan Richards, Medicaid Fair Hearing Representative, appeared on behalf of Respondent The Right Door for Hope, Recovery and Wellness ("Right Door" or "Respondent"). Kerri Possehn, Chief Executive Officer, and Julie Dowling, Director of Outpatient and Specialty Services, testified as witnesses for Respondent.

ISSUE

Did Respondent properly suspend Petitioner's respite care 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. Respondent is a Community Mental Health Service Provider (CMHSP) associated with Mid-State Health Network, a Prepaid Inpatient Health Plan (PIHP).

2. Petitioner is a Medicaid beneficiary who has been approved for services through Respondent.

3. Prior to the action at issue in this case, Petitioner was approved for 40 hours per week of Community Living Supports (CLS) and 90 hours per month of respite care services.

4. On March 10, 2020, Governor Gretchen Whitmer issued Executive Order 2020-4 regarding the "Declaration of State of Emergency".

> The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person.
>
> COVID-19 has been identified as the cause of an outbreak of respiratory illness first detected in Wuhan City in the Hubei Province of China. Person-to-person spread of the virus has occurred in the United States, with some of those occurring in people with no travel history and no known source of exposure. On January 31, 2020, the United States Department of Health and Human Services Secretary Alex Azar declared a public health emergency for COVID-19, and affected state and local governments have also declared states of emergency.
>
> The State of Michigan has been taking proactive steps to prevent and prepare for the spread of this disease. On February 3, 2020, the Michigan Department of Health and Human Services (MDHHS) activated the Community Health Emergency Coordination Center, and has been working diligently with local health departments, health systems, and medical providers throughout Michigan to make sure appropriate screening and preparations for COVID-19 are being made. On February 28, 2020, I activated the State Emergency Operations Center to maximize coordination with state, local and federal agencies, as well as private partners, and to help prevent the spread of the disease. On March 3, 2020, I created four task forces comprising key state government agencies to coordinate the state's response and work closely with the appropriate community and non-governmental stakeholders to combat the spread of COVID-19 and assess the impact it may have on Michiganders' day-to-day lives. And throughout this time, the State has been working with schools, businesses, medical providers, local health

> departments, and residents to make sure they have the information they need to prepare for potential cases.
>
> On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan.
>
> Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.
>
> The Emergency Management Act, 1976 PA 390, as amended, MCL 30.403(4), provides that "[t]he governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists."
>
> The Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31(1), provides that "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, . . . the governor may proclaim a state of emergency and designate the area involved."
>
> Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:
>
> 1. A state of emergency is declared across the State of Michigan . . .

5. That same day, Petitioner's Case Manager sent Petitioner's mother/guardian a text message indicating that Petitioner's services would be suspended as of March 17, 2020.

6. On March 19, 2020, Respondent also sent a letter to its consumers.

7. In part, that letter stated:

> To our persons served:
>
> In a response to all that have expressed great concern over the decrease in services from The Right Door for Hope, Recovery and Wellness, we hear you and we understand the frustration. Life has changed drastically for almost everyone. In the end, the

decisions leadership at The Right Door are making are because we are committed to your health and safety. In an effort to limit your exposure to the Coronavirus (COVID-19), and to limit the transmission, the following actions are being taken by us as a part of Mid-State Health Network's provider network:

- We are limiting all but critical and essential services. The services that are being suspended until it becomes safe for persons served and staff to resume these services are:
    - Community Living Supports,
    - Respite,

* * *

The federal, state and affiliation social distance requirements being followed by The Right Door for Hope, Recovery and Wellness are below:

1. President Trump’s Coronavirus Guidelines for America
2. Directrices Del Presidente Sobre el Cornoavirus para los Estados Unidos
3. MDHHS Community Mitigation Strategies
4. Departamento de Servicios de Humanos y Salud de Michigan Recomendaciones Provisionales para COVID-19 Estrategias de Mitigación para la Comunidad
5. MSHN COVID-19 TIER SYSTEM – The Right Door is operating as a Tier 3 organization
6. MSHN PROVIDER COMMUNICATION
7. MSHN CONSUMER COMMUNICATION
8. The Right Door COVID-19 Operations

We will not be providing individual action notices to persons served during the suspension of services as this is due to a statewide declared emergency as well

> as a national and international pandemic. If you would like to make a complaint, please call Customer Service at 616-527-1790. Customer Services will listen, will log your complaint and will follow up with leadership staff. We will continue to make responsible decisions based on the most current information from WHO, CDC, MDHHS, and the Ionia County Health Department. We will update our website and Facebook page as service provision options change, as we receive ongoing communication from MDHHS, our Governor and our President regarding this evolving situation.
>
> The Right Door is taking the COVID-19 threat to our persons served and staff seriously and we hope you will, too. Please continue to be informed by the Centers for Disease Control and Prevention at the current website location: https://www.cdc.gov/coronavirus/2019-nCoV/index.html Please do not hesitate to call our crisis line should you be experiencing a mental health crisis at 1.888.527.1790.

8. On March 23, 2020, Governor Whitmer issued Executive Order 2020-21 regarding: “Temporary requirement to suspend activities that are not necessary to sustain or protect life”.

9. In part, that order stated:

> To suppress the spread of COVID-19, to prevent the state’s health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.
>
> This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.
>
> Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life . . .

2. Subject to the exceptions in section 7, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.

* * *

3. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.

    a. For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9.

* * *

8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available here). Such workers include some workers in each of the following sectors:

    a. Health care and public health.

10. On March 25, 2020, the Behavioral Health and Developmental Disabilities Administration within MDHHS issued Communication #20-01 regarding Essential Behavioral Health Services and Stay Home Stay Safe Executive Order 2020-21 in the COVID-19 Context.

11. In part, Communication 2020-21 stated:

> This guidance is being issued in response to the Governor's Executive Order 2020-21 (COVID-19) Temporary requirement to suspend activities that are not necessary to sustain or protect life (Stay Home Stay Safe Order) and is directed to Pre-Paid Inpatient Health Plans (PIHPs), Community Health Service Programs (CMHSPs), their provider agencies and direct care workers that provide home and community based behavioral health care and supports or direct care clinical services to individuals with serious mental illness, children with serious emotional disturbance, individuals with intellectual and developmental disabilities, substance use disorders, and all other individuals served by the public behavioral health system or experiencing a behavioral health crisis.
>
> All behavioral health services are essential to sustain and protect life and therefore must continue to be provided under the Governor's Stay Home Stay Safe Order. Behavioral health services shall continue to be provided in homes, residential or clinical settings if such services cannot reasonably be performed telephonically or through other virtual methods and are necessary to sustain and protect life. Home-based or clinic-based services are necessary to sustain and protect life if, based on a provider's good faith clinical judgment, are necessary for the individual to remain in the least restrictive environment, are required for assistance with activities of daily living, instrumental activities of daily living (IADLs), be sustained on life-preserving medication, as well as those services necessary to maintain behavioral or psychiatric stability.
>
> Essential services that do not require face to face home-based or clinic-based intervention may be done telephonically or through other virtual methods. Each service should be evaluated on an individual basis and the clinical rationale for telephonic or virtual method must be documented. The clinical rationale for the use of virtual methods vs home-based or clinic-based intervention given the Governor's Stay Home Stay Safe Order should be based upon the

behavioral health needs of the individual and whether or not a home-based or clinic-based intervention is essential to maintain the individual's health and safety and at home and in the least restrictive environment. The clinical rationale for the use of telephonic or virtual services must be reviewed and updated regularly as the individual's needs and the public health crisis evolves.

* * *

Essential services for which there must be a clear determination of when to deliver a face to face in-person encounter vs a virtual encounter include but are not limited to the following services:

- Community crisis stabilization- 24/7 response
- Pre-admission screening for inpatient psychiatric care
- Inpatient psychiatric care
- Intake and access to care services
- Crisis residential
- Intensive crisis stabilization, via mobile or on-site stabilization
- Community living supports – (limited to supporting independent living needs not socialization)
- Private duty nursing
- Personalized care in specialized residential settings
- Overnight health and safety supports
- Psychiatric services – assessments and medication reviews
- Medication administration
- Assertive community treatment

- Individual and group therapies, including home-based services for children,
- Applied Behavioral Analysis (ABA)
- Case management and supports coordination, including wraparound services
- Substance use disorder withdrawal management
- Substance use disorder residential treatment services
- Medication assisted treatment – Opioid treatment programs and office based opioid treatment services
- Adult Peers, Recovery Coaches, Parent Support Partners and Youth Peer Support Specialists
- Recipient Right services

12. Petitioner's guardian subsequently filed a Local Appeal with Respondent with respect to the suspension of Petitioner's CLS and those services were reinstated.

13. On March 30, 2020, Petitioner's guardian also filed an Emergency Local Appeal Request with Respondent with respect to the suspension of Petitioner's respite care services.

14. In that request, Petitioner's guardian wrote in part:

> Despite the COVID-19 crisis, [Petitioner] continues to be a young man with disabilities and needs assistance and prompting for toileting, bathing, and hygiene. He is non-verbal, severely autistic, gets upset easily, and engages in self-injurious and other inappropriate behaviors. [Petitioner] has been engaging in increasing problematic behavior due to the fact that he has to remain at home during this ongoing crisis. He is unable to receive services or supports from his school because it closed pursuant to the Governor's executive order that she issued on March 12, 2020. I am currently teleworking from home. I have to work eight hours a day, draft notices,

> take phone calls, emails, conference calls, etc. and am not able to care for [Petitioner] during this time. I am paying for [Petitioner's] caregivers out-of-pocket and am struggling to make ends meet. I have had to take out loans just to keep afloat.
>
> Respite, even if provided exclusively in the family home, is essential to [Petitioner] and myself, as I need respite time in order to buy essential groceries and supplies, shop and assist family members who cannot risk exposure in the public, clean and disinfect the home, as well as have time to walk and have a break from care giving. This break is necessary because it allows me to recharge and continue to have the energy to provide the best care possible when I am care giving. It also helps me to keep working so that I may provide for [Petitioner].

15. On April 2, 2020, Respondent sent Petitioner written notice that the Local Appeal had been denied pursuant to Executive Order 2020-21 and DHHS Communication #20-01 and on the basis that respite services are not considered necessary to sustain or protect the life of Petitioner or his family.

16. The reviewer of the Local Appeal did note that Petitioner's family might benefit from additional CLS hours while his school is suspended and provided Petitioner with the telephone number of a person to contact at Respondent in order to request a reassessment of CLS for additional hours while the stay at home order is in place.

17. On April 7, 2020, the Michigan Office Administrative Hearings and Rules (MOAHR) received the request for hearing filed in this matter regarding Respondent's decision to suspend Petitioner's respite care services.

18. Following a recent reassessment, Petitioner's CLS were increased to 52.5 hours per week.

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:

> 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…
>
> *42 USC 1396n(b)*

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).

Here, as discussed above, Petitioner has been receiving respite care services through Respondent. With respect to services, the applicable version of the Medicaid Provider Manual (MPM) provides in part:

> **17.3.I. RESPITE CARE SERVICES**
>
> Respite care services are intended to assist in maintaining a goal of living in a natural community home and are provided on a short-term, intermittent basis to relieve the beneficiary's family or other primary caregiver(s) from daily stress and care demands during times when they are providing unpaid care. Respite is not intended to be provided on a continuous, long-term basis where it is a part of daily services that would enable an unpaid caregiver to work elsewhere full time. In those cases, community living supports, or other services of paid support or training staff, should be used.
>
> Decisions about the methods and amounts of respite should be decided during person-centered planning. PIHPs may not require active clinical treatment as a prerequisite for receiving respite care. These services do not supplant or substitute for community living support or other services of paid support/training staff.
>
> - "Short-term" means the respite service is provided during a limited period of time (e.g., a few hours, a few days, weekends, or for vacations).
>
> - "Intermittent" means the respite service does not occur regularly or continuously. The service stops and starts repeatedly or with a time period in between.
>
> - "Primary" caregivers are typically the same people who provide at least some unpaid supports daily.
>
> - "Unpaid" means that respite may only be provided during those portions of the day when no one is being paid to provide the care, i.e., not a time when the beneficiary is receiving a paid State Plan (e.g., home help) or waiver service (e.g., community living supports) or service through other programs (e.g., school).
>
> - Children who are living in a family foster care home may receive respite services. The only exclusion of receiving respite services in a family foster care home

is when the child is receiving Therapeutic Foster Care as a Medicaid SED waiver service because that is considered in the bundled rate. (Refer to the Child Therapeutic Foster Care subsection in the Children's Serious Emotional Disturbance Home and Community-Based Services Waiver Appendix for additional information.)

Since adult beneficiaries living at home typically receive home help services and hire their family members, respite is not available when the family member is being paid to provide the home help service, but may be available at other times throughout the day when the caregiver is not paid.

Respite care may be provided in the following settings:

- Beneficiary's home or place of residence
- Licensed family foster care home
- Facility approved by the State that is not a private residence, (e.g., group home or licensed respite care facility)
- Home of a friend or relative chosen by the beneficiary and members of the planning team
- Licensed camp
- In community (social/recreational) settings with a respite worker trained, if needed, by the family
- Licensed family child care home

Respite care may not be provided in:

- day program settings
- ICF/IIDs, nursing homes, or hospitals

Respite care may not be provided by:

- parent of a minor beneficiary receiving the service
- spouse of the beneficiary served

- beneficiary's guardian
- unpaid primary care giver

Cost of room and board must not be included as part of the respite care unless provided as part of the respite care in a facility that is not a private residence.

MPM, January 1, 2020 version
Behavioral Health and Intellectual and Developmental Disability Supports and Services
Pages 145-147

To be approved, respite care services must be medically necessary. *See* 42 CFR 440.230. Regarding medical necessity, the MPM also provides:

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;

- Based on clinical information from the beneficiary's primary care physician or health care professionals with relevant qualifications who have evaluated the beneficiary;

- For beneficiaries with mental illness or developmental disabilities, based on person-centered planning, and for beneficiaries with substance use disorders, individualized treatment planning;

- Made by appropriately trained mental health, developmental disabilities, or substance abuse professionals with sufficient clinical experience;

- Made within federal and state standards for timeliness;

- Sufficient in amount, scope and duration of the service(s) to reasonably achieve its/their purpose; and

- 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;

- Responsive to particular needs of multi-cultural populations and furnished in a culturally relevant manner;

- Responsive to the particular needs of beneficiaries with sensory or mobility impairments and provided with the necessary accommodations;

- 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;

  - that are 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.
>
> *MPM, January 1, 2020 version*
> *Behavioral Health and Intellectual and Developmental Disability Supports and Services*
> *Pages 14-15*

Here, as discussed above, Respondent decided to suspend Petitioner's respite care services.

In support of that decision, Respondent's Chief Executive Officer (CEO) testified that the respite care services were suspended because, unlike CLS, which was suspended and then reinstated, respite care services are not essential services necessary to sustain or protect life. She also testified that the suspension was the same for all of its clients and for the same reasons, *i.e.* respite care is not an essential service.

She further testified that, while everything was happening so fast due to the COVID-19 pandemic, Respondent had extensive conversations with representatives from its PIHP and MDHHS prior to suspending services; and that she believed that all CMHSPs across the State of Michigan have suspended respite care services.

She also noted that respite care was not listed as an essential service in Communication #20-01 from the Behavioral Health and Developmental Disabilities Administration, but did agree that the communication expressly stated that the list was not exclusive.

Respondent's CEO further agreed that Petitioner was previously approved for respite care services because the services were medically necessary and that nothing has changed medically, but also testified that it is challenging to say that home-based care can be provided safely at this time and that Respondent approved the same amount of services as best as it could.

Respondent's Director of Outpatient and Specialty Services testified that the suspension was across-the-board for all beneficiaries and that no individualized letters or notices of

adverse action were sent out. She also testified that Executive Order 2020-21 was the driving force behind the decision and that, while, every parent could benefit from respite care, it is not essential at this time.

She did agree that, for Petitioner, his respite care services are still part of the PCP and that they remain necessary for him, but again testified that they are not essential during a world-wide pandemic.

Respondent's Director of Outpatient and Specialty Services further testified that she is not aware of the status of Petitioner's school services, but that Petitioner's primary caregiver would be taking on additional care if those services were suspended as well as Petitioner cannot be left alone and needs someone with him around-the-clock.

In response, Petitioner's mother/legal guardian testified that Petitioner previously received CLS and respite care services through Respondent and seven hours per week of in-home schooling as part of his special education services, but that she is his only natural support. She also testified that, prior to the suspension of respite care services at issue in this case, she normally used the respite care on the weekends in order to give herself a needed break from the demands of caring for Petitioner.

Petitioner's mother/guardian further testified that Respondent suspended Petitioner's services on March 17, 2020 and that the only notice she received was a text from Petitioner's Case Manager the day before. She also testified that, while Petitioner's CLS was subsequently reinstated, his respite care services remain suspended and that he also lost his seven hours per week of in-home school services.

She further testified that the loss of services has been a disruption in Petitioner's life and has caused a regression in his behavior, though she does pay for services out-of-pocket as much as she can because they continue to be necessary.

Petitioner's paid caregiver testified regarding the precautions they have been taking in the home in order to safely provide services and the regression Petitioner has had with reduced hours, including increased anxiety and increased instances of urination on the couch; throwing feces; and throwing furniture.

Petitioner bears the burden of proving by a preponderance of the evidence that Respondent erred.

Given the record and applicable policies in this case, the undersigned Administrative Law Judge finds that Petitioner has met that burden of proof and Respondent's decision must therefore be reversed.

As a preliminary matter, the undersigned Administrative Law Judge would note that Respondent failed to provide Petitioner with the notice required by 42 CFR 438.400 *et al.*, which requires timely and adequate notice of adverse benefit determination, including advance notice of suspension of services.

Here, it is undisputed that Respondent did not send any such notice prior to suspending Petitioner's services and Respondent offered no legal justification or support for failing to do so. Moreover, while Respondent points to Executive Order 2020-21 and that order could provide support for an immediate suspension of services, the record also demonstrates that Respondent suspended Petitioner's services prior to that executive order or the relevant communication from MDHHS being issued.

Additionally, even putting aside the notice issue and reviewing Respondent's decision in light of the later executive order and communication, Respondent erred by suspending Petitioner's services without doing an individualized assessment of Petitioner's circumstances and whether *his* respite care services are necessary to sustain or protect *his* life.

Executive Order 2020-21 generally prohibits in-person work, but there is an exception for in-person work that is necessary to sustain or protect life. Moreover, Communication 2020-21 states both that "[a]ll behavioral health services are essential to sustain and protect life and therefore must continue to be provided under the Governor's Stay Home Stay Safe Order" and that:

> Home-based or clinic-based services are necessary to sustain and protect life if, based on a provider's good faith clinical judgment, are necessary for the individual to remain in the least restrictive environment, are required for assistance with activities of daily living, instrumental activities of daily living (IADLs), be sustained on life-preserving medication, as well as those services necessary to maintain behavioral or psychiatric stability.

Accordingly, the specific circumstances and individual needs still matter and, with respect to home-based services like respite care, the provider must make a good faith clinical judgement as to whether the services are necessary for the individual to remain in the least restrictive environment, for assistance with ADLs or IADLs, to be sustained on life-preserving medication, or to maintain behavioral or psychiatric stability. If the provider answers yes, then the respite care would be necessary to sustain and protect life for that individual.[1]

Here, it is undisputed that Petitioner's respite care services are medically necessary as that term is defined in the MPM and that, if anything, the need for respite care has only increased given the loss of school-based services, additional care demands on

[1] Respondent correctly notes that Communication 2020-21 also contains a list of essential services for which there must be a clear determination of when to deliver an in-person encounter versus a virtual encounter, and that respite care is not on that list, but the communication also expressly states that such services are not limited to what is listed and Respondent must still make the required clinical judgment for Petitioner.

Petitioner's mother, regression in Petitioner's behavior, and Petitioner's undisputed need for around-the-clock care.

However, Respondent did not review those circumstances or make a good faith clinical judgment as to whether Petitioner's respite care is necessary to sustain and protect his life on the basis that they are needed to allow him to remain in the least restrictive environment, *i.e.* his home, or maintain his behavioral or psychiatric stability. Respondent instead just concluded that respite care is *per se* non-essential in all cases, and, by doing so, Respondent erred in suspending Petitioner's services and its decision must be reversed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Respondent improperly suspended Petitioner's respite care services.

IT IS THEREFORE ORDERED that

> The Respondent's decision is **REVERSED,** and it must initiate a reassessment of Petitioner's respite care services.

Steven Kibit

SK/sb

Steven Kibit
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
Lansing, Michigan 48909-8139

DHHS -Dept Contact	Belinda Hawks 320 S. Walnut St. 5th Floor Lansing, MI 48913
Counsel for Petitioner	Kyle M. Williams 4095 Legacy Parkway, Suite 500 Lansing, MI 48911-4264
DHHS Department Rep.	Susan Richards Ionia County CMHSP 375 Apple Tree Drive Ionia, MI 48846
Petitioner	[redacted] MI