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Date Mailed: August 31, 2020
MOAHR Docket No.: 20-003389
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Colleen Lack

DECISION AND ORDER

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 *et seq*; 42 CFR 438.400 *et seq*; and Mich Admin Code, R 792.11002.

After due notice, a hearing commenced on July 1, 2020, and concluded on July 13, 2020. [redacted], Mother, Guardian, and Authorized Hearing Representative, represented the Petitioner. [redacted] brother; [redacted] sister; Susan Fritz, ADA Advocate; and Jennifer Trobaugh, Graduate Student Therapist, appeared as witnesses for Petitioner. Mike Schlack, Attorney, represented the Respondent, Southwest Michigan Behavioral Health (SWMBH). Jeremy Franklin, Clinical Quality Specialist; Teresa Lewis, Customer Services Manager; Valerie Storey, Supervisor of Supports Coordination; Heather Woods, Customer Service; and Sarah Ameter, Manager Customer Services, appeared as witnesses for Respondent.

During the hearing proceeding, Respondent's Hearing Summary packet was admitted as Exhibit A, pp. 1-22; and Respondent's additional documentation was admitted as Exhibit B, pp. 1-17, Exhibit C, pp. 1-19, and Exhibit D, pp. 1-62; Petitioner's Hearing Request with attachments was admitted; and Petitioner's additional documentation was admitted as Exhibit 1, pp. 1-150, Exhibit 2, pp. 1-12, and Exhibit 3, pp. 1-8. Limited weight and relevancy is given to evidence that was not current at the time of the contested action.

ISSUE

Did Respondent properly terminate community Living Support (CLS) services for Petitioner?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. Integrated Services of Kalamazoo (ISK) is a member of the PIHP SWMBH. (Exhibit A, p. 1)

2. Petitioner is an adult Medicaid beneficiary.

3. Petitioner was receiving CLS services from ISK.

4. On February 25, 2020, a Notice of Adverse Benefit Determination was issued to Petitioner stating CLS services would be terminated effective March 10, 2020. (Exhibit A, p. 3)

5. On March 4, 2020, Petitioner requested a local appeal. (Exhibit A, p. 4)

6. On March 27, 2020, ISK issued a Notice of Appeal Denial to Petitioner upholding the termination of CLS services. In part, the notice indicates Petitioner has made it clear to ISK that he does not wish to participate in CLS any longer. When CLS was in place, Petitioner utilized it minimally and most often for transportation to Special Olympic events rather than as support for his daily living. Medical necessity was not met to receive CLS. The various CLS coverage areas were reviewed with regard to Petitioner's functional abilities and needs for assistance. (Exhibit A, pp. 7-10)

7. On June 2, 2020, the Michigan Office of Administrative Hearings and Rules (MOAHR) received Petitioner's request for hearing contesting the determination. (Hearing Request with Attachments)

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 1396(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).

In this case, Petitioner's Guardian is seeking continuation of CLS services for Petitioner.

With respect to CLS services, the Medicaid Provider Manual (MPM) provides in part:

17.3.B. COMMUNITY LIVING SUPPORTS

NOTE: This service is a State Plan EPSDT service when delivered to children birth-21 years.

Community Living Supports are used to increase or maintain personal self-sufficiency, facilitating an individual's achievement of his goals of community inclusion and participation, independence or productivity. The supports may be provided in the participant's residence or in community settings (including, but not limited to, libraries, city pools, camps, etc.).

Coverage includes:

- Assisting (that exceeds state plan for adults), prompting, reminding, cueing, observing, guiding and/or training in the following activities:

  - meal preparation
  - laundry
  - routine, seasonal, and heavy household care and maintenance
  - activities of daily living (e.g., bathing, eating, dressing, personal hygiene)
  - shopping for food and other necessities of daily living

  CLS services may not supplant services otherwise available to the beneficiary through a local educational agency under the Individuals with Disabilities Education Act (IDEA) or the Rehabilitation Act of 1973 or state plan services, e.g., Personal Care (assistance with ADLs in a certified specialized residential setting) and Home Help or Expanded Home Help (assistance in the individual's own, unlicensed home with meal preparation, laundry, routine household care and maintenance, activities of daily living and shopping). If such assistance appears to be needed, 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 case manager or supports coordinator must

assist him/her in requesting Home Help or in filling out and sending a request for Fair Hearing when the beneficiary believes that the MDHHS authorization of amount, scope and duration of Home Help does not appear to reflect the beneficiary's needs based on the findings of the MDHHS assessment.

- Staff assistance, support and/or training with activities such as:

  - money management
  - non-medical care (not requiring nurse or physician intervention)
  - socialization and relationship building
  - transportation from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence (transportation to and from medical appointments is excluded)
  - participation in regular community activities and recreation opportunities (e.g., attending classes, movies, concerts and events in a park; volunteering; voting)
  - attendance at medical appointments
  - acquiring or procuring goods, other than those listed under shopping, and non-medical services

- Reminding, observing and/or monitoring of medication administration

- Staff assistance with preserving the health and safety of the individual in order that he/she may reside or be supported in the most integrated, independent community setting.

CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, state plan coverage Personal Care in Specialized Residential Settings. Transportation to medical appointments is covered by Medicaid through MDHHS or the Medicaid Health Plan. Payment for CLS services may not be made, directly or indirectly, to responsible relatives (i.e., spouses, or parents of minor children), or guardian of the beneficiary receiving community living supports.

> CLS assistance with meal preparation, laundry, routine household care and maintenance, activities of daily living 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 the DHS's allowable parameters. 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. Reminding, observing, guiding, and/or training of these activities are CLS coverages that do not supplant Home Help or Expanded Home Help.
>
> 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.
>
> *MPM, January 1, 2020 version*
> *Behavioral Health and Intellectual and*
> *Developmental Disability Supports and Services*
> *Pages, 132-133*

While CLS is a covered service, Medicaid beneficiaries are still only entitled to medically necessary Medicaid covered services. The Medicaid Provider Manual (MPM) sets forth the criteria for medical necessity and for authorizing B3 Supports and Services:

> **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 costeffective 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, Behavioral Health and Intellectual and Developmental Disability Supports and Services Chapter, January 1, 2020, pp. 14-15

17.2 CRITERIA FOR AUTHORIZING B3 SUPPORTS AND SERVICES

The authorization and use of Medicaid funds for any of the B3 supports and services, as well as their amount, scope and duration, are dependent upon:

- The Medicaid beneficiary's eligibility for specialty services and supports as defined in this Chapter;
- The service(s) having been identified during person-centered planning;
- The service(s) being medically necessary as defined in the Medical Necessity Criteria subsection of this chapter;
- The service(s) being expected to achieve one or more of the above-listed goals as identified in the beneficiary's plan of service; and
- Additional criteria indicated in certain B3 service definitions, as applicable.

Decisions regarding the authorization of a B3 service (including the amount, scope and duration) must take into account the PIHP's documented capacity to reasonably and equitably serve other Medicaid beneficiaries who also have needs for these services. The B3 supports and services are not intended to meet all the individual's needs and preferences, as some needs may be better met by community and other natural supports. Natural supports mean unpaid assistance provided to the beneficiary by people in his/her network (family, friends, neighbors, community volunteers) who are willing and able to provide such assistance. It is reasonable to expect that parents of

> minor children with disabilities will provide the same level of care they would provide to their children without disabilities. MDHHS encourages the use of natural supports to assist in meeting an individual's needs to the extent that the family or friends who provide the natural supports are willing and able to provide this assistance. PIHPs may not require a beneficiary's natural support network to provide such assistance as a condition for receiving specialty mental health supports and services. The use of natural supports must be documented in the beneficiary's individual plan of service.
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> MPM, Behavioral Health and Intellectual and Developmental Disability Supports and Services Chapter, January 1, 2020, p. 130

On March 27, 2020, ISK issued a Notice of Appeal Denial to Petitioner upholding the termination of CLS services. In part, the notice indicates Petitioner has made it clear to ISK that he does not wish to participate in CLS any longer. When CLS was in place, Petitioner utilized it minimally and most often for transportation to Special Olympic events rather than as support for his daily living. Medical necessity was not met to receive CLS. The various CLS coverage areas were reviewed with regard to Petitioner's functional abilities and needs for assistance. (Exhibit A, pp. 7-10)

On June 16, 2020, Respondent completed a Utilization Review and recommended upholding the decision to terminate Petitioner's CLS services. (Exhibit A, pp. 12-18) In part, the Utilization Review went over Petitioner's services from an October 1, 2019, treatment plan, which include 13 hours of CLS per week, supports coordination, DD peer mentorship services, and medication reviews. The March 10, 2020, addendum for the treatment plan was intended to remove CLS services due to a lack of clinical necessity/engagement in the services as well as Petitioner's expressed interest in being done with the program. (Exhibit A, p. 13) A September 23, 2019, Assessment documented diagnoses of Autism Spectrum Disorder, mild intellectual disability, obsessive compulsive disorder, and unspecified psychosis. Petitioner lives independently in an apartment; likes to be involved in the community and participates in Special Olympics; can navigate himself to many areas in the community; is interested in obtaining employment and is working with Michigan Rehabilitation Services to achieve this. Petitioner was noted to have complaints with the CLS staffing; struggle to build relationships with staff he did not know; and would typically cancel services if he did not know who would be filling in on his scheduled days. (Exhibit A, p. 13) Documentation showed that Petitioner had not received CLS since January 2020, and even at that time he was only using them for transportation and did not want to work on his goals with them. (Exhibit A, p. 16) The service provision logs indicated Petitioner used 14 hours total in March 2019; 8 hours total in April 2019; 11.25 hours for May 2019; 12.5 hours for June 2019; 19.5 hours for July 2019; 17.75 hours in August 2019; 8 hours in September 2019; 4 hours in October 2019; 9.5 hours in November 2019; 4 hours in

December 2019; and 13 hours in January 2020. (Exhibit A, p. 16) The documentation used for the utilization Review were submitted as Exhibits B, C, and D.

Petitioner's mother testified that Petitioner needs continued services. Petitioner has not attained his CLS goals and is not ready to be weaned off appropriate CLS services. (Hearing Request; Mother Testimony) However, the termination was not based on Petitioner meeting his CLS goals. Rather, Petitioner frequently did not utilize most of his CLS hours and when he did utilize CLS, Petitioner was not engaging in the CLS to work on his goals. Accordingly, CLS was not an effective service for Petitioner at the time of this determination. This does not imply that CLS would never be an appropriate or effective service for Petitioner, or that Petitioner is not in need of any other appropriate services that may be more effective for him currently.

Petitioner's mother notes that Petitioner expressing that he does not want to continue with CLS is not a reason to terminate services. (Hearing Request; Mother Testimony) It is understood that Petitioner has a Guardian and cannot determine what is best for himself. However, Petitioner's unwillingness to continue with CLS would no doubt adversely affect how engaged he would be when services are provided, how often he cancels, and ultimately how much he benefits from CLS services.

Given the evidence and applicable policies, in this case Petitioner has not met his burden of proof regarding the CMH's determination to terminate his CLS services. As noted from the utilization review, Petitioner had not used CLS at all since January 2020, and had persistently underutilized his CLS authorization since March 2019. The evidence does not indicate Petitioner was working on, or making progress with, his CLS goals when services were able to be provided. Accordingly, Respondent's March 27, 2020, determination to terminate CLS services for Petitioner is upheld based on the available information.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Respondent properly terminated CLS services for Petitioner based on the available information.

IT IS THEREFORE ORDERED that:

The Respondent's decision is AFFIRMED.

CL/dh

Colleen Lack
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
DHHS Department Rep.	Heather Woods Southwest Michigan Behavioral Health 5250 Lovers Lane-Suite 200 Portage, MI 49002
Petitioner	[redacted] [redacted] MI [redacted]
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