

GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED], MI [REDACTED]

Date Mailed: October 19, 2020
MOAHR Docket No.: 20-005243
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 October 7, 2020. [REDACTED], Petitioner's mother and co-legal guardian, appeared and testified on Petitioner's behalf. [REDACTED], Petitioner's father and co-legal guardian, and [REDACTED], Petitioner's in-home Board-Certified Behavior Analyst (BCBA), also testified as witnesses for Petitioner. Katie Snay, Fair Hearings Officer, represented the Respondent Washtenaw County Community Mental Health. Krista DeWeese, Program Administrator, testified as a witness for Respondent.

Following completion of the hearing, the undersigned Administrative Law Judge left the record open at Petitioner's request, and without any objection from Respondent, until October 16, 2020, so that Petitioner could submit additional information regarding Petitioner's eye care. On October 13, 2020, MOAHR received that additional information and it was entered into the record.

In all, the following exhibits were entered into the record:

Exhibit #1: Request for Hearing
Exhibit #2: Letter from Dr. [REDACTED], M.D.
Exhibit #3: Letter from Dr. [REDACTED], M.D.

Exhibit A: Respondent's Hearing Summary
Exhibit B: July 21, 2020 Notice of Action
Exhibit C: Excerpt from Medicaid Provider Manual and Executive Order
Exhibit D: Progress Notes

ISSUE

Did Respondent properly decide to terminate Petitioner's Behavioral Health Treatment (BHT)/Applied Behavioral Analysis (ABA) services?

FINDINGS OF FACT

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

1. Petitioner is a now [REDACTED] (■) Medicaid beneficiary with a date of birth of [REDACTED]. (Exhibit D, page 1).
2. She has been diagnosed with severe Autism Spectrum Disorder and approved for services through Respondent. (Exhibit #2, page 2; Exhibit D, pages 1-6).
3. As part of her services, Petitioner was specifically approved for BHT/ABA services. (Testimony of Petitioner's representative; Testimony of Respondent's Program Administrator).
4. The services were scheduled to end on Petitioner's 21st birthday, i.e. [REDACTED], 2020. (Testimony of Petitioner's representative; Testimony of Respondent's Program Administrator).
5. On March 13, 2020, Petitioner's BHT/ABA services stopped due to health and safety reasons arising out of the COVID-19 pandemic. (Testimony of Petitioner's representative).
6. Specifically, the services stopped because the provider agency for the services decided that it could not send its employees into homes or communities and Petitioner's guardians decided they could not allow workers into Petitioner's home due to the risk of exposure. (Testimony of Petitioner's representative; Testimony of BCBA).
7. While Petitioner's services were interrupted, she regressed in her behaviors and capabilities in activities of daily living. (Exhibit #2, page 2; Testimony of Petitioner's representative; Testimony of BCBA).
8. On June 5, 2020, Petitioner's BHT/ABA services resumed. (Testimony of Petitioner's representative; Testimony of BCBA).
9. Petitioner's guardians also requested an extension of Petitioner's BHT/ABA services for 84 days past her 21st birthday to make up for the services she missed during the interruption. (Testimony of Petitioner's representative; Testimony of Respondent's Program Administrator).

10. On July 21, 2020, Respondent sent Petitioner a Medicaid Advanced Action Notice of Adverse Benefit Determination stating that Petitioner's BHT/ABA services will be terminated on [REDACTED], 2020, Petitioner's 21st birthday, because the Medical Provider Manual provides that BHT/ABA services are only available to individuals until the age of 21. (Exhibit B, pages 1-3).
11. Petitioner's guardians then requested an internal appeal with Respondent regarding that decision. (Exhibit #1, page 2).
12. On August 10, 2020, Respondent sent Petitioner a Notice of Resolution of Internal Appeal stating that the decision denying an extension of BHT/ABA services was being upheld. (Exhibit #1, pages 2-3).
13. Specifically, the notice stated in part:

The internal review/local appeal was conducted on August 6, 2020 and this notice is to inform you of the outcome of that process. The following information was reviewed to form the decision:

Both the written explanation attached to your appeal request and your testimony provided on August 6, 2020

Per the Medicaid Provider Manual, BHT/ABA services are only available to individuals until the age of 21.

42 CFR 440.230, Michigan's Mental Health Code, Public Act 258, Michigan MDHHS/PIHP Medicaid Managed Specialty Supports and Services Concurrent 1915 (b)(c)Waiver Program Contract and/ or applicable policy found in the Medicaid Provider Manual Behavioral Health and Intellectual and Development Disability Supports and Services.

The decision for denying your request for an extension of your daughter's BHT/ABA services is being upheld. Medicaid Behavioral Health Treatment /ABA Benefit coverage ends the last day prior to a youth's 21st birthday. Therefore, we are unable to grant an extension.

As discussed, your clinical team has developed a plan to allow your daughter to continue working with her current BCBA/Behavior Technician prior to and post her 21st birthday to work on both a transition plan and as a result of an increase in behaviors since the COVID-19 closure.

Exhibit #1, page 2

14. On August 19, 2020, the Michigan Office Administrative Hearings and Rules (MOAHR) received the request for hearing filed in this matter regarding Respondent's decision. (Exhibit #1, pages 1-4).
15. Petitioner's BHT/ABA services have been maintained while this matter has been pending. (Testimony of Petitioner's representative; Testimony of Respondent's representative).

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 BHT/ABA services through Respondent. With respect to such services, the applicable version of the Medicaid Provider Manual (MPM) provides in part:

SECTION 18 – BEHAVIORAL HEALTH TREATMENT SERVICES/APPLIED BEHAVIOR ANALYSIS

The purpose of this policy is to provide for the coverage of Behavioral Health Treatment (BHT) services, including Applied Behavior Analysis (ABA), for children under 21 years of age with Autism Spectrum Disorders (ASD). All children, including children with ASD, must receive EPSDT services that are designed to assure that children receive early

detection and preventive care, in addition to medically necessary treatment services to correct or ameliorate any physical or behavioral conditions, so that health problems are averted or diagnosed and treated as early as possible.

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

BHT services prevent the progression of ASD, prolong life, and promote the physical and mental health and efficiency of the child. Medical necessity and recommendation for BHT services is determined by a physician, or other licensed practitioner working within their scope of practice under state law. Direct patient care services that treat or address ASD under the state plan are available to children under 21 years of age as required by the EPSDT benefit.

* * *

18.5 DETERMINATION OF ELIGIBILITY FOR BHT

The following is the process for determining eligibility for BHT services for a child with a confirmed diagnosis of ASD. Eligibility determination and recommendation for BHT must be performed by a qualified licensed practitioner through direct observation utilizing the ADOS-2 and symptom rating using the DD-CGAS. BHT services are available for children under 21 years of age with a diagnosis of ASD from the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), and who have the developmental capacity to clinically participate in the available interventions covered by BHT services. A well-established DSM-IV diagnosis of Autistic

Disorder, Asperger's Disorder or PDD-NOS should be given the diagnosis of ASD. Children who have marked deficits in social communication but whose symptoms do not otherwise meet criteria for ASD should be evaluated for social (pragmatic) communication disorder.

The following requirements must be met:

- Child is under 21 years of age.
- Child received a diagnosis of ASD from a qualified licensed practitioner utilizing valid evaluation tools.
- Child is medically able to benefit from the BHT treatment.
- Treatment outcomes are expected to result in a generalization of adaptive behaviors across different settings to maintain the BHT interventions and that they can be demonstrated beyond the treatment sessions. Measurable variables may include increased social-communication, increased interactive play/age-appropriate leisure skills, increased reciprocal communication, etc.
- Coordination with the school and/or early intervention program is critical. Collaboration between school and community providers is needed to coordinate treatment and to prevent duplication of services. This collaboration may take the form of phone calls, written communication logs, participation in team meetings (i.e., Individualized Education Plan/Individualized Family Service Plan [IEP/IFSP], Individual Plan of Service [IPOS], etc.).
- Services are able to be provided in the child's home and community, including centers and clinics.
- Symptoms are present in the early developmental period (symptoms may not fully manifest until social demands exceed limited capacities or may be masked by learned strategies later in life).
- Symptoms cause clinically significant impairment in social, occupational, and/or other important areas of current functioning that are fundamental to maintain

health, social inclusion, and increased independence.

- A qualified licensed practitioner recommends BHT services and the services are medically necessary for the child.
- Services must be based on the individual child and the parent's/guardian's needs and must consider the child's age, school attendance requirements, and other daily activities as documented in the IPOS. Families of minor children are expected to provide a minimum of eight hours of care per day on average throughout the month.

*MPM, April 1, 2020 version
Behavioral Health and Intellectual and Disability Supports and Services
Pages 153, 156*

Here, pursuant to the above policies, Respondent decided to terminate Petitioner's BHT/ABA services. Petitioner then appealed that decision.

In appealing Respondent's decision, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent erred. Moreover, the undersigned Administrative Law Judge is limited to reviewing the Respondent's decision in light of the information it had at the time it made the decision.

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

The facts in this case are undisputed and they demonstrate that Petitioner's BHT/ABA services are medically necessary; they were approved through Petitioner's 21st birthday, i.e. [REDACTED], 2020; they temporarily stopped on March 13, 2020 through no fault of Petitioner and due to health and safety reasons arising out of the COVID-19 pandemic; they resumed on June 5, 2020; Petitioner regressed in her behaviors and capabilities in activities of daily living while her services were interrupted; and Petitioner only requested an extension of Petitioner's BHT/ABA services for 84 days past her 21st birthday to make up for the services she missed during the interruption.

However, those undisputed facts do not demonstrate that Respondent erred given the clear policy that applies in this case. As expressly provided above, the BHT/ABA policies in the MPM only provide for coverage of BHT services, including ABA, for children under 21 years of age; the specific requirements in policy that must be met for such services to be approved include a requirement that the child is under 21 years of age; and there is nothing in policy allowing for services to continue past Petitioner's 21st birthday.

The undersigned Administrative Law Judge agrees that, given that the interruption in Petitioner's services was not her fault and could not even be planned for, the application of the policy limiting services to beneficiaries under age 21 is unfair. However, the applicable policy is clear, and the undersigned Administrative Law Judge has not been delegated the authority to overrule or make exceptions to policy, or to make decisions on the basis of equity or fairness.

Accordingly, given the clear policy, Respondent's decision to terminate Petitioner's BHT/ABA services must be affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Respondent properly decided to terminate Petitioner's BHT/ABA services.

IT IS THEREFORE ORDERED that

The Respondent's decision is **AFFIRMED**.



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

Authorized Hearing Rep.

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DHHS Department Rep.

Katie Snay
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Petitioner

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