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Date Mailed: January 4, 2021
MOAHR Docket No.: 20-006739
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 December 10, 2020. [redacted], Petitioner's mother, appeared and testified on Petitioner's behalf.

Heather Woods, Customer Service, appeared on behalf of Respondent, Southwest Michigan Behavioral Health (SWMBH), the PIHP for St. Joseph County Community Mental Health (Respondent or CMH). Jeremy Franklin, Clinical Quality Specialist, SWMBH; Jessica Singer, COO, St. Joseph CMH; and Kathleen Morrill, Clinical Supervisor, St. Joseph CMH; appeared as witnesses for the CMH.

ISSUE

Did the Respondent properly determine that Petitioner was no longer 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 autism spectrum disorder. (Exhibit A, p 4; Exhibit 1; pp 29-34; Testimony)

2. Petitioner resides with his parents in a single-family home in [redacted], Michigan. (Exhibit A, p 11; Testimony)

3. Petitioner was diagnosed with autism spectrum disorder in July 2019 and

received speech therapy for a few months. (Exhibit 1; pp 25-34; Testimony)

4. Petitioner began receiving EPSDT Autism Services, including Applied Behavioral Analysis (ABA) and family training for ABA concepts through the Michigan Department of Health and Human Services' (MDHHS) Autism Benefit in June 2020. (Exhibit A, p 2; Exhibit 1, pp 2-24; Testimony)

5. On September 8, 2020, CMH staff completed a re-evaluation of Petitioner, including the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2), and the Developmental Disability Children's Global Assessment Scale (DD-CGAS), to determine if Petitioner continued to be eligible for BHT/ABA. (Exhibit A, pp 4-7; Testimony)

6. Following the re-evaluation, CMH staff concluded that Petitioner did not meet medical necessity for continued BHT/ABA because Petitioner scored a "6" on the ADOS-2 and a score of "8" is required for continued eligibility. (Exhibit A, pp 4-7; Testimony)

7. On September 28, 2020, CMH sent Petitioner's parents a Notice of Adverse Benefit Determination informing them that Petitioner's ABA services would end October 12, 2020. (Exhibit A, pp 8-10; Testimony)

8. On October 6, 2020, CMH notified Petitioner's parents that they had received their request for a local appeal and request for a second opinion screening. (Exhibit A, p 11; Testimony)

9. On October 16, 2020, a Second Opinion evaluation of Petitioner's eligibility to receive BHT/ABA was conducted by Integrated Services of Kalamazoo. Following the evaluation, this clinician also determined that Petitioner did not meet the medical necessity criteria for continued BHT/ABA as Petitioner had an overall score of "5". In conclusion, the clinician indicated:

> Based on the algorithm, [redacted] had a total overall score of 5 which places him in the non-Autism Classification with a comparison score of 2. This indicates that [redacted] falls in the minimal-to-no evidence of autism spectrum related symptoms and does not meet eligibility for ABA services through the Michigan Medicaid Autism Benefit. [redacted] had a total score of 2 in the Social Affect subscale and a total of 3 in the Restricted and Repetitive Behavior subscale. Some of [redacted]'s observed skills included effectively using eye contact to initiate social interaction, often utilizing three-point gaze shifts. He directed most of his verbalizations to the

> administrator and his mom who was present in the room. [redacted] was observed directing most of his facial expressions towards this administrator. He appeared to enjoy all of the activities presented often including the administrator in the play. He used a couple gestures and used several distal points with eye contact to direct the administrations attention or to request. He did have some poor social overtures, including trying to touch the writers face shield and climbing on her back. [redacted] was observed tensing his body on two occasions and had a sensory interested with the bubble blower. He had some repetitive words that he would say such as "yep" and "boop", both used in and out of context. Overall, [redacted] played appropriately with the toys and activities presented but was limited in his imaginative/creative play.
>
> Based on the total score, [redacted] does not continue to meet eligibility for ABA through the Michigan Medicaid Autism Benefit.
>
> (Exhibit A, pp 12-13; Testimony)

10. On October 23, 2020, CMH sent Petitioner's parents Notice that Petitioner's local appeal was complete and that based on the Second Opinion evaluation, Petitioner was not eligible for continued ABA services. (Exhibit A, pp 14-15; Testimony)

11. On October 30, 2020, Petitioner's request for hearing was received by the Michigan Office of Administrative Hearings and Rules. (Exhibit 1)

12. On November 17, 2020, in preparation for the hearing, CMH conducted a utilization and file review. The review supported the decision to terminate Petitioner's ABA services. (Exhibit A, pp 17-23; Testimony)

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, 2020, 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).

Medicaid Provider Manual
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
July 1, 2020, pp 155, 157-158

CMH's witnesses testified that following two separate evaluations, plus a post evaluation utilization paper review, it was determined that Petitioner no longer met the criteria for BHT/ABA services because he 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 witnesses noted that they made recommendations to Petitioner's parents for other treatments that would be beneficial to Petitioner, such as speech and occupational therapy.

Petitioner's mother testified that Petitioner was perfectly normal until about two years old, when he had a traumatic experience when their granddaughter was pulled off life support and died. Petitioner's mother indicated that he was a completely different person after that and did not eat solid food for four months. Petitioner's mother testified that they have tried all sorts of therapies with Petitioner and the only thing that has helped is ABA services. Petitioner's mother indicated that yes, Petitioner has advanced quickly, but that is because he is getting the help he needs. Petitioner's mother noted that the only reason Petitioner is getting ABA services is because he is on Medicaid and he is set to lose his Medicaid coverage within a year. Petitioner's mother testified that Petitioner is autistic, and the evaluators did not spend enough time with him to make a proper determination. Petitioner's mother noted that the actual assessments only lasted approximately 15 minutes and that is not enough time to make a fair assessment. Petitioner's mother noted that the assessment involves the use of brand-new toys in front of brand-new people, so it is not surprising that Petitioner did as well as he did. Petitioner's mother pointed out that the people who actually spend the most time treating Petitioner believe that he needs continued ABA services.

Petitioner's mother noted that Petitioner cannot take care of himself, he cannot speak, and he cannot tell them what he needs. Petitioner's mother testified that Petitioner has sensitivity issues and the evaluators do not get to see him in his daily activities. Petitioner's mother noted that Petitioner's caseworker can tell from her visits that Petitioner has autism. Petitioner's mother testified that the Petitioner is only advancing so fast because they are doing everything they can so he gets the care that he needs.

Petitioner's mother indicated that she will do whatever she needs to do to continue his services.

Based on the evidence presented, Petitioner did not prove, by a preponderance of the evidence, that the termination of BHT/ABA services was improper. Two re-evaluations demonstrate that Petitioner does 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 re-evaluations completed here are consistent with policy and Petitioner's entire file relating to ABA was reviewed thoroughly during a utilization review prior to the hearing. While Petitioner's mother argues that the persons treating Petitioner recommend continued ABA services, Medicaid policy does not leave eligibility decisions up to those individuals. Instead, policy requires that evaluations be completed by individuals specifically trained to conduct such evaluations, which was done here. It is clear from the evidence presented, and all parties agree, that Petitioner has made significant improvements over the short period he has received ABA services. Petitioner's remaining behavioral issues can likely be addressed by other services recommended by the CMH.

It bears noting that the fact that it has been determined that Petitioner is no longer eligible for ABA services paid for by Medicaid does not mean that Petitioner does not have autism or that he does not need additional help. It only means that Petitioner no longer needs 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 continued 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 termination of Petitioner's 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 no longer 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
Lansing, Michigan 48909-8139

DHHS -Dept Contact

Belinda Hawks
320 S. Walnut St.
5th Floor
Lansing, MI
48913

Petitioner

[redacted], MI
[redacted]

DHHS Department Rep.

Heather Woods
Southwest Michigan Behavioral Health
5250 Lovers Lane-Suite 200
Portage, MI
49002
heather.woods@swmbh.org

DHHS-Location Contact

Jessica Singer
St. Joseph CMH
677 East Main St
Centerville, MI
49032

Authorized Hearing Rep.

[redacted], MI
[redacted]