

GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

MI

Date Mailed: February 18, 2021
MOAHR Docket No.: 20-007771
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.

Following due notice, a telephone hearing was held on February 17, 2021. [REDACTED]
[REDACTED], Stand-By Guardian, appeared on behalf of Petitioner. [REDACTED]
Mother and Guardian, and Petitioner, [REDACTED], appeared as
witnesses.

Katie Snay, Fair Hearing Officer, appeared on behalf of Respondent, Washtenaw County Community Mental Health (CMH or Respondent). Krista DeWeese, Program Administrator appeared as a witness for the CMH. Evan George, Back-Up Fair Hearing Officer; Sara Camilleri, HSW Supports Coordinator; and Brooke Reiter, MSW Intern, appeared as observers for the CMH.

EXHIBITS

Petitioner's Exhibits:

Exhibit 1: Written Arguments

Respondent's Exhibits:

Exhibits A-H: Hearing Summary and attachments

ISSUE

Did the CMH properly terminate Petitioner from the Habilitation Supports Waiver (HSW) because he resides in a licensed facility with more than 12 beds?

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 May 9, 1964, receiving services through [REDACTED] County Community Mental Health (CMH). (Exhibit G, pp 1-2; Testimony)
2. CMH is under contract with the Michigan Department of Health and Human Services (MDHHS) to provide Medicaid covered services to people who reside in the CMH service area. (Exhibit A; Testimony)
3. Petitioner resides at [REDACTED], which is a licensed residential facility with more than 12 beds. (Exhibit A, p 1; Testimony)
4. Effective October 1, 2019, Habilitation Supports Waiver (HSW) beneficiaries residing in licensed residential settings with more than 12 beds are no longer eligible to remain on the HSW per the Michigan Department of Health and Human Services (MDHHS) and Center for Medicare and Medicaid (CMS) waiver renewal application. (Exhibit D, p 7; Testimony)
5. Since 2008, the HSW renewal application contained an exception that allowed persons previously living in licensed residential settings with more than 12 beds to remain on the HSW. That exception was removed as of October 1, 2019. (Exhibits E, F; Testimony)
6. On March 26, 2020, CMH contacted Petitioner's mother and guardian to inform her of the above change and to inquire whether she wanted to begin steps to move Petitioner from [REDACTED] so that Petitioner could remain in the HSW. Petitioner's mother informed CMH that she wished for Petitioner to remain at [REDACTED] (Exhibit H; Testimony)
7. On August 7, 2020, CMH sent Petitioner a Notice of Adverse Benefit Determination informing him that he would no longer be on the HSW. (Exhibit B, pp 1-4; Testimony)
8. Despite being terminated from the HSW, Petitioner's services through CMH have remained in place and unchanged. (Exhibit G, pp 1-2; Testimony)
9. Following an Internal Appeal, the CMH upheld its decision to terminate Petitioner from the HSW. (Exhibit A, p 1; Testimony)
10. On December 18, 2020, Petitioner's request for hearing was received by the Michigan Office of Administrative Hearings and Rules (MOAHR).

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 (MDHHS) 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 Medicaid Provider Manual articulates Medicaid policy for Michigan. It states, in relevant part:

SECTION 15 – HABILITATION SUPPORTS WAIVER FOR PERSONS WITH DEVELOPMENTAL DISABILITIES

Beneficiaries with developmental disabilities may be enrolled in Michigan's Habilitation Supports Waiver (HSW) and receive the supports and services as defined in this section. HSW beneficiaries may also receive other Medicaid state plan or additional/B3 services. A HSW beneficiary must receive at least one HSW service per month in order to retain eligibility. Medical necessity criteria should be used in determining the amount, duration, and scope of services and supports to be used. The beneficiary's services and supports that are to be provided under the auspices of the PIHP must be specified in his individual plan of services developed through the person-centered planning process.

HSW beneficiaries must be enrolled through the MDHHS enrollment process completed by the PIHP. The enrollment process must include annual verification that the beneficiary:

- Has a developmental disability (as defined by Michigan law);
- Is Medicaid-eligible;
- Is residing in a community setting;
- If not for HSW services, would require ICF/IID level of care services; and
- Chooses to participate in the HSW in lieu of ICF/IID services.

The enrollment process also includes confirmation of changes in the beneficiary's enrollment status, including termination from the waiver, changes of residence requiring transfer of the waiver to another PIHP, and death. Termination from the HSW may occur when the beneficiary no longer meets one or more of the eligibility criteria specified above as determined by the PIHP, or does not receive at least one HSW service per month, or withdraws from the program voluntarily, or dies. Instructions for beneficiary enrollments and annual re-certification may be obtained from the MDHHS Bureau of Community Based Services. (Refer to the Directory Appendix for contact information.)

The PIHP shall use value purchasing for HSW services and supports. The PIHP shall assist beneficiaries to examine their first- and third-party resources to pursue all reimbursements to which they may be entitled, and to make use of other community resources for non-PIHP covered activities, supports or services.

Reimbursement for services rendered under the HSW is included in the PIHP capitation rate.

Beneficiaries enrolled in the HSW may not be enrolled simultaneously in any other §1915(c) waiver.

Habilitation services under the HSW are not otherwise available to the beneficiary through a local educational agency under the Individuals with Disabilities Education Act (IDEA) or the Rehabilitation Act of 1973.

*Medicaid Provider Manual
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
July 1, 2020, p 107*

The HSW renewal application between MDHHS and CMS provides, in pertinent part:

6. MDHHS-BHDDA continues to review bed size as part of the waiver enrollment which includes a limit of no more than 12 beds. (Exhibit D, p 7)

CMH argues that it properly terminated Petitioner from the HSW because he lives in a licensed residential setting with more than 12 beds. CMH points out that Petitioner was given an opportunity to move to a setting with less than 12 beds but chose to stay where he is. CMH also points out that Petitioner is still receiving the same services through CMH that he received while on the HSW and, should that change at any time, Petitioner will receive proper notice and an opportunity to appeal. CMH indicates that while the Department previously included an exception to the less than 12-bed

requirement in the past, that exception was removed with the most recent HSW application between MDHHS and CMS.

Petitioner's representatives argue that Petitioner should continue on the HSW because he is comfortable at [REDACTED] and has multiple opportunities for community involvement and socialization. Petitioner's representatives argue that Petitioner has a lot of individual choice at [REDACTED], such as choosing what to eat and what activities to participate in. Petitioner's representatives also argue that Petitioner receives a lot of services at SLC, such as transportation to access educational, social, and vocational opportunities that he may not have at a smaller setting. Petitioner's representatives further argue that in smaller size homes, there is not always enough staffing to ensure 24/7 supervision, which Petitioner needs. Petitioner's representatives also point out that the Court in the seminal case of *Olmstead v L.C.*, 527 US 581 (1999) did not hold that there would be no place for larger institutional settings for persons with developmental disabilities going forward, as those settings would be most appropriate for some persons. Petitioner's representatives argue that living at SLC does not exclude Petitioner from any opportunities and living there provides him with more opportunities than he might have in a smaller setting.

Petitioner bears the burden of proving by a preponderance of the evidence that the CMH erred in terminating him from the HSW. Based on the evidence presented, Petitioner has failed to meet that burden.

As indicated above, effective October 1, 2019, Habilitation Supports Waiver (HSW) beneficiaries residing in licensed residential settings with more than 12 beds are no longer eligible to remain on the HSW per the Michigan Department of Health and Human Services (MDHHS) and Center for Medicare and Medicaid (CMS) waiver renewal application. Here, Petitioner resides at [REDACTED] which is a licensed residential facility with more than 12 beds. And, while since 2008 the HSW renewal application contained an exception that allowed persons previously living in licensed residential settings with more than 12 beds to remain on the HSW, that exception was removed as of October 1, 2019. As such, Petitioner is no longer able to remain in the HSW while living in a facility with more than 12 beds through clear policy. And while the undersigned is sympathetic to Petitioner's arguments, the undersigned has no equitable authority and no authority to ignore clear policy.

Petitioner's arguments to the contrary are without merit. Petitioner was given an opportunity to move to a smaller facility and declined and the services that Petitioner is receiving through the CMH are the same as what he received while under the HSW. Petitioner's representative concerns about the merits of larger licensed facilities are noted, but the undersigned does not set policy for MDHHS; the undersigned can only enforce policy as written. As such, CMH's decision must be affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH properly terminated Petitioner from the HSW.

IT IS THEREFORE ORDERED that:

The CMH decision is AFFIRMED.



RM/sb

Robert J. Meade

Administrative Law Judge
for Elizabeth Hertel, 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
MDHHS-BHDDA-Hearings-Notices@michigan.gov

Authorized Hearing Rep.

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

Authorized Hearing Rep.

[REDACTED]
[REDACTED], MI
[REDACTED]

Petitioner

[REDACTED]
[REDACTED], MI
[REDACTED]

DHHS Department Rep.

Katie Snay
555 Towner
Ypsilanti, MI
48198
snayk@washtenaw.org