[redacted]
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Date Mailed: September 9, 2021
MOAHR Docket No.: 21-002920
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

This matter is before the Michigan Office of Administrative Hearings and Rules (MOAHR) and the undersigned Administrative Law Judge (ALJ) pursuant to MCL 400.9 and upon Petitioner's request for a hearing.

After due notice, and following the completion of a prehearing conference on July 15, 2021, a telephone hearing was held on August 19, 2021. Attorney Joelle Gurnoe-Adams appeared on behalf of Petitioner [redacted] (Petitioner). Fair Hearings Officer Evan George appeared on behalf of the Respondent Washtenaw County Community Mental Health (CMH or Respondent).

During the hearing, Petitioner submitted forty-two exhibits that were entered into the record as Exhibits #1-#42. Respondent submitted seventeen exhibits that were entered into the record as Exhibits A-Q.

The following witnesses also testified during the hearing:

Tracy Wells, Health Services Supervisor, Respondent

Louise Hayward, Representative of Utilization Committee, Respondent

[redacted], Petitioner's Father and Legal Guardian

At the close the hearing, Petitioner's attorney further requested that the undersigned Administrative Law Judge award Petitioner attorney fees and costs pursuant to MCL 24.323.

ISSUE

Did Respondent properly suspend Petitioner's Overnight Health and Safety Support (OHSS) 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 [redacted] year-old Medicaid beneficiary with a legal guardian and who has been diagnosed with, among other conditions, Autism Spectrum Disorder, Impulse Control Disorder and Anxiety Disorder. (Exhibit D, pages 1, 4).

2. Due to his diagnoses and associated behaviors, including elopement, physical aggression, property damage and inappropriate social behavior, Petitioner requires supervision at all times, including during the night. (Exhibit #27, page 4).

3. Since 2008. Petitioner has been approved for services through Respondent, with his current services authorized pursuant to Michigan's Habilitation Supports Waiver (HSW). (Exhibit #8, page 1; Exhibit #10, page 1).

4. In June of 2014, Petitioner moved into his own home. (Exhibit F, page 2).

5. On weekend nights, Petitioner would stay at his parents' home. (Testimony of Petitioner's Father).

6. In October of 2018, an Individual Plan of Service (IPOS) for the plan year of October 9, 2018, to October 8, 2019, was developed and agreed upon for Petitioner. (Exhibit #37, pages 1-11).

7. At that time, Petitioner had a roommate in his house. (Exhibit #37, page 3).

8. Goal #2 of that IPOS was identified as follows: "[Petitioner] will continue to live in his home with the supports he requires so that he can live a safe and happy life." (Exhibit #37, page 3).

9. In support of that goal and others, Petitioner was approved for 121 hours of Community Living Supports (CLS) per week. (Exhibit #37, page 4).

10. There was nothing in the plan about Petitioner's CLS being shared with his roommate. (Exhibit #37, pages 1-11).

11. However, Petitioner utilized his CLS on both a 1:1 and shared basis. (Testimony of Petitioner's Father; Testimony of Health Services Supervisor).

12. The IPOS also provided that Petitioner would attend a vocational day program. (Exhibit #37, page 5).

13. In June of 2019, Petitioner's roommate moved out. (Exhibit #38, pages 1-2).

14. Petitioner continued to be authorized for, and to receive, the same amount of services per week, including 121 hours of CLS per week. (Exhibit #38, pages 1-9; Testimony of Petitioner's Father).

15. In October of 2019, an IPOS for the plan year of October 9, 2019, to October 8, 2020, was developed and agreed upon for Petitioner. (Exhibit #39, pages 1-15; Exhibit G, pages 1-15).

16. In that IPOS, Petitioner was approved for the same services as before, including 121 hours per week of CLS and attendance at a vocational program. (Exhibit #39, pages 1-15; Exhibit G, pages 1-15).

17. However, the IPOS now identified his CLS hours as "shared". (Exhibit G, pages 3, 13-15).

18. Petitioner still did not have a new roommate at that time, and he received his services on a 1:1 basis. (Exhibit #39. page 4; Exhibit G, page 4; Testimony of Petitioner's Father; Testimony of Health Services Supervisor).

19. In August of 2019, Petitioner's Supports Coordinator began the process of developing Petitioner's IPOS for the plan year of October 9, 2019, to October 8, 2020. (Exhibit #14, page 1; Exhibit #15, page 1; Exhibit F, page 1).

20. By that time, Petitioner had a new roommate. (Exhibit F, page 2).

21. However, he was no longer attending his vocational day program by that time because it had been closed due to the ongoing COVID-10 pandemic. (Testimony of Health Services Supervisor).

22. Due to Petitioner's continuing need for around-the-clock supports and his inability to attend the vocation program like before, the new IPOS found that Petitioner's CLS should be increased, and he should now be approved for 168 hours per week of CLS. (Testimony of Health Services Supervisor).

23. There was nothing in the new IPOS about those services being shared. (Testimony of Health Services Supervisor).

24. The IPOS including 168 hours per week of CLS was subsequently approved. (Testimony of Health Services Supervisor).

25. However, on October 7, 2020, Respondent also completed an IPOS Addendum with respect to Petitioner. (Exhibit #3, pages 1-11).

26. The reason for the change was identified as followed:

> Consumer is eligible for Overnight Health and Safety Support (OHSS) hours. As such, the IPOS is being updated using the Person Centered Planning process to show the reduction in CLS hours and the addition of OHSS hours. In total, there is not a reduction in overall support hours that will be provided to this individual. This is an administrative update to the record to accurately reflect services that are authorized per this person's eligibility. This change will be effective 10/1/2020.

Exhibit #3, page 1

27. Specifically, Petitioner was approved for 112 hours of CLS and 56 hours of OHSS per week. (Exhibit #3, page 1).

28. There was nothing in the IPOS Addendum about any hours being shared or conditioned on Petitioner having a roommate. (Exhibit #3, pages 1-11; Testimony of Health Services Supervisor).

29. The updated IPOS remained in place for the period of October 9, 2020, to October 8, 2021. (Exhibit #4, pages 1-3; Exhibit F, pages 1-11).

30. For Goal #1, that IPOS stated in part:

> [Petitioner] will continue to live in his home with the supports he requires so that he can live a safe and happy life. [Petitioner] will receive 112 hours of Community Living Supports (CLS) and 56 hours of overnight health and safety supports per week in order to increase his independence. This outcome is effective for the period 10/9/2020 through 10/8/2021.

Exhibit F, page 1

31. The updated IPOS further stated:

> Effective 10/1/2020 – It was assessed that this individual is eligible for Overnight Health and Safety Support (OHSS) and that this is a medically necessary service for this individual. As a result, an administrative change is taking place to accurately reflect the number of CLS hours, OHSS hours and Adult Home Help hours. Overall, the individual will not have a reduction in total support that CMH is providing. This has been discussed with the client/guardian.

Exhibit F, page 6

32. Nothing in that updated IPOS itself indicated that either service was being shared. (Exhibit F, pages 1-11).

33. On October 30, 2020, Respondent sent Petitioner a Medicaid Advanced Action Notice of Adverse Benefit Determination. (Exhibit M, pages 1-3).

34. In part, that notice stated:

> [Petitioner] has been assessed and shows medical necessity for the Overnight Health and Safety Support (OHSS) service. As such there is a reduction in CLS hours and addition of OHSS hours. In total, there is not a reduction in overall support hours that will be provided to this individual from CMH. This is an administrative update to the record to accurately reflect services that are authorized per this person's eligibility. This change will be effective 10/1/2020.

Exhibit M, page 1

35. Petitioner's guardian initially filed a request for an Internal Appeal with Respondent regarding that notice, but later withdrew it after he confirmed that 56 hours of CLS were being replaced with 56 hours of OHSS and not being terminated, and that Petitioner's overall support hours were not changing. (Exhibit #20, pages 1-2).

36. On November 17, 2020, even though the services were already approved, Respondent completed a CLS Assessment with respect to Petitioner. (Exhibit #13, page 1; Testimony of Health Services Supervisor).

37. That assessment indicated a total of 224 hours per week of CLS for Petitioner, with no entry in the portion of assessment form where the CLS was to be identified as 1:1 or unspecified. (Exhibit #13, page 1).

38. In late November or early December of 2020, Respondent's Utilization Management initiated another review of Petitioner's CLS. (Exhibit I, page 5; Testimony of Representative of Utilization Committee).

39. At that time, Petitioner's roommate, who had previously assaulted Petitioner and caused property damage, was still a legal resident in Petitioner's home, but he had either moved out or there was talk of him moving out. (Exhibit 19, page 1; Exhibit 41, page; Testimony of Petitioner's Father; Testimony of Health Services Supervisor; Testimony of Representative of Utilization Committee).

40. Petitioner was also staying at his parents' home at night due to health and safety concerns caused by the ongoing COVID-19 pandemic. (Exhibit I, pages 5-6; Testimony of Petitioner's Father).

41. Petitioner's father further reported that Petitioner was entitled to 168 hours of care based on his disability and regardless of whether he had a roommate or not, but that Petitioner still wanted a roommate so long as a better risk assessment or vetting process was used. (Exhibit 19, page 1; Testimony of Petitioner's Father; Testimony of Health Services Supervisor).

42. In its assessment, Respondent noted that Petitioner had 168 hours of total need, *i.e.,* 24 hours a day. (Exhibit I, page 5).

43. It also found that Petitioner was staying at his parents' home at night, which meant that 56 hours of Petitioner's total needs were being met by natural supports, but that Petitioner's old vocational program was still unavailable due to the COVID-19 pandemic and that it was recommended that 112 hours of CLS continued to be approved. (Exhibit I, pages 5-6).

44. The assessment further note that it was anticipated that Petitioner will return to his vocational program and his own home when appropriate, but that Petitioner should not return home until another roommate was identified. (Exhibit I, pages 5-6).

45. The CLS assessment made no mention of OHSS or shared services. (Exhibit I, pages 5-6; Testimony of Representative of Utilization Committee).

46. Respondent did not send out an Adverse Benefit Determination at that time because, in its view, no negative action had been taken and

Petitioner's services continued to be approved at the same level as before. (Testimony of Representative of Utilization Committee).

47. On December 14, 2020, January 11, 2021, February 26, 2021, and March 29, 2021, the Supports Coordinator completed Progress Notes that, in part, identified Petitioner as being approved for 112 hours of CLS and 56 hours of OHSS per week, with no indication of any hours being shared. (Exhibit #21, pages 1-2; Exhibit #22, pages 1-2; Exhibit #23, pages 1-2; Exhibit #24, pages 1-2).

48. On April 7, 2021, Petitioner's guardian determined that, now that everyone in Petitioner's circle was fully vaccinated, he could return to his home full-time with his previously authorized supports. (Testimony of Petitioner's Father).

49. By that time, Petitioner's roommate, who had previously assaulted Petitioner and caused property damage, had moved out. (Exhibit #41, page 1; Testimony of Petitioner's Father).

50. On April 8, 2021, Petitioner's guardian contacted Petitioner's Supports Coordinator with Respondent to report that Petitioner wanted to return to his home, with his services in place, and that Petitioner's roommate would not be back for a number of reasons. (Exhibit #5, page 1; Exhibit K, page 1).

51. The Supports Coordinator subsequently noted that she informed her supervisor of the contact and asked if the contact would be considered a new request or if that should be determined after Petitioner's guardians confirm what they want to do. (Exhibit #5, page 1; Exhibit K, page 1).

52. On April 19, 2021, Respondent completed an updated Bio/Psycho/Social Assessment. (Exhibit #7, pages 1-20; Exhibit #27, pages 1-20).

53. No changes or improvements in Petitioner's diagnoses, associated behaviors or needs were identified. (Exhibit #7, pages 1-20; Exhibit #27, pages 1-20).

54. With respect to Goal #1 of Petitioner's IPOS, that assessment stated in part:

> [redacted] will continue to live in his home with the supports he requires so that he can live a safe and happy life. [redacted] will receive 112 hours of Community Living Supports (CLS)and 56 hours of overnight health and safety supports per week in order to increase his independence.

> This outcome is effective for the period 10/9/2020 through 10/8/2021.
>
> *Exhibit #27, page 4*

55. On April 20, 2021, Respondent identified Petitioner's request to restart services in his own home at night as a request for an increase in Petitioner's CLS from 112 hours per week to 168 hours per week. (Exhibit I, page 1).

56. However, its review also described the request as follows: "[Petitioner's] parents/guardians have requested that the night shift is reinstated so he can return to his own home." (Exhibit I, page 1).

57. On April 22, 2021, Respondent sent Petitioner a Notice of Adverse Benefit Determination stating that a decision on Petitioner's request was being delayed while it gathered more information. (Exhibit #6, pages 1-3; Exhibit C, pages 1-3).

58. On April 23, 2021, Respondent completed an IPOS Addendum. (Exhibit #28, pages 1-10; Exhibit E, pages 1-10).

59. The reason for the addendum was identified as follows: "IPOS Addendum to reflect current # of CLS hours." (Exhibit #28, page 1; Exhibit E, page 1).

60. However, the IPOS Addendum did not describe and change and still identified Petitioner as being authorized for 112 hours per week of CLS, which is what he was approved for before. (Exhibit #28, page 1; Exhibit E, page 1; Testimony of Health Services Supervisor).

61. No mention was made of the approved OHSS in the IPOS Addendum itself, but the service authorization grouped CLS and OHSS together. (Exhibit #28, pages 1-10; Exhibit E, pages 1-10).

62. The IPOS Addendum further noted that Petitioner was spending midnight to 8:00 a.m. at his parents' home. (Exhibit #28, page 1; Exhibit E, page 1).

63. On April 27, 2021, Petitioner's Supports Coordinator completed a CLS Assessment Tool. (Exhibit #29, page 1; Exhibit J, page 1).

64. That tool identified Petitioner as having 56 hours of unpaid supports and 112 hours of Unspecified CLS. (Exhibit #29, page 1; Exhibit J, page 1).

65. While now identified as unspecified, Petitioner was receiving his CLS on a 1:1 basis and there were no significant changes in his circumstances. (Testimony of Health Services Supervisor).

66. The Assessment Tool also did not mention or address OHSS. (Exhibit #29, page 1; Exhibit J, page 1).

67. On May 6, 2021, Respondent sent Petitioner a Notice of Adverse Benefit Determination stating that the services Petitioner had requested were denied. (Exhibit #1, pages 1-4; Exhibit B, pages 1-4).

68. With respect to the reason for the denial, the notice stated:

> The clinical documentation provided does not establish medical necessity.
>
> Your request for an increase in CLS hours from 112/week to 168/week is denied at this time. It has been determined that [Petitioner] does have a need for support 24 hours a day, however the need for 1:1 CLS is not justified based on your current needs. Without a roommate in place these hours are defaulting to 1:1, which is not medically necessary. Prior to COVID-19, you were in a shared arrangement and when that shared arrangement ended you, as natural supports, provided additional support (56 hours per week). Until a roommate has been identified, agreed upon by you and CMH and had moved into the home, CMH cannot resume with providing the same level of services you received prior to COVID.

Exhibit #1, page 1
Exhibit B, page 1

69. On May 13, 2021, Petitioner requested an Internal Appeal with Respondent with respect to that Adverse Benefit Determination. (Exhibit #2, page 1).

70. On June 2, 2021, Respondent sent Petitioner a Notice of Resolution of Internal Review. (Exhibit #2, pages 1-2).

71. In part, that notice stated:

> The internal appeal was conducted on May 27, 2021, and this notice is to inform you of the outcome of that process. The following information was reviewed to form the decision:

- Review of [redacted] CRCT Record
- Testimony provided on May 27, 2021.

> The WCCMH Local Review Committee determined that the denial for CLS hours is upheld as [redacted] does not meet the medical necessity criteria for 24/7 one on one staffing. Clinical assessments and professional judgement support the decision that one on one staffing is not justified.

Exhibit #2, page 1

72. On June 18, 2021, the Michigan Office of Administrative Hearings and Rules (MOAHR) received the request for hearing filed in this matter.

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 services through Respondent pursuant to the Habilitation Supports Waiver (HSW). With respect to that waiver and services through it, the applicable version of the Medicaid Provider Manual (MPM) provides in part:

> **SECTION 15 – HABILITATION SUPPORTS WAIVER FOR PERSONS WITH DEVELOPMENTAL DISABILITIES [CHANGES MADE 4/1/21]**
>
> 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 covered state plan services. **(Revised 4/1/21)** 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 PIHP's 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, does not receive at least one HSW habilitative **(text added 4/1/21)** service per month, 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.

* * *

Community Living Supports (CLS) facilitate an individual's independence, productivity, and promote inclusion and participation. The supports can be provided in the beneficiary's residence (licensed facility, family home, own home or apartment) and in community settings (including, but not limited to, libraries, city pools, camps, etc.), and may not supplant other waiver or state plan covered services (e.g., out-of-home non-vocational habilitation, Home Help Program, personal care in specialized residential, respite). The supports are:

- Assisting (that exceeds state plan for adults), prompting, reminding, cueing, observing, guiding and/or training the beneficiary with:
  - Meal preparation;
  - Laundry;
  - Routine, seasonal, and heavy household care and maintenance (where no other party, such as a landlord or licensee, has responsibility for provision of these services);
  - Activities of daily living, such as bathing, eating, dressing, personal hygiene; and
  - Shopping for food and other necessities of daily living.
- Assisting, supporting and/or training the beneficiary with:
  - Money management;
  - Non-medical care (not requiring nurse or physician intervention);
  - Socialization and relationship building;

- Transportation (excluding to and from medical appointments that are the responsibility of Medicaid through MDHHS or health plan) from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence);

- Leisure choice and participation in regular community activities;

- Attendance at medical appointments; and

- Acquiring goods and/or services other than those listed under shopping and non-medical services.

- Reminding, observing, and/or monitoring of medication administration.

The CLS do not include the costs associated with room and board. Payments for CLS may not be made, directly or indirectly, to responsible relatives (i.e., spouses or parents of minor children) or the legal guardian.

For beneficiaries living in unlicensed homes, CLS assistance with meal preparation, laundry, routine household care and maintenance, ADLs, 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 DHS's allowable parameters. Reminding, observing, guiding, and/or training of these activities are CLS coverages that do not supplant Home Help or Expanded Home Help. CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, State Plan coverage of Personal Care in Specialized Residential Settings.

If beneficiaries living in unlicensed homes need assistance with meal preparation, laundry, routine household care and maintenance, ADLs, and/or shopping, 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 must assist with

> applying for Home Help or submitting a request for a Fair Hearing when the beneficiary believes that the MDHHS authorization of amount, scope and duration of Home Help does not accurately reflect his or her needs. 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.
>
> 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, April 1, 2021 version
Behavioral Health and Intellectual and Developmental Disability Supports and Services
Pages 108-110
(internal highlighting omitted)

Additionally, Petitioner has also been approved for OHSS through Respondent pursuant to the HSW. With respect to that service, the applicable version of the MPM provides in part:

> **2.11 OVERNIGHT HEALTH AND SAFETY SUPPORT (OHSS) SERVICES**
>
> NOTE: OHSS is not available for individuals residing in licensed non-community facilities or settings. Payment of OHSS may not be made directly or indirectly to responsible relatives (i.e., spouses or parents of minor children) or a legal guardian.

2.11.A. ELIGIBILITY

To be eligible for OHSS, an individual must:

- Be Medicaid eligible;
- Be enrolled in one of the following waiver programs: CWP, HSW, or SEDW;
- Be living in a community-based setting (not in a hospital, Intermediate Care Facility for Individuals with Intellectual Disabilities [ICF/IID], nursing facility, licensed Adult Foster Care home, correctional facility, or child caring institution); and
- Require supervision overnight to ensure and maintain the health and safety of an individual living independently.

The need for OHSS must be reviewed and established through the person-centered planning process with the beneficiary's specific needs identified that outline health and safety concerns and a history of behavior or action that has placed the beneficiary at risk of obtaining or maintaining their independent living arrangement. Each provider of OHSS services will ensure the provision of, or provide as its minimum responsibility, overnight supervision activities appropriate to the beneficiary's needs to achieve or maintain independent living, health, welfare, and safety.

2.11.B. COVERAGE

For purposes of this service, "overnight" includes the hours a beneficiary is typically asleep for no more than 12 hours in a 24-hour period

The purpose of OHSS is to enhance individual safety and independence with an awake provider supervising the health and welfare of a beneficiary overnight. OHSS is defined as the need for an awake provider to be present (i.e., physically on-site) to oversee and be ready to respond to a beneficiary's unscheduled needs if they occur during the overnight hours when they are typically asleep.

OHSS services are generally furnished on a regularly scheduled basis, for multiple days per week, or as specified in the Individual Plan of Service (IPOS), encompassing both health and safety support services needed for the individual to reside successfully in their own home and community-based settings.

OHSS may be appropriate when:

- Service is necessary to safeguard against injury, hazard, or accident.

- A beneficiary has an evaluation that includes medical necessity that determines the need for OHSS and will allow an individual to remain at home safely after all other available preventive interventions/appropriate assistive technology, environmental modifications and specialty supplies and equipment (i.e., Lifeline, Personal Emergency Response System [PERS], electronic devices, etc.) have been undertaken to ensure the least intrusive and cost-effective intervention is implemented.

- A beneficiary requires supervision to prevent or mitigate mental health or disability related behaviors that may impact the beneficiary's overall health and welfare during the night.

- A beneficiary is non-self-directing (i.e., struggles to initiate and problem solve issues that may intermittently come up during the night or when they are typically asleep), confused or whose physical functioning overnight is such that they are unable to respond appropriately in a non-medical emergency (i.e., fire, weather-related events, utility failure, etc.).

- A beneficiary has a documented history of a behavior or action that supports the need to have an awake provider on-site for supported assistance with incidental care activities that may be needed during the night that cannot be pre-planned or scheduled.

- A beneficiary requires overnight supervision in order to maintain living arrangements in the most integrated community setting appropriate for their needs.

The following exceptions apply for OHSS:

- OHSS does not include friendly visiting or other social activities.

- OHSS is not available when the need is caused by a medical condition and the form of supervision required is medical in nature (i.e., nursing facility level of care, wound care, sleep apnea, overnight suctioning, end-stage hospice care, etc.) or in anticipation of a medical emergency (i.e., uncontrolled seizures, serious impairment to bodily functions, etc.) that could be more appropriately covered under PERS or medical specialty supplies.

- OHSS is not intended to supplant other medical or crisis emergency services to address acute injury or illness that poses an immediate risk to a person's life.

- OHSS is not available to prevent, address, treat, or control significantly challenging anti-social or severely aggressive individualized behavior.

- OHSS is not available for an individual who is anxious about being alone at night without a history of a mental health or disability related behavior(s) that indicates a medical need for overnight supports.

- OHSS is not intended to compensate or supplant services for the relief of the primary caregiver or legal guardian living in the same home or to replace a parent's obligations and parental rights of minor children living in a family home

- OHSS is not an alternative to inpatient psychiatric treatment or other appropriate levels of care to meet the beneficiary's needs and is not available

to prevent potential suicide or other self-harm behaviors

2.11.C. COORDINATION OF SERVICES AND CARE

The service normally involves the co-provision of several services through an awake provider in order to achieve the purpose of the service. OHSS services typically fall into this category of “round-the-clock” by the nature and institutional level of care required for HCBS Waiver participants. OHSS is intended to supplement other HCBS (i.e., Community Living Supports [CLS], respite, etc.) that are provided to the beneficiary as part of a comprehensive array of specialized waiver or developmental disabilities services (i.e., supports coordination, peer-delivered, etc.).

If a beneficiary is receiving CLS or respite supports and demonstrates the need for OHSS, the IPOS must document coordination of services to ensure the scope, nature of supervision and/or provider differ from the other community support services to prevent issues of duplicative services. OHSS is complementary of the other habilitative services, but typically does not comprise the entirety of the supports a beneficiary may need to obtain or maintain their independence in their community. OHSS services are enhanced services that are in addition to or concurrent with other waiver services, as outlined in the IPOS, and allow for the provision of supervision to ensure the health and safety of an individual overnight.

MPM, April 1, 2021 version
Behavioral Health and Intellectual and Developmental Disability Supports and Services
Children’s Serious Emotion Disturbance
Home and Community-Based Services Waiver Appendix
Pages 108-110, 124-125
(internal highlighting omitted)

While CLS and OHSS are covered services, Medicaid beneficiaries are still only entitled to medically necessary Medicaid covered services. *See* 42 CFR 440.230. Regarding medical necessity, the MPM 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.

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In appealing Respondent actions, 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 his burden of proof and Respondent's decision must therefore be reversed.

As a preliminary matter, the undersigned Administrative Law Judge must first address what action is at issue in this case.

Respondent's notices identified the action at issue as a denial of Petitioner's request for additional CLS, but that clearly misconstrues the request made by Petitioner and the services at issue. Specifically, both Petitioner's father and Respondent's Health Services Supervisor credibly testified that Petitioner wanted to move back into his home and asked to begin utilizing all of his previously approved services, which included 56 hours per week of OHSS services in addition to the approved 112 hours per week of CLS that he was using. Moreover, while the Representative from Respondent's Utilization Committee testified that the request was deemed a request for additional CLS because that is how it was submitted by the Supports Coordinator, the undersigned Administrative Law Judge does not find that to be credible or sufficient given the remainder of the record, including Petitioner's IPOS and Progress Notes that the Utilization Committee purportedly reviewed and which demonstrate the request at issue, and the senselessness of Petitioner requesting additional CLS at night given the previous approval of OHSS. Accordingly, Respondent improperly treated Petitioner's request as one for an additional 56 hours per week of CLS when Petitioner had made no such request

While there was no request for additional CLS to be denied, there was a suspension of a previously authorized service, *i.e.,* Petitioner's OHSS services. Petitioner was undisputedly approved for 56 hours per week of OHSS services in his most recent IPOS; those services have never been formally reduced, suspended, or terminated; and Respondent still decided to refuse Petitioner the use of those services in his home, which is in effect a suspension of Petitioner's OHSS.

Respondent argues that there has been no negative action taken with respect to OHSS because the services were approved on a shared basis and Respondent is still willing to approve OHSS if shared with a roommate, but that argument is unpersuasive as the record demonstrates that Petitioner was approved for 56 hours per week of OHSS irrespective of whether he has a roommate.

For example, the most recent IPOS approved Petitioner for 56 hours of OHSS and there is nothing indicating that the services were shared or must be shared to be received. Similarly, Respondent never attempted to change the approval language thereafter despite ample opportunity to do so, including a review of services in December of 2020 during which Petitioner's father expressly indicated Petitioner was entitled to his services regardless of whether he had a roommate; Progress Notes in December of 2020, January of 2021, February of 2021 and March of 2021; an updated Bio/Psycho/Social Assessment in April of 2021; and an IPOS Addendum in April of 2019 after Petitioner specifically requested utilization of his approved OHSS services.

Moreover, that the approval language in Petitioner's current IPOS has and has always lacked provisions regarding the sharing of services is particularly notable given that the prior IPOS did note that services were shared, and Respondent is therefore clearly

capable of indicating through the person-center planning process when services are to be shared.

Petitioner did have a roommate at the time of the most recent IPOS and it is undisputed that, whatever the language of previous plans stated, he has shared services with roommates in the past. However, he did not have a roommate at the time of the decision in this case and it is further undisputed that, even if any services had been or were meant to be shared in the past when Petitioner had a roommate, he was still be authorized for them at times he did not have a roommate.

Moreover, while the Representative from Respondent's Utilization Committee testified that beginning October 1, 2020, which was also the effective date of Petitioner's OHSS approval, inside clinical documentation would show whether services were approved on a 1:1 or an unspecified basis, no such documentation was provided and the record in the case continually reflects that Petitioner was approved for 56 hours per week of OHSS without any indication that the hours were only approved as shared hours.

Accordingly, given the above record, the undersigned Administrative Law Judge finds that the action is at issue in this case involves a suspension of Petitioner's OHSS.

Given the action at issue, Respondent failed to provide the required notice of action pursuant to 42 CFR 438.400 *et seq.* and its decision in this case must be reversed.

For example, as discussed above, while Respondent did send notices of some kind, those notices misconstrued that request made by Petitioner and the services at issue, and they failed to comply with the applicable requirements.

Moreover, as Petitioner's OHSS were not approved as shared services and Respondent is now only willing to approve the services on a shared basis, there has been a negative action taken with respect to them and, as Respondent sent no notice of such an adverse benefit determination in this case, it has failed to provide Petitioner with the required notice of action.

Respondent has provided an additional 56 hours per week of CLS while this matter is pending and, given that the parties were essentially able to identify and argue the issue in dispute during the hearing, it can be argued that Respondent's failure to provide proper notice was harmless in this case. However, the undersigned Administrative Law Judge does not find that to be the case given the lack of review for OHSS specifically and the flawed process Respondent followed. CLS and OHSS are separate and distinct services and, as much as Respondent appears to want to group them together, it is improper to do so. Both Respondent's initial review for just CLS and its later review for 168 hours per week of joint services failed to comply with the applicable federal regulations regarding the required appeal system and cannot be excused.

Even if the undersigned Administrative Law Judge found the defective notices to be harmless and reached the merits of this case, he would still find that Respondent erred and its decision to suspend Petitioner's OHSS must be reversed.

The parties expressly stipulated during the hearing that Petitioner meets the requirements for OHSS, including the criteria that Petitioner requires supervision overnight to ensure and maintain his health and safety while living independently. That medical necessity for OHSS exists regardless of whether Petitioner has a roommate or not; and, per policy, Respondent must provide medically necessary services sufficient in amount, scope and duration to reasonably achieve Petitioner's goals of community inclusion and participation, independence, recovery, or productivity. Such goals were clearly laid out in Petitioner's IPOS and his OHSS were not limited to being shared services when approved, seemingly because his needs would still exist even if he had a roommate. Moreover, it is also undisputed that even if any services had been or were meant to be shared in the past when Petitioner had a roommate, he was still authorized for them at times he did not have a roommate as they were still approved and needed.

In contrast to the clear language of the applicable policies and the IPOS, with its approval of OHSS based on Petitioner's needs, with no discussion of whether Petitioner needs a roommate or not, Respondent offers an insufficient basis for now conditioning Petitioner's OHSS on him sharing them with a roommate. For example, Respondent's witnesses conceded that, while it has an informal practice, it has no specific policy regarding requirements for a roommate and that having a roommate is not a condition to receive services.

Respondent does point to the language in the MPM on medical necessity that states that Respondent may deny services 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, but that policy does not support the suspension of services in this case. Respondent agreed upon an IPOS that met Petitioner's needs and expressly contained OHSS in Petitioner's home, where he has lived independently with supports for years and Petitioner has not, as suggested by one of Respondent's witnesses, chosen a different environment in an attempt to receive more services. Instead, he wants to remain in a setting that all parties have found best for him and nothing in the policy Respondent relies upon allows Respondent to now condition Petitioner's receipt of medically necessary OHSS on him having a roommate or dictate where he lives.

Moreover, that is especially the case here as it is not clear that some other appropriate and cost-effective setting that meets Petitioner's needs currently exists. Petitioner may be able to share his OHSS services and still have his needs met, and Respondent argues that this situation is different from previous times where Petitioner received his services 1:1 because Petitioner is now refusing to have any roommate at all. However, the record does not support that decision. Petitioner's father credibly testified that they continue to want Petitioner to have roommate(s), but that they have concerns about the vetting process given the issues with Petitioner's last roommate, including assault and

property damage, and they simply want a better process established before someone moves in. Moreover, his credible testimony is supported by Respondent's own documentation and, to the extent its witnesses suggested that Petitioner was refusing a roommate, their testimony is unsupported. Accordingly, Respondent's basis for distinguishing this situation from prior times when Petitioner possibly received "shared" services is likewise erroneous.

Petitioner was approved for 56 hours per week of OHSS and, while he had not been utilizing those services while staying at his parents' home due to the ongoing COVID-19 pandemic, he wanted to return to his home with his approved services in April 2021. Respondent then decided to deny his request to do so and, in effect, suspended Petitioner's OHSS until he obtained a roommate and shared his services. In doing so, Respondent erred by both failing to provide Petitioner with proper notice and in the decision to suspend services itself. Accordingly, Respondent's decision must be reversed.[1]

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 OHSS services.

IT IS THEREFORE ORDERED that

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

Steven Kibit

SK/sb

Steven Kibit
Administrative Law Judge

[1] While the undersigned Administrative Law Judge finds that Respondent's decision must be reversed, he does not find that Petitioner's request for attorney fees and costs under the Administrative Procedures Act should be granted. MCL 24.323(1) provides that costs and fees incurred by a prevailing party may be awarded when the agency's position was frivolous, *i.e.,* where the agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party; the agency had no reasonable basis to believe that the facts underlying its legal position were in fact true; or the agency's legal position was devoid of arguable legal merit. However, given the complexity of this case, the undersigned Administrative Law Judge does not find that Respondent's position was frivolous under one of the conditions identified in MCL 24.323(1)(a)-(c) and, consequently, Petitioner's request must be denied.

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

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