[redacted]
[redacted]
[redacted] **MI** [redacted]

Date Mailed: November 29, 2021
MOAHR Docket No.: 21-003730
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 begun on September 29, 2021. However, the hearing could not be completed during the allotted time, and it was determined that it must be continued later. After due notice, the hearing was subsequently continued and completed on November 23, 2021.

Attorney John Schwend represented Petitioner [redacted] (Petitioner). Attorney Seth Koches represented the Respondent Barry County Community Mental Health Authority (Respondent).

During the hearing, the following witnesses testified:

Brenna Ellison, Corporate Compliance Officer for Respondent

Lauren Jansheski, Assistant Supervisor for Community Based Program and Petitioner's Case Manager for Respondent

Amanda Matthews, Community Based Services Supervisor for Respondent

[redacted], Petitioner's Mother

Carrie Dorrance, Utilization Review Specialist with Respondent

Heather Woods, Customer Services Specialist at Southwest Michigan Behavioral Health (SWMBH)

Also present during one or both days of the hearing were Kristen Totten, an Attorney with Disability Rights Michigan; Sarah Ameter, Manager of Customer Services at

SWMBH; Tina Williams, Office Manager for Respondent; Rich Thiemkey, Executive Director for Respondent; and Mila Todd, Chief Compliance and Privacy Officer at SWMBH.

The following exhibits were entered into the record during the hearing:

Petitioner's Exhibits

Exhibit #1: Decision and Order dated April 29, 2021

Exhibit #2: Treatment Plan Addendum dated May 6, 2021

Exhibit #3: Order Certification dated May 7, 2021

Exhibit #4: Email dated June 10, 2021

Exhibit #5: Adverse Benefit Determination dated June 7, 2021

Exhibit #6: Letter dated June 30, 2021

Exhibit #7: Email dated June 11, 2021

Exhibit #8: Expedited Internal Appeal Request dated June 18, 2021

Exhibit #9: Expedited Appeal Denial Letter dated June 18, 2021

Exhibit #10: Email dated June 25, 2021

Exhibit #11: Treatment Plan Addendum dated June 29, 2021

Exhibit #12: Email dated July 14, 2021

Exhibit #13: Email dated July 22, 2021

Exhibit #14: Email Chain

Exhibit #15: Email dated August 6, 2021

Exhibit #16: Email Chain

Exhibit #17: Notice of Appeal Denial dated July 30, 2021

Exhibit #18: Request for State Fair Hearing dated August 13, 2021

Exhibit #19: MSA 18-49

Exhibit #20: Email dated August 4, 2021

Exhibit #21: Email dated August 17, 2021

Exhibit #22: Email dated August 23, 2021

Exhibit #23: Email dated September 3, 2021

Exhibit #24: MDHHS Consent to Share Behavioral Health Information

Exhibit #25: Respondent's Agreement to Change Consent Form

Exhibit #26: MPM Section: Provider Qualifications

Exhibit #27: MDHHS/CMHSP Managed Mental Health Supports and Services Contract for Fiscal Year 2021

Exhibit #28: Quality Assessment and Performance Improvement Programs for Specialty Prepaid Inpatient Health Plans

Exhibit #29: SWMBH Policy 12.10: Trauma-Informed System of Care

Respondent's Exhibit

Exhibit A: Hearing Summary and Evidence Packet

ISSUE

Did Respondent properly suspend Petitioner's respite care 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. Respondent is a Community Mental Health Service Provider (CMHSP) associated with SWMBH, a Prepaid Inpatient Health Plan (PIHP).

2. Petitioner is an [redacted] year-old Medicaid beneficiary who has been approved for services through Respondent. (Exhibit A, page 11).

3. As part of his services through Respondent, Petitioner has been approved for respite care services. (Exhibit #1, page 2).

4. On or about November 10, 2020, Petitioner requested a continuation of the approved 7,200 units of respite care services. (Exhibit #1, page 3).

5. On November 10, 2020, the Department issued a Notice of Adverse Benefit Determination indicating that only 1000 units of respite would be approved. (Exhibit #1, page 3).

6. Petitioner subsequently filed an Internal Appeal with Respondent regarding that decision, and, on November 18, 2020, Respondent issued a Notice of Appeal Denial indicating that Petitioner's Internal Appeal was denied. (Exhibit #1, page 4).

7. On November 24, 2020, the Michigan Office of Administrative Hearings and Rules (MOAHR) received a request for hearing filed by Petitioner with respect to the decision to reduce his respite care services. (Exhibit #1, page 4).

8. On May 17, 2021, a hearing commenced before Administrative Law Judge (ALJ) Corey Arendt. (Exhibit #1, page 1).

9. On April 12, 2021, the hearing was subsequently continued and completed. (Exhibit #1, page 1).

10. On April 29, 2021, ALJ Arendt issued a Decision and Order reversing Respondent's decision to deny Petitioner's request for additional respite care services. (Exhibit #1, pages 1-19).

11. In part, ALJ Arendt concluded:

> Based on the foregoing, I agree with Respondent that a reduction in services may be warranted based on a lack of medical necessity for 7,500 units of respite . . . However, the evidence fails to show how the Department calculated the proposed reduction considering Petitioner's inability to acquire a provider for respite services and with the Department failing to provide Petitioner with assistance or provide Petitioner with a second option . . .
>
> Therefore, based on the evidence presented, Petitioner has proven by a preponderance of the evidence that the Department's proposed reduction was improper. The Department must reassess Petitioner and authorize enough

> respite services . . . to meet all the goals in Petitioner's IPOS.

Exhibit #1, page 16

12. Similarly, ALJ Arendt ordered:

> The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department improperly reduced Petitioner's respite, and individual and family therapy.
>
> **IT IS THEREFORE ORDERED** that:
>
> The Department decision is REVERSED.
>
> Within 10 days of the issuance of this Decision and Order, the Department must reassess Petitioner and authorize enough respite . . . to meet all the goals in Petitioner's IPOS.

Exhibit #1, page 17

13. On May 3, 2021, Respondent reassessed Petitioner. (Exhibit A, page 11).

14. At that time, Petitioner's mother declined any sort of self-determination arrangement for the provision of respite care services and indicated that she wanted Respondent to provide the necessary caregivers. (Exhibit A, page 11; Testimony of Petitioner's mother; Testimony of Corporate Compliance Officer).

15. On May 6, 2021, Respondent reauthorized Petitioner for 7,200 units of respite care services. (Exhibit A, page 6).

16. However, on May 7, 2021, when certifying receipt of ALJ Arendt's Decision and Order, SWMBH indicated that it had not been able to comply with the Decision and Order within ten days. (Exhibit #3, pages 1-3).

17. The reason given was: "Respite agencies have been contacted, but have not executed a contract at this time. We will continue to reach out and pursue other respite providers for services." (Exhibit #3, page 3).

18. The Order Certification also indicated an expected Action Date of June 7, 2021. (Exhibit #3, page 1).

19. Over the next month, and after discussing self-determination with Petitioner's mother further, Respondent began searching for providers

through Respondent, with input and discussions with Petitioner's mother. (Exhibit A, pages 7-28; Testimony of Petitioner's mother; Testimony of Corporate Compliance Officer).

20. One of the discussions between Petitioner's mother and his Case Manager through Respondent occurred on June 3, 2021. (Testimony of Case Manager).

21. On June 4, 2021, the next day, Respondent called Petitioner's mother twice to discuss a new potential provider that Respondent was in talks of contracting with. (Testimony of Corporate Compliance Officer).

22. However, as she had previously notified Respondent, Petitioner's mother was unavailable that day and did not answer or respond. (Testimony of Petitioner's mother).

23. On June 7, 2021, while Petitioner's Case Manager with Respondent was on vacation, Respondent sent Petitioner a written Notice of Adverse Benefit Determination stating that Petitioner's respite care services were suspended. (Exhibit A, pages 29-31; Testimony of Case Manager).

24. With respect to the reason for the action, the Notice of Adverse Benefit Determination stated:

> We have tried to reach you regarding potential respite providers. We do have providers available. Because we have not heard back from you, a respite provider has not been chosen. Once you agree to a contracted provider and training requirements are met, we may then reinstate services. It is advised that you contact Lauren Jansheski.
>
> *Exhibit A, page 29*

25. On June 10, 2021, Petitioner's mother called back Respondent after receiving the notice of suspension. (Exhibit A, page 33; Testimony of Petitioner's mother; Testimony of Community Based Services Supervisor).

26. During that conversation, she indicated that she was fine with moving forward with the potential provider identified by Respondent. (Exhibit A, page 33; Testimony of Community Based Services Supervisor).

27. On June 15, 2021, Petitioner filed an Expedited Internal Appeal with Respondent regarding the suspension of respite care services. (Exhibit A, pages 34-35; Exhibit #8, pages 1-4).

28. On June 17, 2021, the potential provider Respondent had been calling about on June 7, 2021, and that Petitioner had agreed to move forward with, unilaterally declined a contract with Respondent after reviewing the case further. (Testimony of Corporate Compliance Officer).

29. On June 18, 2021, Respondent denied Petitioner's request for an expedited Internal Appeal decision. (Exhibit #9, page 1).

30. On July 16, 2021, Respondent sent Petitioner notice that it needed to extend the timeframe for resolving Petitioner's Internal Appeal due to a need for additional information. (Exhibit A, page 54).

31. On July 30, 2021, Respondent sent Petitioner a written Notice of Appeal Denial stating that his Internal Appeal had been denied. (Exhibit #17, pages 1-5; Exhibit A, pages 55-57).

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

> Your appeal was reviewed on July 29, 2021, by Amanda Matthews, MA, LLP, CAADC, QMHP, CMHP, QIDP. Barry County Community Mental Health Authority is unable to re-instate the respite care services at this time. While we are willing to authorize the service, at this time a provider has not been selected by your parent/guardian to provide respite. We are currently working with your parent/guardian to select one or more providers. Once a provider is agreed upon, the respite service will be authorized again.
>
> *Exhibit #17, page 1*
> *Exhibit A, page 55*

33. On August 10, MOAHR received the request for hearing filed by Petitioner in this matter with respect to the decision to suspend his respite care services. (Exhibit #18, pages 1-26).

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 had been receiving respite care services through Respondent. With respect to such services, the applicable version of the Medicaid Provider Manual (MPM) provides in part:

> **17.3.I. RESPITE CARE SERVICES**
>
> Respite care services are intended to assist in maintaining a goal of living in a natural community home and are provided on a short-term, intermittent basis to relieve the beneficiary's family or other primary caregiver(s) from daily stress and care demands during times when they are providing unpaid care. Respite is not intended to be provided on a continuous, long-term basis where it is a part of daily services that would enable an unpaid caregiver to work elsewhere full time. In those cases, community living supports, or other services of paid support or training staff, should be used. Decisions about the methods and amounts of respite should be decided during person-centered planning. PIHPs may not require active clinical treatment as a prerequisite for receiving respite care. These services do not supplant or substitute for community living support or other services of paid support/training staff.
>
> - "Short-term" means the respite service is provided during a limited period of time (e.g., a few hours, a few days, weekends, or for vacations).
>
> - "Intermittent" means the respite service does not occur regularly or continuously. The service stops and starts repeatedly or with a time period in between.
>
> - "Primary" caregivers are typically the same people who provide at least some unpaid supports daily.
>
> - "Unpaid" means that respite may only be provided during those portions of the day when no one is being paid to provide the care, i.e., not a time when the beneficiary is receiving a paid State Plan (e.g., home help) or waiver service (e.g., community living

supports) or service through other programs (e.g., school).

- Children who are living in a family foster care home may receive respite services. The only exclusion of receiving respite services in a family foster care home is when the child is receiving Therapeutic Foster Care as a Medicaid SED waiver service because that is considered in the bundled rate. (Refer to the Child Therapeutic Foster Care subsection in the Children's Serious Emotional Disturbance Home and Community-Based Services Waiver Appendix for additional information.)

Since adult beneficiaries living at home typically receive home help services and hire their family members, respite is not available when the family member is being paid to provide the home help service but may be available at other times throughout the day when the caregiver is not paid.

Respite care may be provided in the following settings:

- Beneficiary's home or place of residence
- Licensed family foster care home
- Facility approved by the State that is not a private residence (e.g., group home or licensed respite care facility)
- Home of a friend or relative chosen by the beneficiary and members of the planning team
- Licensed camp
- In community (social/recreational) settings with a respite worker trained, if needed, by the family
- Licensed family childcare home

Respite care may not be provided in:

- day program settings
- ICF/IIDs, nursing homes, or hospitals

Respite care may not be provided by:

- parent of a minor beneficiary receiving the service
- spouse of the beneficiary served
- beneficiary's guardian
- unpaid primary care giver

Cost of room and board must not be included as part of the respite care unless provided as part of the respite care in a facility that is not a private residence.

MPM, April 1, 2020 version
Behavioral Health and Intellectual and Developmental Disability Supports and Services
Pages 149-150

Moreover, regarding medical necessity, the MPM also 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.

MPM, April 1, 2021 version
Behavioral Health and Intellectual and Developmental Disability Supports and Services
Pages 14-16

Here, as discussed above, Respondent suspended Petitioner's authorized respite care services on the basis that it had providers available for Petitioner and had tried to reach Petitioner regarding those potential providers, but that it had not heard back from Petitioner and therefore no provider had been chosen.

In appealing that decision, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent erred. Moreover, the undersigned ALJ 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 ALJ finds that Petitioner has met his burden of proof and Respondent's decision must therefore be reversed.

Respondent reauthorized Petitioner's respite care services in the requested amount following the previous decision and order and began looking for providers for Petitioner, with Petitioner's mother participating in the process and engaging in discussions regarding the services and potential providers.

However, after Petitioner's mother missed two phone calls made by Respondent on one single day regarding a potential provider, Respondent suspended Petitioner's service on the basis that Petitioner was failing to respond to Respondent's calls about available providers.

Even putting aside Petitioner's mother's credible testimony that she had advised Respondent in advance that she was unavailable that day, a single day of unavailability or failing to immediately respond to phone calls is not a proper basis for a suspension given the previous, ongoing discussions; the fact that Petitioner's mother called Respondent back soon after; the lack of any emergency in securing a provider that day; and the fact that it is not even clear that the providers were truly "available", with the sole identified non-camp provider unilaterally backing out a week later.

Testimony provided during the hearing reflects that the true reason Respondent rushed into suspending Petitioner's respite care services was that the Order Certification it completed following ALJ Arendt's Decision and Order identified an expected Action Date of June 7, 2021, but that self-imposed deadline both misconstrued ALJ Arendt's order, which provided that services needed to be authorized in an sufficient amount, but not necessarily provided, and failed to support the basis for suspension identified here.

Since the suspension issued in this case, the parties have continued to work together, albeit contentiously, on finding Petitioner a suitable respite care provider and they each spent the majority of the hearing arguing why the other party was responsible for the fact that Petitioner does not yet have a respite care provider; and, while there is merit to both arguments, ultimately that question is not before the undersigned ALJ at this time as he is only reviewing the suspension issued by Respondent in light of the information available at the time of that suspension. Moreover, as that suspension was clearly improper for the reasons discussed above, it must be reversed, and Petitioner's respite care services must be reauthorized.

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 respite care services.

IT IS THEREFORE ORDERED that

> The Respondent's decision is **REVERSED,** and it must initiate a reauthorization of Petitioner's respite care services.

Steven Kibit

SK/sb

Steven Kibit
Administrative Law Judge

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-Hearing-Notices@michigan.gov

Petitioner

[redacted]
[redacted]
[redacted], MI
[redacted]

DHHS Department Rep.

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

Counsel for Petitioner

John Schwend
Kyle Williams
4095 Legacy Parkway
Lansing, MI
48911
jschwend@drmich.org
KWilliams@drmich.org

Counsel for Department

T. Seth Koches
Bauckham Sparks, P.C.
470 West Centre Ave., Ste. A
Portage, MI 49025
koches@michigantownshiplaw.com

DHHS-Location Contact

Lynn Bennett
Barry County CMH
500 Barfield Dr
Hastings, MI
49058