[redacted]
[redacted] MI [redacted]

Date Mailed: February 10, 2022
MOAHR Docket No.: 21-005649
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and upon Petitioner's request for a hearing.

After due notice, a telephone hearing was held on January 12, 2022. [redacted], Petitioner's legal guardian, appeared and testified on Petitioner's behalf. [redacted], Petitioner's mother, and [redacted], Petitioner's brother, also testified as witnesses for Petitioner. Barbara Laughbaum, Utilization Manager, appeared and testified on behalf of Respondent Pathways Community Mental Health. Louis Versine, Behavioral Psychology Supervisor, and Angela Reamer, Clinical Supervisor, also testified as witnesses for Respondent.

During the hearing, Petitioner's Request for Hearing was admitted into the record as Exhibit #1, page 1. Respondent also submitted an evidence packet that was admitted into the record as Exhibit A, pages 1-62.

ISSUE

Did Respondent properly decide to terminate Petitioner's personal care and community living support (CLS) 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 who has been diagnosed with, among other conditions, mild intellectual disabilities; anxiety disorder; depressive disorder; pedophiliac disorder; and limitations in receptive and expressive language skills. (Exhibit A, pages 2-3, 14, 40).

2. He also has a history of legal involvement related to charges of pedophile behavior. (Exhibit A, page 3).

3. Since January of 2007, Petitioner has lived at [redacted] (ALS), a specialized residential home in [redacted] Michigan. (Exhibit A, pages 2-6).

4. Petitioner has also been approved for services through Respondent, including supports coordination; behavior services; community living supports; personal care; supported employment; and medication management services. (Exhibit A, page 4).

5. Even with those services, Petitioner continues to have issues with anxious and antagonistic behaviors on a daily basis. (Exhibit A, page 3; Testimony of Behavioral Psychology Supervisor).

6. In particular, Petitioner will refuse to engage with service providers or staff attempts to increase prosocial behavior; antagonize and mock staff for any reason; demonstrate targeted verbal and physical aggression towards other residents, including perseverating on one housemate for weeks at a time; engage in property destruction and physically intimidation towards housemates and staff. (Exhibit A, pages 3, 10-11, 17; Testimony of Behavioral Psychology Supervisor).

7. In trying to address Petitioner's behaviors, Respondent and Petitioner have gone through twenty behavioral plans with only marginal improvement. (Testimony of Behavioral Psychology Supervisor).

8. In April of 2019, Petitioner was brought to the emergency room (ER) after a physical altercation with housemate and he received stiches above his eye. (Exhibit A, page 9).

9. On April 21, 2020, Respondent's Recipient Rights Department substantiated a Recipient Rights Allegation against Respondent for being responsible for an inhumane treatment environment for Petitioner's housemates caused by Petitioner's verbal and physical aggression towards them. (Exhibit A, page 50; Testimony of Clinical Supervisor).

10. The recommendation made from that substantiated finding was that Petitioner be moved to a different setting that could meet his needs. (Exhibit A, pages 4, 50; Testimony of Clinical Supervisor).

11. Respondent began looking for alternative placements, but Petitioner's guardian has refused to explore other placements or sign consents that would allow for a coordinated move given Petitioner's strong connection to the area, including family ties, and their desire that Petitioner remain where he is. (Exhibit A, page 6; Testimony of Petitioner's Guardian).

12. In April of 2021, Petitioner's Individual Plan of Service (IPOS) for the period of April 17, 2021 to April 16, 2022 noted Petitioner's continuing behaviors and inability to manage frustration without demonstrating aggression towards housemates and staff; barriers to providing direct services and supports caused by Petitioner's anxiety, paranoid beliefs, and refusal to discuss or address personal conflicts; and Respondent's determination that an alternative placement needed to be secured. (Exhibit A, pages 20-26).

13. The IPOS also noted Petitioner's strong natural supports and community supports. (Exhibit A, page 21).

14. Respondent continued to explore new placements for Petitioner since that time, but Petitioner's guardian has again refused to provide necessary information or participate in finding a new location. (Testimony of Petitioner's Guardian; Testimony of Clinical Supervisor).

15. In June of 2021, Petitioner was brought to the ER after physical altercation with a housemate. (Exhibit A, page 8).

16. In August of 2021, Respondent reassessed Petitioner and noted continuing aggressive behaviors by Petitioner towards AFC staff and Petitioner's housemates, including specific examples; his failure to respond to staff attempts to increase prosocial behavior; and a high risk of harm towards others due to Petitioner. (Exhibit A, pages 3, 10-11).

17. On September 13, 2021, Respondent sent a letter to ALS in which it noted the substantiated Recipient Rights violation and stated that, upon further review, it appeared that there had not been any improvement with Petitioner's ongoing verbal aggression or behaviors towards housemates. (Exhibit A, page 50).

18. The letter also stated that Respondent believed both that Petitioner is incompatible with others in the home and that his continuation of behaviors warrants an ongoing violation of his housemates' right to a humane treatment environment. (Exhibit A, page 50).

19. On September 17, 2021, ALS sent a letter to Petitioner's Guardian which served as a 30-day notice that it will not be able to continue to provide services to Petitioner. (Exhibit A, page 51).

20. On October 20, 2021, Respondent sent Petitioner a Notice of Adverse Benefit Determination stating that his personal care and CLS services would be terminated. (Exhibit A, pages 52-58).

21. With respect to the reason for the adverse benefit determination, the notice stated:

> The clinical documentation provided does not establish medical necessity.
>
> Personal Care and Community Living Support Services are being terminated for the current setting.
>
> The reason for this action is due to the appropriateness of the current setting for which [Petitioner] resides. It has been determined the current setting is not able to meet [Petitioner's] mental health needs. Therefore, an alternative setting has to be secured to meet his mental health needs. The current provider, ALS provided an eviction notice on September 17, 2021. Pathways has provided you with placement options for [Petitioner] to be placed, however, you have refused to consider the placements that have been offered. Effective November 4, 2021, [Petitioner] will no longer receive the Medicaid covered services (Personal Care and Community Living Support services) that are necessary for him to continue to remain in his current placement. An alternative placement will need to be agreed upon prior to the expiration date of his Medicaid services for him to continue to receive appropriate care.

Exhibit A, page 52

22. Petitioner's legal guardian subsequently filed an Internal Appeal with Respondent regarding that decision. (Exhibit A, page 59).

23. On October 27, 2021, Respondent sent Petitioner a Notice of Appeal Denial stating that the decision to terminate Petitioner's services was being upheld. (Exhibit A, pages 59-62).

24. On November 30, 2021, the Michigan Office of Administrative Hearings and Rules (MOAHR) received the request for hearing filed in this matter regarding Respondent's decision. (Exhibit #1, page 1).

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 numerous covered Medicaid services through Respondent.

With respect to such covered services and the need for them, the applicable version of the Medicaid Provider Manual (MPM) provides in part:

> **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, October 1, 2021 version
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
Pages 14-16

Similarly, with respect to the location of services, the MPM also provides in part:

2.3 LOCATION OF SERVICE [CHANGES MADE 4/1/21]

Services may be provided at or through PIHP service sites or contractual provider locations. Unless otherwise noted in this manual, PIHPs are encouraged to provide mental health and developmental disabilities services in integrated locations in the community, including the beneficiary's home, according to individual need and clinical appropriateness. For office or site-based services, the location of primary service providers must be within 60 minutes/60 miles in rural areas, and 30 minutes/30 miles in urban areas, from the beneficiary's residence.

Substance abuse covered services must generally be provided at state licensed sites. Licensed providers may provide some activities, including outreach, in community (off-site) settings. Mental health case management may be provided off-site, as necessary, to meet individual needs when case management is purchased as a component of a licensed service. For office or site-based services, the location of primary service providers must be within 60 minutes/60 miles in rural areas, and 30 minutes/30 miles in urban areas, from the beneficiary's home.

MPM, October 1, 2021 version
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter

Pages 10
(Internal highlighting omitted)

Here, as discussed above, Respondent decided to terminate Petitioner's personal care and CLS services at ALS pursuant to the above policies.

In support of the action, Respondent's Behavioral Psychology Supervisor testified that Respondent has been working with Petitioner for years to address his behaviors, including through multiple behavior plans, but that there has only been marginal improvement and many remaining behaviors to effective treatment. In particular, he noted Petitioner's enjoyment in aggression and counter programming, including refusal to engage with providers or attempts to change his behavior as barriers. Respondent's Behavioral Psychology Supervisor also testified that other vulnerable individuals live with Petitioner in the AFC home, a home that Petitioner mistakenly believes was set up for him and described the negative effects of Petitioner's aggressive physical and verbal behaviors on them. He further testified that he was not aware of any issues with staff treatment of Petitioner, and agreed that staff badgering Petitioner would not be appropriate

Respondent's Clinical Supervisor testified that a substantiated recipient's rights complaint was the impetus for moving Petitioner. She also described attempts at locating alternative placements for Petitioner, first nearby and then farther out, and how Petitioner's Guardian's refusal to participate in a move has prevented much movement. She further testified that Petitioner needs a specialized residential setting given his needs, and that less restrictive have failed in the past.

In response, Petitioner's Guardian conceded that he was not cooperating with any move because any move would be devasting to Petitioner and his family as Petitioner's mother cannot drive, his brothers work and/or live out-of-state, and no one would be able to visit Petitioner. Petitioner's Guardian also testified that moving Petitioner away from his family would only make Petitioner more difficult and that they wish there could be a place closer to home.

Petitioner's Guardian further testified that Petitioner may have aggressive behaviors, but that Petitioner has never attacked anyone and, instead, was the victim of an attack by another resident. He also testified that staff are harassing Petitioner and they and another resident are creating a stressful situation for Petitioner. Petitioner's Guardian had not witnessed anything himself, but was told that by Petitioner, with Petitioner's Guardian testifying that Petitioner is not a liar.

Petitioner's Mother testified that Petitioner's family has a great relationship and that she looks forward to visiting Petitioner. She also testified that Petitioner has taken tremendous abuse from others and that he is a good man who just needs direction. She further testified that moving Petitioner will be catastrophic; they need to stay together as a family; and that sending Petitioner south will not solve him problems.

Petitioner's Brother testified that, while Petitioner has done well when his caregivers take a genuine interest, Petitioner's Brother has heard staff badgering Petitioner; one was fired for stealing Petitioner's necessary medications; and Petitioner's Brother believes that staff have been instigating confrontations between residents for their own enjoyment. Petitioner's Brother also testified that Petitioner has been attacked twice by another resident since that resident moved in, including an attack that led to a hospitalization, and it has been nothing but chaos. He further testified that Petitioner behaves when his family picks him up, even when he is agitated at first, as he is so happy to be away from that other resident, and that it would be better to move that resident than Petitioner. He also testified that Petitioner and his family are comfortable with Petitioner being at his current location, it is easy to visit him there, and the family would be broken otherwise.

Petitioner's Guardian then testified that they tried to press charges against the other resident or get a restraining order, but that they only received the runaround. He also testified that Petitioner has had a serious downfall since the other resident moved in, and that the other resident loves to attack and harass Petitioner. He further testified that Petitioner calls him several times a week complaining about that other resident.

Respondent's Clinical Supervisor then confirmed that Petitioner was sent to the ER after being attacked by another resident, who has been there for a year. She also testified that Respondent decided to move Petitioner and not the other resident because of the substantiated Recipient Rights complaint, the recommendation of MDHHS, and Petitioner's ongoing behaviors.

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

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

It is undisputed that Petitioner's services are medically necessary, but the above policies also provide that services are to be provided in the least restrictive, most integrated setting that otherwise satisfies the standards for medically-necessary services and it does not appear that Petitioner's current location is that setting given the credible testimony from Respondent's witnesses regarding Petitioner's aggressive behaviors toward other residents, which created an inhumane treatment environment as specifically found in the substantiated Recipient's Rights violation; Petitioner's behavior toward staff; and Petitioner's marginal improvement despite years of treatment and services at Petitioner's location.

Moreover, while Petitioner's witnesses testified that Petitioner's behaviors and lack of improvement are the fault of staff and another resident, with the other resident attacking

Petitioner on multiple occasions, their testimony is ultimately unpersuasive as it is largely unsupported or second hand; Petitioner's aggressive behaviors appear to have preceded the other resident moving in; and the substantiated Recipient's Rights violation specifically found Petitioner's behaviors to be the issue, with a subsequent recommendation that he be moved.

Petitioner's representative and witnesses also dispute the location of Petitioner's next placement and the effect it may have on him, but where Petitioner is moved is not before the undersigned Administrative Law Judge. The issue in this case is whether Petitioner's services at his current location were properly terminated; and given the safety concerns caused by Petitioner's behavior and the ineffectiveness of services at his current placement, Petitioner has failed to meet his burden of showing that Respondent erred.

DECISION AND ORDER

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

IT IS THEREFORE ORDERED that

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

Steven Kibit

SK/tem

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] MI [redacted]

Authorized Hearing Rep.

[redacted]
[redacted]

DHHS Department Rep.

Michael St. John
Pathways
200 West Spring St.
Marquette, MI 49855
mstjohn@up-pathways.org