

GRETCHEN WHITMER  
GOVERNOR

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

ORLENE HAWKS  
DIRECTOR



Date Mailed: January 21, 2022  
MOAHR Docket No.: 21-005688  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Corey Arendt**

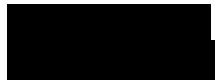
**DECISION AND ORDER**

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9, 42 CFR 431.200 *et seq.* and 42 CFR 438.400 *et seq.* upon Petitioner's request for a hearing.

After due notice, a hearing was held on January 13, 2022. [REDACTED], Petitioner's Mother appeared on behalf of Petitioner. Anthony Holston, Assistant Vice President of Appeals and Grievances, appeared on behalf of Respondent, Beacon Health Options (Department).

**Witnesses:**

Petitioner



Respondent

Dr. Mira Jourdan  
Angie Watkins

**Exhibits:**

Petitioner                    None

Respondent                    A. Hearing Summary

**ISSUE**

Did the Department properly determine that Petitioner was no longer eligible for Applied Behavior Analysis (ABA) 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 Medicaid beneficiary, born [REDACTED] 2014, who has been diagnosed with anxiety disorder and sensory processing problems. (Exhibit (Ex) A, pp 16, 20; Testimony).
2. On January 8, 2019, Karen Salerno, MA, LLP, examined Petitioner and performed a diagnostic evaluation of autism spectrum disorder to determine Petitioner's eligibility for Autism Benefit Services. Following the assessment, Ms. Salerno, diagnosed Petitioner with sensory processing disorder and behavioral issues. (Ex A, pp 56-63.). Ms. Salerno specifically concluded:

Overall, she displayed Slight Impairment in Functioning based on the DD-CGAAS. Results of a standardized diagnostic parent interview suggest the absence [of] Autism Spectrum Disorder symptoms. On a standardized diagnostic observation, [REDACTED] scores were Minimal-to-no-Evidence level of ASD symptoms. Based on these results, [REDACTED] does not meet the diagnostic criteria for Autism Spectrum Disorder. (Ex A, p 62.)

3. On or around June 2, 2021, Petitioner requested ABA services. (Ex A, p 23.)
4. On June 4, 2021, a biopsychosocial assessment was conducted. The assessment took place via Teams Video per Michigan Department of Health and Human Services policy and Covid-19. During the assessment, Petitioner's mother indicated she sought out autism testing as Petitioner had been tested in 2018 but she had continued to notice the same behaviors since the testing. Following the assessment, Petitioner was referred for formal autism testing and approved for targeted case management, psychiatric diagnostic evaluation, and testing. (Ex A, pp 23, 36.)
5. On June 21, 2021, Dr. Mira Jourdan, PhD, ABPP, conducted a neuropsychological evaluation of Petitioner to evaluate Petitioner for autism. The examination took place by video conference and included at least 100 minutes of face-to-face time. Following the assessment, Dr. Jourdan diagnosed Petitioner with anxiety disorder and sensory processing problems. (Ex A, pp 16-21). Dr. Jourdan recommended the following:
  1. I do recommend continuing OT and psychotherapy. With respect to OT, this is new, and so I encouraged

them to give this some time to show benefit. The psychotherapy has been going on for a while, and there, they may wish to review with their therapist how things have progressed over time, share their concerns about some things worsening, and also given that [REDACTED] age and developmental abilities came along during the time since starting therapy, there might be additional modalities or options that were not realistic when therapy started, that might be worth trying now (such as Coping Cat, or biofeedback techniques like Heartmath).

2. The other thing I would recommend is that, although I am limited by not really knowing what the GI workup found, without a clear positive sense that these issues are purely psychosomatic, probably it would be wise to continue monitoring this with pediatrics, and if there were any change in symptoms or course, then consider re-evaluating medically to ensure there is no medical cause for these problems, since improving this functioning might also help with lowering distress level. (Ex A, pp 20-21.)
6. On June 22, 2021, the Department sent Petitioner a Notice of Adverse Benefit Determination. The notice indicated Petitioner's request for Autism Services was denied as Petitioner was determined to not meet the clinical eligibility criteria for services. (Ex A, p 11.)
7. On July 22, 2021, the Department received from Petitioner, a request for a lower-level appeal. (Ex A, pp 4, 9.)
8. On or around August 12, 2021, a Peer Advisor Review was conducted regarding Petitioner's appeal. The review indicated the June 21, 2021 assessment took into consideration the "camouflaging factor effect in girls and still concluded that the member did not exhibit impairments in social interactions that are commonly associated with ASD." Following the review, it was determined the information provided did "not support the level of care requested", and that "it was not medically necessary for [Petitioner's] behaviors to be managed with applied behavioral analysis (ABA)." (Ex A, pp 72-75.)
9. On August 17, 2021, the Department sent Petitioner a Notice of Appeal Denial. The notice indicated Petitioner's request for ABA services was denied. (Ex A, pp 76-88.) The notice stated specifically:

You are a 6-year-old female currently seeking Applied Behavioral Analysis (ABA) services, which are denied because you did not have a diagnosis of Autism Spectrum Disorder (ASD). As a result, ABA treatment is not medically

necessary to treat your condition, and it is not clinically supported based on the results of your most recent clinical evaluation. You are noted to have sensory processing concerns and anxiety. The appeal decision is to uphold the denial of ABA services. The following services are clinically indicated and recommended based on the clinical information reviewed: Outpatient Services.

10. On December 14, 2021, the Michigan Office of Administrative Hearings and Rules received from Petitioner, a request for hearing.

### **CONCLUSIONS OF LAW**

The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). It is administered in accordance with state statute, the Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services.<sup>1</sup>

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.<sup>2</sup>

Section 1915(b) of the Social Security Act provides:

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<sup>1</sup> 42 CFR 430.0.

<sup>2</sup> 42 CFR 430.10.

The Secretary, to the extent he finds it to be cost-effective and efficient and not inconsistent with the purposes of this subchapter, may waive such requirements of section 1396a of this title (other than subsection(s) of this section) (other than sections 1396a(a)(15), 1396a(bb), and 1396a(a)(10)(A) of this title insofar as it requires provision of the care and services described in section 1396d(a)(2)(C) of this title) as may be necessary for a State...

The State of Michigan has opted to simultaneously utilize the authorities of the 1915(b) and 1915(c) programs to provide a continuum of services to disabled and/or elderly populations. Under approval from the Centers for Medicare and Medicaid Services (CMS) the Department of Health and Human Services (MDCH) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver. CMH contracts with the Michigan Department of Health and Human Services to provide services under the waiver pursuant to its contract obligations with the Department.

Medicaid beneficiaries are entitled to medically necessary Medicaid covered services for which they are eligible. Services must be provided in the appropriate scope, duration, and intensity to reasonably achieve the purpose of the covered service.<sup>3</sup>

The Department is mandated by federal regulation to perform an assessment for the Petitioner to determine what Medicaid services are medically necessary and determine the amount or level of the Medicaid medically necessary services.

The applicable sections of the Medicaid Provider Manual (MPM) provide:

## **2.5 MEDICAL NECESSITY CRITERIA**

The following medical necessity criteria apply to Medicaid mental health, developmental disabilities, and substance abuse supports and services.

### **2.5.A. MEDICAL NECESSITY CRITERIA**

Mental health, developmental disabilities, and substance abuse services are supports, services, and treatment:

- Necessary for screening and assessing the presence of a mental illness, developmental disability or substance use disorder; and/or
- Required to identify and evaluate a mental illness, developmental disability or substance use disorder; and/or

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<sup>3</sup> 42 CFR 440.230.

- Intended to treat, ameliorate, diminish or stabilize the symptoms of mental illness, developmental disability or substance use disorder; and/or
- Expected to arrest or delay the progression of a mental illness, developmental disability, or substance use disorder; and/or
- Designed to assist the beneficiary to attain or maintain a sufficient level of functioning in order to achieve his goals of community inclusion and participation, independence, recovery, or productivity.

## **2.5.B. DETERMINATION CRITERIA**

The determination of a medically necessary support, service or treatment must be:

- Based on information provided by the beneficiary, beneficiary's family, and/or other individuals (e.g., friends, personal assistants/aides) who know the beneficiary; and
- Based on clinical information from the beneficiary's primary care physician or health care professionals with relevant qualifications who have evaluated the beneficiary; and
- For beneficiaries with mental illness or developmental disabilities, based on person centered planning, and for beneficiaries with substance use disorders, individualized treatment planning; and
- Made by appropriately trained mental health, developmental disabilities, or substance abuse professionals with sufficient clinical experience; and
- Made within federal and state standards for timeliness; and
- Sufficient in amount, scope and duration of the service(s) to reasonably achieve its/their purpose.
- Documented in the individual plan of service.

## **2.5.C. SUPPORTS, SERVICES AND TREATMENT AUTHORIZED BY THE PIHP**

Supports, services, and treatment authorized by the PIHP must be:

- Delivered in accordance with federal and state standards for timeliness in a location that is accessible to the beneficiary; and
- Responsive to particular needs of multi-cultural populations and furnished in a culturally relevant manner; and
- Responsive to the particular needs of beneficiaries with sensory or mobility impairments and provided with the necessary accommodations; and
- Provided in the least restrictive, most integrated setting. Inpatient, licensed residential or other segregated settings shall be used only when less restrictive levels of treatment, service or support have been, for that beneficiary, unsuccessful or cannot be safely provided; and
- Delivered consistent with, where they exist, available research findings, health care practice guidelines, best practices and standards of practice issued by professionally recognized organizations or government agencies.

#### **2.5.D. PIHP DECISIONS**

Using criteria for medical necessity, a PIHP may:

- Deny services that are:
  - deemed ineffective for a given condition based upon professionally and scientifically recognized and accepted standards of care;
  - experimental or investigational in nature; or
  - for which there exists another appropriate, efficacious, less-restrictive and cost effective service, setting or support that otherwise satisfies the standards for medically-necessary services; and/or
- Employ various methods to determine amount, scope and duration of services, including prior authorization

for certain services, concurrent utilization reviews, centralized assessment and referral, gate-keeping arrangements, protocols, and guidelines.

A PIHP may not deny services based solely on preset limits of the cost, amount, scope, and duration of services. Instead, determination of the need for services shall be conducted on an individualized basis.<sup>4</sup>

## **SECTION 18 – BEHAVIORAL HEALTH TREATMENT SERVICES/APPLIED BEHAVIOR ANALYSIS**

The purpose of this policy is to provide for the coverage of Behavioral Health Treatment (BHT) services, including Applied Behavior Analysis (ABA), for children under 21 years of age with Autism Spectrum Disorders (ASD). All children, including children with ASD, must receive EPSDT services that are designed to assure that children receive early detection and preventive care, in addition to medically necessary treatment services to correct or ameliorate any physical or behavioral conditions, so that health problems are averted or diagnosed and treated as early as possible.

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### **18.4 MEDICAL NECESSITY CRITERIA**

Medical necessity and recommendation for BHT services is determined by a physician or other licensed practitioner working within their scope of practice under state law. The child must demonstrate substantial functional impairment in social communication, patterns of behavior, and social interaction as evidenced by meeting criteria A and B (listed below); and require BHT services to address the following areas:

- A. The child currently demonstrates substantial functional impairment in social communication and social interaction across multiple contexts, and is manifested by all of the following:
  1. Deficits in social-emotional reciprocity ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation, to reduced sharing of interests,

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<sup>4</sup> Medicaid Provider Manual, Behavioral Health and Intellectual and Developmental Disability Supports and Services Chapter, October 1, 2019, pp 12-14.

emotions, or affect, to failure to initiate or respond to social interactions.

2. Deficits in nonverbal communicative behaviors used for social interaction ranging, for example, from poorly integrated verbal and nonverbal communication, to abnormalities in eye contact and body language or deficits in understanding and use of gestures, to a total lack of facial expressions and nonverbal communication.
3. Deficits in developing, maintaining, and understanding relationships ranging, for example, from difficulties adjusting behavior to suit various social contexts, to difficulties in sharing imaginative play or in making friends, to absence of interest in peers.

B. The child currently demonstrates substantial restricted, repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least two of the following:

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypes, lining up toys or flipping objects, echolalia, and/or idiosyncratic phrases).
2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, and/or need to take same route or eat the same food every day).
3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects and/or excessively circumscribed or perseverative interest).
4. Hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific

sounds or textures, excessive smelling or touching of objects, and/or visual fascination with lights or movement).

## **18.5 DETERMINATION OF ELIGIBILITY FOR BHT**

The following is the process for determining eligibility for BHT services for a child with a confirmed diagnosis of ASD. Eligibility determination and recommendation for BHT must be performed by a qualified licensed practitioner through direct observation utilizing the ADOS-2 and symptom rating using the DD-CGAS. BHT services are available for children under 21 years of age with a diagnosis of ASD from the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), and who have the developmental capacity to clinically participate in the available interventions covered by BHT services. A well-established DSM-IV diagnosis of Autistic Disorder, Asperger's Disorder or PDD-NOS should be given the diagnosis of ASD. Children who have marked deficits in social communication but whose symptoms do not otherwise meet criteria for ASD should be evaluated for social (pragmatic) communication disorder.

The following requirements **must** be met:

- Child is under 21 years of age.
- Child received a diagnosis of ASD from a qualified licensed practitioner utilizing valid evaluation tools.<sup>5</sup>

The Department argued the Petitioner was not eligible for ABA services because she did not meet the Medicaid Provider Manual criteria. Specifically, the Department indicated the Petitioner lacked a diagnosis of ASD. The Department indicated they came to their conclusion based on the neurological assessment completed by Dr. Jourdan.

Petitioner argued the assessment provided was by video and further, that the video assessment did not provide a full picture of when Petitioner was at her worst or display what Petitioner is like in the absence of her mother. Petitioner also argued that Petitioner masked her feelings during the assessment.

There is nothing in the applicable policy that indicates Petitioner must be assessed when he/she is at their worst. Furthermore, a prior assessment conducted nearly two-and-a-half years prior, came to the same conclusions reached by Dr. Jourdan.

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<sup>5</sup> *Id.* at 156, 158, 159.

Based on the evidence presented, Petitioner did not prove, by a preponderance of the evidence, that the denial of ABA services was improper. Two thorough evaluations demonstrated that Petitioner does not have a diagnosis of ASD.

As such, the Department was correct in determining that Petitioner was not eligible for ABA services because she did not meet the medical criteria for those services. Accordingly, the Department's denial of Petitioner's ABA services request must be upheld.

### **DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly determined that Petitioner was not eligible for ABA services.

**IT IS THEREFORE ORDERED** that:

The Department's decision is AFFIRMED.

CA/dh

*J. Arendt*  
Corey Arendt  
Administrative Law Judge

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**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-Location Contact**

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**Petitioner**

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