



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

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Date Mailed: February 16, 2022
MOAHR Docket No.: 22-000065
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 February 10, 2022. [REDACTED], Petitioner's Father 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

Angie Watkins
Dr. Sydney Cohen

Exhibits:

Petitioner

1. Petitioner's Request for Hearing¹

Respondent

A. Hearing Summary

ISSUE

Did the Department properly determine that Petitioner was not eligible for Applied Behavior Analysis (ABA) services?

¹ Copy of Petitioner's request for hearing and can be found in duplicate in Exhibit A, pp 110-155. As a result, only Exhibit A will be referenced throughout this Decision and Order.

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] 2016, who has been diagnosed with Global Developmental Delay, Café Au Lait spots, speech delay, Hypotonia, and tested positive for a pathogenic variant in DLG4. (Exhibit (Ex) A, pp 37, 56, 79; Testimony).
2. In December of 2020, Petitioner's family requested ABA services on behalf of Petitioner. (Ex A, pp 29-30; Testimony).
3. On December 7, 2020, Petitioner's family participated in a biopsychosocial assessment. During the assessment, Petitioner's family reported Petitioner uses verbal language to communicate, spoke in short sentences, phrases, and "full sentences", as well as had a vocabulary of around "300 words". (Ex A, p 35).
4. On February 24, 2021, Petitioner participated in a Autism Spectrum Disorder evaluation. The evaluation took place at Developmental Enhancement Behavioral Health and was performed by Psychologist, Benjamin Kennert, Ph.D. (Ex A, pp 20-24). Following the evaluation, Dr. Kennert opined the following:

[REDACTED] challenges are noted at an early age and have interfered with important areas of functioning. However, his difficulties are not sufficient to meet criteria for a diagnosis of Autism Spectrum Disorder, and are better explained by a Global Developmental Delay, with delays in areas of speech and social functioning. [REDACTED] impairments in speech and challenging behaviors are significant, and he requires support in these areas...²

5. On March 26, 2021, Department sent Petitioner a Notice of Adverse Benefit Determination. The notice indicated Petitioner's request for ABA services was denied as the February 24, 2021, Autism Testing indicated Petitioner did not have autism. (Ex A, pp 13-16).
6. On June 16, 2021, Petitioner underwent a Psychological Consultation at Helen Devos Children's Hospital. The consultation was administered by Psychologists Steven L. Pstynak, Ph.D., and Ellen Manegold, Ph.D. Following the examination, Dr. Pstynak and Dr. Manegold acknowledged recent testing for Autism had came back negative and remarked that some of the task avoidance observed was likely due to actual delays in many of the skill areas assessed and that Petitioner presented with "mild

² Ex A, p 23.

intellectual disability". Dr. Pstynak and Dr. Manegold also opined Petitioner's motor restlessness and limited sustained attention may be consistent with ADHD. Dr. Pstynak and Dr. Manegold recommended Petitioner be re-evaluated for Autism as they suspected the social gap between Petitioner and his peers may potentially widen over time, even when considering his developmental and intellectual delays. (Ex A, pp 72-78).

7. On August 13, 2021, Department received from Petitioner, a request for a local level appeal. (Ex A, pp 2-7).
8. On September 1, 2021, a Peer Review was conducted as part of Petitioner's August 13, 2021, appeal. The Peer Review affirmed the March 6, 2021, determination and found Petitioner lacked the criteria necessary to be eligible for ABA services. (Ex A, pp 91-94).
9. On September 8, 2021, Department sent Petitioner a Notice of Appeal Denial. The notice indicated Petitioner's appeal was considered and denied as a result of Petitioner not meeting the medical necessity criteria for ABA Services. (Ex A, pp 95-103).
10. On January 7, 2022, MOAHR, received from Petitioner, a request for hearing. (Ex A, pp 110-155)

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.³

³ 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.⁴

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

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

The State of Michigan has opted to simultaneously utilize the authorities of the 1915(b) and 1915(c) programs to provide a continuum of services to disabled and/or elderly populations. Under approval from the Centers for Medicare and Medicaid Services (CMS) the Department of Health and Human Services (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.⁵

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:

⁴ 42 CFR 430.10.

⁵ 42 CFR 440.230.

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; 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.⁶

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.

⁶ Medicaid Provider Manual, Behavioral Health and Intellectual and Developmental Disability Supports and Services Chapter, April 1, 2021, pp 14-16.

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, 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.⁷

The Department argued the Petitioner was not eligible for ABA services because he 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. Kennert.

Petitioner argued the assessment provided contained inconsistent statements regarding an ability to speak in full sentences and an inability to determine this ability based on Petitioner only speaking Korean during the assessment. The assertions made following the assessment however are corroborated by statements made by Petitioner's father a few months earlier during a biopsychosocial assessment.

Based on the evidence presented, Petitioner did not prove, by a preponderance of the evidence, that the denial of ABA services was improper. The assessment demonstrated that Petitioner does not have a diagnosis of ASD. This is not to say Petitioner cannot later be tested for ASD. Petitioner can at any time make a new request for ABA services and report any changes in circumstances that might necessitate a new ASD evaluation.

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

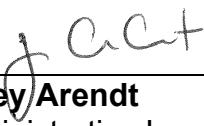
DECISION AND ORDER

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/cg


Corey Arendt

Administrative Law Judge
for Elizabeth Hertel, Director
Department of Health and Human Services

⁷ *Id.* at 156, 158, 159.

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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