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GOVERNOR

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

ORLENE HAWKS
DIRECTOR

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Date Mailed: July 8, 2022
MOAHR Docket No.: 22-001340
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER
DENYING RESPONDENT'S MOTION TO DISMISS
AND
GRANTING PETITIONER'S MOTION FOR SUMMARY DISPOSITION

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

On April 26, 2022, a telephone prehearing conference was held as scheduled for the purpose of presenting and discussing preliminary matters. Attorney Kyle Williams appeared on behalf of Petitioner, [REDACTED] (Petitioner). Evan George, Fair Hearings Officer, appeared on behalf of Respondent, Livingston County Community Mental Health (Respondent).

During that telephone prehearing conference, the parties and the undersigned Administrative Law Judge discussed the issue on appeal and agreed on a briefing schedule for dispositive motions. The briefing schedule was also subsequently extended at Petitioner's request.

Both parties timely filed motions, with Petitioner's motion identified as a Motion for Summary Disposition and Respondent's motion identified as a Motion to Dismiss, as well as responses to the opposing party's motion.

On June 14, 2022, a telephone motion hearing was held. The same representatives as before appeared on behalf of the parties.

Upon review, the undersigned Administrative Law Judge now finds that Respondent's Motion to Dismiss should be denied; Petitioner's Motion for Summary Disposition should be granted; and Respondent's failure to provide approved, medically necessary services in a timely manner should be reversed.

The Administrative Procedures Act (APA) allows parties "an opportunity to present oral and written arguments on issues of law and policy[.]" MCL 24.272(3). Pursuant to MCL 24.272(3), a party may also pursue a motion for summary disposition to address

questions of law that do not involve factual disputes. *Smith v Lansing Sch Dist*, 428 Mich 248, 256-257; 406 NW2d 825 (1987).

MCR 2.116(3) serves as a guide for summary disposition motions under MCL 24.272(3). See, e.g., *American Community Mutual Ins Co v Commr of Ins*, 195 Mich App 351, 361-363; 491 NW2d 597 (1992). Pursuant to MCR 2.116(c)(10), summary disposition is appropriate when there is no genuine dispute of material facts among the parties to an action. MCR 2.116(c)(8) allows summary disposition for failure to state a claim for which relief may be granted.

Furthermore, the Michigan Administrative Code allows for summary disposition under Rule 792.10129, which provides, in pertinent part:

R 792.10129 Summary disposition.

Rule 129. (1) A party may make a motion for summary disposition of all or part of a proceeding. When an administrative law judge does not have final decision authority, he or she may issue a proposal for decision granting summary disposition on all or part of a proceeding if he or she determines that that [sic] any of the following exists:

- (a) There is no genuine issue of material fact.
 - (b) There is a failure to state a claim for which relief may be granted.
 - (c) There is a lack of jurisdiction or standing.
- (2) If the administrative law judge has final decision authority, he or she may determine the motion for summary decision without first issuing a proposal for decision.
- (3) If the motion for summary disposition is denied, or if the decision on the motion does not dispose of the entire action, then the action shall proceed to hearing.

As such, the undersigned Administrative Law Judge has the authority to hear and decide preliminary dispositive motions and the authority to issue an order based on a dispositive motion.

Here, Petitioner's request for hearing alleges that Respondent has failed to provide medically necessary Community Living Supports (CLS) and respite care services approved as part of Petitioner's Individual Plan of Services (IPOS) in a timely manner. As part of that request, Petitioner also included the Internal Appeal decision from Respondent in which it rejected potential methods proposed by Petitioner for getting the

services provided, such as offering an enhanced payment rate for providers or utilizing Respondent's staff as providers, and concluded:

The committee determined that 1) the decision to deny (failure to provide services within 14 days) [Petitioner's] CLS/respite services is overturned; and 2) [Respondent] is obligated to provide the services outlined in [Petitioner's] IPOS and continue its due diligence to procure and provide those services as soon as possible.

*Respondent's Motion to Dismiss
Exhibit A, page 5*

Respondent's Motion to Dismiss

In response to that request for hearing, Respondent argues that this matter should be dismissed for failure to state a claim and/or a lack of jurisdiction over the requested relief.

Specifically, Respondent first argues that, absent a showing that Respondent failed to exercise diligence in providing services, Petitioner cannot state a claim or prove by a preponderance that Respondent failed to provide the services; and that, in this case, Petitioner failed to allege facts indicating what Respondent did or should have done that failed to meet the reasonable promptness requirement as required.

Respondent also argues that prior administrative decisions have found there to be no adverse action where a Community Mental Health (CMH) agency is offering to pay for services in a geographical area where no providers have capacity.

Respondent further argues that, even if Petitioner has sufficiently stated his claim, the matter must still be dismissed as the undersigned Administrative Law Judge lacks jurisdiction to grant the requested relief. In particular, Respondent identified Petitioner's requested relief as "an order compelling [Respondent] to provide, or contract with an agency to provide, Petitioner's Medicaid services," while noting that such an order would require unknown providers to enter into new service contracts, which is something that Respondent, MDHHS and MOAHR lacked the authority to order. Respondent also noted that Petitioner does have avenues of relief, such as seeking such an order in state circuit court or sanctions for Respondent through the MDHHS.

However, given the record in this case, all of Respondent's arguments are unpersuasive and its motion must be denied.

For example, even assuming for the sake of argument that Petitioner is required to allege facts indicating what Respondent did or should have done to meet the reasonable promptness requirement, the request for hearing included the Internal Appeal decision issued in this case and that decision discussed at least two specific

alternatives that Respondent could have, but did not pursue, to provide the approved services: (1) paying an enhanced rate to attract providers, or (2) using CMH staff to provide services. Accordingly, regardless of whether Respondent's reasons for not pursuing those alternatives was correct, Respondent's argument that Petitioner failed to state a claim because of a lack of identified actions Respondent should have taken is wrong.

Moreover, while Respondent is correct that past administrative decisions have appeared to dismiss cases for lack of jurisdiction where a CMH has approved and offered to pay for services, but no providers have been found, the undersigned Administrative Law Judge likewise rejects that argument. Those past decisions are neither binding in this case nor particularly relevant as they focused on whether there was a denial, suspension or termination of services as opposed to the failure to provide services in a timely manner under 42 CFR 438.400(b) expressly alleged in this case.

Additionally, to the extent Respondent further argues that the matter must be dismissed as the undersigned Administrative Law Judge lacks jurisdiction to grant the requested relief, its argument is also rejected. Respondent identified the requested relief as "an order compelling [Respondent] to provide, or contract with an agency to provide, Petitioner's Medicaid services", but it is not clear what Respondent based that identification on and the undersigned Administrative Law Judge would not characterize the requested relief in that manner. From the request for hearing, the discussion during the telephone hearing conference, Petitioner's motion and response to Respondent's motion, and the arguments during the telephone motion hearing, it is clear that Petitioner is seeking an order stating that Respondent provide the approved services and there is no request for a specific method by which Respondent would do so. Accordingly, regardless of whether Petitioner is entitled to that relief, Respondent's argument that the matter should be dismissed because the requested relief cannot be awarded is wrong.

Petitioner's Motion for Summary Disposition

Regarding his request for hearing, Petitioner notes that the parties stipulated that Petitioner's Community Living Supports (CLS) and respite care services are medically necessary, and that they have not been provided since their approved start date of June 4, 2021.

Petitioner also asserts that, when Petitioner filed an appeal with Respondent regarding the lack of timely services, Respondent inaccurately identified the issue as a "denial" and purported to "overturn" that action, but that Respondent's decision was meaningless as it rejected out-of-hand most of the concrete approaches Petitioner proposed to address the failure to timely provide services and, instead, merely provided that Respondent is obligated to provide the services outlined in Petitioner's Individual Plan of Service (IPOS) and continue its due diligence to procure and provide the services as soon as possible.

Petitioner further asserts that, rather than a denial, the issue in this case is just a failure to provide services and that the only way to overturn that failure is for an order stating that Respondent is to provide the services.

Petitioner also seeks summary disposition in his favor on his appeal and the requested relief, arguing that he is entitled to a State fair hearing as a failure to timely provide services is an adverse benefit determination; every right must have a remedy; and the applicable regulations confirm that the Administrative Tribunal has the authority to issue such an order.

“Pursuant to Michigan’s Medicaid State Plan and federally approved managed care waiver, community-based mental health, substance abuse and developmental disability specialty services and supports are covered by Medicaid when delivered under the auspices of an approved Prepaid Inpatient Health Plan (PIHP).” See Medicaid Provider Manual (MPM), Behavioral Health and Intellectual and Developmental Disability Supports and Services Chapter, Section 1.1.

To be approved, mental health and developmental disabilities services must be provided according to an individual written plan of service that has been developed using a person-centered planning process and that meets the requirements of Section 712 of the Michigan Mental Health Code. See MPM, Behavioral Health and Intellectual and Developmental Disability Supports and Services Chapter, Section 2.2.

42 CFR 438.206(a)-(b) also specifically provides that each State must ensure that all services covered under the State plan are available and accessible to enrollees of PIHPs in a timely manner, and that each PIHP maintains and monitors a network of appropriate providers that is both supported by written agreements and is sufficient to provide adequate access to all services covered under the contract for all enrollees. Moreover, 42 CFR 438.206(b)(4) further states that, if the provider network is unable to provide necessary services, covered under the contract to a particular enrollee, the PIHP must adequately and timely cover these services out-of-network for the enrollee, for as long as the PIHP is unable to provide them.

Here, the Medicaid-covered services of CLS and respite care services are at issue, and it was expressly stipulated that those approved services are medically necessary, but that they have not been provided since approved on June 4, 2021.

Given those stipulated facts, Petitioner has met its initial burden of factually supporting its motion as, on its face, there has been a failure to provide services in a timely manner as defined by the State, with “State” meaning the Single State agency, see 42 CFR 431.10, and the Single State agency in this case, *i.e.*, Michigan DHHS defining “timely manner” to mean “within 14 calendar days of the start date agreed upon during the person-centered planning (PCP) meeting and authorized by the PIHP.” See MDHHS Appeal and Grievance Processes Technical Requirement, page 3. Additionally, even Respondent’s Internal Appeal decision appeared to find that Respondent had failed to

provide services in a timely manner, with the dispute in this case only arising from the remedy identified in that appeal decision.

Moreover, as 42 CFR 438.400(b)(4) expressly provides that the failure to provide services in a timely manner, as defined by the State, is an adverse benefit determination on the part of an MCO like Respondent, with Petitioner having the right to appeal that determination with Respondent and then through a State fair hearing, the issue is proper before the undersigned Administrative Law Judge and Petitioner would be entitled to both judgment as a matter of law and an order requiring that Respondent provide the approved, medically necessary services as provided for in the statute, policy, and its contract with MDHHS.

In response, Respondent appeared to briefly assert that the authorized services not being provided in and of itself does not establish a failure on the part of Respondent to provide services in a timely manner, and that Respondent met its obligations under 42 USC 1396d(a) by offering to pay for the services within 14 days of authorizing them and diligently attempting to procure the services. However, Respondent fails to support its argument and reading of 42 USC 1396d(a) with any specific authority, and its claim is contradicted by its obligations to see that the medically necessary services are provided.

Rather than arguing that it provided the approved and medically necessary services in a timely manner, Respondent instead primarily attempts to recharacterize Petitioner's claim as a denial request for Respondent to either offer an enhanced payment rate to providers or become a new provider itself, while also arguing that the undersigned Administrative Law Judge lacks the authority to address such denials or order relief on them.

However, for many of the same reasons discussed above, when denying Respondent's Motion to Dismiss, Respondent's recharacterization of Petitioner's claim is inappropriate and must be rejected.

For example, while Respondent again cites to decisions issued in previous administrative cases treating cases where services have not been provided due to a lack of providers as denials and dismissing them for a lack of jurisdiction, the undersigned Administrative Law Judge again finds that those decisions are not binding, particularly relevant, or persuasive.

Similarly, to the extent Respondent again argues that any issues with its provider network are to be addressed through sanctions by the Department or court actions, the undersigned Administrative Law Judge would note that the existence of other avenues of relief does not preclude a State fair hearing in Petitioner's case, and that the failure to provide services in a timely manner is a specific adverse benefit determination expressly identified as an action that can be appealed by an individual beneficiary.

Moreover, while Respondent argues for the first time in its response to Petitioner's motion that Petitioner's own arguments reveal that this is not a timeliness case, that argument is also unpersuasive.

Respondent argues that the fact that Petitioner's real issue is with Respondent's failure to increase rates or become a provider itself is revealed by Petitioner's shoehorning in a sufficiency of authorization claim into what was supposed to be a timeliness case, with Petitioner fluctuating between promptness and denial arguments when it suits his purpose, and Petitioner's agreement that the effect of ordering the requested relief would be to expand the current level of service. According to Respondent, that argument and agreement demonstrate that Petitioner is attempting to avoid the jurisdictional limitation against the Administrative Tribunal ordering specific relief by only arguing timeliness and avoiding an explicit reference to rates or the CMH stepping into the shoes of the CLS provider.

Nevertheless, while both parties discussed potential ways that the services could be provided, with much of Petitioner's discussion on those issues related to the Internal Appeal decision, Petitioner's motion in this case is devoid of requesting any specific method of how the services would be timely provided; the request is simply that the approved, medically necessary services be provided, with the method of how Respondent fulfills its responsibilities left to Respondent.

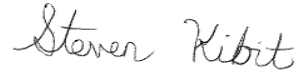
At one point in its response, Respondent acknowledges that, if Petitioner's claim was driven by the timeliness of his services, then 42 CFR 438.400(b)(4) would apply, and the undersigned Administrative Law Judge would have authority to order the services be provided¹; and that is how the undersigned Administrative Law Judge views this matter. Petitioner's claim is clear, *i.e.*, an alleged failure by Respondent to provide services in a timely manner, and, given the record in this case, there is both no genuine issue of material fact with respect to that claim, and Petitioner is entitled to judgment as a matter of law. Accordingly, Petitioner's Motion for Summary Disposition should be granted.

IT IS THEREFORE ORDERED that:

- Respondent's Motion to Dismiss is **DENIED**.
- Petitioner's Motion for Summary Disposition is **GRANTED**.

¹ Respondent's Response to Petitioner's Motion for Summary Disposition, pages 12-13.

- Respondent's failure to provide services in a timely manner is **REVERSED** and it must provide the approved, medically necessary CLS and respite care services in accordance with the applicable law and policy.



SK:tem

Steven Kibit
Administrative Law Judge

NOTICE OF APPEAL: Petitioner 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

Via Electronic Mail:

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