KORY LEFEBVRE
SPRINGTREE APARTMENTS
539 PINECREST
ALPENA, MI 49707

Date Mailed: December 12, 2022
MOAHR Docket No.: 22-002621
Agency No.: 16007049
Petitioner: Kory LeFebvre

ADMINISTRATIVE LAW JUDGE: Corey Arendt

DECISION AND ORDER

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

After due notice, a zoom hearing was held on October 19, 2022, and continued on November 2, 2022, and November 10, 2022. Attorney Cassandra Sanders appeared on Petitioner's behalf. Christopher Cooke, Attorney, appeared on behalf of Respondent, Northeast Michigan Community Mental Health (Department).

During the hearing, the following witnesses testified: Mary Crittenden, Linda Murphy, Lisa Wilson, Nena Sork, Kory LeFebvre, Melissa Bernhardt, Charles LeFebvre, and Brooke Paczkowski.

The following exhibits were also entered into the record:

Petitioner's Exhibits

Exhibit 1: Request for Hearing

Exhibit 2: Affidavit of Kory LeFebvre

Exhibit 3: Affidavit of Charles LeFebvre

Exhibit 4: May 14, 2021 IPOS

Exhibit 5: NEMCMHA Progress Notes

Exhibit 6: Dobson Healthcare Services Client Notes

Exhibit 7: NEMCMHA Service Delivery Records

Respondent's Exhibits

Exhibit A: IPOS and Supplements

Exhibit B: Progress Notes

Exhibit C: Progress Notes

Exhibit D: KL Schedules

Exhibit E: Self Determination Termination Letter

Exhibit F: Compassionate Care Termination Letter

Exhibit G: Definition of Community Living Supports

Exhibit H: KL Information/Refused Staff

Exhibit I: Respondents Special Efforts

Exhibit J: NEMCMHA Emergency Plan

Exhibit K: 24/7 Care Recommendation

Exhibit L: Affidavit of Mary Crittenden

Exhibit M: Log of Missed Shifts (Not Admitted)[1]

Exhibit M1: Affidavit of Kory Lefebvre

ISSUE

Did Respondent suspend Petitioner's Community Living Supports (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 Medicaid beneficiary, receiving services through Department. (Testimony.)

[1] Petitioner testified to the existence of these records but was unable to provide them so they could not be admitted into the record.

2. Department is under contract with the Michigan Department of Health and Human Services (MDHHS) to provide Medicaid covered services to people who reside in the Department service area.

3. As of November 14, 2016, Petitioner had been approved for self-determination arrangement permitting Petitioner to hire his own CLS staff. (Exhibit E; Testimony.)

4. On November 14, 2016, Department sent Petitioner notification terminating Petitioner's self-determination arrangement. The notice indicated a number of reasons for the termination. (Exhibit E; Testimony.) The reasons provided were as follows:

    1. You have overlooked and/or not sufficiently addressed behavior and conduct of the staff you hire.

    2. Stuart Wilson's office, your fiscal intermediary (FI), is recommending to you and to NeMCMHA you use an agency for services due to inappropriate claims and staff hours.

    3. Needs and changes you experience are not communicated in a timely manner to NeMCMHA staff who are attempting to support you.

    4. You have permitted your staff to leave their work shift without completing basic documentation and/or any documentation.

    5. You have not directed your staff to complete First Aid and CPR, or Recipient Rights training as required and recommended.

    6. On more than one occasion you have chosen staff having a criminal history, which does not meet the provider requirements according to the Medicaid Manual.

    7. You did not notify NeMCMHA or DHHS when you became aware of a change in your staff's legal standing (conviction of a felony).

    8. You most recently submitted payroll documentation to your FI to pay wages to this convicted felon. You have been told Medicaid could not be used to pay for your personal care services provided by this individual.

    9. Currently your plan states you need 113 hours of CLS per week and you have refused offers for support from the supports broker and supports coordinator to manage the above issues on more than one occasion.[2]

[2] Exhibit E, pp 179-180.

5. Since December 29, 2021, Petitioner has been approved for 18.5 hours of CLS services per day and 5.5 hours of Home Help Services (HHS)[3]. (Exhibit A; Testimony.)

6. Since December 29, 2021, 8 CLS shifts have gone unfulfilled. (Exhibit A; Exhibit B; Exhibit C; Exhibit D; Exhibit I; Exhibit L; Testimony.)

7. Department has in place a plan of care in the event scheduled staff is unavailable to provide CLS for Petitioner. The plan provides a number of individuals to contact including Adult Protective Services (APS). The Department also has in place, reserved space in a Department operated group home where Petitioner can temporarily stay if all other back-up arrangements fail. Petitioner would not be responsible for the cost so long as the stay is temporary. (Exhibit J; Exhibit L; Testimony.)

8. On October 20, 2022, the Michigan Office of Administrative Hearings and Rules, received from Petitioner, a request for hearing. Petitioner's request for hearing claimed Petitioner has had 57 unfulfilled CLS shifts and was seeking an order requesting the Department to immediately provide the approved for services or approve the use of a self-determination arrangement. (Exhibit 1; Testimony.)

9. Petitioner has a history of refusing staff and care, and a history of being difficult to work with resulting in several agencies refusing to provide for Petitioner. (Exhibit A; Exhibit B; Exhibit C; Exhibit D: Exhibit E; Exhibit F; Exhibit H; Exhibit L; Testimony.)

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

[3] HHS provided by the MDHHS.

> directly by the State to the individuals or entities that furnish the services.[4]
>
> 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.[5]

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…[6]

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 approved for both CLS and respite care services through Respondent. With respect to services, the applicable version of the Medicaid Provider Manual (MPM) provides in part:

> **17.3.B. COMMUNITY LIVING SUPPORTS**
>
> NOTE: This service is a State Plan EPSDT service when delivered to children birth-21 years.

[4] 42 CFR 430.0.
[5] 42 CFR 430.10.
[6] 42 USC 1396n(b).

Community Living Supports are used to increase or maintain personal self-sufficiency, facilitating an individual's achievement of his goals of community inclusion and participation, independence or productivity. The supports may be provided in the participant's residence or in community settings (including, but not limited to, libraries, city pools, camps, etc.).

Coverage includes:

- Assisting (that exceeds state plan for adults), prompting, reminding, cueing, observing, guiding and/or training in the following activities:

  - meal preparation
  - laundry
  - routine, seasonal, and heavy household care and maintenance
  - activities of daily living (e.g., bathing, eating, dressing, personal hygiene)
  - shopping for food and other necessities of daily living

  CLS services may not supplant services otherwise available to the beneficiary through a local educational agency under the Individuals with Disabilities Education Act (IDEA) or the Rehabilitation Act of 1973 or state plan services, e.g., Personal Care (assistance with ADLs in a certified specialized residential setting) and Home Help (assistance in the individual's own, unlicensed home with meal preparation, laundry, routine household care and maintenance, activities of daily living and shopping). If such assistance appears to be needed, the beneficiary must request Home Help from MDHHS. CLS may be used for those activities while the beneficiary awaits determination by MDHHS of the amount, scope and duration of Home Help. (revised 4/1/22) If the beneficiary requests it, the PIHP case manager or supports coordinator must assist him/her in requesting Home Help or in filling out and sending a request for Fair Hearing when the beneficiary

believes that the MDHHS authorization of amount, scope and duration of Home Help does not appear to reflect the beneficiary's needs based on the findings of the MDHHS assessment.

- Staff assistance, support and/or training with activities such as:
  - money management
  - non-medical care (not requiring nurse or physician intervention)
  - socialization and relationship building
  - transportation from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence (transportation to and from medical appointments is excluded)
  - participation in regular community activities and recreation opportunities (e.g., attending classes, movies, concerts and events in a park; volunteering; voting)
  - attendance at medical appointments
  - acquiring or procuring goods, other than those listed under shopping, and non-medical services
- Reminding, observing and/or monitoring of medication administration
- Staff assistance with preserving the health and safety of the individual in order that he/she may reside or be supported in the most integrated, independent community setting.

CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, state plan coverage Personal Care in Specialized Residential Settings. Transportation to medical appointments is covered by Medicaid through MDHHS or the Medicaid Health Plan. Payment for CLS services may not be made, directly or indirectly, to responsible relatives (i.e., spouses, or parents

> of minor children), or guardian of the beneficiary receiving community living supports.
>
> CLS assistance with meal preparation, laundry, routine household care and maintenance, activities of daily living and/or shopping may be used to complement Home Help when MDHHS has determined the individuals need for this assistance exceeds Home Help service limits. CLS may also be used for those activities while the beneficiary awaits the decision from a Fair Hearing of the appeal of a MDHHS decision. Reminding, observing, guiding, and/or training of these activities are CLS coverages that do not supplant Home Help. (revised 4/1/22)
>
> Community Living Supports (CLS) provides support to children and youth younger than 18, and the family in the care of their child, while facilitating the child's independence and integration into the community. This service provides skill development related to activities of daily living, such as bathing, eating, dressing, personal hygiene, household chores and safety skills; and skill development to achieve or maintain mobility, sensory-motor, communication, socialization and relationship-building skills, and participation in leisure and community activities. These supports must be provided directly to, or on behalf of, the child. These supports may serve to reinforce skills or lessons taught in school, therapy, or other settings. For children and adults up to age 26 who are enrolled in school, CLS services are not intended to supplant services provided in school or other settings or to be provided during the times when the child or adult would typically be in school but for the parent's choice to home-school.[7]

* * *

In order to have been approved, the CLS and respite care services had to be medically necessary.[8] Regarding medical necessity, the MPM also provides:

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[7] MPM, Behavioral Health and Intellectual and Developmental Disability Supports and Services, October 1, 2022, pp 137-138.
[8] 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;

- 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.[9]

[9] *Id* at 14-15.

Here, as discussed above, Petitioner requested a hearing asking for the Department to immediately provide the approved for CLS or approve the use of a self-determination arrangement as a result of an alleged 57 unfulfilled shifts.[10]

After a very thorough review of the evidence presented, it is very clear that both the Petitioner and the Department witnesses had vastly different accounts of what transpired since December 2021. And based on this review, it was determined that the Department's evidence is vastly more credible.

Petitioner on examination, proved to be a poor historian with a poor recall of what has transpired. Furthermore, Petitioner, on at least one occasion, attempted to mislead this Tribunal through his testimony.[11]

In complete contrast of Petitioner's testimony, the Department witnesses provided very detailed testimony that was corroborated through the various notes and documents provided. Based on a review of this evidence, it is clear that the Petitioner is difficult to work with and that the Department is doing a phenomenal job of trying to keep up with the Petitioner's demands and his inability to work with certain individuals.

The evidence in this case indicates there was only a small number of unfulfilled shifts since December 2021, far below the alleged 57 to 71 as alleged by Petitioner. The small number of shifts equates to approximately 1.2 percent of all shifts over a 313-day period.[12] Although the Department is required to provide all of the medically necessary services, I am not persuaded that the 1.2% of missed shifts amounts to a suspension or denial of services.[13] The evidence indicates the Department has a phenomenal back up plan and that they continue to restructure that plan to benefit the Petitioner's wants and needs.

Accordingly, the Department's actions should be affirmed as there is no record of a suspension or denial of services.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Department did not suspend or deny Petitioner CLS services.

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[10] Petitioner's request for hearing identifies 57 unfulfilled shifts while Petitioner's affidavit (Exhibit 2) alleges 71 unfulfilled shifts.

[11] Petitioner's admission of making statements to be "agreeable" even though his statements were inaccurate or untrue.

[12] 313 days with 2 shifts per day for a total of 626 shifts. Approximately 8 shifts unfulfilled amounting to only 1.2%. See Department's Closing Brief, p 3.

[13] Petitioner's history of refusing services and denying a large number of providers.

IT IS THEREFORE ORDERED that

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

CA/vc

Corey Arendt
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

Via Electronic Mail:

DHHS Department Representative
Nena Sork
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