[redacted]
MI [redacted]

Date Mailed: August 30, 2022
MOAHR Docket No.: 22-002839
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 a request for a hearing filed on the minor Petitioner's behalf.

After due notice, a hearing was held via video conferencing on August 4, 2022. [redacted], Petitioner's mother, appeared and testified on behalf of Petitioner, [redacted]. George Motakis, Chief Compliance Officer/Fair Hearings Officer with the Lakeshore Regional Entity, appeared and testified on behalf of Respondent, Allegan County Community Mental Health/OnPoint.[1] Mackenzie Bartoli, a Behavioral Analyst with Hope Discovery, and Coreen Perkins, a Supports Coordinator with Respondent, also testified as witnesses.

During the hearing, Petitioner's request for hearing was admitted into the record as Exhibit #1, pages 1-3. Respondent also submitted an evidence packet that was admitted into the record as Exhibit A, pages 1-86. No other proposed exhibits were submitted.

ISSUE

Did Respondent properly terminate Petitioner's 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 minor and a Medicaid beneficiary who has been diagnosed with Autism Spectrum Disorder. (Exhibit A, page 17).

2. He lives with his parents and three siblings. (Exhibit A, page 14).

[1] In April of 2022, Allegan County Community Mental Health changed its name to OnPoint.

3. He also attends school, through special education, and he receives both occupational therapy and physical therapy at school. (Exhibit A, page 14).

4. Due to his diagnosis and accompanying functional limitations, Petitioner was authorized for behavioral health services through the CMH of Ottawa County, a Community Mental Health Service Provider (CMHSP) associated with the Prepaid Inpatient Health Plan (PIHP), Lakeshore Regional Entity. (Exhibit A, page 15).

5. Petitioner's services through the CMH of Ottawa County included in-home Applied Behavior Analysis (ABA) provided by Hope Discovery. (Exhibit A, page 15).

6. He was initially approved for 20 hours per week of such services, but that amount was subsequently reduced several times due to Petitioner's lack of attendance and participation with the services. (Exhibit A, page 31; Testimony of Behavioral Analyst).

7. On or about February 1, 2020, Petitioner's family moved to Allegan County, and his services were to be transitioned to Respondent, another CMHSP associated with the PIHP. (Exhibit A, page 60).

8. Petitioner and his representative missed the first two scheduled initial assessments with Respondent, but his case was finally able to be transferred over in April of 2020. (Exhibit A, pages 38, 40-41, 60; Testimony of Supports Coordinator).

9. Respondent also authorized ABA services, through the same provider as before, *i.e.,* Hope Discovery. (Exhibit A, page 60).

10. In April of 2020, Petitioner switched to online school due to the ongoing COVID-19 pandemic. (Exhibit A, pages 46-47).

11. Respondent temporarily switched to telephone meetings and assessments. (Testimony of Supports Coordinator).

12. Hope Discovery also stopped providing services for a month due to the pandemic. (Testimony of Petitioner's representative; Testimony of Behavioral Analyst).

13. After services resumed, Petitioner's family frequently missed or canceled his ABA services. (Testimony of Behavioral Analyst; Testimony of Supports Coordinator).

14. On March 30, 2021, Petitioner's Supports Coordinator had her first in-person meeting with Petitioner's family since the COVID-19 pandemic had started. (Exhibit A, pages 17-18).

15. The purpose of the meeting was to address lack of attendance at ABA and meetings with the Supports Coordinator. (Exhibit A, page 18).

16. During the meeting, it was agreed that Petitioner's ABA would be authorized for 3 days per week, 4 hours per day, with an expectation of at least 80% attendance before any hours would be increased. (Exhibit A, page 18).

17. On April 20, 2021, after Petitioner's mother missed an earlier, scheduled appointment, Respondent and Petitioner's mother completed his Petitioner's Person-Centered Plan for the upcoming plan year. (Exhibit A, pages 30, 42, 77-86).

18. In that plan, Petitioner was again approved for continued direct ABA, family training, and supports coordination services. (Exhibit A, pages 81-83).

19. Respondent also added an authorization for respite camp after discussions about how Petitioner's family had paid for him to attend such a camp in the past. (Exhibit A, page 77).

20. However, Petitioner was unable to utilize respite camp because the camp the family wanted was filled up by the time the service was approved. (Exhibit A, page 60; Testimony of Petitioner's representative).

21. Petitioner also failed to utilize the vast majority of his services during the plan year, with most of that due to cancelations or lack of participation from Petitioner's representative. (Exhibit A, pages 31, 60; Testimony of Behavior Analyst; Testimony of Supports Coordinator).

22. Other gaps in services were caused by COVID-19 or staff leaving, but those gaps were also prolonged by an inability to communicate with Petitioner's mother and get new staff in place when ready. (Exhibit A, page 19; Testimony of Behavior Analyst).

23. The lack of services has caused a regression in Petitioner's skills and behaviors. (Exhibit A, page 60; Testimony of Petitioner's representative; Testimony of Behavior Analyst).

24. During that time, Petitioner's mother also missed appointments with the Supports Coordinator and was slow getting back in contact for rescheduling. (Exhibit A, pages 20-23, 31-27; Testimony of Supports Coordinator).

25. By January of 2022, Respondent decided to terminate Petitioner's services due to a lack of participation. (Testimony of Supports Coordinator).

26. Hope Discovery also subsequently determined that it would no longer be a provider for Petitioner for the same reason. (Testimony of Behavior Analyst).

27. On January 19, 2022, the Supports Coordinator scheduled a January 25, 2022, telephone call with Petitioner's mother, who also advised the Supports Coordinator that the family was currently sick with COVID-19. (Exhibit A, page 71).

28. On January 25, 2022, the Supports Coordinator called Petitioner's mother as scheduled, but there was no answer and, after confirming that the Behavioral Analyst had not heard from Petitioner's mother either, decided to go ahead with case closure. (Exhibit A, pages 23-24, 72; Testimony of Supports Coordinator).

29. Respondent then sent Petitioner a Notice of Adverse Benefit Determination stating that his services would be terminated on February 8, 2022. (Exhibit A, pages 69-70).

30. With respect to the reason for the termination, the notice stated: "We cannot continue to authorize services for you if you are not participating in treatment." (Exhibit A, page 69).

31. That same day, Petitioner's mother did call back, while also reporting that she was just leaving the hospital after being diagnosed with COVID-19, and she and the Supports Coordinator discussed the termination. (Exhibit A, pages 26, 75-76).

32. On February 15, 2022, Petitioner's representative filed an Internal Appeal with respect to the decision to terminate services. (Exhibit A, pages 63-68).

33. On March 7, 2022, Respondent sent Petitioner written notice that the Internal Appeal had been denied. (Exhibit A, pages 51-58).

34. With respect to the reason for the denial, the notice stated:

> **Why did we deny your appeal?**
>
> We denied your appeal for the service/item listed above because: There is a history of scheduling appointments and not keeping them. Since 04/20/2021, only 20% of direct applied behavioral analysis (ABA) units have been utilized. The benefits of regular attendance, meeting with the supports coordinator, and participation in these services were discussed. Notice of Action letters were also sent stating the need to schedule and keep appointments

> for services to continue. Although this information was provided, multiple visits were still missed. Therefore, as of 02/08/2022, continued ABA services have been denied.
>
> **This action is based on the following:**
>
> The following criteria was used in your case, MDHHS Medicaid Provider Manual, 23rd Ed; Behavioral Health and Intellectual / Developmental Disability 42 CFR 440.230(d) provides the basic legal authority for an agency to place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.
>
> *Exhibit A, page 51*

35. On July 6, 2022, the Michigan Office of Administrative Hearings and Rules (MOAHR) received the request for hearing filed in this matter regarding the termination of Petitioner's services. (Exhibit #1, pages 1-3).

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)) (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 behavioral health treatment/applied behavior analysis services through Respondent. With respect to such services, the applicable version of the Medicaid Provider Manual (MPM) provides in part:

> **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.

According to the U.S. Department of Health & Human Services, autism is characterized by impaired social interactions, problems with verbal and nonverbal communication, repetitive behaviors, and/or severely limited activities and interests. Early detection and treatment can have a significant impact on the child's development. Autism can be viewed as a continuum or spectrum, known as ASD, and includes Autistic Disorder, Asperger's Disorder, and Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS). The disorders on the spectrum vary in severity and presentation but have certain common core symptoms. The goals of treatment for ASD focus on improving core deficits in communication, social interactions, and restricted behaviors. Changing these fundamental deficits may benefit children by developing greater functional skills and independence.

BHT services prevent the progression of ASD, prolong life, and promote the physical and mental health and efficiency of the child. 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. Direct patient care services that treat or address ASD under the state plan are available to children under 21 years of age as required by the EPSDT benefit.

* * *

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.

To be eligible for BHT, the following criteria 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.
- Child is medically able to benefit from the BHT treatment.
- Treatment outcomes are expected to develop, maintain, or restore, to the maximum extent practicable, the functioning of a child with ASD. Measurable variables may include increased social-communication skills, increased interactive play/age-appropriate leisure skills, increased reciprocal and functional communication, etc.
- Coordination with the school and/or early intervention program is critical. Collaboration between school and community providers is needed to coordinate treatment and to prevent duplication of services. This collaboration may take the form of phone calls, written communication logs, participation in team meetings (i.e., Individualized Education Plan/Individualized Family Service Plan [IEP/IFSP], Individual Plan of Service [IPOS], etc.).
- Services are able to be provided in the child's home and community, including centers and clinics.
- Symptoms are present in the early developmental period (symptoms may not fully manifest until social demands exceed limited capacities or may be masked by learned strategies later in life).
- Symptoms cause clinically significant impairment in social, occupational, and/or other important areas of current functioning that are fundamental to maintain health, social inclusion, and increased independence.
- Medical necessity and recommendation for BHT

services are determined by a qualified licensed practitioner.

- Services must be based on the individual child and the parent's/guardian's needs and must consider the child's age, school attendance requirements, and other daily activities as documented in the IPOS. Families of minor children are expected to provide a minimum of eight hours of care per day on average throughout the month.

18.6 PRIOR AUTHORIZATION

BHT services are authorized for a time period not to exceed 365 days. The 365-day authorization period for services may be re-authorized annually based on recommendation of medical necessity by a qualified licensed practitioner working within their scope of practice under state law.

18.7 RE-EVALUATION

An annual re-evaluation by a qualified licensed practitioner to assess eligibility criteria must be conducted through direct observation utilizing the ADOS-2 and symptoms rated using the DD-CGAS. Additional tools should be used if the clinician feels it is necessary to determine medical necessity and recommended services. Other tools may include cognitive/developmental tests, adaptive behavior tests, and/or symptom monitoring.

18.8 TRANSITION AND DISCHARGE CRITERIA

The desired BHT goals and outcomes for discharge should be specified at the initiation of services, monitored throughout the duration of service implementation, and refined through the behavioral service level evaluation process. Transition and discharge from all BHT services should generally involve a gradual step-down model and require careful planning. Transition and discharge planning from BHT services should include transition goal(s) within the behavioral plan of care or plan, or written plan, that specifies details of monitoring and follow-up as is appropriate for the individual and the family or authorized representative(s) utilizing the PCP process.

Discharge from BHT services should be reviewed and

evaluated by a qualified BHT professional for children who meet any of the following criteria:

- The individual has achieved treatment goals and less intensive modes of services are medically necessary and/or appropriate.

- The individual is either no longer eligible for Medicaid or is no longer a State of Michigan resident.

- The individual, family, or authorized representative(s) is interested in discontinuing services.

- The individual has not demonstrated measureable improvement and progress toward goals, and the predicted outcomes as evidenced by a lack of generalization of adaptive behaviors across different settings where the benefits of the BHT interventions are not able to be maintained or they are not replicable beyond the BHT treatment sessions through the successive authorization periods.

- Targeted behaviors and symptoms are becoming persistently worse with BHT treatment over time or with successive authorizations.

- The services are no longer medically necessary, as evidenced by use of valid evaluation tools administered by a qualified licensed practitioner.

- The provider and/or individual/family/authorized representative(s) are unable to reconcile important issues in treatment planning and service delivery to a degree that compromises the potential effectiveness and outcome of the BHT service.

MPM, January 1, 2022 version
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
Pages 157-162

Moreover, regarding the required medical necessity for services in general, the MPM also provides:

> **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.

Here, as discussed above, Respondent decided to terminate Petitioner's services pursuant to the above policies.

In appealing that decision, 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 the Respondent's decision in light of the information it 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 that burden of proof and that Respondent's decision must therefore be affirmed.

Petitioner was previously approved for the services at issue and nothing in his circumstances or needs suggests that he has improved to the point that they are no longer needed, with Petitioner having in fact regressed in multiple areas. However, that alone does not warrant the continuing approval of services and, as described above, services must be revaluated on an ongoing basis and terminated if and when appropriate under the applicable policy.

Such circumstances may exist under policy when an individual has not demonstrated measureable improvement and progress toward goals, and the predicted outcomes; targeted behaviors and symptoms are becoming persistently worse with treatment over time or with successive authorizations; the provider and/or individual/family/authorized representative(s) are unable to reconcile important issues in treatment planning and service delivery to a degree that compromises the potential effectiveness and outcome of the BHT service; or services have been deemed ineffective for a given condition based upon professionally and scientifically recognized and accepted standards of care.

And, given those applicable policies and the facts in this case, Petitioner has failed to meet his burden of proof and Respondent's decision must therefore be affirmed. It is undisputed that, despite being approved for services for years, Petitioner has regressed and is not making the expected progress, in large part due to a lack of participation in services, and continuing services would not appear to be effective. Moreover, while Petitioner's mother credits the lack of participation to the COVID-19 pandemic and other extenuating circumstances, the record demonstrates that Petitioner's lack of participation existed prior to COVID-19. Petitioner has failed to participate across multiple years and different CMHSPs, even with the issue discussed and changes made to increase the utilization of services, and it even reached the point where his direct provider will no longer have Petitioner as a client. The record is also full of examples of lack of communication from Petitioner's mother, including with the provider to get staff in place to prevent gaps in services from going on too long and with the Supports Coordinator to ensure that meetings and assessments are held.

As discussed during the hearing, Petitioner is free to reapply with Respondent to the extent he still wants services. With respect to the decision at issue in this case

however, Petitioner has failed to meet his burden of proof and Respondent's decision must therefore be affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, decides that Respondent properly terminated Petitioner's services.

IT IS THEREFORE ORDERED that

Respondent's decision is **AFFIRMED**.

Steven Kibit

Steven Kibit
Administrative Law Judge

SK/dh

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:

DHHS Department Rep.
George V. Motakis,
Chief Compliance Officer
Allegan County Community Mental Health/OnPoint
5000 Hakes Drive, Suite 250
Norton Shores, MI 49441
georgem@lsre.org

DHHS Department Contact
Belinda Hawks
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MDHHS-BHDDA-Hearing-Notices@michigan.gov

Via First Class Mail:

Petitioner
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Authorized Hearing Rep.
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