[redacted]
[redacted] MI [redacted]

Date Mailed: October 7, 2022
MOAHR Docket No.: 22-003420
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 on September 29, 2022. [redacted], Petitioner's mother, appeared and testified on Petitioner's behalf. Erin Fletcher, Clinical Director, appeared and testified on behalf of Respondent, Northeast Michigan Community Mental Health. Cara Gugliemella, Licensed Behavior Analyst, also testified as a witness for Respondent.

During the hearing, Petitioner's request for hearing was admitted into the record as Exhibit #1, pages 1-14. Respondent also submitted proposed exhibits, but they were not admitted because they had not been provided to Petitioner.

ISSUE

Did Respondent properly deny Petitioner's request 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 [redacted] year-old Medicaid beneficiary who displays selective mutism and anxiety. (Exhibit #1, page 5).

2. She attends school and has had an Individualized Education Program (IEP) since starting in Head Start. (Exhibit #1, page 5).

3. She has not been diagnosed with any medical or psychiatric diagnoses. (Exhibit #1, page 5).

4. While never raising the possibility of a diagnosis of Autism Spectrum Disorder (ASD) before, Petitioner's primary care physician did refer Petitioner to Respondent in April of 2022 at the request of Petitioner's mother for autism testing and to determine eligibility for ABA and other services. (Testimony of Petitioner's representative; Testimony of Respondent's representative).

5. An intake assessment was then performed, and Respondent authorized testing. (Testimony of Respondent's representative).

6. On May 19, 2022, a Licensed Behavior Analyst assessed Petitioner in-person. (Exhibit #1, page 5).

7. In her subsequent report, the Licensed Behavior Analyst concluded:

> Based on the current ADOS testing and behavioral observations, [Petitioner] does not meet` the criteria for 299.00 Autism Spectrum Disorder.

Exhibit #1, page 7

8. She did recommend that (1) parent training be given to focus on ways in which to decrease maladaptive behaviors; (2) Petitioner should continue to meet with case management through MI Children's Services; and (3) Petitioner should continue to meet regularly with a physician to monitor development. (Exhibit #1, page 7).

9. In July of 2022, Respondent sent Petitioner's representative a Notice of Adverse Benefit Determination stating in part that her request for ABA services for Petitioner was denied. (Testimony of Respondent's representative).

10. Petitioner's representative then filed an Internal Appeal with respect to the decision to deny services. (Exhibit #1, page 2).

11. On July 18, 2022, Respondent sent Petitioner's representative written notice that the Internal Appeal had been denied. (Exhibit #1, pages 2-4).

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

Why did we deny your appeal?

> Your Internal Appeal was denied for the service/item listed above because:
>
> After review of documentation and results from ADOS testing conducted on 05/19/22 by Cara Gugliemella, MA, BCBA, LBA, to determine eligibility for Applied Behavior Analysis (ABA) program, [Petitioner] does not meet criteria for Autism and/or ABA services.

Exhibit #1, page 2

13. On August 2, 2022, the Michigan Office of Administrative Hearings and Rules (MOAHR) received the request for hearing filed in this matter regarding the denial of ABA services. (Exhibit #1, pages 1-14).

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 applied for Applied Behavior Analysis (ABA) 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.

18.1 SCREENING

The American Academy of Pediatrics (AAP) endorses early identification of developmental disorders as being essential to the well-being of children and their families. Early identification of developmental disorders through screening by health care professionals should lead to further evaluation, diagnosis, and treatment. Early identification of a developmental disorder's underlying etiology may affect the medical treatment of the child and the parent's/guardian's intervention planning. Screening for ASD typically occurs during an EPSDT well child visit with the child's primary care provider (PCP). EPSDT well child visits may include a review of the child's overall medical and physical health, hearing, speech, vision, behavioral and developmental status, and screening for ASD with a validated and standardized screening tool. The EPSDT well child evaluation is also designed to rule out medical or behavioral conditions other than ASD and include those conditions that may have behavioral implications and/or may co-occur with ASD. A full

medical and physical examination must be performed before the child is referred for further evaluation.

18.2 REFERRAL

The PCP who screened the child for ASD and determined a referral for further evaluation was necessary will contact the Pre-paid Inpatient Health Plan (PIHP) directly to arrange for a follow-up evaluation. The PCP must refer the child to the PIHP in the geographic service area for Medicaid beneficiaries. *The PIHP will contact the child's parent(s)/guardian(s) to arrange a follow-up appointment for a comprehensive diagnostic evaluation and behavioral assessment.* Each PIHP will identify a specific point of access for children who have been screened and are being referred for a diagnostic evaluation and behavioral assessment of ASD. If the PCP determines the child who screened positive for ASD is in need of occupational, physical, or speech therapy, the PCP will refer the child directly for the service(s) needed.

After a beneficiary is screened and the PCP determines a referral is necessary for a follow-up visit, the PIHP is responsible for the comprehensive diagnostic evaluation, behavioral assessment, BHT services (including ABA) for eligible Medicaid beneficiaries, and for the related EPSDT medically necessary Mental Health Specialty Services. Occupational therapy, physical therapy, and speech therapy for children with ASD who do not meet the eligibility requirements for developmental disabilities by the PIHP are covered by the Medicaid Health Plan or by Medicaid Fee-for-Service.

18.3 COMPREHENSIVE DIAGNOSTIC EVALUATIONS [CHANGE MADE 4/1/22]

Accurate and early diagnosis of ASD is critical in ensuring appropriate intervention and positive outcomes. The comprehensive diagnostic evaluation must be performed before the child receives BHT services. The comprehensive diagnostic evaluation is neurodevelopmental review of cognitive, behavioral, emotional, adaptive, and social functioning, and should include validated evaluation tools. Based on the evaluation, the practitioner determines the child's diagnosis, recommends general ASD treatment interventions, and refers the child for a behavior assessment

which is provided or supervised by a BCBA to recommend more specific ASD treatment interventions. The diagnostic evaluations are performed by a qualified licensed practitioner working within their scope of practice and who is qualified and experienced in diagnosing ASD. A qualified licensed practitioner includes:

- a physician with a specialty in psychiatry or neurology;
- a physician with a subspecialty in developmental pediatrics, developmental-behavioral pediatrics or a related discipline;
- a physician with a specialty in pediatrics or other appropriate specialty with training, experience or expertise in ASD and/or behavioral health;
- a psychologist;
- an advanced practice registered nurse with training, experience, or expertise in ASD and/or behavioral health;
- a physician assistant with training, experience, or expertise in ASD and/or behavioral health; or
- a clinical social worker, working within their scope of practice, and is qualified and experienced in diagnosing ASD.

The determination of a diagnosis by a qualified licensed practitioner is accomplished by direct observation utilizing valid evaluation tools, **(revised per bulletin MSA 21-20)** and by administering a comprehensive clinical interview including a developmental symptom history (medical, behavioral, and social history) such as the Autism Diagnostic Interview-Revised (ADI-R) or clinical equivalent. **(text deleted per bulletin MSA 21-20)** Other tools should be used when a clinician feels it is necessary to determine a diagnosis and medical necessity service recommendations. Other tools may include:

- cognitive/developmental tests, such as the Mullen Scales of Early Learning, Wechsler Preschool and Primary Scale of Intelligence-IV (WPPSI-IV),

Wechsler Intelligence Scale for Children-IV (WISC-IV), Wechsler Intelligence Scale for Children-V (WISC-V), or Differential Ability Scales-II (DAS-II);

- adaptive behavior tests, such as Vineland Adaptive Behavior Scale-II (VABS-II), Adaptive Behavior Assessment System-III (ABAS-III), or Diagnostic Adaptive Behavior Scale (DABS); and/or

- symptom monitoring, such as Developmental Disabilities-Children's Global Assessment Scale (DD CGAS), (text added per bulletin MSA 21-20) Social Responsiveness Scale-II (SRS-II), Aberrant Behavior Checklist, or Social Communication Questionnaire (SCQ).

* * *

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 valid evaluation tools. **(revised per bulletin MSA 21-20)**. *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.

Pages 160
(internal highlighting omitted)
(italics added for emphasis)

Here, as discussed above, Respondent decided to deny Petitioner's request for ABA 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 denying her request. 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. The above policies expressly provide that ABA services are only covered for beneficiaries who have been diagnosed with Autism Spectrum Disorder (ASD), and it is undisputed that Petitioner has not been diagnosed with that condition in this case. Petitioner's representative discussed anecdotes and identified a number of symptoms that she believes demonstrates that Petitioner has ASD, but that, even if that led Petitioner's primary care physician to refer Petitioner for an assessment at Petitioner's representative's request, is insufficient to meet the above criteria and a qualified licensed practitioner expressly found that Petitioner did not meet the criteria for ASD after assessing Petitioner. Moreover, while Petitioner's representative took issue with assessment, especially the length of time she felt it took, the qualified licensed practitioner credibly and fully explained her findings and the evaluation tools she utilized.

As discussed during the hearing, Petitioner's representative is free to pursue other services for Petitioner through Respondent or re-request ABA services when appropriate. With respect to the decision at issue in this case however, Petitioner has failed to meet her 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 denied Petitioner's for ABA services.

IT IS THEREFORE ORDERED that

Respondent's decision is **AFFIRMED**.

Steven Kibit

Steven Kibit
Administrative Law Judge

SK/sr

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.
Nena Sork
Northeast Michigan CMH Authority
400 Johnson Street
Alpena, MI 49707
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Via First Class Mail:

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