STATE OF MICHIGAN
GRETCHEN WHITMER
GOVERNOR

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

MARLON I. BROWN, DPA
DIRECTOR

[redacted]

Date Mailed: April 1, 2024
MOAHR Docket No.: 24-001069
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Robert J. Meade

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 March 27, 2024. Attorney Mark Craig appeared on Petitioner's behalf. [redacted] Father, Authorized Hearing Representative; [redacted] Mother; and Marelyn Boulter, Owner, Boulter's AFC, appeared as witnesses for Petitioner.

Heather Woods, Fair Hearing Officer, appeared and testified on behalf of Respondent, Southwest Michigan Behavioral Health, the PIHP for Barry County Community Mental Health. (CMH or Department). Ellie DeLeon, LLP; Gina Adams, Behavioral Analyst; and Tina Williams, Barry County CMH, appeared as witnesses for the CMH.

ISSUE

Did the CMH properly deny Petitioner's request for Personal Care and Community Living Supports (CLS) in a Specialized Residential setting?

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 an adult Medicaid beneficiary who is eligible to receive services through Barry County CMH. (Exhibit 1; Testimony)

2. CMH is under contract with the Michigan Department of Health and Human Services (MDHHS) to provide Medicaid covered services to people who reside in the CMH service area. (Exhibit 1; Testimony)

3. Petitioner currently resides at Boulter's Adult Foster Care (AFC) home, which is a specialized residential setting. (Exhibit 1, pp 2, 11; Testimony.) Petitioner was placed at Boulter's AFC home in 2020 without meeting the medical necessity criteria for such placement. (*Id*.)[1] As such, Petitioner's parents pay the AFC home out-of-pocket for his care to supplement funds Petitioner receives to reside in a general AFC home. (*Id*.)

4. Petitioner was diagnosed with autism spectrum disorder at age 2½ and he has a mild intellectual disability with some substance use disorders and behavioral issues. (Exhibit 1, p 12; Testimony.) Petitioner has mild hearing difficulty and a history of grand mal seizures, which are controlled by medications with no reported seizures for a few years. (*Id*.)

5. Petitioner received a Certification of Completion in the Young Adult program in Kalamazoo County. (Exhibit 1, p 11; Testimony.) He completed 12th grade at Parchment High School, then transferred to the Kalamazoo Co Young Adult program. (*Id*.) Prior to the Covid 19 shut down he was working at a pizza parlor in Delton MI. (*Id*.) The establishment closed and Petitioner is reportedly uninterested in looking for another job at this time. (*Id*.)

6. Petitioner is overly trusting of strangers with poor judgement as it pertains to discerning others' intent, putting him at risk of being taken advantage of by those in the community and online persons with ill intent. (Exhibit 1, p 12; Testimony.) Petitioner is polite and kind and does not have a notable pattern of issues with interpersonal interaction. (*Id*.) Petitioner has a history of violence toward himself in the form of punching himself and banging his head when escalated, however such episodes seem to be historical in nature and currently controlled by medications and people who both understand and love him. (*Id*.)

7. Petitioner lives in a rural area and does not drive. (Exhibit 1, p 11; Testimony.) His parents transport him to medical appointments. (*Id*.) Petitioner relies on others to manage prescriptions and he requires repeated verbal prompts to take medications. (*Id*.) Petitioner is largely independent with performing personal care tasks, however he requires repeated verbal reminders to initiate hygiene tasks, such as remembering to wear clean clothes. (*Id*.) Petitioner communicates well but needs help with mail and communication surrounding his benefits. (*Id*.)

8. In the summer of 2023, CMH received a request from Petitioner's parents for Personal Care and Community Living Supports (CLS) in a Specialized Residential setting at Boulter's. (Exhibit 1; Testimony.)

[1] This decision was also upheld following an administrative hearing in 2021. (*Id*.)

9. On September 13, 2023, CMH denied the request for Personal Care and Community Living Supports (CLS) in a Specialized Residential setting, concluding that Petitioner did not meet the medical necessity criteria for such services and that Petitioner's current needs could be met in a less restrictive setting. (Exhibit 1, pp 3-6; Testimony.) The Notice of Adverse Benefit Determination sent to Petitioner indicated, in relevant part:

> You report that you need Personal Care help because of your seizure activity. You also need Community Living Support (CLS) help with learning to take care of laundry, learning to take care of household chores/ cleaning, receiving guidance while shopping, learning to shop safely and avoid being taken advantage of online, and engaging with the community around you while maintaining safety (not walking out in traffic). You said that you want to engage in volunteer activities, find a Chess club, go to the library, learn to put models together, go to museums/AirZoo, and do things you enjoy like going out to eat and to the movies more often.
>
> You want to keep living in your current home, and it is a Specialized Residential Home. Your home wants to continue providing care to you. They are currently receiving payment to provide Personal Care for you. You do have CLS needs that are currently not being met. Your needs can be met in a general Adult Foster Care setting, however. Your needs do not require Specialized Residential CLS and PC at this time. A general AFC would [be] a less restrictive setting that can meet your needs.
>
> The Medicaid Provider Manual Section 11 (Personal Care in Licensed Specialized Residential Settings) describes that personal care services are meant when the customer's needs are "beyond the level required by facility licensure." Medicaid Provider Manual Section 2.5.D states that we may deny services when there "exists another appropriate, less-restrictive, and cost-effective service, setting or support that satisfies the standards for medically necessary services."
>
> We recommend that an updated CLS assessment is completed to reflect your needs and that your individual plan of service be updated. Your CLS needs can be met by CLS staff coming into the home to provide the services so that when you go into the community, you can remain safe. It is recommended that you receive 4-6 hours of CLS services each week. This service can be directly provided by BCCMHA staff. (Exhibit 1, pp 3-4.)

10. On October 12, 2023, following a local appeal, Petitioner was sent a Notice of Appeal Denial, which indicated in relevant part:

> Your Internal Appeal was denied for the service/item listed above because:
>
> Your appeal was reviewed. Your file does not show that you have needs that cannot be met in a general foster care home. The type of home and services that you are asking for are used for people who have a high level of need for medical or behavioral troubles.
>
> Your needs can be met in a general foster care home. You need guidance throughout the day. You have a need for personal care. You need room and board. You also need some help with being safe in the community. The assessment that we did with you shows that you could use Community Living Support (CLS) services to help with this. This service could be provided by staff in the community. We recommend that you use 4 to 6 hours of CLS services per week. You do not show a need for CLS services in a specialized residential setting.
>
> Medicaid Home and Community Based Services guidelines say that services must be provided in the least limiting level of care that can meet your health and safety needs. Your needs can be met in a general adult foster care setting with community-based services. We cannot place you in a more limiting home because of the rules that we have to follow. (Exhibit 1, pp 7-9; Testimony)

11. On January 24, 2024, Petitioner saw his PA at Bronson Neuroscience Center for a follow-up regarding his seizure disorder. (Exhibit A.) The PA concluded, in relevant part:

> As with many autistic individuals, [redacted] does have a good score on intellect with 23/30 on MOCA. However, it is decision making that is largely affected and self care. Therefore, we recommend no changes be made to [redacted] living arrangements until a more comprehensive test can be conducted to look at his decision making ability and needs. He is doing very well where he is currently, as he is in a special needs home who also understands seizure precautions and treatment requirements for this as well as autism. (Exhibit A, p 3.)

12. On February 7, 2024, Petitioner's Request for Hearing was received by the Michigan Office of Administrative Hearings and Rules. (Exhibit G)

13. On February 19, 2024, in preparation for the hearing, CMH completed a utilization and file review. (Exhibit 1, pp 10-16.)

14. On March 6, 2024, Petitioner submitted to a neuropsychological examination at Bronson Neuroscience Center. (Exhibit B.) The clinical neuropsychologist concluded, in relevant part:

> It is my opinion, with a reasonable degree of neuropsychological certainty that [redacted] cannot make informed medical or financial decisions. He is a vulnerable individual. Full guardianship is recommended.
>
> [redacted] requires a significant level of assistance with independent living skills. This includes support in managing his finances, paying his bills, sorting and taking his medications, keeping track of appointments, following through on new treatment plans, preparing balanced meals, assistance with keeping his living space clean, and prompting (and perhaps surveillance) with personal self-care and hygiene. Is important to remember that [redacted] may demonstrate adequate knowledge of safety and appropriate self-care and hygiene behavior, but executive dysfunction and social impairment limits his ability to carrying out this behavior consistently.
>
> With appropriate support and monitoring, [redacted] likely has the capacity to work simple, routine jobs (e.g. dishwashing).
>
> I do not see any need for further neuropsychological evaluation, but I remain available to [redacted] and his medical team if I can be of more assistance.
>
> (Exhibit B, pp 4-5.)

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.
>
> *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) 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 Michigan Department of Health and Human Services (MDHHS) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver. CMH contracts with MDHHS 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. *See 42 CFR 440.230.*

The CMH 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:

SECTION 11 – PERSONAL CARE IN LICENSED SPECIALIZED RESIDENTIAL SETTINGS

Personal care services are those services provided in accordance with an individual plan of service to assist a beneficiary in performing their own personal daily activities. For children with serious emotional disturbance, personal care services may be provided only in a licensed foster care setting or in a Child Caring Institution (CCI) if it is licensed as a "children's therapeutic group home" as defined in Section 722.111 Sec. 1(f) under Act No. 116 of the Public Acts of 1973, as amended. For children with intellectual/ developmental disabilities, services may be provided only in a licensed foster care or CCI setting with a specialized residential program certified by the state. These personal care services are distinctly different from the state plan Home Help program administered by MDHHS.

Personal care services are covered when authorized by a physician or other health care professional in accordance with an individual plan of services and rendered by a qualified person. Supervision of personal care services must be provided by a health care professional who meets the qualifications contained in this chapter.

11.1 SERVICES

Personal care services include assisting the beneficiary to perform the following:

- Assistance with food preparation, clothing and laundry, and housekeeping beyond the level required by facility licensure, (e.g., a beneficiary requires special dietary needs such as pureed food);
- Eating/feeding;
- Toileting;
- Bathing;
- Grooming;
- Dressing;

- Transferring (between bed, chair, wheelchair, and/or stretcher);
- Ambulation; and
- Assistance with self-administered medications.

"Assisting" means staff performs the personal care tasks for the individual; or performs the tasks along with the individual (i.e., some hands-on); or otherwise assists the individual to perform the tasks himself/herself by prompting, reminding, or by being in attendance while the beneficiary performs the task(s).

11.2 PROVIDER QUALIFICATIONS

Personal care may be rendered to a Medicaid beneficiary in a Foster Care or CCI setting licensed and certified by the state under the 1987 Michigan Department of Health and Human Services Administrative Rule R330.1801-09 (as amended in 1995). For children birth to 21, personal care may be rendered to a Medicaid beneficiary in a Child Caring Institution setting with a specialized residential program facility licensed by the State for individuals with I/DD under Act No. 116 of the Public Acts of 1973, as amended, and Act No. 258 of the Public Acts of 1974, as amended.

11.3 DOCUMENTATION

The following documentation is required in the beneficiary's file in order for reimbursement to be made:

- An assessment of the beneficiary's need for personal care.
- An individual plan of services that includes the specific personal care services and activities, including the amount, scope and duration to be delivered that is reviewed and approved at least once per year during person-centered planning.
- Documentation of the specific days on which personal care services were delivered consistent with the beneficiary's individual plan of service.

* * * *

17.2 DEFINITIONS OF GOALS THAT MEET THE INTENTS AND PURPOSE OF BEHAVIORAL HEALTH 1915(I) STATE PLAN AMENDMENT (SPA) SUPPORTS AND SERVICES [RE-NUMBERED, TITLE REVISED & CHANGES MADE 4/1/23]

The goals (listed below) and their operational definitions will vary according to the individual's needs and desires. However, goals that are inconsistent with least restrictive environment (i.e., most integrated home, work, community that meet the individual's needs and desires) and individual choice and control annot be supported by BH 1915(i) SPA supports and services unless there is documentation that health and safety would otherwise be jeopardized; or that such least restrictive arrangements or choice and control opportunities have been demonstrated to be unsuccessful for that individual. Care should be taken to ensure that these goals are those of the individual first, not those of a parent, guardian, provider, therapist, or case manager, no matter how well intentioned. The services in the plan, whether BH 1915(i) SPA supports and services alone, or in combination with State Plan or Habilitation Supports Waiver services, must reasonably be expected to achieve the goals and intended outcomes identified. The configuration of supports and services should assist the individual to attain outcomes that are typical in their community; and without such services and supports, would be impossible to attain.

* * * *

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. (Emphasis added)

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.

Medicaid Provider Manual
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
July 1, 2023, pp 90-91; 145-146; 12-14
Emphasis added

Petitioner must prove, by a preponderance of the evidence, that he meets the above medical necessity criteria for Personal Care and Community Living Supports (CLS) in a Specialized Residential setting.

Petitioner argues that he meets the medical necessity criteria for Personal Care and Community Living Supports (CLS) in a Specialized Residential setting mainly because he needs repeated and constant reminders to take his medications (which are necessary to prevent seizures) and to perform personal care tasks. Petitioner argues that he cannot manage his own finances or personal benefits and it has been recommended that his parents obtain a guardianship over him.

CMH argues that Petitioner does not meet the medical necessity criteria for Personal Care and Community Living Supports (CLS) in a Specialized Residential because Petitioner's needs do not rise to the level usually seen in a specialized residential setting and because Petitioner's needs can be met in a less restrictive setting, such as a general AFC home.

Having considered the parties arguments in full, it is determined that Petitioner has failed to meet his burden of proof and, therefore, the CMH properly denied his request for Personal Care and Community Living Supports (CLS) in a Specialized Residential setting.

Under Medicaid's medical necessity criteria, there exists a more clinically appropriate, less restrictive and more integrated setting in the community for Petitioner. Specifically, given the evidence presented, Petitioner's needs can be met in a general AFC home, with CLS assistance through the CMH.

As indicated above, Personal Care and Community Living Supports (CLS) in a Specialized Residential setting are only authorized when a beneficiary's needs are "beyond the level required by facility licensure." Here, Petitioner is mostly independent with his personal care, i.e., he can perform most tasks himself, but he does need repeated and frequent reminders. Generally, as the above policy demonstrates, beneficiaries receiving Personal Care and Community Living Supports (CLS) in a Specialized Residential setting are persons who are not independent with personal care tasks, but rather persons for whom those tasks need to be completed by others. That is not the case here, so Petitioner's needs could be met at the level required by "facility licensure", i.e., a general AFC home.

Furthermore, policy provides that "goals that are inconsistent with least restrictive environment (i.e., most integrated home, work, community that meet the individual's needs and desires) and individual choice and control cannot be supported by BH 1915(i) SPA supports and services unless there is documentation that health and safety would otherwise be jeopardized; or that such least restrictive arrangements or choice and control opportunities have been demonstrated to be unsuccessful for that individual. Care should be taken to ensure that these goals are those of the individual first, not those of a parent, guardian, provider, therapist, or case manager, no matter how well intentioned.

Here, while Petitioner has had difficulty living independently or in general AFC homes in the past, it cannot be said on this record that his health or safety was jeopardized, or that those situations were unsuccessful for Petitioner. It appears that Petitioner moved out of his last general AFC home because that home closed, not because Petitioner was unsuccessful there. And, at that time, Petitioner's parents did not even realize that there was a more restrictive level of care available until they discovered Boulter's AFC. Petitioner did not meet the medical necessity criteria for Boulter's AFC at that time and this decision was later upheld following an administrative hearing. So, while Petitioner's parents clearly feel that Petitioner is safer in a more restrictive setting, it is not clear that Petitioner shares those same feelings, or that Petitioner might be successful in a less restrictive setting.

Also, CMH may only authorize services that are, "[p]rovided 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. Again, a specialized residential home is not the least restrictive, most integrated setting for Petitioner, and it cannot be said that less restrictive levels of treatment were unsuccessful or cannot safely be provided.

Finally, CMH may not authorize services, "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." Again, a general AFC home is a less-restrictive setting that can meet Petitioner's needs.

Petitioner's arguments to the contrary are not persuasive. Here, Petitioner presented documentation from his providers indicating that he should not be moved from his current placement at this time, but those providers were not making that determination based on Medicaid's medical necessity criteria. They were basing that determination on the stability Petitioner has shown in his current setting. And, while Petitioner may be stable in his current setting, that is not the same as saying Petitioner meets the medical necessity criteria for Personal Care and Community Living Supports (CLS) in a Specialized Residential setting, paid for by Medicaid.

Petitioner bears the burden of proving by a preponderance of the evidence that Personal Care and Community Living Supports (CLS) in a Specialized Residential setting are a medical necessity in accordance with the Code of Federal Regulations (CFR) and Medicaid policy. Petitioner did not meet the burden to establish that such services are a medical necessity.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH properly denied Petitioner's request for Personal Care and Community Living Supports (CLS) in a Specialized Residential setting.

IT IS THEREFORE ORDERED that:

The CMH decision is **AFFIRMED.**

RM/sj

Robert J. Meade
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

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties, to their last known addresses in the manner specified below, this 1st day of April 2024.

S. James

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Michigan Office of Administrative Hearings and Rules

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