STATE OF MICHIGAN
GRETCHEN WHITMER
GOVERNOR
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
MARLON BROWN
DIRECTOR

[redacted]

Date Mailed: June 27, 2024
MOAHR Docket No.: 24-003476
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

This matter is before the Michigan Office of Administrative Hearings and Rules (MOAHR) and the undersigned Administrative Law Judge (ALJ) pursuant to MCL 400.9 and upon a request for hearing.

After due notice, a telephone prehearing conference was held on April 25, 2024. [redacted] father, appeared on behalf of the minor Petitioner [redacted] (Petitioner). No one appeared on behalf of the Respondent Saginaw County Community Mental Health Authority (Respondent), and it was determined that, as provided in the Notice of Telephone Prehearing Conference and pursuant to the Michigan Administrative Procedures Act, MCL 24.201 *et seq.*, the prehearing conference would proceed without Respondent.

During the prehearing conference, the ALJ determined that, while questions remained about what, if anything, was still in dispute in this case given the notices sent by Respondent, the matter would be set for a hearing with respect to Petitioner's Applied Behavior Analysis (ABA) services, with the hearing scheduled for May 14, 2024.

On May 14, 2024, the scheduled hearing was converted into another telephone prehearing conference. Petitioner's father again appeared on Petitioner's behalf. Kentera Patterson, Recipient Rights Officer, represented Respondent.

During that second prehearing conference, the ALJ granted, over Petitioner's objection, Respondent's request for an adjournment of the hearing. It was also determined that MOAHR had not received Petitioner's proposed exhibits because they had been sent to the wrong location, and Petitioner's representative was directed to resend them. Respondent further indicated that an attorney would be making an appearance for Respondent soon.

On May 23, 2024, a status conference was held. Petitioner's father again represented him. Attorney Debra Geroux now represented Respondent.

During the status conference, the parties and ALJ confirmed the issue on appeal, *i.e.,* Respondent's decision to terminate Petitioner's ABA services; set a deadline for the submission of proposed exhibits; and scheduled a telephone hearing for June 7, 2024, with the date later changed to June 14, 2024 for good cause by the ALJ when the notice of hearing was issued.

On June 14, 2024, the telephone hearing was held as scheduled. [redacted], Petitioner's father, represented Petitioner. Attorney Debra Geroux represented Respondent.

During the hearing, the following exhibits were admitted into the record:

Petitioner's Exhibits:

Exhibit #1: Transition & Titration Plan

Exhibit #2: Notice of Appeal Denial

Exhibit #3: Notice of Appeal Approval

Respondent's Exhibits:

Exhibit A: Order Following Status Conference and Notice of Hearing

Exhibit B: Excerpt from Medicaid Provider Manual

Exhibit C: Notice of Adverse Benefit Determination

Exhibit D: Notice of Receipt of Appeal

Exhibit E: Redetermination Assessment

Exhibit F: Notice of Appeal Denial

Exhibit G: Notice of Appeal Approval

Exhibit H: Progress Note

Exhibit I: November 2023 Monthly Summary

Exhibit J: December 2023 Monthly Summary

Exhibit K: 2016 ABA Eligibility Determination

Exhibit L: 2017 ABA Eligibility Determination

Exhibit M: Initial Treatment Plan

Exhibit N: April 2023 Individualized Education Program (IEP)

Exhibit O: June 2023 Six-Month Assessment

Exhibit P: December 2023 Six-Month Assessment

Exhibit Q: December 2023 Monthly Summary

Exhibit R: Development Disability Child and Adolescent Needs and Strengths Assessment Form 2024

Exhibit S: February 11, 2024 Individual Plan of Service (IPOS)

The following witnesses also testified:

Melissa Taylor, Customer Service Supervisor, Respondent

Jennifer Keilitz, Director of Network Services, Respondent

Amanda Elliot, Autism Program Supervisor, Respondent

Tessa Benedict, Supports Coordinator, Respondent

Samantha Jersey, Board Certified Behavior Analyst (BCBA)

[redacted] Petitioner's father and representative

ISSUE

Did Respondent properly decide to terminate Petitioner's 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 an eleven (11) year-old Medicaid beneficiary who has been diagnosed with autism spectrum disorder and attention-deficit hyperactivity disorder. (Exhibit S, pages 1-2).

2. Due to his diagnoses and need for assistance, Petitioner has been approved for services through Respondent. (Exhibit S, pages 1-11).

3. Since April 11, 2017, Petitioner has been approved by Respondent for ABA services provided at Centria Healthcare ("Centria"). (Exhibit #1, page 2).

4. Specifically, Petitioner has been receiving 20 hours per week of ABA services during his school year and 30 hours per week of ABA services during his summer break from school. (Exhibit O, page 4; Testimony of Supports Coordinator).

5. The most recent assessments of Petitioner with Centria, from June and December of 2023, provide that Petitioner continues to meet some of his targets and goals, with new targets and goals added as he progresses. (Exhibit O, pages 1-24; Exhibit P, pages 1-35).

6. Petitioner had not yet reached his "Graduation Goals" for ABA services. (Exhibit O, page 21; Exhibit P, page 32).

7. In January of 2024, Respondent conducted a review of documentation regarding Petitioner's case and his ABA services. (Testimony of Director of Network Services).

8. On January 19, 2024, Respondent sent Petitioner a Notice of Adverse Benefit Determination stating that his ABA services would be terminated as of February 16, 2024. (Exhibit C, pages 1-7).

9. With respect to the reason for the decision, the Notice of Adverse Benefit Determination stated in part:

> The clinical documentation provided does not establish medical necessity.
>
> Discharge from BHT services:
>
> The individual has not demonstrated measurable 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.
>
> *Exhibit C, page 1*

10. On January 20, 2024, Petitioner's BCBA at Centria developed a Transition & Titration Plan at the request of Respondent, though she also indicated in that plan that she recommended that Petitioner continue to receive 30 hours of ABA services per week until his goals are completely met. (Exhibit #1, pages 1-10).

11. On January 22, 2024, Petitioner's representative filed an Internal Appeal with Respondent with respect to the decision to terminate services. (Exhibit D, pages 1-5).

12. On January 29, 2024, Julie Anklam, MSW, LMSW, reviewed Petitioner's case after it was referred to her for an evaluation to assess whether he continued to meet the medical necessity criteria for Respondent's autism program. (Exhibit E, page 1).

13. On February 5, 2024, Ms. Anklam issued her report. (Exhibit E, pages 1-7).

14. In that report, she updated Petitioner's case since his previous evaluation, including statements that Petitioner's speech, ability to maintain attention to topics of interest, and interactions with people he does not know have improved over the past 14 months. (Exhibit E, pages 1-2).

15. She also noted that Petitioner has some regression at school, but that there had also been recent improvement in his skills and coping there. (Exhibit E, pages 1-2).

16. She further found that Petitioner's ADOS-2 score remains above the cut-off for autism; he currently demonstrates substantial impairment in social communication and social interaction across multiple contexts, including social-emotional reciprocity ranging, nonverbal communication behaviors used for social interaction ranging, and developing, maintaining, and understanding relationship ranging; and he currently demonstrates substantial restricted, repetitive, and stereotyped patterns of behavior, interests and activities. (Exhibit E, pages 3-5).

17. In conclusion, Ms. Anklam recommended:

> **RECOMMENDATIONS**
> [Petitioner's] time in ABA therapy has been beneficial to bring him and his family, who have been involved with the ABA center in parent training, to a point of understanding [Petitioner's] method of operation, his ability to help [Petitioner] set and accomplish goals. [Petitioner] has achieved many skills through his time in ABA. [Petitioner] has support in his educational environment as well.

Research on ABA and children who have benefit from ABA suggests that ABA therapy should never be abruptly ended, but to institute a period of a few months of titrating the number of hours down in preparation to move into a different phase of lower level care which may focus on some specifics, such as sensory seeking, improving some speech articulation difficulties, and developing socialization settings and activities outside of ABA therapy. Therefore, it is recommended that [Petitioner's] ABA schedule be titrated down one hour per month until the end of the school year while other supports and recommendations can be established so that there is a more seamless transition.

[Petitioner] has some behaviors that would benefit from occupational therapy, such as sensory seeking, attention/focus difficulties, and possibly anxiety. An occupational therapist can focus on these behaviors and help [Petitioner] develop self-awareness and an action plan to help with these behaviors.

[Petitioner] should utilize a **speech therapist** who can help with some articulation difficulties such as sound substitutions and deletions. A speech therapist can also help [Petitioner] with non-verbal communication strategies such as utilizing eye contact, facial expressions, and gestures.

[Petitioner] may benefit from utilizing Community Living Supports with an emphasis on socialization skills outside of school and home to explore community activities and places of interest.

[Petitioner's] family should consider engaging [Petitioner] in sports and in a social setting such as through Special Olympics, which has a chapter in Saginaw . . .

[Petitioner] should maintain his involvement with a children's psychiatrist for ADHD and to monitor for any other psychiatric developments as [Petitioner] continues to develop in adolescences and his teens years. [Petitioner] should continue to engage with a case a manager and potentially a behavioral therapist who can help him with becoming more aware of his

> feelings and providing him with skills to help him manage feelings of anxiety.
>
> *Exhibit E, pages 5-6*

18. That report was forwarded to Respondent's Customer Services Supervisor, who was making the decision on Petitioner's Internal Appeal. (Testimony of Customer Services Supervisor).

19. On February 22, 2024, Respondent sent Petitioner's written notice that the Internal Appeal had been denied. (Exhibit #2, pages 1-2; Exhibit F, pages 1-6).[1]

20. 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:
>
> The Eligibility Determination Evaluation report dated January 29, 2024, reviewed [Petitioner's] eligibility for ABA services. It concluded that [Petitioner] currently has significant challenges with social communication and interaction in many situations. Despite these challenges, [Petitioner] has made progress with skills through Applied Behavior Analysis (ABA) and receives support in his school. It's recommended that [Petitioner's] ABA schedule should be titrated down one hour per month until the end of the school year. While other supports and recommendations can be established so that there is a seamless transition.
>
> The evaluation suggest that [Petitioner] could benefit from occupational therapy to address behaviors like seeking sensory input, difficulty focusing, and possibly anxiety. Occupational therapy can help [Petitioner] become more self-aware and create a plan to manage these behaviors. Additionally, [Petitioner] could benefit from working with a speech therapist to

[1] The same day that Respondent sent Petitioner a Notice of Appeal Denial, it also sent Petitioner a Notice of Appeal Approval. (Exhibit #3, pages 1-2; Exhibit G, pages 1-7). That approval notice was improper given that, even if services were to be titrated down, Petitioner's Internal Appeal was not approved. However, any error was harmless as the Notice of Appeal Approval adequately described Respondent's decision; Petitioner also received a Notice of Appeal Denial; and he was not prejudiced by any confusion, with Petitioner able to request a hearing and his services having remained in place while this matter is pending.

> improve articulation, focusing on speech sounds he struggles with. Also, [Petitioner] could maintain his involvement with a children's psychiatrist for Attention deficit and to monitor for any other psychiatric development as [Petitioner] continues to develop in adolescence and his teens [sic] years.
>
> The report recommends Community Living Support to help [Petitioner] improve his social skills outside of school and home by participating in community activities.
>
> After reviewing documentation and interviews conducted, ABA services will be denied, and it is recommended that the family should follow all recommendation in the Re-Eligibility Determination report. Upon discharge of ABA services case holder will coordinate services for speech, occupational therapy and community living supports.

Exhibit F, pages 1-2

21. On April 1, 2024, MOAHR received the request for hearing filed in this matter regarding Respondent's decision to terminate ABA services.

22. Petitioner's ABA services have remained authorized while this matter is pending, though his previous provider no longer provides services through Respondent and he is in the process of locating a new provider. (Testimony of Petitioner's representative; Testimony of Supports Coordinator).

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) 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…

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 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 diagnosed with Autism Spectrum Disorder (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.
>
> 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.
>
> * * *
>
> **18.4 MEDICAL NECESSITY CRITERIA**
>
> Medical necessity and recommendation for BHT services are determined by a physician or other licensed practitioner working within their scope of practice under state law. Comprehensive diagnostic re-evaluations are required no more than once every three years, unless determined medically necessary more frequently by a physician or other licensed practitioner working within their scope of practice. The recommended frequency should be based on the child's age and developmental level, the presence of comorbid disorders or complex medical conditions, the severity level of the child's ASD symptoms, and adaptive behavior deficits through a person-centered, family-driven youth-guided process involving the child, family, and treating behavioral health care providers.

The child must demonstrate substantial functional impairment in social communication, patterns of behavior, and social interaction as evidenced by meeting criteria A and B (listed below); and require BHT services to address the following areas:

A. The child currently demonstrates substantial functional impairment in social communication and social interaction across multiple contexts, and is manifested by all of the following:

    1. Deficits in social-emotional reciprocity ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation, to reduced sharing of interests, emotions, or affect, to failure to initiate or respond to social interactions.

    2. Deficits in nonverbal communicative behaviors used for social interaction ranging, for example, from poorly integrated verbal and nonverbal communication, to abnormalities in eye contact and body language or deficits in understanding and use of gestures, to a total lack of facial expressions and nonverbal communication.

    3. Deficits in developing, maintaining, and understanding relationships ranging, for example, from difficulties adjusting behavior to suit various social contexts, to difficulties in sharing imaginative play or in making friends, to absence of interest in peers.

B. The child currently demonstrates substantial restricted, repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least two of the following:

    1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypes, lining up toys or flipping objects, echolalia, and/or idiosyncratic phrases).

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, and/or need to take same route or eat the same food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects and/or excessively circumscribed or perseverative interest).

4. Hyper- or hypo-reactivity to sensory input or unusual interest in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, and/or visual fascination with lights or movement).

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. 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.

* * *

18.7 RE-EVALUATION

Comprehensive diagnostic re-evaluations are required no more than once every three years, unless determined medically necessary more frequently by a physician or other licensed practitioner working within their scope of practice. The recommended frequency should be based on the child's age and developmental level, the presence of comorbid disorders or complex medical conditions, the severity level of the child's ASD symptoms and adaptive behavior deficits through a person-centered, family-driven youth-guided process involving the child, family, and treating behavioral health care providers.

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 measurable 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, 2024 version
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
Pages 164-169

Moreover, regarding the required medical necessity for Medicaid services in general, including ABA services, 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.

MPM, January 1, 2024 version
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
Pages 13-15

Here, as discussed above, Respondent decided to terminate Petitioner's 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. 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 met his burden of proof and that Respondent's decision must therefore be reversed.

Respondent's initial Notice of Adverse Benefit Determination provides that Petitioner's ABA services were to be terminated because he has not demonstrated measurable improvement and progress toward his goals. However, while that could be a valid basis for terminating services under the applicable policies, Respondent's Adverse Benefit Determination is not supported by the remainder of the record in this case.

For example, the most recent assessments from the ABA provider, from June and December of 2023, demonstrate that Petitioner is progressing, he is meeting some of his targets and goals, and that new targets and goals are being added as he progresses.

Moreover, while Respondent's Director of Network Services pointed to one chart of "Mastered Targets" from the June 2023 assessment that she claimed showed a plateau (Exhibit O, page 10), the time period she identified was a single three-week period and the remainder of that chart, as well as a similar chart in December 2023 assessment (Exhibit P, page 12), demonstrates Petitioner's continual progress toward targets.

Similarly, while Respondent's Autism Program Supervisor testified that the December 2023 assessment stated that Petitioner has only mastered 53% of his goals and programs (Exhibit P, page 12), she also did not compare Petitioner's assessments over time on the record and she testified that she considers a lack of progress to be anything under 50% mastery, which Petitioner exceeded even in the assessment she cited.

Additionally, Respondent's staff's subsequent actions also negate the findings in the Adverse Benefit Determination, with Ms. Anklam's review discussing Petitioner's measurable improvement and progress; the Notice of Appeal Denial both identifying Petitioner's progress and using it as a different basis for terminating services; and Respondent's own consulting BCBA expressly testifying at the hearing that Petitioner has made progress and that any findings or testimony that he has not are incorrect.

Following the Adverse Benefit Determination, Petitioner filed an Internal Appeal, which Respondent considered and rejected. However, while that Internal Appeal appears to have offered a different basis for Respondent's decision than the one offered in the Adverse Benefit Determination, it is likewise unsupported by the record.

As a preliminary matter, the ALJ would note that the Notice of Appeal Denial does not clearly identify the basis for the decision on Petitioner's Internal Appeal. Instead, it only states that, despite still having significant challenges with social communications and interactions in many situations, Petitioner has made progress through his ABA services and it is recommended that the ABA schedule should be titrated down, with other services available to help him. There is no policy cited as the basis for the action and, despite testimony from Respondent's witnesses to the contrary, any express findings as to whether the ABA services remain medically necessary or, if not, why not.

Similarly, the testimony of the Customer Service Supervisor who made the decision on the Internal Appeal is both unclear and unpersuasive. She testified that she made the decision on the Internal Appeal, but not the decision on medical necessity and that she was only deciding if the Adverse Benefit Determination was supported. However, in issuing the Notice of Appeal Denial, she only echoed what Ms. Anklam had found in the most recent review and never referred to the Adverse Benefit Determination. She also failed to discuss, or appear to recognize, the contradiction between the Adverse Benefit Determination, which indicated that services were no longer medically necessary because there had been no measurable improvement and progress toward Petitioner's goals, and the findings of Ms. Anklam and herself, that Petitioner had progressed, apparently to such a point that ABA services are no longer needed.

Moreover, to the extent that some, but not all, of Respondent's witnesses appear to take the position that ABA services are no longer medically necessary because, using criteria for medical necessity, Respondent may deny services for which there exist other appropriate, efficacious, and less-restrictive services that otherwise satisfy the standards for medically necessary services, their testimony is also unpersuasive. For one, that was never clearly conveyed to Petitioner as the reason for termination and it contradicted Respondent's own initial decision. Second, neither the Notice of Appeal Denial nor the testimony demonstrated why, even if additional services were available, ABA should be terminated completely. General statements regarding barriers at the ABA center and Petitioner's full schedule are insufficient, especially given that he would be out of school during the summer. Finally, the record demonstrates that Petitioner has not yet met all of his goals for ABA and his BCBA expressly recommended that the services continue.

Given his progress, current needs and the availability of other, less restrictive services, it is feasible that Petitioner's ABA services could be properly reduced or even terminated in the future. However, given the conflicting reasons offered by Respondent in this case, neither of which were supported by the record, Petitioner has met his burden of proving that Respondent erred in deciding to terminate his ABA services here and Respondent's decision must therefore be reversed.

DECISION AND ORDER

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, decides that Respondent improperly decided to terminate Petitioner's ABA services.

IT IS THEREFORE ORDERED that:

Respondent's decision is **REVERSED**.

Steven Kibit

SK/sj

Steven Kibit
Administrative Law Judge

NOTICE OF APPEAL: Petitioner may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139

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 27th day of June 2024.

S. James

S. James
Michigan Office of Administrative Hearings and Rules

Via First Class Mail:

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