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 28, 2024
MOAHR Docket No.: 24-005597
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 June 27, 2024. [redacted] Petitioner's father and guardian, appeared and testified on Petitioner's behalf.

April Higgins, Fair Hearing Officer, appeared on behalf of Respondent, Community Mental Health for Central Michigan. (Respondent or CMH.) Angela Zywicki, Utilization Manager, appeared as a witness for Respondent.

EXHIBITS

Petitioner's Exhibits: Exhibit 1, pp 1-26

Respondent's Exhibits: Exhibit A, pp 1-55

ISSUE

Did the CMH properly authorize Petitioner's Community Living Supports (CLS) hours?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material, and substantial evidence on the whole record, finds as material fact:

1. Petitioner is a Medicaid beneficiary who has been receiving services through CMH under the Habilitation Supports Waiver (HSW). (Exhibit A, p 40; 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.

3. Petitioner is diagnosed with autism spectrum disorder; intellectual disability – moderate; other specified anxiety disorder; acne conglobata; and constipation, unspecified. (Exhibit A, p 35; Testimony.)

4. Petitioner received special education services beginning at three years old and attended school in Jackson, Kalamazoo, and Clare, MI. (Exhibit A, p 25; Testimony.)

5. Petitioner resides in a Specialized Residential Home – Adult Foster Care Facility (AFC Home.) (Exhibit A, p 25; Testimony.)

6. On December 20, 2023, CMH completed a utilization review of Petitioner's request for continued CLS at 104 units per week as previously authorized. (Exhibit A, pp 20-23; Testimony.)

7. Following this review, CMH determined that Petitioner's CLS would be reduced to 78 units per week primarily because it determined that Petitioner's AFC home was not providing Petitioner more than one community outing per week as required under the Home and Community Based Services (HCBS) final rules.[1] (Exhibit A, pp 2, 20-23; Testimony.)

8. On December 21, 2023, CMH issued an Adverse Benefit Determination (ABD) notifying Petitioner's guardian of the reduction in CLS. (Exhibit A, pp 3-8; Testimony.) Specifically, the ABD indicated:

> There is not sufficient information documented in the chart to determine medical necessity of 26 hours per week at ACI day program. The AFC home is responsible for providing community activities twice per week. (Exhibit A, p 3; Testimony.)

9. On January 2, 2024, Petitioner requested a local appeal. (Exhibits A, pp 9-13; Testimony.)

10. On January 24, 2024, after the local appeal was conducted, CMH issued a Notice of Appeal Denial . (Exhibit A, pp 14-19; Testimony.) Specifically, the Notice of Appeal Denial indicated, in relevant part:

> The Michigan Department of Health and Human Services indicates that a Home and Community Based Service Provider (Adult Foster Care Home) is required to provide regular (more than once per week) opportunities for contact in the community for a consumer. [redacted]ives in an Adult Foster Care home and it appears, per chart review and contact with Utilization Management, the home is not providing the required number of outings.
>
> [redacted] considers his time with the Arnold Center "work", but it is not a vocational program. He does not have a goal to work

[1] CMH did not include a copy of the relevant portion of these rules in its evidence packet.

so he does not have supported employment. The program he is enrolled in at the Arnold Center is Community Living Supports. If [redacted] has a goal to work, community-based work supports could be explored. He did have 4 hours per week of skill building last year but was not requested this year which allowed him to work, however, he is not working this year.

It is recommended that if [redacted] is interested in a goal of working, he and his case holder review those opportunities. It is also recommended that the AFC home provide more than one outing per week. (Exhibit A, p 14.)

11. On May 23, 2024, Petitioner's request for hearing was received by the Michigan Office of Administrative Hearings and Rules.

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 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 the Michigan Department of Health and Human Services 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 Medicaid Provider Manual articulates Medicaid policy for Michigan. It states, in relevant part:

> **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.

SECTION 15 – HABILITATION SUPPORTS WAIVER FOR PERSONS WITH DEVELOPMENTAL DISABILITIES

Beneficiaries with developmental disabilities may be enrolled in Michigan's Habilitation Supports Waiver (HSW) and receive the supports and services as defined in this section. HSW beneficiaries may also receive other Medicaid covered state plan services. A HSW beneficiary must receive at least one HSW service per month in order to retain eligibility. Medical necessity criteria should be used in determining the amount, duration, and scope of services and supports to be used. The beneficiary's services and supports that are to be provided under the auspices of the PIHP must be specified in their individual plan of services developed through the person-centered planning process.

HSW beneficiaries must be enrolled through the MDHHS enrollment process completed by the PIHP. The enrollment process must include annual verification that the beneficiary:

- Has a developmental disability (as defined by Michigan law);
- Is Medicaid-eligible;
- Is residing in a community setting;

- If not for HSW services, would require ICF/IID level of care services; and

- Chooses to participate in the HSW in lieu of ICF/IID services.

The PIHP's enrollment process also includes confirmation of changes in the beneficiary's enrollment status, including termination from the waiver, changes of residence requiring transfer of the waiver to another PIHP, and death. Termination from the HSW may occur when the beneficiary no longer meets one or more of the eligibility criteria specified above as determined by the PIHP, does not receive at least one HSW habilitative service per month, withdraws from the program voluntarily, or dies. Instructions for beneficiary enrollments and annual re-certification may be obtained from the MDHHS Division of Adult Home and Community Based Services. (Refer to the Directory Appendix for contact information.)

The PIHP shall use value purchasing for HSW services and supports. The PIHP shall assist beneficiaries to examine their first- and third-party resources to pursue all reimbursements to which they may be entitled, and to make use of other community resources for non-PIHP covered activities, supports or services.

Reimbursement for services rendered under the HSW is included in the PIHP capitation rate.

Beneficiaries enrolled in the HSW may not be enrolled simultaneously in any other §1915(c) waiver.

Habilitation services under the HSW are not otherwise available to the beneficiary through a local educational agency under the Individuals with Disabilities Education Act (IDEA) or the Rehabilitation Act of 1973.

15.1 WAIVER SUPPORTS AND SERVICES

Community Living Supports (CLS) (This is a habilitative service.)

Community Living Supports (CLS) facilitate an individual's independence, productivity, and promote inclusion and participation. The supports can be provided in the beneficiary's residence (licensed facility, family home, own home or apartment) and in community settings (including, but not limited to, libraries, city pools, camps, etc.), and may not supplant other waiver or state plan covered services (e.g., out-of-home non-vocational habilitation, Home Help Program, personal care in specialized residential, respite). The supports are:

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

    - Meal preparation;

- Laundry;
- Routine, seasonal, and heavy household care and maintenance (where no other party, such as a landlord or licensee, has responsibility for provision of these services);
- Activities of daily living, such as bathing, eating, dressing, personal hygiene; and
- Shopping for food and other necessities of daily living.

- Assisting, supporting and/or training the beneficiary with:
  - Money management;
  - Non-medical care (not requiring nurse or physician intervention);
  - Socialization and relationship building;
  - Transportation (excluding to and from medical appointments that are the responsibility of Medicaid through MDHHS or health plan) from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence);
  - Leisure choice and participation in regular community activities;
  - Attendance at medical appointments; and
  - Acquiring goods and/or services other than those listed under shopping and non-medical services.
- Reminding, observing, and/or monitoring of medication administration.

The CLS do not include the costs associated with room and board. Payments for CLS may not be made, directly or indirectly, to responsible relatives (i.e., spouses or parents of minor children) or the legal guardian.

For beneficiaries living in unlicensed homes, CLS assistance with meal preparation, laundry, routine household care and maintenance, ADL, and/or shopping may be used to complement Home Help services when MDHHS has determined the individual's need for this assistance exceeds Home Help service limits. Reminding, observing, guiding, and/or training of these activities are CLS coverages that do not supplant Home Help. CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, State Plan coverage of Personal Care in Specialized Residential Settings.

If beneficiaries living in unlicensed homes need assistance with meal preparation, laundry, routine household care and maintenance, ADL, and/or shopping, the beneficiary must request Home Help from MDHHS. CLS may be used for those activities while the beneficiary awaits determination by MDHHS of the amount, scope and duration of Home Help. If the beneficiary requests it, the PIHP must assist with applying for Home Help or submitting a request for a Fair Hearing when the beneficiary believes that the MDHHS authorization of amount, scope and duration of Home Help does not accurately reflect their needs. CLS may also be used for those activities while the beneficiary awaits the decision from a Fair Hearing of the appeal of a MDHHS decision.

Community Living Supports (CLS) provides support to a beneficiary younger than 18, and the family in the care of their child, while facilitating the child's independence and integration into the community. This service provides skill development related to activities of daily living, such as bathing, eating, dressing, personal hygiene, household chores and safety skills; and skill development to achieve or maintain mobility, sensory-motor, communication, socialization and relationship-building skills, and participation in leisure and community activities. These supports must be provided directly to, or on behalf of, the child. These supports may serve to reinforce skills or lessons taught in school, therapy, or other settings. For children and adults up to age 26 who are enrolled in school, CLS services are not intended to supplant services provided in school or other settings or to be provided during the times when the child or adult would typically be in school but for the parent's choice to home-school.

Medicaid Provider Manual
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
January 1, 2024, pp 13-15; 123-125
Emphasis added

CMH's Utilization Manager (UM) testified that she is a Licensed Professional Counselor, a Qualified Intellectual Disabilities Professional (QIDP), and has worked for CMH for 23 years. CMH's UM indicated that a utilization review was conducted here because Petitioner requested continued authorization of his CLS at 104 units per week. CMH's UM testified that in making such reviews she looks at multiple factors, including the individual's chart, past usage of CLS, the level of care needed, the psychosocial assessment, the Plan of Service, as well as other paid, natural, and community support. CMH's UM indicated that she also consulted with Petitioner's treatment team. CMH's UM testified that following this review, it was determined that Petitioner's CLS would be reduced to 78 units per week because it determined that Petitioner's AFC home was not providing Petitioner more than one community outing per week as required under the HCBS final rules.

CMH's UM indicated that the purpose of the UM process is to identify an individual's needs and preferences, but that CMH services may not be able to meet all of an individual's needs if those needs can also be met by other support in the community. CMH's UM testified that here Petitioner lives in an AFC home that is paid to provide both personal care and CLS.

CMH's UM noted that the expectation is that the AFC home provide more than one community outing per week. CMH's UM indicated that a review of documentation here indicated that the AFC home was not providing more than one community outing per week, so a reduction in CLS was appropriate. CMH's UM noted that since Petitioner's time at the Arnold Center has now been reduced to three days per week from four, it has been very stressful on Petitioner and he has been acting out more in the AFC home.

Petitioner's father testified that he believes a medical professional should be making medical necessity decisions, not a social worker or similarly licensed professional. Petitioner's father noted that here, the CMH did not receive any information from Petitioner's doctor or the nurse practitioner who handles Petitioner's psychiatric care. Petitioner's father testified that he could not find anything in the evidence packet indicating that an AFC Home needs to provide more than one day per week of community activity.

Petitioner's father testified that Petitioner was adopted at age 3 and his life has been challenging, due to autism, intellectual disabilities, and epilepsy, among other issues. Petitioner's father indicated that Petitioner has difficulty expressing himself verbally and, even though he is almost 50 years old, he has the capacity to function like a 3 to 5-year-old. Petitioner's father noted that Petitioner takes two potent anti-psychotic medications and two other strong medications for anxiety. Petitioner's father noted that Petitioner loves the AFC home where he lives and they do a great job taking care of Petitioner, as does the CMH.

Petitioner's father indicated that Petitioner attends the Arnold Center, which has an excellent program that Petitioner loves. Petitioner's father reviewed the many community activities included in the program every week, including going to the library, a nature center, a senior center to volunteer, the mall, an art gallery, and retail shops.

Petitioner's father testified that the reduction from 4 days to 3 days per week at the Arnold Center has really affected Petitioner's behavior at the AFC home and the reduction was not his fault. Petitioner's father noted that in investigating this matter he learned that the AFC home had been lax in turning in paperwork documenting community outings, even though such outings occur regularly. Petitioner's father noted that he alone takes Petitioner out into the community at least two times per week, including trips to Walmart or Meijer, restaurants, and the stock car races, weather permitting. Petitioner's father also noted that any of the five case managers Petitioner has had since last April could have checked with the AFC home to clear this up as they have regular meetings with the AFC home.

Petitioner bears the burden of proving by a preponderance of the evidence that CMH improperly reduced his CLS hours. Or, in other words, Petitioner must prove that 104 units of CLS per week is medically necessary. Based on the evidence presented, Petitioner has met this burden.

Here, the CMH reduced Petitioner's CLS because records did not show that his AFC home was taking him on more than one community outing per week. CMH argued that this requirement of more than one outing per week is contained in the HCBS final rules, but it did not include those rules, or a cite to those rules, in its evidence packet. "An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims; nor may an appellant give an issue only cursory treatment with little or no citation of authority." *Chessman v Williams*, 311 Mich App 147,

161; 874 NW2d 385 (2015). As such, CMH's position is not supported on this record and must be reversed.

Furthermore, while this ALJ has no reason to doubt CMH's claims that the AFC's records were deficient regarding the number of community outings, it is clear on this record that Petitioner has been getting out of the AFC home and into the community at least two times per week because Petitioner's father takes him on at least two outings per week. As Petitioner's father pointed out, CMH also had regular access to AFC home staff and could have cleared this situation up some time ago. Finally, it now appears that 104 units of CLS is medically necessary for Petitioner given that his behaviors have deteriorated at the AFC home since his CLS was reduced, which resulted in one less day per week at the Arnold Center.

Based on the evidence presented, the CMH's decision was improper and should be reversed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH improperly denied Petitioner's request for the continuation of 104 units of CLS per week.

IT IS THEREFORE ORDERED that:

The CMH decision is **REVERSED in part.** CMH should reauthorize 104 units of CLS per week.

Within 10 days of the date of this Decision and Order, CMH shall certify that it has authorized 104 units of CLS per week consistent with this Decision.

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 28th day of June 2024.

S. James

S. James
Michigan Office of Administrative Hearings and Rules

Via Electronic & First Class Mail:

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[redacted]

Authorized Hearing Representative
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