STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH
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IN THE MATTER OF:

[redacted]

Appellant
_____/

Docket No. 2009-35683 CWS
Case No. [redacted]

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9, following the Appellant's request for a hearing.

After due notice, a hearing was held on [redacted]. [redacted] appeared on behalf of her minor son, [redacted] (Appellant).

[redacted], Manager, Due Process, appeared on behalf of the [redacted] Community Mental Health Services Provider ([redacted]), an agency under contract with the Michigan Department of Community Health to provide Medicaid-funded specialty supports and services (hereafter, 'Department'). Also present on behalf of the Department were [redacted], Social Worker and [redacted], Compliance Coordinator, [redacted]).

ISSUE

Did the Department properly determine the Appellant is no longer eligible for the Children's Waiver Program?

FINDINGS OF FACT

Based upon the competent, material and substantial evidence on the whole record, I find, as material fact:

1. The Appellant is an [redacted] Medicaid beneficiary who has been enrolled in the Children's Waiver Program since [redacted] He is full ambulatory, with no restrictions. His behavioral concerns including scratching, biting, pinching, non-compliance, self-injurious behavior (smacking himself in the head), PICA,

lack of safety skills and stranger safety, and hysterical crying. These behaviors occur several times a week to daily, last on average of 2-4 hours, but can last all day. *(Exhibit 1; p. 6 of 35)*

2. [redacted] is under contract with the Michigan Department of Community Health (Department) to assess potential candidates for the Children's Waiver Program (CWP) and to administer services to beneficiaries enrolled in the Children's Waiver who reside in its service area. [redacted] also provides state plan services to Medicaid beneficiaries.

3. The Appellant has a primary medical diagnosis of Autism. *(Exhibit 1, p. 17 of 35)* He is Medicaid-eligible by virtue of his enrollment in the Child's Waiver Program (CWP); his current authorized services consist of 4 hours of CLS, targeted case management and 96 hours of respite. All services are provided outside of the family home. However, during the two years in which the Appellant has been authorized for these services, no staffing has been utilized by the Appellant's family for either CLS or respite. The failure by the Appellant's family to utilize these services led [redacted] to question the Appellant's continuing eligibility for CSW services. *(Testimony of* [redacted]

4. An [redacted] Progress Note provides, in pertinent part, as follows:

> *"CM received phone call from* [redacted] *regarding* [redacted] *staffing. She reported in the message that she had still not secured staffing. CM spoke with* [redacted] *regarding the Children's Waiver Services, including the lack of staffing in the two years that he has been enrolled in the program.* [redacted] *reminded CM that he is benefiting from the music therapy services. CM explained the services that constitute the CWP, as well as the behavioral requirements for eligibility.* [redacted] *stated, 'well, the reason we don't use respite and those services is because he's not here enough when he's in school for us to need them.' CM explained the eligibility requirements of the program, as well as other services that are available, such as respite-only services. CM suggested that we keep our pre-scheduled meeting* [redacted] *to discuss other services that may be available.* [redacted] *inquired as to continuation of music therapy and recreational therapy services. CM explained that they would become private services if* [redacted] *was no longer enrolled in the CWP.* [redacted] *stated, 'okay, I don't understand why someone who is benefiting from music therapy would be terminated from the Children's Waiver Program.' CM again explained the services that constitute the CWP.* [redacted] *agreed to meet*

> *on [redacted] to discuss potential services outside of the CWP. CM explained Due Process and Appeal rights to which [redacted]. [redacted] stated, 'I understand.' CM will meet with [redacted] and his mother [redacted]*
>
> *(Exhibit 1; p. 27 of 35)*

5. During the [redacted] Periodic Review meeting on the Appellant's Individual Plan of Services, [redacted] informed the Appellant's mother of its proposed termination of the Appellant from the CWP, effective [redacted]. *(Exhibit 1; p. 28 of 35)*

6. On [redacted] the Appellant filed his Request for Hearing with the State Office of Administrative Hearings and Rules for the Department of Community Health.

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.

Section 14.0

The Children's Home and Community Based Services Waiver Program (CWP) provides services that are enhancements or additions to regular Medicaid coverage to children up to age 18 who are enrolled in the CWP...

The Children's Waiver is a fee-for-service program administered by the Community Mental Health Services Provider (CMHSP). The CMHSP is financially responsible for any costs incurred on behalf of the CWP beneficiary that were authorized by the CMHSP and exceed the Medicaid fee screens or amount, duration and scope parameters…

Section 14.1; KEY PROVISIONS

The CWP enables Medicaid to fund necessary home- and community-based services for children with developmental disabilities who reside with their birth or legally adoptive parent(s) or with a relative who has been named legal guardian under the laws of the State of Michigan, regardless of their parent's income.

The CMHSP is responsible for assessment of potential waiver candidates. The CMHSP is also responsible for referring potential waiver candidates by completing the CWP "pre-screen" form and sending it to the MDCH to determine priority rating. Application for the CWP is made through the CMHSP. The CMHSP is responsible for the coordination of the child's waiver services. The case manager, the child and his family, friends, and other professional members of the planning team work cooperatively to identify the

child's needs and to secure the necessary services. All services and supports must be included in the Individual Plan of Services (IPOS).

The IPOS must be reviewed, approved and signed by the physician.

A CWP beneficiary must receive at least one children's waiver service per month in order to retain eligibility. (Emphasis supplied by ALJ)

14.2 ELIGIBILITY

The following eligibility requirements must be met:

- The child must have a developmental disability (as defined in Michigan state law), be less than 18 years of age and in need of habilitation services.
- The child must have a score on the Global Assessment of Functioning (GAF) Scale of 50 or below.
- The child must reside with his birth or legally adoptive parent(s) or with a relative who has been named the legal guardian for that child under the laws of the State of Michigan, provided that the relative is not paid to provide foster care for that child.
- The child is at risk of being placed into an ICF/MR facility because of the intensity of the child's care and the lack of needed support, or the child currently resides in an ICF/MR facility but, with appropriate community support, could return home.
- The child must meet, or be below, Medicaid income and asset limits when viewed as a family of one (the parent's income is waived).
- The child's intellectual or functional limitations indicate that he would be eligible for health, habilitative and active treatment services provided at the ICF/MR level of care. Habilitative services are designed to assist individuals in acquiring, retaining and improving the self-help, socialization and adaptive skills necessary to reside successfully in home and community-based settings. Active treatment includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services. Active treatment is directed toward the acquisition of the behaviors necessary for the beneficiary to function with as much self-determination and independence as possible, and the prevention or deceleration of regression or loss of current optimal functional status.

Michigan Department of Community Health
Medicaid Provider Manual (MPM)
Mental Health and Substance Abuse Services, pp. 70-71
Version Date: July 1, 2009

The Code of Federal Regulations lists the eligibility criteria for admission to an ICF/MR, including the criteria for active treatment to be provided through the ICF/MR facility.

Specifically 42 CFR 440.150 provides:

> § 440.150 Intermediate care facility (ICF/MR) services.
>
> (a) "ICF/MR services" means those items and services furnished in an intermediate care facility for the mentally retarded if the following conditions are met:
>
> (1) The facility fully meets the requirements for a State license to provide services that are above the level of room and board;
>
> (2) The primary purpose of the ICF/MR is to furnish health or rehabilitative services to persons with mental retardation or persons with related conditions;
>
> (3) The ICF/MR meets the standards specified in subpart I of part 483 of this chapter.
>
> (4) The recipient with mental retardation for whom payment is requested is receiving active treatment, as specified in § 483.440 of this chapter.
>
> (5) The ICF/MR has been certified to meet the requirements of subpart C of part 442 of this chapter, as evidenced by a valid agreement between the Medicaid agency and the facility for furnishing ICF/MR services and making payments for these services under the plan.
>
> (b) ICF/MR services may be furnished in a distinct part of a facility other than an ICF/MR if the distinct part--
>
> (1) Meets all requirements for an ICF/MR, as specified in subpart I of part 483 of this chapter;
>
> (2) Is clearly an identifiable living unit, such as an entire ward, wing, floor or building;
>
> (3) Consists of all beds and related services in the unit;
>
> (4) Houses all recipients for whom payment is being made

for ICF/MR services; and

(5) Is approved in writing by the survey agency.

Active treatment is defined in 42 CFR 483.440. The Department's occupational therapy witness testified that the types and intensity of therapies prescribed by the Appellant's physician do not meet the active treatment requirement necessary for an ICFMR admission.

§ 483.440 Condition of participation: Active treatment services.

(a) Standard: Active treatment.

(1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward--

(i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and

(ii) The prevention or deceleration of regression or loss of current optimal functional status.

(2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

(b) Standard: Admissions, transfers, and discharge.

(1) Clients who are admitted by the facility must be in need of and receiving active treatment services.

(2) Admission decisions must be based on a preliminary evaluation of the client that is conducted or updated by the facility or by outside sources.

(3) A preliminary evaluation must contain background information as well as currently valid assessments of functional developmental, behavioral, social, health and nutritional status to determine if the facility can provide for the client's needs and if the client is likely to benefit from placement in the facility.

42 CFR 435.1009 defines persons with related conditions as …"individuals who have a severe, chronic disability that meets all of the following conditions:

(a) it is attributable to (1) Cerebral palsy or epilepsy; or (2) any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.
(b) It is manifested before the person reaches age 22
(c) It is likely to continue indefinitely
(d) It results in substantial functional limitations in three or more of the following areas of major life activity:
    (1) self-care
    (2) understanding and use of language
    (3) learning
    (4) mobility
    (5) self-direction
    (6) capacity for independent living.

As part of its review, [redacted] applied the CWP mandated ICF/MR criteria to the Appellant's condition and determined he was not at risk for out-of-home placement in an ICF/MR. In support of this assertion, [redacted] provided evidence that the Appellant's condition presents primarily in the form of behavioral problems which appear to have improved, and, according to [redacted] witnesses, not as a result of CWP-authorized services.

[redacted] witnesses presented credible testimony and documentation which establishes the Appellant has not utilized either CLS or respite services at a minimum on a monthly basis since enrollment in [redacted]. Thus, it can be concluded the Appellant's improving behavioral concerns are not directly related to CWP-authorized services, simply because they have not been utilized.

The Appellant bears the burden of proving, by a preponderance of evidence, that he meets all of the criteria for continuing CWP eligibility. The Appellant's mother does not dispute the [redacted] conclusion that the Appellant is at risk for ICFMR placement, nor is it her preference that he institutionalized. Rather, she simply asserts he remains eligible for the CWP, because she cannot afford to provide mental health services without [redacted] assistance.

Based on a preponderance of the evidence presented, I conclude the Appellant fails to meet the criteria necessary for continued enrollment in the Children's Waiver, rendering appropriate the CMHSP's proposed termination from this program.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, I decide the Department has properly determined that the Appellant is no longer eligible for the Children's Waiver Program.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

Stephen B. Goldstein
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: _____

***** NOTICE *****

The State Office of Administrative Hearings and Rules for the Department of Community Health may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The State Office of Administrative Hearings and Rules for the Department of Community Health will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.