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

Docket No. 2010-14785 HHS
Case No. 49967659

[redacted]

Appellant
_____/

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.*, upon the Appellant's request for a hearing.

After due notice, a hearing was held on [redacted]. [redacted], Appellant's father, appeared on behalf of the Appellant. The Appellant and her mother [redacted], were also present.

[redacted], represented the Department. [redacted] and [redacted] appeared as witnesses for the Department.

ISSUE

Was the Department's reduction in Appellant Home Help Services (HHS) payments performed in accordance to policy?

FINDINGS OF FACT

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

1. Appellant is a [redacted] year-old woman with Down's Syndrome. (Exhibits 1 and 2).

2. Appellant is a Medicaid beneficiary.

3. Appellant's Down's Syndrome is a developmental disability which manifests in mental retardation. She is dependent on others for her care. (Exhibits 1 and 2).

4. Appellant's mother has been the court-ordered, guardian for Appellant's entire adult life. (Exhibit 2).

5. Appellant's father is her court-ordered, standby guardian. (Exhibit 2).

6. Appellant's representative at hearing is her father.

7. Appellant lives with her mother and father. (Exhibit 1, Page 5).

8. Appellant's chore provider is her mother. (Exhibit 1, Page 18).

9. On [redacted] Appellant's ASW made a visit to Appellant's home to conduct a required HHS redetermination assessment. Appellant and her mother/chore provider were present in Appellant's home.

10. During the reassessment process the ASW observed that the Appellant's previous ASW had failed to apply HHS proration policy and therefore time authorizations for housework, shopping, laundry and meal preparation were prorated for a three-person household. (Exhibit 1, Page 4).

11. On [redacted], the Department sent a Negative Action Notice notifying Appellant that her HHS payments would be reduced from [redacted] to [redacted]1 effective [redacted]. The reason given was that "…housework, shopping, laundry and meal preparation (sic) need to be divided by the number of adults in your household." (Exhibit 1, Page 4).

12. On [redacted], the Department received Appellant's Request for Hearing, signed by her legal guardian/mother. (Exhibit 2).

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.

HHS are provided to enable functionally limited individuals to live independently and receive care in the least restrictive, preferred settings. These activities must be certified by a physician and may be provided by individuals or by agencies.

The ASW testified that on [redacted], she performed a Home Help Services redetermination assessment. The ASW testified she was newly assigned to Appellant's case and [redacted] was the first time she had assessed the Appellant. The ASW explained that during this assessment she discovered the Appellant's authorization for housework, shopping, laundry and meal preparation had not been prorated for a three-person household.

Adult Services Manual (ASM 363 9-1-08), page 5 of 24 requires a HHS worker to address during an assessment:

> The extent to which others in the home are able and available to provide the needed services. Authorize HHS **only** for the benefit of the customer and **not** for others in the home. If others are living in the home, prorate the IADL's by at least 1/2, more if appropriate. (Underline added by ALJ, Exhibit 1, Page 9).

Proration of IADLs Shopping, Housework, Laundry and Meal Preparation -

As stated above in Department policy, the ASW must divide the number of authorized hours for IADLs by the number of people in the household. Upon discovering that the Appellants' IADL time authorization had not been prorated, the ASW prorated the IADL time authorization. The evidence in this case establishes that both of the Appellant's parents live in the home with the Appellant.

The Appellant's father/representative testified that Appellant has received HHS for many years, at least since [redacted] and the proration policy had never been discussed or applied. The Appellant's father/representative testified that Appellant has had many HHS adult services worker's over the years and the proration policy had never been discussed or applied. The Appellant's father/representative questioned when the HHS policy had changed and why the proration policy had never been applied in the past.

The Adult Services Program Manager Puumala testified that HHS proration has been Department policy for many years, but in [redacted], the policy language was clarified and the [redacted] clarification language remains in effect. Manager Puumala stated that while the proration policy continued since the [redacted] language clarification, not all HHS staff uniformly applied the proration policy. Manager Puumala explained that it was a recent management decision to ensure that every HHS case be compliant with the HHS proration policy and ASW/HHS workers were instructed to review each HHS file and apply proration if it had not already been applied.

While the [redacted] HHS office application of a [redacted] policy clarification was a random application of long-standing, non-optional policy never before applied, this Administrative Law Judge is bound to follow Department policy. Applying the facts in evidence to HHS policy demonstrates that the Department's proration reduction in authorization for housework, shopping, laundry and meal preparation was proper.

Department's Motion for Dismissal of Appellant's Request for Hearing –

At the outset of hearing the Department made an oral motion to dismiss the Appellant's request for hearing. The Department moved without a prior written motion served on all parties. Without good cause for failure to provide an advance written notice, its motion was in violation of the Administrative Procedures Act and provisions of court and administrative rules that govern the procedural aspects of this state administrative hearing.

The Department stated its basis for dismissal was its own interpretation that signature verification rendered a hearing request incomplete. The issue of hearing request signature

verification is not a Medicaid fair hearing issue. It was the Department's responsibility to seek clarification in the appropriate forum and not during a Medicaid recipient's Medicaid fair hearing. This Administrative Law Judge was reluctant to address a non-fair hearing issue in this Decision and Order. After repeated and aggressive insistence by the Department during the hearing to address verification of hearing request signatures, and to mitigate the Department's disruption of the fair hearing, the Administrative Law Judge agreed and the issue is addressed below.

The Social Security Act and the federal regulations which implement the Social Security Act mandate MDCH/Department to provide an opportunity for fair hearing to any recipient who believes the Department may have taken an action erroneously. *42 CFR 431.200, 42 CFR 431.201, 42 CFR 431.202, 42 CFR 431.220, and 42 CFR 431.221.* MDCH/Department, as the single state Medicaid agency, is responsible for the provision of a Medicaid fair hearing in accordance to all the provisions of federal regulation, state law and state policy. In Appellant's case MDCH/Department bore the responsibility of ensuring a fair hearing, in particular because the Department had applied a proration policy that had never been uniformly applied in that county office, leading to Appellant's belief that the Department might have acted erroneously. *42 CFR 431.220(2).*

During the hearing, the Department initially overtly refused to provide the Appellant with a copy of the provision of the federal regulation under which it alleged a right of dismissal. The Department's overt refusal to provide information it was required to provide under law necessitated this Administrative Law Judge to order the Department to mail a written copy of the federal regulation provision under which it alleged a right of dismissal.

Appellant's mother is her court-ordered, guardian. On [redacted], the Department received Appellant's Request for Hearing, signed by her legal guardian/mother. (Exhibit 2). Appellant's request for hearing was executed according to instruction, laws pertaining to guardianship, and authority to represent. Appellant's request for hearing was legally sufficient when received on [redacted], and was received within the 90 day window to request a hearing. Because a properly executed request for hearing was received within 90 days of Department action the Department's 42 CFR 431.221 argument is moot. The Appellant's request for hearing was timely and the Department was obligated to afford Appellant a fair hearing. *42 CFR 431.221.* The Department's arguments are discussed below.

The Department argued to deprive Appellant of her right to hearing. The Department asserted that one subsection of a federal regulation provision, 42 CFR 431.221(d), required the State Office of Administrative Hearings and Rules (SOAHR) to dismiss Appellant's request prior to a hearing.

The one subsection reads, in its entirety:

> Request for hearing.
>
> (d) The agency must allow the applicant or recipient a reasonable time, not to exceed 90 days from the date that notice of action is mailed, to request a hearing.

The Department argued that because SOAHR requested independent verification of Appellant's mother's plenary guardianship, it didn't consider the Appellant's request for hearing "final" until the date SOAHR became final. When the Department was asked what law or policy it used to determine by what criteria a request was "final" the Department was unable to provide any authority.

The Department likewise could not provide a response to the question of how it would be irreparably harmed if the Appellant was allowed to proceed to a hearing. Instead of providing a response the Department argued that because it was held to the "letter-of-the-law" so should SOAHR be held to the "letter-of-the-law" and should deprive a person of a Medicaid fair hearing if guardianship verification was received more than 90 days from the date of Department action. The Department could identify no legal basis for its interpretation for when a request for hearing was "final." In other words, instead of the Department providing any legal basis -- which it was obligated as moving party to provide -- for depriving a Medicaid recipient a federally-derived right to hearing, it interrupted a recipient's request for hearing and demanded from the Administrative Law Judge a legal basis for its own unsupported motion for dismissal.

In addition to being unsupported, the Department's 42 CFR 431.221(d) argument is legally and fatally flawed for several reasons.

First, the Department based its entire argument to deprive the Appellant of her right to hearing on **one subsection** of federal regulation for which there are hundreds of subsections. The Department utilized **one subsection** of federal regulation in total disregard of the multi-subsection 42 CFR 431.221 provision entitled Request for Hearing.

The Department's isolation of one, singular sentence subsection ignored the responsibilities it had in the remaining subsections of 42 CFR 431.221. Had the Department not relied on one sentence in disregard of all others it would have noted its absolute obligation to assist the Appellant in processing her request for hearing, instead of blindsiding her at the outset of hearing and refusing to provide her with information, in an attempt to achieve the opposite of assisting her to process her request for hearing. Merely one sentence above subsection 42 CFR 431.221(d), is subsection (c) which reads:

> (c) The agency may assist the applicant or recipient in submitting and processing his request.

The state of Michigan has embodied subsection (c) as a mandate, in Michigan administrative rule. Rule 400.904(3) states in part:

> …The agency **shall** assist a claimant to submit and process his request.

The Department violated its mandate under Michigan Rule to assist Appellant in processing her request for hearing. The Director of the Department of Community Health delegated to SOAHR Administrative Law Judges limited authority regarding hearings, including controlling conduct of hearings and issuing a final decision in most Medicaid beneficiary cases. *See current Delegation of Authority, August 29, 2006.* The Department retains the responsibility to assist a Medicaid beneficiary in submitting and processing a request for hearing. The Department's hostile, aggressive, and adversarial behavior toward Appellant -- here a 40 year old woman with profound mental retardation and her aging parents who have provided loving care for decades and merely sought explanation for why the Department had randomly implemented a reduction – is not only inappropriate for an administrative hearings decorum, it is in direct conflict with its federal and state mandates to assist a beneficiary.

Second, the Department's isolation of one, singular sentence, subsection ignored the responsibilities it had under subsection (b) of 42 CFR 431.221.

Subsection (b) reads:

> (b) The agency may not limit or interfere with the applicant's or recipient's freedom to make a request for a hearing.

The Department's secretive, adversarial demeanor, and aggressive, acrimonious tone, is in direct contradiction to the federal regulation prohibition on limiting or interfering with a recipient's freedom to make a request for hearing. 42 CFR 431.221. The Department's interruption at beginning and end of Appellant's hearing, with no prior notice of intent to dismiss and refusal to provide information underlying the basis for dismissal, did constitute an unsupported interference and attempted limitation of Appellant's freedom to request a hearing in violation of subsection 42 CFR 431.221(b).

Third, the Department's isolation of one, singular sentence, subsection ignored the responsibilities it held in the Code of Federal Regulations (CFR) provisions surrounding 42 CFR 431.221. The singular subsection relied on by the Department is part of a much larger division of the Code of Federal Regulations that directs states, in this case Michigan, on how to implement the Medicaid program. The federal government granted funds to Michigan to operate a Medicaid program under Michigan's promise to comply with provisions of the Code of Federal Regulations. The governing provisions, whose authority overlays 42 CFR 431.221 and at least must be implemented in conjunction with 42 CFR 431.221, set forth the standards for the Department's conduct regarding fair hearings for Michigan Medicaid recipients. In pertinent part:

> Sec. 431.205 Provision of hearing system.
>
> (a) The Medicaid agency must be responsible for maintaining a hearing system that meets the requirements of this subpart.
>
> (b) The State's hearing system must provide for--
> (1) A hearing before the agency; or
> (2) An evidentiary hearing at the local level, with a right of appeal to a State agency hearing.
>
> (c) The agency may offer local hearings in some political subdivisions and not in others.
>
> (d) The hearing system must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970), and any additional standards specified in this subpart.

Merely six (6) provisions above the subsection singularly relied on by the Department to deprive Appellant of her right to hearing, the Code of Federal Regulations mandates that the Department apply due process to all fair hearing sections; including the 90 day appeal timeline. In other words, the Department is required to apply due process when considering the provision 42 CFR 431.221. The federal regulations go to the extraordinary extent of citing the due process articulated in *Goldberg v. Kelly*, 397 U.S. 254, 1970. In pertinent part:

> The opportunity to be heard must be tailored to the [p269] capacities and circumstances of those who are to be heard.- It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore, a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context, due process does not require a particular order of proof or mode of offering evidence. *Cf.* HEW Handbook, pt. IV, § 6400(a).
>
> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-

examine adverse witnesses. *E.g., ICC v. Louisville & N. R. Co.,* 227 U.S. 88, 93-94 (1913); *Willner v. Committee on Character & Fitness,* 373 U.S. 96, 103-104 (1963). What we said in [p270] *Greene v. McElroy,* 360 U.S. 474, 496-497 (1959), is particularly pertinent here:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that, where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment**.** . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

Goldberg v. Kelly unequivocally imposes on the Department a requirement to afford opportunity to Medicaid recipients and afford an opportunity generously and at a level informal enough to ensure Sixth Amendment rights. The Department's legally unsupported dismissal action greatly offends the clear mandate to apply due process and afford an evidentiary hearing. The Department's self-determined, legally unsupported dismissal actions oppose the rights expressed in the Sixth Amendment, here a mentally retarded woman whose vulnerability *Goldberg* precisely seeks to protect, from a right to inquire why her benefits were removed and to have an independent decision-maker review the deprivation of medical assistance.

A singular sentence in law cannot be applied to the exclusion of all other pertinent sections of the law. One sentence of law cannot override the governing provisions of that body of law. For the Department to base its entire argument on one subsection of one provision of law, in total isolation and disregard for the surrounding provisions of law is legally and fatally flawed. The Department cannot protest "letter-of-the-law" when it fails to abide by the letter-of-the-law in several of the related federal regulations and state rules.

The Department argued that BAM 600 required this SOAHR office for DCH to deny Appellant a right to hearing. Once again the Department based its argument on one provision of HHS policy in disregard of all others. Even more fatal to its argument, the BAM policy applies to DHS programs, not the HHS program which is a DCH responsibility. BAM 600 does not govern DCH contested actions, such as the HHS reduction here.

The Department stated that the following phrase of DHS policy required SOAHR to dismiss Appellant's request for hearing:

> "…will deny requests signed by unauthorized persons…"

The section of BAM 600 from which the Department extracted on phrase is:

> **HEARING REQUESTS All Programs**
>
> All clients have the right to request a hearing. The following people have authority to exercise this right by signing a hearing request:
>
> - An adult member of the eligible group; **or**
> - The client's AHR.
>
> Requests for a hearing must be made in writing and signed by one of the persons listed above. The request must bear a signature. Faxes or photocopies of signatures are acceptable. State Office of Administrative Hearings and Rules (SOAHR) will deny requests signed by unauthorized persons and requests without signatures.
>
> * * * * *
>
> An AHR or, if none, the client might express dissatisfaction with a department action, orally or in writing, without specifically requesting a hearing. Determine whether the AHR or, if none, the client actually wishes to request a hearing. If so, ensure that the request is put in writing.
>
> The DHS-18, Request for Hearing, or the hearing request section of the client notice may be used. Note the date of receipt of the original written request on the form/notice. See RFF18.
>
> **Requests Signed by an AHR**
>
> **All Programs**
>
> The appointment of an AHR must be made in writing. An AHR must be authorized or have made application through probate court **before** signing a hearing request for the client.
>
> Verify the AHR's prior authorization unless the AHR is the client's attorney at law, parent or, for **MA only**, spouse. **Relationship of the parent or spouse must be verified only when it is**

> **questionable.** SOAHR will deny a hearing request when the required verification is **not** submitted. See "Local Office and SOAHR Time Limits" in this item.
>
> The following documents are acceptable verification sources:
>
> • Probate court order or court issued "Letters of Authority" naming the person as guardian or conservator.
>
> • Probate court documentation verifying the person has applied for guardian or conservatorship.
>
> Department Of Human Services Bridges Administrative Manual State Of Michigan **(**BAM 600 7-1-2009) 2 of 34 (Bold-underline emphasis added).

The phrase solely relied on by the Department must be read in conjunction with the entire provision. The provision also qualifies the Department's phrase with:

> Relationship of the parent or spouse **must be verified** only when it is questionable. (Bold emphasis added).

DHS policy requires DHS to verify parental relationship. SOAHR through its delegation was acting for the Department/DCH when it attempted to verify the legal relationship of Appellant's mother. While DHS policy does not apply to Department/DCH actions, it is an example of how SOAHR action to verify signatures is consistent with the policy of other state agencies.

It is also an example of how both DHS and DCH, with Medicaid program responsibilities, must consider requests for hearing and conduct Medicaid hearings in conjunction with of all the law and rules which govern the program. SOAHR for DCH must apply all laws and rules related to Medicaid requests for hearing, including the Michigan Mental Health Code's entire body of law aimed at protecting and affording rights to individuals with developmental disabilities. *See Chapter 6 of the Michigan Mental Health Code, MCL 330.1600 and in particular MCL 330.1602.* In reality, the Department's appeals review division's unsupported interpretation regarding verification of hearing request signatures resulted in it opposing its own Department's obligation to verify a parent's signature.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly reduced Appellant's Home Help Services.

IT IS THEREFORE ORDERED THAT:

- The Department's decision is AFFIRMED.

Lisa K. Gigliotti
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 04/02/2010

***** NOTICE *****

The State Office of Administrative Hearings and Rules 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 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.