STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P. O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax (517) 334-9505

IN THE MATTER OF

Docket No. 2010-20717 CMH

Appellant

______________________/

DECISION AND ORDER

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

After due notice, a hearing was held on . , guardian, appeared on behalf of the Appellant. Fair Hearing Officer, represented the Department.

WITNESSES FOR THE APPELLANT:

, grandfather; , Social Worker Clinical Director ; , educator; psychologist, , Home Manager, ; , administrator; , worker.

WITNESSES FOR THE DEPARTMENT:

supervisor; , psychologist; , Director of Operations, Living Alternative for the Developmentally Disabled (LADD); , Regional director of , Recipient Rights Officer.

Also in attendance: , case manager and , family friend.

ISSUE

Did the Department properly terminate CLS and personal care services for the Appellant?

FINDINGS OF FACT

Based upon the competent, material and substantial evidence presented, I find, as material fact:

1. The Appellant is a disabled, Medicaid beneficiary. Appellant's Exhibit #1
2. His diagnoses include Oppositional Defiance Disorder, ADHD (combined type), Schizoaffective Disorder, mental retardation, Osteopenia, Hypothyroid, Growth Hormone Deficiency, anoxia at birth, the residuals of Sydenham's Chorea and aggravating orthopedic issues. Department's Exhibit A, 17-20
3. Currently, the Appellant receives comprehensive around the clock care at – the result of an earlier recommendation by) owing to its then present inability to provide adequate care for the Appellant in crisis and because [as of] "…the current provider array available in does not include a setting that would be able to provide him the clinical services needed." Department's Exhibit A, p. 3
4. The ALJ finds that provider array available in has now changed with the addition of and). *See* Testimony of .
5. On admission to , the Appellant received proper and adequate care for his emotional afflictions, physical/medical needs and educational services. On or about the Appellant reached a plateau. Department's Exhibit A, p. 61
6. Providers at are awaiting a medication-based remedy which has eluded the Appellant's psychiatrist to date. *See* Testimony of and Department's Exhibit A, pp. 50 – 59, 61.
7. Between the months of , the principals at and family met and discussed plan to implement a less restrictive setting for the Appellant via *See* Testimony and Department's Exhibit A, - throughout.
8. On representatives [supports coordinator and DD supervisor] reported that the Appellant had "…be[gun] to rely on physical interventions to get calm rather than learning methods to calm himself." They further reported that their proposed provider would be able to bring necessary supports and services without the need for physical intervention. Department's Exhibit A, pp. 59, 60 and *See* Testimony of .
9. The existing placement at costs . Department's Exhibit A, p. 64
10. On the Appellant's guardian was advised of the proposed termination of CLS and relocation of services and supports to in a less restrictive setting. Her appeal rights and excerpts of personal planning were included with this notice. Department's Exhibit A, pp. 1 – 14

11. The proposed termination and relocation of services was to be effective Department's Exhibit A.

12. The Appellant's guardian objects to the proposed move because she believes he needs a highly structured environment. And because her grandson is "not psychiatrically stable". Appellant's Exhibit #1 and *See* Testimony of .

13. The instant request for hearing was received by the State Office of Administrative Hearings and Rules (SOAHR) on . Appellant's Exhibit #1

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 operates a section 1915(b) Medicaid Managed Specialty Services and Support program waiver in conjunction with a section 1915(c) HSW. Center] contracts with the Michigan Department of Community Health to provide services under the HSW.

The Appellant may receive Medicaid funded B3 services as long as those services do not replace or duplicate State Medicaid Plan Specialty Supports and Services or HSW services and he meets the criteria for B3 supports and services.

> **ADDITIONAL MENTAL HEALTH SERVICES (B3S)**
>
> PIHPs must make certain Medicaid-funded mental health supports and services available, in addition to the Medicaid State Plan Specialty Supports and Services or Habilitation Waiver Services, through the authority of 1915(b)(3) of the Social Security Act (hereafter referred to as B3s). The intent of B3 supports and services is to fund medically necessary supports and services that promote community inclusion and participation, independence, and/or productivity when identified in the individual plan of service as one or more goals developed during person-centered planning.
>
> **DEFINITIONS OF GOALS [ ]**
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> The goals (listed below) and their operational definitions will vary according to the individual's needs and desires. However, goals that are inconsistent with least restrictive environment (i.e., most integrated home, work, community that meet the individual's needs and desires) and individual choice and control cannot be supported by B3 supports and services unless there is documentation that health and safety would otherwise be jeopardized; or that such least restrictive arrangements or choice and control opportunities have been demonstrated to be unsuccessful for that individual. Care should be taken to insure that these goals are those of the individual first, not those of a parent, guardian, provider, therapist, or case manager, no matter how well intentioned. The services in the plan, whether B3 supports and services alone, or in combination with state plan or Habilitation Supports Waiver services, must reasonably be expected to achieve the goals and intended outcomes identified. The configuration of supports and

services should assist the individual to attain outcomes that are typical in his community; and without such services and supports, would be impossible to attain.

Community Inclusion and Participation

The individual uses community services and participates in community activities in the same manner as the typical community citizen.

Examples are recreation (parks, movies, concerts, sporting events, arts classes, etc.), shopping, socialization (visiting friends, attending club meetings, dining out) and civic (volunteering, voting, attending governmental meetings, etc.) activities. A beneficiary's use of, and participation in, community activities are expected to be integrated with that of the typical citizen's (e.g., the beneficiary would attend an "integrated" yoga class at the community center rather than a special yoga class for persons with mental retardation).

Independence "Freedom from another's influence, control and determination." (Webster's New World College Dictionary, 1996). Independence in the B3 context means how the individual defines the extent of such freedom for him/herself during person-centered planning. For example, to some beneficiaries, "freedom" could be living on their own, controlling their own budget, choosing an apartment as well as the persons who will live there with them, or getting around the community on their own. To others, "freedom" could be control over what and when to eat, what and when to watch television, when and how to bathe, or when to go to bed and arise. …

Medicaid Provider Manual (MPM) 3Bs, §17 *et seq* pages 97-116, April 1, 2010

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[ ] COMMUNITY LIVING SUPPORTS

Community Living Supports are used to increase or maintain personal self-sufficiency, facilitating an individual's achievement of his goals of community inclusion and participation, independence or productivity. The supports may be provided in the participant's residence or in community settings (including, but not limited to, libraries, city pools, camps, etc.).

Coverage includes:

Assisting, reminding, observing, guiding and/or training in the following activities:

- meal preparation
- laundry
- routine, seasonal, and heavy household care and maintenance
- activities of daily living (e.g., bathing, eating, dressing, personal hygiene)
- shopping for food and other necessities of daily living

CLS services may not supplant state plan services, e.g., Personal Care (assistance with ADLs in a certified specialized residential setting) and Home Help or Expanded Home Help (assistance in the individual's own, unlicensed home with meal preparation, laundry, routine household care and maintenance, activities of daily living and shopping). If such assistance appears to be needed, the beneficiary must request Home Help and, if necessary, Expanded Home Help from the Department of Human Services (DHS). CLS may be used for those activities while the beneficiary awaits determination by DHS of the amount, scope and duration of Home Help or Expanded Home Help. If the beneficiary requests it, the PIHP case manager or supports coordinator must assist him/her in requesting Home Help or in filling out and sending a request for Fair Hearing when the beneficiary believes that the DHS authorization of amount, scope and duration of Home Help does not appear to reflect the beneficiary's needs based on the findings of the DHS assessment.

Staff assistance, support and/or training with activities such as:

- money management
- non-medical care (not requiring nurse or physician intervention)
- socialization and relationship building
- transportation from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence (transportation to and from medical appointments is excluded)
- participation in regular community activities and recreation opportunities (e.g., attending classes, movies, concerts and events in a park; volunteering; voting)

> attendance at medical appointments
> acquiring or procuring goods, other than those listed under shopping, and non-medical services
> Reminding, observing and/or monitoring of medication administration
> Staff assistance with preserving the health and safety of the individual in order that he/she may reside or be supported in the most integrated, independent community setting.
>
> CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, state plan coverage Personal Care in Specialized Residential Settings. Transportation to medical appointments is covered by Medicaid through DHS or the Medicaid Health Plan. Payment for CLS services may not be made, directly or indirectly, to responsible relatives (i.e., spouses, or parents of minor children), or guardian of the beneficiary receiving community living supports.
>
> CLS assistance with meal preparation, laundry, routine household care and maintenance, activities of daily living and/or shopping may be used to complement Home Help or Expanded Home Help services when the individual's needs for this assistance have been officially determined to exceed the DHS's allowable parameters. CLS may also be used for those activities while the beneficiary awaits the decision from a Fair Hearing of the appeal of a DHS decision. Reminding, observing, guiding, and/or training of these activities are CLS coverages that do not supplant Home Help or Expanded Home Help.

Supra, §17.3.B

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Neither party disputes the Appellant's continuing eligibility and need for services including CLS. The crux of the dispute for hearing centered on the location of those services, and whether the proposed services were reasonable. The Appellant's guardian sets forth the thesis that a less restrictive environment would be harmful for the Appellant as he needs structure in his daily life. Furthermore, the guardian freely admits to significant trust in the [redacted] program and an equally intense suspicion of [redacted] ability to follow through with promised services.

As of the date of hearing, she testified that that the Appellant is not adequately stable to transition from [redacted]. *See generally,* Appellant's Exhibits 1-3

The Department's witnesses testified that the services and supports received by the Appellant at can be replicated by their subcontractor LADD, albeit in a less restrictive environment, but with equal or better control measures, *i.e.*, medical, psychiatric, behavioral, safety, etc.

> , counselor, testified that the Department inventoried the concerns of the family with the Appellant at . They were seeking resolution of nine (9) behaviors before any transition would take place, including; "…non-violence, capable of functioning without 1:1 supervision, function safely in the community, deal with the urgency that he has to be with children and take care of them – but not lose control when not allowed, be able to communicate needs, reduce delusional symptoms, increase expressive communication, follow request/direction without resistance, find out where the Appellant's ability is."
>
> characterized the companion goals from seeking 30 days of zero (0) behaviors as not realistic – given the Appellant's disabilities which will likely cause a reaction at some point whether the service change is now or later. She added that the critical element was that has comparable services available. has no new treatment plan - they merely await a medication solution. *See* Department's Exhibit A at pages 61, 64, 65.

testified that now would be a good time to move - given the Appellant's medical and behavioral status a better transition to SIH housing would be likely. This testimony supported counselor written comments that the Appellant had begun, as of , to rely on physical intervention to calm himself – as opposed to learning other solutions. Since the SIH home practices so-called "gentle teaching" – intensive physical interventions are not utilized. This takes on added importance given the Appellant's generally "frail" habitus.[1]

On review, the greater weight of the evidence supports the idea that the Appellant will receive equal or better treatment through the . The idea of waiting several more months for an elusive medication-solution begs common sense. This work can be picked up seamlessly by medical professionals at . The remaining services on transition offer necessary staffing in the appropriate amount, scope and duration suitable to the Appellant.

As of the date of hearing, the evidence and the testimony established that the Appellant no longer needs CLS at the , but rather medical necessity has established that CLS and the attendant services and supports would be better provided in .

The Appellant has failed to preponderate his burden of proof that the department's action was in error. Accordingly, the Department's reassignment of CLS and relocation of the Appellant to and its LADD subcontractor was both reasonable and within policy.

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[1] The Appellant is frail. He has had a broken hip, leg and elbow in recent history. He suffers from Osteopenia and Osteoporosis. *See* Testimony of .

Medicaid beneficiaries are only 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 Medicaid Provider Manual policy definition for medical necessity is as follows:

> **[ ] MEDICAL NECESSITY CRITERIA**
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> Mental health, developmental disabilities, and substance abuse services are supports, services and treatment:
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> - 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.
>
> ****
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> Using criteria for medical necessity, a PHIP may:
>
> ■ may deny services that are:
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> - deemed ineffective for a given condition based upon professionally and scientifically recognized and accepted standards of care;
> - experimental or investigational in nature; or
> - <u>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</u>; 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. (Emphasis supplied)

MPM, Mental Health [ ],
Medical Necessity, §§2.5 A, D, pages 12 - 14.

While the Department acts within its authority in placing limits on services it is axiomatic that those services are not unlimited but subject to reasonable oversight. In this instance CLS was properly terminated at and then reinstated in the Appellant's community – because of his undisputed eligibility, medical necessity and person centered planning. 42 CFR 230 (d)

The medical evidence presented by the Appellant does not support a conclusion that he will not receive the appropriate amount, scope and duration of medically necessary services in . Clearly, the Department's plan is reasonably designed to achieve the goals and intended outcomes as identified in the Appellant's person centered planning.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, I decide that the properly proposed and planned the transfer of the Appellant from to a less restrictive environment in .

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

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Dale Malewska
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:

Date Mailed: 5/11/2010

***** 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.