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. 2010-40595 CMH

[redacted]

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 [redacted]. [redacted] appeared on behalf of the Appellant. She had no witnesses. [redacted], attorney, represented the Department. Her witness was [redacted]

ISSUE

Did the Department properly terminate respite care because the Appellant did not meet eligibility criteria?

FINDINGS OF FACT

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

1. The Appellant is a disabled, [redacted] Medicaid beneficiary.

2. The Appellant is afflicted with cerebral palsy, hypotonia, seizure disorder, bronchial pulmonary dysplasia, retinopathy of prematurity, failure to thrive, peanut allergy and asthma. Department's Exhibit A, p. 1.

3. The Appellant was placed in the care of her representative, [redacted] as foster parent, at age (4) four months.

4. The Appellant lives with her brother age (7) seven months - as well as other disabled and adopted foster children. Department's Exhibit A, p. 1.

5. The Appellant's representative sought respite care which was denied on [redacted] via Advance Action Notice. Her further appeal rights were contained therein. Department's Exhibit A, p. 4.

6. As a foster parent the Appellant's representative is compensated as a paid provider – at the rate of [redacted]. See Testimony of Short.

7. [redacted]) and its contractors are under contract with the Michigan Department of Community Health (Department) to provide mental health services to those who reside in the Appellant's geographic area.

8. The Department established that the Appellant's respite services were denied based on lack of eligibility under the Medicaid Provider Manual at section 17.3.J Respite Care Services. Department's Exhibit A, sub E, pp. 30, 31.

9. The instant appeal was received by the State Office of Administrative Hearings and Rules on [redacted]. 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 she 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 Community Health (MDCH) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver. Macomb County Community Mental Health Authority contracts with the Michigan Department of Community Health 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 Medicaid Provider Manual, (MPM) Mental Health/Substance Abuse section establishes Medicaid policy for Michigan. With regard to respite the manual states:

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> **[RESPITE]**
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> Services that are provided to assist in maintaining a goal of living in a natural community home by temporarily relieving

the unpaid primary caregiver (e.g., family members and/or adult family foster care providers) and is provided during those portions of the day when the caregivers are not being paid to provide care. Respite is not intended to be provided on a continuous, long-term basis where it is a part of daily services that would enable an unpaid caregiver to work elsewhere full time. In those cases, community living supports, or other services of paid support or training staff, should be used. Decisions about the methods and amounts of respite should be decided during person-centered planning. PIHPs may not require active clinical treatment as a prerequisite for receiving respite care. These services do not supplant or substitute for community living support or other services of paid support/training staff.

Respite care may be provided in the following settings:

- Beneficiary's home or place of residence
- Licensed family foster care home
- Facility approved by the State that is not a private residence, (e.g., group home or licensed respite care facility)
- Home of a friend or relative chosen by the beneficiary and members of the planning team
- Licensed camp
- In community (social/recreational) settings with a respite worker trained, if needed, by the family Respite care may not be provided in:
  - day program settings
  - ICF/MRs, nursing homes, or hospitals Respite care may not be provided by:
    - parent of a minor beneficiary receiving the service
    - spouse of the beneficiary served
    - beneficiary's guardian
    - unpaid primary care giver

Cost of room and board must not be included as part of the respite care unless provided as part of the respite care in a facility that is not a private residence. (Emphasis supplied)

MPM Mental Health [ ] §17.3. J, Respite Care Services, pp. 110, 111, July 1, 2010

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At hearing the Department witnesses established that the Appellant's request for respite was denied because the foster mother was not an unpaid caregiver. The Department sought further review from the authors of the MPM who indicated that any misapprehension about paid versus unpaid status was in error and would be removed from the next edition of the MPM – because foster parents as paid providers – are not eligible to utilize this service.

A review of the MPM language at issue shows that respite is provided for "*unpaid primary caregivers… (e.g., adult family foster care providers)*" – a designation which seemingly included the Appellant's representative, [redacted] – a foster parent.

However, [redacted] testimony described compensation at a rate of [redacted] a day. While the ALJ is sympathetic with the Appellant's characterization of such wage as inadequate – it is nevertheless a lawful payment and clearly places her in the compensated category as a foster parent – a fact that the ALJ cannot ignore.

The Department has pledged to clarify its wording of the MPM by next edition. For now the Appellant's argument that her compensation rate is so low that it renders her as a constructively unpaid caregiver carries little weight on review.

On review the Appellant has failed to preponderate her burden of proof that the Department erred in its denial of respite to the foster parent/primary caregiver.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH properly denied respite to a paid caregiver.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

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

cc: [redacted]

Date Mailed: 9/20/2010

***** 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.