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. 2010-4953 CMH
Case No. [redacted]

[redacted],

Appellant
_____________________/

DECISION AND ORDER

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

After due notice, a hearing was held on [redacted] and continued to [redacted]. [redacted], and [redacted], Legal Aid of [redacted] Michigan, appeared on behalf of the Appellant. [redacted] represented the Department.

DEPARTMENT WITNESSES:

[redacted]

PETITIONER WITNESSES:

[redacted]

PRELIMINARY MATTER

At hearing the ALJ took the admission of Department's Exhibits SUB A through C under advisement on objection from Petitioner for lack of relevance owing to "reflecting the past." Post hearing and on review I found the exhibits SUB A through C exhibits highly relevant for the very historical issue the Petitioner sought to block. Eligibility for services generally does rely on current medical – but of necessity reflects on some historical issues as well. The exhibits are admitted and afforded considerable weight.

ISSUE

Did the Department properly terminate case management, and psychiatric services, for the Appellant?

Has the Department properly concluded the Appellant is not a developmentally disabled person?

FINDINGS OF FACT

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

1. Appellant is a Medicaid beneficiary. (Appellant's Exhibit #1)

2. Community Mental Health and Substance Abuse Services (KCMHSAS) has been providing services to the Appellant since , when she was assessed and diagnosed with Mood Disorder NOS Anxiety Disorder, rule out autism, Borderline Personality, Ehlers-Danlos and Brain stem cyst. (Department's Exhibit A, p 24)

3. is a contractor of the Michigan Department of Community Health pursuant to a contract between these entities. It is charged with providing specialized mental health or developmental disability Medicaid covered services to the Medicaid eligible clients it serves.

4. The Appellant is a woman who alleges that she suffers from autism, anxiety, and phonological disorder. She further reports suffering from the affliction of Ehler-Danlos syndrome.

5. She relies on a keyboard operated speech generating device for verbal communication. *See Testimony* and Department's Exhibits A – throughout

6. The Appellant has an IQ of 135 and is a member of Mensa. (Department's Exhibit A, pp 9, 11, 12, 13, 33, 34)

7. The Department has been unable to confirm any developmental delay issues having manifest before age 22 as required under law at MCL 330.1100(a)(21)(a). (Department's Exhibit A, p 7)

8. The Appellant has uniformly refused to provide the department with necessary releases to enable them to fully vet her medical history. *See* Testimony throughout

9. The Appellant alleges a turbulent past including; childhood molestations, eye surgeries, self-reported agoraphobia, serial foster placements, a closed head injury at age 17 – the result of an automobile accident. See Testimony and Department's Exhibit A - throughout

10. The Appellant is a high school graduate with one year of college – she reports a high IQ. She communicates effectively with her speech generating device – as evidenced in the transcripts and as observed by the ALJ at hearing. *See generally,* Department's Exhibit A, through Sub C (pp 1 – 35.)

11. The Appellant had been receiving CLS supervised case management services since her LOC assessment. Department's Exhibit A through Sub G (pp 37-50)

12. These services were terminated approximately a year later following a poor relationship between the Appellant and her case manager and the Appellant's reluctance to follow her case manager's recommendations. See Testimony of pp 68 - 74 and Department's Exhibit G, pp 49, 50

13. Short term psychiatric services were terminated as well owing to lack of participation by the Appellant. Department's Exhibit G, p 49

14. There is no proof in the record of either an autism or DD diagnosis before age 22. *See* Testimony.

15. At hearing, ., agreed with the statement that autism is usually manifest in childhood. Transcript Vol. II p 9

16. The Appellant is intellectually able, but physically she receives DHS home help services for grocery shopping, laundry, and light housekeeping on a weekly basis and informal supports from a friend in her building. She is believed to have either nine (9) or 18 hours of choreprovider services authorized by DHS for unknown reasons. See Transcript Vol II – pp 11-12 Testimony of and Department's Exhibit A, (sub C) p 35

17. The Appellant lives alone in an apartment. She is dependent on others for some aspects of daily living. She is reluctant to travel outside in the community without a guide, although "she had a certification to have somebody ride with her" according to case manager . Transcript Vol. II p 69

18. She is, however, her own guardian and is intellectually capable of making her own decisions and more. See Testimony of , transcript Vol II. pp 14 - 18

19. While demonstrating some of the mental frustrations of Asbergers syndrome in her proofs the Appellant presented at hearing as one who is cognitively and physically able to advocate and plan for herself and to act as her own guardian. *Supra*

20. M.D., medical director CMH, interviewed the Appellant on [without the benefit of records] and diagnosed the psychiatric issue of

"generalized anxiety" and that he "saw some autistic features." He also identified a "phonological disorder" because she does not communicate verbally – but rather through a keyboard speech generating device. The doctor opined that in the future the Appellant would need some services to maintain her independence – such as a choreprovider. Transcript Vol. II pp 11 - 17

21. Although acknowledging that medication receipt was not a requirement for treatment with the CMH, [redacted] testified that he recommended benzodiazepine for treatment of her generalized anxiety because her condition [while moderate] is pervasive and interferes with all aspects of her life. He believed it would help her lack of verbal language. Transcript Vol. II. p 18

22. The instant appeal was brought by the Appellant 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 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…

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.

For purposes of simplifying the application of the Mental Health Code definition to Appellant's facts, in general, the Appellant must meet all four (4) criteria:

> 1) attributable to a mental or physical impairment or combination of mental and physical impairment;
> 2) that manifests before the person is 22;
> 3) that is likely to continue indefinitely;
> 4) that results in substantial functional limitations…

As applied to adult beneficiaries, the [redacted] utilized the criteria outlined in the Medicaid Managed Specialty Supports and Services Concurrent Waiver Program Contract FY 09 for the Michigan Department of Community Health (MDCH).

The Contract sets forth the following requirements for the PIHP in its servicing of potential clients:

Severe and Persistent Mental Illness is defined in the Contract as:

> Serious Mental Illness: As described in [ ] the Michigan Mental Health Code, a serious mental illness is a diagnosable mental, behavioral, or emotional disorder affecting an adult that exists or has existed within the past year for a period of time sufficient to meet diagnostic criteria specified in the most recent diagnostic and statistical manual of mental disorders published by the American Psychiatric Association and approved by the MDCH and that has resulted in functional impairment that substantially interferes with or limits one or more major life activities. Serious mental illness includes dementia with delusions, dementia with depressed mood, and dementia with behavioral disturbances, but does not include any other dementia unless the dementia occurs in conjunction with

another diagnosable serious mental illness. The following disorders are included only if they occur in conjunction with another diagnosable serious mental illness:

1. A substance use disorder
2. A developmental disorder
3. A "V" code in the diagnostic and statistical manual of mental disorders.[1]

[*See* MCL 330.1100d3]

Developmental Disability is defined in the Contract as:

Developmental Disability: As described in [ ] the Michigan Mental Health Code, a developmental disability means either of the following:[2]

1. If applied to an individual older than five years, a severe, chronic condition that meets all of the following requirements.

   a) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.
   b) Is manifested before the individual is 22 years old.
   c) Is likely to continue indefinitely.
   d) Results in substantial functional limitations in three or more of the following areas of major life activities:

      1) Self-care;
      2) Receptive and expressive language;
      3) Learning, mobility;
      4) Self-direction;
      5) Capacity for independent living;
      6) Economic self-sufficiency.

   e) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

2. If applied to a minor from birth to age five, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined in item 1 if services are not provided. [*See* MCL 330.1100a(21)]

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[1] The Contract reference to the Michigan Mental Health Code now appears at MCL.330.1100d3.
[2] The Contract reference to the Michigan Mental Health Code now appears at MCL 330.1100a(21).

The proofs established first that the Appellant, although impaired [suffering from moderate generalized anxiety], is not a person with a serious and persistent mental illness. She simply underutilized the psychiatric services made available to her under case management. She went twice and rejected advice long advanced by managers and medical professionals. Under the medical necessity standards the CMH is not required to offer services deemed ineffective – such as when a patient does not participate. Accordingly, the record and the testimony support the termination of the Appellant's psychiatric and case management services for underutilization.

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:

- 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:

- deemed <u>ineffective</u> for a given condition based upon professionally and scientifically recognized and accepted standards of care;
- 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. (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. A non-participating "customer" takes up a slot of another who might benefit from the same or equivalent service.

Second, as for a developmental disability, the Appellant does not manifest enough of the necessary elements to prove such status. As best described by Supports Coordinator, the Appellant did not meet any of the criteria to establish adult status developmental disability:

Transcript, Volume I, page 71 & 72, states:

Q. Now, , under Subparagraph 6 there on Page 8 of 9, you indicated that Shelly does not meet criteria, is that correct?

A. That's correct.

Q And do you have any further statement of your basis for that?

A. Based on what was telling me, particularly in the area of the substantial functional limitations, she did not have what we consider a substantial functional limitation in any of those areas. She was reporting that she was basically able to complete all of her own self care. You know, she's able to communicate adequately with others and receive that information in. She was reporting an above-normal I.Q., which is what the rating is based on. And mobility is—I thing she is able to get around on her own, physically. She's made all of her own decisions for herself. The –the economic self-sufficiency, we have to determine whether that's based on an actual inability to work, you know, a—and in this case it was—it appeared to be more of a choice as opposed to an inability to complete

any gainful employment. You know, she was already living independently with minimal help, so.

Q. Let me just ask you about the language portion of it. Was she using the machine?

A. Yes, she was.

Q. Was she at all verbal with you at that point?

A. You mean vocal?

Q. Oh, I'm sorry. Vocal, thank you.

A. No, but the machine—she's able to use the machine to commiquate [sic] – communicate quite adequately.

Q. Now, did you find that there were any services that Community Mental Health could provide for her at that time that would be appropriate?

A. Not through the developmentally disabled unit. I believe we did have a discussion with the MI unit, but she was specifically requesting DD services.

Q. And so you have no knowledge of – of what might have occurred or with might be available through mental health – or the MI side, is that correct?

A I believe she ended up being offered MI services.

Q. Okay. Thank you. Now, on Page 9 of 9, you—under Subsection 5—this is just above the S, service recommendations—what was your professional opinion that you put in there, please?

A. That she would continue with her counseling, continue with the home heath that she was receiving. The assistance in arranging transportation to medical appointments, one thing we had talked about was that insurance companies will cover that transportation to needed medical appointments.

Q. And you—you recommended no services, and that's what it says under F—

A. Correct.

This was bolstered by a second opinion. *See* Department's Exhibit A (Sub C) at page 34

Next, for reasons known only to the Appellant she has steadfastly refused to release previous medical records for documentation of her diagnosis of DD [onset before age 22] or to consent to contact with DHS. See Testimony throughout.

Even though M.D., observed in his testimony on meeting the Appellant that she demonstrated some aspects of limitation - his medical judgment was in offered in the sense of providing services – not determining eligibility. He testified that the CMH could help the Appellant. He did not know whether she was eligible for such services – although he did opine that medication might help her in "all areas" owing to pervasiveness of her general anxiety. As for her present condition - at hearing his description of her future needs mirrored the services she now receives from DHS:

Transcript, Volume II, page 17 & 18, states:

A. I think she will need the services of a chore provider at least some of the time. She acquires more skills. It is my understanding that at one time she had all those verbal skills and then, for whatever reason, she stopped communicating verbally and has started to use a computer.

Q. And if at one point she was verbal and is now using her communicator, your diagnosis of the phonological disorder would still be in place?

A. It is there, but it could be an acquired condition.

Q. Okay. And I'd like to follow up on one more thing, based on your medical background. Did you recommend medication to Ms. Seifer?

A. Yes, Ma'am.

Q. Okay. And where is that actually in your—

A. I—I said the patient has declined medication services at the present time and I have therefore not made any return appointment at this point.

Q. So, what would you have recommended for –

A. I would –

Q. -- Ms. ?

A. --have given her some benzodiazepine.

THE JUDGE: Try to – to wait 'til she finishes the question, then answer, so we don't get the two voices over each other. It makes it difficult for the transcriber to delineate who's saying what. Thank you. Could you please repeat the answer, sir.

THE WITNESS: I did offer some medication services and she declined to accept them.

BY MS. [redacted]:

Q. And – and what exactly did you recommend?

A. I would have suggested benzodiazephine. We did not get to that state of making any recommendation, because she declined medication in the first place.

Q. What would – what would that medication do for her; what would it help with her?

A. Reduce the intensity of her anxiety.

Q. So would—if she received medication, though, that wouldn't help with her eating or bathing or toiletry issues.

A. Yes, it – it may

Q. It may? Okay. Would it assist her with her language?

A. I think it might. The anxiety is all-pervasive, and it's interfering in probably all areas of her life.

Q. Okay.

A. And so it may have helped her to some extent in all areas.

Q. So my question is – and I understand that you are not making decisions for services – but is medication a requirement to receive services from CMH?

A. No.

As for the Appellant's Ehler-Danlos syndrome, the Appellant testified that it was diagnosed in her "30s" and that it is a connective tissue disorder which causes her to be double jointed and heal poorly. She believes she is losing her left eye vision to this disease. She added that she has poor coordination because of that affliction. There was no evidence that the Appellant could not function. She walked about the hearing room, handled equipment, participated in her defense and operated for hours under her own power.

On review, while the physical affliction may be insidious, the Appellant remains in charge of her physical and mental self. She is clearly not subject to a substantial functional limitation under the mental health code at 330.1100a(21). At worst, while Dr. opined that if Appellant could not work - it was because of her anxiety – and not her physical affliction because he observed her to ambulate "very well." He also said that she was able to manage her money and affairs. Dr. said "I did not look into it specifically, but I did – do not believe that she has impairment – she can represent herself quite effectively … so I think she had the ability to – to handle her money…"

Dr. agreed that the Appellant had a substantial limitation in self care and language – but nothing further. Her learning, mobility self-direction, and capacity for independent living remained in tact – perhaps requiring the services a chore provider "some of the time."

The proofs established that the Appellant suffers from moderate generalized anxiety and that she would benefit from treatment. The proofs also established that it was through the Appellant's own failure to participate that those psychiatric services were terminated. This non-participation was not the consequence of any lapse of a major life activity – but rather an ill conceived plan for an as yet unknown future.

The Department properly argues that while they stand ready to provide necessary services they need certain background data – including a release to make contact with DHS. Once coordinated many services bode for the Appellant – *if* she needs them. The proofs today established that her present authorization of home help is adequate to serve her needs. *See Testimony* of Dr. . As for additional services, including disputed community supports, it is clear that the Appellant holds the keys to obtain these or other services.

Because her physical or mental impairments do not result in three (3) or more functional limitations for independent living, she does not meet criteria as a developmentally disabled.

[ ] 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. (Emphasis supplied)

Supra, §17.3.B

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The Appellant has failed to preponderate her burden of proof that she met eligibility requirements for continued CMH services; that the Department improperly terminated those services or that she is an individual with a developmental disability onset before age 22.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly terminated psychiatric and case management services.

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: ____6/28/2010___

***** 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.