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:

[redacted]

Appellant
_____/

Docket No. 2011-12139 CMH
Case No. 8855514

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], Appellant's [redacted], appeared on behalf of the Appellant. [redacted] Appellant's [redacted], appeared as a witness for the Appellant and provided testimony.

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

ISSUE

Did the CMH properly authorize the Appellant's community living supports hours?

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 Medicaid beneficiary receiving services through [redacted] Community Mental Health (CMH).

2. CMH is under contract with the Department of Community Health (MDCH) to provide Medicaid covered services to people who reside in the CMH service area.

3. The Appellant is [redacted] Medicaid beneficiary. The Appellant is diagnosed with Soto's Syndrome and mild mental retardation. The Appellant has behavioral issues. (Exhibit 1, page 36).

4. The Appellant lives with his [redacted]. (Exhibit 1, page 20).

5. Appellant's [redacted] is one of Appellant's paid chore providers. (testimony).

6. The Appellant attends school from 8:00 a.m. to 11:00 a.m. Monday, Tuesday and Wednesday, and all day Thursday and all day Friday.

7. In Appellant's [redacted] PCP the CMH authorized the following Medicaid services: eight hours per day for CLS Monday through Thursday while Appellant was in school part-time; six hours per day for CLS on Friday when Appellant was in school full-time; 10 hours per day for CLS on Saturday and Sunday. The CLS also authorized 96 hours of respite services per month, medication clinic services, occupational therapy services, psychological/behavioral services and family therapy. (Exhibits 1 and 2).

8. On [redacted], an individual plan of service meeting took place at the CMH. (Exhibit 1, pages 27 through 47).

9. On [redacted], Appellant's occupational therapy plan was completed. The plan recommended occupational therapy, in the form of sensory activities, for two hours during the school week and three hours on Saturday and Sunday. Appellant's occupational therapy treatment plan indicated the occupational therapy activities would be implemented as part of CLS. (Exhibit 1, pages 1 through 4).

10. On [redacted], the CMH received an authorization request based on the occupational therapy plan. The CMH Utilization Department reviewed the occupation therapy authorization request and found that there was medical necessity to support approving two hours a day occupational therapy, but not for three hours per day on the weekend.

11. During the review the CMH noted that some of the tasks for which Medicaid was paying for CLS were the responsibility of a parent to provide. The CMH reason for denying the extra hour on the weekend days was because it is considered a parental responsibility to interact with her child. The CMH sent out the notice of approval of two hours per day, seven days a week of CLS to support the occupational therapy plan. The notice included a denial of the extra hours for occupational therapy during the weekends. (Exhibit 1, page 5).

12. On [redacted], Appellant's behavioral treatment plan was completed. The limited license psychologist recommended eight hours per day (56 CLS hours per week) of community living supports for Appellant, to be provided by the Independent Home Care provider. (Exhibit 1, pages 8-16).

13. On [redacted], the CMH received an authorization request based on the behavioral treatment plan. The CMH Utilization Department reviewed Appellant's medical documentation and determined that there was medical necessity for only two hours per day (14 hours per week).

14. On [redacted], the CMH sent a notice to the Appellant notifying that the 56 CLS hours per week were not supported by the documentation as medically necessary. The CMH notice indicated the CLS hours would be authorized at two hours a day for a total of 14 hours per week. The notice included rights to a Medicaid fair hearing. (Exhibit 1, page 17).

15. The State Office of Administrative Hearings and Rules received Appellant's request for hearing on [redacted]. (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.

> 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.
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> *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.
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> *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 of Community Health (MDCH) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver. CMH 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.*

CMH witness [redacted] testified that CMH can only approve CLS hours for tasks that are covered in CLS policy. CMH witness [redacted] explained that during the development of the person centered plan the CMH will identify covered tasks and review medical documentation to determine the amount of medically necessary CLS hours.

Authorization for CLS based on Appellant's behavioral treatment plan

Witness [redacted] testified that upon review of the Appellant's medical documentation, the behaviors reported only resulted in a finding of medical necessity for two hours per day. The witness explained that it was noted that the Appellant was in school five days a week and the Appellant did not have a medical necessity for in-home CLS while he was at school.

The Appellant's [redacted] confirmed that the Appellant is in school full-time Thursdays and Fridays and from 8 a.m. to 11:00 a.m. Mondays through Wednesdays. The Appellant's [redacted] testified that even though the Appellant is [redacted], he weighs over 200 pounds and it is difficult to get his behaviors under control. The Appellant's [redacted] stated that the Appellant can be destructive.

The *Medicaid Provider Manual, Mental Health/Substance Abuse,* section articulates Medicaid policy for Michigan. Its states with regard to community living supports:

> **17.3.B. 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 is needed, the beneficiary, with the help of the PIHP case manager or supports coordinator **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. The PIHP case manager or supports coordinator must assist, if necessary, the beneficiary in filling out and sending a request for Fair Hearing when the beneficiary believes that the DHS authorization amount, scope and duration of Home Help does not accurately reflect the beneficiary's needs based on 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 nonmedical 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 Personal Care services. 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. (Underline emphasis added by ALJ).

MPM, Mental Health and Substance Abuse Section, December 1, 2010, Page 100.

The CMH is mandated by federal regulation to perform an assessment, which includes review of medical documentation, for the Appellant to determine what Medicaid services are medically necessary and to determine the amount or level of the Medicaid medically necessary services that are needed to reasonably achieve his goals.

Appellant's [redacted] testified that in order to keep her house in order and spend time with her [redacted], as well as keep Appellant's behavior under control, more than two hours of behavioral CLS was needed per day. This CMH witness testified that medical documentation of Appellant's recent past behaviors did not demonstrate medical necessity of greater than two hours per day of CLS. The Appellant's [redacted] testified that Appellant's extensive behaviors were documented by the chore providers but that documentation was sent to the chore provider company and not to the community mental health.

This administrative law judge is limited to the evidence the community mental health had at the time it made its decision. Applying the evidence the CMH had at the time it made its authorization decision in [redacted] supports the CMH position that Appellant was not able to demonstrate medical necessity for CLS above two hours per day, seven days a week.

Authorization for CLS based on occupational therapy plan

The Appellant's [redacted] testified that the Appellant must be kept constantly physically active in order to mitigate his behaviors. The Appellant's [redacted] testified that she often works during

the weekdays. The Appellant's occupational therapy plan involves physical activities throughout the day.

The CMH representative and CMH witness pointed out that the Medicaid Provider Manual requires parents of children with disabilities to provide the same level of care they would provide to their children without disabilities. The CMH representative explained that this meant that public benefits could not be used where it was reasonable to expect the parent of [redacted] to provide care, i.e., if the parent had to repeatedly prompt the child to perform a task. The CMH witness explained that the reason two more hours were not granted on weekend days was because it was expected that the Appellant's [redacted] could provide two hours of prompting the Appellant to engage in his physical activities during the weekend mid-mornings.

The CMH representative said that the Appellant is eligible for the B3 category of Medicaid. The Medicaid Provider Manual explicitly states that B3 supports and services are not intended to meet every minute of need, in particular when parents of children without disabilities would be expected to be providing care:

> Decisions regarding the authorization of a B3 service (including the amount, scope and duration) must take into account the PIHP's documented capacity to reasonably and equitably serve other Medicaid beneficiaries who also have needs for these services. The B3 supports and services are not intended to meet all the individual's needs and preferences, as some needs may be better met by community and other natural supports. Natural supports mean unpaid assistance provided to the beneficiary by people in his/her network (family, friends, neighbors, community volunteers) who are willing and able to provide such assistance. **It is reasonable to expect that parents of minor children with disabilities will provide the same level of care they would provide to their children without disabilities.** MDCH encourages the use of natural supports to assist in meeting an individual's needs to the extent that the family or friends who provide the natural supports are willing and able to provide this assistance. PIHPs may not require a beneficiary's natural support network to provide such assistance as a condition for receiving specialty mental health supports and services. The use of natural supports must be documented in the beneficiary's individual plan of service. (Underline added).
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> *MPM, Mental Health and Substance Abuse Section, July 1, 2010, Page 98*

A review of the Medicaid Provider Manual supports the CMH position that B3 supports and services are not intended to meet all of an individual's needs and that it is reasonable to expect that Appellant's parents would provide care for the period of time proposed by the CMH without use of Medicaid funding.

This administrative law judge is bound by the federal regulation, state law, and policy. This administrative law judge cannot order services for which there is insufficient medical documentation to support medical necessity for the service. The Appellant's medical documents and community living supports logs only recorded behaviors and issues sufficient to support two hours of CLS per day to support the occupational therapy/sensory integration plan, and two hours of CLS per day to support the behavioral treatment plan (28 hours per week). For this reason this administrative law judge cannot order, based on equity alone, the eight hours CLS during weekdays and ten hours CLS on weekends (60 hours per week) Appellant's [redacted] and [redacted] requested.

It is also important to note that Medicaid pays for 96 hours of respite services per month. As an average, 96 hours equals over three hours per day for which Medicaid pays to give Appellant's [redacted] a break from Appellant. When adding the more than three hours of respite care to the four hours of CLS Medicaid pays for Appellant each day equals over seven hours of help seven days a week. An example of how that many hours of Medicaid services would look on a daily basis: the typical Friday for Appellant would result in him being at school from shortly after he arose in the morning until approximately 3:30 in the afternoon, at which time he would arrive at home and have seven hours of Medicaid covered services, or in other words have a Medicaid-funded caregiver provided from the moment he got home from school until after 10 p.m.

The Appellant bears the burden of proving by a preponderance of the evidence that the 28 hours per week of CLS was inadequate to reasonably achieve the Appellant's CLS goals. The Appellant did not meet the burden to establish medical necessity above and beyond the 28 CLS hours determined to be medically necessary by CMH in accordance to the Code of Federal Regulations (CFR).

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH properly authorized Appellant’s services at ten CLS hours per week.

IT IS THEREFORE ORDERED that:

The CMH decision is AFFIRMED.

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Lisa K. Gigliotti
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 2/28/2011

***** 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.