**STATE OF MICHIGAN**
**MICHIGAN ADMINISTRATIVE HEARING SYSTEM**
**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],

Docket No. 2011-32433 CMH
Case No. [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]. [redacted] appeared on behalf of the Appellant. He had no witnesses. [redacted], Fair Hearings Officer, represented the Department. Her witnesses were [redacted] Psychologist/Supervisor NSO; [redacted], Clinician; [redacted]i, Clinical Supervisor; [redacted] Supports Coordinator, NSO, and [redacted], NSO Supervisor.

## ISSUE

Did the Department properly terminate the Appellant's Community Living Supports (CLS)?

## 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 [redacted]-year-old Medicaid beneficiary receiving services through [redacted] Community Mental Health Agency (CMH). (Appellant's Exhibit #1)

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

3. The Appellant is diagnosed with Autistic disorder and mental retardation, unspecified. (Department's Exhibit A, page 7)

4. The Appellant lives with his father and biological brother and sisters. (Department's Exhibit A, page 5)

5. Two adult care givers are identified in the home of the Appellant. (Department's Exhibit A, p. 51)

6. The Appellant's representative alleges that the decision to terminate CLS did not take into account his personal care issues, aggression and property destruction. (Appellant's Exhibit #1 and *See* Testimony of Appellant's representative)

7. The Appellant's observed conduct on FAT assessment was determined to be greatly improved such that former problematic behaviors were documented to have decreased. (Department's Exhibit A, pages 1, 49, 52 and *See* Testimony of Ross)

8. The Appellant's representative said that his son still has "lots of issues" as well as "behavior issues" and that he should have brought him to the hearing. *See* Testimony.

9. On community outings the Appellant's representative testified that he does not use any assistance. *See* Testimony of the Appellant's representative.

10. The Appellant's representative claimed to have sought a local review and that his request was ignored. (Appellant's Exhibit #1, page 7)

11. The CMH reviewer(s) determined that the Appellant's needs supported reduction of services owing to his observed "mild tendencies." (*See* Testimony and Department's Exhibit A – throughout)

12. The Appellant was notified of the termination of CLS on [redacted], with an effective date of [redacted]. His further appeal rights were contained therein – including his option for a local appeal by contacting NSO at [redacted]. (Department's Exhibit A, page 3)

13. The Michigan Administrative Hearings System for the Department of Community Health received the instant request for hearing 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. Detroit-Wayne County Community Mental Health Agency (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.

The Medicaid Provider Manual, (MPM) Mental Health/Substance Abuse section establishes Medicaid policy for Michigan. In addition to establishing the framework for medical necessity it states, in relevant part:

> **CRITERIA FOR AUTHORIZING**
>
> The authorization and use of Medicaid funds for any of the B3 supports and services, as well as their amount, scope and duration, are dependent upon:

- The Medicaid beneficiary's eligibility for specialty services and supports as defined in this Chapter; and
- The service(s) having been identified during person-centered planning; and
- The service(s) being medically necessary as defined in the Medical Necessity Criteria subsection of this chapter; and
- The service(s) being expected to achieve one or more of the above-listed goals as identified in the beneficiary's plan of service; and
- Additional criteria indicated in certain B3 service definitions, as applicable.

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) that 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.

Provider qualifications and service locations that are not otherwise identified in this section must meet the requirements identified in the General Information and Program Requirement sections of this chapter. (Emphasis supplied)

MPM, Mental Health [ ] §17.2 Criteria for Authorizing B3 Supports and Services, p. 104, April 1, 2011.

****

Furthermore, the Medicaid Provider Manual (MPM) directs the CMH and service users with the following criteria regarding CLS:

**Community Living Supports (CLS)**

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 DHS's allowable parameters. CLS may also be used for those activities while the beneficiary awaits the decision from the 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.

MPM, *Supra* pp. 106-107

***

At hearing the Department witnesses established that the Appellant's behaviors on FAT assessment were determined to be "mild in intensity and improved" - over time. [redacted] referenced the FAT tool [at page 52 of the Department's Exhibit] wherein the Appellant was observed by FAT reviewers to exhibit behaviors "mild in intensity with no recent reports of escalation of behaviors, exhibited to the point of physical aggression."

He added that there were no collateral reports of injury to others, self or property damage. Many of these observations were disputed by the Appellant's representative at hearing, but yet were documented as shared by him during assessment. [redacted] concluded on review of the assessment tool that current documentation did not support continued CLS or more restrictive interventions.

Department witness [redacted], testified that in her conversations with the family and staff, training was refused by the parents and negative behaviors were denied by the Appellant's mother.

Supports Coordinator [redacted] testified that the school representatives were generally supportive of the Appellant and his behavior.

The Appellant's representative testified that the Appellant still kicks and hits him – he said he did not know if that was "behavior" but it was the reality. But, on questioning from the ALJ the father admitted that he took his son out into the community "all the time" without special precautions or services.

On review of the FAT assessments I found the observations of mild intensity to be credible evidence of a meaningful downturn in negative behavior memorialized by mental health professionals who testified at hearing today. [See Department's Exhibit A, at page 1, 2][1]

> **[ ] DEFINITIONS OF GOALS THAT MEET THE INTENTS AND PURPOSE OF B3 SUPPORTS AND SERVICES**
>
> 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,

[1] The ALJ found the report issued by witness [redacted] to be a good summation of events in the home and as achieved by the Appellant – particularly the absence of negative conduct during the period of review [redacted], through [redacted] – as reported by the Appellant's father.

> or case manager, no matter how well intentioned.… MPM, *Supra*, page 103

The Appellant argues for continued CLS because the Appellant's negative behavior continues – yet his comments to CMH reviewers dispute that conclusion which is documented throughout the Department's written evidence. The Department witnesses testified credibly that the Appellant's behavior and conduct had improved – sufficiently so that CLS was no longer necessary to achieve behavioral goals as referenced in the Appellant's Person Centered Plan.[2]

The Appellant failed to preponderate his burden of proof that the CMH decision to terminate CLS was reached in error; or was not based on a review of medically necessary services.[3]

Today, the Department's CLS termination is supported by the very fact that the Appellant has met his stated goals on person centered planning, thus reordering his remaining services, as coordinated, in the appropriate amount, scope and duration between the Appellant's family, his school and the remaining CMH services still received by the Appellant.

The CMH is mandated by federal regulation to perform an assessment of the Appellant to determine what Medicaid services are medically necessary and to determine the amount or level of medically necessary services needed to achieve his goals. His PCP is not static and over time it will likely reflect changes in services and supports given the ebb and flow of the conditions identified in his diagnosis as monitored by mental health professionals at the CMH.

Today the Appellant's proofs do not preponderate the medical necessity for CLS or that the termination of CLS was reached in error.

## DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH properly terminated the Appellant's CLS services.

**IT IS THEREFORE ORDERED** that:

The CMH decision is AFFIRMED.

_____
Dale Malewska
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

[2] With the inclusion of "playing the drums" – the Appellant appears to be meeting his stated goals: "remaining at home, attending [redacted] school, more positive social skills, good health, taking him places he has to go, and safety in the home and community…" [See Department's Exhibit A, at pp. 5-7, 14, 19, 30-39]
[3] MPM, Medical Necessity, §§2.5.A – D. Mental Health [ ], April 1, 2011, pp. 13, 14

[redacted]
**Docket No. 2011-32433 CMH**
**Decision and Order**

cc: [redacted]

Date Mailed: 8/4/2011

***** NOTICE *****

The Michigan Administrative Hearing System 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 Michigan Administrative Hearing System 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.