**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.** 2011-45108 CMH
**Case No.** 9270235

## 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 Wednesday, [redacted]. [redacted], Appellant's mother, appeared on behalf of the Appellant.

[redacted], Assistant Corporation Counsel, [redacted] County Community Mental Health Authority (CMH), represented the Department. Dr. [redacted], Ph.D., CMH Access Center Manager, appeared as a witness for the Department.

## ISSUE

Did the CMH properly reduce the Appellant's community living supports?

## 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 Macomb County 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 a [redacted] year old Medicaid beneficiary whose date of birth is [redacted]. The Appellant is diagnosed with mild cognitive impairment, cerebral palsy, non-progressive development disorder and poor weight gain.

(Exhibit D, p 17).

4. The Appellant lives with his adoptive mother and his adoptive brother. (Exhibit D, page 20).

5. Appellant's mother is his primary caregiver. Appellant is in special education at Wyandot Middle School. (Exhibit D, p 19).

6. In Appellant's latest Person Centered Plan (PCP) the CMH authorized the following Medicaid services: 30 hours per week for CLS, one hour per month supports coordination, and 50 hours per month respite. (Exhibit E, pp 33-39).

7. In or around [redacted], the CMH performed a review of the Medicaid-covered services the CMH authorized for Appellant, including documentation to support the medical need for services. (Exhibit D)

8. During the review the CMH noted that some of the CLS goals Appellant was approved for were not realistic, some were not described in detail, and those that were clearly stated could be accomplished in less than 30 hours a week. (Exhibits D and E).

9. 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.

10. On [redacted], the CMH sent an Adequate Action Notice to the Appellant notifying him that the 30 CLS hours per week were not supported by the documentation. The CMH mailed an Adequate Action Notice indicating the CLS hours would be reduced to 15 per week. The notice included rights to a Medicaid fair hearing. (Exhibit A).

11. The Michigan Administrative Hearing System received Appellant's request for hearing on [redacted]. (Exhibit B).

## 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 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 Dr. [redacted] testified that CMH can only approve CLS hours for appropriate tasks. CMH witness Dr. [redacted] explained that during the development of the person centered plan the CMH will identify appropriate tasks and assign a reasonable time to them to develop the appropriate authorized CLS hours.

Dr. [redacted] testified that upon review of the Appellant's current person centered plan it was noted that the Appellant was approved for CLS goals that were not realistic or not described in detail. The CMH submitted documentation to support its position, including language from the

Appellant's current person centered plan. In that PCP, CLS hours were recommended in order to "implement in-home OT Program, address areas of safety, and increase independence" and "to be more independent with daily living skills". (Exhibit E)

Dr. [redacted] noted that the in-home OT program mentioned in the general goal statement for CLS activities was not described in detail and that the last authorization for OT evaluation was in [redacted], with the last authorization for OT services ending in [redacted]. There was also no written OT plan in the electronic record and no description of how the CLS staff were to be instructed by an OT professional in the proper delivery of OT activities. In addition, the log of "OT activities" assisted by the CLS staff showed a wide variety of activities not contained in the more specific CLS goals and that the amount of time logged by CLS staff on the "OT activities" sheet was very large when compared to the activities described in the log. .

The Appellant's mother-representative testified that the 30 CLS hours are necessary and if the 30 CLS hours were reduced to only 15 CLS hours she would be concerned for her son's safety. The Appellant indicated that she has also had difficulty with her older son and that she takes her sons to at least two medical appointments per week. She also testified that the Appellant has recently developed a sleep disorder and has also recently gotten into some legal trouble. The Appellant's mother testified that the Appellant has a measured IQ of 58 and also has asthma and allergies, for which his doctors would like him to get weekly injections. The Appellant's mother also testified that she did not know what needed to be in the reports as far as the goals and objectives. She testified that she recently took Appellant in for an OT evaluation, which was completed on Friday, [redacted]. (Exhibit 1).

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.).
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> Coverage includes:
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> - Assisting, reminding, observing, guiding and/or training in the following activities:
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>  - 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).
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> *MPM, Mental Health and Substance Abuse Section, July 1, 2011, Page 100.*

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

Applying the facts of this case to the documentation in the annual assessment and person centered plan supports the CMH position that there was significant ambiguity regarding the goals and interventions of the CLS services and that the goals that were clearly stated could be accomplished in the 15 hours per week authorized.

The CMH representative further 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 would provide care, i.e., if the parent had to purée or cut food into very small pieces to prevent choking, or supervise for safety due to lack of mobility and verbal skills.

The CMH witness Dr. [redacted] noted that the total amount of proposed CMH services, combining respite and CLS, totaled of 27 hours per week: 15 hours authorized for CLS and 12 hours respite. CMH witness Dr. [redacted] asserted that the 15 CLS hours and 12 respite hours per week were an adequate number of hours to reasonably achieve the Appellant's CLS goals and Appellant's mother's respite goals.

The Medicaid Provider Manual explicitly states that recipients of B3 supports and services, the category of services for which Appellant is eligible, is 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. (Emphasis added).
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> *MPM, Mental Health and Substance Abuse Section, July 1, 2011, 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 mother would provide care for the period of time proposed by the CMH without use of Medicaid funding.

The Appellant bears the burden of proving by a preponderance of the evidence that the 15 hours per week of CLS was inadequate to reasonably achieve the Appellant's CLS goals, and 12 hours of respite was inadequate to meet the Appellant's parent's goals. The testimony of the Appellant's mother did not meet the burden to establish medical necessity above and beyond the 15 CLS hours and 12 respite 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 reduced Appellant's services to 15 CLS hours per week.

**IT IS THEREFORE ORDERED** that:

The CMH decision is AFFIRMED.

Robert J. Meade
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 9/9/2011

***** 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.