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. 2012-54292 CMH
Case No. [redacted]

Appellant
_____/

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge, pursuant to MCL 400.9 and 42 CFR 431.200 *et seq*. and upon the Appellant's request for a hearing.

After due notice, a hearing was held on [redacted]. [redacted] Appellant's father, appeared and testified on behalf of Appellant. [redacted] Fair Hearings Officer, appeared on behalf of the Washtenaw Community Health Organization (WCHO) and the Michigan Department of Community Health (MDCH). [redacted] Director of the Community Mental Health Bureau at MDCH, and [redacted] Director of the Children's Waiver Program at MDCH, appeared as witnesses for the Respondent. [redacted], Appellant's case manager, was also present during the hearing, but did not testify.

ISSUE

Did the Department properly deny Appellant's request for vacation respite care services?

FINDINGS OF FACT

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

1. WCHO is under contract with the MDCH to provide Medicaid covered services to people who reside in WCHO's service area. (Testimony of [redacted].

2. Appellant is a [redacted] year-old [redacted] who has been receiving services from WCHO through the Children's Waiver Program (CWP). (Exhibit 2; Testimony of [redacted]).

3. Among other services, Appellant has been receiving 96 hours of respite care services per month. (Testimony of [redacted]

4. In [redacted] Appellant's parents requested vacation respite services in addition to the respite care services already provided. (Testimony of [redacted] .

5. WCHO determined that the vacation respite services were medically necessary and appropriate for Appellant's family. (Testimony of [redacted] .

6. However, on [redacted] WCHO sent notice to Appellant notifying her that the request for vacation respite services was denied "due to state regulations." (Exhibit 3, page 1).

7. According to [redacted], the state regulations referred to in the denial notice were a letter and memorandum dated [redacted] from [redacted] (Exhibit 1) in which [redacted] wrote that, effective [redacted] "vacation respite will be eliminated for children on the CWP" (Exhibit 1, page 1).[1]

8. With respect to that change, [redacted] testified that, after the previous administration reduced the Department's budget, the new administration in the Department decided to change the rules and policies regarding respite care services through the CWP. (Testimony of [redacted] .

9. The specific changes were from a monthly maximum of 96 regular respite hours per month and additional vacation respite that can be used up to 14 days per year and must be used in 24-hour increments, to a yearly maximum of 1,152 total respite hours, or 96 hours per month, and no vacation respite. (Testimony of [redacted]).

10. Knisely also testified that the Department's authority to make the change was based in its ability to manage dollars in the least disruptive way. (Testimony of [redacted] Similarly, [redacted] testified that the change in policy allows for greater flexibility throughout the fiscal year and it has less of an effect on families than other changes that could have been made due to budgetary concerns. (Testimony of [redacted]).

11. According to [redacted], the Department's process for changing rules and policy has not been finalized. (Testimony of [redacted]). Once the decision was made in this case, notification was sent out in memorandum to the Department's managing entities. (Testimony of [redacted] . That change in policy was also discussed during meeting with directors and at various conferences. (Testimony of [redacted]; Testimony of [redacted] .[2]

12. [redacted] also testified that the Department will not typically notify beneficiaries of general changes. (Testimony of [redacted] .

[1] The letter also indicated that [redacted] had sent an earlier memorandum, dated [redacted] also stating that vacation respite was going to be eliminated. (Exhibit 1, page 1).
[2] [redacted] also testified that notification was also sent to tribal chairs at least 90 days before the change. (Testimony of [redacted] .

13. Overall, the notification in this case did not offer an opportunity for feedback or public comment. (Testimony of [redacted] .

14. The Department does intend to issue a policy bulletin discussing the change in policy and amend the Medicaid Provider Manual, but it has not yet done so. (Testimony of [redacted] .

15. On [redacted] the Michigan Administrative Hearing System (MAHS) received a Request for Hearing filed on behalf of Appellant. (Exhibit 4, page 1).

CONCLUSIONS OF LAW

As discussed above, Appellant has been receiving services through the CWP. With respect to that program in general, the Medicaid Provider Manual (MPM) states:

> **SECTION 14 – CHIL DREN'S HOME AND COMMUNITY-BASED SERVICES WAIVER (CWP)**
>
> The Children's Home and Community Based Services Waiver Program (CWP) provides services that are enhancements or additions to regular Medicaid coverage to children up to age 18 who are enrolled in the CWP.
>
> The Children's Waiver is a fee-for-service program administered by the CMHSP. The CMHSP will be held financially responsible for any costs incurred on behalf of the CWP beneficiary that were authorized by the CMHSP and exceed the Medicaid fee screens or amount, duration and scope parameters.
>
> Services, equipment and Environmental Accessibility Adaptations (EAAs) that require prior authorization from MDCH must be submitted to the CWP Clinical Review Team at MDCH. The team is comprised of a physician, registered nurse, psychologist, and licensed master's social worker with consultation by a building specialist and an occupational therapist.
>
> **14.1 KEY PROVISIONS**
>
> The CWP enables Medicaid to fund necessary home- and community-based services for children with developmental disabilities who reside with their birth or legally adoptive parent(s) or with a relative who has been named legal guardian under the laws of the State of Michigan, regardless of their parent's income.

> The CMHSP is responsible for assessment of potential waiver candidates. The CMHSP is also responsible for referring potential waiver candidates by completing the CWP "pre-screen" form and sending it to the MDCH to determine priority rating.
>
> Application for the CWP is made through the CMHSP. The CMHSP is responsible for the coordination of the child's waiver services. The case manager, the child and his family, friends, and other professional members of the planning team work cooperatively to identify the child's needs and to secure the necessary services. All services and supports must be included in the Individual Plan of Services (IPOS). The IPOS must be reviewed, approved and signed by the physician.
>
> A CWP beneficiary must receive at least one children's waiver service per month in order to retain eligibility. [MPM, Mental Health/Substance Abuse Chapter, July 1, 2012, page 77.]

Throughout the course of this case, the MPM has stated the same policy with respect to respite care services through the CWP and, the in the most current version of the MPM, that policy provides:

> Respite care services are provided to the child on an intermittent or short-term basis because of the absence or need for relief of the parent. Respite is intended to support the parent who is the primary caregiver. This service can be provided by a qualified provider under contract with the CMHSP in the child's home, foster home, group home, licensed respite care facility, licensed camp, or the home of a friend or relative. A parent or guardian may not be considered a provider, nor be reimbursed for this service. **The maximum monthly respite allocation is 96 hours. In addition to monthly respite, vacation respite can be used up to 14 days per year and must be used in 24-hour increments.**
>
> The cost of room and board cannot be included as part of respite care, unless provided as part of the respite care in a facility that is not a private residence. Respite provided in an institution (i.e., ICF/MR, nursing facility, or hospital) is not covered by the CWP. When a child requires skilled nursing interventions for 24 hours, the maximum daily amount that

> one nurse can provide is 16 hours. When the family is not available to provide the additional eight hours of care, a second nurse will be required to provide services for the remainder of the 24-hour period. If a nurse provides respite to more than one child at the same time, the nurse can only provide skilled nursing interventions to one child at a time. Therefore, service for that child would be covered as RN or LPN respite, and services to the other child(ren) would be covered as aide-level respite. [MPM, Mental Health/Substance Abuse Chapter, July 1, 2012, page 81 (emphasis added).]

Here, despite the language in the MPM allowing for a maximum monthly respite allocation of 96 hours and additional vacation respite up to 14 days per year, the Department asserts that it changed its policy and that vacation respite is no longer available. As discussed above, the Department argues that it changed its policy regarding vacation respite in a letter and memorandum dated [redacted] from Knisely (Exhibit 1) in which Knisely wrote that, effective [redacted] "vacation respite will be eliminated for children on the CWP" (Exhibit 1, page 1).

However, while the Department is exempted from the rule-making requirements of the Administrative Procedures Act, *see* MCL 400.6, it still has a process it must follow in changing its rules and policies. Contrary to Craft's testimony that the Department's process for changing rules is still being finalized, the MPM specifically states:

> **SECTION 18 - REVIEW OF PROPOSED CHANGES**
>
> The following guidelines for the development of policies, procedures, forms, and instructions apply to the Medicaid, Children's Special Health Care Services, Adult Benefits Waiver, and other health insurance programs administered by MDCH.
>
> MDCH consults with affected providers and other interested parties on those proposed changes in Medicaid policies, procedures, forms, and instructions which are determined significant enough to be communicated to providers by means of a provider bulletin. This consultation process involves a notification of the proposed change and the reasons for the change. MDCH includes the distribution of draft policy to those parties who have expressed interest in reviewing and commenting on the changes.
>
> Affected provider means any enrolled provider or provider association/organization that is impacted by the proposed changes. Any affected provider or other interested party who

would like an opportunity to comment on any proposed changes in his area of interest (e.g., podiatry, hospital, vision) may do so.

Visit the MDCH website to review draft policies or to request draft policies be sent to you for comment. You may also contact MDCH directly to request to participate in the policy promulgation process. (Refer to the Directory Appendix for contact information.)

Your request to receive draft policies must include:

- Provider's/Individual's name;
- Telephone number;
- Mailing address (and E-mail address, if requesting electronic distribution);
- Involvement with Medicaid (e.g., Medicaid provider, drug manufacturer, interested party);
- Association/organization represented (if applicable); and
- Specific area(s) of interest to review and comment on (e.g., physician, ambulance, hospital, Maternal Infant Health Program (MIHP), dental, nursing facilities).

Copies of draft bulletins are sent to interested parties via e-mail or US mail, and are posted on the MDCH website for a minimum of 30 days. Anyone wishing to comment on proposed changes may submit comments electronically, by fax or by US mail within the comment period.

Comments received are considered and suggestions may be incorporated in the final policy if determined appropriate. Upon completion of the consultation process, a provider bulletin serves as final notice of the change. A summary of the comments made, MDCH's response, and a copy of the final bulletin are sent to those who submitted comments. Proposed changes may have to be implemented before comments are considered if specific action is ordered by governmental entities having authority over MDCH with time frames that do not allow full compliance with the consultation

> process. In these cases, comments are requested from affected providers and are considered for incorporation after the implementation of the change.
>
> MDCH consults with the Medical Care Advisory Council (composed of consumers, providers, and government officials) in the review of proposed policies and procedures prior to implementation. Numerous provider associations and organizations are also involved in the review process. A provider who feels that his association or the Medical Care Advisory Council adequately represents him may not wish to be included on the provider consultation list. [MPM, General Information for Providers Chapter, July 1, 2012, pages 50-51.]

In this case, the Department clearly did not comply with the above policies when attempting to remove vacation respite. The consultation process was not followed and, while affected providers were notified, they were not given an opportunity to comment. Similarly, no copy of a draft bulletin was posted on the MDCH website for a minimum of 30 days and there was no opportunity for public comment. Additionally, no final notice of the change was issued through a policy bulletin.

The MPM emphasizes the importance of the MPM as a whole and that any changes to policy are only to be made through revisions to the MPM itself or through policy bulletins:

> **SECTION 1 - INTRODUCTION**
>
> This chapter applies to all providers.
>
> The Michigan Department of Community Health (MDCH) acts as the fiscal intermediary for several health insurance programs including Medicaid, Adult Benefits Waiver (ABW), Children's Special Health Care Services (CSHCS), the Refugee Assistance Program (RAP), Maternity Outpatient Medical Services (MOMS), and the Repatriate Program. Although coverage, limitations, and administration may differ, billing procedures and reimbursement methods are essentially the same. This chapter is used for all health insurance programs administered by MDCH. Any reference to Medicaid in the manual and bulletins pertains to all programs administered by MDCH unless specifically stated otherwise. Reference to the state mental health facilities includes only those facilities owned and operated by MDCH. It does not include proprietary facilities for the mentally ill or developmentally disabled.

> **1.1 BULLETINS**
>
> This manual is the provider's primary source of information. Revisions to the manual regarding policy and procedural changes are sent to the provider via Policy Bulletins. Bulletins should be kept until the information is incorporated into the manual. Bulletins are numbered for the provider's reference. The first two digits of the bulletin number refer to the year. The next two digits refer to the specific sequence number assigned to the bulletin (e.g., 03-04). Bulletins are sent to affected providers and are posted on the MDCH website. (Refer to the Directory Appendix for website and contact information.) [MPM, General Information for Providers Chapter, July 1, 2012, pages 50-51.]

Here, as discussed above, the MPM still provides that vacation respite is available and the manual was never amended. Likewise, no policy bulletin regarding a change in vacation respite was ever issued. [redacted] testified that the Department intends to do both of those things, but it is undisputed they were not done prior to the denial in this case or prior to the hearing.

At the hearing, the Department's representative expressed confusion regarding the Department's policy toward vacation respite and that confusion is understandable given the conflict between MPM and the [redacted] letter/memorandum. However, the MPM is the policy that governs this case and, as discussed above, it was not amended properly. Accordingly, per the MPM, vacation respite is an available service through the CWP.

The Department's representative also conceded that vacation respite for Appellant is medically necessary and should be granted if available. The amount of vacation respite it is willing to authorize was not discussed. Therefore, the Department is to determine the amount of vacation respite it finds appropriate and authorize those services. To the extent Appellant disagrees with the amount of vacation respite authorized, she will have to file another appeal.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department improperly denied Appellant's request for vacation respite services.

IT IS THEREFORE ORDERED that:

The Department's decision is REVERSED. The Department is to determine the appropriate amount of vacation respite and authorize those services. To the extent Appellant disagrees with the amount of vacation respite authorized, she will have to file another appeal.

Steven J. Kibit
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 8/21/2012

***** 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.