

**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) 373-4147

IN THE MATTER OF:

Docket No. 2013-45357 CMH
Case No. [REDACTED]

[REDACTED]

Appellant

_____ /

DECISION AND ORDER

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

After due notice, a hearing was held on [REDACTED]. [REDACTED] and [REDACTED], Appellant's parents, appeared and testified on Appellant's behalf.

[REDACTED], Fair Hearing Officer, represented the [REDACTED] Community Mental Health Authority (CMH). [REDACTED], Case Manager, Supervisor; [REDACTED], Psychologist; [REDACTED], Clinical Supervisor; and [REDACTED], Executive Director, [REDACTED], appeared as witnesses for the Department.

ISSUE

Did the CMH properly deny the Appellant's request for residential placement?

FINDINGS OF FACT

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

1. Appellant is an [REDACTED] year old Medicaid beneficiary, born [REDACTED], receiving services through [REDACTED] Community Mental Health (CMH) under the Children's Home and Community Based Waiver. (Exhibit A, p 28; Testimony)
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. Appellant is diagnosed with autism. (Exhibit A, p 28; Testimony). Appellant also has diagnoses of ADHD, OCD, ODD, impulse control disorder and agitated catatonia. Appellant also has frequent ear infections. (Exhibit 2, p 12)

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4. Appellant is currently prescribed the medications Trazadone 150mg, HS, Zyprexa 5 mg AM, Zyprexa 10 mg, PM, Clonopin 0.5 mg HS, Ativan 3 mg HS and 1 mg PRN, Catapres 0.1 mg HS, Dosepin 30 mg HS, and Melatonin 6 mg HS. Appellant has previously tried the following medications without success: Seroquel, Abilify, Remeron, Daytrana, Ritalin, Adderall, Ambien, Lunesta, Topamax, Depakote, Zoloft and Cogentin. (Exhibit 8)
5. Appellant's behaviors include elopement, aggression (hitting, kicking grabbing, touching), self-injurious behaviors, such as head banging, and non-compliance. Appellant has limited verbal skills. (Exhibit 4, p 53; Testimony)
6. Appellant has private insurance through ██████████. (Exhibit A, p 5)
7. Appellant lives at home with her parents and her twin brother, who does not have any special needs. (Exhibit A, p 31; Testimony)
8. Appellant was last hospitalized in ██████████ for ten days. During the hospitalization Appellant was evaluated for medical conditions, iatrogenic conditions, medication options, and behavior management options. (Exhibit 3, p 38; Testimony)
9. Appellant attends ██████████ for Autistic Children, Monday through Friday, 7:00 am to 4:00 pm, during the school year. (Exhibit A, p 8; Testimony)
10. Appellant has been receiving services through The ██████████ (TGC) for 7-8 years. Current authorized services include 8 hours per day of home care when Appellant is in school more than 25 hours per week, 14 hours per day of home care when Appellant is not in school more than 25 hours per week and 96 hours of respite each month. (Exhibit A, p 32; Testimony)
11. Beginning in ██████████, Appellant's parents requested residential placement for Appellant due to her ongoing behavioral issues. (Exhibit 2; Testimony)
12. CMH denied the request for residential placement because it determined that such placement was not medically necessary and that Appellant's needs could be met in a less restrictive environment. (Exhibit A, p 1; Testimony)
13. On ██████████, CMH sent a notice to Appellant's parents notifying them that their request for residential placement was denied. (Exhibit A, pp 3-4)

14. Appellant's Request for Hearing was received by the Michigan Administrative Hearing System on [REDACTED]. (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...

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. The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures. See 42 CFR 440.230.

The Department's *Medicaid Provider Manual, Mental Health and Substance Abuse Chapter, Sections 2.3, 2.5.C and 2.5.D* provide:

2.3 LOCATION OF SERVICE

Services may be provided at or through PIHP service sites or contractual provider locations. Unless otherwise noted in this manual, PIHPs are encouraged to provide mental health and developmental disabilities services in integrated locations in the community, including the beneficiary's home, according to individual need and clinical appropriateness. For office or site-based services, the location of primary service providers must be within 60 minutes/60 miles in rural areas, and 30 minutes/30 miles in urban areas, from the beneficiary's residence.

* * *

Medicaid does not cover services provided to children with serious emotional disturbance in Child Caring Institutions (CCI) unless it is for the purpose of transitioning a child out of an institutional setting (CCI).

* * *

Medicaid does cover services provided to children with developmental disabilities in a CCI that exclusively serves children with developmental disabilities, and has an enforced policy of prohibiting staff use of seclusion and restraint.

Medicaid does not cover services provided to persons/children involuntarily residing in non-medical public facilities (such as jails, prisons or juvenile detention facilities).

2.5.C. SUPPORTS, SERVICES AND TREATMENT AUTHORIZED BY THE PIHP

Supports, services, and treatment authorized by the PIHP must be:

- Delivered in accordance with federal and state standards for timeliness in a location that is accessible to the beneficiary; and
- Responsive to particular needs of multi-cultural populations and furnished in a culturally relevant manner; and
- Responsive to the particular needs of beneficiaries with sensory or mobility impairments and provided with the necessary accommodations; and
- Provided in the least restrictive, most integrated setting. Inpatient, licensed residential or other segregated settings shall be used only when less restrictive levels of treatment, service or support have been, for that beneficiary, unsuccessful or cannot be safely provided; and
- Delivered consistent with, where they exist, available research findings, health care practice guidelines, best practices and standards of practice issued by professionally recognized organizations or government agencies. (Emphasis added)

2.5.D. PIHP DECISIONS

Using criteria for medical necessity, a PIHP may:

Deny services that are:

- deemed ineffective 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.

*Medicaid Provider Manual
Mental Health and Substance Abuse Chapter
January 1, 2013, pages 9-10, 13-14*

The Department witnesses testified that they can provide the same services as a residential program in a less restrictive environment, namely the child's home. The Department witnesses also indicated that The ██████████ (TGC), through which Appellant receives services, has taken the following steps to address Appellant's family's concerns:

1. Appellant has been assigned a new treatment team, including a new Occupational Therapist (OT), Psychologist, Case Manager and Speech Therapist (ST), in order to bring a fresh perspective to Appellant's case.
2. Services are now provided in the Appellant's home to address a concern the family had about Appellant being seen at TGC.
3. Appellant's new psychologist is a Board Certified Behavior Analyst, who is approaching Appellant's behavioral issues from that perspective and has offered to train the parents and staff in techniques to support Appellant in the home and in the community.
4. The OT and ST can demonstrate techniques to both parents and work with them as they support their child in the family home.
5. TGC offered Appellant's family specialized respite via a newly contracted provider.
6. A Sensory Room is being developed in the family home, which will give more options for Sensory Integration Training in the family home to address behavior while allowing Appellant to receive services at home as opposed to in a clinical setting, where Appellant has struggled.
7. TGC has proposed training CLS staff and the family in Applied Behavior Analysis (ABA) to assist with Appellant's behaviors in the home.

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In response to the changes offered by TGC, and outlined above, Appellant's mother testified that:

1. The new OT and ST started in ██████████, but they are young, inexperienced, and unable to deal effectively with Appellant's significant needs and behaviors. The new psychologist started in ██████████, which Appellant's mother believed was too close to the time of the hearing, and followed the submission of a report written by the prior psychologist who supported the request for residential placement. (Exhibit 8) The new psychologist was also not experienced enough and she was not offering anything different than the previous psychologist, who had worked with Appellant for many years.
2. Appellant's mother never expressed any reluctance for Appellant to receive services at TGC, rather, TGC staff stopped Appellant from receiving services there because of Appellant's behaviors. Appellant's mother was the one who advocated for Appellant to receive services at home once TGC refused to allow Appellant to receive services at the clinic.
3. Appellant's new psychologist has yet to do anything different with regard to Appellant's behaviors. The new psychologist was approved in ██████████, but did not start until ██████████. The new psychologist is supposed to come to the home twice monthly, but this has yet to happen. Information from the workers who are with Appellant every day is not getting to the psychologist on a regular basis.
4. The new OT and ST come once per week but they have not provided any training to the family or the staff on how to better work with Appellant.
5. Specialized respite was declined at the time because Appellant's mother did not think it was the best thing for Appellant, which is what the family is seeking.
6. The Sensory Room was approved in ██████████ and Appellant's mother provided TGC with a list of requested equipment in ██████████. In ██████████, some ██████████ months later, Appellant's mother received a notice from the Department that the requested equipment was denied and that she would need to file a separate appeal to contest the denial.
7. The family is willing to be trained in ABA, but the staff that TGC sends out is only minimally trained. Appellant's mother indicated that staff has stolen from the home and made numerous inappropriate comments regarding drug use and prostitution. Appellant's mother also indicated that one of the workers tried to sell her food stamps. Appellant's mother indicated that she is very concerned about staff's inappropriate conduct, especially in front of her ██████████ year old son, but that she has to be very careful because if she complains too much, she knows the family will be left with staff shortages overall.

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Appellant's mother testified that she believes staff in a residential setting would be better trained to deal with Appellant's significant needs and that while she agrees in general with the Department's philosophy to treat persons in their own homes, that philosophy does not meet Appellant's needs. Appellant's mother indicated that the family has to keep the water shut off in the home because Appellant has flooded rooms in the past, has to have a padlock on the refrigerator, and locks on all of the doors, because of Appellant's behavior. Appellant's mother testified that her breaking point came when her [REDACTED] year old son complained that Appellant was abusing him and asked for it to stop. Appellant's mother indicated that in a residential setting, ABA trained technicians would be with Appellant at all times.

Appellant's mother also submitted numerous letters and reports from medical professionals, who all opined that Appellant would be best treated in a residential setting. (Exhibit 3) Appellant's mother submitted reports and letters from personnel at Appellant's school, who also recommended residential placement for Appellant. (Exhibit 4) Finally, Appellant's mother submitted numerous letters from family and friends who also expressed support for the family's request for residential placement. (Exhibit 5)

Under the Department's medical necessity criteria section, there exists a more clinically appropriate, less restrictive and more integrated setting in the community for Appellant, specifically her own home. Clearly, Appellant's placement in her own home is less restrictive than any residential placement. Furthermore, as noted above, "Inpatient, licensed residential or other segregated settings shall be used only when less restrictive levels of treatment, service or support have been, for that beneficiary, unsuccessful or cannot be safely provided." Here, it appears that the Department is attempting to provide Appellant with extensive in-home services, but the problem lies with the delivery of those services. Appellant's mother raised numerous serious concerns about the staff treating her daughter, both their inability to deal with Appellant's behaviors and their inappropriate behavior towards Appellant and Appellant's brother. There also appear to have been significant time delays in delivering promised services, which need to be addressed. However, at this time, it cannot be said that less restrictive levels of treatment have been unsuccessful or cannot be safely provided. The Department and TGC need to simply do a better job delivering on promises regarding services to Appellant. And while problems with the delivery of services is not the issue in the present appeal, if Appellant has not filed a recipients' rights complaint with the Department regarding the delivery of services, she may wish to do so. With that said, Appellant has been receiving services through TGC for many years, her behaviors are getting worse, and, if things do not improve soon, it could very well be said that treatment in the home is unsuccessful and unsafe.

Furthermore, based on the Department's covered services policy, Section 14 of the Medicaid Provider Manual, long-term residential placement is not a Medicaid covered service under the Children's Waiver. Additionally, long-term residential placement is not a covered service under the Children's Waiver Technical Assistance Manual and it does not appear as a covered service on the Children's Waiver application. And while

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Children's Waiver services are simply an enhancement to regular Medicaid services, which contemplate inpatient services, those services cannot be provided to Appellant at this time through the Children's Waiver because, as discussed above, Appellant does not meet the medical necessity criteria for residential placement.

Finally, the requested residential placement is not a covered service under Medicaid in general because the cost for placement at in a residential setting is billed on a per diem basis, which includes room and board. Since the relevant Medicaid policy does not allow for payment of room and board, rather only Medicaid covered services provided in a CCI for which individuals are eligible, CMH was correct in denying Appellant's request for services on that basis. Services must be provided in the appropriate scope, duration, and intensity to reasonably achieve the purpose of the covered service. The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures. See 42 CFR 440.230.

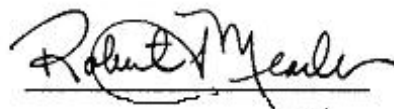
Appellant bears the burden of proving by a preponderance of the evidence that residential placement is a medical necessity in accordance with the Code of Federal Regulations (CFR). Appellant did not meet the burden to establish that such placement is a medical necessity.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH properly denied Appellant's request for residential placement.

IT IS THEREFORE ORDERED that:

The CMH decision is **AFFIRMED**.



Robert J. Meade
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

cc:

Date Signed: 8/26/2013

Date Mailed: 8/26/2013

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***** 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.