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. 2013-56793 CWS

[redacted] [redacted] [redacted]

Appellant

[redacted]/

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.,* 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 Appellant's behalf. [redacted] Appellant's mother also testified on Appellant's behalf.

[redacted], LMSW, Corporate Compliance Officer for [redacted] appeared and testified on behalf of [redacted] an affiliate of [redacted] the PIHP responsible for providing Medicaid covered services to the Appellant (Department). [redacted] LMSW, Developmentally Disabled Services Supervisor for [redacted] [redacted] appeared as a witness for the Department.

ISSUE

Did the Department properly determine that there should be a reduction in the Appellant's Community Living Supports from [redacted] hour per week down to [redacted] hours per week?

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. (Exhibit A, p. 1 and testimony).

2. The Appellant is currently receiving services through the MDCH Children's Waiver Program (CWP). (Exhibit A, p. 1 and testimony).

3. The Appellant is a [redacted]-year-old male ([redacted] who resides in a private residence with his natural family in [redacted], Michigan. (Exhibit A, Attachment 1, p.1 and testimony).

4. The Appellant is diagnosed with autism with subsequent delays in age appropriate communication skills, social skills, independence with ADLS, sensory processing, self-regulatory skills, and insight into safety. Appellant exhibits challenging behaviors of physical aggression, property destruction, and self-injury. (Exhibit A, Attachment 1, p. 3 and testimony).

5. The Appellant attends a special education program full-time, including [redacted]-weeks of summer school, at [redacted] and the [redacted] (Exhibit A, Attachment 1, pp. 1, 5, 8 and testimony).

6. In the [redacted] Treatment Plan for the Appellant, the Department determined to reduce Appellant's CLS hours to [redacted] hours per week, to continue the authorization of [redacted] Respite hours per week, and to continue the current authorizations for occupational therapy, speech-language therapy, and applied behavior analysis services. The current authorization for therapeutic toys and personal care items, covered by the CWP would also remain the same. (Exhibit A, Attachment 6, p. 2 and testimony).

7. On [redacted], the Michigan Administrative Hearing System received the Appellant's request for an administrative hearing. (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.

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) Medicaid Managed Specialty Services and Supports program waiver in conjunction with section 1915(c) Home and Community Based Services Waivers. Summit Pointe CMH (PIHP/CMH) contracts with the Michigan Department of Community Health to provide services under the CWP.

At issue in this case is the Department's determination that there should be a reduction in the Appellant's Community Living Supports from 44 hour per week down to 20 hours per week. The

Medicaid Provider Manual, Mental Health and Substance Abuse Services chapter, Section 14 gives a description of Children's Home and Community Based Services Waiver Program (CWP). This section states in part:

> **Section 14**
>
> 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.
>
> * * *
>
> **Section 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.
>
> *Medicaid Provider Manual (MPM)*
> *Mental Health and Substance Abuse Services*
> Section 14, April 1, 2013, p. 77.

The Department must follow the Medicaid Provider Manual when approving mental health services to an applicant, and the Department must apply the medical necessity criteria found within the Medicaid Provider Manual. The Department's *Medicaid Provider Manual, Mental Health and Substance Abuse, Medical Necessity Criteria, October 1, 2012, Section 2.5* lists the criteria as follows:

> **2.5.A. Medical Necessity Criteria**
>
> Mental health, developmental disabilities, and substance abuse services are supports, services and treatment:
>
> - Necessary for screening and assessing the presence of a mental illness, developmental disability or substance use disorder; and/or
> - Required to identify and evaluate a mental illness, developmental disability or substance use disorder; and/or
> - Intended to treat, ameliorate, diminish or stabilize the symptoms of mental illness, developmental disability or substance use disorder; and/or
> - Expected to arrest or delay the progression of a mental illness, developmental disability, or substance use disorder; and/or
> - Designed to assist the beneficiary to attain or maintain a sufficient level of functioning in order to achieve his goals of community inclusion and participation, independence, recovery, or productivity.

2.5.B. DETERMINATION CRITERIA

The determination of a medically necessary support, service or treatment must be:

- Based on information provided by the beneficiary, beneficiary's family, and/or other
- individuals (e.g., friends, personal assistants/aides) who know the beneficiary;
- Based on clinical information from the beneficiary's primary care physician or health care professionals with relevant qualifications who have evaluated the beneficiary;
- For beneficiaries with mental illness or developmental disabilities, based on person centered planning, and for beneficiaries with substance use disorders, individualized treatment planning;
- Made by appropriately trained mental health, developmental disabilities, or substance
- abuse professionals with sufficient clinical experience;
- Made within federal and state standards for timeliness;
- Sufficient in amount, scope and duration of the service(s) to reasonably achieve its/their purpose; and
- Documented in the individual plan of service.

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;
- Responsive to particular needs of multi-cultural populations and furnished in a culturally relevant manner;
- Responsive to the particular needs of beneficiaries with sensory or mobility impairments and provided with the necessary accommodations;
- 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.

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. [pp. 12-14].

The waiver services available under the CWP are contained in Section 14.3 which states in part:

14.3 COVERED WAIVER SERVICES

Covered Medicaid services that continue to be available to CWP beneficiaries are listed in the Covered Services Section of this chapter. Refer to the Children's Waiver Community Living Support Services Appendix of this chapter for criteria for determining number of hours. Services covered under CWP include:

Community Living Supports

Community Living Supports (CLS) provides assistance to a family in the care of their child while facilitating the child's independence and integration into the community. This service provides skill development related to activities of daily living, such as bathing, eating, dressing, personal hygiene, household chores and safety skills; skill development to achieve or maintain mobility, sensory-motor, communication, socialization and relationship-building skills, and participation in leisure and community activities. These supports must be provided directly to, or on behalf of, the child. The supports, as identified in the individual plan of services, are provided in the child's home and may be provided in community settings when integration into the community is an identified goal. These supports may serve to reinforce skills or lessons taught in school, therapy or other settings, but are not intended to supplant services provided in school or other settings.

Medicaid Provider Manual,
Mental Health and Substance Abuse Services
Section 14.3 Covered Waiver Services, April 1, 2013, p. 78.

The *Medicaid Provider Manual*, *Children's Waiver Community Living Support Services Appendix*, April 1, 2013 version, sets forth the criteria for determining the number of CLS hours a CWP waiver beneficiary is entitled to receive. The Appendix states in part:

SECTION 1 - CHILDREN WITH CHALLENGING BEHAVIORS

1.1 PURPOSE

This Section is to help the CMHSP determine whether the challenging behavioral needs of the child support hourly care and other support services, and to determine the appropriate range of hourly care that can be authorized under the Community Living Support (CLS) waiver service. The following categories do not, in and of themselves, establish eligibility for publicly funded hourly care.

The amount of CLS services (i.e., the number of hours) that can be authorized for a child is based on several factors, including the child's care needs which establish waiver eligibility, child's and family's circumstances, and other resources for daily care (e.g., private health insurance, trusts bequests, private pay). In addition to identifying the family situation and the specific behaviors as described in the category definitions, the following elements contribute to the overall assessment of need:

- Type of behaviors identified;
- Frequency, intensity, and duration of identified behaviors;
- How recently serious behaviors occurred;
- Actual specific effects of the behavior on persons in family and property;
- Level of family intervention required to prevent behavioral episodes;
- Extent to which family must alter normal routine to address behavioral needs of the child;
- Prognosis for change in the child's behavior;
- Whether or not child functions more effectively in any current setting than in other settings; and
- Age, size, and mobility of child.

1.2 CATEGORIES OF CARE

1.2.A. CATEGORY IV

Qualifications

Demonstrates mild level behaviors that may interfere with the daily routine of the family.

Definitions

Mild Behavior: Infrequent or intermittent behaviors including pinching, hitting, slapping, kicking, head banging, and/or elopement without careful supervision when there is evidence of lack of judgment regarding danger, or an extremely high activity level requiring extensive supervision and redirection.

* * *

1.2.C. CATEGORY II

Qualifications

Demonstrates a daily pattern of moderate self-injurious, physically aggressive or assaultive behavior when medical intervention or emergency room treatment has been required for treatment of injuries in the past year without resulting hospitalization, or if the child has engaged in frequent, significant property destruction that is not life threatening.

Definitions

Moderate Behavior: Includes behaviors that pose a significant risk of injury to self or others in the immediate environment. Examples include physical assault or self-abuse resulting in injuries requiring hospital emergency room treatment without hospital admission in the past year, biting that breaks the skin, hair pulling resulting in removal of clumps of hair from the scalp, multiple daily episodes of smearing feces with associated PICA, and head banging resulting in documented concussion or detached retina.

SECTION 3 – COVERAGE DECISIONS

3.1 DECISION RESPONSIBILITY

The MDCH Children's Waiver Review Team will continue to review all plans of service and current assessments, and prior authorize waiver services, for those children who:

- Qualify for Category of Care I; or
- Any child who has been approved to receive additional CLS hours under the exception process.

The responsible CMHSP, following the Children's Waiver Decision Guide in the following subsection, will review and prior authorize waiver services for those Children's Waiver beneficiaries who are determined to qualify for Categories II, III, or IV.

3.2 DECISION GUIDE

The determination of the amount of hourly care should result from a person-centered planning/family centered practice process that considers both the child's and family's needs. The Children's Waiver Decision Guide Table below assists in identifying the range of hours provided for children based on their category of care and the family's resources to provide that care. It is expected that hourly care services will be provided within the range for which the child qualifies. Within the four Categories of Care are five sections that apply to the child's family status. In determining the total number of hours, it is acceptable to use the highest range within the appropriate section of the eligible category. If the child is receiving Home Help services, those hours must be considered as part of the total hours allowable. For example, a child determined to have Category III level of care needs is eligible for a maximum of six hours a day while in school. If that child receives two hours per day of Home Help, CWP could then provide a maximum of four hours of CLS staffing per day. The range of hours identified in the guide is an average daily amount that is provided seven days a week, based on a monthly total authorization.

If the child is attending school an average of 25 hours per week, the Section VI maximum would apply unless the maximum exceeds the range qualified for in Sections I-V. In that case, the maximum range in Sections I-V would apply. The Section VI maximum would not be required during school breaks, such as Christmas, Easter, and summer vacations, or if the child is out of school due to illness for 5 or more consecutive days.

CHILDREN'S WAVER DECISION GUIDE TABLE				
ADDITIONAL FAMILY RESOURCES	**DOCUMENTED CATEGORY OF NEED FOR HOURLY CARE AUTHORIZATON**			
	CATEGORY IV	**CATEGORY III**	**CATEGORY II**	**CATEGORY I**
Section I – Number of Caregivers				
1. Two or more caregivers live in home; both work F/T	4 – 8	6 – 10	8 - 12	12 - 16
2. Two adult caregivers; one works F/T	2 - 8	2 - 8	4 - 10	10 - 16
3. Two adult caregivers; neither is employed	2 - 4	2 - 6	4 - 8	8 - 12
4. One adult caregiver lives in home and works F/T	4 – 8	4 – 10	8 - 12	12 - 16
5. One adult caregiver; does not work F/T	2 - 6	2 - 8	8 - 10	10 - 14
Section II – Health Status of Caregivers				
1. Significant health issues	6 - 8	6 - 10	10 - 14	12 - 16
2. Some health issues	4 - 6	4 - 8	8 - 12	10 - 12
Section III – Additional Dependent Children				
1. Applicant has one or more siblings age 5 or older	2 - 4	2 - 6	4 - 8	8 - 12
2. Applicant has one or more siblings under age 5	4 - 6	4 - 8	6 - 8	8 - 12
Section IV – Additional Children with Special Needs				
1. Applicant has one or more siblings with nursing needs	4 - 8	6 - 8	4 - 8	8 - 12
2. Applicant has one or more siblings with non-nursing special needs	2 - 4	2 - 6	N/A	N/A
Section V – Night Interventions				
1. Requires 2 or fewer interventions at night or total time less than one hour	2 - 4	2 - 6	4 - 8	8 - 12
2. Requires 3 or more interventions requiring one hour or more to complete	4 - 8	6 - 8	6 - 10	8 - 12
Section VI – School				
1. Child attends school an average of 25 hours per week	6 max	6 max	8 max	12 max

3.3 DECISION GUIDE TABLE DEFINITIONS

The definitions used in each section of the Decision Guide Table are as follows:

SECTION

DEFINITIONS

I – Number of Caregivers

Caregiver is defined as a legally responsible adult(s) living in the home or adult(s) who is not legally responsible but chooses to participate in providing care for the child.

Full-Time (F/T) is defined as a person who works 30 or more hours per week for wages, or a person who attends school 30 or more hours per week.

II – Health Status of Caregivers

Significant health concerns of a caregiver is defined as one or more of the primary caregivers have a significant health or emotional condition which prevents that caregiver from providing care for the child. Example: A parent that recently had back surgery with full body cast or similar condition.

Some health concerns of a caregiver is defined as one or more primary caregivers (as defined above) have a health or emotional condition that interferes with, but does not prevent, provision of care. Examples: Alcoholism, depression, lupus, back pain when lifting, lifting restrictions and similar health concerns; or primary caregiver is in therapy three or more times per month.

SECTION

DEFINITIONS

III – Additional Dependent Children

This section applies when the child has one or more siblings or related individuals under age 18, who reside in the home full-time and the caregiver is not paid for providing care.

IV – Additional Children With Special Needs

Additional special needs are identified when the child has one or more siblings or related individuals who reside in the home and do not currently receive hourly care supports.

Siblings with nursing needs are children who meet the criteria for Intensity of Care-High or Intensity of Care-Medium (refer to the Additional Mental Health Services (B3s) Section of this chapter), whether or not those children are developmentally disabled.

Siblings without skilled nursing needs are children with needs as identified in Category of Care I-IV definitions.

V – Night Interventions

If the child requires one or two interventions at night and the time required to complete the interventions is one hour or less, Section V-1 applies.

If the child requires an average of three or more interventions per night, or the time required to complete the interventions is more than one hour, Section V-2 applies.

VI – School

Average hours of school should be used to determine the appropriate range of hours. Include transportation time if provided by the school.

The number of hours of school attendance is based on the school year that applies to the child's educational classification. Variations in hours may be seen for children without a summer program.

This factor limits the maximum number of hours that can be authorized for a child of any age in a center-based school program for more than 25 hours per week, or a child who has reached the age of 6 and for whom there is no medical justification for a home-bound school program.

The school maximum is also waived for that time period when a child is out of school for at least 5 consecutive days due to illness, surgery, or scheduled school breaks. *Medicaid Provider Manual*, *Children's Waiver Community Living Support Services Appendix,* April 1, 2013, pp. A1-A7.

The Department's witnesses demonstrated the Appellant is currently receiving Medicaid covered services under the Children's Waiver Program (CWP) through Northcare the PIHP covering the Appellant's service area. The Department's witnesses established that the Appellant was authorized the following Medicaid Services: a Supports Coordinator, [redacted] CLS hours per week, psychiatric and psychological services, [redacted] Respite hours per week, occupational therapy, speech-language therapy, applied behavior analysis services, and therapeutic toys and personal care items covered by the CWP.

The Department's witnesses established they had worked with the Appellant's parents through the person centered planning process in [redacted] to develop a new treatment program for the Appellant. The Department determined to reduce the Appellant's CLS to [redacted] hours per week and

to keep the remainder of the Appellant's Medicaid covered services at their previous levels. The Department established they had provided increased services to address the Appellant's challenging aggressive behaviors over the past year and a half, and the Appellant has shown significant improvement in target behaviors.

The Department demonstrated that Medical Necessity no longer exists to maintain the CLS services at [redacted] hours per week. Using person centered planning and utilizing the expertise of appropriately trained mental health and development disabilities professionals, it was determined that the reduction in CLS services to [redacted] hours per week would be sufficient in amount, scope, and duration to meet the Appellant's current needs. A review of the CLS workers logs showed that many of the hours of service had shifted from focusing on active treatment (services designed to provide skill development related to the Appellant's activities of daily living), to that of providing services more in the nature of respite services, which are to be provided only on an intermittent or short-term basis because of the absence or need for relief of the parent. In short, the CLS workers had begun to take over the role of the parents and had in part abandoned their role as treatment providers. Accordingly, their actions provide support for a reduction in the number of CLS hours that are medically necessary in this case. Furthermore, utilizing the decision guide found in the Children's Waiver Community Living Support Services Appendix quoted above, the [redacted] hours per week are in excess of the maximum CLS hours allowed for Appellant (determined to be a Category IV child attending school an average of [redacted] hours per week by the appropriately trained mental health and development disabilities professionals assigned to his case).

The Appellant's parents testified that Appellant was extremely aggressive to the point that about one and a half years ago they requested out-of-home placement. When the Department could not authorize such a placement the services were increased and at one point Appellant had two-workers to deal with his challenging behaviors. The parents indicated that eventually things were going better, and the Appellant's behavior got a lot better. The parents indicated that after Appellant's behaviors improved the Department recommended a reduction in CLS hours. The Appellant's parent's indicated they did not believe that this was a good idea, to change things now that things have improved.

The parent's indicated that the Appellant is doing pretty well now, but he is still unable to speak, is not potty trained, he can't dress himself, he understands very little, he can't be left alone, and he has elopement issues. They indicated Appellant is a severely impaired [redacted] year old, whose behaviors can be unpredictable. They believe that without one-on-one coverage the Appellant is not safe. The parent's indicated the Appellant's mother does not work and is his full-time caregiver when staff is not present, and the Appellant's father works the afternoon shift, so he is not home to help out when the Appellant is home from school. They indicated the Appellant can't be taken out into the community without CLS staff being present.

The Appellant's parents want the staffing levels to remain at the [redacted] hours per week, which they believe will allow time for the Appellant to work on his daily living skills that are set forth in his person centered plan. They indicated the Appellant needs to work on his communication skills, and they believe his skills regress when he is without CLS staff support. The parents indicated

the Appellant needs [redacted] hour care as he gets up in the night. They indicated he also has a seizure disorder. The parents further indicated the Appellant needs to be monitored for safety concerns.

The trained mental health and development disabilities professionals assigned to the Appellant's case have demonstrated that medical necessity no longer exists for the enhance level of CLS services provided to the Appellant over the past year and a half. The reduction to [redacted] hours per week, along with all the other Medicaid covered services being provided, is sufficient in amount, scope, and duration to meet the Appellant's current needs as demonstrated by the Appellant's marked improvement in behaviors that even the Appellant's parents agree has occurred. Based on the information presently available to the Department, their decision to reduce CLS hours in this case is proper under federal law and state policy.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly determined that there should be a reduction in the Appellant's Community Living Supports from 44 hour per week down to [redacted] hours per week.

IT IS THEREFORE ORDERED THAT:

The Department's decision is AFFIRMED.

William D Bond

William D. Bond
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

Date Signed: [redacted]
Date Mailed: [redacted]

WDB/db

cc: [redacted]

***** NOTICE *****

The Administrative Tribunal 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 Administrative Tribunal 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.