STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P. O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax (517) 373-4147

IN THE MATTER OF:

Docket No. 14-013987 CMH

[redacted] [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 [redacted], Appellant's co-guardian appeared on behalf of the Appellant.

[redacted], Due Process Manager, appeared on behalf of [redacted] County Community Mental Health Authority (CMH), representing the Department. [redacted], [redacted]) Supports Coordinator Supervisor, appeared as a witness for the Department.

ISSUE

Did CMH properly reduce 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. Appellant was a [redacted]-year-old Medicaid beneficiary (DOB [redacted]) at the time of the hearing. (Exhibit A, p. 4).

2. [redacted] Community Mental Health (CMH) is responsible for providing Medicaid-covered mental health and developmental disability services to eligible recipients in its service area.

3. Appellant receives Medicaid covered services under the HAB waiver, including Supports Coordination, Community Living Supports (CLS) - [redacted] hours per week, [redacted] hour that were authorized on a temporary basis to provide person care pending the process of reattaining AHH services),

CLS mileage - [redacted] miles per month, Private Duty Nursing – [redacted] hours per day, and Private Duty Nursing Respite – [redacted] hours per week. (Exhibit A, pp. 1, 5).

4. On [redacted] issued a notice that contained a reduction in the amount of CLS authorized for the Appellant. At issue is the reduction in CLS hours from [redacted] hours per week down to [redacted] hours per week. The notice stated the [redacted] hours CLS temporarily authorized until Appellant's Adult Home Help (AHH) assessment was completed was being terminated effective 1[redacted] as the AHH assessment was done on [redacted] (Exhibit A, pp. 1, 2-3 and testimony).

5. On [redacted], MAHS received the Appellant's Request for 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.

> 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) Medicaid Managed Specialty Services waiver. Kalamazoo County Community Mental Health (CMH) contracts with the Michigan Department of Community Health to provide specialty mental health services. Services are provided by CMH pursuant to its contract obligations with the Department and in accordance with the federal waiver.

The *Medicaid Provider Manual*, *Mental Health/Substance Abuse*, July 1, 2014 specifies what supports and services are available for persons such as the Appellant. It states in pertinent part:

> **SECTION 17 – ADDITIONAL MENTAL HEALTH SERVICES (B3s) [Change Made 7/1/14]**
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> PIHPs must make certain Medicaid-funded mental health supports and services available, in addition to the Medicaid State Plan Specialty Supports and Services or Habilitation Waiver Services, through the authority of 1915(b)(3) of the Social Security Act (hereafter referred to as B3s). The intent of B3 supports and services is to fund medically necessary supports and services that promote community inclusion and participation, independence, and/or productivity when identified in the individual plan of service as one or more goals developed during person-centered planning. NOTE: Certain services found in this section are State Plan EPSDT services when delivered to children birth-21 years, which include community living supports, family support and training (Parent-to-Parent/Parent Support Partner) peer-delivered services, prevention/direct models of parent education and services for children of adults with mental illness, skill building, supports coordination, and supported employment. **(text added 7/1/14)**
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> **17.1 DEFINITIONS OF GOALS THAT MEET THE INTENTS AND PURPOSE OF B3 SUPPORTS AND SERVICES [Change Made 7/1/14]**
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> 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, or case manager, no matter how well intentioned. The services in the plan, whether B3 supports and services alone, or in combination with state plan or Habilitation Supports Waiver services, must reasonably be expected to achieve the goals and intended outcomes identified. The configuration of supports and services should assist the individual to attain outcomes that are typical in his community; and without such services and supports, would be impossible to attain.

Community Inclusion and Participation

The individual uses community services and participates in community activities in the same manner as the typical community citizen.

Examples are recreation (parks, movies, concerts, sporting events, arts classes, etc.), shopping, socialization (visiting friends, attending club meetings, dining out) and civic (volunteering, voting, attending governmental meetings, etc.) activities. A beneficiary's use of, and participation in, community activities are expected to be integrated with that of the typical citizen's (e.g., the beneficiary would attend an "integrated" yoga class at the community center rather than a special yoga class for persons with intellectual disability).

Independence

"Freedom from another's influence, control and determination." (Webster's New World College Dictionary, 1996). Independence in the B3 context means how the individual defines the extent of such freedom for him/herself during person-centered planning.

For example, to some beneficiaries, "freedom" could be living on their own, controlling their own budget, choosing an apartment as well as the persons who will live there with them, or getting around the community on their own. To others, "freedom" could be control over what and when to eat, what and when to watch television, when and how to bathe, or when to go to bed and arise. For children under 18 years old, independence may mean the support given by parents and others to help children achieve the skills they need to be successful in school, enter adulthood and live independently.

Productivity

Engaged in activities that result in or lead to maintenance of or increased self sufficiency. Those activities are typically going to school and work. The operational definition of productivity for an individual may be influenced by age-appropriateness.

For example, a person who is 76 years old may choose to volunteer or participate in other community or senior center activities rather than have any productivity goals. For children under the age of five years, productivity may be successful participation in home, pre-school, or child care activities. Children under 18 would be expected to attend school, but may choose to work in addition. In order to use B3 supports and services, individuals would be expected to prepare for, or go to, school or work in the same places that the typical citizen uses.

17.2 CRITERIA FOR AUTHORIZING B3 SUPPORTS AND SERVICES

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) 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.

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.

17.3 B3 SUPPORTS AND SERVICES

The B3 supports and services defined below are the supports and services that PIHPs are to provide from their Medicaid capitation. [pp. 117-118].

* * *

17.3.B. COMMUNITY LIVING SUPPORTS [Change Made 7/1/14]

NOTE: This service is a State Plan EPSDT service when delivered to children birth-21 years. **(text added 7/1/14)**

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.
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> 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 the DHS's allowable parameters. CLS may also be used for those activities while the beneficiary awaits the decision from a 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. (Emphasis added). [pp. 120-121].

In this case, it is undisputed that CLS services are medically necessary for the Appellant. On [redacted] issued a notice that contained a reduction in the amount of CLS authorized for the Appellant. At issue is the reduction in CLS hours from [redacted] hours per week down to [redacted] hours per week. The notice stated the [redacted] hours CLS temporarily authorized until Appellant's AHH assessment was completed was being terminated effective 1[redacted] as the AHH assessment was done on [redacted]

The witness for CMH, [redacted], [redacted] Supports Coordination Supervisor, testified that there was an assessment completed on [redacted] in connection with the Appellant's request for AHH services. [redacted] said they had been providing [redacted] hours of Community Living Supports (CLS) pending the decision on the AHH services. She stated after learning that an assessment had been done they determined that they would end the additional [redacted] hours of CLS services, effective [redacted], that were authorized on a temporary basis while the Appellant was awaiting a determination by DHS on his request for AHH services. [redacted] further testified CLS may be used to complement an authorization of AHH services by DHS if there are personal care needs not covered by the AHH. Appellant was notified by phone and email on [redacted] that the additional [redacted] hours would no longer be authorized, and an Advance Action Notice was sent to the Appellant on [redacted] stated they have not received any notification from DHS regarding a determination on the Appellant's request for AAH services.

Appellant's representative declined to present any testimony. However, a [redacted] page response to the Respondent's Hearing Summary was admitted into the record as Exhibit 2.

The Appellant bears the burden of proving by a preponderance of the evidence that additional units of CLS services should remain in effect. The Respondent's witness

provided testimony that the additional [redacted] hours of CLS where to be ended effective [redacted] as there had be an AHH services assessment on [redacted]. The proposed termination was despite the fact that she testified that they have not received any notification from DHS regarding a determination on "the amount, scope and duration of Home Help or Expanded Home Help" authorized for the Appellant's benefit.

The policy quoted above states in pertinent part: "CLS may be used for those activities (personal care) 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." (Emphasis added). Despite the clear language in the policy, [redacted], the CMH's contractor for CLS services, decided to terminate the additional CLS hours when they learned of an assessment being done, but before there had been any determination on the amount, scope and duration of Home Help or Expanded Home Help to be authorized for the Appellant's benefit by DHS.

Respondent argues in part that the additional hours had been authorized for over a year while waiting to have the Appellant's AHH services reauthorized, and that they could no longer support the additional authorization. They suggest that that there had been an unreasonable delay in the process, however, the relevant policy from the Medicaid Provider Manual doers not place any time limits on how long the authorization for additional CLS can continue, except to say "while the beneficiary awaits determination by DHS of the amount, scope and duration of Home Help or Expanded Home Help."

The CMH must authorize CLS services in accordance with the CFR and state policy. The policy in the Medicaid Provider Manual is clear that additional CLS hours may be used for personal care while the Appellant awaits the DHS determination on AHH services. Accordingly, the Appellant has proven by a preponderance of the evidence that the additional units of CLS services should remain in effect. The preponderance of the evidence demonstrates that CMH failed to follow the plain language in the Medicaid policy when it sought to terminate the additional [redacted] CLS hours per week, effective [redacted], prior to a determination by DHS on the authorization of AHH services for the Appellant.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds that CMH acted improperly when it reduced Appellant's Community Living Supports (CLS).

IT IS THEREFORE ORDERED that:

The CMH's decision is REVERSED.

William D. Bond
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

Date Signed: [redacted]

Date Mailed [redacted]

WDB/db

cc: [redacted]

***** 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.