BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

D.H.,	:	
	:	
Petitioner,	:	**Docket No.:**
	:	**OSAH-DCH-ICWP-__________-56-**
v.	:	**Schroer**
	:	
DEPARTMENT OF COMMUNITY HEALTH,	:	
	:	
	:	
Respondent.	:	

INITIAL DECISION

I. INTRODUCTION

The hearing in this matter was held on September 25, 2013,[1] before the undersigned administrative law judge of the Office of State Administrative Hearings. The hearing's purpose was to resolve two disputed factual issues as set forth in the April 9, 2013 *Order Denying Cross-Motions for Summary Determination* ("April 9 Order"), which is incorporated herein by reference. Specifically, the two outstanding issues were (i) whether Petitioner D.H. is "cognitively alert,"[2] an eligibility requirement for Level III Personal Support Services under the Independent Care Waiver Program ("ICWP"), and (ii) whether H. can safely receive care at home. D.H. was represented at the hearing by his mother and legal guardian, V.H., and Jessica Felfoldi, Esq. Respondent Department of Community Health ("DCH" or "Department") was represented at the hearing by Fatih A. Lengerli, Esq.

For the reasons set forth below and in the April 9 Order, the Department's denial is hereby **REVERSED and REMANDED**.

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[1] The parties submitted written closing arguments on October 10, 2013.

[2] Although the Application for a § 1915(c) Home and Community Based Services Waiver ("Waiver") uses the phrase "cognitive alert," this appears to be a typographical error and the parties agreed that the intended phraseology is "cognitively alert." (*Waiver, Exhibit P-3, Appendix C*.)

II. PROCEDURAL BACKGROUND

On August 23, 2012, DCH denied D.H.'s ICWP application, and D.H. filed an appeal on September 10, 2012. DCH referred the matter to OSAH on October 26, 2012, and the parties jointly requested that the Court consider cross-motions for summary determination in lieu of scheduling an evidentiary hearing. However, upon consideration of the cross-motions, as well as the legal arguments of counsel, the Court ruled in the April 9 Order that summary determination was not proper as there remained issues of disputed material facts. Specifically, the Court made the following rulings:

1) Georgia's approved Waiver governs the ICWP and trumps any conflicting provisions in the Department's Policy and Procedures for Independent Care Waiver Services Manual ("Manual").

2) Self-direction of care is an optional service delivery method under the ICWP, and the ability to self-direct is not an eligibility criterion for the program.

3) Self-direction under the Waiver includes direction of services by either the individual *or* his or her representative.

4) D.H. must meet the eligibility criteria for the ICWP services he requested in order to be generally eligible for entry into the program. Specifically, D.H. must be cognitively alert in order to meet the service specifications for Personal Support Services Level III.

5) The inability to communicate is not a *per se* disqualification for ICWP and does not automatically render placement in the home unsafe.

Although the April 9 Order set the matter for an evidentiary hearing on April 29, 2013, DCH requested a continuance, stating that "[t]he only person qualified to make [the determination of whether Petitioner is cognitively alert] is a Neurologist." The Court granted DCH's continuance request, as well as three additional continuance requests, to allow DCH to

arrange for D.H. to be assessed by a neurologist on the question of cognitive alertness. Notwithstanding these requests, at the beginning of the September 25 evidentiary hearing, DCH informed the Court that D.H. had not been assessed by a neurologist due to various scheduling mishaps.

II. FINDINGS OF FACT

A. D.H.'S Background and Medical Condition

1.

D.H. is a thirty-one-year-old father of three. During a vasectomy on February 15, 2010, he went into cardiac arrest, causing him to temporarily lose oxygen to his brain. The resulting anoxic brain damage rendered him non-verbal, non-ambulatory, and totally dependent on others for all of his daily needs. His mother has been his legal guardian since July 30, 2010. (*Testimony of Sonja Leonard, Wound Care Coordinator, Briarcliff Haven Health & Rehab Center; Letters of Guardianship of Adult Ward, Exhibit P-4; Respondent's Motion for Summary Determination, filed January 25, 2013; Petitioner's Cross Motion for Summary Determination, filed January 28, 2013*.)

2.

For a year immediately following his brain injury, D.H. resided in a medical coma at Emory Hospital. Thereafter, he lived in a nursing home in Conyers, Georgia. Due to chronic pulmonary failure and recurrent pneumonia, he was hospitalized several times. On August 13, 2012, he was moved to Briarcliff Haven Health & Rehab Center ("Briarcliff Haven"), a skilled nursing facility, where he has continuously resided through the present time. (*Petitioner's Cross Motion for Summary Determination; Participant Assessment Form, Exhibit P-2*.)

3.

D.H.'s medical condition is now stable and, in fact, has improved significantly since he arrived at Briarcliff Haven. From August 2012 until January 2013, Sonja Leonard was his charge nurse, directly responsible for his care, for overseeing his medication, and for ensuring that his treating nurses were doing their jobs correctly. She and Chaswan Portis, the Social Services Director and Discharge Planner at Briarcliff Haven, both noted significant improvements in his condition. Portis attributes the marked improvement in his condition to his parents' dedicated care. When D.H. first arrived at Briarcliff Haven, he did not open his eyes. By contrast, he is now alert and responsive to his surroundings. In addition, he can now breathe on his own and is no longer ventilator dependent. He also no longer needs an indwelling catheter. (*Testimony of Leonard, Portis, Petitioner's father, W.H., V.H.*)

4.

Although D.H. has demonstrated significant improvement, he has days when he is feeling poorly, and is less alert and responsive. Moreover, he continues to need total care for activities of daily living. For example, he requires continuous feeding via a peg tube; tracheostomy care and suctioning; bathing and grooming; bowel and bladder management; repositioning and range of motion maintenance; and medication administration. He also requires considerable medical equipment, including a hospital bed, a Geri chair, a Hoyer lift, a tube-feeding pump, and has shoe and boot padding. (*Testimony of Leonard, V.H., W.H.; Exhibit P-2.*)

B. <u>H. is Cognitively Alert.</u>

5.

As set forth in the April 9 Order, D.H. must be "cognitively alert" to be eligible for the ICWP services he seeks. Two of the Briarcliff Haven staff members who see H. frequently testified at the administrative hearing regarding D.H.'s cognitive state. First, Leonard testified

regarding indicators of cognition and mental alertness. In her experience, a patient can be awake and have his or her eyes open, yet not be cognitively alert, i.e., aware of his or her surroundings. In a situation where the patient is awake but not cognitively alert, the eyes will wander aimlessly. By contrast, D.H., who she opined is cognitively alert, will track persons with his eyes. If someone walks past his room, he will follow the person with his eyes. If people happen to be conversing in his room, he will look from one speaker to the next as each is speaking, although it not clear whether he understands the content of the conversation. She also testified that his facial expressions communicate pain or discomfort and that he shows signs of anticipating pain.[3] Second, Portis, another Briarcliff Haven staff member, affirmed that D.H. will look at someone who calls his name, will follow people with his eyes, and will respond to both music and television, in the latter situation by looking attentively at the screen. (*Testimony of Leonard, Portis.*)

6.

W. and V.H., Petitioner D.H.'s parents, testified similarly and, given the extensive amount of time they spend with him,[4] were able to provide additional detail and specific examples of their son's mental state. Both testified that D.H. shows a preference for particular people. Specifically, he appears to pay more attention to physically attractive nurses, and he smiles whenever he sees "Eric," a jovial certified nursing assistant. Petitioner is aware of his surroundings and can be startled if approached unexpectedly. When Petitioner is not happy, his parents can tell from his facial expression and from bodily indicators. V.H. relayed an incident

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[3] Leonard also reviewed departmental notes taken by shift nurses from October 2012 through April 2013. These notes indicate times when nurses observed Petitioner to be "alert and responsive" and "alert, awake, and responsive to verbal and physical stimuli," although non-verbal. While Leonard did not personally take any of the notes, she found them to be consistent with her own personal observations of Petitioner's condition. (*Testimony of Leonard; Departmental Notes, Exhibit P-5.*)

[4] See *infra*, at ¶ 12.

where she had inadvertently turned his headset to a non-music channel. Discerning from his demeanor that he was unhappy, she checked his headset and turned the channel to his preferred station, whereupon he ceased showing signs of displeasure. In reaction to discomfort, D.H. jerks his mouth or arm. It may be because his diaper is dirty, he has been in one position for too long, or as happened on one occasion, he had been lying on a bottle of lotion. *(Testimony of W.H., V.H.)*

7.

In addition, W.H. has observed other signs of his son's cognitive abilities. Specifically, D.H. will comply with verbal instructions, such as a request to open his mouth or stick out his tongue. He will also turn his head to help his father shave him and will lift his head up for headphones so he can listen to music. His father has also moved a photograph of D.H.'s daughter from one side of his bed to the other. When cued D.H. will find and look at the picture of his daughter among other pictures of his sons, regardless of which side of the bed his daughter's picture is placed. (*Testimony of W.H.*)

8.

The Department presented no evidence to contradict or draw into question the above observations. Rather, the Department presented testimony of Xan Gatling, the Georgia Medical Care Foundation ("GMCF") nurse who assessed D.H. for inclusion in the ICWP and ultimately made the decision to deny his application. Gatling observed D.H. on two occasions, once in August of 2012 and once in May of 2013. Her observations, which did not last more than an hour on either occasion, did not include extensive attempts to interact with him. Rather, Gatling watched V.H. administer care and observed D.H. open his eyes in response to a tap. She did not attempt to engage him to determine if he was responsive to verbal or tactile stimulation. V.H.

also testified that H. had been feeling poorly on at least one of Gatling's visits, which had a negative effect on his level of alertness. (*Testimony of Gatling, V.H.*)

C. <u>H. can be Served Safely in the Home.</u>

1. Funding in place for equipment and home modification

9.

Briarcliff Haven's goal from the outset of D.H.'s placement there has been to have him leave the facility and live with his parents at home. Portis, the Discharge Planner at Briarcliff Haven, has successfully transitioned similarly-situated persons in the past – in other words, those who are non-verbal, suffer from brain injuries, and are, or have been, trach- and vent-dependent. Portis and D.H.'s parents have been working together to achieve home placement, first, by applying for monetary assistance, and second, by ensuring that his parents are trained, competent, and comfortable in providing for all of his medical and personal care needs. Specifically, on August 7, 2012, Petitioner applied for Money Follows the Person ("MFP"), a Medicaid waiver program that is designed to help disabled persons reside in the community by paying for immediate transition needs, such as housing and equipment. Because MFP funding is transitional and limited to one year, MFP must be used in conjunction with another waiver program for services needed on an ongoing basis. In this instance, MFP initiated D.H.'s ICWP application. Upon his transition home, MFP would cover the cost of necessary equipment for H., such as a Hoyer lift, which could then be used indefinitely. In addition, ICWP offers a one-time grant of $8,000.00 per person for residence modifications. Together, these funding sources would enable his parents to equip their home to accommodate D.H.'s needs. (*Testimony of Portis, Gatling.*)

2. D.H.'s parents are trained in his medical care.

10.

Since D.H.'s injury, W. and V.H. have worked to learn how to provide for his needs should he return home. In working toward this goal, they have received formal and informal training. They, and in some cases their son (D.H.'s brother), were formally trained in (1) tracheostomy care, (2) ventilator care, (3) range-of-motion exercises, (4) wound care, and (5) repositioning. In addition, they also received informal training from his nurse caretakers, who gave them instructions and tips on how to best provide for his care, including how to use a sheet to pull him up and how to turn and wash him. W.H. also sought out additional training by ordering videos online to reinforce knowledge on range of motion exercises. (*Testimony of W.H., V.H., Leonard, Portis.*)

3. D.H.'s parents are experienced in providing all skilled and unskilled care.

11.

In addition to training, D.H.'s parents and brother have become experienced, knowledgeable, and competent in providing for all of his needs, with the exception of medication administration. While the latter must be done by a nurse for the duration of his residency at Briarcliff Haven, his parents are prepared to assume responsibility for that task upon his release. At the hearing, both W. and V.H. clearly articulated (1) the types of tasks necessary for D.H.'s care, (2) how and when such tasks are performed, and (3) the risks associated with improper care. Leonard and Portis attested to D.H.'s parents' competence and dedication in providing excellent care to their son — better care, in fact, than he would receive if attended to by facility nurses alone. (*Testimony of W.H., V.H., Leonard, Portis*.)

12.

Consistent provision of care has solidified W. and V.H.'s caretaking knowledge and skills. W.H. attends to his son three to four hours every day, beginning at approximately 11:30 a.m. V.H. takes over D.H.'s care in the late afternoons and evenings, so that together both parents care for him for approximately eight hours a day. On Saturdays, D.H.'s brother is at Briarcliff Haven providing care. When D.H.'s family members are present, they provide skilled and unskilled care, with the exception of administering medications. Even in relation to medication administration, however, they are knowledgeable about when he will receive his medications and how to prepare him appropriately. (*Testimony of W.H., V.H.*)

13.

As a result of providing such regular care for D.H., his parents have become attuned to his needs. They can discern from D.H.'s facial and bodily cues when he is distressed and respond appropriately. For instance, D.H. shakes to indicate discomfort, a behavior that ceases as soon as the aversive condition is removed. (*Testimony of W.H., V.H.*)

4. Parents' home can accommodate D.H.'S needs.

14.

The evidence in the record shows that D.H.'s parents' home can accommodate his needs. W. and V.H. own a single-level home in Fayetteville, Georgia. There are multiple entry points into the home that do not require going up or down steps. If D.H. is moved home, he will be situated in what is currently his parents' bedroom, which has double French doors leading to a balcony where he can sit and enjoy the fresh air. As mentioned earlier, if any modifications are needed — such as to the shower — MFP and the ICWP provide funding for up-front expenses such as environmental modifications. Medical transport services are available to take him to scheduled medical appointments, and in the event of an emergency, D.H. would have easy access

to medical help as the home is located across the street from a hospital. (*Testimony of V.H., Portis*.)

5. Parents can provide the quantity of care Petitioner needs.

15.

Petitioner's family is available to provide the quantity of care he needs in the home. Both W. and V.H. are federal government employees and have flexible and accommodating supervisors. V.H. is allowed to telework and clock on and off at home as needed. In addition, she has the option to work part-time or take early retirement. Their other son, D.H.'s brother, also lives in the home and is available to provide care. As discussed above, W. and V.H. already spend a cumulative eight hours at Briarcliff Haven caring for D.H. on a daily basis, and their son provides care on the weekends. Caring for D.H. at home would eliminate the extra daily commute to and from the nursing facility. This would allow them to give him additional individualized attention, beyond what the nurses at Briarcliff Haven could provide. (*Testimony of W.H., V.H.*)

D. <u>Independent Care Waiver Program</u>

16.

The Independent Care Waiver Program is a section 1915(c) Medicaid Home and Community-Based Services Waiver program that has the purpose of keeping people out of institutions and in the community. Brian Dowd, the Program Director of Waiver Programs, described the nature of waiver programs in general and this waiver program in particular. Medicaid waiver programs give states broad discretion to design the waiver for a target population. However, a waiver program only goes into effect after it has been approved by the Centers for Medicare & Medicaid Services ("CMS"). CMS will generally review a state's waiver application and make comments and require changes prior to approval. Once approved,

the Waiver, which sets out the parameters of the program, is a binding contract between the state and the federal government. If the state does not adhere to the specifications in the waiver, the federal government may pull funding for the program or even require the state to reimburse money already expended. Waiver programs, in general, enable persons who would otherwise be in a hospital or nursing facility to live in the community, but only if the cost of living in the community is less than the cost to the Medicaid program of institutional care. Thus, waiver programs have a cost-neutral component that compares the average cost of care in a facility to the cost of the applicant's care in the community. The overall cost of the waiver program is capped because entry into a waiver program is limited at the outset to a specific number of participants. (*Testimony of Dowd; Waiver, Exhibit P-3*.)

17.

Dowd also testified specifically regarding the ICWP. First, the target populations for the ICWP are persons ages 21 to 64 who are physically disabled and/or have a traumatic brain injury, and who would otherwise be institutionalized.[5] Second, he stated that his understanding is that ICWP was designed specifically to enable persons to be more independent, which he interprets to mean *personally* able to conduct their own care. He did concede, however, that self-directed care is not necessary for participation in the ICWP, and that there are situations where active participants will be deemed incapable of directing their own care. Third, Dowd testified that he interprets "cognitively alert" to mean "reasonably able to make own decisions," a definition found in neither the Waiver nor the Manual and, thus, not conveyed to or approved by CMS. Dowd also stated that "cognitively alert" has a meaning accepted by the medical community.

[5] Barbara Means-Cheely, DCH's Program Specialist for ICWP, testified that these two categories – physically disabled and traumatic brain injury ("TBI") – are mutually exclusive. Thus, according to Means-Cheely, if a person has a brain injury that is not "traumatic," he cannot not qualify for the program even if he is physically disabled. This interpretation is contrary to the plain language of the Waiver and unsupported by the Manual. (*Testimony of Means-Cheely.*)

However, Dowd was not qualified as a medical expert and the Department failed to present probative evidence from a neurologist or other qualified medical expert to show what that medical definition might be. (*Testimony of Dowd.*)

18.

As stated above, Gatling assessed H. on two occasions. During her relatively short visits with D.H., she discussed D.H.'s medical history with V.H., observed her competently providing care for her son, and reviewed quarterly reports and nurse records from Briarcliff Haven. As part of her assessment, Gatling determined that the following services would enable D.H. to live in the home: (1) eight hours per day of Level III Personal Support Services delivered through the "traditional" model, rather than self-directed care, (2) Case Management Services, and (3) medical supplies. With these services in place, D.H. would be safely served in the home, with Gatling's sole concern being his inability to communicate. According to Gatling, if there was a method of determining when D.H. was in distress, that would suffice to ensure he could be safely served in the home. (*Testimony of Gatling; Exhibits P-2, P-2B.*)

19.

Gatling also determined that D.H. meets the ICWP cost-neutral eligibility requirement. D.H.'s current placement at Briarcliff Haven is paid for by Medicaid at an average rate of $53,561.00 per year. The cost of serving him at home was calculated to be $51,974.64, which is less than the cost of serving him in an institution. The latter estimate was based on Gatling's assessment of the types of services and the number of hours of each service D.H. would receive under the ICWP. (*Testimony of Gatling; Exhibits P-2, P-2B, P-3*.)

20.

Nevertheless, Gatling denied D.H. entry into ICWP because he did not show signs of communication during her limited observations of him. Communication is a concept she has conflated with the state of cognitive alertness. Thus, she did not attempt to examine Petitioner for signs of cognitive alertness other than to look to see whether he was able to communicate.[6] Rather, Gatling based her denial on the fact that he cannot communicate his needs to his caregivers or otherwise direct his own care, which she believes renders it *per se* unsafe for him to live at home. Gatling testified that she had no other safety concerns regarding his placement at home. (*Testimony of Gatling, V.H.; Exhibits P-2, P-2B*.)

21.

Aside from his inability to communicate verbally, it is uncontested that Petitioner meets the requirements for entry into ICWP: (i) he is between the ages of 21 and 64; (ii) he is Medicaid eligible; (iii) he has a severe physical impairment that substantially limits one or more of his activities of daily living; (iv) he does not have a primary diagnoses of a mental disorder; (v) he meets the intermediate level-of-care criteria and, absent entry into ICWP, he will continue to receive Medicaid services in an institution; (vi) he is medically stable; and (vii) the calculated cost of serving him in the community is less than the cost of continuing to serve him in the nursing facility. (*Testimony of Gatling; Exhibits P-2, P-2B, P-3; ICWP Manual § 701*.)

[6] Gatling testified that the nursing notes supported her conclusion that D. H. had no communication abilities. However, the nursing notes contain numerous descriptions of H. as "very alert" or "responsive to verbal and tactile stimuli." Without further explanation of these notes, they do not provide persuasive corroboration of Gatling's conclusions regarding D.H.'s communication abilities generally or her view that communication abilities define cognitive alertness.

III. Conclusions of Law

A. Overview

1.

This matter concerns an application for ICWP participation and services; therefore, the Petitioner D.H. bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07. The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21.

2.

In its April 9 Order, this Court presented an overview of Medicaid Waiver Programs and established that where there is a conflict between the Waiver and the Department's policy manual, the Waiver is binding. In that order, the Court also narrowed the factual considerations to two: (1) whether H. is "cognitive alert," a service eligibility requirement for Level III Personal Support Services; and (2) whether he can live safely at home, taking into consideration that the inability to communicate does not, as a general rule, inextricably render the home environment unsafe.

B. Petitioner is Cognitively Alert because He is Aware of His Surroundings.

3.

This Court finds that D.H. has shown, by a preponderance of the evidence, that he is cognitively alert. In its April 9 Order, this Court defined "cognitive" as "of or pertaining to cognition, or the action or process of knowing; having the attribute of cognizance;" "cognizance" as "knowledge as obtained by observation or information; state of being aware of anything: perception, notice, observation;" and "alert" as "watchful, vigilant, wide-awake." *Oxford English Dictionary* 54, 459 (Compact ed. 1979).

4.

Here, the testimony was uncontroverted that D.H. is often alert — i.e., awake and watchful of his surroundings. Four persons — two Briarcliff Haven staff members and two

family members, all of whom observe him frequently — testified that he will track people walking in and past his room. In addition, he may be startled awake if touched unexpectedly. As for having cognitive abilities, multiple persons testified that he is aware of his surroundings. For instance, Leonard stated that he will look from one participant in a conversation to the other. Portis testified that he appears to focus on what is happening on the television screen. Both W. and V.H. testified that he enjoys the company of certain individuals more than others, as demonstrated by his facial expressions. W.H. testified convincingly that D.H. is responsive to both verbal and physical cues: he will turn his head for a shave, raise his head for headphones, look at a picture when cued to do so, and stick out his tongue and open his mouth upon request.

5.

Beyond merely observing his surroundings, D.H. is able to communicate at a fundamental level. Specifically, Petitioner communicates distress or discomfort through his facial expressions and behavior. Notwithstanding Gatling's conclusion based on her limited observations of and interactions with D.H., the Court credits the testimony of the Briarcliff Haven nursing staff and D.H.'s parents on this issue. Notably, V.H. has been able discern when his headphones were turned to a radio station he did not enjoy. She read his body language, determined the cause of his displeasure, and corrected the problem. W.H. can similarly read Petitioner. D.H. will jerk either his mouth or body when uncomfortable or displeased. Once the aversive condition is removed, D.H. will cease jerking. Thus, the preponderance of the probative evidence shows that D.H. is not only aware and able to observe his surroundings, but he is able to communicate his needs to his caretakers, albeit in a rudimentary fashion.[7] It is possible that

[7] D.H.'s ability to communicate his wants and needs to his parents is not dissimilar to how an infant communicates to his parents before the development of functional expressive language. Yet, parents everywhere, even without the kind of training and practice that D.H.'s parents have had, safely care for their children in their homes, responding to their non-verbal communications and otherwise providing for their wants and needs.

his parents may be more attuned to his communication cues than others; nevertheless, this would be true whether he is in Briarcliff Haven or at home.

C. **It is safe for Petitioner to Reside at Home because His Parents are Excellent Caregivers and His Home is Adapted to His Condition.**

6.

It is safe for D.H. to live at home because his parents are trained and capable caregivers, attuned to his needs, and his home is adaptable for his needs. First, as discussed above, his parents are able to read Petitioner's body language and can respond appropriately. Second, they have received extensive training, both formal and informal, and have had more than a year of experience attending to both his skilled and unskilled needs. At the hearing, they were able to address, in detail, the appropriate methods of ensuring his continued health and the dangers associated with improper care. Third, they have demonstrated not only their knowledge and competence, but also their dedication to providing excellent care by actually providing that care on a sustained and regular basis. Finally, they have the wherewithal to provide the necessary care – in terms of availability, because they have flexible work time and location commitments, and in terms of monetary resources. It was uncontested that Petitioner would be able to obtain start-up funding from MFP and from the ICWP for environmental modifications and necessary equipment. Further, the home is already appropriate for his needs because it is on one level and is even located near a hospital.

D. Preference for Serving Petitioner in the Community.

7.

Granting Petitioner entrance into the ICWP is not only appropriate because he meets all of the eligibility criteria as set forth in the Waiver, but also because he would be best served in the community. There is a preference for serving disabled individuals in the community rather than in an institution. *See generally* 42 U.S.C. § 12101(a)(3) (Congressional findings and purpose in passage of Americans with Disabilities Act includes combating discrimination against individuals with disabilities through institutionalization); *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 587, 588-89 (1999) (unnecessary institutionalization may discriminate against persons with disabilities under the Americans with Disabilities Act); *Cruz v. Dudek*, No. 10-23048-CIV-UNGARO/SIMONTON, 2010 U.S. Dist. LEXIS 118520, at *47-48 (S.D. Fla. Oct. 12, 2010) ("there is a strong public interest in allowing persons [who were applying for entry into a Medicaid waiver program] . . . to remain in their homes . . . . In addition, there is a strong public interest in providing care at the least cost possible"); *Harris v. Hamos*, No. 12 C 7105, 2012 U.S. Dist. LEXIS 181861, at *3, *6-9 (N.D. Ill. Dec. 26, 2012) (demonstrating preference for community-based care for physically and mentally-impaired non-verbal individual where cost of care in community is less); Andrew I. Batavia, *A Right to Personal Assistance Services: "Most Integrated Setting Appropriate" Requirements and the Independent Living Model of Long-Term Care,"* 27 Am. J. L. and Med. 17, 24 (2001) ("objective of the waiver program is to alter the institutional bias of the Medicaid program"). The ICWP Waiver clearly provides that a goal is to serve individuals in the community where it is cost effective to do so. (*Waiver, Exhibit P-3*.)

8.

All indications are that D.H. should be served at home. First, he has two parents who have consistently demonstrated their dedication to his wellbeing and are trained and capable of administering all of his care. If he lives at home, they will have more time to devote to his care and he will have more individualized attention than in a facility. Second, his condition is stable and all safety considerations regarding placement in the home have been addressed. Finally, it would be more cost effective for Medicaid to serve him in his home than in an institutional setting. Keeping D.H. confined to a nursing home when he can safely and more cost effectively be cared for in his home is contrary to the mission of the ICWP program, as well as the best interest of D.H., his family, and the State. Accordingly, as D.H. meets all the eligibility requirements for services under the ICWP waiver, DCH's denial of his application was improper.

IV. DECISION

In accordance with the foregoing Findings of Facts and Conclusions of Law, the Department's decision to deny Petitioner D.H.'s application for services under the Independent Care Waiver Program is hereby **REVERSED.** This matter is **REMANDED** to the agency for further action on his application consistent with this decision.

SO ORDERED, this 25th day of October, 2013.

KIMBERLY W. SCHROER
Administrative Law Judge