

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

John Rasheed
John Rasheed, Legal Assistant

E [REDACTED] E [REDACTED],
Petitioner,

v.

DHS, DIVISION OF FAMILY AND
CHILDREN SERVICES,
Respondent.

Docket No.: [REDACTED]
[REDACTED]-OSAH-DFCS-M-COMP-44-
Walker-Russell
Agency Reference No.: [REDACTED]

FINAL DECISION

Appearances: Petitioner: Chris Vance, *Esquire*
Respondent: Malcolm Wells, Esq.

Petitioner appealed Respondent’s decision to terminate Petitioner’s Medicaid benefits under the New Options Waiver (NOW) and Comprehensive Supports Waiver Program (NOW/COMP Program) because Petitioner no longer receives waiver services as required under the program. The issue in this case is whether Petitioner receives waiver services and meets eligibility criteria for NOW/COMP Waiver Medicaid. The hearing was held on February 13, 2020. The hearing was held open and extended for the parties to submit post-hearing Findings of Fact and Conclusions of law as detailed in the Procedural History of the Case. After considering all of the admissible evidence, arguments of the parties and for the reasons stated below, Respondent’s decision to terminate Petitioner’s NOW/COMP Waiver Medicaid is **HEREBY REVERSED and REMANDED.**

I. PROCEDURAL HISTORY OF CASE:

A hearing in this matter was held on February 13, 2020, before the undersigned Judge. Upon the parties’ request, the hearing record was held open until Friday, March 27, 2020, to submit Proposed Orders, including Findings of Facts and Conclusions of Law. However, on March 14,

2020, Chief Justice Harold D. Melton issued a Statewide Judicial Emergency Order affecting all Courts and Clerk's offices in the State as it relates to all judicial proceedings. The Judicial Emergency Order suspended, tolled, extended and otherwise granted relief from the time in which to file legal proceedings as determined to be necessary by the authorized judicial official. The Judicial Emergency Order was scheduled to terminate on April 13, 2020, at 11:59 p.m. Accordingly, this Court extended the time to file Proposed Orders in this matter to April 14, 2020.

On April 6, 2020, Chief Justice Harold D. Melton extended the March 14, 2020 (Amended) Order Declaring Statewide Judicial Emergency, which would have expired on April 13, 2020 at 11:59 p.m., to May 13, 2020, at 11:59 p.m., unless otherwise further modified or extended. [See, April 6, 2020, Order Declaring Statewide Judicial Emergency]. On April 6, 2020, Petitioner's counsel, Chris Vance, filed an Emergency Motion Seeking an Expedited Order Extending the Time for the Parties to file their Findings of Fact and Conclusions of Law until May 30, 2020, due to Petitioner's counsel having a broken finger on her left hand, which made it difficult to use her left hand. On April 9, 2020, Respondent filed its objection to the length of time requested by Petitioner's counsel and argued that the time for submitting the Proposed Orders in this matter had been continued once. In addition, the eight weeks requested was more time than reasonably expected, since all parties were conceivably working on the Proposed Order when the Court extended the original due date from March 27, 2020, to April 14, 2020.

Upon review of the Motion, Respondent's response, and pursuant to the April 6, 2020, Order issued by Chief Justice Harold D. Melton declaring a Statewide Judicial Emergency set to expire on May 13, 2020, this Court extended the time for the parties to submit Proposed Orders, including Findings of Facts and Conclusions of Law in the above-styled matter to Thursday, May 14, 2020.

On May 14, 2020, Petitioner submitted his Findings of Fact and Conclusions of Law. On May 14, 2020, Respondent submitted its Findings of Fact and Conclusions of Law and an affidavit of

Catherine Ivy as a 'Submission in Response to Petitioner's Mother's/Representative's Testimony after Evidence was Re-Opened.

II. AFFIDAVIT OF CATHERINE IVY

After presentation of the evidence at the February 13, 2020, hearing, and during closing arguments, Petitioner's attorney, Chris Vance, requested permission to re-open the evidence to allow Petitioner's mother, Dr. R■■■■ E■■■■, to provide additional testimony regarding the limited issue of the specific waiver services that Petitioner received at Bancroft, which is the specific issue in this matter. Dr. E■■■■'s testimony was offered in opposition to the testimony of Catherine Ivy, Deputy Executive Director of Medical Assistance Plans, who testified at the hearing, but was excused prior to the testimony of Dr. E■■■■ at the request of Respondent's counsel, Malcolm Wells. In the interest of judicial economy and to ensure that the parties were allowed to submit all relevant and probative evidence into the record for consideration in rendering an expeditious, fair, and impartial decision in this matter, the Court exercised its discretion and allowed the testimony of Dr. E■■■■ over the objection of Respondent's counsel, Malcolm Wells. (OSAH Rule 616-1-2-.22 (o)).

After Dr. R■■■■ E■■■■ gave additional testimony regarding the waiver services that Petitioner received at Bancroft, Attorney Malcolm Wells did not ask the Court to recall Catherine Ivy at the February 13, 2020, hearing. Instead, on May 14, 2020, Respondent submitted a post-hearing Affidavit of Catherine Ivy in rebuttal to the additional testimony given by Dr. E■■■■. Petitioner filed an objection to allowing the Affidavit of Catherine Ivy into evidence and argued that it is patently unfair and unjust for Respondent to introduce new evidence at the very last minute, which denied Petitioner the right to cross examination and a fair hearing. Ordinarily, the Court would agree. However, to ensure that the Court considered all relevant and probative evidence in consideration of rendering an expeditious, fair, and impartial decision in this matter, the Court overrules Petitioner's objection and will consider the Affidavit of Catherine Ivy regarding the limited issue of whether Petitioner received NOW/COMP waived services at Bancroft. Accordingly, to the extent that the Affidavit of Catherine Ivy addressed issues not related to this

limited purpose, it was not considered in rendering a decision in this matter. (OSAH Rule 616-1-2-.22 (g)).

III. FINDINGS OF FACT:

The undersigned Judge has considered the entire evidence in this case and, based upon a preponderance of the credible evidence, makes the following specific findings of fact:

1.

On or around November 18, 2018, Respondent sent Petitioner a written “Change Results” letter to Petitioner’s [REDACTED], Georgia home residence that stated “the Department of Community Health (Medical Assistance) will stop paying for your home and community based care effective 12/21/2018. Your case will close effective 12/21/2018, due to not meeting the residency requirements and no waiver services in place.” The notice further stated that Petitioner was eligible for Medical Assistance-Comprehensive Support Waiver benefits for the months of October 2018, November 2018, and December 2018. However, Medical Assistance under the Comprehensive Support Waiver Program would close effective January 2019. The November 18, 2018, “Change Results” letter did not explain why Petitioner met residency and Support Waiver eligibility requirements under the Comprehensive Support Waiver Program for October, November and December 2018, but was ineligible effective January 2019. On or around November 28, 2018, Dr. R [REDACTED] E [REDACTED], submitted a “Fair Hearing Request” for Medical Assistance on behalf of Petitioner that stated “my son must continue to receive Comp Waiver b/c he is a GA resident with special needs.” The “Fair Hearing Request” also requested that Petitioner continue receiving benefits while waiting for the hearing decision. The parties resolved the matter without a due process hearing being held and Petitioner remained at Bancroft under the NOW/COMP Waiver Program. (Testimony of Dr. R [REDACTED] E [REDACTED]; Petitioner’s Exhibit, P-3).

July 31, 2019, Change Results letter

2.

On or around July 31, 2019, Respondent sent a “Change Results” letter to Petitioner’s Atlanta, Georgia home residence that stated “E [REDACTED] E [REDACTED]’s [sic] ability to be retained as a member of

the COMP waiver program has been compromised as he no longer receives waiver services. In fact, the same is the basis of the present termination. That is, receiving waiver services is a precursor to remain in the program. However, in an attempt to continue to assist Mr. E [REDACTED], we have determined that he meets the eligibility requirements for RIGHT FROM THE START/CHILD UNDER 19 Medicaid program.” The notice further stated that Petitioner was eligible for Medical Assistance-Comprehensive Support Waiver benefits for the months of December 2018, January 2019, February 2019, March 2019, April 2019, May 2019, June 2019 and July 2019. Medical Assistance under the Comprehensive Support Waiver Program would close effective August 2019 because “There are no eligible people in your household.” On or around August 20, 2019, Dr. R [REDACTED] E [REDACTED], submitted a “Fair Hearing Request” for Medical Assistance on behalf of Petitioner that stated “I disagree w/ this determination. Also, I did not receive this until 8/16. (Did not receive wn 10 days of this date).” The “Fair Hearing Request” also requested that Petitioner continue receiving benefits while waiting for the hearing decision. However, Respondent terminated Petitioner’s NOW/COMP Medicaid benefits prior to the hearing decision in this matter. (Testimony of Dr. R [REDACTED] E [REDACTED]; Respondent’s Exhibit R-C; Petitioner’s Exhibit, P-4).

3.

Dophamia Dean is a Healthcare Program Consultant with the Department of Community Health (DCH) since 2013 and testified regarding how DFCS determines eligibility for Medicaid under the NOW/COMP Waiver Program. Policy requires that Petitioner is placed in a NOW/COMP slot and is receiving NOW/COMP waived services. In addition, NOW/COMP Medicaid recipients must receive certain waived services including the following (the list is not all-inclusive):

- Support Coordination
- Community access
- Community Residential Alternative
- Community Guide
- Specialized Medical Equipment and Supplies
- Environmental accessibility Adaptation
- Vehicle Adaption
- Community Living Support

- Behavioral Supports Consultation Services
- Financial Support Services
- Professional Therapeutic Services (in and out of home)
- Transportation
- Adult Dental Services

(Testimony of Dophamia Dean, DCH, Healthcare Program Consultant, Audio Recording Transcript, Pages 17, 25).

4.

Medicaid policy required Respondent to complete an annual review and Continuing Medicaid Determination (CMD) to consider Medicaid eligibility under all classes of assistance before it can deny or terminate Medicaid eligibility. Respondent must process the CMD according to the class of assistance that is most advantageous to the applicant/recipient (A/R).” In this matter, Respondent completed a Continuing Medicaid Determination (CMD) for Petitioner and determined that Petitioner was not eligible for residential services under the NOW/COMP COA, because he was not receiving any waiver services at Bancroft. Respondent changed Petitioner’s placement from NOW/COMP Waiver COA to “Child Under 19” Medicaid COA. If Petitioner continues to be eligible at each annual review, he will remain eligible for Medicaid under the “Child Under 19” COA. (Testimony of Dophamia Dean, DCH, Healthcare Program Consultant, Audio Recording Transcript, Pages 21-22, 25, 27).

5.

Dophamia Dean opined that “Child Under 19” Medicaid COA is a better COA for Petitioner than NOW/COMP because Petitioner is not receiving waiver services at Bancroft and NOW/COMP is unavailable to him. Also, there are no changes in services and Petitioner still remains at Bancroft with “Child Under 19” Medicaid. (Testimony of Dophamia Dean, DCH, Healthcare Program Consultant, Audio Recording Transcript, Page 57).

6.

Every Medicaid COA has income and resource limits to determine eligibility. NOW/COMP income eligibility is based upon Petitioner’s income and resources. In this matter, Petitioner is severely mentally disabled, has no income or resources, and meets the income limit for NOW/COMP Medicaid. However, “Child Under 19” Medicaid eligibility is based upon the

income and resources of Petitioner's parent, Dr. R [REDACTED] E [REDACTED]. Dophamia Dean did not know Dr. R [REDACTED] E [REDACTED]'s income, but alleges that it was provided at the annual review. In addition, Dophamia Dean did not know the income and resource limit for "Child Under 19" Medicaid eligibility and did not bring the income or resource limit for "Child Under 19" Medicaid to the hearing. (Testimony of Dophamia Dean, DCH, Healthcare Program Consultant, Audio Recording Transcript, Pages 60, 66).

7.

Dophamia Dean does not know if "Child Under 19" Medicaid places severely disabled children in an out of state residential placement. To her knowledge it does not, but it depends on the contract with the Department of Community Health (DCH), which she is not a part of. (Testimony of Dophamia Dean, DCH, Healthcare Program Consultant, Audio Recording Transcript, Pages 61, 62).

8.

Petitioner previously received NOW/COMP prior to going into the facility at Bancroft. However, Dophamia Dean does not know the date or for how long Petitioner received the NOW/COMP benefits. DFCS did not approve or assist Petitioner in getting into the facility. When DFCS became aware that Petitioner was in the facility, it terminated the Medicaid. There was an appeal and a court case. Petitioner continued to receive benefits. Ms. Dean does not know the details of the prior case because she was not involved. (Testimony of Dophamia Dean, DCH, Healthcare Program Consultant, Audio Recording Transcript, Pages 44, 45).

9.

Respondent failed to follow the Medicaid policy when it terminated Petitioner's NOW/COMP COA on July 31, 2019, because Petitioner's "Fair Hearing Request" requested to continue receiving benefits while waiting for the hearing decision. Dophamia Dean opined that Respondent failed to follow the policy because Petitioner was eligible for another class of assistance, there was no break in service, and Petitioner continued to receive Medicaid benefits under the "Child Under 19" COA. Also, Petitioner currently receives the same benefits under the "Child Under 19" COA as he received under NOW/COMP. However, she does not know

what those exact services are. (Testimony of Dophamia Dean, DCH, Healthcare Program Consultant, Audio Recording Transcript, 55- 59, 63).

10.

Catherine Ivy, Deputy Director for the Division of Medical Assistance Plans with the Georgia Department of Community Health (DCH), appeared at the hearing on behalf of Respondent. Ms. Ivy testified that the Waiver Agreement with CMS is binding under the State's Waiver Program. The NOW/COMP Waiver Program requires that the minimum number of waiver services that an individual must have to be determined to need waiver services is one (1). In addition, monthly monitoring is required in the Comprehensive Waiver, which is the program that Petitioner was in before Respondent terminated him and moved him to the "Child Under 19" Medicaid COA. (Testimony of Catherine Ivy, DCH, Deputy Director for the Division of Medical Assistance Plans; Respondent's Exhibit B, at Page 27; Audio Recording Transcript, Pages 69, 72, 75).

11.

The NOW/COMP Program is renewed annually. In addition, the level of care is determined annually for continued eligibility according to the level of care for the Waiver Program and to reestablish a new plan of care that includes a service array that is available. There must be a waived service in that service array. The Participant is required to have at least one (1) waived service every thirty (30) days and may not remain in the waiver program if there is no waiver service provided beyond a thirty (30) day period. In this matter, Petitioner was not receiving waived services the period before Respondent terminated him and moved him to the "Child Under 19" Medicaid COA. (Testimony of Catherine Ivy, DCH, Deputy Director for the Division of Medical Assistance Plans; Audio Recording Transcript, Pages 72, 74, 76).

12.

Catherine Ivy was not involved when the decision was made to place Petitioner at Bancroft. However, she testified that the Waiver Program did not initially place Petitioner at Bancroft, was not used to place Petitioner at Bancroft, and it was never intended for Petitioner to be at Bancroft. Catherine Ivy disagrees that the Comp Waiver Program paid for Petitioner to be at Bancroft for over a year. In addition, Respondent did not terminate Petitioner's COMP services.

Instead, Respondent terminated Petitioner's Medicaid benefits under the NOW/COMP Program. (Testimony of Catherine Ivy, DCH, Deputy Director for the Division of Medical Assistance Plans; Audio Recording Transcript, Page 79).

November 17, 2017, Termination letter

13.

The Department of Behavioral Health & Disabilities issued Petitioner a Final Notice of Termination letter dated 11/17/2017, which stated that Petitioner's last date of waiver service was 10/13/2017. The reason given for termination from the NOW/COMP Waiver Program was "because more than thirty (30) days had lapsed between the provisions of monthly monitoring service and you have refused or not complied with the provision of monthly monitoring service per the NOW/COMP Medicaid waiver." (Testimony of Catherine Ivy, DCH, Deputy Director for the Division of Medical Assistance Plans; Audio Recording Transcript, Page 98).

November 15, 2018, Reinstatement Letter

14.

During cross examination, Catherine Ivy conceded that she was unaware that on or around November 15, 2018, DFCS emailed a reinstatement approval letter for Petitioner to receive NOW/COMP waiver coverage through July 2019. Catherine Ivy does not work specifically in eligibility and was not involved in the reinstatement, but reviewed the letter at the hearing for the first time. Catherine Ivy opined that the reinstatement approval letter determined that Petitioner was eligible for the Medicaid type of "Medical Assistance COMP Waiver." Petitioner's class of assistance continued to be determined under Comp Waiver, despite the fact that he had not received any services under the Comp Waiver and had been terminated under the Comp Waiver. In addition, the reinstatement approval letter did not reinstate Petitioner retroactively and continue his Comp Waiver services. It continued his eligibility type under the COMP class of assistance. Petitioner retained all Medicaid benefits, but received no benefits through the COMP Waiver Program. (Testimony of Catherine Ivy, DCH, Deputy Director for the Division of Medical Assistance Plans; Audio Recording Transcript, Pages 98, 106, 111; Petitioner's Exhibit

P-5).

July 31, 2019, Change Results Letter

15.

On or around July 31, 2019, Respondent completed an annual review and Continuing Medicaid Determination (CMD) for Petitioner to consider Medicaid eligibility under all classes of assistance. Respondent determined that Petitioner was not receiving waiver services and was no longer eligible for the NOW/COMP Program. Respondent placed Petitioner under the "Child Under 19" Medicaid COA. The type of Medicaid changed, but Petitioner remained Medicaid eligible. Prior to August 2019, Petitioner had COMP Waiver eligibility. However, at the time Respondent terminated Medicaid benefits under the NOW/COMP Program. Petitioner was not in the COMP Waiver Program, nor had been in a year or so. His class of eligibility assistance was through COMP waiver, which is how his Medicaid was determined. (Testimony of Catherine Ivy, DCH, Deputy Director for the Division of Medical Assistance Plans; Audio Recording Transcript, Pages 77, 78, 83).

16.

Catherine Ivy disputes that Petitioner received community residential alternative services that are applicable to the NOW/COMP Waiver Program. These are waived services that are waiver funded. The services that Petitioner receives now, and at the time, were institutional and are found under the "Psychiatric Residential Treatment Facility" category of eligibility or category of service, which is an institutional service that the State benefit provides. (Testimony of Catherine Ivy, DCH, Deputy Director for the Division of Medical Assistance Plans; Audio Recording Transcript, Page 77, 84).

17.

Federal regulations apply to the NOW/COMP Waiver Program. When a child is eligible under the COMP Waiver Program, the child must be given the choice of either institutional or home and community based services. When Petitioner went into an institution, he chose institutional placement. Medicaid paid and continues to pay for Petitioner to be at Bancroft as a State Plan Medicaid benefit under the "Psychiatric Residential Treatment" service. This is not financial

support. (Testimony of Catherine Ivy, DCH, Deputy Director for the Division of Medical Assistance Plans; Audio Recording Transcript, Pages 84, 85).

18.

Waiver eligibility must be re-determined annually based on the person's current physical status, level of functioning, et cetera. Petitioner's renewal will always be at the annual date of eligibility, which is true of any Medicaid COA that is available. Petitioner received termination notices that are based on Petitioner's eligibility in Medicaid. They have nothing to do with his utilization of the COMP Waiver Program or its services. These are two separate issues. There are Medicaid classes of assistance that are linked, but have nothing to do with each other. Petitioner's program eligibility would have to be re-determined annually because he has not received a service in the past two (2) years, or thirty-two (32) months. (Testimony of Catherine Ivy, DCH, Deputy Director for the Division of Medical Assistance Plans; Audio Recording Transcript, Pages 90, 91).

19.

Under federal law, when a severely disabled person such as Petitioner is eligible for NOW/COMP Waiver services, they are given the choice of either institutional or home and community-based services. Catherine Ivy disagrees that the COMP Waiver Program includes residential placement in an institution. COMP Waiver services apply to a group home or small community arrangements with four (4) beds or less, not the institution that Petitioner has been in since 2017. When Petitioner went to New Jersey, he chose institutional services under a COMP category of Medicaid eligibility. Catherine Ivy went through each of the listed waived services required by Medicaid recipients under the NOW/COMP Waiver Program and testified that Petitioner has not received any of the listed waived services since 2017. Respondent has paid Petitioner's institutional claims under "Psychiatric Residential Treatment." Petitioner received transportation service to help him get to New Jersey as a State plan service. This was not a waiver service. Petitioner has not received transportation since he arrived in New Jersey. (Testimony of Catherine Ivy, DCH, Deputy Director for the Division of Medical Assistance Plans; Respondent Exhibit R-E, Page 60; Audio Recording Transcript, Pages 111, 112, 118-121).

20.

Maya Carter, DCH, Program Specialist and Operations Support Director testified that Bancroft is an institution and Medicaid provider enrolled in the PRTF program. Bancroft submitted numerous charges for Petitioner's treatment at the facility from 2017-2019, which is the relevant time period in this matter. Participants of the Waiver Program are required to receive waived services. Respondent coded the records from Bancroft as "Psychiatric Residential Treatment Facility" (PRTF). Maya Carter alleged that Bancroft only billed for PRTF services and never billed Respondent for any waived service for Petitioner since he has been there. Also, Respondent never paid Bancroft for any waived service. If Bancroft had billed for a waiver service, it would show up on the records. However, Respondent only submitted a listing of the codes into evidence. The actual billing statements or records that Bancroft submitted for Petitioner's treatment were not submitted into evidence for consideration in this matter. (Testimony of Maya Carter, DCH, Program Specialist and Operations Support Director; Respondent's Exhibit R-G; Audio Recording Transcript, Pages 137-138).

21.

Derwin Philpot, DFCS, Outreach Medicaid Supervisor, had not seen the July 31, 2019, Termination letter before the hearing. However, he reviewed the letter and identified it as an eligibility decision letter. Derwin Philpot opined that DFCS terminated Petitioner from the NOW/COMP Waiver Program because he no longer received waiver services, which is required to stay in the program. Once Respondent determined that Petitioner no longer received waived services, the next step was for Respondent to complete a Continuing Medicaid Determination (CMD) to consider Medicaid eligibility for Petitioner under all classes of assistance. A CMD was completed for Petitioner and Respondent determined that he was eligible for "Children Under 19" Medicaid. Prior to August 1, 2019, Petitioner's only class of assistance was Comp Waiver. It appears that Petitioner received Comp Waiver incorrectly because he was not receiving waived services. Derwin Philpot was not involved in the decision and does not know why Petitioner was given waived services. Petitioner may have had waived services at some point, but not at the time of review and when the July 31, 2019, Termination Letter was sent. Mr. Philpot is aware that when a child's COA is NOW/COMP, the child must be given a choice

of either institutional or home and community based services. (Testimony of Derwin Philpot, DFCS, Outreach Medicaid Supervisor; Respondent's Exhibits R-C and R-D; Audio Recording Transcript, Pages 143-152).

22.

Petitioner timely appealed Respondent's decision to terminate Petitioner's Medicaid benefits under the New Options Waiver (NOW) and Comprehensive Supports Waiver Program (NOW/COMP Program). Petitioner's mother, Dr. R [REDACTED] E [REDACTED] appeared on behalf of Petitioner and gave credible testimony that Petitioner is a sixteen (16) year old male with severe autism, cognitive impairment and developmental disabilities. Petitioner cannot work and has no income or resources. Due to his severe disabilities, Respondent determined that Petitioner was eligible for Medicaid benefits under the NOW/COMP Waiver Program when Petitioner was ten (10) years old and Petitioner has had NOW/COMP for many years and prior to 2017. It took six (6) years for Petitioner to receive benefits under the NOW/COMP Waiver Class of Assistance (COA) because Petitioner had been on a long waiting list. (Testimony of Dr. R [REDACTED] E [REDACTED]; Audio Recording Transcript, Pages 158-159). Upon careful review, I find the testimony of Dr. R [REDACTED] E [REDACTED] to be credible and persuasive.

23.

The Department of Community Health ("DCH") worked with Dr. R [REDACTED] E [REDACTED] and Petitioner's Medical team of professionals to locate a proper placement for Petitioner under the NOW/COMP Waiver COA. DCH helped with the search for an out-of-state placement for Petitioner and agreed that there were no appropriate in-state placements for Petitioner in Georgia. They looked out of state and determined that Bancroft Rehabilitation Services in Haddonfield, New Jersey was the appropriate placement for treatment related to Petitioner's autism. In 2017, the Department of Children and Family Services ("DFCS") paid for Petitioner's transportation to Bancroft. Dr. E [REDACTED] has always understood that when DCH placed Petitioner at Bancroft, transported him to Bancroft and while receiving treatment at Bancroft, Petitioner's only COA and eligibility was under the NOW/COMP Waiver Program. (Testimony of Dr. R [REDACTED] E [REDACTED]; Audio Recording Transcript, Pages 160-164; Petitioner's Exhibits P-1, May 9, 2017, Out of State Approval for services at Bancroft; P-2, Proof of Payment by DFCS for Transportation of

Petitioner to Bancroft). Upon careful review, I find the testimony of Dr. R [REDACTED] E [REDACTED] to be credible and persuasive.

24.

DFCS previously informed Petitioner that his “Medical Assistance Comprehensive Support Waiver” case would close effective 12/31/2018, due to residency requirements and not receiving waived services and Dr. E [REDACTED] appealed. Vicki Brown, DFCS Eligibility Support Supervisor emailed an approval letter to Petitioner’s Attorney, Chris Vance, on November 15, 2018, which approved Petitioner to receive NOW/COMP coverage through July 2019. (Testimony of Dr. R [REDACTED] E [REDACTED]: Audio Recording Transcript, Pages 163-164; Petitioner’s Exhibits P-3, November 20, 2018, Change Results Letter; Petitioner’s Exhibits P-5, NOW/COMP Approval letter email). Upon careful review, I find the testimony of Dr. R [REDACTED] E [REDACTED] and Petitioner Exhibits P-5 to be credible and persuasive.

25.

Bancroft is a Psychiatric Residential Treatment Facility (PFTF) institution. Petitioner has received numerous waiver services at Bancroft since he has been there. Dr. E [REDACTED] gave credible testimony that she received and reviewed monthly reports from Bancroft. Petitioner received the following waiver services at Bancroft when Respondent terminated his NOW/COMP on or around August 1, 2019:

- behavioral support consultation - in which specialists work with Petitioner very closely in school and his apartment to track his progress on behaviors that Petitioner should stop, such as toileting accidents, public masturbating, taking off his dirty pants and making a mess, and defecating in public.
- community living support – in which Petitioner received training in acquiring skills for daily living, such as how to live in the community, putting on deodorant, getting dressed, putting on shoes, opening the door and hanging up his coat.
- support coordination – in which Petitioner received support coordinating between the day and evening programs and his overall program.
- transportation - in which Petitioner received transportation to go out or off campus for

community access to class day trips, doctor's appointments, the park, mall and dental appointments.

- Community residential alternative – Petitioner resides in an apartment and has a guide when he goes out.
- professional therapeutic services – in which Petitioner received speech therapy and occupational therapy. (Testimony of Dr. R [REDACTED] E [REDACTED]; Audio Recording Transcript, Pages 207-211; Upon careful review, I find the testimony of Dr. R [REDACTED] E [REDACTED] to be credible and persuasive.

III. CONCLUSIONS OF LAW:

1.

Because it seeks to terminate Petitioner's services under the SOURCE Program, Respondent bears the burden of proof. Ga. Comp. R. & Regs. r. 616-1-2-.07(1)(d). However, Petitioner bears the burden of proof as to any affirmative defenses. *See* O.C.G.A. §24.4.1. The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4).

2.

OVERVIEW OF NOW COMP PROGRAM:

The NOW COMP Waiver Program are classes of assistance (COA) designed to provide in-home and community based services to Medicaid eligible intellectually disabled and developmentally disabled individuals who do not receive Medicaid benefits under a cash assistance program. To be eligible under the NOW/COMP Class of Assistance (COA), the applicant must be placed in a NOW/COMP slot and is receiving NOW/COMP waived services. Community residential alternative services are applicable to the COMP Waiver only. (NOW/COMP Policy, 2132, Volume II/MA, MT 49-05/15, at Section 2132-1).

3.

Eligibility under the NOW/COMP Waiver Program:

To be eligible under the NOW/COMP COA, an A/R must meet the following conditions:

- The A/R is approved for waived services by an MHDDAD Regional Office.

- The A/R is approved by an Intake and Evaluation Team (I & E) for the NOW/COMP, evidenced by a completed DMA-6 OR DMA-7 (only used for NOW/COMP).
- **The A/R is placed in a NOW/COMP slot and is receiving NOW/COMP waived services.**
- The A/R meets the Length of Stay (LOS) and Level of Care basic eligibility criteria.
- The A/R meets all other basic and financial eligibility criteria.

NOW/COMP Medicaid recipients receive certain *waivered* services, including the following:

- Support Coordination
- Community access
- Community Residential Alternative
- Community Guide
- Specialized Medical Equipment and Supplies
- Environmental accessibility Adaptation
- Vehicle Adaption
- Community Living Support
- Behavioral Supports Consultation Services
- Financial Support Services
- Professional Therapeutic Services (in and out of home)
- Transportation
- Adult Dental Services

(See, NOW/COMP Waiver Program Policy, Volume II/MA, MT 48–05/15, at Section 2132-1).

4.

Pursuant to Federal law, the Medicaid Waiver Program allows states to provide home and community-based services that an individual needs to avoid institutionalization. 42 C.F.R. § 441.300 (2007). The Waiver Program requires that such benefits may only be provided to individuals who, in the absence of such services, would require Medicaid-covered care in a hospital, nursing facility, or intermediate care facility for individuals with intellectual disabilities. 42 C.F.R. § 41.301(b)(iii).

5.

Settings that are not Home and Community-Based do not include the following:

- (i) A nursing facility;
- (ii) An institution for mental diseases;

- (iii) An intermediate care facility for individuals with intellectual disabilities;
 - (iv) A hospital; or
 - (v) Any other locations that have qualities of an institutional setting, as determined by the Secretary. Any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS will be presumed to be a setting that has the qualities of an institution unless the Secretary determines through heightened scrutiny, based on information presented by the State or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings. 42 C.F.R. § 441.301(c)(4)(5)(i)
- (ii) (iii)(iv)(v).

6.

Children Under 19 Years of Age Medicaid:

“Children Under 19 Years of Age Medicaid” provides Medicaid to children from birth through the last day of the month in which the child turns nineteen (19) years of age. The following basic eligibility requirements must be met to qualify:

- Age - The applicant’s statement of the child’s date of birth may be acceptable
- Application for Other benefits
- Resources are not considered in determining eligibility. (Medicaid Manual, Volume II/MA, MT 47- 01/14, at Section 2182-1).
- Financial eligibility Criteria – Modified adjusted gross Income (MAGI) limits vary based on the age of the child in accordance with the Federal poverty Level (FPL) for the BG size. Refer to Appendix A2 regarding Financial limits for Family Medicaid. (Medicaid Manual, Volume II/MA, MT 47- 01/14, at Section 2182-2).

7.

Federal law requires that states provide Medicaid recipients with written notice and an opportunity to request a fair hearing before their benefits are terminated. *See* 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.206. *See also Doe v. Bush*, 261 F.3d 1037, 1056-57 (11th Cir. 2001). In this matter, Respondent terminated Petitioner’s NOW/COMP Waiver benefits, despite

Petitioner's request to continue receiving NOW/COMP benefits pending a hearing decision in this matter.

8.

Notice of termination of Medicaid eligibility must be written in plain language and must include a clear statement of the specific reasons for termination along with the specific regulations that support the termination. 42 U.S.C. § 435.917; 42 C.F.R. § 431.210. Federal regulations also specify the contents of such notice, which must include, among other things, a statement of the action the state intends to take and the reason for the intended action. 42 C.F.R. § 431.210. The underlying purpose of the federal notice requirements is to ensure that states meet the due process standard set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970). See 42 C.F.R. § 431.205(d). In *Goldberg v. Kelly*, the United States Supreme Court held that a recipient of public assistance must "have timely and adequate notice *detailing* the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." 397 U.S. at 267-68 (emphasis added).

9.

In this matter, July 31, 2019, "Change Results Letter" stated "E [REDACTED] E [REDACTED] [sic] ability to be retained as a member of the COMP waiver program has been compromised as he no longer receives waiver services. In fact, the same is the basis of the present termination. That is, receiving waiver services is a precursor to remain in the program. However, in an attempt to continue to assist Mr. E [REDACTED], we have determined that he meets the eligibility requirements for RIGHT FROM THE START/CHILD UNDER 19 Medicaid program." The July 31, 2019, Change Results letter clearly stated that Petitioner was a member of the COMP Waiver Program at the time of termination. The only reason given for termination was because Petitioner no longer received waiver services. The only regulation provided to support the July 31, 2019, termination was Policy Statement, § 2050, which addresses "Application Processing Overview" and is irrelevant to Petitioner's termination from the NOW/COMP Waiver Program.

10.

The Medicaid Act provides that any individual eligible for medical assistance may obtain such

assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required who undertakes to provide him such services. 42 U.S.C.S. § 1396a(a)(23)(A). The qualified provider must be willing to furnish services to the beneficiary. 42 C.F.R. § 431.51(b)(1). The Medicaid beneficiary also has the right to choose whether to receive services through Providers of Intermediate Care Facilities for Individuals with Intellectual Disabilities or a Home and Community-Based Services Waiver. 42 U.S.C. § 1396n(c)(2)(C); 42 C.F.R. § 441.302(d).

11.

42 CFR Sec. 441.302 (d) states as follows:

(d) Alternatives - Assurance that when a beneficiary is determined to be likely to require the level of care provided in a hospital, NF, or ICF/IID, the beneficiary or his or her legal representative will be -

- (1) Informed of any feasible alternatives available under the waiver; and
- (2) Given the choice of either institutional or home and community-based services.

12.

In this matter, the July 31, 2019, Change Results letter did not state that Petitioner was terminated from the NOW/COMP Program because he could not receive waiver services in an institution. Respondent submitted the Post- Hearing affidavit of Catherine Ivy and argued that Petitioner was properly terminated from the NOW/COMP Waiver Program because home and community-based settings, as defined in 42 CFR Sec. 441.301 (C)(5), do not include institutional settings. More Specifically, an individual in an institution cannot get waived services. Instead, they receive institutional/PRTF services, which by virtue of being provided in an institution are not waiver services. Upon careful review of the plain language of 42 CFR Sec. 441.302 (d), which provides assurance of alternatives to beneficiaries, I find this argument to be without merit.

Moreover, this argument goes beyond the notice as outlined in the July 31, 2019, termination notice. Thus, the Termination letter was not clear or specific enough to allow Petitioner an

opportunity to prepare a meaningful rebuttal at the hearing. *See Cobb County School Dist. v. Barker*, 271 Ga. 35, 37 (1999). Reasonable notice of termination of NOW/COMP benefits must include, at a minimum, a short and plain statement regarding the factual basis for the Department's conclusion. *See* O.C.G.A. § 50-13-13(a) (under the Administrative Procedures Act, an agency must provide a short and plain statement of the matters asserted). Accordingly, Respondent failed to provide Petitioner with an adequate Notice of Termination from the NOW/COMP Waiver Program in this matter.

13.

Continuing Medicaid Determination

Eligibility for Medicaid must be reviewed under all Medicaid Classes of Assistance (COAs) before denying a Medicaid application or an individual in a Medicaid Assistance Unit (AU), and prior to termination of ongoing Medicaid eligibility for an entire AU or individual in an AU. Do not deny or terminate Medicaid eligibility before completing a Continuing Medicaid Determination (CMD) to consider Medicaid eligibility under all other COA's. Medicaid Manual, Volume II/MA, MT 45-10/12, Section, 2052-1.

14.

Children Under 19 Years of Age Medicaid

Children Under 19 Years of Age provides Medicaid to children from birth through the last day of the month in which the child turns nineteen (19) years of age and requires age and application for other benefits. Medicaid Manual, Volume II/MA, MT 47-01/14, Section, 2182-1.

15.

In this matter, the credible evidence is that Respondent terminated Petitioner's NOW/COMP Waiver benefits, completed a CMD, and determined that 'Child Under 19' was a better COA for Petitioner. It is undisputed that Petitioner is sixteen (16), has no income or resources, and met financial eligibility for NOW/COMP at the time of termination and when Respondent completed the CMD. However, Respondent failed to submit any evidence into the record that Petitioner met the income eligibility requirement for "Child Under 19" Medicaid. Dophamia Dean testified that "Child Under 19" eligibility is based upon the income and resources of Petitioner's parent, Dr.

R ■■■ E ■■■. However, Ms. Dean did not know Dr. R ■■■ E ■■■'s income, but alleged that it was provided at the annual review. In addition, Dophamia Dean did not know the income and resource limit for "Child Under 19" Medicaid eligibility and did not bring the income or resource limit for "Child Under 19" Medicaid to the hearing. Accordingly, Respondent has failed to establish by a preponderance of the evidence that it reviewed all Medicaid Classes of Assistance prior to terminating Petitioner's ongoing NOW/COMP Medicaid eligibility, properly determined that Petitioner met the eligibility requirements for "Child under 19" Medicaid, and properly processed the CMD according to the COA that is most advantageous to Petitioner.

16.

Petitioner Received Waivered Services at Bancroft

In this matter, the credible evidence is that on or around November 15, 2018, Respondent sent a NOW/COMP approval letter to Petitioner's Attorney, Ms. Chris Vance, which placed Petitioner in a NOW/COMP slot for coverage through July 2019. In addition Petitioner's mother, Dr. R ■■■ E ■■■, gave credible testimony that she reviewed monthly reports from Bancroft and Petitioner received numerous waiver services at Bancroft when Respondent terminated his NOW/COMP on or around August 1, 2019. Respondent only submitted a listing of the codes into evidence. The actual billing statements or records that Bancroft submitted for Petitioner's treatment were not submitted into evidence for consideration. In addition, no one from Bancroft appeared at the hearing to testify in this matter. Accordingly, Respondent has failed to establish, by a preponderance of the evidence, that Petitioner did not receive one (1) waiver service under the NOW/COMP Waiver Program.

IV. DECISION:

Based upon the foregoing, it is concluded that Petitioner met the eligibility requirements for the NOW/COMP Waiver Program and received waiver services on or around July 31, 2019. In this matter, Respondent failed to follow the policies and procedures for terminating Petitioner from the NOW/COMP Waiver Program or provide Petitioner with a proper notice of termination. Accordingly, Respondent's decision to terminate Petitioner's NOW/COMP Waiver benefits is

HEREBY REVERSED and this matter is **REMANDED** for Respondent to reinstate Petitioner's NOW/COMP Waiver benefits retroactive to August 1, 2019.

SO ORDERED, June 3 , 2020

Carol W. Russell

Carol Walker-Russell
Administrative Law Judge

