



Colorado  
Cross-Disability  
Coalition

CHCBS-  
decided

May 2, 2011

TO OAC:

FROM: Julie Reiskin non attorney advocate

RE: [REDACTED]. LTCO SHP 2010-0564

Statement of issue and pre-hearing motions:

We have a half-day face to face hearing in the above referenced case on Wednesday May 04, 2011.

I am filing a motion to request that the entire file of SHP 2009-0032 be entered as appellant Exhibit A with the letter from appellant's doctor as Exhibit A and the documentation regarding summary judgment as Exhibit B. I also ask to add two more exhibits:

Exhibit D Autism Research showing this is indeed a medical, rather than behavioral condition

Exhibit E [REDACTED] IEP

Exhibit F CMS documentation

The issues for this hearing are as follows:

- 1) Collateral Estoppel: Appellant does not believe that the response to the order to show cause was adequate and believes that the Appellee has not shown what is different this year. The exhibits, issues and arguments appear to be identical to the case litigated last year. Appellant still believes that had the Appellee not agreed with the decision that a judicial review would have been the appropriate step.
- 2) Does the client meet level of care as defined by Colorado Regulation –passing the ULTC 100.2 scoring more than 2 in two areas of physical need or scoring a 2 in either supervision or behavior. The medical evidence and findings from last year will show that he does meet that level of care as he did last year.
- 3) Is he medically fragile? While appellant continues to take the position that there is no regulatory requirement for medical fragility, even if there is such a requirement appellant meets that requirement based on the only definition available in Colorado law.
- 4) Motion previously filed to hold appellant harmless –initial hearing was scheduled for September 03, which was available for the appellant. Appellee needed to reschedule and needed a six week lag time. There was some confusion with a potential additional Appellee and a hearing was set for December 9<sup>th</sup> that needed to be changed, then a hearing was set for 1/26/11 when the appellant's advocate was out of town and was unable to make a change in plans due to Legal Services Corporation board business. Finally a setting conference was held and May 4<sup>th</sup> was selected. When the initial hearing

Colorado Cross-Disability Coalition (CCDC)

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was postponed appellant agreed to continuance only if he would be held harmless for repayment in the event that he lost this appeal.

- 5) Arapahoe County was added as an Appellee because they dropped his Medicaid after getting a notice from LTCO and regarding confusion on the RRR. Arapahoe County has since withdrawn their adverse action and submitted an unopposed motion for dismissal on the Medicaid eligibility only. The remaining issue is eligibility related but only as it relates to LONG TERM CARE or LEVEL OF CARE or TARGET GROUP eligibility.

Questions for [REDACTED]

- 1) How old are you?
- 2) How much money do you have?
- 3) Is that enough to buy a house?
- 4) Do you like candy?
- 5) If I gave you this (show him a pill) and told you it was candy would you eat it?
- 6) Are you and I friends? Are we really, really close friends?
- 7) Would you show me your father's passwords and give me his wallet if I asked you?
- 8) What would you do if you were sleeping and you woke up and there was a fire in your house?
- 9) If you take a shower one time a month, is that enough?
- 10) Do you know how often you are supposed to go to the doctor? What about the dentist?
- 11) Do you know where we are now? Are we in the city? Are we in a different state from where you live? If you went outside and couldn't find your dad or me what would you do?
- 12) How would you get home from here?
- 13) Would brushing your teeth once a week be enough?
- 14) Do you know the difference between \$100 and \$1000? Is \$100 more than \$1000?

Questions for [REDACTED]

- 1) Describe [REDACTED]'s disabilities?
- 2) Describe the help [REDACTED] needs for bathing—if you were not present could he get himself clean enough to maintain skin integrity and adequate hygiene? Why not.
- 3) Is the verbal assistance [REDACTED] needs for dressing significant? Does he need verbal supervision every day or does he only need to be reminded on some days?
- 4) If [REDACTED] were able to eat without supervision what would he eat?
- 5) Is [REDACTED] able to make safe decisions? Please explain and give recent examples.
- 6) Is [REDACTED] able to manage his medication independently?
- 7) Can [REDACTED] make his needs known to outsiders?
- 8) When [REDACTED] is ill how do you know?
- 9) Would [REDACTED] know how to interact with law enforcement if he were the victim of a crime?
- 10) Would [REDACTED] commit a crime if someone who he saw as an authority figure asked him to do so?
- 11) How does [REDACTED] get to and from school?
- 12) Does [REDACTED] go off campus for lunch with other kids?
- 13) Does [REDACTED] stay after school for sports or activities or just to hang out with other kids?
- 14) Does [REDACTED] go out with other kids on the weekends?
- 15) Has [REDACTED] ever been out with other teens without an adult? Why not?
- 16) Who helps you take care of Collin?

*Alan D. Megibow, M.D.*  
Child and Adolescent Psychiatry

April 29, 2011

RE: [REDACTED]

To Whom it May Concern:

[REDACTED] is a 16-year-old seriously autistic youngster who has been under my psychiatric care for over two years at Arapahoe/Douglas Mental Health Network, Child & Family Services, in Englewood, Colorado. He is being treated for a chronic Mood Disorder and an equally severe Generalized Anxiety Disorder, all complicated by, and intensified by his Autistic condition. [REDACTED] is maintained in his home and community due to the excellent care provided by his father and the support of the Medicaid Home and Community Based Services program. Without the support of this program, it is anticipated that [REDACTED] will not be able to be maintained in the community and will need to be institutionalized at state expense.

As the result of the aforementioned psychiatric illnesses, [REDACTED] displays impulsivity, agitation and episodic explosive anger, disorganized thought processes and inattentiveness and distractibility, all requiring treatment with psychiatric medications, to which he often responds inconsistently and unpredictably, and which produce variable adverse reactions such as sedation, weight gain and occasional neuromuscular difficulties. This all necessitates close medical follow up and management.

Functionally, some of the fall-out of all of the above includes: mental retardation; limited capacity to independently engage in activities of daily living; inability to differentiate between strangers and friends, thus inadvertently putting himself in harms way; and inability to communicate pain or feeling ill.

Because of this, [REDACTED] is considered to be medically fragile by any definition. Colorado regulations do not define medically fragile in regulations governing Medicaid or any other program. Colorado revised statutes do define medically fragile as follows: CRS 26-6-102 (5.6) "Medical foster care" means a program of foster care that provides home-based care for "medically fragile" children and youth who would otherwise be confined to a hospital or institutional setting and includes, but is not limited to, the following:

- (a) Infants impacted by prenatal drug and alcohol abuse;
- (b) Children with developmental disabilities which require ongoing medical intervention;

As his principle treating physician, I am attesting that [REDACTED] has developmental disabilities that require ongoing medical intervention. In addition to medication

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*Alan D. Megibow, M.D.*  
Child and Adolescent Psychiatry

monitoring and administration, he requires monitoring of nutritional, emotional and physical status. His father has been trained to provide this intensive medical monitoring and appropriate response on a daily basis. His father does this and is only able to do this through the support of this waiver.

██████ has a disability that is medically and biologically based. Because it has behavioral manifestations makes no difference in the medical nature of the disorder. It is no different from other neurologically based conditions such as Alzheimer's disease, Multiple Sclerosis, Cerebral Palsy or organic brain disorders. He will never "recover" and will need care for the remainder of his life. As he gets older, he will need more, not less care and services. If he qualified for a service last year, and he did, there is no possible change that would disqualify him this year, absent a change in rule or law. If the requirement for the waiver is medical fragility—absent a definition in regulation—the only definition in Colorado statute must be used. As his physician, I am certifying that ██████ meets this definition.

If you require my testimony or additional information from me, please send a written request to ██████'s non-attorney advocate, Julie Reiskin, LCSW at [jreiskin@ccdconline.org](mailto:jreiskin@ccdconline.org) or by fax to 303-567-6582. Thank you for your consideration.

Yours truly,



Alan D. Megibow, M.D.  
Staff Child & Adolescent Psychiatrist  
Arapahoe/Douglas Mental Health Network

Dressing: You reported that [REDACTED] is physically able to dress/undress himself. You stated [REDACTED] must be reminded to change his clothes, however he is able to complete actual task including all fine motor tasks. The assistance you provide is slightly above and beyond for a typical 16 year old and I scored him a 1 in this area. This is the same score he received on his previous assessment.

Toileting: You reported [REDACTED] is independent with all aspects of toileting. You stated [REDACTED] has not had any recent accidents and does not need any prompts or reminders. I scored him a 0 in this area. This is the same score he received on his previous assessment.

Mobility and Transfers: You reported [REDACTED] is able to ambulate and transfer independently. You reported no impairment in these areas. I scored him a 0 in both mobility and transfers. This is the same score he received on his previous assessment.

Eating: You reported [REDACTED] is able to feed himself and utilize utensils independent. You stated [REDACTED] does not understand the concept of diet or healthy eating and requires supervision to maintain adequate nutrition. You reported he will let you know when he is hungry. The assistance you provide is slightly above and beyond for a typical 16 year old and I scored him a 1 in this area. This is the same score he received on his previous assessment.

Supervision Behaviors: You reported [REDACTED] is taking Invega for his mood. You stated he becomes upset and rude with you when you speak with others, however he does not act out physically. You reported [REDACTED] knows to stay away from the stove and sharp knives, but that he is not careful enough when crossing the street. You reported [REDACTED] has not wandered off recently or attempted to leave the home. You stated the school reported [REDACTED] was using some bad words there, but was directed not to do so. Overall you stated [REDACTED] does need some extra supervision and redirection, however his behaviors do not put him or others at risk. The supervision provided is slightly above and beyond for a typical 16 year old and I scored him a 1 in this area. This is the same score he received on his previous assessment.

Supervision Memory/Cognition: You reported [REDACTED] needs daily reminders and prompts to complete his daily routine. You stated [REDACTED] is in the 10<sup>th</sup> grade and mainstreamed for about half his classes. You stated [REDACTED] continues to work with a tutor to assist with academics. You reported [REDACTED] is able to follow multiple step directions. I scored [REDACTED] a 1 here as he requires some above and beyond supervision for daily routine. This is the same score on the previous assessment as [REDACTED]'s cognition and level of supervision has been stable and consistent over the past year.

The level of assistance [REDACTED] requires on a daily basis places him at risk for placement in an ICF/MR, but not in a Nursing Facility or Hospital.

State department rules(s) supporting the decision to deny functional eligibility are:

1) 8.506

Exhibit: <u>1</u>
Page: <u>2 of 3</u>

- 2) 8.401.11
- 3) 8.401.15A.
- 4) 8.506.11 A.2.
- 5) 8.506.95 A.1.
- 6) 8.506.51 D.
- 7) 8.506.51 E.
- 8) 8.408

Sincerely,

Candace Bailey  
Case Manager  
Longterm Care Options  
(720) 974-2314

CC: Office of Administrative Courts, 633 Seventeenth Street, Suite 1300 Denver, CO 80202

Exhibit: <u>1</u>
Page: <u>3 of 3</u>

April 27, 2011

Andy Lewis  
3721 S Fox St  
Englewood, CO 80110

RE: Denial for Children's Home and Community Based Services  
SHP#: SHP 20100564

On May 11, 2010, I met with you to conduct an annual reassessment of the Home and Community Based Services (HCBS) – Children's Waiver to determine [REDACTED] level of functioning for the program. Collin is a 16-year-old male with Autism and Bipolar disorder. Upon interviewing you regarding Collin's functioning, I determined he no longer met the level of care required for the Home and Community Based Services – Children's Waiver program.

In 2009 the state of Colorado received an audit from Centers for Medicare and Medicaid (CMS). During this audit it was determined that the state and the Children's Waiver case management agencies were not appropriately defining and implementing hospital and nursing facility level of care. In response to this audit, the Colorado Department of Healthcare Policy and Financing (HCPF) more clearly defined hospital and nursing facility level of care. These definitions have been provided to Longterm Care Options to use in conducting assessments. According to volume 8 a child must meet either hospital or nursing home level of care to be eligible for the Children's Waiver. According to the definitions provided by HCPF Collin does not meet this criteria.

Andy, you reported [REDACTED] needs daily reminders and prompts to complete some activities of daily living, however he is physically able to complete all tasks. The assistance you reported providing is above and beyond some of the care provided to a typical 16 yr old, however the assistance is not at the level of care for hospital or nursing facility placement.

The following is an explanation of the functional reporting, that in turn resulted in, a discontinuation of the Children's Waiver.

Bathing: You reported [REDACTED] is able to physically complete all aspects of bathing independently. You stated [REDACTED] does not always remember to use soap or shampoo and you provide reminders for this. The assistance you provide is slightly above and beyond for a typical 16 yr old and I scored him a 1 in this area. This is the same score he received on his previous assessment.

Exhibit: <u>1</u>
Page: <u>1 of 3</u>

- 17) How long can you leave [REDACTED] alone without supervision?
- 18) Do you work?
- 19) How do you work if you have to watch [REDACTED] all of the time?
- 20) What would happen if your business failed and you had to get an office job?
- 21) Why do you think [REDACTED] would have to be in an institution—couldn't he be by himself for a few hours after school?
- 22) You reported that [REDACTED] is able to follow multiple step directions according to the case manager. Can you explain this? What do you mean by multiple step directions?

Questions for Case Manager:

- 1) You say that he received the same scores as the previous assessment but your scores of 1 on both memory and supervision were overturned by the ALJ. What DIFFERENCE have you found between this year and last year that would cause you to drop the score?
- 2) You say [REDACTED] has a need for supervision that is slightly above a typical 16 year old. You assume that because he is in integrated education in the 10<sup>th</sup> grade he is functioning at a 10<sup>th</sup> grade level. Why would you think this when his IEP clearly states that he is academically on a 3<sup>rd</sup> or 4<sup>th</sup> grade level?
- 3) In your opinion do most 16 year olds need ANY assistance with bathing, dressing, or hygiene?
- 4) Do most 16 year olds have enough money management skills to know the difference between \$100 and \$1000?
- 5) Do most 16 year olds understand that \$20 is not enough to buy a house?
- 6) Do most 16 year olds spend time with peers sans adult supervision?
- 7) What specifically is different from last year about [REDACTED] Has he made marked improvements?
- 8) Have there been any published law or rule changes affecting this program?
- 9) Did you disagree with the decision last year?
- 10) Why didn't you file for judicial review?



## COLORADO DEPARTMENT OF HEALTH CARE POLICY & FINANCING

1570 Grant Street, Denver, CO 80203-1818 • (303) 866-5654 • (303) 866-4411 Fax • (303) 866-3883 TTY

John W. Hickenlooper, Governor • Susan E. Birch MBA, BSN, RN, Executive Director

### NOTICE OF INITIAL DECISION

In the matter of: Appellant: [REDACTED]  
Appeal No: [REDACTED]

Enclosed is a true copy of the Initial Decision of the Administrative Law Judge regarding the above captioned matter. ***This is not a final decision.*** If you disagree with this Initial Decision, you have the right to ask for reversal or modification of the Initial Decision by filing written exceptions with the Office of Appeals. Section 24-4-105 (14) and (15), C.R.S.

Any of the parties listed on the attached Certificate of Mailing may file exceptions to the Initial Decision. Written exceptions must be received in the Office of Appeals by 5:00 p.m. on **July 16, 2011** unless this date falls on Saturday, Sunday, or a legal holiday, in which case exceptions will be due on the following business day. Please read the enclosed instructions carefully and follow each step. You will be notified by mail if any exceptions are filed by the other parties and given an opportunity to file a response. Failure to file exceptions may waive the right to seek judicial review of the Final Agency Decision.

If you have any questions, please contact me at the above address, attention Office of Appeals or at (303) 866-5654.

Sincerely,

*Susan Latchford*

Office of Appeals

Date: June 28, 2011

Enclosures

Handwritten initials 'SL' in black ink.

**CERTIFICATE OF MAILING**

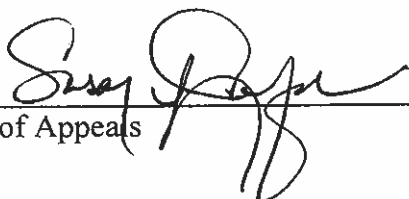
I hereby certify that on June 28, 2011, I placed a true and correct copy of the Notice of the Initial Decision regarding Appeal Number **SHP 2010-0564** in the U.S. Mail, postage prepaid, addressed to the following:

Julie Reiskin  
CCDC  
655 Broadway, Suite 775  
Denver, CO 80203

Jennifer Brodis  
Longterm Care Options, LLC  
8950 E. Lowry Blvd., #1  
Denver, CO 80230

and via Interdepartmental mail to:

Lois Jacobs  
Long Term Benefits Division  
Department of Health Care Policy and Financing  
1570 Grant Street  
Denver, CO 80203

  
Office of Appeals

## APPELLANT INSTRUCTIONS FOR FILING EXCEPTIONS TO THE INITIAL DECISION

If you do not agree with the findings of fact or legal conclusions in the Initial Decision, you may file written Exceptions to the Initial Decision. Exceptions are your written arguments why you believe the Initial Decision is incorrect, based on either incorrect facts or incorrect conclusions of law. This is the last step in the Administrative appeal process before the Office of Appeals issues a Final Agency Decision.

- All Exceptions must be in writing, and they must be **received** in the Office of Appeals by the due date shown on the attached letter. A written statement may be submitted to the Office of Appeals if you feel you need more time to prepare your Exceptions. Your request for more time must be **received** in the Office of Appeals before the due date shown on the attached letter. The Office of Appeals will issue an Order with a new due date.
- Always include the Name and the Appeal Number shown on the top of the Initial Decision in your written Exceptions and all correspondence.
- State in your Exceptions the specific parts of the Initial Decision you disagree with, and the reasons why.
- **FOR THE RECIPIENT OR APPLICANT (Appellant):** If you feel that a FINDING OF FACT is wrong, you must order a written transcript of the hearing. **There is no cost to you for the written transcript.** You do not need a written transcript if you disagree with the conclusion of law.

### TO ORDER A WRITTEN TRANSCRIPT:

- 1) **Contact** the Office of Administrative Courts, 633 Seventeenth Street, Suite 1300, Denver, CO 80202, or call (303) 866-5626 and request a written transcript. The Court will submit the official recording of the hearing to A/V Tronics, a transcribing agency, to prepare the written transcript. The Department will pay A/V Tronics for the cost of the transcript and the cost of one copy for you.
- 2) **Notify** the Office of Appeals in writing that you ordered the written transcript, and need a new due date to file Exceptions. The Exceptions and written transcript must be **received** in the Office of Appeals by the due date. It is your responsibility to request a new due date to ensure timely filing of both your Exceptions and the transcript. Late filings will not be accepted.
- 3) A/V Tronics will submit the original written transcript directly to the Office of Appeals, and send one copy of the transcript to you.
- 4) If you have questions regarding the written transcript, contact A/V Tronics at (303) 634-2295. You must contact A/V Tronics to make sure the written transcript is submitted to the Office of Appeals by the due date for Exceptions.
- 5) **File** your written Exceptions with the Office of Appeals by the due date. The Exceptions shall state that a transcript has been requested.

### MAIL, FAX, or HAND-DELIVER YOUR EXCEPTIONS TO:

Colorado Department of Health Care Policy & Financing  
Office of Appeals  
1570 Grant Street  
Denver, CO 80203  
FAX (303) 866-4411

**Please call (303) 866-5654 to confirm we received the fax.**

The Office of Appeals will issue the Final Agency Decision after reviewing the hearing record and any other documents timely filed with the Office of Appeals. If you have questions, please contact us at the address or phone number above.

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 633 17 <sup>th</sup> Street, Suite 1300 Denver, Colorado 80202	<p style="text-align: center;"><b>RECEIVED</b></p> <p style="text-align: center;">JUN 27 2011</p> <p style="text-align: center;">HEALTH CARE POLICY &amp; FINANCING OFFICE OF APPEALS COURTS USE ONLY</p>
<p>████████████████████</p> <p>Appellant,</p> <p>VS.</p> <p><b>LONGTERM CARE OPTIONS, LLC,</b> Appellee.</p>	
<b>INITIAL DECISION</b>	

The above-referenced case concerns Longterm Care Options' (Options) decision to discontinue Appellant's participation in the state's Medicaid Home and Community Based Services Children's Waiver program (Children's HCBS). Hearing was held before Administrative Law Judge (ALJ) Hollyce Farrell at the Office of Administrative Courts in Denver, Colorado on May 4, 2010 in courtroom 2. The parties were given additional time to submit written closing arguments. Appellant was present at hearing and testified on his own behalf. He was represented by Julie Reiskin, a non-attorney authorized representative. Appellant's father, Andrew Lewis, was also present and testified on behalf of his son, who is a minor child. Jennifer Brodis appeared at hearing on behalf of Options. Candace Bailey presented testimony on behalf of Options. Lois Jacobs of the State Department of Health Care Policy and Financing also presented testimony on behalf of Options. At hearing, the ALJ admitted Options' exhibits 1 through 3 and 5 through 11 and Appellant's exhibits A through F into evidence. The hearing was digitally recorded.

In this Initial Decision the ALJ refers to the State Department of Health Care Policy and Financing as the "State Department". The rules of the State Department cited in this decision are printed in 10 CCR 2505 and are cited by their section number. The cited rules are those currently in effect unless otherwise stated in the decision.

**ISSUE**

The issue presented is whether Options' decision to discontinue Appellant from the Children's HCBS program is supported by the facts, applicable statutes and State Department regulations.

## FINDINGS OF FACT

1. Appellant is a 17-year-old male who has been diagnosed with Autism and Bipolar Disorder. He has been a recipient of services under the Children's HCBS program for several years.
2. Ms. Bailey, Appellant's case manager who is employed by Options, conducted a re-assessment of Appellant on May 11, 2010 using the state-adopted screening guidelines for determining Children's HCBS eligibility along with other unpublished level of care criteria.
3. The ULTC 100.2 is used to assess an individual's functional needs in the following areas of activities of daily living: mobility, bathing, dressing, eating, toileting, transferring, and need for supervision (behaviors and memory/cognition deficit).
4. In order to meet the published criteria for program eligibility in the Children's HCBS program an individual must score a minimum of 2 points in at least two activities of daily living or in at least one score of 2 in either supervision category.
5. The statewide adopted and published HCBS eligibility assessment tool is known as the ULTC 100.2. The ULTC 100.2 is used to assess an individual's functional needs in the following areas of activities of daily living: mobility, bathing, dressing, eating, toileting, transferring, and need for supervision (behaviors and memory/cognition deficit).
6. In accordance with published regulations, in order to meet the functional criteria for program eligibility an individual must score a minimum of 2 points in at least two activities of daily living or in at least one score of 2 in either supervision category.
7. Following an audit conducted by the Centers for Medicare and Medicaid (CMS) and with directions from the State Department, Options used not only the ULTC 100.2 but also relied on the unpublished hospital, nursing facility, and ICF/MR level of care criteria to determine Appellant's continued eligibility in the Children's HCBS program.
8. Ms. Bailey's conducted an assessment of Appellant in May 19, 2009. At that time, she determined that Appellant was no longer eligible for the Children's HCBS program because he did not score a 2 in of the area supervision (memory/cognition) as he had on his prior assessment and because did not require skilled care as set out in the hospital, nursing facility, or ICF/MR level of care criteria provided to her by the State Department. At that hearing, Ms. Bailey conceded that nothing had changed in Appellant's condition or level of functioning between the May 19, 2009 assessment and the prior year's assessment when he had scored a 2 in the supervision area of memory/cognition.
9. When Bailey conducted the May 11, 2010 assessment, she again determined that Appellant was no longer eligible for the Children's HCSBS program because he did not score a 2 in either of the areas of supervision, nor did he score a 2 in at least two

activities of daily living. Moreover, she determined that he did not meet the targeting criteria provided by the State Department of being "medically fragile" by needing hospital or skilled nursing level of care. At the May 4, 2011, hearing, Ms. Bailey again conceded that Appellant's condition and level of functioning had not changed or improved.

10. Options sent notice of its decision to discontinue services to Appellant on July 7, 2010. The basis stated in the 803 Notice of Action is: "You do not meet the functional eligibility level. Other: 8.506.11 A.2, 8.506.95.A.1, 8.506.51E, 8.401.1.15.C, 25.5-901.6. You do not meet the targeting criteria for the program. 8.506.11.A.2. The child is living at home with parents and not at risk for institutional placement. 8.506.95.A.1. The child no longer meets level of care criteria for hospital or nursing facility placement. 8.506.51.D The case management agency shall assist in completing the identification information on the ULTC-100 to the Utilization Review Contractor to determine whether the level of care criteria is met. 8.506.51.E. The case management agency shall verify that the child meets the appropriate level of care (hospital or nursing facility) criteria as determined by the Utilization Review Contractor. 8.401.1.15.C. A person's need for basic Medicaid benefits is not a proper consideration in determining whether a person needs long term care services. 25-5-901.6. The child must have medical needs which would qualify them, pursuant to state department criteria, for institutionalization or place them at risk for institutionalization in any one of the following: An acute care hospital or a nursing facility. Appellant timely appealed Options' June 11, 2009 decision."

11. Appellant challenges the scores given in the supervision categories as well as the appropriateness of applying unpublished levels of care criteria to determine eligibility. The ALJ will limit her review to the May 11, 2010 ULTC 100.2 to the supervision categories.

12. *Behaviors* are described as wandering, disruptive, self-injurious, resistive to care or self-neglect. Options scored Appellant a 1 in this category. In order to receive a score of 2, the evidence must show that, "the client exhibits inappropriate behaviors that put self, others and property at risk. The client frequently requires more than verbal redirection to interrupt inappropriate behaviors." The ALJ finds that a score of 1 is not supported by the credible evidence in the record.

13. *Memory/Cognition Deficit* is defined as the age appropriate ability to acquire and use information, reason, problem solve, complete tasks or communicate needs in order to care for oneself safely. In order to achieve a score of 2 in this area, the evidence must show that the client requires consistent and ongoing reminding and assistance with planning, or requires regular assistance with adjusting to both new and familiar routines, including regular monitoring and/or supervision, or is unable to make safe decisions, or cannot make his basic needs known. Options scored Appellant a 1 in this category finding that Appellant "requires ongoing supervision to maintain routine of daily tasks" and that Appellant "has poor judgment and is not able to made decisions independently. . . ." The ALJ finds that a score of 1 is not supported by the credible evidence in the record.

14. If left unsupervised, Appellant puts self, others and property at risk. Appellant is severely disabled. Appellant's father supervises him at all times when Appellant is not at school. Appellant can never be left alone or he would "freak out." He cannot manage his medication, even with the aid of a pill box; he would never remember to take his medications. Appellant is on a psychiatric medication. His medication is essential to his well-being and safety. Appellant does not know the difference between pills and candy and would eat pills if someone told him they were candy. Appellant's father has to monitor what Appellant eats; if he does not, Appellant will sneak off and eat junk food. Appellant is not called upon to make decisions regarding his safety because of his constant need for supervision. Appellant's father persuasively testified that Appellant needs constant supervision and is not safe when left alone.

15. As a result of his disabilities, Appellant has an Individualized Education Program (IEP) and is requires close supervision while at school for safety and behavior.

16. Appellant's disabilities prevent him from making safe decisions. He requires continual and constant oversight that is atypical for a normally developed 17-year-old. He cannot make safe decisions, in either new or familiar environments. This finding is supported by Ms. Bailey's own notes in the ULTC 100.2 wherein she states, "Clt continues to need ongoing assistance to make safe decisions." In the ULTC-100.2, Ms. Bailey checked the boxes indicating that Appellant has impaired judgment and is subject to wandering. The 2010 ULTC 100.2 also provides, "D/t clt's dx clt requires ongoing supervision to maintain routine of daily tasks. Clt has poor judgment and is not able to make decisions independently." Ms. Bailey again checked a box indicating that Appellant has impaired judgment and checked a box indicating that he has lack of awareness.

17. The ALJ finds that Appellant's disabilities cause him to put self at risk and cause him to require consistent and ongoing reminding and assistance with planning, or require regular assistance with adjusting to both new and familiar routines. Accordingly, he should have received a score of 2 in the supervision categories of behaviors and memory/cognition.

18. In addition to finding that Appellant did not meet the functional eligibility criteria scored in the ULTC 100.2, Options also discontinued Appellant from the program because he did not also meet the definition of "medically fragile". Options concedes that the discontinuation of Children's HCBS was not related to any improvement in Appellant's condition. It relied on State Department Rules 8.506.11 to justify the termination, asserting that pursuant to that section it was required to discontinue Children's HCBS services to Appellant because he did not meet the targeting criteria of medically fragile.

19. According to Ms. Jacobs, following a federal audit conducted by the Centers for Medicare and Medicaid (CMS) in 2008, a recipient of Children's HCBS must now also meet the definition of medically fragile.

20. At hearing, Appellant challenged the appropriateness of applying unpublished targeting criteria definitions of medically fragile to determine eligibility.

21. There is no evidence before the ALJ that the Medical Services Board, the entity authorized to adopt rules regarding Medicaid eligibility, has adopted the State Department's medically fragile definition(s) or amended its Children's HCBS program eligibility rules to include an additional requirement that an applicant must also meet the targeting criteria, similar to the rules it adopted for the HCBS mental illness waiver. There is also no evidence that any such criteria have been adopted by the General Assembly as statutory requirements for program eligibility. Since none of the criteria is found in published State Department rules or state statutes, it cannot be used to determine program eligibility.

22. The state-approved level of care assessment tool for determining Children's HCBS eligibility is the ULTC 100.2. There is currently no statutory or regulatory requirement that Appellant also meet an unpublished definition of medically fragile targeting criteria in order to continue receiving services through the Children's HCBS program.

23. Appellant meets the eligibility requirements of the Children's HCBS program. Options's determination to discontinue benefits is not supported.

### **CONCLUSIONS OF LAW**

1. The legislative intent of the Children's HCBS program is to provide an array of services to eligible children as an alternative to institutional placement. Children's HCBS is an optional program under the federal Medicaid system. 42 U.S.C. Section 1396, see also Section 25.5-5-203, C.R.S.

2. The Children's HCBS Waiver Program (formerly known as the Katie Beckett Waiver Program) is a waiver program for disabled children who are at risk of institutionalization in a hospital or nursing facility and who would not otherwise be eligible for Medicaid due to parental income and/or resources. The services provided under this program serve as alternatives to Medicaid hospital or nursing facility services for children, birth through seventeen (17) years of age, and who meet the established minimum criteria for hospital or nursing facility level of care as determined by the Utilization Review Contractor. Section 8.506.

3. Services shall be provided to children who meet all the following program eligibility requirements: the child has not reached his/her eighteenth birthday; he child is living at home with parent(s) or guardian and is at risk of institutional placement, as determined by the Utilization Review Contractor; or is in an acute care hospital or nursing facility and can be returned home and safely cared for in the home, and the child's parent(s) or guardian choose to receive services in the home or community instead of an institution, with the provision of Children's HCBS Waiver Program services; the child's physician certifies that the quality and quantity of services and supports identified in the Care Plan are sufficient to meet the needs of the child in the

home setting; and the Utilization Review Contractor certifies, through the ULTC-100 (Long Term Care Client Assessment Certification and Transfer) form, in conjunction with the Pediatric Functional Assessment Instrument, that the child meets the established minimum criteria for hospital or nursing facility level of care; the child, due to parental income and/or resources, is not otherwise eligible for Medicaid benefits or enrolled in other Medicaid waiver programs; enrollment of a child is cost effective to the Medicaid Program, as determined by the State; and, the child receives a waiver service on a monthly basis. Section 8.506.11.

4. The guidelines for long term care services, including Children's HCBS, are based on a functional needs assessment in which individuals are evaluated in at least the following areas of activities of daily living: mobility, bathing, dressing, eating, toileting, transferring, and need for supervision. Section 8.401.1.

5. The Medicaid long-term care program provides care to persons who meet the level of care screening guidelines found in Section 8.401.

6. The ULTC 100.2 shall be the comprehensive and uniform client assessment process for all individuals in need of long-term care, the purpose of which is to determine the appropriate services and levels of care necessary to meet clients' needs, to analyze alternative forms of care and the payment sources for such care, and to assist in the selection of long-term care programs and services that meet clients' needs most cost-efficiently. To qualify for Medicaid long-term care services, the recipient/applicant must have deficits in 2 of 6 Activities of Daily Living, ADLs, (2+ score) or require at least moderate (2+ score) in Behaviors or Memory/Cognition under Supervision. Section 8.401.1.

7. The Medical Services Board (MSB) is the entity that is statutorily authorized to adopt rules establishing eligibility requirements for Medicaid programs. Section 25.5-1-303(3)(b), C.R.S. In this case, the MSB has determined, by rulemaking, that the ULTC 100.2 is the comprehensive and uniform client assessment process for all individuals in need of long-term care. The targeting criteria of having high medical needs or being medical fragility have not been published as rules. Unpublished material cannot be used as binding criteria, for determining eligibility for public benefits, as was done here. *Weaver v. Colorado Department of Social Services*, 791 P.2d 1230, 1234 (Colo. App. 1990).

8. Options decision to discontinue Appellant's participation in the Children's HCBS program is not supported by either the facts or the adopted State Department rules and regulations governing eligibility. Options cannot rely on unpublished material to discontinue benefits nor can it discontinue Appellant's benefits if he achieved a score of 2 in either of the supervision categories, which the ALJ has found that he has.

9. Except as otherwise specifically provided in these rules, the provisions of Section 24-4-105, C.R.S., as amended, shall apply to the conduct of fair hearings. Section 8.05.8.A. Under Section 24-4-105, C.R.S., the proponent of an order has the burden of proof. The proponent of an order in this case is Options, who is seeking to change the

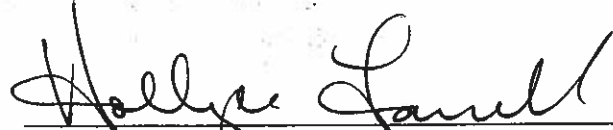
status quo. *Department of Institutions v. Kinchen*, 886 P.2d 700, 708 (Colo. 1994). Options has not met its burden to discontinue Appellant's participation in the Children's HCBS program.

### INITIAL DECISION

It is the Initial Decision of the Administrative Law Judge that Options' determination that Appellant is no longer eligible for Children's HCBS benefits is not supported by the facts or the published State Department regulations. The discontinuation determination is reversed.

Pursuant to Section 25.5-1-107(1)(a), and 24-4-105(14)(a)(I), C.R.S. (2009), this Initial Decision will be reviewed by the Office of Appeals, State Department of Health Care Policy and Financing. The parties shall have 15 calendar days from the date this Initial Decision is mailed, plus 3 calendar days for mailing, to file written exceptions with the Office of Appeals, Department of Health Care Policy & Financing, 1570 Grant Street, Denver, Colorado 80203, unless extended by the Office of Appeals. This Initial Decision will not be implemented while pending State Department review and final agency action. Pursuant to State Department rules, the failure to file exceptions to provisions of the Initial Decision will waive the right to seek judicial review of a final agency decision affirming those provisions.

**DONE AND SIGNED** this 23<sup>rd</sup> day of June, 2011.



HOLLYCE FARRELL

Administrative Law Judge