

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

CHRISTOFER HUBBARD, a minor,)	
through his mother, KRISTINA HUBBARD,)	
)	
Appellant,)	
v.)	C.A. No. 05A-01-014-JEB
)	
VINCENT P. MECONI, in his official)	
capacity as Secretary of the Delaware)	
DEPARTMENT OF HEALTH & SOCIAL)	
SERVICES,)	
)	
Appellee.)	

Submitted: September 12, 2005
Decided: December 28, 2005

OPINION

*Appeal from a Decision of the Department of Health & Social Services.
Decision Affirmed.*

Appearances:

MaryBeth Musumeci, Esquire, Wilmington, Delaware.
Attorney for Christofer Hubbard and Kristina Hubbard.

A. Ann Woolfolk, Esquire, Wilmington, Delaware.
Deputy Attorney General.

JOHN E. BABIARZ, JR., JUDGE.

This is the Court’s opinion regarding a decision of the Delaware Division of Social Services (DSS) to terminate Medicaid benefits for Christofer Hubbard (“Christofer” or “Appellant”), a minor. Christofer received Medicaid benefits under the Community Children’s Alternative Disability Program (“CCADP”) from 2003 to 2004, when DSS recommended termination of benefits because Christofer did not meet a qualifying level of care. A hearing officer from DSS affirmed the recommendation, and an appeal was filed by Christofer’s mother, Kristina Hubbard. For the reasons explained below, the decision to terminate benefits is affirmed because the record supports the finding that Christofer does not meet the qualifying level of care for participation in CCADP.

FACTS

Christopher was born with sacral meningocele, a form of spina bifida. As an infant, he underwent restorative surgery, which damaged the nerves that control bladder and bowel function. As a result, Christofer has a secondary diagnosis of neurogenic bladder and neurogenic bowel, conditions which cause incontinence. Christofer must be catheterized four times per day, and he takes two medications to help relax his bladder and prevent leakage. To help with his bowel condition, he wears a sanitary napkin and drinks apple juice. He has also been diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”), for which he takes a prescription drug.

In 2003, when Christofer was 11 years old, he applied for benefits from the Children’s Community Alternative Disability Program (“CCADP”), a Medicaid program operated by the Delaware Division of Social Services (“DSS”), Department of Health and Social Services (“DHSS”). His application was approved, and Christopher started receiving CCADP benefits in March 2003. In July 2004, DSS found that Christofer did not require a level of care comparable to institutional care (a threshold requirement for CCADP eligibility) and recommended that Christofer’s benefits be terminated. His mother requested that a fair hearing be conducted and that benefits continue pending a final decision. A DSS hearing officer held a hearing in November 2004. The recommendation to terminate benefits was affirmed, and Ms. Hubbard filed a timely appeal to this Court on her son’s behalf.

DISCUSSION

This appeal is taken pursuant to Del. Code Ann. tit. 31, § 520 (1997).

The standard of review is whether substantial evidence supports the hearing officer’s findings of fact,¹ and whether he committed any errors of law.²

The Children’s Community Alternative Disability Program (CCADP) is a Delaware Medicaid option that is designed to serve children with significant disabilities.

¹DEL. CODE ANN. tit. 31, § 520.

²*Collins v. Eichler*, 1991 WL 53447 at *3 (Del. Super.) (citing *State Dept. of Labor v. Med. Placement Serv.* 457 A.2d 382, 383 (Del. Super. Ct. 1982)).

A state can provide Medicaid benefits to a disabled child if the State determines that (1) the child would be eligible for medical assistance if he were living in an institution; (2) while living at home the child receives the type of care that would be provided in an institution; (3) it is appropriate to provide such care for the child outside an institution; and (4) the estimated cost of the care outside the institution is not greater than the cost in an appropriate institution.³ A medical review team (MRT) determines whether an applicant needs the level of care provided at an institution. In this case, the only real issue is whether Christofer needs a level of care consistent with what he would receive in a hospital or other institutional facility, as defined in the Division of Social Services Manual (“DSSM”). The controversy focuses on two of the seven eligibility criteria:

4. The child’s profile is consistent with the level of care of a hospital, Skilled Nursing Facility (SNF), Intermediate Care Facility (ICF), Intermediate Care Facility for Mental Retardation (ICF/MR), or Intermediate Care Facility Institution for Mental Disease (ICF/IMD).
5. The child must meet Supplemental Security Income (SSI) medical disability standards codified at 42 U.S.C. § 1382c (a) (presumptively met if child with chronic condition qualifies for SNF, ICF, ICF/MR, ICF/MD level of care).⁴

The hearing officer affirmed the MRT’s conclusion that Appellant did not meet a qualifying level of care (under #4) and is therefore not presumptively disabled (under

³42 U.S.C.A. § 1396a (e)(3)(B).

⁴DSSM § 25100.

#5). As shown below, the record evidence supports these conclusions and there are no errors of law.

Evidence. At the hearing, DSS asserted that the original finding that Appellant was disabled for purposes of CCADP was erroneous and that DSS recommended termination of his benefits to correct the error. DSS presented the testimony of Anthony Brazen, M.D., Chief Medical Officer/Director, State of Delaware Medicaid Program. Dr. Brazen served on the MRT that found Appellant to be eligible for CCADP and also on the MRT that recommended termination of benefits. Dr. Brazen acknowledged that he had mistakenly thought that Christofer was unable to catheterize himself and that he needed nursing supervision. On review of the records, he realized that Christofer did and does catheterize himself on a daily basis without assistance.

Dr. Brazen provided details about Christofer's current condition to show that he is not disabled and is not a valid candidate for CCADP. Dr. Brazen testified that Christofer has regular check-ups at the Spinal Clinic at the Du Pont Hospital for Children, where he sees several specialists. Based on their reports, Dr. Brazen stated that Christofer is able to perform all activities of daily living ("ADL's") without assistance. He walks and moves normally, keeps up with his peers and participates in gym class without difficulty. His diet is normal and he requires no special exercise program. His kidney ultrasound was normal, and he has no history of kidney infections.

He catheterizes himself four times daily and takes oral medication for incontinence. He has normal strength, muscle mass, and tone in all his extremities. Christofer takes medication for ADHD but does not treat with a psychologist or psychiatrist. At a young age, he had been diagnosed as learning disabled in regard to reading, but prior to the hearing he was assessed as cognitively normal.

Dr. Brazen stated that Christofer's medical care consists of catheterization and oral medications, as well as annual check-ups with several specialists. He does not require nursing supervision or any other type of medical assistance. These conclusions were largely undisputed by Christofer's mother, who was the sole witness on his behalf at the hearing.

Ms. Hubbard was the only witness for Christofer. She described his condition at birth and subsequent corrective surgery, as well as his current needs and condition. Christofer performs the daily catheterizations, but he needs constant prompting to do so. His medications cause side effects such as constipation and dry mouth. Christofer has regular check-ups with several medical specialists to monitor his condition. Ms. Hubbard stated that Christofer has behavioral problems at home which are beginning to manifest themselves at school. She reports that he is often defiant, and has difficulty concentrating and following directions. He is sometimes teased by other students at school.

When Christofer's mother was asked why she wants to receive the CCADP benefits, she stated that Christofer's future includes many unknowns, including possible recurrence of the spine tethering and urinary tract infections.

Good cause for termination. Appellant argues that the hearing officer misapplied all the eligibility requirements, including the basic criteria (DSSM § 25100, 1– 7), the General Level of Care Factors (DSSM § 25250, 1, a–j), and the Specific Level of Care Standards (DSSM § 25300.1 – 25300.6). DSS disputes each of Appellant's arguments, focusing on the question of whether Christofer needs medical care that equates with any level of institutional care.

Appellant asserts that he qualifies for the level of care available in an intermediate care facility (ICF) and that the hearing officer did not use the correct definition of such a facility and did not distinguish an ICF from other types of care facilities.⁵ These arguments fail because all the care facilities, including the ICF, are defined by the DSSM as being either institutional or residential, and the evidence is clear that Christopher needs no such care. The introductory definition provides as follows:

An institutional setting is a residential placement that provides room and board and health-related services, which are supervised by a licensed practitioner. The setting has the necessary professional personnel, equipment and facilities to meet the health and functional needs of the

⁵See DSSM § 25300 for definitions of the various care facilities.

child on a continuing or repetitive basis and is authorized under State law to provide such care.⁶

The five facilities which are then defined are classified as either institutional or residential.⁷ Dr. Brazen testified that Christofer has no need of the level of care available in such a setting, and his testimony is confirmed by the records of the various physicians who have treated Christofer. Christofer does not need nursing supervision in order to catheterize himself or to take his oral medication, which are the only treatments necessitated by his medical condition. The written and testimonial evidence provided by Christofer's mother, Dr. Brazen and the medical files establishes these facts. Christofer's mother testified that he takes his medication and catheterizes himself when he is reminded to do so. The hearing officer noted that an ICF is an institutional setting in which nursing and allied health and support services are provided on a daily basis.⁸ Christofer's mother and his professional health care providers indicated that few treatments have been identified for Christofer and that he has not required a skilled level of care. Appellant points to the fact that when Christofer is at school he often needs to be reminded to go the nurse to catheterize himself as evidence that he requires nursing supervision, but a reminder to go the nurse's office does not constitute skilled

⁶DSSM § 25300.1.

⁷DSSM § 25300.2 – 25300.6.

⁸DSSM § 25300.4

nursing care. Christofer attends a public school, and all of his care is provided in a non-institutional setting without complication other than the reminders that are typically needed for children. These facts are undisputed. They are also dispositive of the core issue. The Court finds that as a matter of both fact and law the record supports the hearing officer's conclusion that Christofer does not meet the qualifying level of care, which is defined as either residential or institutional.

Appellant argues DSS may not terminate Medicaid benefits without showing a change in circumstances or other good cause,⁹ and that DSS made neither showing. DSS asserts that an erroneous recommendation of eligibility is good cause for termination as a matter of law. The Court agrees. If an initial determination of eligibility is incorrect, it is incumbent upon DSS to correct its error and enforce the regulations in a manner that is consistent with the goal of helping disabled children get the necessary medical care at home. At the hearing, Dr. Brazen acknowledged that he had mistakenly thought that Christofer was unable to catheterize himself and that he needed nursing supervision. On review of the records, Dr. Brazen realized that Christofer did and does catheterize himself on a daily basis without assistance and does not meet the qualifying level of care requirements. For this reason, DSS concluded that Christofer was not eligible for participation in CCADP. This is not a complicated legal

⁹*Collins v. Eichler*, 1991 WL 53447 (Del. Super. Ct.).

or medical issue: receipt of benefits not consistent with program goals and requirements must be terminated. The Court concludes that DSS has made a showing of good cause.

Because Christofer does not meet the qualifying level of care, he is not entitled to the presumption of disability set forth in § DSSM 25100 (5), *supra*. Thus there are no issues to be resolved in child's favor, as required by DSSM § 25050.

Appellant also argues that the hearing officer failed to consider the potential for harm or regression in the absence of benefits, but he does not identify any medical evidence supporting this argument.¹⁰ Christofer's mother referred to the possibility of recurrence of the spine tethering and urinary tract infections. Christofer's medical history does not support these assertions, and the Court finds that this argument does not warrant reversal of the decision. Appellant further asserts that because of the possibility of future complications the decision should be resolved in his favor, but without medical evidence of such risks this is not a tenable argument, particularly in light of the fact that he does not meet the qualifying level of care.

Appellant asserts that the potential for future harm is increased because he has no other medical coverage. The record shows otherwise. Two of the four references to insurance in the record show that Christofer is covered by his father's Blue Cross/Blue Shield health insurance, and the third document does not indicate that there

¹⁰See DSSM § 25250(1)(g) (one of the criteria for assessing a qualifying level of care is the "potential for harm, regression, or developmental delay in absence of service").

is no coverage but leaves the question blank.¹¹ This assertion does not warrant reversal.

The Court concludes that the hearing officer's decision is free from legal error and is supported by substantial evidence on the record.

CONCLUSION

For all the foregoing reasons, the hearing officer's decision to terminate Appellant's CCADP benefits is *Affirmed*.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEB,jr./ram/bjw
Original to Prothonotary

¹¹See Joint Appendix of the Appellant and the Appellee at A-54, A-65 and A-110.