

## STATE HEARING DECISION

ODHS 4005 (Rev. 9/94)

County <b>SCIOTO</b>	District Hearings Section <b>COLUMBUS</b>	Assistance Group Name		Assistance Group Number
Place of Hearing <b>SCIOTO CDHS</b>	Initial Hearing Date <b>11/28/2001</b>	Rescheduled Postponed to <b>01/15/2002</b>	Rescheduled Postponed to <b>01/09/2002</b>	Rescheduled Postponed to

Appellant/Representative	Appellant Representation
	Local Agency Representation <b>Kim Reedy, ODJFS; Millie Pritchard, CareStar</b>

Date Notice Mailed <b>09/24/2001</b>	Date Received by Local Agency	Date Received by ODHS <b>10/23/2001</b>	Date Appeal Summary Received	Date Scheduling Notice Mailed <b>01/11/2002</b>
Appeal Number(s)/Program(s) <b>1041539/MED</b>				

### Notice to Appellant

This is the official report of your hearing and is to inform you of the decision and order in your case. All papers and materials introduced at the hearing or otherwise filed in the proceeding make up the hearing record. The hearing record will be maintained by the Ohio Department of Job and Family Services. If you would like a copy of the official record, please telephone the hearing supervisor at the COLUMBUS District hearing section at 1-800-686-1568.

**If you believe this state hearing decision is wrong, you may request an administrative appeal by writing to: Ohio Department of Job and Family Services, Office of Legal Services, 30 East Broad Street, 31st Floor, Columbus, Ohio 43266-0423 or FAX (614) 752-8298.** Your request should include a copy of this hearing decision and an explanation of why you think it is wrong. Your written request must be received by the Office of Legal Services within 15 calendar days from the date this decision is issued. *(If the 15th day falls on a weekend or holiday, this deadline is extended to the next work day.)* During the 15-day administrative appeal period you may request a free copy of the tape recording of the hearing by contacting the district hearings section.

If you want information on free legal services but don't know the number of your local legal aid office, you can call the Ohio State Legal Services Association, toll free, at 1-800-589-5888, for the local number.

### ISSUES SECTION:

Appellant is enrolled in a Medicaid Home & Community Based Services (HCBS) waiver program through the Scioto County Department of Job & Family Services (CDJFS). CareStar is a contracted provider through the Ohio Department of Job & Family Services (ODJFS) to provide care coordination to individuals enrolled in HCBS waivers. On 7/26/01, CareStar performed an assessment of the Appellant which recommended to ODJFS that the Appellant be disenrolled from the HCBS waiver because she no longer met the intermediate level of care requirement. ODJFS notified the county to disenroll the Appellant. Scioto CDJFS mailed notice on 9/24/01 to disenroll the Appellant from the HCBS waiver. Appellant's family disagrees. The issue under appeal is whether the proposed disenrollment is correct. (Appeal 1041539)

Based upon the record before me, I find the appeal should be sustained. HCBS waiver services will continue

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Appeal(s) <b>SUSTAINED 1041539</b>	Date Issued <b>01/18/2002</b>	Compliance <b>1041539</b>
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**Distribution:** Original to appellant, one copy to local agency; one copy to district Hearing section; one copy to district office; two copies to State Hearings. *(Photocopy to appellant's authorized representative, if any, and to ODHS units as appropriate.)*

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at this time. The hearing officer also recommends CareStar perform a new assessment after the Appellant's medical tests in 2/02 and 3/02. Appellant shall be given proper notice of the new assessment and retains all rights to appeal the new HCBS waiver assessment.

### **PROCEDURAL MATTERS**

- (1) On 10/23/01, the Ohio Department of Job & Family Services' (ODJFS) Bureau of State Hearings received the state hearing request.
- (1) The state hearing was rescheduled twice. The hearing was initially convened on Tuesday, January 15, 2002 at 10:00am via telephone from the Franklin CDJFS. Representing the Appellant were her parents, Mr. & Mrs. Gee and the contracted care provider, Cheryl Justice. Kim Reedy, Client Coordinator, represented the ODJFS Bureau of Community Long Term Care. CareStar was represented by Millie Pritchard, regional Supervisor.

The hearing was reconvened on Friday, January 18, 2002 at 10:00am in order to provide additional medical documentation. Appellant was represented by her mother, Cynthia Gee and the contracted care provider, Cheryl Justice. Kim Reedy, Client Coordinator, represented the ODJFS Bureau of Community Long Term Care. CareStar was represented by Millie Pritchard, regional Supervisor. All parties were sworn in at both hearings by ODJFS Hearing Officer Richard K. Collins.

- (1) ODJFS Bureau of Community Long Term Care appropriately provided an appeal summary.

### **FINDINGS OF FACT:**

#### **Undisputed Facts:**

- (1) Appellant is a five-year old child enrolled on the Medicaid home and community based services (HCBS) waiver through the Scioto County Department of Job & Family Services. The primary diagnoses is cerebral palsy. Secondary diagnoses include Arthogryposis and club feet. All diagnoses were onset at birth.
- (1) Appellant was enrolled on the HCBS waiver with an intermediate level of care because she needed assistance in four (4) activities of daily living (ADLs) [See the 7/24/00 level of care assessment, Exhibits E & F].

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- (1) On 7/26/01, a reassessment was performed by a CareStar representative. The initial assessment recommended waiver reenrollment with an intermediate level of care ( ILOC) [See Exhibit B, & Exhibit C, page 1].
- (1) After the 7/26/01 assessment was reviewed by the CareStar supervisor, it was determined that the Appellant no longer met ILOC because she only needed assistance in one ADL and the occupational therapist stated that the Appellant had progressed very well and had reached her maximum potential for her age, and occupational therapy was no longer a medical necessity (See Exhibits A, H, & I).
- (1) ODJFS and CareStar acknowledge that although the occupational therapist recommended that the skilled service is no longer needed, the treating physician has not changed the physician order to reflect that this skilled service is no longer necessary.
- (1) Appellant has upcoming medical appointments for a full neurological evaluation in 2/02 and 3/02 by her treating physicians.

**Disputed Facts:**

- (1) The primary issue is whether the Appellant meets at least an intermediate level of care (ILOC) in order to have continued enrollment in the HCBS waiver.

ODFJS Bureau of Community Long Ter Care Services and its contracted provider, CareStar, purport that Appellant no longer meets at least an intermediate level of care (ILOC) because her medical condition has improved. Comparing the assessment from 7/24/00 to the 7/26/01, the Appellant's ADLs have decreased from needing assistance in four ADLs to one ADL. According to the Data Collection Checklist of 7/26/01 (Exhibit B, page 2), the Appellant is age-appropriate in her ADLs except in the area of eating. According to a nurse who performed the Denver Developmental Test performed (Exhibits G1 & G2), Appellant is developing successfully in all areas except one.

Appellant's parents contend that she needs hands-on assistance in three ADLs: (1) Eating (Exhibit B, page 2); Grooming - brushing her teeth; and (3) Mobility - unable to walk heel-to-toe. The family received information about the grooming and mobility from the same nurse who performed the Denver Developmental Test (See Exhibit 4). This nurse notes that there is a caution in the mobility because of the Appellant's inability to walk heel-to-toe.

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The hearing officer reviewed the evidence and finds that the Appellant meets the level of care because she needs assistance in at least two ADLs: Eating & grooming.

- (1) ODJFS and CareStar contend that the physical/occupational therapy is no longer a medical necessity (See the letter from the occupational therapist, Exhibits H & I). Appellant's family contend that the physician has not changed the order to terminate the occupational therapy.

The hearing officer finds that although the occupational therapist information is persuasive, the physician has not changed the order. Therefore, the therapy is still a medical necessity.

### **CONCLUSIONS OF POLICY:**

- (1) **Ohio Administrative Code (OAC) Rule 5101:6-7-01(C)** provides that the hearing officer's findings of fact shall be based exclusively on the evidence introduced at the hearing, or after the hearing and subject to examination and rebuttal by both parties. It shall be the responsibility of the agency to show, by a preponderance of the evidence, that its action or inaction was inaccordance with ODJFS Rules.

- (1) **OAC Rule 5101:3-12-11** describes home services facilitation. In relevant parts:

**Paragraph (B) of this rule** states that home services facilitation shall be performed by ODJFS or an entity(entities) designated by and under contract with ODJFS. The entity (entities) designated by and under contract with ODJFS to provide home services facilitation shall be referred to as the designee or contractor in OAC chapter 5101:3-12. Different entities may be designated by and under contract with ODJFS to provide home service facilitation to consumers who reside in specified regions of the state.

**Paragraph (E) of this rule, Utilization monitoring and management**

(1) The designee is responsible for monitoring and managing utilization of home care services for consumers eligible for core-plus benefits and consumers eligible for ODJFS-administered waiver benefits.

- (1) **OAC Rule 5101:3-3-06 Intermediate level of care (ILOC).**  
**Paragraph (A) of this rule:** This rule sets forth the criteria used to determine whether

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an individual who is seeking medicaid payment for long term care services needs an intermediate level of care (ILOC).

**Paragraph (B) of this rule:** Definitions.

(1) "Activity of daily living (ADL)" means a personal or self-care skill performed, with or without the use of assistive devices, on a regular basis that enables the individual to meet basic life needs for food, hygiene, and appearance. For purposes of this rule, the term "ADL" may refer to any of the following:

(a) "Mobility" is the ability to use fine and gross motor skills to reposition or move oneself from place to place, with or without the use of assistive devices. Mobility includes all of the following: (i) "Bed mobility," the ability to move to and/or from a lying position, turn from side to side, or otherwise position the body while in bed;

(ii) "Transfer," the ability to move between surfaces (e.g. to/from bed, chair, wheelchair, standing position, etc.); or (iii) "Locomotion," the ability to move between locations by ambulation or by other means.

(b) "Bathing" is the ability to cleanse one's body by showering, tub or sponge bath, or any other generally accepted method, and may be performed with or without the use of assistive devices.

(c) "Grooming" is the ability to perform the tasks associated with oral hygiene, hair care, and nail care.

(d) "Toileting" is the ability to appropriately eliminate and dispose of bodily waste, with or without the use of assistive devices or appliances. Toileting may include the use of a commode, bedpan, or urinal, the ability to change an absorbent pad, and to appropriately cleanse the perineum; and/or the ability to manage an ostomy or catheter;

(e) "Dressing" is the ability to put on, fasten, and take off all items of clothing, including the donning and/or removal of prostheses;

(f) "Eating" is the ability to feed oneself. Eating includes the processes of getting food into one's mouth, chewing, and swallowing, and/or the ability to use and self-manage a feeding tube.

(2) "Assistance" means the hands-on provision of help in the initiation and/or completion of a task.

(3) "Individual" has the same meaning as in rule 5101:3-3-15 of the Administrative Code.

(4) "Medication administration" means the ability to prepare and self-administer all forms of over the counter and prescription medication.

(5) "Supervision" means either of the following: (a) Reminding an individual to perform

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or complete an activity; or (b) Observing while an individual performs an activity to ensure the individual's health and safety.

**Paragraph (C) of this rule:** An individual may be determined to require an intermediate level of care (ILOC) only if both of the following conditions are met:

(1) The individual's physical and mental condition and resulting service needs have been evaluated and compared to all of the possible levels of care (in accordance with OAC Rule 5101:3-3-15) and it has been determined that:

(a) The individual requires services beyond the minimum required for a protective level of care (set forth in OAC Rule 5101:3-3-08); but,

(b) The individual's condition and/or corresponding service needs do not meet the minimum criteria for a skilled level of care set forth in OAC Rule 5101:3-3-05; and,

(c) The individual's condition and/or service needs do not meet the criteria for an ICF-MR/DD LOC set forth in OAC Rule 5101:3-3-07; and

(2) At least one of the following applies:

(a) The individual requires hands-on assistance with the completion of at least two activities of daily living;

(b) The individual requires hands-on assistance with the completion of at least one activity of daily living; and is unable to perform self-administration of medication and requires that medication administration be performed by another person;

(c) The individual requires one or more skilled nursing or skilled rehabilitation services [as defined in paragraphs (B)(4) and (B)(5) of OAC Rule 5101:3-3-05] at less than a skilled care level [as defined in paragraph (B)(3) of OAC Rule 5101:3-3-05]; or

(d) Due to a cognitive impairment, including but not limited to dementia (as defined in OAC Rule 5101:3-3-151), the individual requires the presence of another person, on a twenty-four-hour-a-day basis for the purpose of supervision to prevent harm.

### ANALYSIS:

According to OAC 5101:3-3-06, in order for an individual to meet the intermediate level of care (ILOC), she must meet at least one of four criteria:

(1) must not meet another level of care AND need assistance in at least two activities of daily living (ADLs); OR

(2) Needs assistance in one ADL and is unable to perform self-administration of medication and requires that medication administration be performed by another person; or

(3) The individual requires one or more skilled nursing or skilled rehabilitation services at less than a skilled care level [as defined in paragraph (B)(3) of OAC Rule 5101:3-3-05]; OR

(4) Due to a cognitive impairment, including but not limited to dementia, the individual

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requires the presence of another person, on a twenty-four-hour-a-day basis for the purpose of supervision to prevent harm.

There is no disagreement that the Appellant does not meet another level of care criteria, nor has a cognitive impairment which requires twenty-four hour supervision. At issue is whether the Appellant met the ILOC criteria at the time of the proposed disenrollment which notice was mailed on 9/24/01. The disenrollment was based upon the assessment performed by CareStar on 7/26/01.

The hearing officer disagrees with the assessment. The Appellant continues to meet the intermediate level of care. According to new information provided at the reconvened hearing of 1/18/02, the Appellant provided a medical statement (dated 1/8/02) from the nurse who performed the Denver Developmental Test (Exhibit 4). The statement was as follows: "*....I have been working with [Appellant] since **July 25, 2001**. I have completed a Denver II screen on her that showed a delay in the area of personal-social in which she **needed help with brushing her teeth**. She also had a **caution in gross motor** in which she was **unable to successfully walk-heel to-toe**." (Emphasis provided).*

There was no dispute by ODJFS or CareStar that the Appellant needed hands-on assistance in one ADL - eating. However, the nurse, who has provided care since 7/25/01, the day before the CareStar assessment, has identified at least one additional needed assistance in an ADL - brushing her teeth. According to OAC 5101:3-3-06, brushing the teeth is identified as an ADL category under "grooming." In addition, the hearing officer finds that if a small child is unable to walk heel-to-toe, she may need assistance in the ADL category of "mobility."

The hearing officer also concludes that although the occupational therapist's treatment notes are persuasive, the skilled therapy of "occupational therapy" needs to continue because the treating physician has not changed the physician order of 5/01 which identified occupational/ physical therapy as a medically necessary service.

In light of the above, the hearing officer finds that the proposed disenrollment from HCBS waiver services is not correct.

### **HEARING OFFICER'S RECOMMENDATIONS:**

Based upon the record before me, I find the appeal should be sustained. HCBS waiver services will continue at this time. The hearing officer also recommends CareStar perform a new assessment after the Appellant's medical tests in 2/02 and 3/02. Appellant shall be given proper notice of the new assessment and retains all rights to appeal the new HCBS waiver assessment.

### **FINAL ADMINISTRATIVE DECISION AND ORDER:**

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Finding the hearing officer's decision to be supported by the evidence, the recommendations shown above are adopted, appeal number 1041539 is Sustained. The agency is required to comply with each of the terms set forth in the hearing officer's recommendation.

**Compliance to the Hearing Decision:**

O.A.C. Section 5101: 6-7-03 requires prompt compliance with state hearing decisions. For decisions involving Medicaid waiver, compliance shall be achieved within 15 calendar days from the date the decision is issued, but in no event later than 90 calendar days from the date of the hearing request.

**APPENDIX:**

**AGENCY EXHIBITS:**

- (A) ODJFS Appeal Summary
- (B) Data Collection Checklist of 7/26/01
- (C) Level of Care Determination Worksheet of 7/26/01
- (D) Communication Record
- (E) Data Collection Checklist of 7/24/00
- (F) Level of Care Determination Worksheet of 7/24/00
- G-1 Denver II Test
- G-2 Denver Developmental Test (How to interpret test results)
- (H) Allied Healthcare letter
- (I) Rehab Progress Occupational Therapy Notes (4/12/01)
- (J) Allied Healthcare Physical Therapy Notes (5/29/01)

**APPELLANT EXHIBITS:**

- (1) Letter from Appellant
- (2) Physician Orders (1/5/02, 5/31/01, and un-date order)
- (3) Children's Hospital medical appointments (of 2/02 & 3/02)
- (4) Referral & educational Association for Child Health

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Date Issued: 01/18/2002