STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: May 2, 2013)

BETHANY BORGUETA, on behalf of JACOB BORGUETA	:	
v.	:	**C.A. No. PC 2010-5813**
RHODE ISLAND DEPARTMENT OF HUMAN SERVICES	:	

DECISION

STERN, J. Bethany Borgueta (Appellant), on behalf of Jacob Borgueta (Jacob), appeals a decision (the "Decision") of the Rhode Island Department of Human Services (DHS), denying Jacob's application for Medical Assistance (MA) benefits under the "Katie Beckett" option.[1] Appellant argues that the Decision is affected by error of law and is arbitrary and capricious because the agency applied incorrect standards and ignored evidence in the record when denying Jacob's application. Appellant also contends that her constitutional and statutory rights were violated because the content of DHS's denial notice was defective. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

Jacob was born without complication on October 10, 2008, but at seven months old was diagnosed with "Right Hemiparesis Seizure Disorder and Left MCA

[1] The "Katie Beckett" option is a component of the federal Medicaid program which allows certain "disabled" children to receive services at home which they otherwise would receive only in an institutional setting. See DHS Regulation § 0394.35.

Infarct[ion]."[2] (Dec. at 7.) As a result, Jacob suffers seizures, "has significant cognitive, gross motor, fine motor and expressive communication impairments[,] . . . [and] limited peripheral vision on the right side of his eyes."[3] (Brown Letter, June 2, 2010 at 1); (EI Letter, June 14, 2010 at 1.) Jacob takes medication to help control his seizures[4] and is a candidate for surgery to disconnect the malformed left hemisphere of his brain from the functional right hemisphere.[5] (Brown Letter, June 2, 2010 at 1.)

[2] Jacob developed these conditions because he suffered a stroke in utero and was born with significant malformation of the left hemisphere of his brain. (Brown Letter, June 2, 2010 at 1.) He began exhibiting early symptoms—the inability to crawl and "disuse and tightness of the right hand"—at three months old. (Epilepsy Program Clinic Final Report, June 22, 2010 at 1.)

[3] Jacob's motor impairments include "[continued] disuse and tightness of the right hand[,] . . . very mild right facial asymmetry[,] . . . [and] out-turning [of the right foot]." (Epilepsy Program Clinic Final Report, June 22, 2010 at 1-2.) "Jacob can manipulate simple toys or tools but needs hand over hand assistance to help with age appropriate toys and tools that require two hands to manipulate." (Early Intervention (EI) Letter, June 14, 2010 at 1.) He can walk several steps without support, but loses his balance often and requires constant supervision because "[h]is gait is relatively slow and tottering," Epilepsy Program Clinic Final Report, June 22, 2010 at 3, and "[h]is seizures also add to the risk of falling while being upright." (EI Letter, June 14, 2010 at 1.) Jacob's language and expressive impediments negatively impact his ability to feed himself and verbally communicate with others. Id.

[4] After experimenting with various seizure-control medications without success, Jacob currently takes "Depakote" twice daily and has responded "very well." (Epilepsy Program Clinic Final Report, June 22, 2010 at 2.)

[5] According to Jacob's Attending Physician in Neurology at the Epilepsy Program Clinic, Dr. Frank Hopkins Duffy, M.D. (Duffy), the intended surgical procedure, called a "left hemispherectomy," would stop Jacob's "poorly functional left hemisphere [from] interfering with right hemisphere compensatory function [and] . . . [eliminate] the epileptiform activity that is evidenced by report over the residual portions of the left hemisphere." (Epilepsy Program Clinic Final Report, June 22, 2010 at 3.) Duffy advised that such surgery is necessary to "maximize [Jacob's] performance later in life, and minimize the likelihood of severe seizures." Id.

Since July 2009, Jacob has also received multiple therapies from EI[6] designed to "help Jacob function with as much independence as possible in his natural environment." (EI Letter, June 14, 2010 at 1.) In particular, EI provides Jacob with physical therapy services once a week, occupational therapy services twice a week, and speech therapy services once a week.[7] See id. Jacob has also undergone one round of "constraint therapy"[8] and begun weekly aquatic therapy sessions. See Hr'g Tr. at 22. Jacob's family members participate substantially in the provision of these services along with EI's practitioners. See id. at 18-24.

Appellant applied for "Katie Beckett" assistance on December 16, 2009. (Hr'g Tr. at 5.) DHS denied Jacob's application by written notice dated March 12, 2010, determining that Jacob was "not aged (65 years or older), or blind, or permanently disabled (RI DHS Manual, Sections 0306.05.05 (aged), 0306.05.10 (blind), 0306.05.15

[6] EI, a component of Rhode Island's MA program, "provid[es] comprehensive, coordinated, community based services that respond to the identified needs of eligible infants, toddlers and their families." (DHS Regulations §§ 0322.05, 0322.15.) Jacob is eligible to receive EI services because his diagnosed impairments were found to constitute a "single established condition." (EI Letter, June 14, 2010 at 1.) A "single established condition" is "a physical or mental condition known to impact development, including, but not limited to, diagnosed chromosomal, neurological, metabolic disorders, or hearing impairments and visual impairments not corrected by medical intervention or prosthesis." (DHS Regulation § 0322.30(6.21).)

[7] Beginning on June 3, 2010, Jacob's physical therapy services were to increase from once-weekly to twice-weekly sessions. (Hr'g Tr. at 20.)

[8] "Constraint therapy" is a type of physical therapy service used to facilitate the growth and mobility of a child's underdeveloped arm by restraining the child's use of his or her dominant arm. See Constraint Therapy Pamphlet at 2. It is appropriate for those "children who have one-sided weakness from a neurological impairment [such as] . . . cerebral palsy, stroke, traumatic brain injury, hemispherectomy and arteriovenous malformation, among others . . . ." Id. In practice, "[c]onstraint therapy involves [the] casting (from fingertips to shoulder, worn 24 hours per day) of the [child's] stronger arm in order to promote improved strength and function [in] the weaker arm." Id. This therapy "is 4 weeks long and consists of 21 days of 6-hour therapy sessions." Id.

(permanently disabled)) . . . ." (DHS Notice, March 12, 2010 at 2.) However, the notice further stated that "[a]s of today, the [medical] information we have is insufficient to determine [Jacob's] eligibility," and requested that Appellant send additional medical records within thirty days so that Jacob's application could "be returned to the Clinical Team for review." Id. at 3.

On March 17, 2010, Appellant appealed DHS's denial and requested an Administrative Hearing (the "Hearing"). (Hearing Request Form, March 17, 2010 at 1.) Appellant authorized the release of additional medical records of Jacob's on April 15, 2010. (Medical Information Release Form, April 15, 2010 at 1.) DHS obtained the additional medical information and began reassessing Jacob's "Katie Beckett" application on April 19, 2010. (Katie Beckett Fax Sheet, April 19, 2010 at 1.)

Appellant received written notice of DHS's subsequent denial attached to her Hearing notice. (Hr'g Tr. at 27.) This second denial notice informed Appellant that Jacob met the federal definition for "disability," but denied his application because he did not require a sufficient "level of care" warranting "Katie Beckett" assistance. Id. DHS did not cite or reference in the second notice any federal or state regulations or policies supporting its decision to deny Jacob's application. Id.

The Hearing was held before Hearing Officer Michael J. Gorman (the "Hearing Officer") on June 3, 2010. (Dec. at 1.) Appellant was represented by attorney Anne Mulready (Mulready), and the agency presented DHS Senior Medical Care Specialist Jack Demus (Demus) and DHS Pediatrician Dr. Seth Asser, M.D. (Asser). (Hr'g Tr. at 2.)

Asser testified that "[t]here are two sets of criteria used to determine eligibility for medical assistance [under the] Katie Beckett [option]." Id. at 4. He stated that the first

requirement "is disability according to [the] Social Security guidelines," and that there was "[n]o question that Jacob meets that criterion." Id. Asser stated that the second requirement "is level of care," meaning that "[the child must] be getting care at home that is ordinarily the kind of care that is provided . . . for people who are so disabled they are totally one hundred percent dependent on others to take care of them." Id. Asser represented that for children seeking "Katie Beckett" assistance, the level of care criteria were age dependent and "also based, at least to some degree[,] on . . . the range of [developmental] expectations children have . . . ." Id.

Asser then noted Jacob's particular medical diagnoses and history and concluded that "the kind of issues that Jacob has are not the kind of things that are ordinarily addressed in a comprehensive, complete way in a rehab facility or nursing home." Id. at 5. He explained that while the therapies Jacob receives are among the types of care utilized in medical institutions, "you have to be getting a twenty-hour (sic), seven day a week comprehensive plan with professional input, done by professionals, to meet that level of care." Id.

When questioned by Mulready regarding the regulations applicable to his assessment of Jacob's case, Asser pointed to DHS's "Katie Beckett Level of Care Criteria Guidelines" (the "Guidelines"). Id. at 7. Asser represented that "there are three or four different [levels of care] . . . listed in the [Guidelines]." Id. The first level of care is "hospital level of care and that's . . . complex monitoring, immediate medical assessment, [and] provision of immediate services." Id. The second level of care is "psychiatric hospital[,] which doesn't apply [here]." Id. The third level of care is "intermediate care facility for the mentally retarded ("ICF/MR") . . . [which is for] people who are

intellectually disabled with IQ's below 70 . . . [and that level of care] generally doesn't apply." [9] Id. Asser stated that the fourth level of care, "nursing facility," was "the applicable area" in this case. Id. He explained that this level of care constituted "specialized professional training and monitoring beyond those ordinarily expected [of parents]," and "Jacob isn't getting those kinds of services." Id.

Mulready disputed Asser's descriptions of the "Katie Beckett" eligibility requirements in the Guidelines and his conclusions thereunder. Id. at 8. In particular, Mulready asserted that an applicant satisfies the requirements for the "ICF/MR" level of care when the applicant is either "developmentally disabled . . . [or] mentally retarded," and receives "active treatment" as defined by federal law. Id. at 8-9. Mulready contended that "this is the level of care criteria for which . . . Jacob falls under" because he was "developmentally disabled" and his EI therapies constituted "active treatment." Id. at 9.

---

[9] Federal law defines ICF/MR in pertinent part as:

> an institution (or distinct part thereof) for the mentally retarded or persons with related conditions if--
>
> (1) the primary purpose of such institution (or distinct part thereof) is to provide health or rehabilitative services for mentally retarded individuals and the institution meets such standards as may be prescribed by the Secretary; [and]
>
> (2) the mentally retarded individual with respect to whom a request for payment is made under a plan approved under this subchapter is receiving active treatment under such a program . . . .

42 U.S.C. § 1396d(d).

Mulready also requested that the record remain open after the Hearing concluded to allow Appellant to file additional materials in support of her arguments.[10] Id. at 25.

The Hearing Officer issued the Decision on September 8, 2010, affirming DHS's determination that Jacob was ineligible for "Katie Beckett" assistance. (Dec. at 1.) After reviewing the evidence and testimony submitted by the parties, see id. at 2-6, the Hearing Officer outlined the two-prong standard for determining a child's eligibility for "Katie Beckett" assistance: the child must be "disabled" as defined by federal law and receiving a sufficient level of care as enumerated in the Guidelines. Id. The Hearing Officer found that Jacob satisfied the first requirement because "[t]here is no dispute from the agency that the child's medical condition does meet the Social Security Disability criteria." Id. at 11.

The Hearing Officer noted that the remaining issue on appeal was whether "the appellant meets the [level of care] criteria of the Katie Beckett Program." Id. at 7. He stated that under the Guidelines, the level of care criteria applicable to this case were those for "a Hospital, Nursing Facility, [and an] [ICF/MR]." Id. at 11. With regard to the "Hospital" level of care, the Hearing Officer noted that "[these] criteria . . . include . . . [s]killed observation . . . skilled assessment[,] and intervention multiple times during a 24-hour period." Id. at 11-12. The Hearing Officer determined that "[t]he medical record does not support [Jacob's] need" for this level of care. Id. at 12.

The Hearing Officer found that the "Nursing Facility" level of care encompassed a number of factors, including the need for "complex skilled nursing care or comprehensive rehabilitative interventions throughout the day[,] . . . specialized

[10] The Hearing Officer agreed to hold the record open for thirty days following the Hearing to allow the filing of additional materials. (Hr'g Tr. at 28.)

professional training and monitoring beyond those ordinarily expected of parents[,] . . . skilled observation and assessment several times daily due to significant health needs[,] . . . [and] complex care management that substantially exceeds age appropriate assistance." Id. The Hearing Officer further noted that to be eligible for this level of care, "[t]he child would need to have unstable health, functional limitations, complicating conditions, cognitive or behavioral problems, or be medically fragile . . . [and the] child's routine would need to be substantially altered by the need to complete . . . specialized and complex treatments and medical interventions." Id. He determined that Jacob's "medical record does not support [his] need for Nursing Facility [level of care]." Id.

Concerning the "ICF/MR" level of care, the Hearing Officer stated that the applicant must "require the type of active treatment typically provided by a facility whose primary purpose is to furnish health or rehabilitative services [to persons with] mental retardation or related conditions." Id. He noted the "CFR definition of mental retardation"[11] and concluded that Jacob did not meet that definition. Id. The Hearing Officer also noted the "ICF/MR [level of care] criteria [definition]" for "related conditions"[12] but found that it did not apply in this case "due to [Jacob's] age." Id. The

[11] The Hearing Officer defined a "mentally retarded" person as "an individual with significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance." (Dec. at 12.)

[12] According to the Hearing Officer, the "ICF/MR level of care criteria definition" for "related conditions" is:

> a condition, other than mental illness, which is found to be closely related to mental retardation because it is likely to last indefinitely, requires similar treatment and services, constitutes an impairment of general intellectual functioning, and results in substantial limitations in three or

Hearing Officer determined that "[t]he medical record does not support the child's need for ICF/MR [level of care] . . . ." Id.

The Hearing Officer also found that more general factors supported his determination that Jacob "does not meet the [level of care] requirement for [any of the] institution[s]" provided in the Guidelines. Id. First, he noted that "[t]he record indicates that [Jacob] has had good response to his treatment and therapies . . . [and] [he] would [not] need to be admitted to a facility to receive the care that he presently receives at home." Id. Second, the Hearing Officer determined that because "[t]he [level of care] criteria are age dependent, at this age [Jacob] is dependent on others for almost all of his care [and] he does not require care that is substantially different from a child of his age." Id. The Hearing Officer concluded that "[a]fter a careful review of the agency's policies [and] the evidence and testimony given . . . the agency was correct in [its] denial of [Jacob's] Katie Beckett [application]." Id. at 13.

Appellant timely filed the instant appeal on October 6, 2010. See Docket Sheet, PC-2010-5813 at 1. She argues that the Decision is affected by error of law, contains findings which are clearly erroneous in light of the reliable and probative evidence in the record, and is arbitrary and capricious. With regard to the "ICF/MR" level of care, Appellant asserts that the Hearing Officer applied an incomplete standard when denying Jacob's application. Concerning the "Nursing Facility" level of care, Appellant argues that the Hearing Officer misapplied the facts such that his conclusions are not supported

---

> more of the following: self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living.

(Dec. at 12.)

by the record. Appellant contends that under the correct analyses, Jacob satisfies both the "ICF/MR" and "Nursing Facility" levels of care and is eligible for "Katie Beckett" assistance. Appellant also asserts that the defective content of DHS's denial notices violated constitutional due process and prejudiced her rights in responding to DHS's denial of Jacob's application.

DHS argues that the Hearing Officer applied the correct standards when finding Jacob ineligible for "Katie Beckett" assistance. DHS contends that the Decision is based upon probative evidence in the record and is not arbitrary or capricious because DHS's "Katie Beckett" review team and the Hearing Officer conducted an exhaustive analysis of Jacob's case pursuant to federal and state regulations.

II

Standard of Review

Superior Court review of administrative agency decisions is governed by the Rhode Island Administrative Procedures Act (the "Act"), § 42-35-1 et seq. See Rossi v. Employees' Retirement System of R.I., 895 A.2d 106, 109 (R.I. 2006). Section 42-35-15(g) provides the applicable standard of review:

> The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inference, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Under the Act, this Court is limited to an examination of the certified record in determining whether the agency's decision is supported by substantial evidence. Johnston Ambulatory Surgical Associates v. Nolan, 755 A.2d 799, 804-05 (R.I. 2000) (citing Barrington School Committee v. R.I. State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994)). Substantial evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion and means an amount more than a scintilla but less than a preponderance." Town of Burrillville v. R.I. State Labor Relations Board, 921 A.2d 113, 118 (R.I. 2007). When this Court finds that substantial evidence exists in the record, it "is required to uphold the agency's conclusions." Auto Body Association of R.I. v. State of R.I. Dep't of Business Regulation, 996 A.2d 91, 95 (R.I. 2010) (quoting Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)) (internal quotation marks omitted). This rule applies even when the reviewing court is inclined to arrive at different conclusions and inferences from the evidence presented. Nolan, 755 A.2d at 805 (citing R.I. Public Telecomm. Authority v. R.I. State Labor Relations Board, 650 A.2d 479, 485 (R.I. 1994)); see Barrington School Committee, 608 A.2d at 1138.

By contrast, all agency determinations of law are reviewed de novo. Iselin v. Retirement Board of Employee's Retirement System of R.I., 943 A.2d 1045, 1049 (R.I. 2008). This Court accords great "weight and deference" to an administrative agency's interpretations of a statute it is empowered to enforce, however, "so long as that construction is not clearly erroneous or unauthorized." Labor Ready Northeast, Inc. v. McConaghy, 849 A.2d 340, 344 (R.I. 2004). This is true "even when other reasonable constructions of the statute are possible." Id. at 345; see Town of Burrillville v. Pascoag

Apartment Associates, LLC, 950 A.2d 435, 445-46 (R.I. 2008). The reviewing court will also defer to an agency's "reasonable" interpretation of the regulations it promulgates pursuant to a statute it is authorized to enforce. See State v. Swindell, 895 A.2d 100, 104 (R.I. 2006); State v. Cluley, 808 A.2d 1098, 1104-06 (R.I. 2002); Pawtucket Power Associates Limited Partnership v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993).

III

Discussion

The federal Medicaid program is a joint federal/state scheme designed to provide financial assistance to those individuals "whose income and resources are insufficient to meet the costs of necessary [medical and related] care and services." Atkins v. Rivera, 477 U.S. 154, 156 (1986); see G.L. 1956 § 40-8-1; Arnold v. Lebel, 941 A.2d 813, 816 (R.I. 2007); see also DHS Regulation § 0300.05. States wishing to participate in the Medicaid program must draft a state MA plan compliant with federal law and appoint a state agency to administer that plan. See 42 U.S.C. § 1396a; 42 C.F.R. § 430.0; 42 C.F.R. § 435.10; Antrican v. Buell, 158 F. Supp. 2d 663, 667 (E.D.N.C. 2001).

Our Legislature designated DHS to administer Rhode Island's MA plan. See G.L. 1956 § 42-12-4; Tierney v. DHS, 793 A.2d 210, 211 (R.I. 2002); see also G.L. 1956 § 40-8-3 (describing various eligibility requirements for Rhode Island's MA plan). Among other assistance, our state's MA plan contains a "Katie Beckett" option which affords financial aid to "certain disabled children under the age of nineteen (19) who are living at home and who would qualify for Medical Assistance if in a medical institution." (DHS Regulation § 0394.35.) A child is eligible for "Katie Beckett" assistance when the child: (1) is "disabled" within the meaning of applicable federal law; and (2) requires "the

level of care provided in a hospital, a Nursing Facility, or an ICF/MR." (DHS Regulation § 0394.35.05); see 42 U.S.C. § 1396a(e)(3); 42 C.F.R. § 435.225.

With regard to the first requirement, federal law defines a "disabled" child as "[a]n individual under the age of 18 [who] has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(C)(i). The phrase "physical or mental impairment" means "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." Id. at § (a)(D).

Pursuant to G.L. 1956 § 40-8-13,[13] the Director of DHS promulgated the Guidelines for determining whether an applicant meets the second, "level of care" requirement for eligibility under the "Katie Beckett" option. See Guidelines §§ 1.0-2.1.1 at 3-4. The Guidelines provide general guidance for four different levels of care: "Hospital," "Psychiatric Hospital," "ICF/MR," and "Nursing Facility." See id. at §§ 3.1.1-3.1.4 at 5-6. The Appendices to the Guidelines define the specific eligibility requirements for each level of care and note applicable federal statutes and regulations. See id. Appendices A-D at 11-15.

[13] In order to effectuate our state's MA plan, the Director of DHS is empowered by § 40-8-13 to:

> make and promulgate such rules, regulations, and fee schedules not inconsistent with state law and fiscal procedures as he or she deems necessary for the proper administration of this chapter and to carry out the policy and purposes thereof, and to make the department's plan conform to the provisions of the federal Social Security Act, 42 U.S.C. § 1396 et seq., and any rules or regulations promulgated pursuant thereto.

IV

Analysis

A

The "ICF/MR" Level of Care

According to Appendix C of the Guidelines, a child must satisfy two eligibility requirements to receive "Katie Beckett" assistance under the "ICF/MR" level of care. First, the child must "meet [the] criteria for developmental disabilities, mental retardation, and/or related conditions including autism spectrum disorders."[14] Guidelines,

---

[14] The meanings of "developmental disability," "mental retardation," and "related conditions" are defined in federal regulations. See Guidelines, Appendix C at 13-14. Specifically, the term "developmental disability," "when applied to infants and young children," means "[an] individual from birth to age 5, inclusive, who [has] substantial developmental delay or specific congenital or acquired conditions with a high probability of resulting in developmental disabilities if services are not provided." 42 C.F.R. § 1385.3(5). "Mental retardation" is defined in 42 C.F.R. § 483.102(b)(3) to mean those individuals with "(a) [a] level of retardation (mild, moderate, severe or profound) described in the American Association on Intellectual Disability's Manual on Classification in Intellectual Disability (1983) . . . ; or (b) [a] related condition as defined by § 435.1010 . . . ." 42 C.F.R. § 435.102(b)(3). "Related conditions" is defined in 42 C.F.R. § 435.1010, and includes

> [those] individuals who have severe, chronic disability that meets all of the following conditions:
>
> (a) [i]t is attributable to—
> (1) [c]erebral palsy or epilepsy; or
> (2) [a]ny other condition, other than mental illness, found to be closely related to Intellectual Disability because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.
>
> (b) [i]t is manifested before the person reaches age 22.
>
> (c) [i]t is likely to continue indefinitely.

Appendix C at 13. The "and/or" language of this regulation demonstrates that a child suffering from any one of the three enumerated conditions satisfies the first "ICF/MR" requirement. See City of East Providence v. International Association of Firefighters Local 850, 982 A.2d 1281, 1288 (R.I. 2009) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996) and finding that "when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings"); Partlow v. Indiana Family & Social Services Administration, 717 N.E.2d 1212, 1216 (Ind. App. 1999) (determining that to fulfill the first eligibility requirement for the "ICF/MR" level of care, an applicant could be either "mentally retarded" or a "person with a related condition"). Second, the child must also show that he or she is receiving "active treatment" as defined in 42 C.F.R. §§ 483.440(a)-(b).[15] See Guidelines, Appendix

---

> (d) It results in substantial functional limitations in three or more of the following areas of major life activity:
> (1) [s]elf-care.
> (2) [u]nderstanding and use of language.
> (3) [l]earning.
> (4) [m]obility.
> (5) [s]elf-direction.
> (6) [c]apacity for independent living.

42 C.F.R. § 435.1010.

[15] "Active Treatment" is defined as:

> [the] aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services . . . that is directed towards--
>
> (a) [t]he acquisition of the behaviors necessary for the [child] to function with as much self determination and independence as possible; and

C at 13; Partlow, 717 N.E.2d at 1216 (recognizing that "[b]ecause not all mentally retarded individuals or persons with related conditions are in need of aggressive and continuous active treatment . . . not all of those disabled individuals are entitled to receive federally funded services").

Appellant challenges the Hearing Officer's determination that Jacob is ineligible for "Katie Beckett" assistance under the "ICF/MR" level of care. With regard to the first eligibility requirement, Appellant does not dispute the Hearing Officer's determination that Jacob is not "mentally retarded." She contends, however, that the Hearing Officer's finding that Jacob is not a "person with a related condition," as defined in 42 C.F.R. § 435.1010, is against the weight of the evidence. Appellant asserts that the Hearing Officer also fails to determine whether Jacob has a "developmental disability" within the meaning of 45 C.F.R. § 1385.3. With regard to the second eligibility requirement, Appellant argues that the Hearing Officer altogether fails to address whether Jacob is receiving "active treatment" as defined in 42 C.F.R. §§ 483.440(a)-(b).

In the Decision, the Hearing Officer noted that eligibility under the "ICF/MR" level of care requires "the type of active treatment typically provided by a facility whose primary purpose is to furnish health or rehabilitative services [to persons] with mental retardation or related conditions." (Dec. at 12.) The Hearing Officer found that Jacob "does not meet the CFR definition of mental retardation . . . ." Id. The Hearing Officer then determined that Jacob was not a "person with a related condition" because Jacob was too young for a proper determination of whether he suffers from "substantial

---

> (b) [t]he prevention or deceleration of regression or loss of current optimal functional status.

42 C.F.R. §§ 483.440(a)-(b).

functional limitations in three or more . . . areas of major life activity." Id. He concluded that Jacob's "medical record[s] [do] not support the child's need for ICF/MR [level of care] as required by the policy." Id.

The Hearing Officer's analysis comports with the general definition for the "ICF/MR" level of care provided in the Guidelines, but fails to include the complete, two-prong eligibility standard enumerated in Appendix C. See Dec. at 12; compare Guidelines § 3.1.3 at 5 with Guidelines, Appendix C at 13-14. With regard to the first requirement, while the Hearing Officer correctly decides whether Jacob is "mentally retarded" or a person with a "related condition," see Dec. at 12, he does not also address whether Jacob has a "developmental disability" as defined in 42 C.F.R. § 1385.3(5). See Guidelines, Appendix C at 13. Concerning the second requirement, the Hearing Officer wholly fails to consider whether Jacob is receiving "active care" as defined in 42 C.F.R. §§ 483.440(a)-(b). See id. Both eligibility requirements must be addressed for an applicant to receive meaningful review of his or her "Katie Beckett" application under the "ICF/MR" level of care. See Partlow, 717 N.E.2d at 1216.

The Hearing Officer's incomplete analysis of Jacob's eligibility under the "ICF/MR" level of care lacks cited evidentiary support as well. Despite providing an extensive summarization of the evidence in the record at the beginning of the Decision, see Dec. at 2-6, the Hearing Officer fails to point to any specific supporting evidence in his analysis beyond a bare conclusion that Jacob's "medical record[s] [do] not support the child's need for ICF/MR [level of care] . . . ." Id. at 12. Thus, it is unclear to this Court on what evidentiary basis the Hearing Officer denies Jacob's application under this level of care. See Hooper v. Goldstein, 104 R.I. 32, 44-45, 241 A.2d 809, 815-16 (1968)

(finding that "[an administrative] decision, at least where the evidence is conflicting, must be factual as well as conclusional, must contain a statement of the reasons and grounds upon which it is predicated, and must point out the evidence upon which the ultimate findings rest"). (Emphasis added.)

Because the Hearing Officer fails to apply the complete eligibility standard or cite specific supporting evidence from the record when analyzing Jacob's application under the "ICF/MR" level of care, this Court finds that this portion of the Decision is "affected by . . . error of law" and Appellant's substantial rights have been prejudiced. See § 43-35-15(g)(4); Easton's Point Association v. Coastal Resources Management Council, 522 A.2d 199, 202 (R.I. 1987) (recognizing that "[t]he statutory reference to errors of law [in § 42-35-15(g)(4)] . . . extend[s] the purview of the Superior Court to include consideration of . . . determinations by the agency that might in themselves violate statutory or constitutional principles). Accordingly, this Court remands this portion of the Decision to DHS so that the Hearing Officer can consider Jacob's application using the complete "ICF/MR" level of care eligibility standard enumerated in Appendix C and cite specific evidence from the record supporting his analysis. See § 42-35-15(g); Champlin's Realty Associates v. Tikoian, 989 A.2d 427, 448-49 (R.I. 2010); 2 Am. Jur. 2d Administrative Law § 574 at 489-90 (noting that "a court will remand a case to the administrative agency where . . . the court is left in the position where it must speculate as to the basis of the decision reached . . . [and] the agency appears to have applied the incorrect standard for determining an issue"); see also Annapolis Market Place, LLC v. Parker, 369 Md. 689, 721-22 (2002) (quoting Belvoir Farms Homeowners Association, Inc. v. North, 355 Md. 259, 270 (1999) and recognizing that "when an administrative

agency utilizes an erroneous standard and some evidence exists . . . that could be considered appropriately under the correct standard, the case should be remanded so the agency can consider the evidence using the correct standard).

B

"Nursing Facility" Level of Care

Appendix D to the Guidelines enumerates seven eligibility factors for the "Nursing Facility" level of care. These seven factors are:

> (1) The child requires specialized professional training and monitoring beyond those ordinarily expected of parents[;]
>
> (2) The child requires skilled observation and assessment several times daily due to significant health needs[;]
>
> (3) The child has unstable health, functional limitations, complicating conditions, cognitive or behavioral conditions, or is medically fragile such that there is a need for active care management[;]
>
> (4) The child's impairment substantially interferes with the ability to engage in everyday activities and perform age appropriate activities of daily living at home and in the community, including but not limited to bathing, dressing, toileting, feeding, and walking/mobility[;]
>
> (5) The child's daily routine is substantially altered by the need to complete these specialized, complex and time consuming treatments and medical interventions or self-care activities[;]
>
> (6) The child needs complex care management and/or hands on care that substantially exceeds age appropriate assistance [; and]
>
> (7) The child needs restorative and rehabilitative or other special treatment[.]

Guidelines, Appendix D at 15. Appellant challenges the Hearing Officer's determination that Jacob is ineligible for "Katie Beckett" assistance under this level of care. She argues

that the Hearing Officer's findings that Jacob was "clinically stable," did not require "daily skilled care," and was not receiving "care that is substantially different from a child his age" are unsupported by the record and, thus, are arbitrary and capricious. Appellant contends that had the Hearing Officer engaged in the proper inquiry as described in Appendix D, he would have found Jacob eligible for "Katie Beckett" assistance under the "Nursing Facility" level of care because Jacob satisfies all seven Appendix D factors. DHS argues that the Hearing Officer addressed Jacob's eligibility under the "Nursing Facility" level of care using the correct standard, and his decision denying Jacob's application is supported by substantial evidence.

In the Decision, the Hearing Officer found that Jacob did not satisfy "[t]he [level of care] criteria for [a] Nursing Facility." (Dec. at 12.) The Hearing Officer noted that that eligibility criteria includes the need for "complex skilled nursing care or comprehensive rehabilitative interventions throughout the day[,] . . . specialized professional training and monitoring beyond those ordinarily expected of parents[,] . . . skilled observation and assessment several times daily due to significant health needs[,] . . . [and] complex care management that substantially exceeds age appropriate assistance." Id. The Hearing Officer further noted that "[t]he child would need to have unstable health, functional limitations, complicating conditions, cognitive or behavioral problems, or be medically fragile . . . [and the] child's routine would need to be substantially altered by the need to complete . . . specialized and complex treatments and medical interventions." Id. He concluded that Jacob's "medical record does not support [his] need for Nursing Facility [level of care]." Id.

The Hearing Officer properly begins his analysis by noting the seven "Nursing Facility" eligibility factors enumerated in Appendix D before determining that Jacob is ineligible for "Katie Beckett" assistance under this level of care. See Dec. at 12; Guidelines, Appendix D at 15. This Court would ordinarily defer to his analysis as a "reasonable" interpretation of the Guidelines, promulgated pursuant to § 40-8-13. See Swindell, 895 A.2d at 104; Cluley, 808 A.2d at 1104-06; Pawtucket Power Associates, 622 A.2d at 456-57. However, the Hearing Officer fails to cite any specific evidence from the record in support of his analysis despite thoroughly describing the evidence at the beginning of the Decision. See id. at 2-6, 12. Thus, beyond the Hearing Officer's bare assertion that Jacob's "medical record does not support [his] need for Nursing Facility [level of care]," id., it is unclear to this Court how Jacob's application fails to satisfy the seven Appendix D eligibility factors. See Hooper, 104 R.I. at 44-45; 241 A.2d at 815-16 (recognizing that in every administrative decision, "factual determinations [must] be made [along with] ample decisional demonstration of the grounds upon which [the] ultimate conclusion is predicated").

When "[a] court is left in the position where it must speculate as to the basis of the decision reached . . . [the] court will remand a case to the administrative agency" for further development of an administrative decision. 2 Am. Jur. 2d Administrative Law § 574 at 489-90; see Champlin's Realty Associates, 989 A.2d at 448-49. This Court, therefore, remands this portion of the Decision to the agency so that the Hearing Officer can further develop his analysis and conclusions with citation to evidence from the record. See § 42-35-15(g); Champlin's Realty Associates, 989 A.2d at 448-49; Birchwood Realty, Inc. v. Grant, 627 A.2d 827, 834 (R.I. 1993).

C

Notice

Appellant argues that the content of DHS's denial notices violates the requirements of constitutional due process and federal MA notice standards as set forth in 42 C.F.R. § 431.210. [16] Appellant maintains that the two notices she received from DHS contain different justifications for denying Jacob's application. In particular, Appellant asserts that in the first denial notice she received from DHS, on March 12, 2010, DHS denied Jacob's "Katie Beckett" application because Jacob was "not aged (65 years or older), or blind, or permanently disabled (RI DHS Manual, Sections 0306.05.05 (aged), 0306.05.10 (blind), 0306.05.15 (permanently disabled)) . . . ." (DHS Notice, March 12, 2010 at 2.) Appellant avers that in the second denial notice, attached to her Hearing notice, DHS denied Jacob's application because, although Jacob met the federal definition for "disability," he did not require a sufficient "level of care" warranting "Katie Beckett" assistance. (Hr'g Tr. at 27.) Appellant contends that DHS did not cite any

[16] 42 C.F.R. § 431.210 provides in pertinent part that:

> notice . . . must contain--
>
> (a) A statement of what action the State, skilled nursing facility, or nursing facility intends to take;
>
> (b) The reasons for the intended action;
>
> (c) The specific regulations that support, or the change in Federal or State law that requires, the action; [and]
>
> (d) An explanation of--
>
> (1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing . . . .

42 C.F.R. §§ 431.210(a)-(d)(1).

supporting regulations or policies in the second denial notice. Id. Appellant argues that the differing reasons for denial in the two notices, and DHS's failure to cite relevant regulations in the second notice, prejudiced her in properly responding at the Hearing. Appellant further contends that the Hearing did not provide a meaningful opportunity to cure these deficiencies because DHS's representatives could not point to any specific regulations supporting DHS's denial of Jacob's application.

Federal law requires state MA agencies to provide written notice and "the opportunity for a fair hearing to any individual whose claim for medical assistance is denied or not acted upon with reasonable promptness." 42 U.S.C. § 1396a(a)(3); see Ladd v. Thomas, 962 F. Supp. 284, 289 (D. Conn. 1997). 42 C.F.R. § 435.912 proscribes the content requirements for such notice: "[t]he agency must send each applicant a written notice of the agency's decision on his application, and, if eligibility is denied, the reasons for the action, the specific regulation supporting the action, and an explanation of his right to request a hearing." (Emphasis added.)[17] The mandatory language of this regulation "succinctly sets forth a congressional command which . . . is wholly uncharacteristic of a mere suggestion or nudge." Wilder v. Virginia Hospital Association, 496 U.S. 498, 512 (1990). Thus, state MA agencies, like DHS, are required

[17] Although Appellant cites 42 C.F.R. § 431.210 for the pertinent notice requirements, 42 C.F.R. § 435.912 provides notice standards specifically applicable to agency decisions regarding first-time MA applications. See Doe, 1-13 ex rel. Doe Sr. 1-13 v. Bush, 261 F.3d 1037, 1056 n.18 (11th Cir. 2001). The provisions of 42 C.F.R. § 435.912 are substantially similar to those of 42 C.F.R. § 431.210, and courts have interpreted them to require the same level of notice. Compare id. with In the Matter of Clark, 122 N.H. 888, 891-92 (1982).

to provide to each MA applicant notice which comports with 42 C.F.R. § 435.912.[18] See Doe, 1-13, 261 F.3d at 1056-57.

Here, it is undisputed that DHS provided two written denial notices to Appellant. The first written notice, dated March 12, 2010, denied Jacob's application because Jacob was "not aged (65 years or older), or blind, or permanently disabled . . . ." (DHS Notice, March 12, 2010 at 2.) DHS also cited the regulations applicable to its reasons for denial, "(RI DHS Manual, Sections 0306.05.05 (aged), 0306.05.10 (blind), 0306.05.15 (permanently disabled)) . . . ." Id. In an addendum attached to the notice, DHS further explained that it denied Jacob's application because his medical records were incomplete and invited Appellant to send additional materials so that it could proceed with a full

[18] All Rhode Island state agencies are also subject to the notice procedures set forth in G.L.1956 § 42-35-9. See Larue v. Registrar of Motor Vehicles, Dept. of Transportation, Office of Operator Control, 568 A.2d 755, 758-59 (R.I. 1990). Sec. 42-35-9 provides in pertinent part that:

> (a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.
>
> (b) The notice shall include:
>
> (1) A statement of the time, place, and nature of the hearing;
>
> (2) A statement of the legal authority and jurisdiction under which the hearing is to be held;
>
> (3) A reference to the particular sections of the statutes and rules involved; [and]
>
> (4) A short and plain statement of the matters inserted.
>
> (c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

These provisions are substantially similar to those of 42 C.F.R. §§ 431.210 and 435.912. Compare § 42-35-9 with 42 C.F.R. §§ 431.210, 435.912.

review. Id. at 3. The notice also informed Appellant of her right to request a hearing to appeal DHS's decision. (Hearing Request, March 17, 2010 at 1.) Thus, the content of DHS's March 12, 2010 denial notice comports with the requirements of 42 C.F.R. § 435.912. See 42 C.F.R. § 435.912; see also Avanzo v. R.I. Department of Human Services, 625 A.2d 208, 210-11 (R.I. 1993) (finding, in the context of terminating welfare benefits, that DHS's written notices must contain the reasons for termination, citation to applicable regulations, and an explanation of the recipient's right to a hearing).

DHS's second written notice denied Jacob's application because, although Jacob was "disabled" within the meaning of federal law, he did not require a sufficient "level of care" warranting "Katie Beckett" assistance. (Hr'g Tr. at 27.) Appellant received this notice attached to the notice scheduling the Hearing. Id. Because DHS failed to cite any regulations supporting its reason for denying Jacob's application in the second notice, however, id., it is defective because it does not provide Appellant with explanatory context and allow her "to test the accuracy of the decision." Rodriquez By and Through Corella v. Chen, 985 F. Supp. 1189, 1194 (D. Ariz. 1996) (quoting Wolff v. McDonnell, 418 U.S. 539, 564 (1974) and finding, with regard to a state agency's denial of welfare benefits, that the notice given to the applicant contained "reasons [that] are so vague . . . [that it] do[es] not 'apprise the [applicant] of the basis for the government's proposed action'"). Thus, the second notice does not satisfy the requirements of 42 C.F.R. § 435.912. See In the Matter of Clark, 122 N.H. 888, 891-92 (1982) (holding that the state MA agency's notice failed to comport with the comparable provisions of 42 C.F.R. § 431.210 because it "did not state the complete reasons for" the agency's decision or cite to applicable authority).

However, Appellant has not produced any evidence substantiating her claim that the defects in DHS's second denial notice prejudiced her at the Hearing. See Larue, 568 A.2d at 758-59 (quoting Gorman v. University of Rhode Island, 837 F.2d 7, 15 (1st Cir. 1988) and holding that "in the examination of administrative proceedings, 'the presumption favors the administrators, and the burden is upon the party challenging the action to produce evidence sufficient to rebut this presumption'"). At the Hearing, Asser cited to the Guidelines when responding to Mulready's questions regarding the regulations underlying DHS's denial decisions. (Hr'g Tr. at 7.) Mulready was familiar with the Guidelines at the Hearing because she discussed them cogently and intelligently when questioning Asser and arguing Appellant's position. See id. at 7-10. Moreover, the Hearing Officer expressly left the record open for thirty days following the Hearing to allow Appellant to file any additional evidence or briefs in support of her arguments. Id. at 25, 28. The record shows that Appellant, in fact, filed several additional documents that DHS considered, along with the evidence adduced at the Hearing, before the Hearing Officer issued the Decision. See Asser Memo., July 13, 2010 at 1-2; Mulready Memo., August 2, 2010 at 1-2.

Based on this evidence, Appellant was afforded meaningful review of Jacob's application at the Hearing. See Larue, 568 A.2d at 758 (recognizing that "[i]t is the opportunity to exercise a right, and not petitioner's actual implementation of that right, that constitutes due process"); see also Anderson v. White, 888 F.2d 985, 993-96 (3rd Cir. 1989). This Court finds that the Decision was not "[m]ade in violation of

. . . statutory provisions" such that Appellant's substantial rights were not prejudiced. Sec. 45-35-15(g)(3).[19]

IV

Conclusion

After review of the entire record, this Court finds that two portions of the Decision are affected by error of law and Appellant's substantial rights have been prejudiced. This Court remands this case to DHS with instructions that the agency reconsider Jacob's eligibility for "Katie Beckett" assistance under the "ICF/MR" level of care using the complete eligibility standard enumerated in Appendix C of the Guidelines. First, the agency must determine whether Jacob is "mentally retarded" as defined in 42 C.F.R. § 483.102(b)(3), has a "related condition" as defined in 42 C.F.R. § 435.1010, or has a "developmental disability" as defined in 42 C.F.R. § 1385.3(5). DHS must then decide whether Jacob is receiving "active treatment" as defined in 42 C.F.R. §§ 483.440(a)-(b). If DHS determines that Jacob fulfills both of these requirements, it must find Jacob eligible for "Katie Beckett" assistance under the "ICF/MR" level of care. The agency must also cite to specific evidence in the record supporting its analysis under this level of care. In addition, DHS will provide Appellant with more meaningful review of Jacob's eligibility under the "Nursing Facility" level of care by citing specific evidence from the record supporting its findings in that portion of the Decision.

Counsel shall submit the appropriate judgment for entry.

[19] Because Appellant's notice challenge has been decided on statutory grounds, this Court need not reach Appellant's constitutional due process argument. See Dandridge v. Williams, 397 U.S. 471, 475-76 (1970) (holding that "there is no occasion to reach" a party's constitutional argument when the issue at hand can be decided on statutory grounds); see also Mitchell v. Johnston, 701 F.2d 337, 344 (5th Cir. 1983).

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Borgueta v. Rhode Island Department of Human Services
CASE NO:	PC 10-5813
COURT:	Providence County Superior Court
DATE DECISION FILED:	May 2, 2013
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	Anne M. Mulready, Esq.
For Defendant:	Gail A. Theriault, Esq.