

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MALCOLM and DOMINICA)
OLDHAM, as parents and legal)
Guardians of ASHLEE OLDHAM,)

-and-)

EDWARD and PAMELA PRUNCKUN,)
as parents and legal guardians of)
ROBERT PRUNCKUN,)

Appellants,)

v.)

DELAWARE HEALTH AND)
SOCIAL SERVICES,)

Appellee.)

C.A. No. N16A-05-009 FWW

C.A. No. N16A-05-010 FWW

CONSOLIDATED

Submitted: October 30, 2017

Decided: January 30, 2018

Upon Appeal from the Delaware Department of Health and Social Services,
Division of Social Services:

AFFIRMED.

OPINION AND ORDER

Francis G.X. Pileggi, Esquire, Brian D. Ahern, Esquire, Justin M. Forcier, Esquire, Eckert Seamans Cherin & Mellott, LLC, 222 Delaware Avenue, 7th Floor, Wilmington, Delaware 19801; Michael P. Flammia, Esquire, Eckert Seamans Cherin & Mellott, LLC, Two International Place, 16th Floor, Boston, Massachusetts, 02110; Christopher E. Torkelson, Esquire, Eckert Seamans Cherin & Mellott, LLC, 50 West State Street, Suite 1400, Trenton, New Jersey, 08607; Attorneys for Appellants.

A. Ann Woolfolk, Esquire, Lauren E. Maguire, Esquire, Roopa Sabesan, Esquire, Deputy Attorneys General, Carvel State Office Building, 820 N. French Street, 6th Floor, Wilmington, Delaware 19801; Attorneys for Appellee.

WHARTON, J.

I. INTRODUCTION

Ashlee Oldham and Robert Prunckun (“Beneficiaries”), by and through their parents and guardians (“Guardians”) (collectively “Appellants”), filed a Notice of Appeal on May 20, 2016 requesting judicial review of the January 13, 2016 decision of the Medicaid Fair Hearing Officer (“Hearing Officer”). Appellants contend that the Hearing Officer erred in bifurcating the Fair Hearing and concluding that aversive treatment was no longer a “covered” service under Delaware’s Medicaid waiver program, resulting in a denial of a Fair Hearing.

In considering this appeal, the Court determines whether the Hearing Officer’s conclusions are supported by substantial evidence and are free from legal error. What the Court does not address, because it cannot, in this appeal is the degree to which aversive treatments afforded the Beneficiaries have improved the quality of their lives, and whether regulations purporting to prohibit such treatments are in their best interests.¹ Based upon the pleadings before the Court and the record below, the Court finds that the Hearing Officer’s conclusions are supported by substantial evidence and are free from legal error. Accordingly, the Hearing Officer’s decision is **AFFIRMED**.

¹ The Court recognizes that the Guardians, as parents of the Beneficiaries, have the greatest interest in enhancing the Beneficiaries’ welfare, and takes their resolute support for continuing with aversive treatments as evidence of the effectiveness of those treatments in improving the quality of the Beneficiaries’ lives.

II. FACTUAL AND PROCEDURAL CONTEXT

The Beneficiaries are adult Medicaid recipients and Delaware citizens with severe behavioral, developmental, and emotional disorders and disabilities.² As a result of their disorders and disabilities the Beneficiaries receive aversive treatment procedures at the Judge Rotenberg Educational Center, Inc. (“JRC”) in Massachusetts.³ In October 2013, the Division of Developmental Services (“DDDS”), a division within Delaware Health and Social Services (“DHSS”), demanded the termination of aversive treatment because it violated state and federal law and was thereby no longer a Medicaid covered service.⁴ The Guardians filed requests for a Medicaid Fair Hearing to contest the reduction of their sons’ Medicaid services.⁵ The Hearing Officer concluded that a bifurcated Fair Hearing process was proper, that the treatment was no longer a covered service, and that DDDS had the authority to terminate the treatment services.⁶ The Beneficiaries, through the Guardians, appeal that decision.

The Beneficiaries are adult males diagnosed with mental retardation and autism.⁷ They have long-documented histories of self-injurious, aggressive, and

² Appellants’ Opening Br., D.I. 15, at 4-10.

³ *Id.* at 1.

⁴ Appellee’s Answering Br., D.I. 24, at 19-20.

⁵ *Id.* at 1.

⁶ Ex. A to Notice of Appeal, D.I. 1, at 15.

⁷ Appellants’ Opening Br., D.I. 15, at 4, 7.

destructive behavior, including: throwing chairs; destroying property; kicking and biting others; and refusing medical care.⁸ As a result, they have been subjected to a multitude of treatments—positive-only programming, mechanical and chemical restraints, medications, isolation, and aversives—with varying effect.⁹ Aversive treatment, however, has been the most successful and contentious.¹⁰

JRC owns and operates a program in Massachusetts that houses adults and children with developmental disabilities.¹¹ It is one of the few facilities in the country to utilize aversive treatment procedures.¹² It is the only facility nationwide whose aversive treatment procedures include the use of a Graduated Electronic Decelerator (GED) device.¹³ The GED applies an electrical shock to the patient's skin in response to targeted behaviors.¹⁴ GED use has reduced aggressive and self-injurious behaviors, enabled patients to integrate into a community group home, and improved quality of life.¹⁵ However, it is not without its side effects, such as: nightmares, avoidance behaviors, mistrust, depression, flashbacks of panic and rage, anger, hypervigilance, and pain.¹⁶

⁸ *Id.* at 4-10.

⁹ *Id.*

¹⁰ *Id.* at 6, 9.

¹¹ Appellee's Answering Br., D.I. 24, at 5.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 5; *see also* Appellants' Opening Br., D.I. 15, at 6.

¹⁵ Appellants' Opening Br., D.I. 15, at 4, 6.

¹⁶ Appellee's Answering Br., D.I. 24, at 6, 11.

The services rendered by JRC to the Beneficiaries, including GED, were included and covered by the Delaware Home and Community-Based Settings (“HCBS”) waiver and the JRC/DDDS provider contracts.¹⁷ The HCBS Waiver is a Medicaid option available to States that allows them to offer services and supports to individuals who are elderly or have disabilities and live in a community setting in lieu of institutionalization.¹⁸ The termination of coverage by the DDDS HCBS waiver prompted this litigation.

On October 8, 2013 and October 13, 2013 DDDS sent letters directing JRC to cease the use of all aversives because they were prohibited by the HCBS waiver and state law.¹⁹ DDDS’ letters were based on the Centers for Medicare and Medicaid Services (“CMS”) advisory materials regarding the legality of GED use on HCBS Medicaid recipients.²⁰ Region I of CMS concluded that JRC’s use of certain aversive treatments, including GED, violated federal rules regarding the standard of care for waiver recipients.²¹ Consequently, CMS, by letter (“McGreal Letter”) directed Massachusetts to immediately cease the use of such procedures on individuals enrolled in the HCBS waiver program.²² In light of the CMS directive

¹⁷ Appellants’ Opening Br., D.I. 15, at 11.

¹⁸ Appellee’s Answering Br., D.I. 24, at 12.

¹⁹ *Id.* at 19-20.

²⁰ CMS is the federal agency charged with promulgation and enforcement of Medicaid regulations and the approval of HCBS Medicaid waivers.

²¹ Appellee’s Answering Br., D.I. 24, at 18.

²² *Id.* at 18-19.

to the State of Massachusetts and in preparation for renewal of its own HCBS Waiver Program, DDDS directed JRC to discontinue the use of aversive treatment procedures.²³

The CMS advisory materials on which DDDS relied were not issued for Region III, which includes Delaware.²⁴ Therefore, Delaware Medicaid Director, Stephen M. Groff, sought clarification from Region III on the use of GED.²⁵ By letter (“Lollard Letter”) dated March 10, 2015, CMS responded that JRC’s administration of GED was not characteristic of HCBS and that Delaware should insure that aversive procedures were eliminated for settings in which Delaware residents received services.²⁶ The CMS letter, therefore, confirmed to DDDS that aversives violated federal law and were not covered services under the HCBS waiver.²⁷

Changes to HCBS “covered” services were a long time coming. In April 2011 and May 2012 CMS published a proposed regulation, the HCBS Rule, to amend the HCBS waiver program.²⁸ The HCBS Rule prohibited the use of coercive devices

²³ *Id.* at 16, 20-21.

²⁴ *Id.* at 20.

²⁵ *Id.*

²⁶ *Id.* at 21.

²⁷ *Id.*

²⁸ *Id.* at 13.

such as GED.²⁹ The final HCBS Rule was published as a final regulation in January 2014, became effective March 17, 2014, and was adopted soon thereafter by CMS.³⁰

Delaware soon followed suit. The DDDS HCBS Waiver was scheduled for renewal in 2014.³¹ In anticipation, prior to the March 2014 Waiver application to CMS, DDDS gathered input from providers and advocates.³² Much like the federal waiver, the DDDS HCBS Waiver prohibited the use of aversives such that they would no longer be covered by the waiver.³³ The Waiver renewal became effective June 2014 and CMS approved the Waiver the next month.³⁴

As a result of DDDS' letters to JRC, the Beneficiaries, through counsel, submitted a Fair Hearing request to DHSS.³⁵ Specifically, they requested a Fair Hearing evidentiary review with respect to DDDS' proposed termination of the use of aversive procedures in treatment rendered via the Medicaid HCBS waiver

²⁹ The rule reads: Home and community-based settings must have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, based on the needs of the individual as indicated in their person-centered service plan: Ensures an individual's right of privacy, dignity and respect, and freedom from coercion and restraint.

³⁰ Appellee's Answering Br., D.I. 24, at 13.

³¹ *Id.* at 16.

³² *Id.*

³³ The Waiver language reads, in pertinent part: As articulated in the DDDS Policy on Behavior and/or Mental Health Support, positive supports are the essential foundation upon which all programs and individual plans are developed...The use of aversive conditioning, defined as the contingent application of startling, painful or noxious stimuli is prohibited.

³⁴ Appellee's Answering Br., D.I. 24, at 16-17.

³⁵ Appellants' Opening Br., D.I. 15, at 1.

program.³⁶ Additionally, the Beneficiaries requested an opportunity to present evidence and witnesses as to facts and issues relevant to the legal issues and the Beneficiaries' medical needs.³⁷

JRC's provider contract expired in September 2014.³⁸ Immediately thereafter DHSS sought the Beneficiaries' removal from JRC and transition to another Delaware-approved provider.³⁹ In March and April 2015, while they remained at JRC, DHSS threatened to terminate all funding for the Beneficiaries unless their parents and guardians signed a written agreement confirming that the Beneficiaries would be removed from JRC and transferred.⁴⁰ The Beneficiaries continue to receive treatment at JRC, however DHSS has not paid any medical assistance benefits to JRC for their services since October 1, 2014.⁴¹

A Fair Hearing was conducted on January 13, 2016.⁴² The Hearing Officer bifurcated the Fair Hearing because she deemed Medicaid coverage and medical necessity as conceptually independent from each other.⁴³ According to the Hearing Officer, "consideration of whether the GED treatment services at issue are medically

³⁶ *Id.* at 1-2.

³⁷ *Id.* at 13.

³⁸ *Id.* at 16.

³⁹ *Id.*

⁴⁰ *Id.* at 17.

⁴¹ The payment issue was not raised below and is subject to separate litigation.

⁴² Appellee's Answering Br., D.I. 24, at 3-4.

⁴³ Ex. A to Notice of Appeal, D.I. 1, at 4.

reasonable and necessary is a moot issue if Delaware's Medicaid program prohibits these treatment services."⁴⁴ Therefore, the Hearing Officer would first determine whether GED is a Medicaid covered service and, if GED is covered, the Hearing Officer would then entertain the issue of medical necessity.

During the first phase of the Fair Hearing, the Hearing Officer limited evidence to the issue of Medicaid coverage. The Guardians were not permitted to introduce evidence of medical necessity.⁴⁵ The Hearing Officer concluded that electric shock treatment was not a Medicaid covered service, therefore, the Fair Hearing was limited to the first phase.⁴⁶ On April 21, 2016 the Hearing Officer issued a final decision, finding that GED is not a Medicaid covered service and affirming DHSS' decision to cease coverage of GED.⁴⁷ The Guardians filed an administrative appeal of that decision in this Court pursuant to 31 Del. C. § 520.⁴⁸

III. THE PARTIES CONTENTIONS

The Guardians contend that they were not afforded due process and, additionally, the Hearing Officer's conclusion was not supported by substantial evidence.⁴⁹ In particular, the Guardians argue that the Beneficiaries' due process

⁴⁴ *Id.*

⁴⁵ *Id.* at 4, 14.

⁴⁶ *Id.* at 15.

⁴⁷ Ex. A to Notice of Appeal, D.I. 1.

⁴⁸ Appellants Notice of Appeal, D.I. 1.

⁴⁹ Appellants' Opening Br., D.I. 15, at 2.

rights were violated because: 1) DHSS failed to provide adequate notice of the legal and factual basis for its proposed actions and treatment mandates; 2) DHSS failed to provide a meaningful evidentiary hearing that addressed Medicaid coverage and medical necessity; and 3) DHSS used coercive, discriminatory, and prejudicial conduct to defeat due process and thwart the Fair Hearing.⁵⁰ Furthermore, the Guardians maintain that the Hearing Officer's conclusion was incorrect because: 1) necessary services have been and remain covered services;⁵¹ 2) the conclusion is not supported by substantial evidence;⁵² and 3) the conclusion sanctions violations of law by DHSS.⁵³

In response, DHSS argues that the Guardians were not denied due process.⁵⁴ They were given adequate notice as to GED's impermissibility, they had a meaningful opportunity at the Fair Hearing to contest whether aversives were covered services, and their Due Process Clause challenge of the legislative policy determination should not have warranted a Fair Hearing in the first place. DHSS further argues that the Hearing Officer's conclusion—that GED was not a covered service—was correct because: 1) GED use was prohibited by federal and state law;⁵⁵

⁵⁰ *Id.* at 19-38.

⁵¹ *Id.* at 39-44.

⁵² *Id.* at 44-49.

⁵³ *Id.* at 49-50.

⁵⁴ Appellee's Answering Br., D.I. 24, at 24-36.

⁵⁵ *Id.* at 36-42.

2) medical necessity did not determine medical coverage;⁵⁶ and 3) the GED ban does not violate the ADA or other law.⁵⁷

IV. STANDARD OF REVIEW

Title 31 *Del. C.* § 520 vests this Court with appeals from an administrative hearing decision.⁵⁸ The Hearing Officer's final decision must be affirmed so long as it is supported by substantial evidence and free from legal error.⁵⁹ Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion.⁶⁰ While a preponderance of evidence is not necessary, substantial evidence means "more than a mere scintilla."⁶¹ In presiding over administrative Fair Hearings concerning Medicaid benefits, a Hearing Officer must generally apply "the

⁵⁶ *Id.* at 42-45.

⁵⁷ *Id.* at 45.

⁵⁸ Any applicant for or recipient of public assistance benefits under this chapter or Chapter 6 of this title against whom an administrative hearing decision has been decided may appeal such decision to the Superior Court if the decision would result in financial harm to the appellant. The appeal shall be filed within 30 days of the day of the final administrative decision. The appeal shall be on the record without a trial de novo. The Court shall decide all relevant questions and all other matters involved, and shall sustain any factual findings of the administrative hearing decision that are supported by substantial evidence on the record as a whole. The notice of appeal and all other matters regulating the appeal shall be in the form and according to the procedure as shall be provided by the rules of the Superior Court.

⁵⁹ *Lawson ex rel. Lawson v. DHSS*, 2004 WL 440405, at *2 (Del. Super. 2004).

⁶⁰ *Lehto v. Bd. Of Educ. of Caesar Rodney Sch. Dist.*, 962 A.2d 222, 225-226 (Del. 2008).

⁶¹ *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988); *see also Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

State rules except to the extent they are in conflict with applicable federal regulations.”⁶² Applicable precedent from federal courts and Delaware state courts, in that order, are binding on the Hearing Officer.⁶³

Questions of law are reviewed *de novo*.⁶⁴ If the Hearing Officer’s findings and conclusions are sufficiently “supported by the record and are the product of an orderly and logical deductive process,” its decision will be affirmed.⁶⁵

V. DISCUSSION

I. THE HEARING OFFICER, THROUGH A BIFURCATED EVIDENTIARY FAIR HEARING, CORRECTLY CONCLUDED THAT GED IS NOT A MEDICAID COVERED SERVICE.

A. The Hearing Officer’s Bifurcated Evidentiary Fair Hearing Afforded the Guardians Due Process.

The Hearing Officer was rightfully within her powers to bifurcate the Evidentiary Fair Hearing. According to the Delaware Social Services Manual (“DSSM”) §5304.3, Hearing Officers have the authority to restrict the issues raised at the hearing.⁶⁶ Here, the Hearing Officer recognized that Medicaid coverage and medical necessity are conceptually independent - “consideration of whether the GED treatment services at issue are medically reasonable and necessary is a moot issue if

⁶² Delaware Social Services Manual, 16 Del. Admin. Code § 5406.1, ¶ 1.

⁶³ *Id.*

⁶⁴ *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *see also Ward v. Dep’t of Elections*, 2009 WL 2244413, at *1 (Del. Super. July 27, 2009).

⁶⁵ *Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959, 963 (Del. 2003).

⁶⁶ DSSM, 16. Del. Admin. Code § 5304.3

Delaware's Medicaid program prohibits these treatment services."⁶⁷ Furthermore, necessity of treatment does not equate to Medicaid coverage.⁶⁸ For example, chiropractic and adult dental services may be necessary, but they are not required to be covered under the State's optional home and community based waiver program.⁶⁹ Consequently, the Hearing Officer was within her power, and not in error, first to determine whether GED is a Medicaid covered service, then to address medical necessity if coverage was sustained.

In the bifurcated hearing, the Guardians took issue with the Hearing Officer's prohibition on evidence of medical necessity in the first phase. However, the parties were not limited in their ability to offer evidence regarding Medicaid coverage, including by witness testimony. The Guardians ultimately presented evidence as to the deference owed to the CMS letters and argued that GED remained covered under the interventional behavioral treatment category in the Delaware HCBS Waiver. Had the Hearing Officer determined that GED was a covered service, no doubt the Guardians would have had a full opportunity to present their case in support of medical necessity. The Guardians, therefore, were given due process; a full

⁶⁷ Appendix Part I In Support of Appellant's Opening Br., D.I. 20, A-915.

⁶⁸ *See Beal v. Doe*, 432 U.S. 438, 443-44 (1977) ("Nothing in the language of Title XIX requires a participating State to fund every medical procedure falling within the delineated categories of medical care.").

⁶⁹ *See generally* 42 C.F.R. § 440.225.

evidentiary Fair Hearing on the pertinent issues in what the Hearing Officer reasonably determined to be the most efficient and orderly manner.

B. The Hearing Officer’s Opinion Correctly Concluded that GED is Prohibited Under State and Federal Law and, Therefore, not a Medicaid Covered Service.

State and federal law support the Hearing Officer’s conclusion that aversives are not a Medicaid covered service. The Delaware HCBS waiver, in pertinent part, provides “[t]he use of aversive conditioning, defined as the contingent application of startling, painful, or noxious stimuli is prohibited.” The waiver, therefore, undoubtedly prohibits the use of GED and terminates its coverage as a Medicaid service. Moreover, the Delaware HCBS waiver carries the force and effect of law because an agency regulation that is validly promulgated pursuant to legislative authority has the force and effect of law.⁷⁰ Here, DHSS amended its waiver through the formal rulemaking process by gathering input from providers and advocates, convening public hearings and comment, and publishing notice of the waiver as a proposed and final regulation. Delaware’s HCBS waiver therefore carries the force and effect of law and substantiates the Hearing Officer’s conclusion—aversives are not Medicaid covered services.

The CMS letters also substantially support the Hearing Officer’s conclusion. An agency interpretation of its own regulation is entitled to mandatory judicial

⁷⁰ See *Benton v. Rhodes*, 586 F. 3d 1, 3 (6th Cir. 1978).

deference.⁷¹ CMS is the federal entity tasked with overseeing the implementation of the HCBS Rule in all Medicaid funded community services. In the 2012 McGreal Letter, CMS, through its regional administrators, explained that GED violated the characteristics of home and community based settings. More recently, in the 2015 Lollard Letter, CMS reviewed the Delaware HCBS waiver and concluded that the waiver complied with Medicaid laws and regulations—including the ban on aversives. The CMS letters are agency interpretations of its own regulation and are therefore entitled to mandatory judicial deference.

Federal law also dictates the result. The HCBS Rule, proposed in 2011 and published in 2014, requires assurances from States that HCBS used to serve Medicaid recipients assure an individual's right to freedom from coercion and restraint.⁷² The CMS, in 2012, interpreted the freedom from coercion and restraint as prohibiting the use of aversives, such as GED, on HCBS waiver recipients. Such an interpretation is entitled to mandatory judicial deference. Therefore, according to federal law, state law, and the federal agency tasked with implementing the HCBS

⁷¹ See *Cnty. Health Ctr. V. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002). See also *Castellanos-Contreras v. Decauter Hotels, LLC*, 662 F.3d 393, 408 (5th Cir. 2010) (stating in pertinent part: opinion letters, handbooks and other published declarations of an agency's views...are authoritative sources of the agency's interpretation of its own regulations).

⁷² 42 C.F.R. § 441.530(a)(1)(iii).

Rule, the Hearing Officer's conclusion that GED is not a Medicaid covered service is correct.

II. BECAUSE THE GUARDIANS RECEIVED DUE PROCESS AND THEIR SUBSTANTIVE LEGAL CLAIMS DO NOT OVERCOME STATE AND FEDERAL LAW, THE HEARING OFFICER'S FINAL DECISION IS AFFIRMED.

A. The Guardians Received Due Process: A Full, Fair Evidentiary Hearing.

The Guardians argue that procedural due process violations require reversal of the Hearing Officer's decision. In particular, they argue that they received inadequate notice of DHSS' treatment mandates, that DHSS provided an inadequate Fair Hearing Summary with shifting legal bases for its actions, and that DHSS engaged in coercive and prejudicial conduct intended to defeat due process. Despite the claimed due process violations, the Guardians fail to elicit any evidence of harm or analyze how the Fair Hearing was substantively impacted. The Guardians offer no evidence that they were unprepared, no evidence that notice was not received, or that the hearing was held without them, and nothing to the effect that they did not understand the issues or the bases for the decisions in question. In fact, the Guardians received exactly what they sought. They engaged in a full evidentiary Fair Hearing in which they were prepared to argue the issues raised, permitted to produce any evidence on the issue of Medicaid coverage, and to raise arguments as to why aversives were still Medicaid Covered Services.

If this Court granted reversal it would hold form over substance. Reversal would do nothing but grant the guardians another bifurcated evidentiary Fair Hearing involving federal and state law that prohibits the use of aversives. The Guardians already had their evidentiary Fair Hearing on the dispositive issue and nothing in their claims state otherwise. Therefore, the claimed due process violations are without merit and do not warrant reversal.

B. The Guardians Argument That Aversives Remain Covered as Necessary Behavioral Support Services Under Delaware’s HCBS Waiver Is Unsupported and Contradicts State and Federal Law.

The Guardians contend that Delaware HCBS Waiver participants are eligible for additional services on top of those normally covered by Medicaid. One such service, they argue, is clinical/behavioral support services, “services and supports provided to consumers to maintain, remediate or enhance functioning as deemed necessary in an individual’s personalized care plan.”⁷³ The Guardians further argue that the Delaware HCBS Waiver includes “Behavioral Consultation” services which “results in individually designed behavior plans and strategies for waiver participants who have significant behavioral difficulties.”⁷⁴ According to the Guardians, GED is a necessary behavioral support service and therefore a covered service under Delaware’s HCBS Waiver.

⁷³ Appellants’ Opening Br., D.I. 15, at 41.

⁷⁴ *Id.* at 42.

The Guardians' argument ignores the federal and state law prohibition of the use of aversives. The HCBS Rule ensures an individual's freedom from coercion and restraint,⁷⁵ while the Delaware HCBS Waiver outright prohibits the use of aversive conditioning.⁷⁶ Aversives cannot be prohibited outright by the waiver, but also—as the Guardians propose—covered by the waiver. Moreover, the Guardians argument not only flies in the face of established law, but allows individuals to override it. According to the Guardians, treatment deemed necessary in an individual's personalized care plan would be a covered service. Therefore, anyone determining a recipient's treatment plan may decide how to best treat a Delaware Medicaid recipient, irrespective of Delaware and federal law. The Guardians have cited nothing to support this position and the Court finds nothing. Federal and state law dictate that aversives are not Medicaid covered services and the Guardians cannot establish otherwise.

C. The Guardians Discrimination Claim Based on Title II of The ADA is Rejected Because it is Raised for The First Time On Appeal.

The Guardians also argue that to discontinue all aversive treatment and develop entirely new treatment plans would place the Beneficiaries at the risk of unjustified isolation and/or institutionalization in violation of Title II of the ADA. As a matter of appellate procedure, however, the Superior Court cannot hear this

⁷⁵ 42 C.F.R. § 441.530(a)(1)(iii).

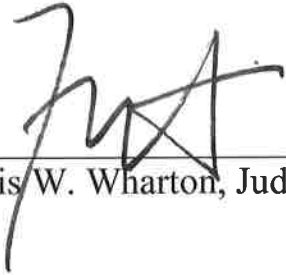
⁷⁶ Application for 1915(c) HCBS Waiver

argument because it was not raised in the forum from which the appeal was taken.⁷⁷ Superior Court Civil Rule 72(g) provides that appeals shall be heard and determined by the Superior Court from the record of proceedings below, except as may be otherwise expressly provided by statute⁷⁸ The Court, therefore, cannot consider the Guardians' ADA argument because they did not raise it during the January 13, 2016 Fair Hearing and it is not part of the record.

VI. CONCLUSION

The Court finds that the Hearing Officer's decision was supported by substantial evidence and free from legal error. Therefore, the decision hereby **AFFIRMED.**

IT IS SO ORDERED.



Ferris W. Wharton, Judge

⁷⁷ *Tatten Partners, L.P. v. New Castle County Bd. of Assessment Review*, 642 A.2d 1251, 1262 (Del. Super. 1993), *Wilmington Trust Co. v. Conner*, 415 A.2d 773, 781 (Del. 1980).

⁷⁸ Super. Ct. Civ. R. 72(g).