STATE OF MICHIGAN
IN THE COURT OF APPEALS

WASHTENAW COUNTY COMMUNITY
MENTAL HEALTH,

Petitioner-Appellee,

v. Court of Appeals No. 355523

IN THE MATTER OF KEVIN WIESNER,

Respondent-Appellant. Washtenaw County
Circuit Court No. 20-000430-AA

_____/

NATIONAL HEALTH LAW PROGRAM
by: Abigail K. Coursolle (CA Bar # 266646)
(pro hac vice pending)
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_____/

BRIEF *AMICUS CURIAE* OF THE NATIONAL HEALTH LAW PROGRAM IN SUPPORT OF APPELLANT KEVIN WEISNER AND REVERSAL

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STATEMENT OF THE QUESTIONS PRESENTED

Federal law makes Medicaid Fair Hearing decisions final and binding on both the single state Medicaid agency and its agents, including WCCMH. Mr. Wiesner won a Medicaid Fair Hearing against WCCMH and received a final decision in his favor. Because the decision is final, WCCMH has no right to appeal it against Mr. Wiesner in Circuit Court.

INTEREST OF THE *AMICUS*

The National Health Law Program (NHeLP), founded in 1969, protects and advances health rights of low-income and underserved individuals and families.[1] NHeLP advocates, educates, and litigates at the federal and state levels to advance health and civil rights in the U.S. NHeLP defends and fights to expand health and civil rights of those most in need and those with the fewest resources. NHeLP strives to give a voice to low-income individuals and families in federal and state policy making, promote the rights of patients in emerging managed-care health care systems, and advocate for a health care system that will ensure all people have access to quality and comprehensive health care.

Much of NHeLP's work has focused on protecting the rights of Medicaid beneficiaries and enforcing Medicaid law in the courts, and advocating for Medicaid policies and laws in Congress and statehouses from coast to coast that meet the needs of low-income individuals, families, underserved communities, and people historically discriminated against by private health care insurance companies, such as people of color, women, people living with disabilities, and LGBTQ individuals. Through NHeLP's 50+ year history, the organization has litigated

[1] Pursuant to MCR 7.312(H)(4), Movant states as follows: No party and no counsel for a party has authored this Brief in whole or in part, nor has any party or counsel for a party or anyone else made a monetary contribution intended to fund the preparation or submission of this Brief.

several key cases to enforce Medicaid beneficiaries rights to due process, including the right to a fair hearing. *See, e.g., Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016); *Davis v. Shah*, 821 F.3d 231 (2d Cir. 2016); *K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107 (4th Cir. 2013); *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013); *McCartney ex rel. McCartney v. Cansler*, 608 F. Supp. 2d 694 (E.D.N.C. 2009), *aff'd sub nom. D.T.M. ex rel. McCartney v. Cansler*, 382 F. App'x 334 (4th Cir. 2010); *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004). As a result of our deep expertise in the area of Medicaid due process and fair hearing rights, and our interest in protecting the rights of Medicaid beneficiaries, we have an interest in this case to ensure that these rights remain in force to protect low-income people on Medicaid.

ISSUES PRESENTED

Appellant has presented three issues to this court for consideration:

1. Where federal law makes Medicaid Fair Hearing decisions binding on both the single state agency and its local agents, including WCCMH, and where federal law requires "final administrative action" on hearing requests within 90 days, did WCCMH have the right to appeal Mr. Wiesner's favorable Fair Hearing decision?

2. Where the Michigan Administrative Procedures Act excludes from the category of persons entitled to appeal administrative decisions to the circuit court "the agency engaged in the particular processing of a . . . contested case," and where controlling Michigan precedent holds that an agency in exactly parallel circumstances is not a "person" entitled to appeal under the APA, did WCCMH have the right to appeal Mr. Wiesner's favorable Fair Hearing decision?

3. Where the ALJ was mandated by state and federal law to decide the Fair Hearing at issue, applied controlling law to a well-developed record to determine whether Mr. Wiesner's services authorization was sufficient, and acted within the bounds of MDHHS's Delegation of Authority, was the ALJ's decision within MDHHS's statutory authority and jurisdiction?

This amicus brief will address the first issue, and argues that federal law makes Medicaid Fair Hearing decisions binding on both the state itself, and the entities with which it contracts, including WCCMH, and thus, WCCMH may not appeal a hearing decision in a beneficiary's favor to Circuit Court.

ARGUMENT

In this case, a Medicaid beneficiary, Mr. Wiesner, had a dispute with the entity responsible for providing him with certain Medicaid services, Washtenaw County Community Mental Health (WCCMH). He exercised his right to resolve the dispute through the Medicaid fair hearing process, where he prevailed. But Mr. Wiesner could hardly celebrate his victory before WCCMH improperly initiated this action in the Circuit Court, wrongly subjecting Mr. Wiesner to further appeals of what is meant to be a final, binding decision of the state Medicaid agency. Allowing WCCMH's appeals to proceed against Mr. Wiesner is contrary to federal Medicaid law, and to public policy. This court should reverse.

I. Medicaid's Single State Agency Requirement is Necessary to Ensure Accountability and Consistency in a Complex Program

As courts have observed, Medicaid is a complicated program. It is governed by thousands of pages of state and federal statutory and regulatory provisions, which courts have described as

"the regulatory equivalent of the Serbonian bog," *Cherry by Cherry v. Magnant*, 823 F. Supp. 1271, 1274 n. 4 (S.D. Ind. 1993), "almost unintelligible to the uninitiatied," *Friedman v. Berger*, 547 F.2d 727, n. 7 (2d Cir. 1976), and "labyrinthian." *Roloff v. Sullivan*, 975 F.2d 333, 340, n. 12 (7th Cir. 1992). In addition, these laws are fleshed out by countless state and federal manuals and guidance documents. Billions of dollars flow from the federal coffers to the states and, through them, to thousands of managed care plans, health care providers, and other contractors. *See* Kaiser Comm'n on Medicaid and the Uninsured, Robin Rudowitz et al., *Medicaid Enrollment and Spending Growth: FY 2020 & 2021* (Oct. 14, 2020), https://bit.ly/2KMfxEU.

States must ensure compliance with all of these complex federal Medicaid requirements. *In re Estate of Rasmer*, 501 Mich. 18, 25 (2017); *see also People v. Kanaan*, 278 Mich. App. 594 (2008); *Waskul v. Washtenaw County Comm'ty Mental Health*, 979 F.3d 426, 436 (6th Cir. 2020). To this end, federal law requires states to establish a "single state agency" ultimately responsible for the operation of the program; here, the Michigan Department of Health and Human Services. *See Ass'n of Home Help Care Agencies v. Dep't Health & Human Servs.,* No. 349405, *5, -- Mich. -- 2020 WL 6811692 (Mich. Ct. App. Nov. 19, 2020). This requirement is crucial because all state Medicaid programs delegate significant responsibilities to their contractors, including Community Mental Health Service Programs (CMHSPs) like WCCMH, as they carry out functions integral to the Medicaid program such as authorizing and providing services and reimbursing providers. *See MDHHS/CMHSP Managed Mental Health Supports and Services Contract* FY 20 (CMHSP Contract) Pt. I, §§ 7.0, 15.0, pp. 13, 16-19 (Attached as Exhibit A). Pursuant to federal regulations, and its contract, WCCMH must comply with the laws that bind the states, as well as the contractual provisions to which it has agreed. Ex. A, CMHSP Contract, Pt. I, § 15.1, Pt. II, § 5.0, pp. 16, 31. At the same time, MDHHS, the single

state agency, remains responsible for implementing the program consistent with federal mandates. 42 U.S.C. § 1396a(a)(5). It cannot contract away ultimate authority for its legal responsibilities to other entities. *See, e.g., Salazar v. D.C.,* 596 F. Supp. 2d 67, 69-70 (D.D.C. 2009); *J.K. v. Dillenberg*, 836 F. Supp. 694, 699 (D. Ariz. 1993); *see also Hilburn v. Maher*, 795 F.2d 252, 261 (2d Cir. 1986) (noting reason for single state agency requirement "was to avoid a lack of accountability for the appropriate operation of the program").

The single state agency requirement also stands for the converse of this principle: an MCO such as WCCMH may not "place itself in the driver's seat and call the shots on how the state's Medicaid program is to be administered in the face of a clearly contrary decision by the single state agency." *K.C. ex rel. Africa v. Shipman,* 716 F.3d 107, 115 (4th Cir. 2013). *See also* 42 C.F.R. § 431.10(e) (prohibiting the single state agency from delegating to others its authority to "issue policies, rules, and regulations on program matters") Yet, that is precisely what WCCMH is attempting to do. The single state agency, MDHHS, has held that Mr. Wiesner is entitled to the services he seeks, and its agent WCCMH is trying to overturn that decision in the courts.

As Mr. Wiesner has explained in his brief, WCCMH's actions violate the single state agency requirement. *See* Appellant's Br. at 21. Under its contract, WCCMH is acting on behalf of the state when it authorizes and pays for the Medicaid services that Mr. Wiesner needs. The single state agency has determined that Mr. Wiesner is entitled to the services he seeks. Appellant's Br. at 22. Allowing WCCMH to appeal that decision would be the equivalent of allowing the state itself to appeal its own decision. Not only would that be nonsensical, it would undermine the purpose of the single state agency, which is to impose consistency and establish accountability in a complex system where authority is delegated to many entities. At the same

time, if WCCMH disputes the state's conclusion, its dispute should not delay Mr. Wiesner the relief he seeks. As set forth below, the forum for such a dispute lies elsewhere. *See* pp. 9-10, *infra.* Thus, WCCMH has no right to seek appeal of this decision in state court.

II. Medicaid's Due Process requirements are designed to protect Medicaid beneficiaries' entitlement to public health care benefits.

WCCMH's appeal is also inconsistent with the due process principles that animate the fair hearing process. Medicaid is an entitlement program, and as such, the Constitution requires due process before a beneficiary's public health care benefits are terminated or reduced. *See, e.g., Catanzano v. Dowling*, 60 F.3d 113, 117 (2d Cir. 1995) (opportunity for fair hearing is required under Fourteenth Amendment when state action terminates Medicaid benefits) (additional case history omitted); *Stenson v. Blum*, 476 F. Supp. 1331, 1342 (S.D.N.Y. 1979) (holding notice and opportunity for hearing before termination of Medicaid benefits are required under Due Process Clause of Fifth and Fourteenth Amendments), *aff'd,* 628 F.2d 1345 (2d Cir. 1980); *Dozier v. Haveman*, No. 2:14 CV 12455, 2014 WL 5480815, at *5 (E.D. Mich. Oct. 29, 2014) (plaintiffs likely to succeed on the merits of their claim that Michigan official, before terminating plaintiffs from one Medicaid program, was required to conduct *ex parte* redetermination of their eligibility under other Medicaid programs). Michigan's fair hearing system is established pursuant to the federal Medicaid requirement that a state's Medicaid "hearing system must meet the due process standards set forth in [landmark Constitutional due process case] *Goldberg v. Kelly*, 397 U.S. 254 (1970)," in addition to Medicaid-specific requirements. 42 CFR § 431.205(d). These federal requirements thus flow from constitutional due process, which, in determining what procedures are appropriate to address disputes between a state that administers a public benefit, like Medicaid, and the beneficiaries of those benefits, requires a balancing between the government's interests, and the private interest at stake,

accounting for "the risk of an erroneous deprivation." *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

Importantly, in disputes over public benefits that "provide[] the means to obtain essential . . . medical care," such as Medicaid, both the individual and the government have great interest in ensuring the beneficiary's continued access to those benefits. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). Continued access to benefits is required by "the Nation's basic commitment . . . to foster[ing] the dignity and well-being of all persons within its borders[and] recogni[tion] that forces not within the control of the poor contribute to their poverty." *Id.* at 264-65. As the Court in *Goldberg* recognized: "The same governmental interests that counsel the provision of [public benefits], counsel as well its uninterrupted provision to those eligible to receive it." *Id.* at 265. Thus, the procedures that govern disputes over a person's entitlement to such benefits must account for the beneficiary's particular need for them, since unlike "the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended. . . termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." *Id.* As the Court later explained, for a low-income person, "erroneous termination would damage [a beneficiary] in a way not recompensable through retroactive payments." *Mathews*, 424 U.S. at 331.

The same principles that require states to afford Medicaid beneficiaries the opportunity to be heard before their benefits are terminated or reduced require that the fair hearing process also have a predictable end point for the beneficiary. As Mr. Wiesner explains in his brief, where the beneficiary's right to public health care benefits is at issue, once the state has found in the beneficiary's favor in a fair hearing, the state may not appeal its own decision and subject a

beneficiary to litigation over the very issue that the state has already decided. Appellant's Br. at 23. For this reason, as the Medicaid regulations make clear, the state's decision in a fair hearing is final and obligates the state to take corrective action. 42 C.F.R. §§ 431.244(f), 431.246. The right to appeal an adverse decision—which accrues only to the beneficiary, not the state—is meaningless if the result of that appeal has no real effect, but is subject to further proceedings by the state if the beneficiary prevails. As the Ninth Circuit recently explained: "An appeal lacking the practical capacity to reverse or modify the prior decision is but 'an arid ritual of meaningless form.' . . . . [T]he term 'appeal' encompasses the issuance of an enforceable order to redress an invalid original decision." *Anderson v. Ghaly*, 930 F.3d 1066, 1076 (9th Cir. 2019) (quoting *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958)).

Allowing the state's agent to litigate a final fair hearing decision made by the state against the beneficiary who initiated the fair hearing leaves that beneficiary in a state of uncertainty—potentially for months, or even years, as litigation continues. It subjects the low-income Medicaid beneficiary to the prospect of endless appeals in the courts that they have to defend, potentially incurring attorneys' fees. Moreover, the beneficiary is at risk again of an "erroneous deprivation" while litigation and appeals are pending. *Mathews*, 424 U.S. at 321. WCCMH's interpretation of the rules governing fair hearing subverts their purpose in protecting the rights of low-income Medicaid beneficiaries to receive the benefits to which they are entitled without interruption. WCCMH would instead discourage beneficiaries from appealing adverse decisions, since a successful appeal could land the beneficiary in court, owing far more in attorneys' fees than the value of the benefits they might forgo, even if they are ultimately successful. The appeals process is designed to protect low-income beneficiaries' rights to the Medicaid benefits to which they are entitled. Thus, the principles of due process require that fair

hearing decision in the beneficiary's favor must be final, and bind the state, and, by corollary, its agents such as WCCMH; a decision in the beneficiary's favor is not an invitation to WCCMH to take that beneficiary to court.

III. Allowing WCCMH to appeal a decision by the single state agency in favor of Mr. Weisner ignores the proper remedies available to the WCCMH.

The fact that WCCMH cannot appeal fair hearing decisions in court does not leave it without a remedy. As an agent of the state, and pursuant to its contract with the state, WCCMH has contractual remedies it may pursue if it believes that a state hearing decision is incorrectly obligating it to provide services beyond the scope of its contract, through the dispute resolution processes set forth in the contract. *See* Ex. A, CMHSP Contract, Pt. I, § 18, pp. 19-20; *id.* Attach. C.1.3.1 § III, pp. 5-6; *see also* 42 C.F.R. § 438.710 (federal requirements regarding hearing procedures for certain disputes between Medicaid Managed Care Entities and State Medicaid Agencies). If WCCMH is unable to resolve the issue through the administrative dispute resolution procedures available to it, it could pursue litigation against the state.[2]

Under well-established common law principles, where an agent is authorized to act on behalf of a principal to engage in legal relations with a third party, the authority of the agent may not exceed that of the principal. Rather, the principal authorizes the agent to work under their control and on their behalf. Where the principal has a relationship with a third party, and

[2] Such litigation is not uncommon where there is a dispute between a state Medicaid agency and its contractor over responsibility for providing, and reimbursement for, Medicaid services. *See, e.g., Cmty. Health Care Ass'n of New York v. DeParle*, 69 F. Supp. 2d 463, 469 (S.D.N.Y. 1999) (Medicaid providers and plans sued state Medicaid agency for improper reimbursement); *Care v. Hawaii, Dep't of Human Servs.*, 567 F. Supp. 2d 1238, 1243 (D. Haw. 2008), *aff'd*, 572 F.3d 740 (9th Cir. 2009) (discussing reimbursement dispute litigation between managed care plan and state Medicaid agency); *Columbia United Providers, Inc. v. Washington*, No. C12-5174BHS, 2012 WL 1432236, at *1 (W.D. Wash. Apr. 25, 2012) (contract dispute between managed care plans and state Medicaid agency).

designates the agent to carry out some of its obligations to that third party, the agent may not independently contradict the principal's interpretation of its obligations to the third party by taking the third party to court. *C.f., e.g., Barclae v. Zarb*, 300 Mich. App. 455, 473 (2013) (an agent generally may not enforce a contract between its principal and a third party). Here, the principal, the Michigan Medicaid agency, has rendered a final, binding, administrative decision that a third party, Mr. Wiesner, is entitled to certain Medicaid services. The agent, WCCMH, disagrees with the principal's decision. Its recourse does not lie with the third party. Rather, it lies with the principal, who made the decision

In other words, when a beneficiary requests a fair hearing, and WCCMH believes that the final fair hearing decision was incorrect, it has several ways in which it may contest the decision. But there is no right to appeal the final decision in favor of an individual Medicaid beneficiary to court. Rather, its dispute lies with the state, not the beneficiary, and it must therefore seek redress from the state.

RELIEF REQUESTED

For all the reasons discussed above, *Amicus* the National Health Law Program respectfully requests that this Court grant Mr. Wiesner's request that this Court either:

• vacate the Circuit Court's order, and dismiss WCCMH's underlying appeal from ALJ Meade's Decision and Order, on the basis that WCCMH had no right to appeal from the Decision and Order or, in the alternative,

• reverse the Circuit Court's erroneous order vacating the Decision and Order, and, in either event

reinstate the Decision and Order.

Respectfully Submitted,

Dated: December 23, 2020

/s/ Abigail K. Coursolle (CA Bar # 266646)
(*pro hac vice* pending)
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EXHIBIT A:
Excerpt of the Fiscal Year 2020 Contract Between Michigan Department of Health & Human Services and WCCMH (CMHSP Contract)

Contract Manager and Location Building:
John P. Duvendeck– Lewis Cass Building, 320 S. Walnut
Contract Number#_____

Agreement Between
Michigan Department of Health & Human Services
And
CMHSP_____
For
Managed Mental Health Supports and Services

Period of Agreement:
This contract shall commence on October 1, 2019 and continue through September 30, 2020. This agreement is in full force and effect for the period specified.

Program Budget and Agreement Amount:
Total funding available for managed mental health supports and services is identified in the annual Legislative Appropriation for community mental health services programs. Payment to the CMHSP will be paid based on the funding amount specified in Part II, Section 7.0 of this contract. The value of this contract is contingent upon and subject to enactment of legislative appropriations and availability of funds.

The terms and conditions of this contract are those included in: (a) Part I: Contractual Services Terms and Conditions; (b) Part II: Statement of Work; and (c) all Attachments as specified in Parts I and II of the contract.

Special Certification:
The individuals signing this agreement certify by their signatures that they are authorized to sign this agreement on behalf of the organization specified.

Signature Section:

For the Michigan Department of Health & Human Services

_____ _____
Christine H. Sanches, Director Date
Bureau of Grants and Purchasing

For the CONTRACTOR:

_____ _____
Name (print) Title (print)

_____ _____
Signature Date

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6.1 Cost Liability

The MDHHS assumes no responsibility or liability for costs under this contract incurred by the CMHSP prior to October 1, 2019. Total liability of the MDHHS is limited to the terms and conditions of this contract.

6.2 Contract Liability

A. All liability, loss, or damage as a result of claims, demands, costs, or judgments arising out of activities to be carried out pursuant to the obligation of the CMHSP under this contract shall be the responsibility of the CMHSP, and not the responsibility of the MDHHS, if the liability, loss, or damage is caused by, or arises out of, the actions or failure to act on the part of the CMHSP, its employees, officers or agent. Nothing herein shall be construed as a waiver of any governmental immunity for the County(ies), the CMHSP, its agencies or employees as provided by statute or modified by court decisions.

B. All liability, loss, or damage as a result of claims, demands, costs, or judgments arising out of activities to be carried out pursuant to the obligations of the MDHHS under this contract shall be the responsibility of the MDHHS and not the responsibility of the CMHSP if the liability, loss, or damage is caused by, or arises out of, the action or failure to act on the part of MDHHS, its employees, or officers. Nothing herein shall be construed as a waiver of any governmental immunity for the state, the MDHHS, its agencies or employees or as provided by statute or modified by court decisions.

C. The CMHSP and MDHHS agree that written notification shall take place immediately of pending legal action that may result in an action naming the other or that may result in a judgment that would limit the CMHSP's ability to continue service delivery at the current level. This includes actions filed in courts or governmental regulatory agencies.

7.0 CMHSP RESPONSIBILITIES

The CMHSP shall be responsible for the development of the service delivery system and the establishment of sufficient administrative capabilities to carry out the requirements and obligations of this contract. The CMHSP is responsible for complying with all reporting requirements as specified in this contract. Data reporting requirements are specified in Part II, Section 6.5 of the contract. Finance reporting requirements are specified in Part II, Section 7.8. Additional requirements are identified in Attachment C 7.0.2 (Performance Objectives).

7.1 MDHHS Standard Consent Form

It is the intent of the parties to promote the use and acceptance of the standard release form that was created by MDHHS under Public Act 129 of 2014. Accordingly, the CMHSPs have the opportunity to participate in the Department's annual review of the DCH-3927 and to submit comments to the Department regarding challenges and successes with using DCH-3927.

E. All earned carry-forward funds and savings from prior fiscal years that remain unspent as of the end date, must be returned to the MDHHS within 90 days. No carry-forward funds or savings as provided in Part II, Section 7.7.1 and 7.7.1.1, can be earned during the year this contract ends, unless specifically authorized in writing by the MDHHS.

F. All financial, administrative and clinical records under the CMHSP's responsibility must be retained according to the retention schedules in place by the Department of Management and Budget's (DTMB) General Schedule #20 at: http://michigan.gov/dmb/0,4568,7-150-9141_21738_31548-56101--,00.html unless directed otherwise in writing by the MDHHS.

Should additional statistical or management information be required by the MDHHS, after this contract has ended or is canceled, at least 45 days notice shall be provided to the CMHSP.

14.0 CONFIDENTIALITY

Both the MDHHS and the CMHSP shall assure that services and supports to and information contained in the records of people served under this agreement, or other such recorded information required to be held confidential by federal or state law, rule or regulation, in connection with the provision of services or other activity under this agreement shall be privileged communication, shall be held confidential, and shall not be divulged without the written consent of either the recipient or a person responsible for the recipient, except as may be otherwise required by applicable law or regulation. Such information may be disclosed in summary, statistical, or other form, which does not directly or indirectly identify particular individuals.

15.0 ASSURANCES

The following assurances are hereby given to the MDHHS:

15.1 Compliance with Applicable Laws

The CMHSP will comply with applicable federal and state laws, guidelines, rules and regulations in carrying out the terms of this agreement.

15.2 Anti-Lobbying Act

With regard to any federal funds received or utilized under this agreement, the CMHSP will comply with the Anti-Lobbying Act, 31 USC 1352 as revised by the Lobbying Disclosure Act of 1995, 2 USC 1601 et seq, and Section 503 of the Departments of Labor, Health and Human Services and Education, and Related Agencies Appropriations Act (Public Law 104-208). Further, the CMHSP shall require that the language of this assurance be included in the award documents of all sub-awards at all tiers (including sub-contracts, sub-grants, and contracts under grants, loans and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

15.3 Non-Discrimination

In the performance of any contract or purchase order resulting here from, the CMHSP agrees not to discriminate against any employee or applicant for employment or service delivery and access, with respect to their hire, tenure, terms, conditions or privileges of employment, programs and services provided or any matter directly or indirectly related to employment, because of race, color, religion, national origin, ancestry, age, sex, height, weight, marital

status, physical or mental disability unrelated to the individual's ability to perform the duties of the particular job or position. The CMHSP further agrees that every sub-contract entered into for the performance of any contract or purchase order resulting here from will contain a provision requiring non-discrimination in employment, service delivery and access, as herein specified binding upon each sub-contractor. This covenant is required pursuant to the Elliot Larsen Civil Rights Act, 1976 P.A. 453, as amended, MCL 37.2201 et seq, and the Persons with Disabilities Civil Rights Act, 1976 P.A. 220, as amended, MCL 37.1101 et seq, and Section 504 of the Federal Rehabilitation Act 1973, PL 93-112, 87 Stat. 394, and any breach thereof may be regarded as a material breach of the contract or purchase order.

Additionally, assurance is given to the MDHHS that pro-active efforts will be made to identify and encourage the participation of minority-owned, women-owned, and handicapper-owned businesses in contract solicitations. The CMHSP shall incorporate language in all contracts awarded: (1) prohibiting discrimination against minority-owned, women-owned, and handicapper-owned businesses in sub-contracting; and (2) making discrimination a material breach of contract.

15.4 Debarment and Suspension

With regard to any federal funds received or utilized under this agreement, assurance is hereby given to the MDHHS that the CMHSP will comply with Federal Regulation 45 CFR Part 76 and certifies to the best of its knowledge and belief that it, including its employees and sub-contractors:

A. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal department or CMHSP;

B. Have not within a three-year period preceding this agreement been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or contract under a public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

C. Are not presently indicted or otherwise criminally or civilly charged by a government entity (federal, state or local) with commission of any of the offenses enumerated in section B, and;

D. Have not within a three-year period preceding this agreement had one or more public transactions (federal, state or local) terminated for cause or default.

15.5 Federal Requirement: Pro-Children Act

Assurance is hereby given to the MDHHS that the CMHSP will comply with Public Law 103-227, also known as the Pro-Children Act of 1994, 20 USC 6081 et seq, which requires that smoking not be permitted in any portion of any indoor facility owned or leased or contracted by and used routinely or regularly for the provision of health, day care, early

childhood development services, education or library services to children under the age of 18, if the services are funded by federal programs either directly or through state or local governments, by federal grant, contract, loan or loan guarantee. The law also applies to children's services that are provided in indoor facilities that are constructed, operated, or maintained with such federal funds. The law does not apply to children's services provided in private residences; portions of facilities used for inpatient drug or alcohol treatment; service providers whose sole source of applicable federal funds is Medicare or Medicaid; or facilities where Women, Infants, and Children (WIC) coupons are redeemed. Failure to comply with the provisions of the law may result in the imposition of a civil monetary penalty of up to $1,000 for each violation and/or the imposition of an administrative compliance order on the responsible entity. The CMHSP also assures that this language will be included in any sub-awards, which contain provisions for children's services.

15.6 Hatch Political Activity Act and Inter-governmental Personnel Act

The CMHSP will comply with the Hatch Political Activity Act, 5 USC 1501-1508, and the Intergovernmental Personnel Act of 1970, as amended by Title VI of the Civil Service Reform Act, Public Law 95-454, 42 USC 4728. Federal funds cannot be used for partisan political purposes of any kind by any person or organization involved in the administration of federally assisted programs.

15.7 Limited English Proficiency

The CMHSP shall comply with the Office of Civil Rights Policy Guidance on the Title VI Prohibition Against Discrimination as it Affects Persons with Limited English Proficiency. This guidance clarifies responsibilities for providing language assistance under Title VI of the Civil Rights Act of 1964.

15.8 Health Insurance Portability and Accountability Act

To the extent that this act is pertinent to the services that the CMHSP provides to the MDHHS, the CMHSP assures that it is in compliance with the Health Insurance Portability and Accountability Act (HIPAA) requirements currently in effect and will be in compliance by the time frames specified in the HIPAA regulations for portions not yet in effect.

All recipient information, medical records, data and data elements collected, maintained, or used in the administration of this contract shall be protected by the CMHSP from unauthorized disclosure as required by state and federal regulations. The CMHSP must provide safeguards that restrict the use or disclosure of information concerning recipients to purposes directly connected with its administration of the contract.

The CMHSP must have written policies and procedures for maintaining the confidentiality of all protected information.

16.0 MODIFICATIONS, CONSENTS AND APPROVALS

This contract will not be modified, amended, extended, or augmented, except by a writing executed by the parties hereto, and any breach or default by a party shall not be waived or released other than in writing signed by the other party.

17.0 ENTIRE AGREEMENT

The following documents constitute the complete and exhaustive statement of the agreement between the parties as it relates to this transaction.

A. This contract including attachments and appendices
B. Michigan Mental Health Code and Administrative Rules
C. Michigan Public Health Code and Administrative Rules
D. MDHHS Appropriations Act in effect during the contract period
E. Approved Children's Waiver, corresponding CMS conditions, Medicaid Policy Manuals and subsequent publications
F. All other pertinent federal and state statutes, rules and regulations
G. All final MDHHS guidelines, final technical requirements as referenced in the contract - Additional guidelines and technical requirements may be added as provided for in Part I, Section 16.0 of this contract.

In the event of any conflict over the interpretation of the specifications, terms, and conditions indicated by the MDHHS and those indicated by the CMHSP, the dispute resolution process in included in Part I, Section 18.0 of this contract will be utilized.

This contract supersedes all proposals or prior agreements, oral or written, and all other communications pertaining to the purchase of mental health supports and services for the non-Medicaid population between the parties.

18.0 DISPUTE RESOLUTION

Disputes by the CMHSP may be pursued through the dispute resolution process.

In the event of the unsatisfactory resolution of a non-emergent contractual dispute or compliance/performance dispute, and if the CMHSP desires to pursue the dispute, the CMHSP shall request that the dispute be resolved through the dispute resolution process. This process shall involve a meeting between agents of the CMHSP and the MDHHS. The MDHHS Deputy Director of Behavioral Health and Developmental Disabilities Administration will identify the appropriate Deputy Director(s) or other department representatives to participate in the process for resolution. The Deputy Director may handle disputes involving financial matters unless the MDHHS Director has delegated these duties to the Administrative Tribunal.

The CMHSP shall provide written notification requesting the engagement of the dispute resolution process. In this written request, the CMHSP shall identify the nature of the dispute, submit any documentation regarding the dispute, and state a proposed resolution to the dispute. The MDHHS shall convene a dispute resolution meeting within twenty (20) calendar days of receipt of the CMHSP request. The Deputy Director shall provide the CMHSP and MDHHS representative(s) with a written decision regarding the dispute within fourteen (14) calendar days following the dispute resolution meeting. The decision of the Deputy Director shall be the final MDHHs position regarding the dispute.

Any corrective action plan issued by the MDHHS to the CMHSP regarding the action being disputed by the CMHSP shall be on hold pending the final MDHHS decision regarding the dispute.

In the event of an emergent compliance dispute, the dispute resolution process shall be initiated and completed within five (5) working days.

19.0 NO WAIVER OF DEFAULT

The failure of the MDHHS to insist upon strict adherence to any term of this contract shall not be considered a waiver or deprive the MDHHS of the right thereafter to insist upon strict adherence to that term, or any other term, of the contract.

20.0 SEVERABILITY

Each provision of this contract shall be deemed to be severable from all other provisions of the contract and, if one or more of the provisions shall be declared invalid, the remaining provisions of the contract shall remain in full force and effect.

21.0 DISCLAIMER

All statistical and fiscal information contained within the contract and its attachments, and any amendments and modifications thereto, reflect the best and most accurate information available to MDHHS at the time of drafting. No inaccuracies in such data shall constitute a basis for legal recovery of damages, either real or punitive. MDHHS will make corrections for identified inaccuracies to the extent feasible.

Captions and headings used in this contract are for information and organization purposes. Captions and headings, including inaccurate references, do not, in any way, define or limit the requirements or terms and conditions of this contract.

22.0 RELATIONSHIP OF THE PARTIES (INDEPENDENT CONTRACTOR)

The relationship between the MDHHS and the CMHSP is that of client and independent contractor. No agent, employee, or servant of the CMHSP or any of its sub-contractors shall be deemed to be an employee, agent or servant of the state for any reason. The CMHSP will be solely and entirely responsible for its acts and the acts of its agents, employees, servants, and sub-contractors during the performance of a contract resulting from this contract.

23.0 NOTICES

Any notice given to a party under this contract must be written and shall be deemed effective, if addressed to such party at the address indicated on the signature page of this contract upon (a) delivery, if hand delivered; (b) receipt of a confirmed transmission by facsimile if a copy of the notice is sent by another means specified in this section; (c) the third (3rd) business day after being sent by U.S. mail, postage prepaid, return receipt requested; or (d) the next business day after being sent by a nationally recognized overnight express courier with a reliable tracking system.

Either party may change its address where notices are to be sent by giving written notice in accordance with this section.

24.0 UNFAIR LABOR PRACTICES

Pursuant to 1980 P.A. 278, as amended, MCL 423.321 et seq., the state shall not award a contract or sub-contract to an employer or any sub-contractor, manufacturer or supplier of the employer, whose name appears in the current register compiled by the Michigan Department of Consumer

6. For HSW enrollees, the HSW certificate will be transferred upon MDHHS receipt of documentation from both the 'home' and the 'serving' PIHPs with an effective date of transfer
7. The end date of the contract is the beginning of the fiscal year when the capitation rate of the 'serving' county includes the costs reported

III. DISPUTE RESOLUTION

Good faith efforts to resolve disputes, utilizing principles of ethical conduct, and the standards contained in this document must be made prior to initiating this Dispute Resolution process. In order to facilitate informal dispute resolution, each CMHSP/PHP shall provide the name of a responsible contact person to the manager of this contract and to the MACMHB for publication on its website. This good faith effort shall include documented notification of the Executive Director of each CMHSP regarding the known facts and areas of disagreement within two business days of identification of the disagreement.

When formal Dispute Resolution is required, the following process shall be used:

A. Dispute Resolution Committee.

A COFR Dispute Resolution Committee, consisting of three persons, shall be constituted annually, at the beginning of the fiscal year. One person shall be appointed by MDHHS and two shall be appointed by the MACMHB. Vacancies on the committee shall be filled within ten days. The Committee shall appoint its chair by consensus. The MACMHB shall appoint a third person who will serve as an alternate representative in cases which would present a conflict of interest for one of the regular representatives.

B. Initiation of Dispute Resolution.

Either party may initiate dispute resolution by notifying the MACMHB and the MDHHS Contract Manager identified in this contract in writing.

C. Fact Finding.

The MACMHB shall notify each Board/PIHP, and all members of the Dispute Resolution Committee, within three business days of receiving notification, that a formal dispute has been received. Each CMHSP shall respond to MDHHS and the MACMHB, with a copy to the other CMHSP/PIHP, within three business days with a written response, including

- The facts as each entity sees them;
- The rationale for their position, including documents to support their position. In cases involving a child who is a ward of the court, documents must include a court order which establishes the 'court of record/jurisdiction'. Additional documents may be presented at the hearing.

D. Dispute Resolution Meeting.

The Dispute Resolution Committee will designate a time and place for a resolution meeting, which will be held no later than 30 days following submission of the facts identified in B. above. At this time

- Each CMHSP's (or PIHP's in cases involving Medicaid) designated responsible representative will attend. Each representative will be provided an opportunity to make a verbal presentation regarding the case. Each CMHSP (PIHP) representative must be empowered by its CMHSP (PIHP) to negotiate a settlement of the dispute.
- Should a negotiated settlement not be reached at this meeting, the committee will meet, without others present, to arrive at a decision reached by majority vote of the Resolution Committee.
- The decision shall be reached, and conveyed to the disputing parties, on the day of the meeting.
- A record of each proceeding, including documentation of the facts and the decision, shall be kept by the MDHHS and by the MACMHB for public review.

IV. DEFINITIONS

"Living Independently". The following factors will be used to determine whether a person is 'living independently':

- The location in which the person is residing is not transient. For example, residing in a motel or hotel which is rented by the day or week, without intent to remain in the community is not considered 'living independently.' Likewise, placement in a half-way house upon release from jail or prison is not considered 'living independently'. Living in a vehicle is also not considered 'living independently.'
- Migrant workers shall be considered the responsibility of the CMHSP in which they are housed.
- The intent of the individual to be part of the community shall be considered. For example, persons who are homeless, living on the street or in a shelter shall be considered part of the community, when the intent of the person is to remain in the community.
- The location in which the person resided prior to moving into a county was not a boarding school, a facility, or a dependent living setting as defined in the Mental Health Code and utilized in Section 306 thereof.

Provider. As used in Part II, C above, means a provider of specialized behavioral health services or a dependent living site regardless of whether such services are delivered under contract with a CMHSP/PIHP.