STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P. O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax (517) 334-9505

IN THE MATTER OF:

[redacted],

Appellant

_____/

Docket No. 2011-26121 CMH
Case No. [redacted]

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 upon the Appellant's request for a hearing.

After due notice, a hearing was held on [redacted] appeared on behalf of the Appellant. She had no witnesses. [redacted], attorney, represented the Department. Her witness was [redacted].

PRELIMINARY MATTER

At the close of proofs the Appellant offered proposed Exhibit #2. The admission of that document was taken under advisement subject to objection from Department's counsel post review. There was no objection and the proposed exhibit was admitted into evidence.

ISSUE

Did the Department properly deny the Appellant's request for increased Community Living Supports (CLS) and Speech Therapy?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. The Appellant is a disabled [redacted]-year-old Medicaid beneficiary receiving services through [redacted] Community Mental Health (CMH).

2. CMH is under contract with the Department of Community Health (MDCH) to provide Medicaid covered services to people who reside in the CMH service area.

3. The Appellant is diagnosed with Cognitive Impairment, moderate and autism. (Department Exhibit A [Hearing Summary] page 5 and Appellant's Exhibit #2, p. 7)

4. The Appellant lives with her mother and has "occasional contact with her father – who provides little support." (Department's Exhibit A, sub F, page 38)

5. Appellant's mother is her primary caregiver. (Department's Exhibit A [Hearing Summary] page 2)

6. The Appellant attends school 5-days a week, arriving home at 4 PM each day. (Department Exhibit A, [Hearing Summary] page 2 and Appellant's Exhibit #2 – throughout).

7. In Appellant's [redacted], Personal Care Plan (PCP) it was recommended that she participate in speech therapy – among other services. (Department Exhibit A, sub F, page 38)

8. While still demonstrating delay in receptive-expressive language skills the Appellant, on testing, demonstrated a new expressive language skill on SLP assessment that "[she] did not have a year ago." (Appellant's Exhibit #2, page 34)

9. The Appellant's representative expressed satisfaction with exisiting levels of CLS on PCP progress review as late as [redacted]. (Department Exhibit A, sub G, page 46)

10. During the hearing the CMH witness noted that some of the tasks for which the Appellant's representative sought additional CLS were the responsibility of a parent to provide. (Department Exhibit A [Hearing Summary] page 2 and sub K)

11. On [redacted], the CMH sent an Adequate Action Notice to the Appellant notifying her that 90 units of Speech Therapy per month were not authorized, but that 18 units of Speech Therapy would be authorized. The denial of the 72 units of Speech Therapy was explained in adequate action notice as not medically necessary, while the Department's supporting evidence actually demonstrated a simple clerical error of omission. The Appellant's further appeal rights were contained therein. (Department Exhibit A, sub B, page 12)

12. On [redacted], the CMH sent an Adequate Action Notice to the Appellant notifying her that the requested 2200 units of CLS per month were not authorized, but that 1400 units of CLS would be authorized. The denial of the additional 800 units of CLS was based on a lack of supporting documentation demonstrating medical necessity. The Appellant's further appeal rights were contained therein. (Department Exhibit A, sub A, page 8)

13. The Michigan Administrative Hearing System for the Department of Community Health received the instant request for hearing on [redacted]. (Appellant's Exhibit #1).

CONCLUSIONS OF LAW

The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). It is administered in accordance with state statute, the Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

> Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services.
>
> 42 CFR 430.0

> The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program.
>
> 42 CFR 430.10

Section 1915(b) of the Social Security Act provides:

> The Secretary, to the extent she finds it to be cost-effective and efficient and not inconsistent with the purposes of this subchapter, may waive such requirements of section 1396a of this title (other than subsection(s) of this section) (other than sections 1396a(a)(15), 1396a(bb), and 1396a(a)(10)(A) of this title insofar as it requires provision of the care and services described in section 1396d(a)(2)(C) of this title) as may be necessary for a State…

The State of Michigan has opted to simultaneously utilize the authorities of the 1915(b) and 1915(c) programs to provide a continuum of services to disabled and/or elderly populations. Under approval from the Centers for Medicare and Medicaid Services (CMS) the Department of Community Health (MDCH) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver. [redacted] Community Mental Health

contracts with the Michigan Department of Community Health to provide services under the waiver pursuant to its contract obligations with the Department.

Medicaid beneficiaries are entitled to medically necessary Medicaid covered services for which they are eligible. Services must be provided in the appropriate scope, duration, and intensity to reasonably achieve the purpose of the covered service. *See* 42 CFR 440.230.

The Medicaid Provider Manual (MPM), Mental Health/Substance Abuse section establishes Medicaid policy for Michigan. In addition to establishing the framework for medical necessity[1] it states, in relevant part:

> **CRITERIA FOR AUTHORIZING**
>
> The authorization and use of Medicaid funds for any of the B3 supports and services, as well as their amount, scope and duration, are dependent upon:
>
> - The Medicaid beneficiary's eligibility for specialty services and supports as defined in this Chapter; and
> - The service(s) having been identified during person-centered planning; and
> - The service(s) being medically necessary as defined in the Medical Necessity Criteria subsection of this chapter; and
> - The service(s) being expected to achieve one or more of the above-listed goals as identified in the beneficiary's plan of service; and
> - Additional criteria indicated in certain B3 service definitions, as applicable.
>
> Decisions regarding the authorization of a B3 service (including the amount, scope and duration) must take into account the PIHP's documented capacity to reasonably and equitably serve other Medicaid beneficiaries who also have needs for these services. The B3 supports and services are not intended to meet all the individual's needs and preferences, as some needs may be better met by community and other natural supports. Natural supports mean unpaid assistance provided to the beneficiary by people in his/her network (family, friends, neighbors, community volunteers) that are willing and able to provide such assistance. It is reasonable to expect that parents of minor children with disabilities will provide the same level of care they would provide to their children without disabilities. MDCH encourages the use of natural supports to assist in meeting an individual's needs to the extent that the family or friends who provide the natural supports are willing

[1] *See* MPM, Mental Health [ ] §§ 2.5 through 2.5D, Medical Necessity Criteria, pp. 12 – 14, April 1, 2011

> and able to provide this assistance. PIHPs may not require a beneficiary's natural support network to provide such assistance as a condition for receiving specialty mental health supports and services. The use of natural supports must be documented in the beneficiary's individual plan of service.
>
> Provider qualifications and service locations that are not otherwise identified in this section must meet the requirements identified in the General Information and Program Requirement sections of this chapter. (Emphasis supplied)
>
> MPM, Mental Health [ ] §17.2 Criteria for Authorizing B3 Supports and Services, p. 104, April 1, 2011.[2]

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Furthermore, the Medicaid Provider Manual (MPM) directs the CMH and service users with the following criteria regarding CLS:

> **Community Living Supports (CLS)**
>
> Community Living Supports are used to increase or maintain personal self-sufficiency, facilitating an individual's achievement of his goals of community inclusion and participation, independence or productivity. The supports may be provided in the participant's residence or in community settings (including, but not limited to, libraries, city pools, camps, etc.).
>
> Coverage includes:
>
> - Assisting, reminding, observing, guiding and/or training in the following activities:
>
> - meal preparation
> - laundry
> - routine, seasonal, and heavy household care and maintenance
> - activities of daily living (e.g., bathing, eating, dressing, personal hygiene)
> - shopping for food and other necessities of daily living
>
> CLS services may not supplant state plan services, e.g., Personal Care (assistance with ADLs in a certified specialized residential setting) and Home Help or Expanded

[2] This version of the MPM is identical to the edition in place at the time of notice and appeal.

Home Help (assistance in the individual's own, unlicensed home with meal preparation, laundry, routine household care and maintenance, activities of daily living and shopping). If such assistance appears to be needed, the beneficiary must request Home Help and, if necessary, Expanded Home Help from the Department of Human Services (DHS). CLS may be used for those activities while the beneficiary awaits determination by DHS of the amount, scope and duration of Home Help or Expanded Home Help. If the beneficiary requests it, the PIHP case manager or supports coordinator must assist him/her in requesting Home Help or in filling out and sending a request for Fair Hearing when the beneficiary believes that the DHS authorization of amount, scope and duration of Home Help does not appear to reflect the beneficiary's needs based on the findings of the DHS assessment.

- Staff assistance, support and/or training with activities such as:

  - money management
  - non-medical care (not requiring nurse or physician intervention)
  - socialization and relationship building
  - transportation from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence (transportation to and from medical appointments is excluded)
  - participation in regular community activities and recreation opportunities (e.g., attending classes, movies, concerts and events in a park; volunteering; voting)
  - attendance at medical appointments
  - acquiring or procuring goods, other than those listed under shopping, and non-medical services

- Reminding, observing and/or monitoring of medication administration.

- <u>Staff assistance with preserving the health and safety of the individual in order that he/she may reside or be supported in the most integrated, independent community setting.</u>

CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, state plan coverage Personal Care in Specialized Residential Settings.

> Transportation to medical appointments is covered by Medicaid through DHS or the Medicaid Health Plan. Payment for CLS services may not be made, directly or indirectly, to responsible relatives (i.e., spouses, or parents of minor children), or guardian of the beneficiary receiving community living supports
>
> CLS assistance with meal preparation, laundry, routine household care and maintenance, activities of daily living and/or shopping may be used to complement Home Help or Expanded Home Help services when the individual's needs for this assistance have been officially determined to exceed DHS's allowable parameters. CLS may also be used for those activities while the beneficiary awaits the decision from the Fair Hearing of the appeal of a DHS decision. Reminding, observing, guiding, and/or training of these activities are CLS coverages that do not supplant Home Help or Expanded Home Help. (Emphasis supplied)

MPM, *Supra* pp. 106-107

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At hearing the testimony established that the Appellant sought increased CLS owing to her status as a "single mother" with two children afflicted with autism spectrum disorder. The Appellant's representative said that the level of chaos when the children return home from school is neither manageable nor safe.

However, the Department witness, [redacted], correctly observed that the exisiting levels of CLS were adequate to meet the goals established and approved by the Appellant's representative for the exisiting time period on PCP – specifically that CLS be directed at helping the Appellant achieve improvement in ADL skills.

The chaos and safety concerns expressed by the Appellant's representative at hearing are not reflected in the record and appear to this reviewer to represent a post-petition change in circumstance which would not have been addressed by the CMH on review of the Appellant's [redacted], request for increased CLS.

Accordingly, while events at home may now be in flux, the goals established within the existing PCP with regard to the amount of CLS are appropriate in amount, scope and duration to meet the Appellant's established need. The Appellant's representative will need to address this issue of safety in the next PCP review or alert her supports coordinator of the recent change in circumstance which now causes an unsafe environment in the home.

As for the requested speech services[3] the evidence clearly preponderates in favor of the Appellant – who has established in the record that she is making expressive advances in language and is recognized by expert reviewers as at that level of development where increased speech services will likely have a salutatory effect and lead to the further development of language skills. The evidence does not establish a conclusion that no further development is possible or likely. *See* Appellant's Exhibit #2 – throughout.

The Department's denial of Speech Therapy as stated in its exhibit centered on the omission ["a mis-match"] of an end date on the new prescription the Appellant received from the physician referring the Appellant for such services – although it is currently extant. Individual sessions were approved and vouchered at [redacted] per meeting – but then denied for lack of proof of required coordination by the Appellant's school district. The parties were operating on the assumption that the school system would do nothing - but Appellant's Exhibit #2 established otherwise.[4]

The subsequent denial of requested speech services for lack of an easily amendable end-date on a physician's prescription – when the proofs show that the Appellant has routinely complied with instructions – is an exercise in form over substance. The current prescription is valid. It refers the Appellant for five (5) individual sessions of speech therapy a week. While the ALJ agrees that the school system must coordinate services – the CMH, as the Medicaid provider of last resort, is required to fill the void in the absence of other payors or insurance[5] so long as the Appellant is not receiving duplicate serves elsewhere. There was no evidence that the Appellant was receiving duplicate services elsewhere.

The Appellant's representative emphasized that the Appellant is "making better progress" with speech. Her evidence supported the conclusion that the Appellant has the capacity to further improve her language skills. *See* Appellant's Exhibit #2 – throughout.

Today, the Department's CLS calculation is supported by medical necessity and the presently articulated goals in the PCP under review today. It is dispensed in the appropriate amount, scope and duration consistent with law and policy. However, the Department's decision with regard to speech services rested on an easily amendable clerical omission and was not a decision based on medical necessity.

This Administrative Law Judge must follow the CFR and the state Medicaid policy, and is without authority to grant CLS hours out of accordance with the CFR and state policy. The [redacted] CMH provided sufficient evidence that it adhered to the CFR, state policy and the MPM when they denied an increase in CLS to 2200 units per month, but approved 1400 units per month. On the issue of Speech Therapy the Appellant preponderated her burden of proof to establish the medical necessity for five (5) sessions of individual speech therapy a week for the time period ending August 31, 2011. [Department's Exhibit A, sub I].

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[3] Speech Therapy is a covered service under policy "…as appropriate, when referred by a physican." MPM, §3.20, Mental Health [ ], April 1, 2011, page 21
[4] On March 29, 2011.
[5] The Appellant's father lost his job and medical insurance which covered speech services for the Appellant under BC/BS. Department's Exhibit A, pp. 41 and 77

The CMH is mandated by federal regulation to perform an assessment for the Appellant to determine what Medicaid services are medically necessary and to determine the amount or level of medically necessary services needed to achieve her goals. The PCP is not a static instrument and over time it will likely reflect changes in medically necessary supports and services - when those changes are manifest. At present the Appellant's proofs do not preponderate the required medical necessity for an increase in CLS.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department correctly denied the requested increase in CLS, but incorrectly denied the requested increase in Speech Therapy.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED, in part, and REVERSED, in part.

IT IS FURTHER ORDERED that:

The Department shall ensure that speech services be reinstated at the level prescribed by the Appellant's physician, if coordination of such services from the Appellant's school has yet to occur.

Dale Malewska
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 6/24/2011

***** NOTICE *****

The Michigan Administrative Hearing System may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The Michigan Administrative Hearing System will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.