STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
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IN THE MATTER OF:

Docket No. 2011-46091
CMH
[redacted], Case No. 41498629

Appellant
_____/

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge (ALJ), pursuant to M.C.L. § 400.9 and 42 C.F.R. § 431.200 *et seq*., upon the Appellant's request for a hearing.

After due notice, a hearing was held on [redacted]. Appellant's father, [redacted], appeared on behalf of Appellant. [redacted], Assistant Corporation Counsel, represented the [redacted] County Community Mental Health Authority (CMH). Dr. [redacted], CMH Access Center Manager, appeared as a witness for the CMH.

ISSUE

Did the CMH properly deny Appellant's request for occupational 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. Appellant is a Medicaid beneficiary receiving services through the Macomb County Community Mental Health. (Exhibit C).

2. The 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. Appellant is a [redacted] year-old male who has been diagnosed with autism. (Exhibit D, pages 1, 4).

4. Appellant attends the Special Education Program at Wilde Elementary. (Exhibit D, page 3).

5. The CMH had previously authorized the following Medicaid services: supports coordination, respite care, occupational therapy, behavioral

support services, and speech and language therapy. Appellant has been receiving services since [redacted]. (Exhibit E, pages 1-10).

6. Following a review of Appellant's services on [redacted], it was requested that the services be maintained. (Exhibit E, pages 1-13).

7. However, on [redacted], the CMH sent a notice to Appellant notifying that occupational therapy would be denied because "[d]ocumentation submitted does not justify requested service." (Exhibit A, page 1).

8. On [redacted], the Department received Appellant's Request for Hearing with respect to that denial. (Exhibit B).

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 C.F.R. § 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 C.F.R. § 430.10)

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

> The Secretary, to the extent he 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…

(42 U.S.C. § 1396n(b))

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. CMH 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 C.F.R. § 440.230.

In this case, Appellant was notified that occupational therapy was being denied because "[d]ocumentation submitted does not justify requested service. (Exhibit A, page 1). In particular, the CMH relied upon Appellant's Person Centered Plan (PCP) and a letter submitted by Appellant's school. The CMH's witness, Dr. [redacted], also addressed the documentation submitted on Appellant's behalf after the decision was made and she testified that the decision would have been the same had that documentation been provided earlier. Appellant's representative, on the other hand, argues that it is clear that Appellant requires occupational therapy and that the request should not be denied because paperwork was filled out incorrectly. For the reasons discussed below, this Administrative Law Judge finds that the CMH's denial of occupational therapy services should be affirmed.

[redacted] first addressed the goals found in Appellant's PCP with respect to occupational therapy. Appellant's PCP identified six objectives for Appellant's

occupational therapy: (1) "improve self care skills as shown by dressing self with minimal assistance after set up five or seven times per week"; (2) "improve ability to bathe self as shown by washing self with verbal prompting while supervised in the bath tub three of four times"; (3) "improve hygiene skills as shown by brushing his teeth for two minutes continuously with verbal prompting one of two times per day"; (4) "participate in interactive games with parents as show by visually attending, imitating and taking turns, for five minutes continuously three or five times per day"; (5) "decrease tantrums to less than two times per day as shown by receiving a hug, walking away from the situation, or using some form of communication to indicate what he wants"; and (6) "improve nutritional intake by consuming one bite of a new food each day for a week, then try a different new food for the next week, and so on for a month". (Exhibit E, page 5).

Those same goals were earlier identified during a [redacted], Occupational Therapy Evaluation conducted by Occupational Therapist [redacted].[1] That evaluation described Appellant's problems and developmental delays before setting out the six goals of treatment. The evaluation also provided:

> **Summary:** [redacted] is a gentle 3 year 11 month old boy that enjoys some movement and deep pressure touch. He is resistant to having grooming tasks for him. [redacted] fine and gross motor skills are well below age level. He is a picky eater and is not toilet trained. His self care skills and safety awareness require physical assistance and constant supervision. [redacted] eye contact and interactions with others is fleeting but improves when his sensory needs are met. His anxiety and crying seem to decrease when his is comfortable with the person he is working with as well as the setting. His father stated that if [redacted] father brings him to therapy, he will not seek out his mother.

(Exhibit G, page 4)

While the same goals were identified at the Occupational Therapy Evaluation and in the PCP, Dr. [redacted] and the CMH found that they were insufficient to justify occupational therapy. As testified to by Dr. [redacted], several of the goals described above; specifically objectives 1, 2, 3, 4 and 6, would be appropriate goals for all children Appellant's age and not just those with a disability. Moreover, all children age four would require significant parental assistance in meeting those goals. Therefore, according to Dr. [redacted], it is more appropriate for the assistance to be provided by Appellant's parents and the five goals described above are insufficient to justify occupational therapy.

Additionally, Dr. [redacted] testified that the remaining objective, that Appellant decrease his tantrums to less than two times per day as shown by receiving a hug, walking away

[1] An occupational therapy evaluation had been attempted approximately a year earlier, but was not completed due to Appellant's crying. (Exhibit G, page 1).

from the situation or using some form of communication to indicate what he wants, would be more appropriately addressed by a behavioral therapist. Appellant is already receiving behavioral therapy through the CMH in this case.

Appellant's representative/father argues that his son needs the occupational therapy and that goals can be re-written if necessary, but he fails to meet his burden of demonstrating by a preponderance of evidence that the CMH erred. The CMH can only review the actual goals and information submitted in support of a request for occupational therapy and, in this case, it properly found that the stated goals were insufficient because they are appropriate for all four year-olds regardless of any disability and/or are better met through parental assistance or behavior therapy. Those supports are already available and Dr. [redacted] conclusions regarding the stated goals are uncontradicted. Accordingly, the goals identified for occupational therapy in the PCP and the occupational therapy evaluation fail to support Appellant's representative's argument that occupational therapy is medically necessary.

Similarly, Dr. [redacted] also testified that the letter provided by Appellant's school demonstrated why occupational therapy was not justified. As provided in the Michigan Medicaid Provider Manual, the CMH must coordinate its services with other supports, including school based providers:

> **2.1 Mental Health and Developmental Disabilities Services**
>
> Mental health and developmental disabilities services (state plan, HSW, and additional/B3) must be:
>
> * * *
>
> - Coordinated with other community agencies (including, but not limited to, Medicaid Health Plans [MHPs], family courts, local health departments [LHDs], MIChoice waiver providers, school based services providers, and the county Department of Human Services [DHS] offices).
>
> (Exhibit K, page 1)

Here, with respect to Appellant and occupational therapy, a [redacted] letter from Appellant's school stated:

> [Appellant] has no specific "OT GOALS" as part of his first year in the Autism Program Preschool Classroom.
>
> However, the OT is available to the classroom teacher on a weekly basis for consult via observation and conversation,

> so that the students' gross and fine motor needs are **embedded** within other activities of the day, for as many occasions as possible.
>
> Overall then, the OT has the classroom staff emphasize, encourage, and guide skills in our beginning students for:
>
> - "eye-hand" and "eye-foot" coordination;
> - large muscle movement involving cross of mid-line;
> - motor planning ability for use of motor skills equipment . . . and
> - work with the sensory areas of need specific to each student.
>
> (Exhibit I, page 1)

As testified to by Dr. [redacted], the letter provided by Appellant's school only supports the conclusion that Appellant failed to submit sufficient documentation to justify the requested service. Particularly, the fact that Appellant's school has not identified Appellant as having a specific need for separate occupational therapy undercuts the request for that service and supports the CMH's decision.

Additionally, Dr. [redacted] also addressed the Request for Authorization submitted by Appellant's representative after the decision regarding occupational therapy was made. In that Request for Authorization, Occupational Therapist [redacted] writes that Appellant has attended 26 occupational therapy sessions and that:

> **Parental report of changes in functional performance (play, self-care, school, school, social/emotional):** Barion's mother and father have both stated their ability to follow through with prescribed activities and they have indicated that Barion has improved his cooperation and interaction skills at home. Barion has also played with cousins briefly which he would not do in the past. Barion's father stated he can take Barion out in public with decreased difficulty and Barion will stop a favorite activity with pre-warning and verbal prompts. (minimal physical assistance).
>
> **Summary of Progress:** Barion has shown improved overall strength, coordination, interaction skills, self initiation as well as less negative frustration (decreased screaming, crying, laying on the floor) during treatment sessions. Barion has shown improvement in responding to his father's guidance in unsafe situations as shown by Barion stopping 50% of the

> time before running into the street. Barion has begun to allow a variety of textured foods be put on his plate and will attempt to try them 50% of the time.
>
> **Summary of Problems:** Barion has improved but continues to exhibit squeeze and pinch others when frustrated. Barion continues to require physical assistance to perform motor tasks, to perform self-care activities, and to interact verbally. Barion continues to require physical assistance to make safe choices such as when to cross a street, when not to touch something hot, when to ask for help[.] Barion continues to be a picky eater and his nutritional intake is limited.
>
> **Recommendations:** Continue occupational therapy treatment 2-3 times a week at Sensory Systems Clinic for 40 more sessions to improve Barion's skills as listed above. Continue to have his parents participate in all treatment sessions to improve his ability to carry over activities at home.

(Exhibit H, p. 1)

As a preliminary matter, this Administrative Law Judge would note that the above request was only submitted after the decision to deny occupational therapy was made. Moreover, Dr. [redacted] credibly testified that the letter did not change the insufficient reasons offered in support of the request for occupational therapy and that, consequently, occupational therapy would still have been denied if the letter was timely. The request merely provides that Appellant has benefitted from occupational therapy and it does not change the stated goals of the PCP or conflict with Dr. [redacted] testimony that those goals are more appropriately met by Appellant's parents and a behavioral therapist. Similarly, the request does not change the fact that Appellant's school has not identified a specific need for occupational therapy.

Appellant's representative also focused on the Initial Intake form, dated [redacted], in which [redacted], MSW and supports coordinator, discussed Appellant's presenting problems as well as his bio-psycho-social development and history. (Exhibit D, page 4). According to that report, Appellant has been diagnosed with autism, has no awareness of safety, does not play well with others, is nonverbal, communicates like an eighth-month old despite being three years-old, and has difficultly with transitions. Overall, it was noted that Appellant has been "delayed in meeting developmental milestones." (Exhibit D, page 4). [redacted] also wrote that Appellant meets the eligibility criteria for developmental delay (Exhibit D, page 16) and that his "parents are seeking . . . occupational therapy as he struggles with eating and using utensils" (Exhibit D, page 18).

Following that [redacted] intake, occupational therapy for Appellant was authorized. Appellant's representative now argues that nothing has changed with respect to Appellant's need for occupational therapy since that time and that the later request should also be approved. However, each assessment stands on its own and the CMH offered clear and convincing reasons for the subsequent denial of occupational therapy.

Additionally, Appellant's representative provided Appellant's Individualized Education Program (IEP) dated [redacted]. That IEP provides that "[d]evelopmentally, [redacted] is behind his actual age of 4 yrs, 1 month." (Exhibit L, page 3). However, it also noted that Appellant's needs were being addressed in the classroom for children with autism and that Appellant is progressing toward his goals at the expected rate. (Exhibit L, page 3). Among the goals listed for Appellant were goals relating to the areas of adaptive/independent living and perception/fine motor skills. Included among the positions responsible for implementing activities for those goals was the position of occupational therapist and the performance criteria for the goals was developmental age. (Exhibit L, pages 14-17).

To some extent, the IEP appears inconsistent with the letter the school sent in regarding occupational therapy as it describes both occupational therapy goals and the apparent need for an occupational therapist. However, it is undisputed that the school has not actually employed an occupational therapist with respect to Appellant or practiced specific occupational therapy rather than just embedding it in other activities. The IEP does not change the fact that Appellant's school determined that he did not require separate occupational therapy and, consequently, it does not contradict the CMH's findings or decision.

In accordance with the Code of Federal Regulations (CFR), Appellant bears the burden of proving by a preponderance of the evidence that he is entitled to occupational therapy. Here, given the above evidence, Appellant did not meet that burden. Occupational therapy must be medically necessary and, in this case, the documentation submitted by Appellant was insufficient to demonstrate any medical necessity.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH properly denied Appellant's request for occupational therapy services.

IT IS THEREFORE ORDERED that:

The CMH decision is AFFIRMED.

Steven J. Kibit
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 10/19/2011

***** 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.