

**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:

██████████,

Appellant

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Docket No. 2011-44994 CMH  
Case No. 40106869

**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 ██████████. Appellant's mother, ██████████, appeared on behalf of Appellant. Appellant was present, but did not participate in the hearing. ██████████, Appellant's former supports coordinator, and ██████████, Appellant's current supports coordinator, also testified on his behalf. ██████████, Assistant Corporation Counsel, represented the ██████████ County Community Mental Health Authority (CMH). Dr. ██████████, CMH Access Center Manager, appeared as a witness for the CMH.

**ISSUE**

Did the CMH properly deny Appellant's requests for occupational therapy and speech, hearing and language 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 ██████ year-old male who has been diagnosed with autism and mild mental retardation. (Exhibit C, page 1; Exhibit D, page 12).
4. Appellant attends the Special Education Program at ██████████ School. (Exhibit D, page 5).

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5. The CMH had previously authorized the following Medicaid services: supports coordination, respite care, community living supports, occupational therapy, and speech, hearing and language therapy. (Exhibit E, pages 1-7).
6. Appellant has been receiving occupational therapy and speech, hearing and language therapy since late [REDACTED]. (Testimony of [REDACTED]).
7. Occupational therapy and speech, hearing and language therapy were again requested for the period of [REDACTED] to [REDACTED]. (Exhibit E, page 1; Testimony of [REDACTED]).
8. On [REDACTED], the CMH sent a notice to Appellant notifying that occupational therapy and speech, hearing and language therapy would be denied because “[d]urable treatment and progress over a reasonable time has not been evident.” (Exhibit A, page 1).
9. On [REDACTED], the Department received Appellant’s Request for Hearing with respect to that denial. In the request for hearing, Appellant’s representative asserts that the therapies are necessary and have helped Appellant. She also noted that they were in the process of updating the goals in Appellant’s person centered plan. (Exhibit B, p. 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 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.

### **Speech, Hearing and Language Therapy**

The request for speech, language and hearing therapy in this case was denied because “[d]urable treatment and progress over a reasonable time has not been evident.” (Exhibit A, page 1). The relevant portion of the Medicaid Provider Manual does provide:

Diagnostic, screening, preventive, or corrective services provided on an individual or group basis, as appropriate, when referred by a physician (MD, DO).

**Therapy must be reasonable, medically necessary and anticipated to result in an improvement and/or**

**elimination of the stated problem within a reasonable amount of time.** An example of medically necessary therapy is when the treatment is required due to a recent change in the beneficiary's medical or functional status affecting speech, and the beneficiary would experience a reduction in medical or functional status were the therapy not provided.

Speech therapy must be skilled (i.e., requires the skills, knowledge, and education of a certified speech language pathologist) to assess the beneficiary's speech/language function, develop a treatment program, and provide therapy. Interventions that could be expected to be provided by another entity (e.g., teacher, registered nurse, licensed physical therapist, registered occupational therapist, family member, or caregiver) would not be considered as a Medicaid cost under this coverage.

Services may be provided by a speech-language pathologist or licensed audiologist or by a speech pathology or audiology candidate (i.e., in his clinical fellowship year or having completed all requirements but has not obtained a license). All documentation by the candidate must be reviewed and signed by the appropriately credentialed supervising speech-language pathologist or audiologist.

(Medicaid Provider Manual, Mental Health/Substance, Section 3.20  
(Speech, Hearing, and Language Therapy) (emphasis added))

In this case, the record of the reports and evaluations relating to speech therapy demonstrate Appellant's lack of improvement and support the denial of future speech, hearing and language therapy.

The summary of the Speech and Language Pathology Quarterly Report dated November 1, 2010, stated:

[Appellant] continues to demonstrate a significant speech and language delay. Without functional verbal output and communication, Mic is often unable to identify basic wants and needs (pain, safety, toileting, comfort, hunger, etc.) with consistency, specificity, or accuracy. Mic's difficulties with receptive language and communication is a safety concern as Mic would be unable to follow or comprehend warnings of caution in dangerous situations.

(Exhibit L, page 1)

Similarly, the Speech and Language Pathology-Evaluation conducted on ██████████ ██████████ reflected that Appellant has “profound delays in his receptive and expressive language skills.” (Exhibit G, page 1). That conclusion was based, in part on the results of two assessments:

The first assessment given was the Receptive On-Word Picture Vocabulary Test (ROWPVT). This assessment is designed to assess one’s comprehension of vocabulary that reflects the extent of an individual’s knowledge and understanding of words. Mitchell’s performance on this assessment was significantly below age level expectations. He presented with a Standard Score of 22, with an age equivalent of 4 year 6 months . . .

The second assessment given was the Expressive One-Word Picture Vocabulary Test (EOWPVT). This assessment measure’s one’s spoken language skills and reflects the extent of an individual’s vocabulary that can be accessed and retrieved from memory to be used in producing meaningful speech. Mitchell’s performance on this assessment was also significantly below age level expectations. He demonstrated a Standard Score of 38, with an age equivalent of 4 years 10 months . . .

(Exhibit G, page 1)

The February 8, 2011 evaluation also stated that:

Due to impulsivity Mitchell did demonstrate difficulties with following directions. He also presents with decreased Mean Length of Utterance (MLU) for his age, deficits in his ability to effectively express his needs/wants, and difficulty answering “wh” and yes/no questions.

(Exhibit G, page 1)

Additionally, in the annual assessment completed April 19, 2011, it was noted that:

[Appellant] has speech and language delays. That is [the] family’s biggest concern. They want to be able to understand him and have him express himself. They want staff to work on speech, handwriting, and communication.

(Exhibit D, page 6)

The above-three evaluations took place months apart, but all three reflect Appellant’s continuing speech and language delays despite the authorization of speech, hearing

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and language therapy. In light of those evaluations, ██████████ testified that, in her professional opinion, Appellant has failed to demonstrate durable treatment and progress over a reasonable amount of time and that his request for speech, hearing and language therapy should be denied. (Testimony of ██████████). ██████████ also addressed the Individualized Education Program (IEP) plan dated ██████████ and submitted by Appellant after the denial (Exhibit M), and noted that, once again, it did not describe any improvement (Testimony of ██████████).

As discussed during the administrative hearing, some evidence potentially suggested that Appellant's speech and language had improved in certain areas. For example, the evaluation of Speech and Language Pathology-Evaluation conducted on ██████████, did report that:

During his assessment session, Mitchell was very attentive and cooperative and therefore the above results are believed to be an accurate reflection of his current level of abilities. Mitchell did respond appropriately to ritual greetings and with prompts/reminders he was generally very compliant with simple basic directions requested of him. His articulation skills appeared to be age appropriate and his overall speech intelligibility was good.

(Exhibit G, page 1)

To the extent that evaluation describes Appellant as doing well in certain areas, such as appropriate response and speech intelligibility, there is still no indication in the evaluation that Appellant has improved and past reports do not document what Appellant's abilities in those areas was prior to the start of speech, hearing and language therapy. Appellant's mother/representative testified that such areas do represent an improvement in Appellant's abilities (Testimony of ██████████), but no specific improvement was ever recorded. Moreover, as discussed above, the evaluation on ██████████ still described a number of areas where Appellant had not improved and it still concluded that Appellant has "profound delays in his receptive and expressive language skills." (Exhibit G, page 1).

Appellant's representative/mother and his former supports coordinator both testified that Appellant has improved greatly in the area of speech since taking part in speech, hearing and language therapy. (Testimony of ██████████; Testimony of ██████████). However, they both also concede that much of that improvement has declined since the therapy was stopped (Testimony of ██████████; Testimony of ██████████) and the improvement that should be expected would be durable once the therapy ends (Testimony of ██████████). Additionally, as discussed above, their testimony is unsupported by the speech evaluations conducted in this case.

Appellant's representative/mother further testified that Appellant was in the hospital in ██████████ and that the effects of that hospital stay lingered until ██████████. (Testimony of ██████████). However, while that hospital stay may have had an effect

of his speech, hearing and language therapy and limited his improvement in those areas, there is no evidence or documentation supporting that conclusion. The burden in this case is on Appellant to demonstrate by a preponderance of the evidence that the denial of speech, hearing and language therapy was in error. Here, given the documented lack of specific improvement by Appellant, he has failed to meet that burden in this case. Appellant is free to reapply for speech, hearing and language therapy in the future and the CMH can always reassess his needs. However, looking at decision made in this case and the information available at the time of that decision, the denial of speech, hearing and language therapy must be affirmed.

### **Occupational Therapy**

The Waiver Agency is required to send Appellant notice of the action it intends to take and the reason for that action. See 42 C.F.R. 431.210. Here, as described above, Appellant was notified that his request for occupational therapy was being denied because “[d]urable treatment and progress over a reasonable time has not been evident.” (Exhibit A, page 1). Holding the Waiver Agency to the reason given in the notice of denial, it is clear that the denial was in error and that the decision should be reversed.

In its Hearing Summary submitted prior to the hearing and during the hearing itself, the CMH argued that the request for occupational therapy was denied because it was not medically necessary given Appellant’s improvement and current status.<sup>1</sup> However, the reasons for the denial of occupational therapy given in the notice and during the hearing are completely at odds. In the notice, the CMH asserts that occupational therapy should be denied because Appellant has not demonstrated sufficient progress. During the hearing, the CMH argued that occupational therapy should be denied because Appellant has improved so much that the occupational therapy is medically unnecessary. Given the complete disconnect between the reasons offered for the denial in the notice and the arguments made during the hearing, the Waiver Agency’s arguments and evidence actually support reversal of the denial of services in this case as even the Waiver Agency is arguing that Appellant has greatly improved since entering the program.

Similarly, Appellant’s representative/mother testified that, while Appellant still requires occupational therapy, Appellant has improved in a number of areas. (Testimony of ██████████). Appellant’s representative/mother also noted that Appellant’s improvement has occurred despite the fact that Appellant’s progress was delayed by the extensive time he spent in the hospital and the failure of Appellant’s school to provide sufficient occupational therapy. (Testimony of ██████████).

Given the testimony of Appellant’s representative/mother, in addition to the evidence and arguments made by the Waiver Agency, this Administrative Law Judge finds that

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<sup>1</sup> 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.

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Appellant has met his burden of proving by a preponderance of the evidence that the Waiver Agency erred by denying his request for occupational therapy on the basis that durable treatment and progress over a reasonable time has not been evident. Accordingly, the Waiver Agency's decision is reversed and it must reassess Appellant for occupational therapy within three weeks of the date of this decision.

**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 speech, hearing and language therapy, but improperly denied Appellant's request for occupational therapy services.

**IT IS THEREFORE ORDERED** that:

The CMH decision is **AFFIRMED IN PART** and **REVERSED IN PART**. The Waiver Agency must reassess Appellant for occupational therapy within three weeks of the date of this decision.

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

cc:



Date Mailed: 11/18/2011

**\*\*\* 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.