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) 373-4147

IN THE MATTER OF:

Docket No. 2013-66205 QHP

[redacted]

Appellant.
_____/

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.*, and upon a request for a hearing filed on behalf of the minor Appellant.

After due notice, a hearing was held on [redacted] appeared on Appellant's behalf. [redacted] Appellant's grandparents, testified as witnesses for Appellant. [redacted] represented [redacted] the Respondent Medicaid Health Plan ("MHP"). [redacted], Medical Director of Utilization Management at the MHP, testified as a witness for Respondent. Following the hearing, the record was left open for [redacted] week so that the parties could submit closing briefs.

ISSUE

Did the MHP properly deny Appellant's request for a speech generating device (SGD)?

FINDINGS OF FACT

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

1. On or about [redacted] the MHP received a request made on behalf of Appellant for an Accent 1200 SGD through the MHP. The request was also contained supporting documentation and evaluations. (Respondent's Exhibit A, pages 5-24).

2. As provided in that request and supporting documentation, Appellant is a [redacted] year-old male who has been diagnosed with a developmental delay;

[1] This matter was originally docketed with [redacted], the minor Appellant's mother, as the named appellant. However, it is clear from the record that the named appellant should be [redacted] as it is his services at issue and the request for hearing was filed on his behalf. Accordingly, the matter has been re-titled. The parties were always aware of the nature of the appeal and are not prejudiced by the change.

static encephalopathy; a failure to thrive; microcephaly; congenital heart disease; gastroesophageal reflux disease.; and expressive speech/language disorder. (Respondent's Exhibit A, pages 6, 11-12).[2]

3. That request and documentations also provide that, since at least the age of [redacted], Appellant has only been able to use up to [redacted] words to communicate and that, even when using those words, he has poor intelligibility. (Respondent's Exhibit A, pages 6, 12).

4. Appellant does understand most of what is said to him and it is primarily limited in only his expressive language. (Respondent's Exhibit A, pages 13-14).

5. Appellant attends special education classes within the [redacted] and successfully uses a Vantage Lite SGD at school. (Petitioner's Exhibit 2, pages 4-7; Respondent's Exhibit A, page 12).

6. Appellant has also utilized speech therapy through his school in an attempt to increase his functional speech, but that therapy has generally been unsuccessful. (Respondent's Exhibit A, page 17).

7. Instead, when not at school, Appellant generally uses pointing, gestures, and limited sign language (1-2 signs) to communicate expressively. (Respondent's Exhibit A, pages 12-14).

8. There was no discussion in request or documentation regarding attempts at increasing Appellant's use of sign language, despite the fact that he understands most of what is said to him, knows what he wants to say, and appears to have the cognitive abilities necessary to learn sign language. (Respondent's Exhibit A, pages 13-15).

9. The documentation does, however, provide that Appellant's prognosis for speech production to meet his needs is poor and that his independent communication is expected to remain stable at the present level. (Respondent's Exhibit A, page 12, 15).

10. The request and accompanying documentation also identifies types of features in a SGD that Appellant would need and the [redacted] types of speech generating devices meeting those needs that were trialed. (Respondent's Exhibit A, pages 19-21).

[2] Letters submitted after the request for hearing was filed also indicate that Appellant was born premature and has been diagnosed with a congenital genetic defect; apraxia of speech; severe expressive and receptive language disorder; plagocephaly; and global developmental delays. (Petitioner's Exhibit A, pages 2-4).

11. The request and documentation also provided that the requested SGD is the only one out of the three devices trialed that can meet Appellant's needs. (Respondent's Exhibit A, pages 19-21).

12. In a letter dated [redacted], the MHP sent Appellant's parents/guardians written notice that the request for a SGD was denied. (Respondent's Exhibit A, pages 26-30).

13. Regarding the denial, the notice provided in part:

> The notes sent show that you have microcephaly (head size that is smaller than normal) with severe deficits in your speech production (saying words) and expressively (what is spoken) language skills. Per the Michigan Department of Community Health (MDCH) Medicaid provider manual, speech generating devices are only approved for members who had the ability to speak/communicate at one time but lost that ability over as a result of an illness or injury. The notes you sent do not show that you have had a sudden change or regression (loss of ability) in your speech production. Additionally, per MDCH, Medicaid covers the least costly alternative that will meet your needs. There is no mention that other forms of communication techniques such as sign language have been tried. Sign language is a good alternative that is commonly used in children with severe cognitive and language deficits. Please follow up with your physician to discuss further care options.

Respondent's Exhibit A, page 26

14. On [redacted], the Michigan Administrative Hearing System (MAHS) received the request for hearing filed on behalf of Appellant in this case. (Petitioner's Exhibit 1, pages 1-2).

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.

In 1997, the Department received approval from the Health Care Financing Administration, U.S. Department of Health and Human Services, allowing Michigan to restrict Medicaid beneficiaries' choice to obtain medical services only from specified Medicaid Health Plans. The Respondent is one of those MHPs and Appellant and Appellant's family are enrolled as members in it.

With respect to the services provided by the MHP, Appellant's representative appears to broadly assert that the SGD requested in this case should be covered through the MHP as the device is medically necessary for Appellant and both the Michigan Medicaid State Plan and the Michigan Medicaid Provider Manual (MPM) generally provide for the coverage of medically necessary prosthetic devices, orthotic devices and durable medical equipment.

However, even considering those general provisions, the denial in this case was based on specific provisions of the MPM and those specific provisions are applicable to and govern this case. The Michigan Medicaid State Plan is an agreement between the state and federal government that identifies the general health care services, reimbursement, and eligibility policies in effect under Michigan Medicaid, but it is also written on a more general level than contained in program policy. Moreover, as provided by both the MPM and the MHP's contract with the MDCH, MHPs must operate consistently with all applicable published Medicaid coverage and limitation policies. *See* MPM, [redacted] version, Medicaid Health Plans Chapter, page 1; MDCH contract (Contract) with the Medicaid Health Plans, [redacted], Section 1.022(E)(1), Covered Services.

Here, the MHP asserts that it denied Appellant's request for a SGD pursuant two coverage and limitation policies found in the MPM: (1) speech generating devices are only approved for members who had the ability to speak/communicate at one time, but lost that ability as a result of an illness or injury, and Appellant did not meet that criteria; and (2) Medicaid only covers the least costly alternative that will meet Appellant's needs and the request in this case did not sufficiently identify less costly alternatives that had been tried and that failed. (Respondent's Exhibit A, page 26).

Appellant bears the burden of proving by a preponderance of the evidence that the MHP erred in denying his request for a SGD. Both of the reasons offered by the MHP will be examined in turn and, for the reasons discussed below, this Administrative Law Judge finds that Appellant has failed to demonstrate that the MHP erred in denying the request for a SGD for either reason. Accordingly, the MHP's decision must be affirmed.

With respect to the first reason identified in the notice of denial, the MHP relies upon the specific definition of and provisions regarding speech generating devices found in the MPM. Those provisions state:

2.39 SPEECH GENERATING DEVICES

Definition

A Speech Generating Device (SGD) is defined as any electric or nonelectric aid or device that replaces or enhances lost communication skills. The device must be an integral part of a treatment plan for a person with a severe communication disability who is otherwise unable to communicate basic functional needs.

Standards of Coverage

SGDs may be covered under the following conditions for beneficiaries who demonstrate the comprehension and physical skills necessary to communicate using the requested device.

- **Prosthetic Function** - To replace a missing body part, to prevent or correct physical deformity or malfunction, or to support a weak or deformed portion of the body.

- **Rehabilitative Function** - To restore communication skills to the previous functional level by providing a tool to the beneficiary.

A speech-language pathologist, in conjunction with other disciplines such as occupational therapists, physical therapists, psychologists, and seating specialists as needed, must provide a thorough and systematic evaluation of the beneficiary's receptive and expressive communication abilities.

Ancillary professionals must possess proper credentials (certification, license and registration, etc., as appropriate). SGD vendors (manufacturers, distributors) may not submit assessment information or justification for any requested SGD.

Frequency - The program will purchase new equipment only. Only one SGD will be purchased within a three-year period for beneficiaries under age 21. Only one SGD will be purchased within five years for beneficiaries age 21 and older.

Exceptions may be considered in situations where there has been a recent and significant change in the beneficiary's medical or functional status relative to the beneficiary's communication skills.

Warranty - The warranty period begins at the point when the device is in the beneficiary's home and the beneficiary has received adequate training to use his system for functional communication.

Repairs - Repairs for speech generating devices (SGD) are covered after the warranty expires for no more than one SGD per beneficiary. Additionally, repair of an SGD not purchased by MDCH is covered only if the SGD is determined to be necessary to meet basic functional communication needs in accordance with the criteria for SGD coverage.

Documentation

Documentation must be within 90 days and include:

- Medical diagnosis. (The medical diagnosis must directly relate to the beneficiary's communication deficit.)
- Specifications for the SGD. (Refer to the Outpatient Therapy Chapter)
- Necessary therapy and training to allow the beneficiary to meet functional needs.

All SGD evaluation documentation must be submitted following the established criteria stated within the Evaluations and Follow-up for Speech Generating Devices subsection of the Outpatient Therapy Chapter.

Documentation for modifications must indicate the changes in the beneficiary's functional or medical status that necessitate the need for modifications in the system or parts.

When a current SGD needs replacement and the replacement is **identical** to the SGD previously purchased by MDCH, the documentation required is:

- Clinical confirmation of continued suitability by a speech-language pathologist.

- Clinical confirmation by a speech-language pathologist and occupational or physical therapist of the beneficiary's functional ability to use the SGD.

- Cost of the repair and the cost of replacement.

When a current SGD needs replacement and the replacement is **different** than the SGD previously purchased by the program, a new SGD Evaluation must be conducted. Additional documentation required is a statement that indicates how the current system no longer meets the beneficiary's functional communication needs. A current reevaluation is required for any device that is not identical to the device being replaced.

For replacements due to loss or damage, indicate the following additional documentation:

- The cause of the loss or damage; and

- The plan to prevent recurrence of the loss or damage.

PA Requirements

The speech-language pathologist performs the functional communication assessment and SGD evaluation and initiates the PA request with a medical supplier that has a specialty enrollment with the MDCH to provide SGDs. To improve beneficiary access to low-end devices, a medical supplier without a SGD specialty enrollment with MDCH may provide SGDs with eight minutes or less of speech capability, basic SGD accessories such as switches, buttons, etc., or SGD wheelchair mounting systems. A SGD vendor must enroll through the MDCH CHAMPS PE on-line system as a medical supplier with a subspecialty of Speech Generating Devices in order to provide the full range of SGDs. (Refer to the Directory Appendix for contact information.)

PA is required for all SGD systems. Required documentation must accompany the Special Services Prior Approval—Request/Authorization (MSA-1653-B) when requesting authorization for all original and replacement/upgrade SGD requests.

A copy of the physician prescription must be submitted with the request for an SGD. The prescription must be based on the evaluation of an individual's communication abilities and medical needs made by a speech-language pathologist and other evaluation team members (as appropriate).

Modifications - All modifications and upgrades for SGDs require PA. Indicate the procedure code that defines the modifications, requesting PA for modifications and upgrades.

Repairs - For a repair, report HCPCS code K0739 (for the labor charge) and HCPCS code E1399 (for the replacement part). PA is required for all repairs. If repair charges exceed $150, a speech-language pathologist, occupational therapist, or physical therapist must conduct an evaluation. A statement must be included in the evaluation indicating whether the current SGD continues to meet the beneficiary's functional needs. If the beneficiary's needs are being met with the current system, PA may be granted.

Each repair must consist of a thorough assessment of the general working condition of the entire system so that frequent repairs may be avoided. If additional repairs to the system are needed, PA for those additional services must be obtained.

In some cases, it may be more costly to repair the SGD than to replace it. When requesting PA for a repair, provide the cost of the repair and the cost of the replacement so that determination can be made by MDCH whether to repair or replace the device.

Replacements - All replacements (identical, upgrades, downgrades) of an SGD require PA.

Payment Rules

> **Purchase** - MDCH will purchase new equipment only. The serial number of the device purchased must be maintained on file by the vendor for audit purposes.
>
> Shipping and handling fees relating to the SGD equipment are not separately reimbursed.
>
> Reimbursement includes the charges for the SGD and all approved components.
>
> The provider's charge for an SGD must be based on the usual and customary charge. Reimbursement will be the lesser of the provider's charge and/or the Medicaid fee screen.
>
> **Rental** - MDCH will rent equipment or devices when the purchase price of the device, including the component parts, exceeds $9,000. Equipment will not be rented for a period of less than 30 days and may be rented for a maximum period of 90 days. The monthly rental reimbursement rate will be 1/10 of the maximum purchase reimbursement. The amount reimbursed for rental will be deducted from the total purchase price.
>
> *MPM, April 1, 2013 version*
> *Medical Supplier Chapter, pages 70-73*

Relying on the above policy, the MHP determined that Appellant did not meet the criteria for a SGD because he is not a member who had the ability to speak/communicate at one time, but lost that ability as a result of an illness or injury. According to the MHP's representative and witness, speech generating devices are limited to such members given that a SGD is defined as an electric or nonelectric aid or device that replaces or enhances lost communication skills.

In response, Appellant's representative and witnesses agree that Appellant has always been essentially non-verbal and that he never had the ability to speak/communicate effectively at any one time. However, Appellant's representative also argues that coverage for a SGD is not as limited as asserted by the MHP. According to Appellant's interpretation of the provisions of the MPM, the definition of a SGD merely explains what the equipment is and does not provide any limitations on coverage. Moreover, the actual Standards of Coverage that do limit coverage state that a SGD may be covered as a Prosthetic Function when it is used to correct a physical deformity or malfunction or

support a weak or deformed portion of the body, as would be the case here given Appellant's microcephaly.

This Administrative Law Judge would first note that the definition for a SGD found in the MPM and quoted above appears to support the MHP's position as it expressly and solely defines a SGD as an aid or device that "replaces or enhances lost communication skills" and does not appear to apply in circumstances, such as this case, where a beneficiary never truly developed communication skills at all and is not seeking to replace or enhance lost skills. The starting point and most significant factor in construing the provisions of the MPM is the language of the manual itself and, in this case, that language strongly supports the MHP. Moreover, while Appellant argues that the definition is simply describing what a SGD is and not providing any criteria for the approval of such a device, other parts of that definition clearly identify requirements for the approval of such a device as it states that the SGD "must be an integral part of a treatment plan for a person with a severe communication disability who is otherwise unable to communicate basic functional needs" in order to be approved.

Similarly, while less clear, the Standards of Coverage quoted above with respect to a SGD also support the MHP's argument that a SGD may only be approved for beneficiaries who had the ability to speak/communicate at one time but lost that ability as a result of an illness or injury. For example, there are only two functions in the Standards of Coverage and one is strictly limited to restoring communication skills to a previous functional level. The other function in the Standards of Coverage, the Prosthetic Function, is the one relies upon by Appellant and, while it is not does not expressly prohibit the authorization of a SGD to help someone develop speech skills for the first time, it also does not expressly contradict the limitation found in the definition for a SGD.

Despite the language of the MPM, Appellant's representative asserts that there have been a number of cases where beneficiaries who have been unable to speak at any point were able to successfully challenge Medicaid for speech generating devices. The record was also left open in this case so that Appellant's representative could have an opportunity to identify and submit such cases. However, while a closing brief was filed, Appellant's representative failed to identify any cases backing up the assertions made during the hearing. An absence of case law supporting Appellant's position is not fatal to Appellant's claims, but he does have the burden of proof and it is telling that Appellant's representative was unable to provide any support for his interpretation of the MPM or deliver the case law he pledged to.

Moreover, while Appellant argues that the distinction made by the MHP between rehabilitating lost speech versus developing speech for the first time is irrelevant and that the focus should be on whether the SGD is medically necessary, for whatever reason, that distinction is significant in other portions of the MPM. In particular, the distinction is relevant for authorizations of speech therapy, which includes training in the use of a SGD and which is not covered when intended to improve communication skills

beyond premorbid levels, *.i.e.* the functional communication status prior to the onset of a new diagnosis or change in medical status; for habilitative purposes, *i.e.* teaching someone communication skills for the first time; if it is designed to facilitate the normal progression of development without compensatory techniques or processes; or if provided to meet developmental milestones. *See* MPM, [redacted] version Outpatient Therapy Chapter, pages 18-20. This is obviously not a speech therapy case, but speech therapy does include training in the use of the SGD and, more generally, the provisions speak to the significance of the distinction relied upon by the MHP.

Given the above provisions of the MPM, including both the plain language regarding speech generative devices and the distinctions made regarding the purpose of some speech services, in addition to the lack of support for Appellant's interpretation of the MPM, this Administrative Law Judge finds that Appellant has failed to meet his burden of proving that the MHP erred in denying his request for a SGD on the basis that such equipment is only approved by the MHP for members who had the ability to speak/communicate at one time but lost that ability as a result of an illness or injury.

The second reason for the MHP's decision identified in the notice of denial is that Medicaid only covers the least costly alternative that will meet Appellant's needs and the request in this case did not sufficiently identify less costly alternatives that had been tried and that failed.

It is true that the MPM generally provides that "Medicaid covers the least costly alternative that meets the beneficiary's medical need for medical supplies, durable medical equipment or orthotics/prosthetics." *See* MPM, [redacted] version; Medical Supplier Chapter, page 1. Additionally, in addressing medical necessity, the MPM states:

> **1.5 MEDICAL NECESSITY**
>
> Medical devices are covered if they are the most cost-effective treatment available and meet the Standards of Coverage stated in the Coverage Conditions and Requirements Section of this chapter.
>
> The medical record must contain sufficient documentation of the beneficiary's medical condition to substantiate the necessity for the type and quantity of items ordered and for the frequency of use or replacement. The information should include the beneficiary's diagnosis, medical condition, and other pertinent information including, but not limited to, duration of the condition, clinical course, prognosis, nature and extent of functional limitations, other therapeutic interventions and results, and past experience with related items. Neither a physician's order nor a certificate of medical

> necessity by itself provides sufficient documentation of medical necessity, even though it is signed by the treating physician. Information in the medical record must support the item's medical necessity and substantiate that the medical device needed is the most appropriate economic alternative that meets MDCH standards of coverage.
>
> Medical equipment may be determined to be medically necessary when all of the following apply:
>
> * * *
>
> - It is the most cost effective treatment available.
>
> *MPM, April 1, 2013 version*
> *Medical Supplier Chapter, pages 4-5*

In this case, regarding the cost of the requested SGD, the notice of denial specifically stated that:

> Medicaid covers the least costly alternative that will meet your needs. There is no mention that other forms of communication techniques such as sign language have been tried. Sign language is a good alternative that is commonly used in children with severe cognitive and language deficits.
>
> *Respondent's Exhibit A, page 26*

However, despite the assertion in that notice, it is simply not true that the request for the SGD in this case failed to mention any other forms of communication techniques that have been tried. For example, the request clearly discussed the types of features in a SGD that Appellant would need and the three types of speech generating devices meeting those needs that were trialed. The request also went into detail as to why the requested SGD is the only one that can meet Appellant's needs. (Respondent's Exhibit A, pages 17-21).

Nevertheless, with respect to sign language specifically, the request for a SGD is largely silent. At most, the documentations accompanying the request provide that Appellant currently using pointing, gestures, and limited sign language (1-2 signs) to communicate expressively (Respondent's Exhibit A, page 12-14), but that, even in doing so, he is unable to communicate all his daily wants and needs or participate in social interaction (Respondent's Exhibit A, page 17). Additionally, the documentation also states that the Appellant's prognosis for speech production to meet his needs is poor and that his independent communication is expected to remain stable at the present level.

(Respondent's Exhibit A, page 12). In particular, it is noted that speech therapy to improve or increase functional speech is not a viable option, as it has resulted in insufficient progress in functional speech production. (Respondent's Exhibit A, page 17).

From that documentation, it therefore appears that Appellant will never be able to use sign language to the extent his guardians and doctors would hope and that he would greatly benefit from the use of a SGD, as seen in his use of such a device in school. However, it also appears that Appellant has the cognitive skills necessary to learn sign language (Respondent's Exhibit A, page 15) and merely benefitting from the use of a SGD is not a sufficient basis for authorizing one. The SGD must be medically necessary, the least costly alternative, and "be an integral part of a treatment plan for a person with a severe communication disability who is otherwise unable to communicate basic functional needs." (MPM, [redacted] version, Medical Supplier Chapter, page 70). Here, while Appellant may never be fully skilled in the use of sign language, the request and accompanying documentation in this case fail to demonstrate that sign language has ever being attempted as a viable option or that he cannot learn and use sign language to the extent that would be medically necessary. Sign language may not be a viable option in Appellant's case, but that is not clear from the request and documentation submitted to the MHP.

During the hearing, Appellant's representative did submit evidence regarding why sign language would not work for Appellant, whether it be because of Appellant's contractures (Petitioner's Exhibit 2, page 2); his current natural speech production, age, and severe speech apraxia (Petitioner's Exhibit 2, page 3); his lack of finger control (Petitioner's Exhibit 2, page 5); or the fact that his primary caregivers, family and teachers do not know sign language (Petitioner's Exhibit 2, page 9; Testimony of David Smaw).

However, this Administrative Law Judge is limited to reviewing the MHP's decision in light of the information had at the time and, consequently, the later evidence is not relevant to this decision and order. To the extent Appellant has additional or updated information to provide to the MHP, he would have to re-request the SGD. Moreover, despite the fact that nothing would have changed with respect to the first reason for the denial, the MHP's witness indicated a willingness to review such new evidence.

Therefore, this Administrative Law Judge finds that Appellant has not met his burden of proving that the MHP erred in denying Appellant's request for a SGD on the basis that Medicaid only covers the least costly alternative that will meet Appellant's needs and the request in this case did not sufficiently identify less costly alternatives that had been tried and that failed.

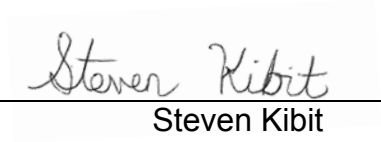
Appellant is free to re-request the SGD with new or updated information at any time. However, the decision before this Administrative Law Judge is sustained given the information available at the time the MHP denied Appellant's request.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the MHP properly denied Appellant's request for a speech generating device.

IT IS THEREFORE ORDERED that:

The Medicaid Health Plan's decision is **AFFIRMED**.



Steven Kibit
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

Date Signed: [redacted]

Date Mailed: [redacted]

SK/db

cc: [redacted]

***** 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 60 days of the mailing date of the Decision and Order or, if a timely request for rehearing was made, within 60 days of the mailing date of the rehearing decision.