STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P. O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax (517) 373-4147

IN THE MATTER OF:

Docket No. 14-011380 CMH

[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], Appellant's mother, appeared and testified on Appellant's behalf. [redacted], supports coordinator, and [redacted], advocate, also testified as witnesses for Appellant. [redacted], Assistant Corporation Counsel, represented Respondent [redacted] County Community Mental Health (CMH). [redacted], Director of the CMH's Access Center, and [redacted], hearing officer, testified as witnesses for Respondent.

ISSUE

Did the CMH properly deny Appellant's requests for Occupational Therapy (OT) and Physical Therapy (PT) evaluations and services?

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

2. Appellant is a [redacted]-year-old male who has been diagnosed with attention deficit hyperactivity disorder, hyperactive or combined; moderate mental retardation; intermittent ataxia; and complicated migraines. (Respondent's Exhibit A, pages 11, 29, 31).

3. Appellant has been receiving services through the CMH, including supports coordination; respite care services; community living supports; speech and language therapy; OT; and PT. (Respondent's Exhibit A, page 19; Testimony of [redacted]

4. Appellant also receives OT and PT through his school. (Respondent's Exhibit A, page 64).

5. On [redacted], an Annual Assessment was held with respect to Appellant's services. (Respondent's Exhibit A, pages 11-32).

6. During that assessment, it was noted that Appellant experiences decreased muscle definition and strength and continues to have substantial limitations in the areas of self-care, mobility, and age appropriate activities of daily living. (Respondent's Exhibit A, page 18).

7. Appellant's mother also reported at that time that Appellant is able to take his socks and shoes off, but cannot put them back on; he cannot manipulate buttons or zippers; he has to use a sippy cup with a straw while drinking; he cannot cut meat while eating; and can use a spoon, but struggles with using a fork. (Respondent's Exhibit A, page 19).

8. Appellant's mother further reported that Appellant is ambulatory, but is accompanied while walking up and down stairs as he is likely to fall, and that he gets tired while navigating longer distances. (Respondent's Exhibit A, page 19).

9. With respect to PT and OT, Appellant's mother generally reported that Appellant has had definite improvements in gross and fine motor skills, but that she was requesting an increase in OT because Appellant continued to struggle with fine motor skills. (Respondent's Exhibit A, page 19).

10. She also specifically reported that he is able to climb stairs better with the use of the railing, though he still requires supervision as he is unsteady due to his decreased muscle definition and strength; he is walking better; and he has improved in using utensils and brushing teeth. (Respondent's Exhibit A, page 19).

11. Overall, it was recommended that Appellant continue to participate in PT, in order to increase his gross motor skills, and in OT, in order to increase his fine motor skills and coping mechanisms for sensitivity to sensory input, through the CMH and in addition to the services he receives in school. (Respondent's Exhibit A, page 31).

12. The CMH then approved OT and PT for another [redacted] months. (Testimony of [redacted]

13. On [redacted], a meeting/annual review was held at Appellant's school with respect to his Individualized Education Program (IEP). (Respondent's Exhibit A, page 58).

14. Following that meeting, a report was generated in which it was noted that Appellant has some difficulty navigating the school without assistance and that he gets tired very quickly if he is standing for a period of time or doing a lot of walking. (Respondent's Exhibit A, pages 60, 62).

15. The report also noted that Appellant is demonstrating some decline in his gross motor abilities and that, due to his recent decline in gross motor skills, Appellant's mother took him to a neurologist and the doctor increased the dosage on one of Appellant's medications. (Respondent's Exhibit A, pages 60, 64).

16. On [redacted], Appellant's representative requested reauthorization of the PT and OT, in addition to PT and OT evaluations. (Respondent's Exhibit A, pages 5-6; Testimony of [redacted]).

17. In reviewing those requests, the CMH's Access Center looked at Appellant's most recent annual assessment with the CMH, his most recent IEP with his school, and progress notes regarding his past PT and OT services. (Testimony of [redacted]

18. With respect to Appellant's PT, a [redacted] Progress Note, regarding the time period of [redacted] to [redacted], noted, in the objective findings section, that Appellant had shown improved tolerance to exercises, slight increased endurance with therapeutic exercises, and slight improvement with motor planning with upper and lower extremity exercises. (Respondent's Exhibit A, page 48).

19. The other [redacted] PT progress notes in the record, dated [redacted] and [redacted], reported the same exact improvement in the objective findings section. (Respondent's Exhibit A, pages 39, 42).

20. Moreover, in the subjective findings section, the [redacted] Progress Note stated that Appellant's mother reports that he is more stable on stairs, but still has an unsteady gait; the [redacted] Progress Note stated that Appellant's mother reports that he has become less stable over time, his loss of balance has become worse, and the school ordered a balance belt for him; and the [redacted] Progress Note stated that Appellant's mother reported that his balance had improved since receiving the balance belt, but that Appellant continues to shake if fatigued. (Respondent's Exhibit A, pages 39, 42, 48).

21. The PT Progress Notes also described three therapy goals that Appellant was working to. (Respondent's Exhibit A, pages 39-50).[1]

[1] Appellant also had one ongoing goal regarding compliance with his home exercise program.

22. The [redacted] therapy goal related to Appellant's ability to use steps or stairs and, while Appellant met his current goal in that area in the [redacted] and [redacted] progress notes, it was unmet and revised in the [redacted] progress note. (Respondent's Exhibit A, pages 40, 43, 49).

23. The second therapy goal related to Appellant's motor planning and Appellant met his current goal in that area in the [redacted] and [redacted] progress notes by demonstrating an ability to perform bilateral cross crawl exercises, with resistance. (Respondent's Exhibit A, pages 40, 43, 49).

24. The third therapy goal related to Appellant's gait endurance and Appellant failed to meet his current goal in that area in any of the progress notes, with the [redacted] Progress Note specifically noting that the goal was being revised to reflect Appellant's decreased gait endurance. (Respondent's Exhibit A, pages 40, 43, 49).

25. With respect to Appellant's OT, a [redacted] Progress Note, regarding the time period of [redacted] through [redacted], provided that Appellant has shown improvement in his tolerance with brain gym, motor planning with bilateral hand coordination, and body awareness. (Respondent's Exhibit A, page 54).

26. That report also identified four ongoing goals that Appellant would continue to work at. (Respondent's Exhibit A, page 55).

27. A [redacted] Progress Note regarding Appellant's OT, covering the time period of [redacted] through [redacted], noted that Appellant had shown improvement with bilateral coordination with lacing large beads and that Appellant had met his goal in that area. (Respondent's Exhibit A, page 51).

28. However, the report also noted that the other [redacted] goals were still unmet and that one goal was being revised. (Respondent's Exhibit A, page 52).

29. The report further stated that Appellant's mother had reported seeing increased hand strength, but that his school had noticed a decrease in balance. (Respondent's Exhibit A, page 51).

30. On [redacted], the CMH sent Appellant written notice that the requests for a PT evaluation, PT, OT evaluation, and OT were denied. (Respondent's Exhibit A, pages 5-6).

31. The notice also provided that the requests were denied because Appellant had been receiving PT since [redacted] and OT since [redacted],

but that the services had not eliminated the stated problems in a reasonable amount of time. (Respondent's Exhibit A, pages 5-6).

32. Appellant's representative requested a local appeal with respect to those denials and a local hearing was held on [redacted] with [redacted] as the hearing officer. (Respondent's Exhibit A, page 34; Testimony of [redacted]

33. On [redacted] issued a decision affirmed the denials of PT and OT services on the basis that the services had not produced measureable functional gains, despite being consistently available, and that it appeared unlikely that more services will produce significant changes. (Respondent's Exhibit A, page 37).

34. On [redacted], the Michigan Administrative Hearing System (MAHS) received the request for hearing filed in this case. (Petitioner's Exhibit 1, pages 1-3).

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*

Additionally, 42 CFR 430.10 states:

> 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 also 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 USC 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.

Among the services that can be provided pursuant to that waiver are PT and OT evaluations and therapies, and, with respect to those services, the applicable version of the Medicaid Provider Manual (MPM) states:

3.19 OCCUPATIONAL THERAPY [CHANGE MADE 7/1/14]

Evaluation	Therapy
Physician/licensed physician assistant/family nurse practitioner -prescribed **(revised 7/1/14)** activities provided by an occupational therapist licensed by the State of Michigan to determine the beneficiary's need for services and to recommend a course of treatment. An occupational therapy assistant may not complete evaluations.	It is anticipated that therapy will result in a functional improvement that is significant to the beneficiary's ability to perform daily living tasks appropriate to his chronological developmental or functional status. These functional improvements should be able to be achieved in a reasonable amount of time and should be durable

	(i.e., maintainable). Therapy to make changes in components of function that do not have an impact on the beneficiary's ability to perform age-appropriate tasks is not covered. Therapy must be skilled (requiring the skills, knowledge, and education of a licensed occupational therapist). Interventions that could be expected to be provided by another entity (e.g., teacher, registered nurse, licensed physical therapist, family member, or caregiver) would not be considered as a Medicaid cost under this coverage. Services must be prescribed by a physician/licensed physician's assistant/family nurse practitioner **(revised 7/1/14)** and may be provided on an individual or group basis by an occupational therapist or occupational therapy assistant, licensed by the State of Michigan or by an occupational therapy aide who has received on-the- job training. The occupational therapist must supervise and monitor the assistant's performance with continuous assessment of the beneficiary's progress, but on-site supervision of an assistant is not required. An aide performing an occupational therapy service must be directly supervised by a qualified occupational

	therapist who is on site. All documentation by an occupational therapy assistant or aide must be reviewed and signed by the appropriately credentialed supervising occupational therapist.

* * *

3.22 PHYSICAL THERAPY

Evaluation	Therapy
Physician/licensed physician's assistant-prescribed activities provided by a physical therapist currently licensed by the State of Michigan to determine the beneficiary's need for services and to recommend a course of treatment. A physical therapy assistant may not complete an evaluation.	It is anticipated that therapy will result in a functional improvement that is significant to the beneficiary's ability to perform daily living tasks appropriate to his chronological, developmental or functional status. These functional improvements should be able to be achieved in a reasonable amount of time and should be durable (i.e., maintainable). Therapy to make changes in components of function that do not have an impact on the beneficiary's ability to perform age-appropriate tasks is not covered. Physical therapy must be skilled (it requires the skills, knowledge, and education of a licensed physical therapist). Interventions that could be expected to be provided by another entity (e.g., teacher, registered nurse, licensed occupational therapist, family member or caregiver) would not be considered as a Medicaid cost under this coverage.

	Services must be prescribed by a physician/licensed physician's assistant and may be provided on an individual or group basis by a physical therapist or a physical therapy assistant currently licensed by the State of Michigan, or a physical therapy aide who is receiving on-the-job training. The physical therapist must supervise and monitor the assistant's performance with continuous assessment of the beneficiary's progress. On-site supervision of an assistant is not required. An aide performing a physical therapy service must be directly supervised by a physical therapist that is on-site. All documentation by a physical therapy assistant or aide must be reviewed and signed by the appropriately credentialed supervising physical therapist.

MPM, July 1, 2014 version
Mental Health/Substance Abuse Chapter, pages 19-21

Here, the CMH denied Appellant's request for OT and PT evaluations therapies on the basis that the services would not be anticipated to result in significant and durable functional improvements in a reasonable amount of time. Specifically, the CMH's witness noted that, while Appellant had been receiving the services for years, the services had not eliminated the stated problems in a reasonable amount of time and that Appellant had actually declined in a number of areas.

Appellant's representative challenges those decisions on appeal and, in doing so, bears the burden of proving by a preponderance of the evidence that the CMH erred in denying the requests. Moreover, the undersigned Administrative Law Judge's jurisdiction is limited to reviewing the denial in light of the information available at the time the decisions were made.

Given the record in this case and the applicable policies, Appellant's representative has failed to meet her burden of proof and the denials must therefore be affirmed. The criteria identified above for both OT and PT provides that it must be anticipated that the therapies will result in a significant functional improvement in a reasonable amount of time and that the improvements should be durable/maintainable. Therapy to make changes in components of function that do not have an impact on the beneficiary's ability to perform age-appropriate tasks is not covered.

Here, Appellant's representative and witnesses argue that Appellant has demonstrated significant improvement during the times he has been receiving PT and OT. For example, Appellant's representative testified that Appellant has improved in walking up-and-down stairs, dressing himself, and using a spoon. Appellant's witnesses also noted that the PT progress notes consistently found that Appellant had shown improved tolerance to exercises, slight increased endurance with therapeutic exercises, and slight improvement with motor planning with upper and lower extremity exercises while the OT progress notes demonstrated improvement with Appellant's bilateral coordination.

However, despite some minimal improvement, the record fails to demonstrate Appellant's past services have resulted in significant and durable functional improvements and there is no reason to expect that to change with additional services, as required by the applicable policy.

With respect to PT, the objective findings of improvement found in the progress notes are unpersuasive as they always use the same exact boilerplate language and are unsupported by the rest of the notes, which fail to reflect significant improvement with respect to the specific therapy goals and even demonstrate that Appellant is declining in some areas, such as gait endurance. Similarly, the most recent annual assessment reflects that Appellant continues to have substantial limitations, despite receiving PT for years, and the school's IEP expressly states that Appellant is demonstrating some decline in his gross motor abilities.

Additionally, with respect to OT, the record demonstrates that, while Appellant has shown some improvement with bilateral coordination, his other therapy goals are unmet and Appellant continues to struggle with fine motor skills. During the most recent annual assessment, even Appellant's mother essentially acknowledged that lack of improvement by requesting an increase in OT because of Appellant's continuing struggles.

Appellant's representative also testified that the CMH's incorrectly found that Appellant receives both PT and OT at school and therefore mistakenly relied on that fact in making its determination. According to Appellant's representative, Appellant has not received those services in his school for years. However, Appellant's [redacted] IEP expressly provides that Appellant receives both PT and OT through his school and Appellant's witnesses could not explain that discrepancy with their testimony. Moreover, even if Appellant's representative's testimony is true, the CMH still justifiably relied on the documentation submitted.

Appellant's representative and witnesses further testified that, while the CMH asserted that Appellant has been receiving PT since [redacted] and OT since [redacted], there have actually been gaps in Appellant's services and he did not receive PT between [redacted] and [redacted] or OT in [redacted] and [redacted]. However, even if true, Appellant would still have been receiving PT and OT for years at the time of the CMH's decisions in this case and any gap in the past would not significantly affect those decisions.

Lastly, Appellant's representative and witnesses questioned how the PT and OT could ever be expected to eliminate Appellant's stated problems in a reasonable amount of time.as his conditions will be life-long and cannot be eliminated. However, while the notice of denial does refer to eliminating problems, the applicable policy only requires significant and durable functional improvements in a reasonable amount of time and that is the standard that the issues in this case will be reviewed under. For the reasons discussed above, the undersigned Administrative Law Judge finds that the requested therapies in this case would not be anticipated to result in significant and durable functional improvements in a reasonable amount of time and that the CMH's decisions must therefore be affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the CMH properly denied Appellant's requests for OT and PT evaluations and services.

IT IS THEREFORE ORDERED that:

The Respondent's decision is **AFFIRMED**.

Steven Kibit

Steven J. Kibit
Administrative Law Judge
for Nick Lyon, 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 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.