

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. 14-012739 CMH

██████████

██████████

██████████

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, an in-person hearing was held on ██████████, Appellant's supports coordinator, appeared and testified on Appellant's behalf. ██████████ Appellant's mother; ██████████ Appellant's physical therapist; and ██████████, Appellant's supports coordinator's supervisor; also testified as witnesses on Appellant's behalf. ██████████, Assistant Corporation Counsel, represented Respondent ██████████ County Community Mental Health (CMH). ██████████, Director of the CMH's Access Center, testified as a witness for Respondent.

At the conclusion of the hearing, the undersigned Administrative Law Judge determined that the record should be left open so that Appellant could have the opportunity to submit additional evidence. Accordingly, Appellant's representative was given until ██████████ to submit additional evidence, as identified on the record, and Respondent's representative was given until ██████████ to submit a response to Appellant's additional evidence.

Appellant's representative subsequently submitted documents on ██████████ and ██████████. No response was received from Respondent and, given the lack of any objection, the ██████████ documents are admitted as Exhibit 1 and the ██████████ documents admitted as Exhibit 2.

ISSUE

Did the CMH properly deny Appellant's requests for Occupational Therapy (OT), Physical Therapy (PT), and Speech, Hearing and Language Therapy (ST)?

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 ██████████-year-old female who has been diagnosed with mental retardation, severity unspecified; petit mal intractable epilepsy; cerebral palsy; respiratory problems; kidney stones; severe constipation; brittle bones; sleep apnea; and developmental delays in speech, fine motor skills, and gross motor skills. (Exhibit A, pages 11, 32-34).
3. Since ██████████, Appellant has been approved for, among other services, PT and ST through the CMH. (Exhibit A, page 22; Testimony of Appellant's representative; Testimony of ██████████).
4. The CMH also authorized OT starting in ██████████ and, with the exception of a lapse in authorization for OT in ██████████, Appellant has been continually approved for that therapy as well. (Exhibit A, page 68).
5. However, while all three types of skilled therapies had been approved by the CMH, Appellant did not utilize her OT and ST the entire time they were approved due to constant turnover in staff. (Exhibit 2, pages 2-7; Testimony of Appellant's representative; Testimony of Appellant's mother; Testimony of ██████████).
6. Moreover, after Appellant broke her femur in ██████████, there was a break in use of her PT services. (Testimony of ██████████).
7. It was also discovered at that time that Appellant had brittle bones and any subsequent PT was conducted more slowly and carefully. (Testimony of ██████████).
8. On ██████████, an Annual Assessment was held with respect to Appellant's services. (Exhibit A, pages 11-35).
9. During that assessment, it was noted that Appellant continues to experience substantial limitations with age-appropriate self-care, learning, mobility, expressive/receptive language, and living skills. (Exhibit A, page 21).

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10. It was also noted that Appellant had not received OT in over a year, but that she had been increasing her tactile defensiveness when she did receive it. (Exhibit A, page 22).
11. Appellant's mother did report an increase in Appellant's gross motor skills, as evidence by Appellant standing more often and for longer periods of time. (Exhibit A, page 22).
12. Appellant's mother also reported that, while Appellant remained non-verbal and lacked expressive/receptive language skills, Appellant was making progress through her ST by choosing more words on an I-pad and making more choices by turning her head and looking at items. (Exhibit A, page 23).
13. Following the ██████████ assessment, the CMH approved Appellant's therapies for another six months. (Exhibit A, pages 34-35; Testimony of Appellant's representative; Testimony of ██████████).
14. When those authorizations were set to expire, Appellant requested that the services be reauthorized. (Testimony of ██████████).
15. On ██████████, the CMH sent Appellant's mother notice that the requests for OT, PT and ST had been denied. (Exhibit A, pages 6-7).
16. With respect to each therapy, the notice provided that the request was denied on the basis that "Durable [treatment] is in question and has not eliminated the states problems in a reasonable amount of time." (Exhibit A, page 6).
17. Appellant's mother requested a local appeal with respect to those denials and a hearing was held on ██████████. (Exhibit A, page 67).
18. On ██████████, the CMH's hearing officer issued a decision affirming the denials of the requests for OT, PT and ST. (Exhibit A, pages 67-70).
19. After her skilled therapies ended, Appellant began regressing and losing any improvement she had made. (Testimony of Appellant's mother; Testimony of ██████████).
20. On ██████████, the Michigan Administrative Hearing System (MAHS) received the complete request for hearing filed in this case. (Exhibit A, page 9).
21. On ██████████, MAHS sent out written notice of an administrative hearing scheduled for ██████████.

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22. On [REDACTED], Appellant's representative requested that the hearing be changed into an in-person hearing.
23. On [REDACTED], another annual assessment was held with respect to Appellant's services. (Exhibit A, pages 36-65).
24. During that assessment, it was noted that Appellant had recently been denied OT, PT and ST, and that her mother wanted the services back in order to avoid further regression. (Exhibit A, pages 48-A and 48-B).
25. On [REDACTED], MAHS subsequently sent out written notice of a rescheduled in-person hearing to be held in this matter on [REDACTED].
26. At the conclusion of the hearing on [REDACTED], the undersigned Administrative Law Judge determined that the record should be left open so that Appellant could have the opportunity to submit additional evidence.
27. Specifically, it was ordered that Appellant's representative had until [REDACTED] to submit additional evidence, as identified on the record, and Respondent's representative had until [REDACTED] to submit a response to Appellant's additional evidence.

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

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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, OT and ST. 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	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

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.

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-

	<p>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.</p>
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3.22 PHYSICAL THERAPY

Evaluation	Therapy
<p>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.</p>	<p>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.</p> <p>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</p>

	<p>occupational therapist, family member or caregiver) would not be considered as a Medicaid cost under this coverage.</p> <p>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.</p>
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3.23 SPEECH, HEARING, AND LANGUAGE

Evaluation	Therapy
<p>Activities provided by a licensed speech language pathologist or licensed audiologist to determine the beneficiary's need for services and to recommend a course of treatment. A speech-language pathology assistant may not</p>	<p>Diagnostic, screening, preventive, or corrective services provided on an individual or group basis, as appropriate, when referred by a physician (MD, DO).</p> <p>Therapy must be reasonable,</p>

<p>complete evaluations.</p>	<p>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.</p> <p>Speech therapy must be skilled (i.e., requires the skills, knowledge, and education of a licensed 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, licensed occupational therapist, family member, or caregiver) would not be considered as a Medicaid cost under this coverage.</p> <p>Services may be provided by a licensed 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</p>
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	the candidate must be reviewed and signed by the appropriately licensed supervising speech-language pathologist or audiologist.
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*MPM, July 1, 2014 version
Mental Health/Substance Abuse Chapter, pages 19-22
(Internal highlighting omitted)*

Here, pursuant to the above policies, the CMH denied Appellant's request for OT, PT and ST. Specifically, the CMH's witness testified that, while the MPM requires that the skilled therapies be anticipated to result in durable/maintainable improvements in a reasonable amount of time, Appellant has only made minimal, non-durable improvements, despite receiving the services for years, and there is no reason to expect those circumstances to change with additional services, as required by the applicable policy.

In response, Appellant's representative and witnesses testified that, while Appellant was approved for all ██████ skilled therapies for years, there were significant lapses in her utilization of the services due to constant turnover in staff, a significant injury Appellant suffered in ██████, and issues with getting OT authorized in ██████. Appellant's representative and witnesses also testified that it was only in the year prior to the denial that Appellant began consistently receiving all the services she had been approved for. Appellant's representative and witnesses further testified that Appellant made improvements over that year and, while she regressed once services were stopped, they believed that Appellant could reach a foundational and maintainable level with additional skilled therapies.

Appellant bears the burden of proving by a preponderance of the evidence that the CMH erred in denying the requests for skilled therapies.

Given the record in this case and the applicable policies, the undersigned Administrative Law Judge finds that Appellant has failed to meet her burden of proof and the denials must therefore be affirmed. The criteria identified above for OT, PT and ST 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. Here, it is undisputed that there has been no such durable improvement despite the services being approved for years and that Appellant began regressing as soon as the therapies were stopped. Moreover, while Appellant's representative demonstrated that Appellant was unable to fully utilize the approved skilled therapies at all times they were approved, Appellant received sufficient services over the years, especially during the last year, to allow the CMH to properly determinate that any further services would not meet the applicable criteria.

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 occupation therapy, physical therapy, and speech, hearing and language therapy.

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.