



# Ohio Legal Rights Service

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November 23, 2007

Helen Jones-Kelley, Director  
Ohio Department of Job and Family Services  
30 E. Broad St., 32nd Floor  
Columbus, Ohio 43215-3414

Sandra Stephenson, Director  
Ohio Department of Mental Health  
30 E. Broad Street, 8th floor  
Columbus, Ohio 43215-3430

**Re: Proposed changes and limitations to Medicaid covered services**

Dear Director Jones-Kelley, and Director Stephenson:

We are writing to inform you of Ohio Legal Rights Service's concerns with Ohio's current efforts to limit coverage under Medicaid through proposed rules governing community mental health and therapy services. OLRs' mission, as the Protection and Advocacy agency for adults and children with disabilities, is to protect and advocate, in partnership with people with disabilities, for their human, civil and legal rights. In that capacity OLRs has reviewed and opposes proposed rule changes by your agencies that would limit the scope of covered services for people with disabilities.

***Ohio cannot enact rules that are inconsistent with existing federal law and regulations.***

Both the Ohio Department of Job and Family Services (ODJFS) and the Ohio Department of Mental Health (ODMH) have proposed rules that impermissibly limit Medicaid coverage for community mental health services (O.A.C. 5101:3-27-02, and O.A.C. 5122-29-01 and 5122-29-17). Proposed in these rules is a new restriction to community mental health services which requires that the services must be "rehabilitative", and that "rehabilitative services provide for the maximum reduction of mental illness and are intended to restore an individual to the best possible functional level." (O.A.C. 5101:3-27-02(A), and O.A.C. 5122-29-01). Both agencies have stated that they are making these changes to comply with federal regulations, yet these restrictions are far beyond the current federal regulations governing rehabilitative services<sup>1</sup>.

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<sup>1</sup> Rehabilitative Services under Medicaid are a critical support for persons with physical and mental disabilities. As recently as 2004 over 70% of individuals receiving these services were receiving them for mental health needs. Crowley, Kaiser Commission on Medicaid and the Uninsured, *Medicaid's Rehabilitation Services Option: Overview and Current Policy Issues*, 7.

In many ways these rules, instead, align with *proposed* rather than current federal regulations on rehabilitative services. Ohio's attempt to change Ohio rules in anticipation of a change in federal regulation is premature and impermissible. Further, there are ongoing efforts to postpone proposed changes to the federal regulations.

Opposition to the federal proposed regulations is widespread and fierce. The Centers for Medicare and Medicaid Services (CMS) received 1700 electronic comments as well as multiple boxes of hand delivered comments in response to proposed changes in federal regulations on rehabilitative services. Most importantly, Congress has expressed its opposition to the restrictions of the proposed regulations. Congress has included language imposing a moratorium on the proposed federal regulations on rehabilitative services in two bills on children's health insurance and the budget bill covering the U.S. Department of Health and Human Services. The most recent budget language calls for a two year moratorium on implementation of these controversial regulations. Even without a Congressional moratorium, the CMS rule is only proposed, it is not final. As such, those restrictions are not yet effective and Ohio cannot implement them in anticipation of possible federal changes.

***Ohio must operate its Medicaid program in compliance with current federal law and regulation.***

The current federal regulation on rehabilitative services is found at 42 CFR § 440.130(d) and states in its entirety:

d) "Rehabilitative services," except as otherwise provided under this subpart, includes any medical or remedial services recommended by a physician or other licensed practitioner of the healing arts, within the scope of his practice under State law, for maximum reduction of physical or mental disability and restoration of a recipient to his best possible functional level.

There are no other federal regulations that include limitations specific to this service (although the *proposed* federal regulations add limitations not authorized by Congress.)

Other than comments from ODJFS and ODMH that the proposed rules are an attempt to comply with federal regulations, no other authority, such as written guidance from CMS, has been cited to support efforts to restrict Ohio's Medicaid services. This attempt by ODJFS and ODMH to limit services to Medicaid eligible Ohioans is premature.

***EPSDT requirements are ignored in the proposed rules.***

The proposed rules are contrary to Ohio's obligation to provide medically necessary services to children under the federal Medicaid requirements of Early and Periodic Screening, Diagnosis and Treatment (EPSDT).<sup>2</sup> Under those requirements children are entitled to treatment

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<sup>2</sup> OLRS is counsel for a proposed class of Medicaid eligible children who have not received services under EPSDT. See *G.D. v. Jones Kelley* Case No. 2:05cv980 in the U.S. District Court, Southern District of Ohio. The parties to that case have recently agreed to attempt mediation to resolve the issues raised by that case.

services that can be covered under the federal Medicaid plan services - whether or not they are covered in Ohio's state plan. Treatment services under EPSDT are provided "to correct or ameliorate defects and physical and mental illnesses and conditions". Ohio's proposal to limit services to those that are rehabilitative in nature violates the federal EPSDT mandate.

As was clear at the November 19th hearings on the community mental health services rules, there are many individuals with disabilities who will lose services if the proposed rules are implemented. Many parents of young children testified that services their children currently receive under that Medicaid program would be eliminated by requiring that all services must be rehabilitative in nature.

***ODJFS proposed therapy rules impermissibly restrict services to children.***

ODJFS' proposed therapy rules ( O.A.C. 5101:3-34 and every other rule that cross-references this section of O.A.C.) also impermissibly restrict therapy services for children. They do so both by requiring them to be "rehabilitative" and by failing to acknowledge the appropriate standard for the provision of services to children under EPSDT.

ODJFS treats therapy services as rehabilitative services under Ohio's Medicaid state plan. Physical therapy, occupational therapy and speech therapy are separately listed services in the federal regulations. As such, they do not carry a "rehabilitative" restriction.<sup>3</sup>

Indeed, federal regulation specifically calls for services that " (1) Prevent disease, disability, and other health conditions or their progression; (2) Prolong life; and (3) Promote physical and mental health and efficiency." 42 CFR § 440.130(c). The restriction in Ohio's proposed rules eliminates the vehicle for children to receive therapy services beyond those that are strictly rehabilitative. The experience of our clients is that, in practice, prior authorization review and state hearing officers will interpret the state rules to deny services to children in violation of federal law

Further, ODJFS fails to incorporate language that provides the correct standard for provision of services to children under EPSDT. None of these rules acknowledges that Medicaid eligible children are entitled under EPSDT to services "to correct or ameliorate defects and physical and mental illnesses and conditions". As Ohio's single state agency for Medicaid, ODJFS must ensure that children receive services to which they are entitled under EPSDT.

Because these proposed rules conflict with the existing federal rules governing rehabilitative and EPSDT services, the rules do not meet Joint Committee on Agency Rule Review (JCARR) requirements and should not be implemented. OLRs urges your agencies to withdraw the proposed rules.

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<sup>3</sup> For example, see 42 CFR §440.130 (c) Preventive services; 42 CFR § 440.110 Physical therapy, occupational therapy, and services for individuals with speech, hearing, and language disorders; 42 CFR § 440.60 Medical or other remedial care provided by licensed practitioners; and 42 CFR § 440.90 Clinic services.

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***Impact on Community Integration***

Finally, the proposed rules could potentially place individuals who are currently living in integrated settings, either their own homes or with family, at risk of being institutionalized in order to receive "habilitation services." This would, of course, result in *increased* costs to Medicaid, and would be contrary to the significant work that Ohio is undertaking to comply with the community integration mandates of Title II of the Americans with Disabilities Act and the Rehabilitation Act of 1973, 28 CFR §§ 35.130(d) and 41.51(d), respectively. These require that ODJFS and the State of Ohio "shall administer programs and activities in the most integrated setting appropriate to the needs" of individuals with disabilities. *Id.*

Given the many conflicts with federal law and the potential harm to a large class of adults and children with disabilities, we strongly recommend that the proposed rules be withdrawn. We would be pleased to meet and talk with you regarding the proposed changes, and hope that these concerns can be resolved.

Sincerely,

Julianne Johnson  
Disability Rights Advocate

Kristin E. Hildebrant  
Attorney at Law

Michael Kirkman  
Executive Director

c: Governor Ted Strickland  
John Martin, Director ODMR/DD