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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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DECISION

MPA/145821

PRELIMINARY RECITALS

Pursuant to a petition filed December 06, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on January 31, 2013, at Oconto, Wisconsin.

The issue for determination is whether the Department erred in its denial of PA request ██████████ for speech and language therapy.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████ ██████████
██████████ ██████████
██████████
████████████████████

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By: Theresa Walske, MS, CCC-SLP (in writing).
Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Oconto County. She is 11 years old. She has diagnoses of speech delay and developmental delay.

2. Petitioner's provider submitted a PA request November 26, 2012 for speech and language therapy ("SLT").
3. Petitioner receives SLT services in her school and has an individualized education program ("IEP"). She has also been receiving SLT through the requesting provider, CP, Inc. since 2010.
4. The Department denied the request on November 26, 2012 because it found the services duplicative of the school-based SLT and because petitioner has made no progress since receiving SLT.
5. Petitioner filed a timely appeal.

DISCUSSION

Speech and language therapy is an MA-covered service, subject to prior authorization after the first 35 treatment days. Wis. Admin. Code, §DHS 107.18(2). In determining whether to approve such a therapy request, the DHCAA employs the generic prior authorization criteria found at §DHS 107.02(3)(e). Those criteria include the requirements that a service be medical necessary, appropriate, and an effective use of available services.

In determining whether to approve such a therapy request, the Division employs the generic prior authorization criteria found at § DHS 107.02(3)(e). Those criteria include the requirements that a service be a medical necessity, appropriate, and an effective use of available services. *Id.*

First, the Division argues that the sought services would be duplicative, and this not medically necessary. Also included in the definition of "medically necessary" at § DHS 101.03(96m) are the requirements that services not be duplicative of other services, and that services be cost effective when compared to alternative services accessible to the recipient. When speech therapy is requested for a school age child in addition to therapy provided by the school system, the request must substantiate the medical necessity of the additional therapy as well as the procedure for coordination of the therapies. Prior Authorization Guidelines Manual, Speech Therapy, page 113.001.03. It is up to the provider to justify the provision of the service. § DHS 107.02(3)(d)6.

Prior hearing decisions have held consistently that where speech therapy is provided in school, it would not be cost effective for MA to cover private therapy. If the private therapy covers a situation that school therapy does not address, it has been found that the services are not duplicative. See, for example, the final Decision in DHA Case No. MPA-48/16180, (Wis. Div. Hearings Appeals, August 21, 1997) where the evidence showed that the petitioner had a unique oral deficiency that the school therapist was not trained to address. Also see the Decision in DHA Case No. MPA-51/41838 (Wis. Div. Hearings Appeals, November 18, 1999), where the school therapist was working on building vocabulary while the private therapist was working on the physical process of vocalizing sounds.

The Department, by then-Deputy Secretary Susan Reinardy held in DHA Final Decision No. MPA-37/80183 (Wis. Div. Hearings Appeals, February 16, 2007) (DHFS), another speech therapy appeal, that "the deciding factor in whether services are duplicative is not the [therapy] technique utilized by the therapists, but the goals and outcomes being addressed by the therapists." *Id.* at 2. It does not matter, for example, if one provider addresses group activities with peers and the other one-on-one activities with an adult. A requested service duplicates "an existing service if the intended outcome of the two services is substantially the same." *Id.* at 3. Her decision specifically rejected additional therapy because the recipient "'needs' more intense services than the school provides."

That holding rests on the principle that "Medicaid may not pay for two services if both services have the same intended outcome or result with respect to the medical condition the services are intended to address." *Id.* at 4. The Department has made it clear that the "intended outcome" test must be read

broadly. In DHA Final Decision No MPA-49/82886, a decision reiterating the principle laid down in MPA-37/80183, the Department's then-Deputy Secretary pointed out that the intended outcome was the same if both therapists were working to develop similar functional skills. The unstated rationale underlying the deputy secretary's decision is that federal law requires school districts to meet the special needs of its students and the department will not allow a district's failure to comply with this obligation provide the reason for funding another source of therapy.

In this case the goals and comments of the private and school therapists are very similar as demonstrated by the written record (see exhibit #1). A comparison of goals of both providers shows that they are nearly identical (see exhibits #1 and #3). The private provider conceded that the goals are largely identical and explained that the school provider modeled her school-based IEP goals off of the private provider plan of care goals.¹ Testimony by the private therapist suggested that the methods pursued by the two providers, however, are different. As outlined above, this does not matter as the "intended outcome" or goal is the critical determination. The record indicates that this is really a situation of two therapists trying to achieve the same goals. I fully appreciate that more services may indeed be better for petitioner, or that the one-on-one setting of the private therapy may be best. I also understand that the private provider may be a better therapist. ForwardHealth is not intended to provide the most ideal or comprehensive services, but only basic health services. Under the rules and these facts, the services are duplicative.

Because I find the requested service duplicative, I affirm the Department denial. However, I will briefly address the second basis asserted by the Department.

The Department also argues that the authorization criteria have not been satisfied because the petitioner has made no progress towards their achievement in previous therapy. It follows that if a patient is not making progress after receiving therapy, there is not a medical necessity for more ineffectual therapy.

In this case, the Department points to the objective test results of receptive and expressive language skills from July 9, 2010 and February 19, 2012 testing. These results were supplied by the provider. Though 19 months had passed, the petitioner test results indicated only a 1 month improvement in expressive skills and a 3 month regression in receptive skills. In other testing of articulation skills from July 2010 to September 2012, petitioner showed no improvement. I agree that these test results show no measurable progress. I understand the argument that there has been progress that is not reflected by these test results; the provider explains that petitioner is not a good test taker and that the tests do not show progress of a child with apraxia. But, it is the provider's burden to persuade the Department and I cannot overrule the Department based on the record before me. Should the provider choose to submit a new prior authorization, it would be well-served by drafting a letter explaining why the objective results should be ignored and highlighting the progress not reflected in the test results. That could assist in meeting its burden.

CONCLUSIONS OF LAW

The Department did not err in denying the prior authorization request for SLT.

THEREFORE, it is

ORDERED

That this appeal is dismissed.

REQUEST FOR A REHEARING

¹ The provider testified that since the prior authorization request, the IEP has been amended and no longer reflects the same goals. If that is the case, then the petitioner may benefit by submitting a new PA request with documentation of the more recent IEP. I can only determine whether the Department erred based on the documentation they considered and what is in the record.

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 26th day of March, 2013

\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on March 26, 2013.

Division of Health Care Access And Accountability