



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
c/o [Redacted]

DECISION

MPA/148562

PRELIMINARY RECITALS

Pursuant to a petition filed April 05, 2013, 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 telephonic hearing was held on May 13, 2013, at La Crosse, Wisconsin. The petitioner's current foster mother, [Redacted], represented 3 year old [Redacted] at that hearing. Ms. [Redacted] has been the foster parent for petitioner since about March 29, 2013.

During the hearing, petitioner's foster mother requested that the record be held open for document(s) to be sent to the Division of Hearings and Appeals, and then for those documents to be sent to the Division of Health Care Access and Accountability (DHCAA) for a reconsideration decision with an opportunity for a reply by petitioner's mother.

This Administrative Law Judge (ALJ) sent June 23, 2013 cover letter to Ms. Walske at the Division of Health Care Access and Accountability (DHCAA) with a copy of the following documents: a) a three page June 6, 2013 letter by petitioner's current foster mother, [Redacted]; b) June 2, 2013 managed care program (MCO) appeal for petitioner; c) a May 15, 2013 letter by petitioner's speech therapist [Redacted], MS, CCC-SLP; d) 55 pages of petitioner's speech pathology progress notes; e) a May, 2013 letter by petitioner's former foster mother, [Redacted]. Those documents respond to DHCAA's April 9, 2013 denial summary to DHA (Exhibit 1). In that same letter, this ALJ requested that Ms. Walske review the enclosed letter, and submit a reconsideration summary to me at the Division of Hearings and Appeals by July 9, 2013 with a copy of that reconsideration summary letter to be sent to the petitioner's current foster mother as her representative. The petitioner's representative was granted 7 days to respond to Ms. Walske's reconsideration summary. Ms. Walske timely submitted her reconsideration to DHA and Ms. [Redacted]. However, petitioner's representative failed to submit to DHA any response to that reconsideration by July 16, 2013 or even by the date of this decision.

The issue for determination is whether the Department correctly denied the petitioner's prior authorization (PA) request for twice weekly individual speech language therapy for 18 weeks.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted]
c/o [Redacted]

Representative:

[Redacted], foster parent
[Redacted]

Respondent:

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

By: Theresa Walske, speech language consultant
Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner, [REDACTED] (a/k/a [REDACTED]) is a 3 year old resident of La Crosse County who has been in foster care since she was four months old. [REDACTED] has resided in a private residence with her foster mother, [REDACTED], for about the past four months.
2. Petitioner received MA paid speech therapy from speech language therapist (SLT) [REDACTED] from November, 2011 to January, 2013. Petitioner made progress in her speech language skills during that period, but SLT [REDACTED] asserts that [REDACTED] has not completed all her SLT goals and thus requested this current PA request.
3. During about December, 2012, petitioner's foster mother applied on behalf of petitioner for speech therapy through the [REDACTED]. The [REDACTED] evaluated petitioner and determined that: a) petitioner did not qualify for speech therapy through the [REDACTED]; and b) petitioner did not qualify for early childhood special education based upon her test results and observation of petitioner.
4. The December, 2012 [REDACTED] evaluation of petitioner (at age 35 months) denied the petitioner speech therapy and early childhood special education for the following reasons: a) the petitioner's speech and language skills were in the low average to average range; b) during the test petitioner demonstrated "beautiful language and ability to categorize"; c) petitioner demonstrated all of the language comprehension and language expression skills at the 33-36 level on the Rossetti (infant-Toddler Scale); d) petitioner demonstrated "speech productions which were typical of a child aged 35 months. Her speech contains developmental speech errors but is at least 90% intelligible to familiar listeners;" and e) petitioner demonstrated "solid ability to imitate appropriate play skills and verbal communication and also initiated both spontaneously."
5. On or about February 2, 2013, petitioner's provider, Gundersen Lutheran Medical Center, Inc., requested on behalf of petitioner prior authorization for MA coverage of twice weekly continued individual, private speech therapy for 18 weeks at a cost of \$13,743.00. See Exhibit 2.
6. On or about March 6, 2013, the Division of Health Care Access and Accountability (DHCAA) sent a notice to the petitioner's foster parent denying the prior authorization request for private, individual speech and language therapy because the submitted documentation did not establish the medical necessity of the requested continued private SLT. DHCAA concluded that petitioner's speech and language skills are in the low average to average range, and were thus age appropriate. See Exhibit 1.

7. The record was held open for petitioner's representative to submit documentation to establish the medical necessity of the requested private speech therapy, and for a DHCAA reconsideration summary and petitioner's representative's response. See above Preliminary Recitals.
8. After reviewing the petitioner's submissions, Department SLT consultant Theresa Walske issued a July 5, 2013 reconsideration summary to DHA and the petitioner's representative. In that reconsideration, DHCAA continued to deny the request for continued private speech language therapy based upon lack of medical necessity due to the following factors: a) the PA request did not establish with reliable evidence that petitioner has a speech and language deficit which required the continued skilled intervention of a private speech therapist; b) the petitioner's speech and language skills are in the low average to average range; c) in its January 2, 2013 letter, the provider confirmed that petitioner's "receptive vocabulary skills are steadily increasing with most recent testing indicating she is within the low average range for her chronological age . . . the child did not qualify for early childhood special education services through the [REDACTED];" d) neither petitioner nor her provider established the medical need for the requested twice weekly private SLP sessions.
9. The petitioner's representative did not submit any evidence or response to refute the Department's reconsideration summary and evidence which established reasons for continuing to deny petitioner's speech therapy request for the reasons set forth in Finding of Fact #6 and #8 above.

DISCUSSION

Speech and language therapy is an MA-covered service, subject to prior authorization after the first 35 treatment days. Wis. Adm. Code § DHS 107.18(2). In determining whether to approve such a therapy request, the Bureau 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. "Medically necessary" services are those "required to prevent, identify or treat a recipient's illness, injury, or disability. Wis. Adm. Code § DHS 101.03(96m)(a).

Included in the definition of "medically necessary" at § DHS 101.03(96m)(b) are the requirements that services be of proven medical value or usefulness, 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 113.001.02. It is up to the provider to justify the provision of the service. Wis. Adm. Code § DHS 107.02(3)(d)6.

During the fair hearing process, it is generally accepted that the state or county agency, as the party which has taken the action appealed from bears the burden of proof of the propriety of that action. *See State v. Hanson*, 98 Wis.2d 80, 295 N.W.2d 209 (Ct.App.1980). Like most public assistance benefits, however, the initial burden of demonstrating eligibility for any particular benefit or program at the operational stage falls on the applicant, *Gonwa v. Department of Health and Family Services*, 2003 WI App 152, 265 Wis.2d 913, 668 N.W.2d 122 (Ct.App.2003). In other words, it was petitioner's burden to demonstrate that she qualified for the requested continued speech and language services.

An applicant will need to demonstrate that the procedure for which he or she seeks approval is "medically necessary." A "medically necessary" service is

[A] medical assistance service under ch. DHS 107 that is:

(a) Required to prevent, identify or treat a recipient's illness, injury or disability; and

(b) Meets the following standards:

1. **Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;**

5. **Is of proven medical value or usefulness** and, consistent with s. HFS 107.035, is not experimental in nature;

6. Is not duplicative with respect to other services being provided to the recipient;

7. Is not solely for the convenience of the recipient, the recipient's family or a provider;

8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is **cost-effective compared to an alternative medically necessary service** which is reasonably accessible to the recipient; and

9. **Is the most appropriate supply or level of service** that can safely and **effectively** be provided to the recipient.

Wis. Admin. Code §DHS 101.03(96m).

The crux of the Division's denial of petitioner's request is that while [REDACTED] has some remaining speech and language problems, petitioner's expressive and receptive language scores were and are age appropriate, and within the low average to average range at the time of the February 2, 2013 PA request. In addition, petitioner's language skills are at a level that her expressive and receptive abilities are functional and she is understood by adults and peers. The [REDACTED] evaluated the petitioner and determined that petitioner did not qualify for speech therapy through the [REDACTED], and petitioner did not qualify for early childhood special education. See Finding of Fact #3 and #4 above.

The question to be determined by the MA program was not just whether some remaining problems are present, but why the specific skill of a private SLP is medically required for two sessions per week for 18 weeks, given her current test scores and progress in the past two years. The MA definition of medical necessity requires that services provided be basic and necessary. Furthermore, there is no school speech therapy or early special education because the petitioner did not qualify for those programs.

The petitioner's representative provided documents to DHA and to DHCAA attempting to document the medical necessity of continued private speech therapy. See above Preliminary Recitals. In those documents petitioner and the provider explained that petitioner has the following problematic behaviors: a) playing with feces; b) requesting more food when full; c) constantly copying the speech of others in her environment; d) eating crayons, band aids, markers, chalk or stickers; e) "constant" confusion; and f) lack of self-initiation.

However, in her very detailed 9 page July 5, 2013 reconsideration summary, Ms. Walske disputed that petitioner's problems indicated in the above paragraph are concerns to be addressed by a speech therapist. Ms. Walske asserted correctly that the above concerns are not listed as covered services for a speech therapist pursuant to Wisconsin Statute §459.20(5) or Wisconsin Administrative Code DHS §107.18(1)(c). Specifically, DHCAA responded that: a) petitioner did not establish an identified speech and language deficit; b) speech and language therapy is not the appropriate medical service to address the concerns expressed by petitioner's foster parent; c) it is not cost effective to reimburse for speech and language therapy in the absence of an identified deficit in the area of speech and language; d) to address

the concerns expressed by petitioner's caregivers, speech and language therapy is not effective; and e) petitioner's representative failed to establish the medical necessary of the requested private speech therapy for the reasons set forth in Finding of Fact #8 above. The petitioner's representative and the SLT provider were unable to establish reliable evidence to convincingly refute those reasons for denial in regard to petitioner's request for continued private speech and language therapy. Moreover, petitioner's representative failed to submit to DHA any response to DHCAA's reconsideration by July 16, 2013 or even by the date of this decision.

The following are pertinent prior DHA hearing decisions which are relevant to the instant case:

MPA-11/113233 – The requested ...ST, while it would be beneficial as would any extra services, was not necessary. To receive it would be a bonus, **but MA is meant to cover basic and necessary services, not every possible beneficial services.**

MPA-5/116573 - . . . The MA program is not required to cover all of the services that a recipient or his parents would like to have him get, **only those that meet the MA program definition of medical necessary.** . . .

MPA-16/76555 - Duplication is not avoided by using somewhat different terminology to describe the goals because it is unlikely that any two providers are going to use exactly the same words. Nor can the provider merely use somewhat different means to reach the goals because if goals are similar the result should be similar. Medical assistance is meant to provide basic services at a reasonable cost to a large number of persons and is the payer of last resort, principles not possible if the program reimburses recipients for each bit of therapy that is subtly different from that already provided.

(Emphasis added).

In reviewing the petitioner's submissions, I agree with Ms. Walske's assessment that the petitioner's current medical concerns did not establish why private speech and language therapy is medically necessary for the petitioner as of January, 2013. While petitioner's foster parent's concerns are valid, other medical personnel would be more appropriate than an SLT to effectively address those concerns.

It is the responsibility of the fee-for service provider to justify MA coverage of the service to the Division. The fee-for-service provider has not established that [REDACTED] has current, specific speech problems which require the continued skilled expertise of a private speech therapist, especially given that she tests and performs expressive and receptive language within age appropriate norms. In her June 6, 2013 letter, petitioner's foster mother confirmed that [REDACTED] made improvement with SLT [REDACTED], but does not feel that [REDACTED] has completed all the SLT goals set for her. Thus, she would like for continuing private SLT be approved so that the petitioner can fully complete all of her SLT goals. While the petitioner's foster parent's efforts and desire for [REDACTED] to achieve as much progress as possible in her speech and language skills is commendable, the petitioner has not established that the requested continued, private SLT is medically necessary. Accordingly, for the above reasons, I conclude that the Department correctly denied the petitioner's prior authorization (PA) request for twice weekly individual speech language therapy for 18 weeks due to lack of established medical necessity.

CONCLUSIONS OF LAW

The Department correctly denied the petitioner's prior authorization (PA) request for twice weekly individual speech language therapy for 18 weeks due to lack of established medical necessity.

THEREFORE, it is

ORDERED

The petition for review herein be and the same is hereby Dismissed.

REQUEST FOR A REHEARING

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 August, 2013

\sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals



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

Division of Health Care Access And Accountability