



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

MPA/150843

PRELIMINARY RECITALS

Pursuant to a petition filed July 24, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Office of the Inspector General (OIG) in regard to Medical Assistance, a telephonic hearing was held on October 02, 2013, at Friendship, Wisconsin. At the request of petitioner, a hearing set for September 17, 2013 was rescheduled. The record was held open for written submissions by the petitioner and the Department to DHA.

The issue for determination is whether the Department correctly denied the petitioner's prior authorization (PA) request for twice weekly private speech therapy services due to alleged lack of progress, and other therapies providing sufficient services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
c/o [REDACTED], mother
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Mitchell Hagopian, written
submissions only (after hearing)
Disability Rights of Wisconsin
131 W Wilson St Suite 700
Madison, WI 53703-3263

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Theresa Walske, MS, CCC-SLP speech therapy 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 (CARES # [REDACTED]) is a five year old resident of Adams who receives MA.
2. Petitioner is diagnosed with autism and childhood apraxia of speech (CAS).
3. Petitioner attends the [REDACTED] where he participates in speech and language therapy (SLT) which focuses on assistive technology training (augmentative communication skills).
4. Petitioner participates in intensive in-home autism therapy through the provider, [REDACTED].
5. On May 17, 2013, the petitioner's provider, [REDACTED], submitted a prior authorization (PA) request to the Office of the Inspector General (OIG) requesting on behalf of the petitioner requesting approval for twice weekly private speech therapy for 40 weeks. Petitioner did receive private SLT through Moundview for about the past two years.
6. The petitioner's provider stipulated that it was no longer disputing OIG's denial of petitioner's PA request for retroactive SLT services prior to his May 17, 2013 PA request for coverage of SLT services from March 1, 2013 to May 16, 2013.
7. Petitioner has delays in articulation/speech sound production and oral motor deficits.
8. Petitioner has been diagnosed with apraxia which is described on the National Institutes of Health website as:

Apraxia is a disorder of the brain and nervous system in which a person is unable to perform tasks or movements when asked, even though

- *The request or command is understood*
- *They are willing to perform the task*
- *The muscles needed to perform the task work properly*
- *The task may have already been learned*

See URL: <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0004944/>. Apraxia of Speech is defined on the website of the National Institute on Deafness and Other Communication Disorders as *a speech disorder in which a person has trouble saying what he or she wants to say correctly and consistently. It is not due to weakness or paralysis of the speech muscles (the muscles of the face, tongue, and lips). The severity of apraxia of speech can range from mild to severe. See <http://www.nidcd.nih.gov/health/voice/pages/apraxia.aspx>.*

9. Petitioner's speech and language therapy through the [REDACTED] is to address his augmentative communication skills (alternative communication). The school therapist, SLP [REDACTED], has coordinated the school ST with the private SLT through [REDACTED] in order to avoid any duplication of speech therapy services to [REDACTED].
10. The private SLT works primarily with the apraxia and the actual physical act of moving the mouth to speak. The private SLT also addresses specific problems with petitioner's expressive and receptive speech. The private therapist also teaches petitioner certain sign language signs to use in emergencies and when necessary.
11. The Office of the Inspector General (OIG) sent a July 15, 2013 notice to the petitioner stating that the requested private speech and language therapy was denied due to: a) the petitioner and his provider have not submitted updated standardized tests in objective, measurable terms to document to OIA progress in petitioner's speech therapy through [REDACTED] [REDACTED] [REDACTED]; and b) therapy through the school district and the annual assessment by the speech department of the [REDACTED] [REDACTED] are providing sufficient services to meet the petitioner's speech therapy needs.

12. During the hearing, petitioner's mother, [REDACTED] [REDACTED], testified credibly regarding progress that petitioner has made during the past six month period in his expressive and receptive language skills.
13. In his September 30, 2013 report and attached documentation (Attachments #1-#7), Moundview speech therapist, [REDACTED] [REDACTED] (CCC-SLP) established with specific evidence that petitioner has made the following generally steady progress in his speech abilities: a) standardized testing was completed both by the school system and the speech pathology department at [REDACTED]; b) petitioner's test results from Birth to Three and then at the OWLS assessment of 11/1/12 show gains in his comprehension from scoring at 0-3 months of age at start of SLT care and at November 1, 2012 improving to scores equivalent to 1 year and 7 months, and improving on September 5, 2013 to scores of 2 years and 2 months. Petitioner's scores for auditory comprehension went from 6 items correct to 12 items correct. His verbal expressive section improved also.
14. The [REDACTED] does not provide speech therapy for the petitioner but only conducts annual evaluative testing of the petitioner.
15. The petitioner's in-home autism care does not provide speech therapy services for petitioner, but instead focuses on the petitioner's medical problem related to his autism.

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 he 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. DHS 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 speech and language problems related to his child apraxia of speech (CAS), petitioner did not establish any progress in his private SLT through his SLT provider, and the therapy through the school district and the annual assessment at [REDACTED] were sufficient to meet his SLT needs.

I. PROGRESS IN THERAPY.

With respect to the petitioner's apraxia, the Division argues that service denial was proper because the petitioner has made no progress towards his achievement in previous therapy. The Division invokes the following SLT-specific provision from the state administrative code:

(e) Extension of therapy services. Extension of therapy services shall not be approved in any of the following circumstances:

1. The recipient has shown **no progress** toward meeting or maintaining established and measurable goals over a 6-month period, or the recipient has shown **no ability** within 6 months to carry over abilities gained from treatment in a facility to the recipient's home;

....

Id., §107.18(3)(e)1. It follows that if a patient is not making progress after receiving therapy, there is not a medical necessity for more ineffectual therapy.

The Department argues that the petitioner has not progressed with respect to measurable testing regarding his private speech therapy goals regarding apraxia. In her July 31, 2013 summary (Exhibit 1), OIG SLT consultant, Theresa Walske, indicated that petitioner has received speech and language therapy at [REDACTED] since about August, 2010. Ms. Walske argued that to approve the instant

PA for SLT the provider needed to document with updated standardized tests with measurable terms that petitioner has made progress in the past six months. It appears that the initial PA request did not provide the required objective measurements. However, during the hearing, petitioner established with testing and objective measurements that [REDACTED] has made progress during the past six months (and in fact progress during the past two years). See Finding of Fact #13 above. The petitioner's progress may have been slow, but there has been progress. The code provision relied upon above, §107.18(3)(e)1, directs the Division not to approve more therapy when there has been **no** progress, as to opposed to slow progress. Thus, I will not deny the PA for private therapy on a "no progress" theory.

II. APPROPRIATE USE OF SCHOOL SERVICES and OTHER THERAPIES.

Additionally, the Division argued that the petitioner receives SLT services through his school, so there is not a need for the requested therapy, as there are other available services that can be effectively and appropriately used. See, §DHS 107.02(3)(e)7. This generic standard for service approval is sometimes "short-handed" to a test of "duplication" of services. However, exact duplication of goals is not what is required by this standard. Rather, this reviewing standard causes the reader to consider whether, if the patient is taking advantage of available, appropriate services offered in other venues, the requested private therapy is still needed.

In this case, [REDACTED] attends the [REDACTED] where he participates in speech and language therapy (SLT), but that therapy focuses on assistive technology training (augmentative communication skills). The school SLT therapy does not address [REDACTED]'s child apraxia of speech (CAS). In fact, the school therapist, SLP [REDACTED] [REDACTED], has made efforts to coordinate the school ST with the private SLT through [REDACTED] in order to avoid any duplication of speech therapy services to [REDACTED].

OIG asserted that therapy through the school district and the annual assessment by the speech department of the [REDACTED] [REDACTED] are providing sufficient services to meet [REDACTED]'s speech therapy needs. However, the hearing record indicates that the school therapy is focused on augmentative communication, and the "therapy" through [REDACTED] is in fact only an annual evaluative assessment. Such annual assessment is helpful and informative, but does not replace the need for ongoing therapy provided through [REDACTED]. Accordingly, based upon the above, I conclude that the Department incorrectly denied the petitioner's prior authorization (PA) request for twice weekly private speech therapy services due to alleged lack of progress, and other therapies providing sufficient services.

CONCLUSIONS OF LAW

1. The provider has shown that the requested ST services are not duplicative of school services because petitioner is working on different areas of speech and language need (apraxia)
2. The petitioner has made progress towards SLT goals, and thus denial of private SLT on the basis of lack of progress was incorrect.

THEREFORE, it is

ORDERED

That [REDACTED] is hereby authorized to provide the petitioner with 40 sessions of the requested speech and language therapy sessions as of May 17, 2013, and to submit its claim, along with a copy of this Decision and a new prior authorization request, to Forward Health for payment.

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, Room 651, 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 27th day of December, 2013

\sGary M. Wolkstein
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 December 27, 2013.

Division of Health Care Access And Accountability
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