



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

██████ ██████ ██████
c/o ██████ ██████
██████████████████
██

DECISION

MPA/151156

PRELIMINARY RECITALS

Pursuant to a petition filed August 02, 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 September 17, 2013, at Wausau, Wisconsin.

The petitioner's mother, ██████ ██████, represented 9 year old ██████ at that hearing. Petitioner's SLT ██████ ██████ also appeared and testified at that hearing. During that hearing, petitioner's representative requested that the record be held open for documents to be submitted to the Division of Hearings and Appeals, and then for those documents to be sent to the Office of the Inspector General (OIG) for a reconsideration decision with an opportunity for a reply by Ms. ██████.

This Administrative Law Judge (ALJ) sent an October 19, 2013 letter to Ms. Walske at the Office of the Inspector General with a large packet of documents that were sent to DHA. This ALJ instructed petitioner to send two separate copies of the documents: one for her file and one copy to be sent to Ms. Walske. Instead, petitioner sent one large, unorganized mass of documents (about 120 pages) in which there were not two copies of some of the documents. There was also no cover page or list of which documents were included to summarize the submission.

In that same letter, this ALJ requested that Ms. Walske do her best to review the many, enclosed copies of letters/documents, and submit a detailed reconsideration summary to me at the Division of Hearings and Appeals by November 5, 2013 with a copy of that reconsideration summary letter to be sent to the petitioner's mother as her representative. The petitioner's representative requested and was granted an opportunity to respond to Ms. Walske's reconsideration summary. Ms. ██████ was granted until November 15, 2013 to respond to Ms. Walske's summary.

OIG consultant Walske sent a detailed 14 page, reconsideration summary with a very well organized "Table of Contents" (Attachment A) in addition to Attachments A-1 to A-62. In that persuasive reconsideration, OIG confirmed that it continued to assert it correctly denied petitioner's PA for speech therapy services. The petitioner's representative failed to submit any response to DHA by November 15, 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 once weekly private speech therapy services for 26 weeks, due to lack of progress in her speech deficits, school therapies providing sufficient services, and documentation did not establish that petitioner has physiological feeding/swallowing problems.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████
c/o ██████
██████
██████

Representative:

██████, mother
██████
██████

Respondent:

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

By: Theresa Walske, speech therapy consultant
Office of the Inspector General (OIG)
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 is a 9 year old resident of Marathon County who resides with her family and receives MA.
2. Petitioner is diagnosed with articulation delays, feeding concerns, Congenital cytomegalovirus (CMV), hearing loss, oppositional defiant disorder (ODD), and Attention Deficit Hyperactivity Disorder (ADHA).
3. The petitioner has a hearing aid in her right ear. She received a Cochlear implant for her left ear on January 5, 2011 at Children’s Hospital in Milwaukee. ██████ uses American Sign Language (ASL), as well as verbal communication to communicate with her family, classmates and peers at school.
4. During school hours, the petitioner has an interpreter with her to assist her communication with teachers and classmates.
5. The petitioner has functional physiological mobility for speech and feeding.
6. The petitioner demonstrates oral sensitivity and is resistant to having her teeth brushed. She refuses to eat many foods offered to her, but occasionally will taste new foods. ██████ prefers to eat crunch, crisp and hard textures. Petitioner has been observed to eat a banana, pretzel and soft bread sticks. She has an adequate biting ability to eat the foods.
7. On or about June 10, 2013, the petitioner’s provider, ██████, LLC, submitted a prior authorization (PA) # ██████ request to the Office of the Inspector General (OIG) requesting on behalf of the petitioner approval for once weekly private speech therapy and oral function therapy for 26 weeks.

8. Petitioner did receive private SLT through [REDACTED], LCC from about October 13, 2010 to April 8, 2013 with no documented change in her articulation abilities as the result of those years of private SLT therapy.
9. Petitioner has delays in articulation, hearing loss with Cochlear Implant, and feeding problems.
10. Through the [REDACTED] School District, [REDACTED] receives speech and language therapy twice per week for 30 minutes. She also receives deaf/hard of hearing services for 60 minutes per week (Attachment A, page A-42). [REDACTED] has an interpreter who accompanies her to all classes and interprets through sign what is being said by classroom teachers and students (Attachment A, p. A-44).
11. The Office of the Inspector General (OIG) sent a July 29, 2013 notice to the petitioner stating that the requested continued private speech and language therapy was denied for the following reasons: a) the PA failed to document any progress or improvement in her speech language deficits as a result of her past private SLT; b) the petitioner has not established any physiological barrier to her feeding problem, but instead an oral sensitivity or eating behavioral problems; c) other therapies through the school district (including an interpreter with her) are providing sufficient services to meet the petitioner's functional needs; d) the petitioner did not establish the medical necessity of the requested private SLT; and e) petitioner did not establish the cost effectiveness or appropriateness of the requested continuation of private SLT.
12. During the hearing (or while the record was held open), petitioner's mother, [REDACTED] [REDACTED], and SLT [REDACTED] [REDACTED] were unable to establish that [REDACTED] had made progress in her speech language problems during the past six month period or that she had physiological impairment resulting in her eating problems.
13. While the record was held open, petitioner sent one large, unorganized mass of documents (about 120 pages). There was also no cover page or list of which documents were included to summarize the submission. This ALJ requested that Ms. Walske do her best to review the many, enclosed copies of letters/documents, and submit a detailed reconsideration summary to me at the Division of Hearings and Appeals by November 5, 2013 with a copy of that reconsideration summary letter to be sent to the petitioner's mother as her representative. See above Preliminary Recitals.
14. OIG consultant Walske sent a detailed 14 page, reconsideration summary with a very well organized "Table of Contents" (A-1 to A-62) which was attached. In that reconsideration, OIG provided the following reasons for its continued denial of petitioner's PA request for private speech therapy services: a) The lack of documentation showing progress of improvement as a result of past therapy. After at least 18 months of private SLT, [REDACTED]'s articulation skills have no documentation of improvement and Dr. [REDACTED] of [REDACTED] did not confirm any change in petitioner's articulation abilities; b) the lack of documented physiological feeding problem. Treating food aversion and behavioral concerns by a SLT is not a covered service per DHS 107.18(b) or (c); c) services provided by the school appear sufficient; d) the PA did not meet the Department's legal standards for PA approval; e) the petitioner did not establish the medical necessity of the requested SLT services.
15. The petitioner's representative failed to submit any response by November 15, 2013, or even by the date of this decision.

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. 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 speech and language problems, hearing problems and feeding concerns, petitioner did not establish any progress in her private SLT through her SLT provider, and the therapies through the school district were sufficient to meet her SLT needs.

I. PROGRESS IN THERAPY.

With respect to the petitioner's speech and language and feeding problems, the Division argues that service denial was proper because the petitioner has made no progress towards her 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 established that the petitioner has not progressed with respect to measurable testing regarding her private speech therapy goals. In her October 24, 2013 summary, OIG SLT consultant, Theresa Walske, indicated that petitioner has received speech and language therapy at [REDACTED] LLC since about 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. There is no evidence in the hearing record to establish that petitioner has made progress in her speech therapy goals. 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**. Thus, it appears that the OIG is correct in its denial of PA for continued 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. The petitioner is receiving school services as stated in Finding of Fact #10 above.

Prior DHA final decisions regarding speech therapy PA requests have concluded the following in cases relevant to the petitioner's PA for SLT services:

MPA 150142 and 1500465: The DHCAA interpret the code provision to mean that a person must continue to improve for therapy to continue, specifically to increase the ability to do activities of daily living. In addition, at some point the therapy program should be carried over to home, without the need for professional intervention.

MPA 150012: The DHCAA interprets the code provision to mean that a person must continue to improve for therapy to continue . . . I agree that the prior authorization request failed to show how the ST was helping petitioner improve.

MPA 150142: The general idea of therapy is to work on a problem and then carry over that work to the home. It is not meant to be a long-term service, but petitioner had no change in his status over a year's period in 2012 . . .

MPA 145440: . . . It could be very well be that petitioner requires more intensive private SLT than school can provide. However, the request must show that need and why the school SLT is insufficient.

MPA 150141: Department policy does not cover ST for eating problems when there are no physiological impairments. That alone is a basis for denying that part of the therapy.

MPA 136452: The DHCAA correctly denied ST swallow therapy because petitioner has no physiological barrier to oral feeding.

MPA 136565: Although there has been a showing the petitioner is in need of services to address her eating behavior, there has been no showing that such services must be provided by a certified speech and language pathologist (or under the direct, immediate, on-premises supervision of a certified speech and language pathologist).

During the hearing and while the record was held open, the petitioner was unable to refute OIG's case that it correctly denied the PA request for SLT services for the reasons set forth in the above Findings of Fact. Accordingly, based upon the above, I conclude that the Department correctly denied the petitioner's prior authorization (PA) request for once weekly private speech therapy services for 26 weeks, due to alleged lack of progress in her speech deficits, school therapies providing sufficient services, and documentation does not establish that petitioner has physiological swallowing/feeding problems.

CONCLUSIONS OF LAW

1. The school therapies are providing sufficient SLT services for the petitioner.
2. The petitioner's documentation does not establish that petitioner has physiological swallowing/feeding problems to require private SLT services.
3. The petitioner has not made progress towards her SLT goals, and thus denial of private SLT on the basis of lack of progress was correct.

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, 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 15th day of January, 2014

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



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 15, 2014.

Division of Health Care Access and Accountability