



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

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In the Matter of

[REDACTED]

DECISION

MPA/157174

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**PRELIMINARY RECITALS**

Pursuant to a petition filed April 25, 2014, 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 July 24, 2014, at Kenosha, Wisconsin.

The issue for determination is whether the Department of Health Services correctly denied Petitioner’s request for speech/language services.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]

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Respondent:

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

By: OIG by letter

Division of Health Care Access and Accountability  
1 West Wilson Street, Room 272  
P.O. Box 309  
Madison, WI 53707-0309

**ADMINISTRATIVE LAW JUDGE:**

Mayumi M. Ishii  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Kenosha County.
2. On February 13, 2014, Tender Touch Therapy, LLC (Tender Touch) submitted a prior authorization request on behalf of the Petitioner seeking 26 sessions of speech/language therapy at a cost of \$3,120.00. (Exhibit 3, pg. 4)

3. The goals of the requested therapy were as follows:
  - a. Decrease echolalia [repetitive vocalizations] to demonstrate functional communication by accurately and appropriately responding to questions, comments, requests and greetings in 4 of 5 trials with moderate supports.
  - b. Demonstrate true engagement with clinician as demonstrated by sustained visual regard and/or shared positive affect in 3 of 5 trials. (As opposed to fixating on preferred activities and breaking out into angry outbursts/dysregulation, attempts are made to initiate other play.)
  - c. Given visual supports and aids, will utilize a multi-modal communication to appropriately comment and request using the following phrases when given a model and moderate cueing: “I want”, “I feel”, “I see”, “He/she is” and “I am” in 8 out of 10 opportunities.
  - d. Given visual supports and aids, will identify emotions of others (e.g happy, mad, said) when shown pictures and given a model and moderate cueing with 75% accuracy.
  - e. Will participate in scripts for activities of daily living (bath time and meal time) along a hierarchy of non-confrontational tasks (e.g. targeting expansion of receptive and expressive language skills that are requisite components to participate in ADL’s in the home environment safely and regularly) within 1-1 structured environment with moderate support in 3 of 5 trials.

(Exhibit 3, pg. 18)
4. On March 18, 2014, the Department of Health Services (DHS) sent the Petitioner a letter, in care of his parents, indicating that the request for services was denied. (Exhibit 3, pgs. 19-22)
5. On March 18, 2014, DHS sent Tender Touch Therapy notice of the same. (Exhibit 3, pgs. 23-24)
6. Petitioner’s parents filed an appeal on his behalf that was received by the Division of Hearings and Appeals on April 25, 2014. (Exhibit 1)
7. The Petitioner is a four year old boy with a diagnosis of severe autism. (Exhibit 3, pg. 8)
8. The Petitioner has significant delays in his expressive language skills and engages in echolalic utterances. (Exhibit 3, pg. 18; Exhibit 2, pg. 16)
9. The Petitioner receives special education services through his school district, including speech/language therapy, 60 minutes per week, occupational therapy 60 minutes per week, and special education, 4 days a week, 3 hours per day to address “significant delays in communication, sensory, fine motor, social and self-help skill development. (Exhibit 2, pgs. 11-20)
10. The goals of Petitioner’s school based therapy are:
  - a. Increase joint attention and reciprocal interactions through simple turn taking, social play and cause and effect games by gaining his communicative partner’s attention by orienting eye gaze to his communication partner, gently tapping their arm and/or saying their name to initiate or continue an activity at least 5 times per day.
  - b. Demonstrate understanding of safety commands (stop, no, wait, come here) and respond to his name 75% of opportunities.

- c. With visual supports, improve self-help skills by independently completing 75% of the following: putting toys away, hanging up backpack, taking off/putting on coat, pushing down/pulling up pants and washing/drying hands so that he can be successful like his same age peers.
- d. With visual sensory supports, sit for a 20 minute teacher directed activity.
- e. Improve fine motor skills as evidence by his ability to hold a writing tool with a tripod grasp, trace the letters in his name forming the letters correctly and cut across a piece of paper with standard preschool scissors in 3 out of 5 sessions.
- f. Will spontaneously initiate communication to request objects, actions, assistance (“help”), cessation (“all done”) and protest in 50% of opportunities.
- g. Independently use a pointing response when given the cue “touch the...”, “where is the...?” or “show me the...” to identify pictures and objects in 75% of trials.
- h. Follow simple verbal directions using objects and simple prepositional phrases with 60% accuracy.
- i. Identify and name actions in pictures following the question “what is he/she doing?” with 60% accuracy.
- j. Increase his tolerance and participation in tactile play by allowing his sleeves to be pushed up, wearing a paint smock/shirt and initiating play in messy textures for the duration of a sensory or art activity in 3 out of 5 trials.

(Exhibit 2, pgs. 18 and 19)

- 11. The Petitioner has an extended school year, but will not receive school-based speech therapy during the summer months. (Testimony of Petitioner’s father)
- 12. During the summer, the Petitioner was expected to attend private therapy only, twice a week (Testimony of Petitioner’s father)

### **DISCUSSION**

The Department of Health Services sometimes requires prior authorization to:

1. Safeguard against unnecessary or inappropriate care and services;
2. Safeguard against excess payments;
3. Assess the quality and timeliness of services;
4. Determine if less expensive alternative care, services or supplies are usable;
5. Promote the most effective and appropriate use of available services and facilities; and
6. Curtail misutilization practices of providers and recipients.

Wis. Admin. Code § DHS 107.02(3)(b)

Speech and language therapy is a Medicaid covered service, subject to prior authorization after the first 35 treatment days. Wis. Admin. Code, § DHS107.18(2).

Wis. Admin. Code Wis. Admin. Code § DHS107.18(1)(a) defines covered speech and language pathology services as those services that are, “medically necessary, diagnostic, screening, preventive or corrective speech and language pathology services prescribed by a physician and provided by a certified speech and language pathologist or under the direct, immediate on-premises supervision of a certified speech and language pathologist.”

Wis. Admin. Code Wis. Admin. Code § DHS107.18(1)(c) lists the speech procedure treatments that must be performed by a certified speech and language pathologist or under the direct, immediate, on-premises supervision of a certified speech and language pathologist:

1. Expressive language:

- a. Articulation;
  - b. Fluency;
  - c. Voice;
  - d. Language structure, including phonology, morphology, and syntax;
  - e. Language content, including range of abstraction in meanings and cognitive skills; and
  - f. Language functions, including verbal, non-verbal and written communication;
2. Receptive language:
- a. Auditory processing — attention span, acuity or perception, recognition, discrimination, memory, sequencing and comprehension; and
  - b. Visual processing — attention span, acuity or perception, recognition, discrimination, memory, sequencing and comprehension;
3. Pre-speech skills:
- a. Oral and peri-oral structure;
  - b. Vegetative function of the oral motor skills; and
  - c. Volitional oral motor skills; and . Hearing/auditory training:
4. Hearing screening and referral;
- a. Auditory training;
  - b. Lip reading;
  - c. Hearing aid orientation; and
  - d. Non-verbal communication.

“In determining whether to approve or disapprove a request for prior authorization, the department shall consider:

1. The medical necessity of the service;
2. The appropriateness of the service;
3. The cost of the service;
4. The frequency of furnishing the service;
5. The quality and timeliness of the service;
6. The extent to which less expensive alternative services are available;
7. The effective and appropriate use of available services;
8. The misutilization practices of providers and recipients;
9. The limitations imposed by pertinent federal or state statutes, rules, regulations or interpretations, including Medicare, or private insurance guidelines;
10. The need to ensure that there is closer professional scrutiny for care which is of unacceptable quality;
11. The flagrant or continuing disregard of established state and federal policies, standards, fees or procedures; and
12. The professional acceptability of unproven or experimental care, as determined by consultants to the department.”

Wis. Admin. Code §DHS107.02(3)(e)

“Medically necessary” means 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;
  2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided;
  3. Is appropriate with regard to generally accepted standards of medical practice;
  4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
  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.

*Emphasis added, Wis. Adm. Code. §DHS 101.03(96m)*

Petitioner has the burden to prove, by a preponderance of the credible evidence that the requested level of therapy meets the approval criteria.

The Department of Health Services (DHS) does not dispute the fact that the Petitioner needs speech/language therapy to address deficits in his expressive communication skills. However, DHS objected to the requested speech/language therapy because it determined that the requested therapy is duplicative of the therapy the Petitioner is supposed to be receiving through school.

When asked to distinguish between the school-based therapy and the therapy provided by Tender Touch, Petitioner's father indicated that the school-based therapy was more task driven and education based, while private therapy focused on more general communication skills. However, when looking at the stated goals of therapy, this distinction seems to be lost.

Though the exact language of the goals is not identical, there does appear to be some duplication of services:

- A. The TenderTouch goal to, "demonstrate functional communication by accurately and appropriately responding to questions, comments, requests and greetings in 4 of 5 trials with moderate supports"

correlates to

The school goals to, "increase joint attention and reciprocal interactions through simple turn taking, social play and cause and effect games by gaining his communicative partner's attention by orienting eye gaze to his communication partner, gently tapping their arm and/or saying their name to initiate or continue an activity at least 5 times per day.", to "demonstrate understanding of safety commands", "initiate communication to request objects, actions, assistance ('help'), cessation ('all done') and protest in 50% of opportunities and to, "identify and name actions in pictures following the question 'what is he/she doing?' with 60% accuracy.

- B. The Tender Touch goal to "Demonstrate true engagement with clinician as demonstrated by sustained visual regard and/or shared positive affect in 3 of 5 trials. (As opposed to fixating on preferred activities and breaking out into angry outbursts/dysregulation, attempts are made to initiate other play.)"

correlates with

The school goal of having the Petitioner, "With visual and sensory supports..sit for a 20 minute teacher directed activity."

- C. The Tender Touch goal of, "Given visual supports and aids, will utilize a multi-modal communication to appropriately comment and request using the following phrases when given a

model and moderate cueing: ‘I want’, ‘I feel’, ‘I see’, ‘He/she is’ and ‘I am’ in 8 out of 10 opportunities.”

correlates to

The school’s goals to “initiate communication to request objects, actions, assistance (‘help’), cessation (‘all done’) and protest in 50% of opportunities and to, “identify and name actions in pictures following the question ‘what is he/she doing?’ with 60% accuracy.

- D. The Tender Touch goal to, “participate in scripts for activities of daily living...along a hierarchy of non-confrontational tasks...within 1-1 structured environment with moderate support 3 of 5 trials

correlates to

The school’s goals to, “improve self-help skills by independently completing 75% of the following: putting toys away, hanging up backpack, taking off/putting on coat, pushing down/pulling up pants and washing/drying hands so that he can be successful like his same age peers” and to “follow simple verbal directions using objects and simple prepositional phrases with 60% accuracy.”

It should be noted that one would expect some carry over; that is to say, what Petitioner learns in school he should be able to carry over to situations at home or in the community.

Because of the apparent duplication of services, DHS was correct to deny the February 2014 prior authorization request.

The Petitioner’s father testified that the time of the hearing, school was out and so Petitioner was only receiving services from Tender Touch Therapy. Petitioner’s father testified that the Petitioner’s communication skills improved while he was receiving therapy from both the school and Tender Touch Therapy. Petitioner’s father testified that in the absence of both school-based therapy and private therapy, the Petitioner’s communication skills had started to regress. This is a troubling change in circumstances that warrants further review by DHS’s consultant and should be addressed through a new prior authorization request.

Petitioner’s parents are going to understandably be frustrated by this decision. However, administrative law judges do not have equitable authority and must follow the law as it is written.

**CONCLUSIONS OF LAW**

DHS correctly denied the request for speech therapy services.

**THEREFORE, it is ORDERED**

That the petition is 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 Milwaukee,  
Wisconsin, this 29th day of August, 2014

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\sMayumi M. Ishii  
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 September 2, 2014.

Division of Health Care Access and Accountability