



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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DECISION

MPA/164510

PRELIMINARY RECITALS

Pursuant to a petition filed March 07, 2015, 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 April 23, 2015, at Appleton, Wisconsin.

The petitioner's mother, ██████████ ██████████, represented 7 year old ██████████ 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 petitioner's mother.

This Administrative Law Judge (ALJ) sent an April 26, 2015 cover letter to Ms. Chucka at the Office of the Inspector General (OIG) with a copy of the following letters/documents that were received at DHA: a) Exhibit 3- a 6 page March 24, 2015 letter by Children's Hospital pediatric speech language pathologist, ██████████ ██████████ ██████████, MS, CCC-SLP, and a March 19, 2015 letter by ██████████ ██████████ speech therapist, ██████████ ██████████, MS/CCC-SLP; b) Exhibit 4 – March 31, 2014 letter by ██████████ ██████████ regarding petitioner's test results regarding Preschool Language Scale and Auditory Comprehension; and c) Exhibit 5 – Parent Statement by Ms. ██████████.

In that same letter, this ALJ requested that OIG review the enclosed documents and letters, and submit a detailed reconsideration summary to me at the Division of Hearings and Appeals by May 5, 2015 with a copy of that reconsideration summary letter to be sent to the petitioner's representative, his mother. The petitioner's mother requested a brief opportunity to respond to Ms. Chucka's reconsideration summary. Ms. ██████████ was granted 3 days (until Friday, May 8, 2015) to respond to Ms. Chucka's summary, if she wished.

Ms. Chucka, on behalf of OIG SLP Laura Ronowski, timely submitted her well-organized, detailed reconsideration to DHA and to petitioner's mother which is received into the hearing record. Ms. ██████████ failed to submit any response to DHA by May 8, 2015 or even by the date of this decision.

The issue for determination is the Department correctly denied the petitioner's application for Speech and Language therapy (SLT) evaluation and once weekly SLT therapy for 15 weeks.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Representative:

██████████, mother
██████████
██████████

Respondent:

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

By: Mary Chucka, OIG OT consultant on behalf of Laura Ronowski, SLP
consultant

Office of the Inspector General (OIG)
1 West Wilson Street
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 7 year old resident of Outagamie County who receives MA, and lives at home with his mother, ██████████ and his father.
2. Petitioner is diagnosed with Down Syndrome, Childhood Apraxia of speech, and receptive/expressive language disorder (especially sound production and intelligibility issues).
3. The petitioner attends Kindergarten at the ██████████ where he has a full-time, one-on-one aide.
4. Through the ██████████, ██████████ receives speech and language therapy three times per week for 20 minutes through his Individual Education Plan (IEP). Petitioner has received SLT for about the past five years in the school setting by school SLP ██████████ who worked on articulation skills with goals focusing on consonant-vowel production. At school, ██████████ also receives physical therapy (PT) and occupational therapy (OT) each once per week for an hour
5. The petitioner has been MA approved for 157 sessions of private speech language therapy (SLP) since 2010 in addition to his school speech therapy. Prior to 2010, petitioner received SLP services through the Birth to Three program.
6. The Department denied the petitioners' SLT PA request for continued SLT as of September 16, 2014. The petitioner has not documented any ability to carryover his skills from his private SLT from that discontinuation to the instant January 23, 2015 new PA request.
7. On or about January 23, 2015, the petitioner's provider, ██████████, submitted a prior authorization (PA) # ██████████ request to the Office of the Inspector

General (OIG) requesting on behalf of the petitioner approval for a SLP evaluation and once weekly private speech therapy for 15 weeks.

8. Petitioner did receive private SLT from about September, 2010 through about September, 2014 with two brief PA denials during that period with no documented carryover or change in his articulation abilities or intelligibility as the result of those years of private SLT therapy.
9. The Department sent a February 25, 2015 notice to the petitioner stating that his January 23, 2015 PA request for speech therapy was denied due to failure to establish the medical necessity of the requested services.
10. The Office of the Inspector General (OIG) sent a March 18, 2015 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 sustained progress as a result of past SLT therapy; b) the PA was denied due to SLT services provided to the petitioner by his school SLT appears sufficient; c) the PA did not meet the Department's legal standards for PA approval; d) the PA did not meet the definition of "medically necessary" per Wis. Admin. Code § DHS 101.03(96m); and e) petitioner did not establish the cost effectiveness or appropriateness of the requested continuation of private SLT.
11. During the hearing (or while the record was held open), petitioner's mother, [REDACTED] [REDACTED] and SLP [REDACTED] [REDACTED] [REDACTED] were unable to establish that [REDACTED] had made progress in his speech language production or intelligibility during the past six month period or has not regressed during that period.
12. While the record was held open, petitioner sent Exhibits 3-5 to DHA, and DHA requested that OIG review those documents, and submit a detailed reconsideration summary to the Division of Hearings and Appeals by May 5, 2015 with a copy of that reconsideration summary letter to be sent to the petitioner's mother as his representative. See above Preliminary Recitals.
13. OIG SLT consultant Laura Ronowski sent a detailed 11 page, reconsideration summary with a very well organized "Table of Contents" (Attachment A – page 12) which was attached. In that reconsideration, OIG responded to the petitioner's Exhibit 3-5, and provided the following reasons for its continued denial of petitioner's PA request for a SLT evaluation and 15 sessions of private speech therapy services: a) The additional information provided by petitioner did not support progress or improvement as a result of past private SLT therapy as required by DHS 107.18(3)(e). To approve speech and language therapy, a member must document progress and carryover of SLT skills learned in therapy to home and everyday settings. The petitioner's representatives were unable to document such progress or carryover of SLT skills from the private therapy; b) the additional information does not support SLT services provided by the school SLT are insufficient; c) the PA did not meet the Department's legal standards for PA approval; d) the petitioner did not establish the medical necessity of the requested SLT services.
14. The petitioner's representative failed to submit any response to the OIG's May 4, 2015 Reconsideration by May 8, 2015, 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 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.

(Emphasis added).

Wis. Admin. Code §DHS 101.03(96m).

The crux of the Division’s denial of petitioner’s request is that while [REDACTED] has speech Apraxia and receptive/expressive language disorder (especially intelligibility issues), petitioner did not establish any progress or carry over in his speech production or intelligibility in his private SLT through his SLT provider, and the therapies through the school district were sufficient to meet his SLT needs.

During the hearing and in her written “Parent Statement” (Exhibit 5), petitioner’s mother argued that it was inappropriate that OIG’s March 18, 2015 denial summary was written by an occupational therapist (OT Mary Chucka), and not evaluated and written by a speech therapist. In its May 4, 2015 response, OIG explained that the denied SLT PA was reviewed by two speech language pathologist at OIG and

those SLPs both determined to deny that PA (even though the denial letter was signed by an occupational therapist on their behalf).

I. PROGRESS IN THERAPY.

With respect to the petitioner's speech and language problems, the Division argues that service denial was proper because the petitioner has made no documented progress and has documented no carry over skills towards his achievement in speech production and intelligibility. In fact, during the hearing, petitioner's mother explained that [REDACTED]'s speech intelligibility is regressed (despite private SLT) that at times it is a safety concern (because people can not understand what [REDACTED] is asking or saying). Ms. [REDACTED] argued in part that due to safety concerns, [REDACTED]'s private speech therapy should be continued. See Exhibit 5. However, in her May 4, 2015 reconsideration, SLP Laura Ronowski responded in pertinent part:

. . . the medical/safety concerns identified in Exhibit 5 do not take the specific skill of a SLP to address. The situations identified rely not only on speech sound production, but also spoken language comprehension, spoken language production, and a cognitive maturity and self-control to respect boundaries and understand overall situations, responsibilities, and understand natural consequences of actions.

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 and is unable to carry over his SLT abilities after receiving private SLT therapy, there is not a medical necessity for more ineffectual therapy.

The Department established that the petitioner has not progressed and has been unable to carryover his SLT skills with respect to measurable testing regarding his private speech therapy goals. In its March 18, 2015 denial summary and its May 4, 2015 Reconsideration summary, OIG SLT consultants asserted that petitioner has received speech and language therapy since about 2010 without any documented carryover of SLT skills. OIG argued that to approve the instant PA for continued private 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 or maintained his ability to carry over his skills towards his 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** or **no carry over**. 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 Findings of Fact #4 and #3 above.

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

MPA 756864: However, I am particularly struck by the regression when services are unavailable. The ability to carry over therapy into daily living is a vital aspect of the therapy, and if petitioner regresses at the end of therapy, that is another basis for finding that he has failed to progress.

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 SLT 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 159652 One of the requirements for medical necessity is that the service must be 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)(b)9. . . . he has made no progress (in fact, the evaluations show that he may have actually regressed in the area of expressive language). Therefore, in the absence of at least some progress, it would not be appropriate to approve addition SLT.

During the hearing and while the record was held open, the petitioner was unable to convincingly 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. In fact, Ms. [REDACTED] failed to submit any response to DHA to the Department's Reconsideration by May 8, 2015 or even by the date of this decision. See above Preliminary Recitals. Accordingly, based upon the above, I conclude that the Department correctly denied the petitioner's prior authorization (PA) request for a SLT evaluation and once weekly private speech therapy services for 15 weeks, due to lack of carryover of skills and progress in his speech deficits, school therapies providing sufficient services, and lack of documentation of medical necessity for continued private SLT services.

CONCLUSIONS OF LAW

1. The school therapies are providing sufficient SLT services for the petitioner.
2. The petitioner has not established the medical necessity of the requested SLT evaluation or 15 additional private SLT services.

3. The petitioner has not documented any carryover of SLT skills or made progress towards his SLT goals, and thus denial of continued private SLT on the basis of lack of progress/carryover was correct.

THEREFORE, it is

ORDERED

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

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 6th day of July, 2015

\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 July 6, 2015.

Division of Health Care Access and Accountability