

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 08-6225APD
)
AGENCY FOR PERSONS WITH)
DISABILITIES,)
)
Respondent.)
_____)

URECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 13, 2009, by video teleconference, with the parties appearing in ██████████ Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: ██████████

For Respondent: David Glantz, Esquire
Office of the Attorney General
110 Southeast 6th Street, Tenth Floor
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STATEMENT OF THE ISSUE

Whether the Petitioner's request for 416 quarter hours of speech therapy services through the Developmental Disabilities

Home and Community-Based Services Medicaid Waiver Program ("Medicaid Waiver Program") should be granted or denied.

PRELIMINARY STATEMENT

In correspondence dated December 4, 2008, the Agency for Persons with Disabilities ("APD"), through APS Healthcare, a contractor performing Prior Service Authorization ("PSA") reviews of requests for services under the Medicaid Waiver Program, advised the Petitioner, [REDACTED], that [REDACTED] request for 416 quarter hours of speech therapy services had been denied pursuant to a prior services authorization review. The reason for the denial given in the December 4, 2008, letter was that "the information provided does not meet the criteria necessary to establish medical necessity."

A Notice of Intent; Determination of Prior Service Authorization Review Form #3a ("Form #3a), prepared on or about November 7, 2008, was enclosed with the December 4, 2008, letter, which indicated that the requested Speech Therapy Services had been denied. The explanation of the reasons for the decision to deny the request was set forth in a Notice of Intent; Determination of Prior Service Authorization Review Form #3b, Rationale and Recommendations for Approvals with Changes, Denials, or Terminations ("Form #3b), that was included with the December 4, 2008, letter. In addition, attached to the December 4, 2008, letter was a Final Determination;

Determination of Prior Service Authorization Review ("Form #5a") and a Final Determination; Determination of Prior Service Authorization Review; Rationale for Denials, Reductions, or Terminations of Service ("Form #5b"), also recommending denial of the requested speech therapy services.

██████, ██████████ timely filed a request for an administrative hearing with the APD with respect to the recommendation to deny Speech Therapy Services. This request was transmitted to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on March 13, 2009.

At the hearing, the APD presented the testimony of Kim Watson, and Respondent's Exhibits 1 through 5 were offered and received into evidence. ████████ testified on behalf of ██████████ ████████, and Petitioner's Exhibits 1 through 4 were offered and received into evidence.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on April 2, 2009, and the parties timely submitted proposed findings of fact and conclusions of law, which have been considered in the preparation of this Recommended Order.¹

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The APD is the state agency responsible for providing all services available to persons with developmental disabilities under Chapter 393, Florida Statutes (2008),² including the operation of all state institutional programs and the management of the Medicaid Waiver Program under which home and community-based services are provided to persons with developmental disabilities. See §§ 393.063(1) and 393.065, Fla. Stat.

2. [REDACTED] is [REDACTED] who has been diagnosed with mental retardation. [REDACTED] also has been diagnosed with anxiety disorder, not otherwise specified.

3. [REDACTED] currently resides in [REDACTED] with [REDACTED] [REDACTED], who is [REDACTED] primary caregiver.

4. [REDACTED] has been described as a [REDACTED] who smiles a lot and is independent in [REDACTED] self care skills. [REDACTED] communication skills are limited, and [REDACTED] expresses [REDACTED] in one-, two-, and three-word utterances. [REDACTED] is often unable to make [REDACTED] understood, and [REDACTED] becomes very frustrated when [REDACTED] is unable to communicate [REDACTED] thoughts. This inability to communicate causes [REDACTED] to experience a high level of anxiety,

which in turn causes [REDACTED] to behave in an inappropriate and unacceptable manner.

5. At some time prior to April 1, 2008, but subsequent to February 15, 2008, [REDACTED]'s Medicaid Waiver Support Coordinator, [REDACTED] submitted a request to amend [REDACTED]'s cost plan effective April 1, 2008, through June 30, 2008, to request speech therapy services. [REDACTED]'s internal medicine physician wrote a prescription on April 3, 2008, indicating that [REDACTED] needed speech therapy, evaluation, and treatment, and this prescription may have been included with the request to amend [REDACTED]'s cost plan.³

6. Karen Harrison, a PSA reviewer for APS Healthcare, prepared a Form #3b in which she recommended that the request be denied because no speech assessment was submitted for review and because no cost plan screen was entered in the APD's Allocation, Budget and Contract Control System ("ABC system") for review. The Form #3b indicated that the district APD office was notified of this recommendation on May 1, 2008.

7. In May 2008, [REDACTED] submitted to APS Healthcare a request for reconsideration of the May 1, 2008, recommendation to deny [REDACTED]'s request for speech therapy. [REDACTED] noted on the Response to Notice of Intent for PSA Decision ("Form #4") requesting reconsideration that "Speech Therapy was checked on Form #1; Speech Assessment should have been checked." Neither

██████████ nor APS Healthcare has a record of APS Healthcare's having issued a Final Determination of Prior Service Review ("Form #5a") with respect to this request for reconsideration.

8. ██████████ a speech language pathologist, conducted a speech and language evaluation of ██████ on June 6, 2008, in which ██████ found that ██████ had "severely decreased expressive speech usage" and spoke in one- or two-word utterances with moderate verbal prompting. The speech pathologist recommended speech therapy for one hour, twice weekly.

9. On October 9, 2008, ██████'s new Medicaid Waiver Support Coordinator, ██████████ prepared an update of ██████'s Support Plan, in which ██████ included the following handwritten statement: "██████ is requesting speech therapy to address ██████ communication problem that has led to unacceptable behavior."⁴

10. On October 10, 2008, ██████████'s physician, ██████████, M.D., wrote a prescription for a "speech therapy eval and treat."

11. ██████████ apparently submitted a request for speech therapy services to APS Healthcare prior to November 1, 2008, although the record does not contain the Form #1 that ██████████ would have submitted.

12. Jane Siskind, a PSA reviewer for APS Healthcare, prepared a Form #3a recommending denial of the request for speech therapy for the "Cost Plan/Amendment Effective Date" of November 1, 2008, through June 30, 2009, and she stated on the Form #3a that the district APD office had been notified on November 7, 2008. Ms. Siskind also prepared a Form #3b to accompany the Form #3a, in which she noted that the June 2005 edition of the Developmental Disabilities Handbook was used to evaluate the request and stated in pertinent part:

Review of the submitted documentation and previous support plans indicate that ■ is shy and is described in ■ previous support plans as "not very talkative[,] " that ■ is able to converse in complete sentences but usually chooses to limit ■ responses to one word answers. ■ has not received these services previously and it is unclear what change in ■ condition or circumstances have warranted the request for this service, especially considering ■'s reported "shy" nature. Medical necessity for the provision of this service has neither been established nor documented.

13. It cannot be determined from the evidence whether the June 2008 speech and language evaluation report and the October 10, 2008, prescription were submitted with the November 2008 request.⁵ It may be inferred, however, that the evaluation report was submitted since Ms. Siskind stated in the Form #3b that "[i]n addition to the above, the cost plan screen indicates a request of 3 hours per week of services when the

documentation submitted for review recommends 2 hours per week." Ms. Siskind did not, however, refer in the Form #3b to having reviewed the speech and language evaluation report or the prescription written by Dr. [REDACTED].

14. On November 20, 2008, a psychiatrist wrote a prescription for speech therapy for [REDACTED], in which the physician stated: "After due evaluation of [REDACTED] I recommend speech therapy because this will alleviate the anxiety state that pt is going through at this time. Please don't hesitate to contact me."

15. This prescription, together with the June 8, 2008, speech and language evaluation, was submitted with a Form #4 dated November 24, 2008, requesting reconsideration of the November 7, 2008, recommendation that the request for speech therapy be denied. [REDACTED] included the following statement on the Form #4:

[REDACTED] displays high level of Anxiety and [REDACTED] psychiatrist has attributed this to [REDACTED] difficulty in communicating [REDACTED] needs sufficiently. The doctor has therefore issued a prescription for Speech Therapy. In addition, the speech and language evaluation recommends that [REDACTED] receives [sic] speech therapy twice per week. In [REDACTED] daily living, [REDACTED] cannot articulate [REDACTED] needs to alleviate pain, to protect [REDACTED] life, or prevent illness. More often than not, one has to guess at what [REDACTED] is trying to say. [REDACTED] is aware of [REDACTED] not being understood, so [REDACTED] becomes very anxious and irritable and

refrains from speaking. [REDACTED] deficiency impacts [REDACTED] psychologically and medically.

16. Kim Watson, a PSA reviewer employed by APS Healthcare, considered [REDACTED]'s request on reconsideration, and she prepared a Form #5a, in which she indicated that the district APD office was notified of the recommendation on December 4, 2008. In the Form #5a, Ms. Watson recommended that [REDACTED]'s request for speech therapy services be denied.

17. Ms. Watson explained the basis for her recommendation in a Form #5b, in which she also indicated that the district APD office was notified of the recommendation on December 4, 2008. In the Form #5b, Ms. Watson included, verbatim, the statement quoted above from the Form #3b regarding medical necessity, and she added the following:

Page 2-9 of the Handbook states that a cost plan may be amended at a time other than the annual update only if there is a documented significant change in the recipient's condition or circumstance that affects the recipient's health or welfare; when a change in the plan is required to avoid institutionalization; or when a service array will result in a more cost effective and less restrictive plan. Examples of a significant change can be found on page 2-9 of the Handbook and are as follows:

1) A deterioration in medical condition that requires that the recipient receive services at a greater intensity or in a different setting to ensure that recipient's health or safety;

2) Onset of a health, environmental, behavioral, or medical condition that requires that the recipient receive services at a greater intensity or in a different setting to ensure the recipient's health or safety; or

3) A change in age or service setting resulting in a loss of services funded or two provided from sources other than the waiver. This may include a change in living setting which requires a different service array or a change in presence or health status of a primary caregiver that prevents the caregiver from continuing to provide support.

The documentation submitted for review did not indicate a significant change in the recipient's condition or circumstance. The recommendation is made to deny this service request.

Ms. Watson relied in conducting her reconsideration review on the requirements in the July 2007 edition of the Developmental Disabilities Handbook.

18. Ms. Watson completed her review on reconsideration of ██████'s request for speech therapy on December 2, 2008.⁶

19. Although Ms. Watson reiterated the language from the Form #3b regarding medical necessity in the Form #5b she prepared, Ms. Watson testified at hearing that she based her recommendation on reconsideration solely on the requirement on page 2-9 of the June 2007 edition of the Developmental Disabilities Handbook that a significant change in circumstances must be shown in order to support an amendment to a cost plan.⁷

It may, therefore, reasonably be inferred that, notwithstanding her including in the Form #5b Ms. Siskind's rationale for concluding that medical necessity for speech therapy had not been established, Ms. Watson did not consider as part of her reconsideration review whether the June 9, 2008, speech and language evaluation and the November 20, 2008, prescription established medical necessity.

20. Between January 30, 2009, and April 30, 2009, [REDACTED], completed a speech and language evaluation and plan of treatment for [REDACTED]. As a result of the evaluation, it was recommended that [REDACTED] receive speech therapy two times per week, for 30 minutes each session.

21. Ms. Watson testified that "[t]here is no doubt that [REDACTED] needs these [speech] therapies, based on the documentations today."⁸

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes. See J. M. v. Florida Agency for Persons With Disabilities, 938 So. 2d 535 (Fla. 1st DCA 2006).

23. This is a de novo proceeding for the purpose of formulating agency action, and the findings of fact "shall be based exclusively on the evidence of record and on matters

officially recognized." § 120.57(1)(j) and (k), Florida Statutes; see Hamilton County Bd. of County Comm'rs v. State Dep't of Environmental Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981); McDonald v. Department of Banking & Finance, 346 So. 2d 569 (Fla. 1st DCA 1977).

24. █████ has challenged the APD's intended decision to deny speech therapy during the cost plan period from November 1, 2008, through June 30, 2009. Because this is a request for a new service, █████ has the burden of proving by a preponderance of the evidence that the request should be granted. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health & Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

25. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000) (relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

26. Title 42, Section 440.180, Code of Federal Regulations, defines home or community-based services as "services, not otherwise furnished under the State's Medicaid

plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this chapter." The Federal Social Security Act allows states to offer an array of home and community-based services to developmentally disabled individuals in order to avoid the need for these individuals to reside in an institution. 42 C.F.R. § 441.300. Florida's plan for providing services to the developmentally disabled is found in Chapter 393, Florida Statutes, and in Florida Administrative Code Rule Chapter 59G-13.

27. Florida Administrative Code Rule 59G-13.080 implements and describes Florida's Medicaid Waiver Program. Florida Administrative Code Rule 59G-13.083 incorporates by reference the July 2007 edition of the Developmental Disabilities Handbook, which establishes guidelines for the Medicaid Waiver Program. Florida Administrative Code Rule 59G-13.083 was effective December 3, 2008.

28. Based on the findings of fact herein, Ms. Watson relied exclusively on the definition of "cost plan" found on page 2-9 of the 2007 Developmental Disabilities Handbook, which provides:

The cost plan is the document used by the waiver support coordinator that lists all waiver services requested by the recipient on the support plan and the anticipated cost of each waiver service. The cost plan for each recipient is updated annually based on the results of the support planning process

to reflect current needs and situations. APD must approve the cost plan prior to service provision. A cost plan may be amended at a time other than the annual update only if there is a documented significant change in the recipient's condition or circumstance that affects the recipient's health or welfare; when a change in the plan is required to avoid institutionalization; or when a service array will result in a more cost effective and less restrictive plan. Each time a recipient has a significant change in condition or circumstance that indicates the need for an increase in the approved plan or added services, the cost plan must be amended and approved in order for the service to be initiated.

A change in a recipient's condition or circumstances that affects the recipient's health or welfare is significant if it is a change of considerable magnitude or considerable effect. Examples of a significant change are:

- 1) A deterioration in medical condition that requires that the recipient receive services at a greater intensity or in a different setting to ensure that recipient's health or safety;
- 2) Onset of a health, environmental, behavioral, or medical condition that requires that the recipient receive services at a greater intensity or in a different setting to ensure the recipient's health or safety; or
- 3) A change in age or service setting resulting in a loss of services funded or two provided from sources other than the waiver. This may include a change in living setting which requires a different service array or a change in presence or health status of a primary caregiver that prevents

the caregiver from continuing to provide support.

29. Based on the findings of fact herein, however, Ms. Watson incorrectly applied the requirements of the July 2007 edition of the Developmental Disabilities Handbook in her reconsideration review of ██████'s request for speech therapy. There is no statute authorizing the retroactive application of the July 2007 edition of the Developmental Disabilities Handbook adopted in Florida Administrative Code Rule 59G-13.083, and that edition of the Developmental Disabilities Handbook cannot be applied to requests for services made prior to December 3, 2008, the effective date of the rule. See § 120.54(1)(f) ("An agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute.").

30. It is clear in the record that ██████'s first definitive request for speech therapy was submitted for prior service authorization review in or about November 1, 2008. Ms. Watson's review was in response to a request for reconsideration of the November 7, 2008, recommendation that ██████'s request be denied. November 1, 2008 is, therefore, the determinative date with respect to the appropriate edition of the Developmental Disabilities Handbook to be used in conducting the reconsideration review.

31. In addition, even though the Form #5a and Form #5b prepared by Ms. Watson indicated that the district APD office was notified on December 4, 2008, of Ms. Watson's recommendation for denial on reconsideration, Ms. Watson actually completed the review on December 2, 2008, the day before the effective date of the rule adopting the July 2007 edition of the Developmental Disabilities Handbook.

32. ██████'s request for speech therapy must, therefore, be evaluated in accordance with the requirements of the June 23, 2005, edition of the Developmental Disabilities Handbook. Page 2-9 of the 2005 Developmental Disabilities Handbook includes the definition of "cost plan" as follows:

The form used by the waiver support coordinator listing all services requested by the recipient on the support plan, regardless of funding source, and the anticipated cost of each waiver service. The Department's District Office must approve the cost plan prior to service provision. Each time a recipient makes a request to increase or add services the cost plan too must be amended and approved, as described above, in order for the service to be initiated. A support plan and cost plan must be updated for each recipient enrolled on the waiver at least annually, during the annual support planning process to reflect current needs and situations. Cost plan forms are available from the District Office.

33. Because there is no "significant change" requirement in the June 2005 edition of the Developmental Disabilities

Handbook, ██████'s request for speech therapy cannot be denied because the documentation submitted does not demonstrate a significant change in ██████'s condition or circumstances but must, rather, be evaluated with respect to whether speech therapy is medically necessary for ██████

34. The Developmental Disabilities Handbook provides at pages 1-5 through 1-6 and 2-4 that "waiver services shall only be provided when the [requested] service or item is medically necessary." The Developmental Disabilities Handbook adopts the following definition of "medically necessary" or "medical necessity," which is found in Florida Administrative Code Rule 59G-1.010:

(166) "Medically necessary" or "medical necessity" means that the medical or allied care, goods, or services furnished or ordered must:

(a) Meet the following conditions:

1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;

4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide; and

5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

* * *

(c) The fact that a provider has prescribed, recommended, or approved medical or allied care, goods or services does not, in itself, make such care, goods or services medically necessary, or a medical necessity, or a covered service.

35. "Speech therapy" is described on page 2-86 of the June 2005 edition of the Developmental Disabilities Handbook in pertinent part as follows: "Speech therapy is a service prescribed by a physician and is necessary to produce specific functional outcomes in the communication skills of a recipient with a speech, hearing or language disability. . . ." Speech therapy was prescribed in April 2008 and October 2008 by [REDACTED] and in November 2008 by [REDACTED]'s psychiatrist. In addition, the evaluation reports prepared by [REDACTED] and by [REDACTED] both reflect that [REDACTED] has significant difficulty with expressive communication and speaks in a whisper or at a very low volume and recommend speech therapy to increase [REDACTED] expressive language skills and to improve [REDACTED] ability to verbalize at greater volume.⁹

36. Based on the findings of fact herein, [REDACTED] has proven by a preponderance of the evidence that [REDACTED] request for speech therapy should be approved. The documentation and evidence submitted demonstrates that [REDACTED]'s inability to communicate effectively with [REDACTED] caregiver, [REDACTED] co-workers, and [REDACTED] peers is very frustrating to [REDACTED] and exacerbates [REDACTED] level of anxiety, causes [REDACTED] to engage in unacceptable behavior, and compromises [REDACTED] ability to communicate pain or illness. Ms. Watson testified that, based on the documentation submitted, "there is no doubt that [REDACTED] needs these therapies,"¹⁰ and the APD in the Agency's Proposed Recommended Findings of Fact and Conclusions of Law conceded that the "Petitioner would benefit from 'speech and language therapy 2 times per week for 30 minutes per session' as recommended by [REDACTED]" and that, but for the Petitioner's failure to prove "significant change," [REDACTED] would be entitled to receive speech therapy at the rate recommended by [REDACTED]¹¹

37. Because "significant change" is not required to support a cost plan amendment pursuant to the requirements on page 2-9 of the June 2005 edition of the Developmental Disabilities Handbook, it is appropriate to accept the APD's alternative recommendation that [REDACTED] be approved for speech therapy twice a week, for 30 minutes per session.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Persons with Disabilities enter a final order approving [REDACTED]'s request for speech therapy at the rate of two 30-minute sessions each week for the Cost Plan Year ending June 30, 2009.¹²

DONE AND ENTERED this 22nd day of May, 2009, in Tallahassee, Leon County, Florida.

S

PATRICIA M. HART
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of May, 2009.

ENDNOTES

^{1/} It is noted that Respondent Exhibits 1 through 5 were extracted from a packet of documents filed with the Division of Administrative Hearings by the APD prior to the final hearing. The documents were not pre-marked or even arranged in any discernable order, and the support plan was incomplete, containing only three pages of five. The lack of organization of the documents resulted in the failure of the APD to move into evidence documents that would have been very helpful in formulating the findings of fact in this Recommended Order. As

information will be sent to the waiver support coordinator, recipient, family or guardian.")

¹⁰/ Transcript at page 53.

¹¹/ Agency's Proposed Recommended Findings of Fact and Conclusions of Law at paragraphs 10 and 11.

¹²/ It is anticipated that [REDACTED]'s current Support Coordinator will present the request for speech therapy in the appropriate form in the support plan and cost plan for the cost plan year extending from July 1, 2009, through June 30, 2010, together with supporting documentation.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.