

STATE OF CONNECTICUT
DEPARTMENT OF SOCIAL SERVICES
OFFICE OF LEGAL COUNSEL, REGULATIONS, AND ADMINISTRATIVE HEARINGS
25 SIGOURNEY STREET
HARTFORD, CT 06106-5033

December 29, 2011
SIGNATURE CONFIRMATION

[REDACTED]

[REDACTED]

NOTICE OF DECISION

PARTY

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

PROCEDURAL BACKGROUND

On June 6, 2011, Connecticut Behavioral Health Partnership ("CTBHP") sent [REDACTED] (the "Appellant") a Notice of Action ("NOA") for non-covered service denying a prior authorization request for approval of applied behavioral analysis services. The prior authorization request was denied by CTBHP as Medicaid does not cover applied behavioral analysis services when provided by unlicensed providers.

On July 9, 2011, the Appellant's mother and guardian ([REDACTED]) requested an administrative hearing on behalf of the Appellant to contest CTBHP's denial of the Appellant's prior authorization request.

On August 5, 2011, the Office of Legal Counsel, Regulations, and Administrative Hearings ("OLCRAH") issued a notice scheduling an administrative hearing for August 16, 2011 to address CTBHP's denial of the Appellant's prior authorization request.

On August 16, 2011, in accordance with sections 17b-60, 17-61 and 4-176e to 4-189, inclusive, of the Connecticut General Statutes, OLCRAH held an administrative hearing to address CTBHP's denial of the Appellant's prior authorization request.

The record was closed on November 17, 2011.

The following individuals were present at the hearing:

[REDACTED]

Atty. Sheldon Toubman, Counsel for the Appellant
Atty. Victoria Veltri, Co-Counsel for the Appellant
Melissa Olive, PhD, Witness for the Appellant
Atty. Patricia McCooley, Counsel for the Department
Steven M. Kant, M.D., Representative from CTBHP/Witness for the Department
Marc Shaefer, PhD, For the Department
William Halsey, For the Department
Hernold C. Linton, Hearing Officer

STATEMENT OF THE ISSUE

The issue to be decided is whether CTBHP's denial of the prior authorization request for approval of Medicaid coverage for Applied Behavioral Analysis ("ABA") services for the Appellant was correct and in accordance with the regulations and statutes.

FINDINGS OF FACT

1. The Appellant is a recipient of medical assistance under the Medicaid program. (Appellant's testimony; Hearing Summary)
2. On March 21, 2011, CTBHP received a prior authorization request from the Appellant's provider for approval of 40 hours per week of ABA services for the Appellant, 20 hours per week of ABA services to be provided in a day care setting and 20 hours per week of in-home ABA services. (Hearing Summary)
3. The identified goals of the ABA intervention included improving the Appellant's communication skills, increasing her receptive skills, improving her social skills allowing her to interact with her siblings and peers, and increasing her adaptive skills. (Hearing Summary)
4. On June 6, 2011, CTBHP sent a NOA to the Appellant advising her that the prior authorization request received from her provider for approval of 40 hours per week of ABA services, 20 hours per week of ABA services provided in a day care setting and 20 hours per week of in-home ABA services had been denied as habilitation services provided by unlicensed providers are not covered under the state's Medicaid plan. (Hearing Summary; Dept.'s Exhibit #1: 06/06/11 Notice of Action)
5. The Appellant is three (3) years of age. (Hearing Summary)
6. The Appellant has been diagnosed with both Autism and Down's Syndrome. (Hearing Summary)
7. The symptoms of the Appellant's Down's Syndrome include facial stigmata, short stature, and hearing loss. (Hearing Summary)

8. The Appellant has a reported IQ of 50. (Hearing Summary)
9. The Appellant reportedly showed deterioration in her ability to speak due to the onset of Autism. (Hearing Summary)
10. The Appellant's provider did not submit evidence to CTBHP documenting the Appellant's claimed regressions. (Hearing Summary)
11. The requested ABA services would be provided according to a behavioral training plan resulting from an assessment conducted by a licensed practitioner with expertise in behavior analysis or behavior modification, such as licensed Psychologist. The ABA therapy itself would be provided by family members or paraprofessionals who received training to carry out the behavioral training plan. (Hearing Summary)
12. The parents or other unlicensed individuals would provide the ABA services requested for the Appellant. (Dept.'s 10/03/11 Memorandum of Law)
13. The requested ABA services will not restore lost functioning or skilled that the Appellant previously had. (Dept.'s 10/03/11 Memorandum of Law)
14. The provider that recommended the requested ABA services holds an educational degree in Psychology but does not possess a clinical license. (Dept.'s 11/07/11 Reply Brief)

CONCLUSIONS OF LAW

1. Section (§) 17b-2(8) of the Connecticut General Statutes states that the Department of Social Services is designated as the state agency for the administration of the Medicaid program pursuant to Title XIX of the Social Security Act.
2. Section 17b-259b of the Connecticut General Statutes states that "Medically necessary" and "medical necessity" defined. Notice of denial of services. Regulations. (a) For purposes of the administration of the medical assistance programs by the Department of Social Services, "medically necessary" and "medical necessity" mean those health services required to prevent, identify, diagnose, treat, rehabilitate or ameliorate an individual's medical condition, including mental illness, or its effects, in order to attain or maintain the individual's achievable health and independent functioning provided such services are: (1) Consistent with generally-accepted standards of medical practice that are defined as standards that are based on (A) credible scientific evidence published in peer-reviewed medical literature that is generally recognized by the relevant medical community, (B) recommendations of a physician-specialty society, (C) the views of physicians practicing in relevant

clinical areas, and (D) any other relevant factors; (2) clinically appropriate in terms of type, frequency, timing, site, extent and duration and considered effective for the individual's illness, injury or disease; (3) not primarily for the convenience of the individual, the individual's health care provider or other health care providers; (4) not more costly than an alternative service or sequence of services at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of the individual's illness, injury or disease; and (5) based on an assessment of the individual and his or her medical condition.

(b) Clinical policies, medical policies, clinical criteria or any other generally accepted clinical practice guidelines used to assist in evaluating the medical necessity of a requested health service shall be used solely as guidelines and shall not be the basis for a final determination of medical necessity.

(c) Upon denial of a request for authorization of services based on medical necessity, the individual shall be notified that, upon request, the Department of Social Services shall provide a copy of the specific guideline or criteria, or portion thereof, other than the medical necessity definition provided in subsection (a) of this section, that was considered by the department or an entity acting on behalf of the department in making the determination of medical necessity.

3. 42 U.S.C. Section 1396d(a)(6) defines other Remedial Care available under Medicaid as medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law;
4. 42 U.S.C. Section 1396d(a)(13) defines other diagnostic, screening, preventive, and rehabilitative services, including any medical or remedial services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level;
5. 42 U.S.C. Section 1396d(r)(5) provides that the term "early and periodic screening, diagnostic, and treatment ("EPSDT") services" means the following items and services: screening, vision, dental, and hearing services as well as such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.
6. 42 CFR Section 441.57 provides that (Discretionary services) under the EPSDT program, the agency may provide for any other medical or remedial care specified in part 440 of this subchapter, even if the agency does not otherwise

provide for these services to other recipients or provides for them in a lesser amount, duration, or scope.

7. The EPSDT mandate requires that Medicaid pay for only the categories of services listed at 42 U.S.C section 1396d(a)(1) – (28) as medical assistance. EPSDT services are limited to those listed in Part 440, the State Plan Categories.
8. The EPSDT mandate offers a broad scope of benefits for children. However, it does not allow for coverage of services that are not described in section 42 U.S.C. § 1396d(a), and therefore, not covered under the State's Medicaid Plan.
9. There is no Medicaid State Plan category for Applied Behavioral Analysis ("ABA") services.
10. Some types of ABA services, such as an ABA evaluation or assessment provided by a psychologist could be covered under the State Medicaid Plan.
11. The ABA services requested for the Appellant would not be provided by a licensed medical practitioner.
12. The Appellant submitted no clinical evidence from a licensed provider or practitioner of the healing arts to support recommending the requested ABA services for the Appellant as required by state regulations.
13. The ABA services requested for the Appellant were not intended achieve maximum reduction of physical or mental disability and restoration of the Appellant's best possible function level. (Rehabilitation Services)
14. The ABA services requested for the Appellant are designed to assist the Appellant in acquiring and attaining adaptive skills to improve her ability to engage with others.
15. The ABA services requested for the Appellant are intended to assist her in learning and attaining new skills rather than restoring skills that she previously had. (aka Habilitation Services)
16. Medicaid does not cover habilitation services unless provided under certain circumstances or settings, pursuant to the State Medicaid Plan, such as part of an active treatment by an intermediate care facility to mentally delayed residents, pursuant to a provision of the State's Medicaid plan.
17. The State's Medicaid plan and EPSDT categories of services will cover children services which are intended to restore skills or abilities the child once had but lost due to an illness or injury.

18. The ABA services requested for the Appellant would not be provided by licensed practitioners within their scope of practice, but by family members or other paraprofessionals at her home and day care setting.
19. K.G. v. Dudek, Case No. 11-20684-CIV-LENARD/O'SULLIVAN (S.D. Fla. November 1, 2011) is a preliminary injunction granted against Florida's Medicaid denial of ABA services, and is not binding on the State of Connecticut.
20. The Appellant's provider offered no medical evidence of the Appellant's regression and that the requested ABA services would restore functioning or skills that the Appellant previously had.
21. CTBHP correctly determined that the ABA services requested would not be provided under certain circumstances or settings, pursuant to the State Medicaid Plan.
22. CTBHP correctly determined that the ABA services requested would not be provided by a licensed provider or practitioner, pursuant to the State's Medicaid Plan.
23. CTBHP correctly determined that the ABA services requested were not intended to restore the Appellant to a prior level of functioning, as with rehabilitative services.
24. The deficiency in CTBHP's notice of action, wherein the applicable regulation was not cited, did not deprive the Appellant of due process as she was fully represented by counsel and afforded the opportunity to review evidence submitted by CTBHP.
25. There is no relief that could be granted to the Appellant to remedy the deficiency in CTBHP's notice of action. The Appellant has been afforded all due process rights during the conduct of the hearing and all submissions and arguments made by the parties were accepted into the record as evidence.
26. CTBHP correctly determined that State's Medicaid Plan does not cover the requested ABA services when not provided by a licensed provider or practitioner and not intended to restore the Appellant to a prior level of functioning.
27. CTBHP correctly determined that ABA services are not medically necessary according to Section 17b-259b of the Connecticut General Statutes.

DISCUSSION

After reviewing all the evidence and testimony provided for this hearing by the parties, I find that CTBHP was correct in denying the Appellant's request for approval of 40 hours per week of ABA services for the Appellant, 20 hours per week of ABA services

provided in a day care setting and 20 hours per week of in-home ABA services. The Medicaid program covers rehabilitative services provided by a licensed provider or practitioner and intended to restore an individual to a prior level of functioning lost due to an injury. However, the ABA services requested would not be provided by a licensed provider or practitioner and were not intended to restore the Appellant to a prior level of functioning. The Medicaid program covers ABA services as part of an active treatment by an intermediate care facility to mentally delayed residents. However, the State's Medicaid plan does not cover ABA services provided in the home or day care setting by an unlicensed provider or practitioner as is the case in the Appellant's situation.

The Appellant's representative submitted rulings from different jurisdictions on the issue at hand. However, those rulings are not binding on the State of Connecticut with respect to its administration of the Medicaid program and the facts in those cases with respect to the practitioners and circumstances are different from the facts in the case at hand. Under the federally approved State's Medicaid plan and ESPDT categories of services, ABA services provided by unlicensed individuals are not recognized or implied as a covered service. However, ABA services furnished by licensed practitioners within the scope of their practice are recognized under the State's Medicaid plan as available remedial care. Consequently, CTBHP denied the Appellant's request for approval of 40 hours per week of ABA services. The undersigned finds that CTBHP's denial of the Appellant's request for approval of ABA services is in accordance with prevailing regulations.

DECISION

The Appellant's appeal is **DENIED**.

Hernold C. Linton
Hearing Officer

Pc: **Steven M. Kant, M.D.**, Connecticut Behavioral Health Partnership,
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RIGHT TO REQUEST RECONSIDERATION

The appellant has the right to file a written reconsideration request within **15** days of the mailing date of the decision on the grounds there was an error of fact or law, new evidence has been discovered or other good cause exists. If the request for reconsideration is granted, the appellant will be notified within 25 days of the request date. No response within 25 days means that the request for reconsideration has been denied. The right to request a reconsideration is based on §4-181a (a) of the Connecticut General Statutes.

Reconsideration requests should include specific grounds for the request: for example, indicate what error of fact or law, what new evidence, or what other good cause exists.

Reconsideration requests should be sent to: Department of Social Services, Director, Office of Administrative Hearings and Appeals, 25 Sigourney Street, Hartford, CT 06106-5033.

RIGHT TO APPEAL

The appellant has the right to appeal this decision to Superior Court within 45 days of the mailing of this decision, or 45 days after the agency denies a petition for reconsideration of this decision, provided that the petition for reconsideration was filed timely with the Department. The right to appeal is based on §4-183 of the Connecticut General Statutes. To appeal, a petition must be filed at Superior Court. A copy of the petition must be served upon the Office of the Attorney General, 55 Elm Street, Hartford, CT 06106 or the Commissioner of the Department of Social Services, 25 Sigourney Street, Hartford, CT 06106. A copy of the petition must also be served on all parties to the hearing.

The 45 day appeal period may be extended in certain instances if there is good cause. The extension request must be filed with the Commissioner of the Department of Social Services in writing no later than 90 days from the mailing of the decision. Good cause circumstances are evaluated by the Commissioner or the Commissioner's designee in accordance with §17b-61 of the Connecticut General Statutes. The Agency's decision to grant an extension is final and is not subject to review or appeal.

The appeal should be filed with the clerk of the Superior Court in the Judicial District of New Britain or the Judicial District in which the appellant resides.