

The petitioner's son does not attend school. Instead, the petitioner provides home schooling.¹ She has been advised, and has presented as-yet-unrebutted expert medical evidence, that in addition to the education she herself provides, her son requires direct one-on-one speech therapy services from a licensed speech/language pathologist (SLP) four times a week.

The petitioner would frame the issue in this matter simply as a determination of medical necessity. The petitioner argues that federal and state provisions relating to Medicaid coverage for children require the Department to grant prior approval of any level and frequency of speech therapy services the petitioner can show are medically necessary for her child. See 42 U.S.C. § 1396d(r)(5), W.A.M. § M100. The petitioner argues that the fact that she has chosen to home school her child is irrelevant to any issue regarding Medicaid coverage.

An initial hearing was held in this matter on July 7, 2004. The hearing officer advised the petitioner that he thought her request implicated provisions of special education law and procedures. Several continuances were

¹ There is no dispute that the petitioner, to date, has complied with state law and regulations regarding registration for home schooling. See

granted to allow the petitioner to obtain an attorney and to submit additional medical evidence and legal argument in this regard. As noted above, the petitioner has submitted opinions from the child's service providers as to the medical necessity of four-times-a-week speech therapy provided on a one-to-one basis by a licensed SLP. The evidence also indicates that the petitioner has done an exemplary job of home schooling her child. However, the petitioner has not provided any evidence whatsoever that her decision to completely eschew evaluations, services, and procedural rights under special education are in any way advised or necessitated by her child's medical condition.²

The petitioner does not dispute that speech therapy is a defined "related service" that school districts are required to provide free of charge to any child with a disability who requires them in order to receive an appropriate education. See 20 U.S.C. § 1401(22), 16 V.S.A. § 2942(2). The petitioner further admits that there are procedures and protocols between the Department of Education and the Agency of Human Services regarding the relative financial

16 V.S.A. § 166b.

² There is a brief mention in the medical evidence that the child "was not successful in his mainstream program" when he attended school. However,

responsibilities of funding certain aspects of special education programs.³ The petitioner argues that because the above provisions contemplate Medicaid reimbursement to a school district for speech therapy services provided to a student on an IEP, Medicaid is *automatically* required to fund all such services provided pursuant to home schooling. Unfortunately, this argument ignores several underlying premises of the above provisions and protocols.

First is the recognition that the educational and medical needs of certain disabled children are inherently overlapping. Speech therapy is a salient example of a service specifically defined under *both* Medicaid (see *infra*) and special education services. The petitioner is correct that Medicaid routinely pays for related *educational* services, including speech therapy (see *supra*), under an IEP. However, it only does so pursuant to the above protocol, part of which is designed to obtain such services in the most cost-effective manner that will meet the student's educational/medical needs.

it is not at all clear from the record when, and for how long, the child attended school.

³ These procedures are not in dispute, and were accurately summarized (see pp. 5-7) in the petitioner's Memorandum of Law in this matter dated March 1, 2005.

The Medicaid regulations, themselves, are specific and unequivocal in this regard. Speech therapy is initially covered only up to four months. Any coverage beyond that "requires prior authorization". Prior approval is given only when the service is shown to be "reasonable and necessary under accepted standards of medical practice to the treatment of the patient's condition". W.A.M. § M710.4(10). Further, the regulations provide that prior approval is designed to include the assurance "that all appropriate, less-expensive alternatives have been given consideration". § M106.1.

The problem in this case is that the petitioner's son does not have an IEP, because the petitioner has unilaterally elected not to have him evaluated for one--at least not a current one. Therefore, there has been no determination made as to the level of speech therapy that would be necessary to provide him with a free and appropriate education. Even assuming that the child may need speech therapy at the level and frequency requested by the petitioner, the school district and the Department have not had the opportunity to explore any medically and educationally appropriate alternatives, much less more cost-effective ones.

The issue in this case, at least at this point, does not involve the petitioner's right to home school her child. Nor

does it (at least yet) require a determination by the Board regarding the frequency and quality of the child's medical need for speech therapy. The issue concerns the petitioner's cooperation in allowing the Department and the child's school district to reasonably and thoroughly determine the child's educational/medical need for speech therapy in accordance with the above statutes, regulations, and protocols, and to seek the most cost-effective means of providing such services.

The petitioner may be correct that Medicaid, as opposed to special education funds, may ultimately be liable to pay for most, if not all, of her child's speech therapy. See 42 U.S.C. § 1396b(c). However, this fact does not alter the reasonable requirement in the regulations that less expensive alternatives at least be explored. At this point, it is simply unknown whether the level and frequency of speech therapy sought by the petitioner (even assuming it is medically necessary) is the most efficient and cost-effective

service available to and suitable for her son.⁴ It is one thing to argue that the availability of alternative services is "speculative" (see e.g., *Hunter v. Chiles*, 944 F.Supp. 914 [S.D. Fla., 1996]). It is another to effectively deny the Department the customary and most reasonable means to explore these alternatives.

In determining medical necessity, the findings and opinions of treating sources are accorded great weight. However, it cannot be concluded that the law allows or contemplates that the child's service providers, in effect, dictate the level of services to be covered under Medicaid. This would undermine the entire concept and rationale behind the prior approval process. Home schooling may be the petitioner's right, but it cannot become a means to short circuit the Medicaid prior approval process by preventing the legally responsible public entities from determining her child's educational and medical needs in accord with applicable laws and protocols.⁵

⁴ Although it may be ultimately irrelevant, the Department maintains that the level of speech therapy sought by the petitioner for her son is far in excess of any currently being funded by Medicaid for any other child in Vermont.

⁵ These protocols include full due process protections in terms of parental participation, mediation, and appeal. See 34 C.F.R. §§ 300.505-507.

Unless and until the petitioner either avails herself of the IEP evaluation process, produces medical evidence that engaging this process would be detrimental to her child, or is able to come forward with an alternative method whereby the Department can reasonably assess the availability and suitability of alternative services, it cannot be concluded that the petitioner meets the requirements for prior approval of increased speech therapy for her son.

ORDER

For the above reasons the Department's decision in this matter is affirmed.

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