

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C. M., a minor,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2123 C.D. 2013
	:	SUBMITTED: June 20, 2014
Department of Public Welfare,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE LEADBETTER**

FILED: March 11, 2015

Petitioner, C.M., a minor, petitions for review of the final order of Secretary of the Department of Public Welfare¹ denying Petitioner’s request for reconsideration of the administrative law judge’s (ALJ) order denying in part and sustaining in part Petitioner’s appeal relating to the provision of therapeutic staff support (TSS) services. We affirm.

Petitioner is a female, nine-year-old fourth grade student in the Altoona Area School District (District). She has been diagnosed with Autistic

¹ Subsequent to the filing of the instant appeal, the Department of Public Welfare changed its name to the Department of Human Services. See Act of June 13, 1967, P.L. 31, amended by Act of September 24, 2014, P.L. __, 62 P.S. § 103 (effective November 24, 2014).

Disorder and Phonological Disorder and received autistic support services, music therapy, occupation therapy, speech therapy and language support. Petitioner has displayed aggressive behaviors and tried to walk away from an activity or task, and she requires assistance with communication skills, social and coping skills, compliance, impulsivity, aggression, and safety. She also requires prompts and redirection to remain focused on school tasks and displays a lack of age appropriate skills. In September 2013, Petitioner began attending a new school with a new autistic support teacher, new regular education teacher, and new peers.

On May 31, 2013, Family Behavioral Resources² (“FBR”) submitted an outpatient services authorization request to the Department of Public Welfare (“Department”) requesting TSS services for Petitioner for a period beginning July 1, 2013, and running through December 31, 2013. FBR requested authorization for: 32 hours of TSS services per week in the school setting from July 1, 2013 to December 31, 2013; three hours of TSS services per week in the home and community setting for the same period. The Department reviewed the request and approved TSS hours in amounts significantly less than those requested by FBR: 17 hours of TSS services per week in the school setting from September 4, 2013 until December 31, 2013. Petitioner subsequently filed an appeal from this decision.

The ALJ held a hearing on September 10, 2013, at which Doris Lebischak, M.D., a psychiatric consultant, testified on behalf of the Department. Angela O’Brien, FBR’s autism director, Katie Lloyd, FBR’s behavioral specialist

² Family Behavioral Resource provides a variety of mental health services including specialized autism services, behavioral health rehabilitation services and psychological evaluations and testing.

consultant, and Petitioner's father and mother testified on her behalf. Dr. Lebischak testified:

[M]edical necessity was not found for the hours that were requested because the documentation was insufficient to support this intensity of TSS. Many of the hours are requested in school. Comprehensive clinical information from the school is needed to support --- to usually support the intensity of this request. [Petitioner] has need for close proximity, for supervision and prompting. And that's not a TSS intervention, it's considered non-behavioral. [Petitioner] does have behaviors that can be evaluated and that can be programmed and may respond to a behavioral intervention.

Reproduced Record (R.R.) at 44a. On cross-examination, Dr. Lebischak stated that Petitioner's school failed to submit clinical information, but would not specifically state whether the Department was looking for an individual education plan (IEP) or some other document. R.R. at 62a-63a.

Petitioner submitted into evidence a letter from Harry J. Gregg, special education supervisor in the Altoona School District, which stated that she required continued TSS support throughout the school day because she has difficulty transitioning from one activity to another, she may verbally refuse to complete tasks, stomp, cry, lay her head on the table, lay on the floor, and has tried to walk away from an activity or task. R.R. at 130a. Petitioner also entered into the record the Blair County Behavioral Health Rehabilitation Services School Feedback Form which noted that she was easily distracted and sometimes refused to participate or complete assignments, lacked social skills, and was non-engaged. Petitioner submitted an IEP dated December 2012, which stated that she

participates in the regular education setting for specials, reading, and spelling and that she needs adult assistance to stay on tasks and complete activities. R.R. at 144a.

Petitioner also submitted a Plan of Care dated from January through August 2013, which stated that she had shown good improvement in compliance, verbal protests, stereotypical behaviors, utilizing replacement behaviors, attention to task, positive transition, socially appropriate behaviors, interactive play, and reciprocal conversation based on one or two prompts. R.R. at 147a-52a. Petitioner further submitted a confidential psychological evaluation performed by a licensed psychologist, Richard A. Petroski, Ph.D. Petitioner scored 100 on the Child and Adolescent Functional Assessment Scale,³ which placed her behavior in the serious impairment category and she scored 45 on the Global Assessment of Functioning Scale,⁴ with severe difficulty in home, school and social functioning as well as mood instability. R.R. at 162a. The evaluation recommended that Petitioner receive 32 hours of TSS services per week in school and that a taper of services was not recommended. R.R. at 162a-63a. Petitioner entered into evidence a letter from Dr. Kenneth A. Bock, her autism specialist, who opined that she required full-time TSS services in school or her behavior could regress. R.R. at 165a. FBR submitted a report recommending that Petitioner receive 32 hours of TSS support in school and noting that Petitioner's level of services will be tapered upon behavioral success. R.R. at 169a.

³ The Child and Adolescent Functional Assessment Scale assesses the degree of impairment in children with emotional, behavioral, psychiatric, or substance use problems.

⁴ The Global Assessment of Functioning is a numeric scale (1 through 100) used by mental health clinicians and physicians to rate subjectively the social, occupational, and psychological functioning of individuals, e.g., how well or adaptively one is meeting various problems-in-living.

Petitioner submitted a letter from Dennis Marion, deputy secretary of the Department, in which he stated that Petitioner's 2012 IEP did not identify a need for TSS services because the "no" box was checked in response to the question "[d]oes the student exhibit behaviors that impede his/her learning or that of others?" R.R. at 177a. The letter also stated that a current IEP was not submitted and that the Department was under the impression that the transitioning of TSS services was going to occur prior to July 2013. *Id.* Finally, Petitioner submitted a letter from Melissa Huber, her autistic support teacher, who stated that the IEP section that asks whether the student's behaviors impede her learning is not marked because the TSS staff intervenes before problem behaviors get to the point of impeding Petitioner's learning or that of others. R.R. at 138a. Huber further stated that if the TSS intervention is unsuccessful before behaviors occur, then the TSS intervenes during the problem so that the behavior does not impede Petitioner's learning. *Id.*

The ALJ partially denied and partially sustained Petitioner's appeal from the Department's decision. The ALJ ordered that Petitioner receive 18.5 weekly TSS hours in the home and community setting from July 1, 2013 through July 24, 2013 and 25 weekly TSS hours from July 25, 2013 through August 11, 2013. The ALJ also ordered that Petitioner receive 27 weekly TSS hours in the school setting from September 4, 2013 through December 31, 2013.⁵ With regard to Petitioner's behavior in school, the ALJ found that she demonstrated:

⁵ FBR requested 32 hours per week of in-school TSS. Under the ALJ's order, Petitioner received one hour less per school day of TSS services.

- increasing compliance from less than 50% of the time in January 2013 to greater than 80% of the time in July 2013
- decreasing verbal protests from more than 12 incidents per TSS shift in January 2013 to less than 2 in July 2013
- an increased attention to task from requiring more than 35 prompts every ten minutes in January 2013 to less than 5 every ten minutes in July 2013
- a reduction in [walking away from supervision] from more than 1.5 incidents per TSS shift in both January 2013 and May 2013 to 0 incidents per TSS shift in June 2013.

ALJ's Opinion at 5, Findings of Fact No. 20. The ALJ also found that Petitioner received 20 to 30 minutes of both speech and occupational therapy per week and has a special education aide available to assist with toileting activities. *Id.* No. 21. Finally, the ALJ found that Petitioner participates in a regular education classroom setting approximately 31% of the school day. *Id.* No. 22. The ALJ concluded that Petitioner had provided sufficient evidence relating to level of care, documentation and active treatment criteria, as outlined in Departmental policy, to warrant a high intensity of TSS services. ALJ's Opinion at 12. The ALJ found that Petitioner's medical reports, statements from providers and testimony also supported the position that her needs could best be met with the level of care provided by a trained TSS. *Id.* However, the ALJ ultimately concluded that Petitioner's medical documentation did not support the requested TSS service hours for the time periods in question due to the Petitioner's behavioral improvements. *Id.*

Petitioner filed a petition for reconsideration with the Secretary. The Secretary denied the petition for the reasons stated in the ALJ's opinion. This appeal followed.

Petitioner argues that the ALJ's decision and the Secretary's denial of reconsideration were an abuse of discretion because they were against the weight of the evidence that she required full-time TSS service. Petitioner also argues that the Department's decision to deny full-time TSS services was an abuse of discretion and an error of law because the decision violates Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1487, by denying her right to an education in the least restrictive environment.

The hearing examiner is the ultimate fact-finder in matters involving the Department. *Perna ex rel. Bekus v. Dep't of Pub. Welfare*, 807 A.2d 310 (Pa. Cmwlth. 2002). A hearing examiner's findings of fact may not be set aside if they are supported by substantial evidence. *Lehmann v. Dep't of Pub. Welfare*, 30 A.3d 580, 585 (Pa. Cmwlth. 2011). Either party may seek reconsideration of an ALJ's decision by the Secretary. 55 Pa. Code § 275.4(h)(4)(ii), which provides:

The Secretary may affirm, amend, or reverse the decision of the Director, or remand the case to the hearing officer for further findings of fact. Actions taken by the Secretary will be confined to matters of law and established departmental policy; no findings of fact made by the hearing examiner will be subject to reversal.

Review of the grant or denial of reconsideration is subject to review for abuse of discretion. *Modazewlewski v. Dep't of Pub. Welfare*, 531 A.2d 585, 587 (Pa. Cmwlth. 1987). This Court may overturn a reconsideration decision only where the agency's decision demonstrates "bad faith, fraud, capricious action or abuse of power." *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712, 721-22 (Pa. Cmwlth. 2010).

Pennsylvania’s Medical Assistance Program (MAP) is “a state plan for funding the provision of medical care and services to individuals in need of government aid, conducted with the assistance of federal funding and subject to extensive federal regulation.” *Dep’t of Pub. Welfare v. Presbyterian Med. Ctr. of Oakmont*, 877 A.2d 419, 421 (Pa. 2005). The Department administers MAP and has promulgated rules, standards and regulations relating to eligibility and the nature and extent of assistance. *See* Section 403 of the Public Welfare Code.⁶

To be eligible for MAP assistance, the treatment must be “medically necessary.” The term medically necessary is defined in the Department’s regulations as a service, item, procedure or level of care that is: (i) compensable under the MAP; (ii) necessary to the proper treatment or management of an illness, injury or disability; and (iii) prescribed, provided or ordered by an appropriate licensed practitioner in accordance with accepted standards of practice. 55 Pa. Code § 1101.21. The definition of medically necessary is further clarified by 55 Pa. Code § 1101.21a, which states:

A service, item, procedure or level of care that is necessary for the proper treatment or management of an illness, injury or disability is one that:

- (1) Will, or is reasonably expected to, prevent the onset of an illness, condition, injury or disability.
- (2) Will, or is reasonably expected to, reduce or ameliorate the physical, mental or developmental effects of an illness, condition, injury or disability.
- (3) Will assist the recipient to achieve or maintain maximum functional capacity in performing daily activities, taking into account both the functional capacity of the recipient and those functional capacities that are appropriate for recipients of the same age.

⁶ Act of June 13, 1967, P.L. 31, *as amended*, 62 P.S. § 403.

Petitioner argues that the Department's denial of reconsideration is an abuse of discretion because the ALJ's decision is against the weight of the evidence. The ALJ based his decision to partially deny Petitioner's appeal on the Plan of Care report showing that Petitioner had demonstrated an increased compliance with requests, a decreased number of verbal protests, an increased attention to task and a decreased incidence of walking away from supervision. R.R. at 147a-52a. While we acknowledge that Petitioner provided evidence that medical necessity requires that she receive intensive TSS services, the ALJ weighed all the evidence of record and determined that Petitioner's demonstrated improvements merited a one hour per day reduction in services at her school. Such a weighing of evidence is fully within the ALJ's purview and does not demonstrate bad faith, fraud, capricious action or an abuse of power.

Next, Petitioner argues that the Department's refusal to grant reconsideration of the ALJ's decision violated the IDEA's requirement that special needs students receive their education in the least restrictive environment. The IDEA requires that for a state to receive federal assistance thereunder, it must provide a child with disabilities a "free appropriate public education." 20 U.S.C. § 1412. Free appropriate public education means special education and related services, provided at public expense and under public supervision, meeting the standards of the state educational agency and provided in conformity with an individualized education program. 20 U.S.C. § 1401(9). The state must provide special education and related services sufficient to meet the child's unique needs in the least restrictive environment. *Big Beaver Falls Area Sch. Dist. v. Jackson*, 624 A.2d 806 (Pa. Cmwlth. 1993). "It is the intent of the [State Board of Education] that children with disabilities be provided with quality *special education services*

and programs.” 22 Pa. Code § 14.102(a) (emphasis added). The Board adopted federal regulations to satisfy the statutory requirements under the IDEA. 22 Pa. Code § 14.102(a)(1). These regulations apply to local educational agencies. 22 Pa. Code §§ 14.101, 14.103.

On the other hand, TSS services are medical services administered by the Department, not educational services subject to administration by the State Board of Education or the Department of Education and governed by regulations promulgated pursuant to the IDEA. Therefore, the provision of TSS services is subject to the medical necessity standard established in relation to the MAP program rather than the IDEA’s least restrictive environment standard. We reject Petitioner’s argument that the final order of the Department violated the IDEA.

For the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
Judge

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	:	
Respondent	:	

ORDER

AND NOW, this 11th day of March, 2015, the order of the Department of Public Welfare is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge