

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

New Jersey Department of Human Services
Docket No. A-12-33
Decision No. 2447
March 26, 2012

DECISION

The New Jersey Department of Human Services (New Jersey) appeals a determination by the Centers for Medicare & Medicaid Services (CMS) with respect to a matter remanded to CMS in *New Jersey Dept. of Human Services*, DAB No. 2415 (2011). In that decision, the Board upheld in part and reversed in part a disallowance of federal financial participation (FFP) claimed by New Jersey under title XIX of the Social Security Act for school-based services provided during the period July 1, 1998 through June 30, 2001. The Board also remanded the appeal with respect to certain services in five sample claims.* The Board directed CMS to afford New Jersey a reasonable opportunity to provide additional evidence with respect to the remanded sample claims and to issue a new determination with respect to any of these sample claims for which New Jersey provided additional evidence. CMS afforded that opportunity but, after considering the evidence submitted by New Jersey, disallowed FFP for speech therapy services in claim #3-16 and for transportation services in claim #3-32. In its response to New Jersey's brief on appeal, CMS conceded that the transportation services in claim #3-32 are allowable. Accordingly, the sole issue before us is the allowability of the speech therapy services in claim #3-16. For the reasons discussed below, we uphold the disallowance with respect to these services.

CMS disallowed the services on the ground that the individual who provided them did not qualify as a speech pathologist within the meaning of the applicable Medicaid regulations. Section 440.110(c)(1) of 42 C.F.R. requires that speech therapy services be provided "by or under the direction of a speech pathologist or audiologist." A "speech pathologist" is defined as "an individual who meets one of the following conditions: (i) Has a certificate of clinical competence from the American Speech and Hearing Association. (ii) Has completed the equivalent educational requirements and work

* The disallowance was based on a projection from the sample to the universe of claims for the period in question. See DAB No. 2415, at 1.

experience necessary for the certificate. (iii) Has completed the academic program and is acquiring supervised work experience to qualify for the certificate.” 42 C.F.R. § 440.110(c)(2). In the proceedings in DAB No. 2415, New Jersey argued that both the individual who provided the speech therapy services in claim #3-16 as well as the individual who provided the same type of services for another claim New Jersey did not pursue on remand qualified as speech pathologists because they had once been certified by the American Speech and Hearing Association (ASHA), although their certification expired before the services were provided. The Board addressed this argument as follows:

[T]hese individuals did not qualify as speech pathologists under section 440.110(c)(2)(i) at the time they provided the services on the ground that they were ASHA-certified because they were not currently certified by ASHA. *See* CMS Br. at 29-30, 40. Nevertheless, if the requirements they met for ASHA certification were the same as the requirements for ASHA certification at the time they provided the services, they would have qualified as speech pathologists under section 440.110(c)(2)(ii) on the alternative ground that they met educational and work requirements equivalent to those required for ASHA certification. The record does not show when the individuals became ASHA-certified or whether there was any change in the ASHA requirements after that date. We therefore remand the appeal with respect to the speech therapy services in these two sample claims in order to give New Jersey a reasonable opportunity to provide additional evidence to show when the two individuals in question were certified and that the ASHA requirements did not change between their dates of certification and the time the services at issue were provided.

DAB No. 2415, at 24.

The parties’ submissions in the appeal of CMS’s decision on remand show the following undisputed facts. The service provider in claim #3-16, to whom we refer by the initials “KS,” was certified by ASHA as a speech language pathologist from April 1, 1990 through December 31, 1991. NJ Ex. ii at 39 (attached to NJ Br. dated 12/28/11). KS let her ASHA certification lapse after the end of 1991. *Id.* She became a State-licensed speech pathologist in 1991 and maintained her State license throughout the relevant period. *Id.* at 41. Between the time KS became ASHA-certified and October 2000, when she provided the services at issue, the requirements for ASHA certification as a speech language pathologist changed once—in 1993. As relevant here, when KS became ASHA-certified, a master’s degree or equivalent 60 semester hours in specified areas was required for certification. As of 1993, a master’s or doctoral degree with 75 hours of coursework (including basic sciences) was required. In addition, when KS became ASHA-certified, 300 hours of clinical practicum were required for certification. As of 1993, 350 hours of clinical practicum in addition to 25 hours of observation were required. NJ letter dated 1/6/12, 1st attachment (originally Exhibit 1 to CMS’s decision

on remand) at 1. An individual who became ASHA-certified in 1990 could maintain his or her certification indefinitely by paying annual dues and meeting “certification maintenance requirements.” *Id.* at 2. An individual whose ASHA certification had lapsed in 1991 could have been reinstated in 2000 only by (1) meeting the new education requirements specified above or (2) retaking and passing the “Praxis exam” required for initial certification and either (a) completing a “modified Clinical Fellowship Year” or (b) submitting three letters of recommendation. *Id.*

Since the requirements for ASHA certification changed in 1993, the mere fact that KS was ASHA-certified from April 1, 1990 through December 31, 1991 is not sufficient to show that, when the services were provided in October 2000, KS “had completed the equivalent educational requirements and work experience necessary” for ASHA certification, as provided in section 440.110(c)(2)(ii).

There is no other basis in the record for finding that KS qualified as a speech pathologist under this regulatory provision. First, New Jersey does not assert that KS met the increased educational requirements that were necessary for ASHA certification as of 1993 either at the time she became ASHA-certified or thereafter. New Jersey merely states that KS’s master’s degree transcript “did satisfy ASHA when she was initially certified by them” but that New Jersey “did not obtain” that transcript “for ASHA to re-review.” NJ Br. at 5. Second, with respect to the increased work experience requirements necessary for ASHA certification as of 1993, New Jersey asserts only that KS would have obtained an additional 75 hours of “clinical experience” “during her practice as an ASHA certified provider and thereafter as a State licensed provider.” *Id.* Even assuming this work experience was equivalent to the additional work experience requirement imposed by ASHA in 1993, however, KS did not qualify as a speech pathologist under section 440.110(c)(2)(ii) when she provided the services in October 2000 because she had not completed the equivalent educational requirements necessary for an ASHA certificate.

New Jersey nevertheless argues that section 440.110(c)(2)(ii) does not necessarily refer to the requirements for ASHA certification in effect at the time the services claimed are provided. According to New Jersey, KS—

met the ASHA requirements and even after she didn’t renew her certification with ASHA, she had met the equivalent of ASHA’s requirements. Once [KS] met the ASHA certification requirements, she was a qualified provider and did not need to meet new basic qualifying requirements for those wanting to newly-qualify for ASHA certification.

NJ Br. at 4-5; *see also* NJ Reply Br. at 2 (stating that because KS “met the eligibility requirements when she became certified in 1990, and would not have had to re-meet those requirements if she had maintained her certification, the lack of an evaluation under

the new educational and clinical hours does not cause her to not have met the ASHA equivalent requirements”).

New Jersey points to no support in the language or purpose of the regulation for reading it to treat as a qualified speech pathologist an individual who meets only outdated ASHA certification requirements at the time the services are provided. The regulation reflects CMS’s determination of what is necessary to ensure that quality speech therapy services will be provided. Section 440.110(c)(2) uses the present tense in defining the term “speech pathologist” as someone who “meets” one of the specified conditions. In addition, it furthers the goal of quality services to read the regulation as meaning that the provider must have education and work experience consistent with current standards at the time the services are provided. It is irrelevant that KS would not have had to meet the certification requirements in effect when she provided the services if she had maintained her ASHA certification after 1991 since New Jersey concedes she did not maintain her ASHA certification. Moreover, New Jersey does not allege, much less show, that KS met the “certification maintenance requirements” ASHA said it imposes for continued certification (NJ letter dated 1/6/12, 1st attachment at 2). Thus, it is not even clear that KS would have been able to maintain her ASHA certification had she sought to do so.

New Jersey also argues that the services in question are allowable because KS “was also State-licensed and was performing services which were referred by a different ASHA certified provider[.]” NJ Br. at 6. This argument has no merit. In DAB No. 2415, the Board rejected New Jersey’s argument that a State-licensed speech pathologist qualified as a speech pathologist within the meaning of section 440.110(c)(2). DAB No. 2415, at 21-24. The Board also rejected New Jersey’s argument that services were provided “under the direction of a speech pathologist” and thus allowable under section 440.110(c)(1) where an ASHA-certified speech language pathologist referred the student for speech therapy services. DAB No. 2415, at 25-26. New Jersey does not explain why a different result is warranted here.

Finally, New Jersey points out that KS had a speech language specialist “endorsement by the Department of Education for those with Masters degrees[.]” NJ Br. at 2, citing DHS1367 (in New Jersey’s exhibits in DAB No. 2415). This may establish that KS had a master’s degree. As discussed above, however, the mere fact that she had a master’s degree does not establish that KS met the educational requirements for ASHA certification as of the time the services were provided. Moreover, New Jersey has not established that a speech language specialist qualifies as a speech pathologist within the meaning of section 440.110(c)(2). Indeed, CMS asserts, and New Jersey does not dispute, that the requirements for State certification as a speech language specialist are even lower than the requirements for a State-licensed speech pathologist who, as noted above, does not qualify as a speech pathologist under section 440.110(c)(2). CMS Br. at 2.

Conclusion

For the reasons stated above, we uphold the disallowance with respect to the speech therapy services in claim #3-16.

_____/s/
Stephen M. Godek

_____/s/
Sheila Ann Hegy

_____/s/
Judith A. Ballard
Presiding Board Member