

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Oklahoma Health Care Authority    DATE: March 12, 2008  
Docket No. A-08-52  
Ruling No. 2008-4

**Ruling on Request for Partial Reconsideration**

On December 27, 2007, we issued a decision, DAB No. 2140, in the appeal of the Oklahoma Health Care Authority (OHCA) from a determination by the Centers for Medicare & Medicaid Services (CMS) disallowing \$2,035,381 in federal financial participation (FFP) claimed under title XIX of the Social Security Act for school-based services. As relevant here, we upheld the disallowance of \$1,131,859 based on the finding that occupational therapy services and speech language therapy services were provided without a prescription or a referral, respectively, "by a physician or other practitioner of the healing arts within the scope of his or her practice under State law," as required by 42 C.F.R. § 440.110(b) or (c). On February 1, 2008, OHCA requested that the Board reconsider or clarify this part of DAB No. 2140 and remand the case to CMS with instructions. In particular, OHCA argues that the Board should have found that the requisite prescriptions or referrals were made by occupational therapists and speech language pathologists where they signed the child's IEP or developed a treatment plan for providing the services in question. OHCA also asks that the Board clarify a statement made in DAB No. 2140 that OHCA says incorrectly suggests that the prescription or referral had to be made at the time the child was identified as needing health-related services. In its response, CMS asks that the Board uphold the disallowance at issue.

The Board may reconsider a decision if "a party promptly alleges a clear error of fact or law." 45 C.F.R. § 16.13. As explained below, we conclude that our decision was not based on a clear error of fact or law and, accordingly, we reject OHCA's request for reconsideration. We have also clarified the statement in our decision as requested by OHCA. That clarification, however, does not support OHCA's request for reconsideration, as it does not alter the result or the rationale or represent any error in the original wording.

## Discussion

In order to satisfy the regulatory requirement for a prescription for occupational therapy or a referral for speech therapy, the person prescribing or referring must 1) be a physician or other licensed practitioner of the healing arts and 2) have authority under State law to prescribe or make a referral for the services. It is undisputed that CMS has interpreted section 440.110 as permitting the IEP to "be considered as the prescription for occupational therapy services and the referral for speech therapy services if an individual on the team of medical professionals signing the IEP has the authority to prescribe or refer under state law." See DAB No. 2140, at 4 (quoting disallowance letter).

In the proceedings leading to DAB No. 2140, OHCA argued that occupational therapists and speech language pathologists were "on the team of medical professionals signing the IEP," within the meaning of CMS's policy, whenever the IEP included a treatment plan for occupational therapy or speech therapy, so that there was a prescription or referral even if the occupational therapist or speech language pathologist did not sign the IEP.<sup>1</sup> The Board addressed that argument as follows:

In essence, OHCA takes the position that an occupational therapist or speech language pathologist is automatically a member of the IEP team where a child receives occupational therapy or speech language therapy. Even assuming that an occupational therapist or speech language pathologist is a "licensed practitioner of the healing arts" within the meaning of section 440.110(a) or section 440.110(c) (which OHCA did not show), OHCA's position appears to be contrary to the IDEA regulations. Those regulations indicate that affirmative action must be take by the parent or the local education agency to include related services personnel on the IEP team. . . . Moreover, although an occupational therapist or speech language therapist who is providing (or overseeing the provision of) those types of services to a student might logically be considered a member of the student's team once services commence, these providers would not necessarily have been on the IEP team at the time the child was

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<sup>1</sup> OHCA did not argue that section 440.110 requires a broader view of what constitutes a prescription or referral than set out in CMS's policy.

identified as needing a referral or prescription for such services.

DAB No. 2140, at 6.

OHCA now argues that "the Board misconstrues the process that gives rise to an IEP and appears to impose requirements more stringent than CMS policy" by requiring that the providers have taken part "in the initial 'identification' of the child's needs." OHCA Request for Reconsideration (RR) at 1. OHCA states that "it cannot be the case that related service providers must be on the IEP team 'at the time the child was identified' for services, . . . because there is no IEP team assembled at that preliminary stage." Id. at 4. According to OHCA, "an initial assessment team decides that the child may require related services such as occupational or speech therapy, then the school refers the child to a licensed specialist for evaluation, and, if necessary, the development of a plan of treatment to be included in the IEP." Id. at 5 (emphasis in original). OHCA points out that "the IDEA regulations expressly contemplate that the professionals involved in the child's initial evaluation may not necessarily be the same as members of the IEP team." Id.<sup>2</sup> Nothing in our decision was intended to suggest that an occupational therapist or speech language pathologist must be on the team that initially assesses whether a child may require health-related services in order to be considered as being on the team of medical professional signing the IEP. We did not lay down a rule about exactly when the relevant medical professional must have become part of the IEP team in order for the IEP to be considered a valid prescription or referral for a particular type of service. The purpose of requiring a prescription or referral, however, is to ensure that the services are authorized by a

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<sup>2</sup> OHCA also states that "[i]t is not OHCA's position that related service providers 'automatically' become members of the IEP team." RR at 5, quoting DAB No. 2140, at 6. The Board reasonably thought this was OHCA's position since OHCA did not cite to any IEPs for specific children showing that an occupational therapist or speech language pathologist was on the IEP team and instead relied on regulations providing that the IEP team includes "related services personnel as appropriate." As we pointed out in our decision, however, the regulations further "indicate that affirmative action must be taken by the parent or the local education agency to include related services personnel on the IEP team." DAB No. 2140, at 6.

qualified individual, i.e., a licensed practitioner of the healing arts, before the services are provided. While the treatment plans for some of the services in question here may have been developed by licensed practitioners of the healing arts, even that would not necessarily be true in every case. Thus, the Board's point was that, for the IEP to meet the purpose of the regulation, such an individual must have been on the IEP team and have signed off on the referral or prescription decision reflected in the IEP. Accordingly, the fact that a child has a treatment plan or eventually receives a certain type of service under an IEP is not enough to show that the need for the service was documented as required by a licensed practitioner of the healing arts writing a prescription or making a referral for the service.

OHCA also asserts that "where a related service provider actually signed the standardized IEP form, the record could not be clearer that the individual was a member of the IEP team." RR at 6 (emphasis in original). OHCA notes that CMS had pointed out in the earlier proceedings that there were 48 IEPs signed by a speech pathologist and five signed by another type of related service provider. Id. This is not a sufficient basis for finding that the Board made a clear error in determining that OHCA had not shown that the \$1,131,859 in FFP claimed for speech therapy or occupational therapy provided pursuant to these IEPs was allowable. It is a fundamental principle that a state has the initial burden to document its costs and to show that its claim for reimbursement is proper. See, e.g., California Dept. of Health Services, DAB No. 1606 (1996); see also 45 C.F.R. § 74.51-53 (1998). OHCA has not met this burden since neither its prior briefing nor its reconsideration request cite to where in the record any of these 53 IEPs are, relate them to specific claims for services, or state how any of these IEPs functioned as a prescription for occupational therapy services or a referral for speech pathology services.

As indicated above, moreover, the regulation requires that the person prescribing occupational therapy or making a referral for speech therapy be a physician "or other licensed practitioner of the healing arts" and have authority under State law to prescribe or refer, respectively. In DAB No. 2140, we stated that OHCA had not shown that an occupational therapist or speech language pathologist is a licensed practitioner of the healing arts within the meaning of section 440.110(a) or section 440.110(c), respectively. DAB No. 2140, at 6. OHCA now argues that an October 2007 notice of proposed rulemaking broadly defining the term "other licensed practitioner of the healing arts" makes clear that CMS always intended this term to encompass

occupational therapists and speech language pathologists licensed under State law. RR at 2, citing 72 Fed. Reg. 45,201, 45,211 (Aug. 13, 2007).<sup>3</sup> While the proposed rule may encompass occupational and speech language pathologists, it does so only if state licensure allows them to both diagnose and treat individuals.

Even if an occupational therapist or speech language pathologist could properly be considered a practitioner of the healing arts licensed to diagnose and treat individuals, section 440.110 requires that it be "within the scope of his or her practice under State law" to prescribe occupational therapy or make a referral for speech therapy. According to OHCA, the Board did not "reject the State's showing that occupational therapists and speech language pathologists have the necessary authority under state law to prescribe or refer within their own specialities." RR at 2. OHCA made no such showing, however, failing to even allege in the briefs it submitted in its appeal that occupational therapists or speech language pathologists had the requisite authority. Indeed, the Board stated that "[w]e express no opinion as to what would be required to show that a psychologist or other licensed practitioner of the healing arts had the authority to make referrals for speech language therapy or another health-related service." DAB No. 2140, at 5, n.4.

OHCA now cites an Oklahoma statute that OHCA describes as permitting speech pathologists to make self-referrals for speech pathology services such as the ones in question here. RR at 2, citing Okla. Stat. tit. 59, § 1604(C). Section 1604(C) was originally enacted in 1973 and last amended in 2004. OHCA did not specifically allege that the version it described was in effect during the relevant period (July 1, 1999 through June 30, 2000), however. OHCA also cites a publication that OHCA describes as stating that no prescription or referral is necessary under Oklahoma law for the provision of occupational therapy services. RR at 2, citing *Occupational Therapy and Physical Therapy in Oklahoma Schools, Technical Assistance Document*, Department of Rehabilitation Science, University of Oklahoma Health Sciences Center, at 49 (and providing a web

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<sup>3</sup> Under the proposed rule, which has not yet been made final, a licensed practitioner of the healing arts is "any health practitioner or practitioner of the healing arts who is licensed in the State to diagnose and treat individuals with the physical or mental disability functions limitations at issue, and operating within the scope of practice defined in state law."

address to access the document rather than a copy of the document). This publication is undated, however, and OHCA offers nothing to establish its relevance to the disallowance period. Moreover, simply because Oklahoma law may not require a prescription for occupational therapy does not obviate the requirement in the federal regulations for a prescription.

Finally, OHCA offers no explanation of its failure to mention in the prior proceedings either the Oklahoma statute on speech therapy referrals or the statement in the technical assistance document about prescriptions for occupational therapy.<sup>4</sup> In the absence of any explanation, we would not consider this statute or publication to be a basis for reconsideration, even if they were on point. The purpose of the reconsideration process is to allow the Board to correct clear errors of law or fact made by the Board, not to permit the parties to relitigate a case.

### Conclusion

For the reasons discussed, we deny OHCA's request for reconsideration.

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/s/  
Judith A. Ballard

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/s/  
Constance B. Tobias

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/s/  
Leslie A. Sussan  
Presiding Board Member

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<sup>4</sup> OHCA cited the technical assistance document for another point in its prior briefing. OHCA Opening Br., Docket No. A-05-117, at 20.