

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[FILED: January 15, 2015]

KATHERINE AMBROSINI¹ on behalf :
of her son, THEO BROWN :

v. :

STATE OF RHODE ISLAND :
DEPARTMENT OF HUMAN :
SERVICES :

C.A. No. PC-2013-3036

DECISION

MATOS, J. Katherine Ambrosini (Appellant), on behalf of her son, Theo Brown (Theo), appeals a decision (the Decision) of the Rhode Island Department of Human Services (DHS) finding that Theo is no longer eligible for Medical Assistance (MA) benefits under the Katie Beckett Program² (the Program). The Appellant argues that the Decision is clearly erroneous, arbitrary and capricious because the hearing officer adopted a new set of standards and failed to consider all of the evidence. Jurisdiction is pursuant to G.L. 1956 § 42-35-15. For the reasons set forth in this Decision, this Court remands this case to DHS for further proceedings consistent with this Decision.

¹ The Appellant filed this appeal as Katherine Ambrosini. However, at the DHS hearing, Appellant stated her name as Kathleen Ambrosini. (Hr’g Tr. at 1, Dec. 11, 2012.) For the purposes of this Decision, Appellant is referred to as Katherine Ambrosini.

² The Katie Beckett Program is part of the federal Medicaid program that permits disabled children to receive services at home, which would normally be provided in an institutional setting. See DHS Regulation § 0394.35. The Program provides any type of service that would typically be administered in a hospital or other institutional setting, but are admissible in a home setting. See id.

I

Facts and Travel

Theo was born on XX/XX/1998. At age two he was diagnosed with autism, a motor speech disorder (apraxia of speech), and lead poisoning. (Hr'g Tr. at 23, Dec. 11, 2012.) As a result, Theo was non-verbal and his behavior was erratic. Id. at 23-24. Consequently, Theo began speech therapy, occupational therapy, physical therapy, and treatments for lead poisoning. Id. By age three, he had fled from his home on three separate occasions. Id. at 24. Thereafter, Theo attended school year round and began receiving services at home. Id.

In 2002, Theo began receiving Katie Beckett services. (Ex.³ 1, CEDARR Clinical Narrative, Jan. 25, 2012.) In recent years, he has received twenty (20) hours per week of home care to improve communication, behavioral, and psychosocial skills; twenty (20) hours per week of Personal Assistance Services and Supports (PASS), where a social worker helps Theo participate in social situations; and Respite Services, to help provide care for Theo. (Hr'g Tr. at 39-40.) As a result of his diagnosis, Theo continues to suffer from a variety of impairments, including a tendency to elope when stressed; difficulty sustaining attention; impulsivity; low frustration tolerance; irritability; social skills deficits; and aggressive behavior. Id. at 25-27. Theo also continues to struggle with speech and language skills. (Ex. 10, Neuropsychological Evaluation of Dr. Nicole Shay at 2, Aug. 15, 2012.)

After review for recertification of Theo's Katie Beckett services, DHS rendered a decision on September 14, 2012, determining that Theo was no longer qualified to receive services. (DHS Decision at 9-10, May 3, 2013.) The agency held that Theo was not disabled or in need of the level of care requiring special interventions and intensive services typically

³ All exhibits referenced in this Decision refer to Appellant's memorandum.

provided in an institution. Id. at 11. Appellant appealed DHS's denial and requested an Administrative Hearing (Hearing) on September 15, 2012.

The Hearing was held on December 11, 2012 before Hearing Officer Michael J. Gorman (Hearing Officer). (Hr'g Tr. at 1.) At the Hearing, Appellant was represented by Attorney Nicholas Long (Attorney Long), and the agency presented Michelle Bouchard, RN (Nurse Bouchard), Katie Beckett Unit, Dr. Julie Meyers (Dr. Meyers), Pediatrician, Katie Beckett Unit, and Frank Canino (Dr. Canino), Psychologist. (Hr'g Tr. at 1-2.)

Nurse Bouchard explained Theo's recertification process. Id. at 4. She testified that DHS had to do a new evaluation because the agency never received the financial redetermination paperwork from Appellant. Id. Nurse Bouchard stated that a clinical evaluation was conducted and that two reviewers analyzed the information. Id. at 6.

Subsequently, Dr. Meyers testified regarding her review of Theo's records for his recertification application on September 25, 2012. Id. at 10. Dr. Meyers noted that she reviewed a physician form completed on July 19, 2012 by Dr. Arena,⁴ Theo's primary care doctor. Id. She also reviewed a parent questionnaire completed July 6, 2012; Theo's IEP from May 5, 2011; Theo's PASS plan from December 2011; a report from Bradley Hospital from January 2012; a Comprehensive Evaluation Diagnosis Assessment Referral and Reevaluation (CEDARR) care plan from January 25, 2012; Theo's academic records from Barrington Public Schools; and a psychological evaluation from Dr. Shay. Id. at 10-12. After reviewing the materials, Dr. Meyers testified that she did not feel that the child was severe enough in any of the individual diagnoses to qualify as disabled for SSI eligibility. Id. at 14. When a child's diagnoses do not meet the disability requirements, Dr. Meyers testified, the child's disability eligibility is reviewed over six

⁴ The hearing transcript references "Dr. Urina." (Hr'g Tr. 10.) However, on the physician form the doctor spells her own name as Dr. Arena. (Ex. 5, Physician Evaluation Form, July 19, 2012.)

functional domain areas. Id. In order to meet disability by this method, a child needs to have marked impairments in two out of the six domains. Id. Dr. Meyers testified that she determined Theo to have a marked score in the domain of interacting and relating to others. Id. at 15. However, she did not find Theo to have a marked score in any other domain, including the domains of acquiring and using information; attending and completing tasks; moving about and manipulating objects; and caring for himself. Id. Thus, she found that Theo only had one marked score and did not meet the disability criteria required for Program services. Id. at 16.

Additionally, Dr. Meyers opined that Theo did not meet the level of care required to receive services because she did not find Theo to have two substantial functional limitations. Id. Dr. Meyers acknowledged that Theo needs extra help with self-care and has learning issues, but she testified that neither is severe enough to meet the level of care criteria. Id. Dr. Meyers determined that Theo's impairments do not cause significant disruption in functioning and he is not a serious risk to himself or others. Id. Thus, Dr. Meyers determined that in her opinion, Theo does not meet a psychiatric hospital level of care. Id.

Subsequently, Dr. Canino testified on behalf of DHS. Id. He reviewed Theo's records from August 2012, and explained that the information did not include certain elements about Theo's neuropsychological condition. Id. Dr. Canino also testified that he reviewed Theo's CEDARR report, the Bradley Hospital report, Theo's academic records, and Theo's neuropsychological evaluation. Id. at 16-17. Dr. Canino attested that the recommendations from the evaluations indicate that Theo's behavior is consistent with ADHD and Asperger's, but, in his opinion, the reports do not provide enough information about all areas of Theo's life. Id. at 19. Dr. Canino testified that the neuropsychological assessment recommends considering a placement at Bradley Hospital. Id. However, Dr. Canino noted such a placement is a serious

recommendation and that he did not have enough information to determine if the child met the level of care criteria to support the recommendation. Id.

Attorney Long, testifying on behalf of the Appellant, explained that the Hearing was the first time he heard any information supporting the denial of Theo's services. Id. at 21. Attorney Long maintained that the denial letter contained no explanation detailing the reasons for Theo's denial of services. Id. at 22.

The Appellant then testified as to Theo's condition. Id. at 23. The Appellant explained that her son has progressed, but his progress is due to the intervention and support services he has received. Id. at 25-26. The Appellant reported that her son still elopes and continues to have violent behavior. Id. at 27. She explained that Theo requires constant supervision, and without supervision, his behavior regresses. Id. at 28. During the time Theo was not receiving services, Appellant described Theo's behavior as unmanageable. Id. at 30. The Appellant emphasized that Theo needs the services to function. Id. The Appellant explained that the service providers have more effective abilities with Theo because they are skillfully trained and able to give Theo their full focus. Id. at 39. Thereafter, the Hearing concluded, and the Hearing Officer agreed to leave the record open for thirty (30) days to allow Appellant to submit additional material. Id. at 43.

The Hearing Officer issued the Decision on May 3, 2013, reversing the determination that Theo was not disabled, and affirming the finding that Theo did not meet the requisite level of care standard. (DHS Decision at 14.) After reviewing the evidence and testimony submitted by the parties, the Hearing Officer outlined the two-prong standard for determining a child's eligibility for Katie Beckett assistance: the child must be "disabled" as defined by federal law, and receiving a sufficient level of care as enumerated in the Guidelines. Id. The Hearing Officer

found that Theo satisfied the first requirement because Theo's impairment "interferes seriously with his ability to independently initiate, sustain, or complete domain-related activities." Id. Furthermore, "his day-to-day functioning is seriously limited." Id.

The Hearing Officer noted that the remaining issue on appeal was whether Theo met the level of care criteria of the Program. Id. He stated that the level of care guidelines require a need for hospitalization or care in a nursing facility. Id. Based on the record, the Hearing Officer determined that Theo did not meet the requirement for an institution because he is clinically stable and does not require daily skilled or complex medical care. Id. The Hearing Officer found that the record did not support medical, behavioral, and developmental problems to meet the care requirement to qualify for a psychiatric hospital, in order to receive Program services. Id. at 15. Thus, the Hearing Officer affirmed the agency's determination that Theo does not meet the level of care requirement. Id. Since the Hearing Officer found that Theo only met one of the two required criteria for recertification of the Program, he denied Appellant's appeal. Id.

Following the decision, Appellant filed a Motion for Reconsideration and a request for a stay pending the outcome of an appeal with the DHS Executive Counsel. Both motions were denied on June 4, 2013. Thereafter, Appellant filed an appeal in Superior Court with a request for a stay pending the outcome of the appeal. The stay was granted on June 28, 2013.

On appeal, Appellant avers that the Decision is clearly erroneous in view of the evidence on the record, and that the Decision is arbitrary and capricious because the Hearing Officer adopted a new set of standards and concluded without consideration of all the evidence. The agency contends that based on the evidence, the Hearing Officer correctly found that Theo did not meet the level of care requirement to qualify for Katie Beckett services.

II

Standard of Review

Pursuant to § 42-35-15, the Superior Court is granted appellate jurisdiction to review final orders of state administrative agencies. In undertaking that review, the Superior Court “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” Sec. 42-35-15(g); Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992). Section 42-35-15(g) of the APA states:

“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- “(1) In violation of constitutional or statutory provisions;
- “(2) In excess of the statutory authority of the agency;
- “(3) Made upon unlawful procedure;
- “(4) Affected by other error or law;
- “(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- “(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

In reviewing an agency decision, this Court is limited to an examination of the certified record in deciding whether the agency’s decision is supported by substantial evidence. Johnston Ambulatory Surgical Assocs. v. Nolan, 755 A.2d 799, 804-05 (R.I. 2000) (citation omitted). Substantial evidence has been defined as “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla but less than a preponderance.” Newport Shipyard, Inc. v. R.I. Comm’n for Human Rights, 484 A.2d 893, 896 (R.I. 1984). If this Court finds that substantial evidence exists in the record, it “is required to uphold the agency’s conclusions.” Auto Body Ass’n of R.I. v. State of R.I. Dep’t of Bus.

Regulation, 996 A.2d 91, 95 (R.I. 2010) (quoting Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)) (internal quotation marks omitted).

This Court must uphold the agency’s conclusions even in cases where, after reviewing the entire certified record, the Court “might be inclined to view the evidence differently and draw different inferences from those of the agency below.” Barrington Sch. Comm., 608 A.2d at 1138. This Court may “reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record.” Kachanis v. Bd. of Review, Dep’t of Emp’t & Training, 638 A.2d 553, 556 (R.I. 1994) (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)).

Remanding a case to the agency is appropriate “[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it.” Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); see also Champlin’s Realty Assocs. v. Tikoian, 989 A.2d 427, 448 (R.I. 2010). Our Supreme Court has held that the “authority to remand the case for further proceedings is a broad grant of power . . . to correct deficiencies in the record and thus afford the litigants a meaningful review.” Lemoine v. Dep’t of Mental Health, Retardation & Hospitals, 113 R.I. 285, 290, 320 A.2d 611, 614 (1974).

III

Determining Eligibility under the Katie Beckett Program

The DHS is an agency within the Executive Branch of State Government that is responsible for the management, supervision, and control of various social service programs. G.L. 1956 §§ 42-12-1, 40-8-1, 40-8-3. Specifically, DHS is responsible for public financial assistance programs. Sec. 42-12-4. The DHS is authorized to create rules and regulations as it deems necessary and proper for the administration of its medical assistance program; however, in

order to receive federal funding, DHS's rules and regulations must conform to the provisions of the federal Social Security Act, 42 U.S.C. §§ 1396 et seq., and any rules or regulations promulgated pursuant thereto. 42 U.S.C. § 1396; § 40-8-13.

The Katie Beckett Program is a medical assistance program that provides Medicaid to children 19 years of age or younger “who would be eligible for Medicaid if they were in a medical institution, and who are receiving, while living at home, medical care that would be provided in a medical institution.” 42 C.F.R. § 435.225; see also 42 U.S.C. § 1396a(e)(3); DHS Regulation § 0394.35. A child is eligible for Katie Beckett services when the child is (1) disabled in accordance with federal law, and (2) “requires a level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded.” 42 U.S.C § 1396a(e)(3); see also DHS regulation § 0394.35.05.

Federal law considers a child to be disabled “if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(C)(i). A “physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.” Id. at § (a)(D). In order to determine if a child meets the level of care required, DHS issued Guidelines to follow. See Guidelines § 3.0, Aug. 1, 2006. The Guidelines offer general guidance for four different levels of care: Hospital, Psychiatric Hospital, ICF/MR, and Nursing Facility. See Guidelines § 3.0, Aug. 1, 2006. The Guidelines offer specific eligibility requirements for each level of care and reference applicable federal statutes and regulations. Id. at Appendixes A-D.

IV

Analysis

On appeal, Appellant contends that DHS must have adopted de facto new standards in reviewing Theo's recertification because his condition has not changed from the time he originally qualified for Katie Beckett services. The DHS counters that the evidence in the record supports that Theo has improved and he no longer meets the level of care requirement. This Court must determine whether the Hearing Officer's decision to terminate Theo's services was clearly erroneous or arbitrary or capricious.

The Rhode Island Supreme Court has held that when an agency changes its standards the agency "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." New England Tel. & Tel. Co. v. Pub. Utilities Comm'n, 446 A.2d 1376, 1389 (R.I. 1982) (finding a public utilities commission acted arbitrarily and capriciously when it altered its policy without supplying notice or reasoning) (internal citation omitted). This Court has reiterated that when an agency departs from a prior ruling, "it must explain its reasons and do more than enumerate factual differences, if any, between . . . cases; it must explain the relevance of those differences." Columbia Broad. Sys., Inc. v. F.C.C., 454 F.2d 1018, 1026 (D.C. Cir. 1971). "The rule of law is intended to eliminate the appearance as well as the reality of arbitrariness." Id. at 1027.

It is well settled that an agency decision must contain findings of fact "accompanied by a concise and explicit statement of the underlying facts supporting the findings." Sec. 42-35-12. "An administrative decision that fails to include findings of fact required by statute cannot be upheld." Sakonnet Rogers, Inc. v. Coastal Res. Mgmt. Council, 536 A.2d 893, 896-97 (R.I. 1988) (citing East Greenwich Yacht Club v. Coastal Res. Mgmt. Council, 118 R.I. 559, 569, 376

A.2d 682, 687 (1977)). “The absence of required findings makes judicial review impossible . . . and fails to satisfy the statutory requirements of § 42-35-12.” East Greenwich Yacht Club, 118 R.I. at 568, 376 A.2d at 687.

In his decision, the Hearing Officer determined that the record reflects that Theo is clinically stable; he has made improvements in school and the community; and he does not require skilled nursing care, or care that would put him in danger of being institutionalized if he did not receive the care at home. (DHS Decision at 14.) The Hearing Officer made findings of fact that merely reiterated the procedural posture of the case. Id. at 9; see New England Tel. & Tel. Co., 446 A.2d at 1389 (finding that when an agency changes policies, it must supply a reasoned analysis). He failed to explain how Theo’s condition has changed or improved, and failed to provide specific factual statements to support his conclusion that Theo did not meet the hospital, nursing facility, or psychiatric hospital level of care. (DHS Decision at 10-14); see § 42-35-12; see also Florida Power & Light Co., 470 U.S. at 744 (holding remand is appropriate where the agency has not considered all relevant factors).

Moreover, the Hearing Officer did not address how he weighed countervailing evidence, including: the neuropsychological assessment recommendation for placement at Bradley Hospital; Theo’s school records that he has difficulty at school; and Appellant’s testimony that Theo continues to elope, and that he regresses without Program services. See Hr’g Tr. at 17-19, 27-30; see also Florida Power & Light Co., 470 U.S. at 744. Of particular significance is the testimony of Dr. Canino in which he confirms that the neuropsychological assessment recommends considering a placement at Bradley Hospital. However, Dr. Canino does not opine on the propriety of the recommendation because, according to him, he does not have enough information to determine if the child meets the level of care criteria to support the

recommendation. Hr’g Tr. at 19. Likewise, the Hearing Officer does not address the recommendation. An analysis that addresses the Bradley recommendation, however, is certainly relevant to a determination of whether the child “requires a level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded.” 42 U.S.C § 1396a(e)(3).

This Court will not search the record for evidence to support DHS’s decision or “decide for [itself] what is proper in the circumstances.” Hooper v. Goldstein, 104 R.I. 32, 44-45, 241 A.2d 809, 815-16 (1968). Our Supreme Court has held that the Superior Court has the power to remand an administrative appeal “to correct deficiencies in the record and thus afford the litigants a meaningful review.” Lemoine, 113 R.I. at 290, 320 A.2d at 614 (remanding where the hearing officer failed to consider certain evidence, and thus, did not provide an adequate record). “These requirements exist . . . because the parties as well as the court are entitled to know and should not be required to speculate on the basis for a board’s decision.” Hooper, 104 R.I. at 45, 241 A.2d at 816. Accordingly, this Court remands the Decision to DHS for findings of fact supporting conclusions of law. See id.; see also Lemoine, 113 R.I. at 290, 320 A.2d at 614; East Greenwich Yacht Club, 118 R.I. at 568, 376 A.2d at 687.

V

Conclusion

After review of the entire record, this Court finds that the Decision of the agency is in violation of statutory provisions. This Court remands this case to DHS for findings of fact regarding Theo’s eligibility for Katie Beckett services under the eligibility standard enumerated in the Guidelines.

As this matter is remanded, Appellant’s request for attorney’s fees is hereby reserved pending a final resolution of this case. Counsel shall submit the appropriate judgment for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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State of Rhode Island Department of Human Services

CASE NO: PC 2013-3036

COURT: Providence County Superior Court

DATE DECISION FILED: January 15, 2015

JUSTICE/MAGISTRATE: Matos, J.

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