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S.L.,  
Petitioner,

v.

DEPARTMENT ON DISABILITY  
SERVICES, REHABILITATION SERVICES  
ADMINISTRATION  
Respondent

Case No.: 2011-DDS-000XX

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**FINAL ORDER GRANTING PARTIAL RELIEF**

**I. Introduction**

In this case, Petitioner S.L. and Respondent District of Columbia Department on Disability Services, Rehabilitation Services Administration, have entered into an agreement to provide Rehabilitation Services (“RSA”) benefits to Ms. S.L. under an individualized plan for employment (“IPE”), dated June 6, 2011. The sole remaining issue is whether Respondent must provide dental service benefits under the IPE before the Fall 2011 Semester begins, based on the current status of Respondent’s determination of comparable benefits.

Respondent has filed a Brief on Comparable Benefits, and requested dismissal of the hearing request. Ms. S.L. has filed a Reply, in which she also seeks an order granting relief. I deem both pleadings to be cross-motions for summary adjudication.

In this Final Order, I will grant partial relief to Ms. S.L. as to dental services. In order to prevent unreasonable delay, I will require Respondent to commit funding under the IPE to a dental treatment plan within one month, or August 14, 2011. If no Medicaid provider can provide this dental service by that time, Respondent must fund the program offered by Dr. Smith, even if he is not an authorized Medicaid provider. 34 C.F.R. § 361.53(c).

I will not order Respondent to immediately fund the services of Dr. Stanley Smith, Ms. S.L.'s preferred dentist, for two reasons: (1) the record does not show that Dr. Smith is an authorized Medicaid provider; and (2) Dr. Smith's own treatment plan shows that it requires ten visits and therefore cannot be completed before the Fall 2011 Semester begins.

Since this Order resolves the final issue remaining between the parties, I will dismiss all other claims with prejudice. If Ms. S.L. is dissatisfied with any future actions taken with regard to her RSA services, she may request another hearing.

The Procedural History of this case is set forth in Appendix A.

In the next section, I will analyze the Standard of Review, the Undisputed Material Facts, Discussion and Resolution of the Arguments, and the Summary of this decision.

## **II. Analysis**

### **A. Standard of Review**

OAH Rule 2801.1 provides that where a procedural issue is not specifically addressed in the OAH Rules of Procedure, an administrative law judge may be guided by the District of Columbia Superior Court Rules of Civil Procedure.

Respondent has entitled its pleadings, “Agency Brief on Comparable Benefits,” and “Agency’s Reply Brief to Petitioner’s Reply (Opposition) to the Agency’s Brief on Comparable Benefits.” Respondent seeks dismissal of this case.

Ms. S.L. has entitled her pleading, “Petitioner’s Reply to Respondent’s Brief on Comparable Benefits That Included a Motion to Dismiss.” Ms. S.L. seeks an order requiring Respondent to immediately fund her dental services under the RSA program, and to seek Medicaid reimbursement for the dental services through a Memorandum of Agreement (“MOA”) with the District of Columbia Department of Health Care Finance (“DHCF”).

In support of their respective requests for relief, both parties have also relied upon facts that are outside the scope of the pleadings. Therefore, it is more appropriate to consider both parties’ pleadings as akin to cross-motions for summary judgment or summary adjudication, than cross-motions for dismissal. *Compare* D.C. Superior Court Rules 12-I(k) and 56 [summary judgment] *with* D.C. Superior Court Rule 12(b)(6) [dismissal for failure to state a claim].

Under Rule 56, the burden is on the moving party to show: (1) that there are no issues of material fact; and (2) that the moving party is entitled to judgment as a matter of law. *See, e.g., Kissi v. Hardesty*, 3 A.3d 1125, 1128 (D.C. 2010).

**B. The Undisputed Material Facts**

The pleadings of both parties, the attached documents, and the case file, show the following undisputed material facts:

Prior to December 2010, Ms. S.L. was receiving RSA benefits under an IPE that included educational services and dental services. Her vocational goal was to become a daycare provider administrator. Ms. S.L. attended classes at the University of the District of Columbia (“UDC”), to earn a degree so that she could obtain a daycare facility administrator’s license.

In December 2010, Respondent closed out Ms. S.L.’s RSA case. Respondent has conceded that it erred in doing so, and has agreed to provide RSA services going forward.

On February 8, 2011, Ms. S.L. filed a hearing request with OAH seeking reversal of the closure of her RSA case and other relief. Initially, Ms. S.L. represented herself but later she was represented by Joseph Cooney, Esq. Status conferences were held and continued on several occasions.

The development of a new IPE was delayed for three reasons:

First, Respondent agreed to reassign Ms. S.L. to another vocational counselor, as Ms. S.L. had a poor relationship with the counselor who had closed out her case. The first reassigned vocational counselor also had conflicts with Ms. S.L., so in April 2011, Respondent reassigned Ms. S.L.’s case again to Vocational Counselor Jovita Hollins. Ms. Hollins had to reschedule two appointments when she was not available.

Second, UDC would not enroll Ms. S.L. for the Fall 2011 Semester until she paid a prior bill. Respondent investigated whether it was liable to pay the prior bill. Respondent determined that it was liable, and it paid the bill.

Third, due to budgetary cutbacks to the RSA program in general, Respondent needed to investigate whether the cutbacks would impact services that could be provided to Ms. S.L. Respondent determined that there would be no impact.

Ms. S.L. and Ms. Hollins met on June 6, 2011, and signed a new IPE. The IPE provides for RSA funding of Ms. S.L.’s educational program at UDC for the Fall 2011 Semester, and for RSA funding of Ms. S.L.’s dental services in the amount of \$1,500 from Dr. Stanley Smith.

The parties have no dispute as to the provision of educational services.

With regard to dental services, Ms. Hollins referred Ms. S.L. to three dental providers who accept Medicaid funding. Ms. S.L. receives Medicaid benefits. Respondent is seeking to apply the comparable benefits of the Medicaid funding to reduce the costs of the dental services to RSA.

Ms. S.L. contacted D.C. General Hospital’s Dental Clinic, one of the listed providers, and scheduled an appointment for June 29, 2011. At the appointment, a technician conducted a cleaning. Staff informed Ms. S.L. that it would take several months for Ms. S.L. to schedule the dental procedures she requires.

On July 12, 2011, Ms. S.L. met with her preferred dentist, Dr. Stanley Smith.<sup>1</sup> Dr. Smith has recommended the following procedures and costs:

<u>SERVICE</u>	<u>CODE</u>	<u>COST</u>
Prophylaxis	01110	42.00

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<sup>1</sup> It does not appear that Dr. Smith is related to Ms. S.L.

Subgingival Scaling 4 Quadrants	04220X4	128.00
Occlusal Amalgam	02140	21.00
Partial Upper Denture	05291	341.00
Partial Lower Denture	05293	341.00
TOTAL		\$873.00

Approx. 10 visits

The record does not show whether Dr. Smith is an authorized Medicaid dental services provider.

### **C. Discussion**

The issue is whether Respondent is required to immediately fund the dental services offered by Dr. Smith, as requested by Ms. S.L., and as authorized under the June 6, 2011 IPE. Ms. S.L. has a need for the dental services, and she urges that the services must be rendered before she starts classes in the Fall 2011 Semester, or she will be in debilitating pain and unable to participate in her education.

For reasons I will explain, I cannot order the full relief requested by Ms. S.L. The recommendation of her own dentist, Dr. Smith, shows that the dental services cannot be completed before the Fall Semester begins because the process requires ten visits. Further, there is no evidence that Dr. Smith is an authorized Medicaid dental services provider. Respondent is required to seek comparable benefits, such as Medicaid benefits, to reduce the costs of the RSA services. I can only order Respondent to immediately fund Dr. Smith's program, if there is a realistic plan to give Ms. S.L. the relief she needs before the school period begins. There is not.

The purpose for the RSA program is to provide vocational rehabilitation services to eligible individuals with disabilities, and Respondent implements this program on behalf of the District of Columbia. *See* 34 C.F.R. § 361.57(b)(2); 29 DCMR 100; and 29 DCMR Chapter 1 *generally*. The parties agree that Ms. S.L. has a disability and meets the criteria for the RSA program. *See* 29 U.S.C. § 722(a)(1).

The specific issue here requires analysis of Respondent's duty to apply comparable benefits and services, in a situation in which the RSA client claims an immediate need for the services in question. In other words, if the client needs the dental services now, and the application of comparable services takes time, can the agency be compelled to provide the services without using comparable services to reduce the cost? The short answer is, Yes, but not under the facts of the present case.

The state agency is required to issue benefits only to the extent that financial benefits exist and to the extent that comparable benefits are not available. 34 C.F.R. § 348. "Comparable benefits" are defined as services and benefits that are:

- (A) Provided or paid for, in whole or in part, by other Federal, State, or local public agencies, by health insurance, or by employee benefits;
- (B) Available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's individualized plan for employment in accordance with § 361.53; and
- (C) Commensurate to the services that the individual would otherwise receive from the designated State vocational rehabilitation agency.

34 C.F.R. § 361.5(b)(10); *see also*, 29 DCMR 111.2(f) and 114.1.

The federal regulation on comparable services and benefits, 34 C.F.R. § 361.53, provides guidance to the situation here:

(c) Provision of services.

(1) If comparable services or benefits exist under any other program and are available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's IPE, the designated State unit **must use those comparable services or benefits** to meet, in whole or part, the costs of the vocational rehabilitation services.

(2) If comparable services or benefits exist under any other program, but are not available to the individual at the time needed to ensure the progress of the individual toward achieving the employment outcome in the individual's IPE, the designated State unit **must provide vocational rehabilitation services until those comparable services and benefits become available.**

34 C.F.R. § 361.53(c) [emphasis added].

As this regulation explains, the use of comparable benefits is not an absolute requirement. If the comparable benefits are not available in time to matter, Respondent must provide the services anyway, and seek comparable benefits later for the present services or for later services.

Ms. S.L. has a present need for dental services. She seeks to have Respondent pay for the treatment plan offered by Dr. Smith. She contends that the services must be given before the school year begins or she will not be able to participate in her education. If Dr. Smith had provided a realistic plan to accomplish this, I would order Respondent to fund this plan under 34 C.F.R. § 361.53(c)(2).

Since it is apparent that Ms. S.L. needs dental services that will be rendered over a period of time, Respondent may reasonably apply the provisions of § 361.53(c)(1). In order to prevent unreasonable delay, I will require Respondent to commit funding under the IPE to a dental treatment plan within one month. If no Medicaid provider can provide this dental service

by that time, Respondent must fund the program offered by Dr. Smith, even if he is not an authorized Medicaid provider.<sup>2</sup>

Finally, since the issue of dental services is the only remaining issue in this case, I will grant Respondent's motion to dismiss all other claims.

#### **D. Summary**

For these reasons, I conclude that there are no issues of material fact, and both parties are entitled to partial relief as a matter of law. OAH Rule 2801.1; D.C. Superior Court Rules 12-I(k) and 56; *Kissi v. Hardesty*, 3 A.3d 1125, 1128 (D.C. 2010).

Because Respondent must apply comparable benefits or services, but only if they are available in time for Ms. S.L. to achieve her vocational goal, I will require Respondent to commit funding under the IPE to a dental treatment plan within one month. If no Medicaid provider can provide this dental service by that time, Respondent must fund the program offered by Dr. Smith, even if he is not an authorized Medicaid provider. 34 C.F.R. § 361.53(c). I will grant this relief to Ms. S.L.

I will grant Respondent's motion to dismiss all other claims.

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<sup>2</sup> Respondent makes other arguments that are not germane here. If Ms. S.L. failed to follow up on prior treatment two years ago, this does not mean that she does not need the dental services now. Further, I do not understand Respondent's position that its MOA with DHCF is a privileged document, or that Mr. Cooney somehow acted improperly in obtaining it. The MOA certainly may have relevance to the issue of comparable benefits. Ultimately, the existence of the MOA does not affect this ruling. The most critical factor is the treatment plan offered by Dr. Smith, which Respondent submitted with its Reply. I also disagree with Ms. S.L. that, because the IPE mentions

**III. Order**

Therefore, it is hereby, this \_\_\_\_\_ day of \_\_\_\_\_, 2011:

**ORDERED**, that, on or before August 15, 2011, Respondent shall commit funding under the IPE to a dental treatment plan. If no Medicaid provider can provide this dental service by that time, Respondent must fund the program offered by Dr. Smith, even if he is not an authorized Medicaid provider; and it is further

**ORDERED**, that all other claims in this case are hereby, **DISMISSED WITH PREJUDICE**; and it is further

**ORDERED**, that the appeal rights of any party aggrieved by this Order are stated below.

\_\_\_\_\_/s/\_\_\_\_\_  
Paul B. Handy  
Administrative Law Judge

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Dr. Smith, the dental service must be authorized through him. The subject matter of the IPE is the dental service itself.

## **APPENDIX A. Procedural History**

On February 8, 2011, Petitioner S.L., on her own behalf, filed a Petition and request for hearing, regarding Respondent District of Columbia Department on Disability Services, Rehabilitation Services Administration's administration of the Rehabilitation Services program ("RSA").

Status conferences have been held on March 1, 2011; March 22, 2011; April 21, 2011; and May 10, 2011. Joseph R. Cooney, Esq., has entered his appearance on behalf of Ms. S.L. and participated in all four continued status conferences. Shakira Pleasant, Esq., has appeared on behalf of Respondent.

Ms. S.L. has contended that her case was wrongfully closed out, and that she re-applied for RSA services on January 19, 2011, on the advice of her prior counselor. She is seeking employment as a day-care provider, and has requested RSA services to support her educational program at the University of the District of Columbia ("UDC"), and for her dental and vision care needs.

Respondent has agreed that it erred in closing out Ms. S.L.'s prior RSA case, and it has agreed to provide services to Ms. S.L.

However, three issues have remained unresolved. First, Ms. S.L. had conflicts with her new vocational counselor, and Respondent agreed to re-assign Ms. S.L. to Vocational Counselor Jovita Hollins. Second, there was a question whether budgetary cutbacks to RSA's overall budget would impact on the services provided to Ms. S.L. Third, UDC refused to re-enroll Ms.

S.L. until a pending bill from last year has been paid; Respondent needed to determine whether it was responsible for paying the bill.

### **The June 2, 2011 Status Conference**

An in-person status conference was held on June 2, 2011. Mr. Cooney again appeared on behalf of Ms. S.L., who attended the status conference. Ms. Pleasant again appeared on behalf of Respondent. Ms. Hollins, RSA, Vocational Counselor, also attended the status conference.

Ms. Pleasant reported the following status: Ms. Hollins had to reschedule an IPE meeting with Ms. S.L., due to a personal emergency. Another appointment is scheduled for June 6, 2011. In the meantime, Respondent has agreed to pay the pending bill from UDC.

One remaining potential issue, which may or may not be resolved at the IPE meeting, is whether and under what circumstances Respondent will provide dental services to Ms. S.L. The IPE for last year included dental services, and Ms. S.L. has identified a dentist who can perform this work. Ms. S.L. seeks to have dental procedures before the Fall Semester 2011. Respondent contends that it has to seek comparable services, and this may complicate the IPE process. Respondent did not contend that it would not provide any dental services, but there appears to be a disagreement as to whether Respondent can or should provide the dental services requested by Ms. S.L., as reflected in the prior IPE.

Mr. Cooney said that, if the proposed IPE does not include dental services, he will advise his client not to sign the IPE. Without a signed IPE, Ms. S.L. may not be able to enroll at UDC for the Fall Semester 2011. The parties agreed that, if they are unable to resolve language about

dental services, they will draft an IPE to cover other services and separate out the issue of dental services.

Ms. Pleasant contends that OAH already lacks jurisdiction to hear this case because there is no contested case. Once Respondent agreed to provide RSA services to Ms. S.L., this case should have been dismissed, according to Ms. Pleasant.

I disagree. Ms. S.L. filed a hearing request after Respondent closed out her case, and Respondent has agreed that this closure was in error. At the time the case was closed out, Ms. S.L. was seeking dental services as provided in the prior IPE. Therefore, if the parties cannot resolve the issue of dental services, this issue is properly before this administrative court.

Nevertheless, in light of the current posture of this case, Ms. Pleasant moved that all proceedings be suspended. After the June 6, 2011 IPE meeting, Ms. Pleasant offered to file a status report, and then to file a motion for dismissal.

Mr. Cooney and Ms. Pleasant agreed that it was appropriate to schedule motions on the issue of dental services, if the parties cannot resolve this issue. It is imperative that this issue be resolved as soon as possible, so that Ms. S.L. can obtain appropriate services before the next school year starts.

The parties agreed to the following schedule, outlined in the next section.

### **Motions Schedule**

Under this schedule, all pleadings must be filed by fax to OAH at 202-737-3497, addressed to this administrative law judge, and served on counsel listed in the Certificate of

Service for the other party by fax. As an alternative, a party may use same-day messenger service to serve its pleading on the other party.

(1) On or before June 10, 2011, Respondent shall file a status report of the IPE meeting and attach a copy of the IPE developed by the parties;

(2) On or before June 23, 2011, Respondent shall file its motion briefing its position as to its obligations to provide dental services to Ms. S.L.;

(3) On or before July 8, 2011, Ms. S.L. shall file her responsive brief; and

(4) Within seven (7) calendar days after Ms. S.L. files her responsive brief, Respondent may file a reply brief.

### **Filing of Motions**

Pursuant to the Motions Schedule, on June 23, 2011, Respondent filed its Agency Brief on Comparable Benefits. On July 8, 2011, Ms. S.L. filed her Petitioner's Reply to Respondent's Brief on Comparable Benefits That Included a Motion to Dismiss. On July 14, 2011, Respondent filed its Agency's Reply Brief to Petitioner's Reply (Opposition) to the Agency's Brief on Comparable Benefits.

