

THIS DECISION WAS ADOPTED AS FINAL ON 10-8-03



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

(petitioner)

**PROPOSED
DECISION**

MPA-13/59153

PRELIMINARY RECITALS

Pursuant to a petition filed July 24, 2003, under WI Stat § 49.45(5) and WI Admin Code § HA 3.03(1), to review a decision by the Division of Health Care Financing in regards to a modification of in-home autism services under Medical Assistance, a hearing was held on August 29, 2003, at Madison, Wisconsin. A hearing set for August 18, 2003, was rescheduled at the petitioner's request.

The issue for determination is whether the modification of reimbursement for a regimen of in-home autism services is an action over which the Division of Hearings and Appeals has authority.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Elaine Gundlach, R.N., Nurse Consultant

ADMINISTRATIVE LAW JUDGE:

Kenneth D. Duren

Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN: xxx-xx-xxxx) is a minor resident of Dane County; she is certified as eligible for MA.
2. The petitioner's in-home autism provider, Counseling And Wellness Center, S.C., of Fond du Lac, Wisconsin, filed a Prior Authorization Request with the Division of Health Care Financing on or about April 11, 2003, requesting MA coverage for a package of services known together as "in-home autism services", to be provided 35 hours per week over twenty-six weeks for continuing services.

3. On or about June 17, 2003, the Division of Health Care Financing modified the PA Request approving 15 hours per week of in-home autism services, because the petitioner has received intensive in-home autism services for more than 3 years.
4. The petitioner filed an appeal with the Division of Hearings & Appeals on July 24, 2003.
5. The Division modified the petitioner's PA Request for in-home autism services because of a change in Wisconsin law that provides that when a patient has received such services for three years or more, the maximum amount that can be approved is 15 hours per week.
6. The petitioner has been receiving intensive in-home autism treatments since March 22, 1999. See, Exhibit #5, attached Wisconsin Medicaid Autism Service Summary.

DISCUSSION

The Division of Health Care Financing (hereafter referred to as the "Division") may only reimburse providers for medically necessary and appropriate health care services and equipment listed in WI Stat §§ 49.46(2) and 49.47(6)(a), as implemented by WI Admin Code § HSS 107. Some services and equipment are covered only when listed guidelines are met. Some services and equipment are covered if a prior authorization request is submitted and approved by the Division in advance of receiving the service. Finally, some services and equipment are never covered by the MA program.

The Division employs professional consultants to apply these guidelines to each and every PA Request. In determining whether to grant prior authorization for services or equipment, the Division must always follow the general, and specific, guidelines contained in WI Admin Code § HFS 107.02(3), as well as the limitations set forth in written departmental policy statements and under Wisconsin law. See also, WI Admin Code § HFS 107.02(3)(e); and see, WI Admin Code § HFS 101.03(96m).

The Division's Nurse Consultant asserts in her Summary letter that the petitioner's request was denied because Wisconsin law has recently changed. State law no longer allows approval of more than 15 hours per week of in-home autism services when the patient has received such services for three years or more. Accordingly, she modified the request and approved the 15 hours per week only.

Since 1994 the department has covered in-home autism services under the federal Early and Periodic Screening, Diagnosis and Treatment (EPSDT) law, 42 U.S.C. 1396d(r)(5). In 2000 the department submitted a proposal to the federal Department of Health and Human Services (DHHS) requesting that in-home autism services be covered under a category separate from the existing "in-home psychotherapy" category. DHHS responded in June, 2000 and suggested that in-home autism should not be covered at all by Medicaid. See, Exhibit #5, DHCF Summary, at page 2. The department was informed further that no other states, to the knowledge of DHHS, covered in-home autism services under Medicaid. Id.

In 2003, as part of the Wisconsin budget process, Governor Doyle initially proposed to eliminate all state funding for in-home autism services. See Exhibit #5, attachment #1, at page 4. After contacts with DHHS, the governor's proposal was amended to fund autism services as part of a community-based waiver. Id. The current plan is that the waiver services will be implemented on November 1, 2003 if all necessary approvals are received. Id., at page 12.

Importantly for this case, the governor's proposal included the following proviso:

Beginning July 1, 2003, DHFS [Wisconsin Department of Health and Family Services] would review cases of each child who is currently receiving intensive, in-home autism services to determine if the child has been receiving the therapy for more than three years. If so, the child would be eligible to receive up to 15 hours per week of transitional services.

Id., page 5, no. 8. The amended proposal was sent to the legislature, and on May 27, 2003, the Joint Committee on Finance adopted the amended proposal to be included in the state budget bill. Exhibit #5, at page 3; attachment #4 to (Exhibit #5), at page 4, paragraph p.

Federal law provides: "The agency need not grant a hearing if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients." 42 C.F.R. § 431.220(b). WI Stat § 49.45(5)(b)1b provides that the department shall deny a petition for a hearing or refuse to grant relief if the sole issue in the petition concerns a change that affects an entire class of recipients and is the result of a change in state or federal law. See also, WI Admin Code § HA 3.05(4)(c).

It is evident that the change in petitioner's case was not done at the discretion of the DHCF or by any change implemented by the DHCF. The change was made by the Wisconsin legislature as part of the state budget process. The DHCF was given no discretion. It was required by law to review the cases of all children receiving in-home autism services, and in all cases where the child received services for at least three years the services were required to be reduced to 15 hours per week pending the change to coverage of autism services via a community waiver program. Whether the services remain effective and necessary thus is not an issue in the case.

It could be possible that there is an issue in fact in individual cases, for example, whether the child actually has been in the program for more than three years. There is no such issue in this case. Because the department simply implemented the change in services required by the passage of the budget bill, no relief is available through an administrative hearing.

CONCLUSIONS OF LAW

Because the change in petitioner's services occurred because of an act by the Wisconsin legislature, there is no right to an administrative hearing or relief through such a hearing.

NOW, THEREFORE, it is ORDERED

That the petition for review herein be and the same is hereby dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P. O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15 day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health & Family Services for final decision-making. The process relating to Proposed Decisions is described in WI Stat § 227.46(2).

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 9th day of
September, 2003.

/s

Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
322/KDD