

THIS DECISION WAS ADOPTED AS FINAL ON 3-19-04



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

In the Matter of

(petitioner)

**PROPOSED
DECISION**

MPA-53/59269

PRELIMINARY RECITALS

Pursuant to a petition filed July 29, 2003, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Division of Health Care Financing in regard to Medical Assistance (MA), a hearing was held on November 7, 2003, at Madison, Wisconsin. At the request of petitioner, hearings set for September 25, 2003 and October 16, 2003 were rescheduled. Also, at the request of petitioner and DHCF, the record was held open until January 19, 2004 for initial and responsive briefs to be filed at the Division of Hearings and Appeals (DHA). The petitioner's legal representation by ABC for Health began after the November 7, 2003 hearing. ABC for Health has filed briefs on behalf of the petitioner. The initial and responsive briefs of petitioner's attorneys and DHCF were timely filed with DHA and have been received into the record.

The issue for determination is whether the Division of Health Care Financing (DHCF) correctly denied petitioner's June, 2003 prior authorization request for in-home autism therapy.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:
(petitioner)

Representative:
Attorneys Ellen Escalera & Robert Peterson
ABC for Health, Inc.
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By: Elaine Gundlach, Nurse Consultant
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ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx) is a 10-year-old (dob 7-30-93) resident of Rock County who receives Medical Assistance (MA).
2. In the past, the Division of Health and Family Services (DHFS) approved petitioner to receive in-home intensive autism services since October, 1998 under the federal Early and Periodic Screening, Diagnosis and Treatment (EPSDT) law. The petitioner has received intensive autism therapy services for more than three years.
3. The petitioner's provider, Wisconsin Young Autism Program (WYAP)-Dr. Glenn Sallows, Ph.D.), notified petitioner's parent that it would discontinue (redacted) in-home autism therapy as of April 24, 2003. WYAP discontinued petitioner's autism therapy because it believed it would not be paid for such therapy due to changes in State legislation regarding in-home therapy services for children with autism.
4. The petitioner's parents pursued an extensive search for another provider, but found that none of the providers they contacted were accepting new patients, in anticipation of the State law changes. Petitioner's parents finally located Dr. David Small, Ph.D. at the Counseling and Wellness Center in Fond du Lac, WI, who was willing to accept (redacted) as a client for intensive in-home autism therapy.
5. DHCF sent a June 17, 2003 letter only to parents of children who were currently receiving autism therapy services. That letter indicated that the Department submitted a request to the federal government that a waiver be granted to Wisconsin allowing federal funds to be used for coverage of intensive in-home therapy. See Appendix 3. Under that waiver, DHCF would review approvals for autism services for children who were receiving autism services as of a July 1, 2003 deadline.
6. The petitioner's new provider, Dr. David Small of Counseling and Wellness Center, submitted on behalf of the petitioner on or about June 24, 2003 a prior authorization (PA) request to DHCF for in-home autism therapy at a total cost of \$113,235.00. See Exhibit 2. DHCF received that PA request on June 27, 2003.
7. DHCF sent a July 24, 2003 notice to the petitioner denying her PA request for in-home autism therapy. The reasons for the denial were: a) that petitioner's PA request does not meet the eligibility criteria in the Wisconsin Administrative Code or the Wisconsin Prior Authorization Guidelines Manual, pages 126.004.01 – 126.004.05; and b) Since petitioner's in-home autism services ended on April 24, 2003 by petitioner's prior provider, the new PA was a request for initiation of services. Such initiation of therapy must be begun before the child reaches the age of eight and petitioner was nine at the time of the June 24, 2003 PA request. See Exhibit 1.

DISCUSSION

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. The department was further informed that no other states, to the knowledge of DHHS, covered in-home autism services under Medicaid.

In 2003, as part of the Wisconsin budget process, Governor Doyle initially proposed to eliminate all state funding for in-home autism services. After contacts with DHHS, the Governor's proposal was amended to temporarily fund autism services at a reduced level, and to seek future federal funding for such services pursuant to a community-based waiver. The current plan is that the waiver services will be implemented on or after November 1, 2003 *if* all necessary federal approvals are received.

In the context of the budget process, the Governor's proposal to the Legislature's Joint Committee on Finance (JCF) included the following provision:

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 proposal to amend the budget bill (2003 SB 44) was sent to the Legislature, and on May 27, 2003, the JCF apparently voted to adopt this amendment. Based on this direction from the Governor's office and the JCF, plus the passed budget bill's actual reduction of funding for in-home autism services to a level that made coverage at the existing level impossible, the DHCF drafted new policy that reduced the maximum amount of hours of in-home autism services that will be paid for a child who has received such services for three years.

The DHCF's issued revised guidelines on June 26, 2003 (effective July 1, 2003) which state in pertinent part:

Disposition

1. ...
- c. For children who have received intensive in-home autism services covered by Wisconsin Medicaid for three years or more from the date of initiation of treatment, approve up to 15 hours per week, when appropriate, distributed as follows...
- 2. Any initial PA request for in-home services for children who have reached their 8th birthday not approved prior to 7/1/03 shall be denied.**

(Emphasis added).

Prior Authorization Guidelines Manual, p. 126.004.05 (6/26/03).

The *MA Prior Authorization Guidelines Manual*, at pp. 126.004.01-.05, provides that the maximum hours of direct in-home autism services that may be approved, effective with date of service on July 1, 2003, or thereafter, is 35 hours per week for children. The 35 hour per week direct service hour limitation arises on that effective date based upon the Wisconsin Legislature directive explained above – to reduce the amount of MA funding available to the DHCF for in-home autism services. Where a child has had 3 years worth of such services, thereafter only 15 hours per week may be approved, at maximum. When the child has had less than 3 years of such services, the maximum is 35 hours per week. This reduction in funding for autism regimens was incorporated by the Department in recent changes to MA policy. See MA Prior Authorization Guidelines Manual, at pp. 126.004.01, et seq.

In the instant case, DHCF sent a July 24, 2003 negative notice to the petitioner denying her PA request for in-home autism therapy. The reasons for the denial were: a) petitioner's PA request does not meet the eligibility criteria in the Wisconsin Administrative Code or the Wisconsin Prior Authorization Guidelines Manual, pages 126.004.01 – 126.004.05; and b) since petitioner's in-home autism services ended on April 24, 2003 by petitioner's prior provider, the new PA was a request for initiation of autism services. Such initiation of therapy must be initiated before the child reaches the age of eight and petitioner was nine at the time of the June 24, 2003 PA request. See Exhibit 1. The Guidelines state: "Any initial PA request for in-home services for children who have reached their 8th birthday not approved prior to 7/1/03 shall be denied." Wisconsin Prior Authorization Guidelines Manual, page 126.004.05, #2. See Appendix 2.

Attorneys Robert Peterson and Ellen Escalera of ABC for Health, Inc have presented in their briefs three central arguments for why the petitioner's June 24, 2003 PA should have been approved by DHCF. The first argument was that petitioner did not receive any notice from DHCF that the guidelines for in-home autism services were about to change, and that the change could result in denial (termination) of services. As such, DHCF's July 24, 2003 denial of petitioner's PA request for in-home autism services was a violation of Madeleine's due process rights. The second argument was that Madeleine's PA was submitted to DHCF prior to the July 1, 2003 deadline. Third, petitioner argued that federal law requires that medically necessary in-home autism services be provided pursuant to 42 U.S.C. 1396d(4)(2003). See Appendix 1.

In her December 15, 2003 response, DHCF consultant Elaine Gundlach opposed the petitioner's arguments. Ms. Gundlach stated that petitioner's parents did not receive written notice of the changes in PA guidelines because there was no PA in effect when the June 17, 2003 parent letters were sent (as petitioner's last PA had expired on April 24, 2003). DHCF contended that there was no change in the services petitioner was receiving at the time of the June 17, 2003 parent letter because (redacted) was not receiving any autism services. If she had been receiving in-home autism services at any level, she would have been notified of changes in those services. DHCF argued that the law does not required DHCF to notify persons who *might* be affected, only those who *are* in fact affected. In support of its position, Ms. Gundlach cited to 42 CFR sec. 431.206(c)(2) that each state Medicaid agency must provide written notice to a recipient "at the time of any action affecting his or her claim." The term "action" is defined as "a termination, suspension, or reduction of Medicaid eligibility or covered services." 42 CFR sec. 431.201.

Ms. Gundlach argued that there was no legal notice requirement that petitioner be provided notice of the July 1, 2003 change. Ms. Gundlach indicated that each state Medicaid agency must provide written notice to a recipient "at the time of any action affecting his or her claim" pursuant to 42 CFR sec. 431.206(c)(2). As Ms. Gundlach correctly stated, petitioner was not a current recipient of in-home autism and the Department is not required to send notice of a change in law to all possible future and past recipients of autism therapy, but only the currently approved recipients who are immediately affected.

DHCF contended that because there was no PA in effect for (redacted) at the time the new PA Guidelines were published, their publication did not terminate, suspend or reduce covered services she was currently receiving. Further, petitioner was not constitutionally entitled to prior notice of the PA Guidelines because those PA Guidelines were a policy determination driven by legislation. When the action is purely legislative, a law satisfies due process if the enacting body provides public notice and open hearings.

ABC for Health argued that petitioner should be granted autism therapy because she did not receive prior notice of the change in guidelines in violation of her Due Process rights; the request for the PA was submitted and received prior to the date the guidelines change; and Federal law requires that in-home

therapy be funded through Medicaid. DHCF's failure to notify Madeleine of the guideline changes for in-home autism therapy violated her due process rights because the State is required to provide written notice to those affected by a reduction in services. The point of notice is that deprivation of life, liberty or property must be preceded by notice. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). More relevant and material to petitioner's argument is the legal argument that: "Notice must be reasonably certain to inform persons effected by the change." Mullane, 339 U.S. 306.

In this case, petitioner did not receive any notice about the guideline changes until her PA request was denied in DHCF's July 24, 2003 negative notice. The petitioner contended that the DHCF's version of proper notice was not reasonably certain to inform all persons affected by the changes, as the Department only sent notices to people who had approved PA's in place at the time of the notice. The guideline changes also affected people who did not have current PA's or were transitioning to another provider. Attorney Peterson argued that a course of action more reasonably certain to inform all persons effected would be to send written notice to people who had a PA for in-home therapy or other autism services over the past two years. While such two-year notice appears may be unduly long and burdensome to the State, petitioner's attorneys argued that a) as early as March 7, 2003, the State was aware of: Medicaid recipient difficulties in accessing services for in-home autism services once the proposed guidelines became public; b) DHCF was aware of the number of children who could be affected by the changes; and c) DHCF was aware that some children could fall through the cracks during a transition period (May, 2003 – July 1, 2003). See Exhibits A and C. Petitioner's attorneys contended that ensuring that all children potentially affected by the guideline changes receive prior notice of the changes did not put an unreasonable burden on the State to fulfill the due process notice requirement.

The petitioner argued that public notice of legislative budget deliberations in itself does not satisfy the due process notice requirement. In this case, the law was enacted as part of the budget in May, 2003 and it went into effect July 1, 2003. Petitioner's attorneys contended that there was no time for people to assure the law would not affect their property interest or their medically necessary medical care, therefore the notice requirement of due process was not satisfied in (redacted) case. Under federal regulation, the State Medicaid agency must provide proper notice to the patient informing him or her of proposed changes. Catanzano v. Dowling, 847 F.Supp. 1070, 1081 (W.D.N.Y. 1994). Attorney Peterson correctly pointed out that since DHCF's letter notice was dated June 17, 2003, there were only nine business days before the July 1, 2003 deadline. While the petitioner was not actually a "patient" at the time of her June 24, 2003 application, such loss of patient status was solely due to the action of her former provider to cancel its autism therapy services for petitioner.

At first impression, the Department appeared correct in denying petitioner's June 24, 2003 PA request for in-home autism therapy. The recent Wisconsin Prior Authorization Guidelines Manual does state that an initial request for in-home autism services must be approved before the recipient is 8 years old. At the time of this PA request, (redacted) was 9 years old during June, 2003. The Guidelines also require that the PA request be "approved" prior to July 1, 2003, the date of the change in law. However, such first impression is altered based upon the rather unique facts of this case.

In the instant case, there is no dispute that petitioner has ongoing medical needs for in-home autism therapy. In fact, the petitioner has been receiving in-home autism therapy since 1998 and making some progress. Petitioner's physician, Dr. Catherine Van Leuven, submitted a December 5, 2003 letter clearly indicating that petitioner has regressed since the discontinuation of her autism services as of April, 24, 2003. See Appendix 7. As explained by petitioner's representatives, the petitioner's provider on its own initiative decided to discontinue petitioner's autism therapy as of April 24, 2003, because WYAP believed it would not be paid for such therapy because of changes in State legislation regarding services for children with autism. DHCF argued in its briefs that petitioner's June, 2003 PA request was an initiation (start) of services as her autism services had "lapsed" as of April 24, 2003, and the new provider did request approval for workshop costs (which are requested by a provider for a new client at the initiation of

services). While it is true that petitioner's autism therapy "lapsed," such lapse was out of the control of petitioner and to her medical detriment. More importantly, when petitioner actually initiated or started her autism services, she was about 5 years old, and has continued since that time. The June 24, 2003 PA request can be considered a resumption or continuation of interrupted therapy services, and not as a start of new services.

The Department acknowledged that if petitioner's new PA request had been "approved" prior to July 1, 2003 (as was the case in other June, 2003 autism PA requests), petitioner would have been approved for in-home autism services. The petitioner's parents conscientiously sought to obtain a new provider, but were unable to find one without much difficulty and delay. The petitioner's parents pursued an extensive search for another provider, but found that none of the providers they contacted were accepting new patients, in anticipation of the State law changes. Petitioner's parents finally located Dr. Small at the Counseling and Wellness Center in Fond du Lac, WI, who was willing to accept (redacted) as a client for intensive in-home autism therapy. When the provider discontinues a medical service, it seems unfair to then penalize the patient (petitioner) further by labeling the June, 2003 application as an initiation or start of autism services, and not an interrupted continuation of services caused by petitioner's former therapy provider.

While it is appropriate and necessary that some deadline needed to be set, DHCF could have been more flexible in accepting this autism PA request as timely, especially since the petitioner's new provider did submit the new PA prior to the July 1, 2003 deadline. The facts of this case simply demand that good cause be recognized as an applicable concept, where petitioner is substantially harmed by being deprived of autism therapy due to no fault of her own or her parents.

In petitioner's briefs, her attorneys argued that federal Medicaid law required that state Medicaid program must cover medically necessary services under Early Periodic Screening, Diagnostic and Treatment (EPSDT). However, while petitioner was correct in the past, a recent April 17, 2003 letter from the Centers for Medicare and Medicaid Services to the Wisconsin Medicaid Director indicated that: "the appropriate method . . . to claim federal financial participation for . . . intensive in-home autism services is through a section 1915c home and community-based services waiver." See Appendix 6. Furthermore, the Governor's recommendations to eliminate intensive, in-home autism services was based on an understanding that the services were not available for federal matching funding as a fee-for-service benefit under EPSDT. In other words, a service that is covered under such a community waiver is not coverable as an EPSDT.

DHCF argued that (redacted) received written notice at the time the action affecting her claim was denied, which was when her request for PA was submitted. Ms. Gundlach agreed that if there had been an active PA for the petitioner when the in-home autism services were transferred to a Home and Community Based Waiver, petitioner would have been notified of the upcoming change, as were all recipients with active PA's at the time of the change. However, the facts of this case and the unusual circumstances of the change make such notice another reason for DHCF to have been more flexible with the July 1, 2003 deadline. The record is uncontested that DHCF's letter to even the parents of the current recipients was sent out on June 17, 2003, only 9 business days before the July 1, 2003 deadline. Such notice was questionable as sufficient prior notice even to the parents who received such notice. Notice must be reasonably certain to inform persons effected by the change. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The petitioner's representatives also provided convincing evidence that the denial of autism therapy will place petitioner at high risk for future institutionalization. Petitioner's

doctor stated in her letter that since the discontinuation of her autism therapy, (redacted) has become less engaged, less communicative and more self-injurious. See Exhibit 3 and Appendix 7.

In general terms, DHCF had reasonable justification for deciding to deny the petitioner's PA request for in-home autism pursuant to the Wisconsin Prior Authorization Guidelines Manual, pages 126.004.01 – 126.004.05. However, there were unusual factual circumstances that created good cause in this case so that such denial was incorrect: 1) petitioner's former provider's financial decision to discontinue petitioner's autism therapy as of April 24, 2003, even though petitioner medically needed continued autism therapy; 2) the petitioner had no intention of interrupting her autism therapy, but such discontinuance was due to factors out of the control of petitioner and her parents; 3) the Department only sent written notice on June 17, 2003, only 9 business days before the July 1, 2003 deadline; 4) the petitioner did not receive any notice of the July 1, 2003 deadline because she was not receiving autism therapy during June, 2003 (due to the action by her former provider to interrupt services); 5) due to the changes in the law and budgetary concerns, many providers were no longer accepting new in-home autism patients resulting in significant difficulty for persons to obtain new in-home autism therapy providers; 6) petitioner's parents had significant difficulty obtaining a new in-home autism provider, and therefore there was good cause for Dr. Small's PA request to not be submitted to DHCF until about June 24, 2003; 7) the petitioner's June 24, 2003 PA request could be interpreted to be a continuation of interrupted autism services, and not a new "start" of in-home autism therapy, and therefore the 8 year old age limit did not apply; 8) DHCF has acknowledged that but for the July 1, 2003 deadline, petitioner would have been approved for in-home autism therapy; and 9) the record clearly indicates that it is medically necessary for petitioner to receive continued in-home autism therapy at this time. Accordingly, based upon the totality of the circumstances, DHCF should have found the petitioner's June 24, 2003 PA request to be timely for the July 1, 2003 deadline, and approved petitioner's PA request for continued (resumed) in-home autism services.

CONCLUSIONS OF LAW

Given the rather unique factual circumstances of this case, the Division of Health Care Financing (DHCF) incorrectly denied petitioner's June, 2003 prior authorization request for in-home autism therapy services.

NOW, THEREFORE, it is **ORDERED**

That the matter is remanded to DHCF to approve at the level of 15 hours per week petitioner's June, 2003 PA request for in-home autism services, within 10 days of the date of this Decision.

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 IMPLMENTED 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 Dept. of Health and Family Services for final decision-making.

The process relating to Proposed Decisions is described in Wis. Stats. § 227.46(2).

Given under my hand at the City of
Madison, Wisconsin, this 17th day of
February, 2004.

/s

Gary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals
320/GMW