



FH  
[REDACTED]

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

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In the Matter of

[REDACTED]

DECISION

FCP/144829

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**PRELIMINARY RECITALS**

Pursuant to a petition filed October 29, 2012, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Health Partnership in regard to Medical Assistance, a hearing was held on November 29, 2012, at Menomonie, Wisconsin.

The issue for determination is whether Community Health Partnership correctly seeks to reduce the petitioner's supportive home care hours from 40 to 27 per week.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street  
Madison, Wisconsin 53703

By: Megan Mahoney  
Community Health Partnership  
Eau Claire, WI

**ADMINISTRATIVE LAW JUDGE:**

Michael D. O'Brien  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of Dunn County.
2. The petitioner receives Family Care Medical Assistance at the Nursing Home Level of Care through Community Health Partnership.

3. The petitioner is a 25-year-old man who has required constant supervision and assistance since suffering a traumatic brain injury. In particular, he cannot have any social contact without supervision because he inappropriately touches people and makes comments when in their presence.
4. The petitioner's mother is his primary caregiver. Community Health Partnership has been reimbursing her for 40 hours of supportive home care each month. It seeks to reduce this care to 27 hours per month.
5. Community Health Partnership's contract with the Department requires it to provide supportive home care services. These services include "[o]bservation of the participant to assure...companionship for the participant (excluding hands-on care)." *Contract for Family Care Program between the Wisconsin Department of Health Services, Division of Long-Term Care and Community Health Partnership*, p.277.
6. The petitioner now requires more assistance than he did in the past because his inappropriate behavior has increased.

### DISCUSSION

The Family Care Program provides appropriate long-term care services for elderly or disabled adults. It is supervised by the Department of Health and Family Services, authorized by Wis. Stat. § 46.286, and comprehensively described in Chapter DHS 10 of the Wisconsin Administrative Code. The process contemplated for an applicant is to test functional eligibility, then financial eligibility, and if both standards are met, to certify eligibility. The applicant is then referred for enrollment in a care management organization (CMO), which drafts a service plan that meets the following criteria:

(f) The CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee, with the full participation of the enrollee and any family members or other representatives that the enrollee wishes to participate. ... The service plan shall meet all of the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e)1.
2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e)2 and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes.
4. Is agreed to by the enrollee, except as provided in [subd. 5.](#)
5. If the enrollee and the CMO do not agree on a service plan, provide a method for the enrollee to file a grievance under [s. DHS 10.53](#), request department review under [s. DHS 10.54](#), or request a fair hearing under [s. DHS 10.55](#). Pending the outcome of the grievance, review or fair hearing, the CMO shall offer its service plan for the enrollee, continue negotiating with the enrollee and document that the service plan meets all of the following conditions:
  - a. Meets the conditions specified under [subds. 1.](#) to [3.](#)
  - b. Would not have a significant, long-term negative impact on the enrollee's long-term care outcomes identified under [par. \(e\) 2.](#)
  - c. Balances the needs and outcomes identified by the comprehensive assessment with reasonable cost, immediate availability of services and ability of the CMO to develop alternative services and living arrangements.

- d. Was developed after active negotiation between the CMO and the enrollee, during which the CMO offered to find or develop alternatives that would be more acceptable to both parties.

Wis. Admin. Code § DHS 10.44(2)(f).

CMOs must “comply with all applicable statutes, all of the standards in this subchapter and all requirements of its contract with the department.” Wis. Admin. Code, § 10.44(1)

The petitioner receives Family Care Medical Assistance at the nursing home level of care through Community Health Partnership because of the effects of a traumatic brain injury. Among the services he has been receiving is 40 hours of supportive home provided each week by his mother. Both parties agree that he requires constant care, including a great deal of supervision because of his behavior: for example, he tries to touch most people he meets and talks inappropriately to them. There is little doubt that, even though he is out of the house at a workshop much of the time, his mother provides well over 40 hours of care each week. The parties also agree that his condition has not improved in the last year, and his mother testified credibly that it has gotten worse. Nevertheless, Community Health Partnership seeks to reduce his supportive home care hours to 27 per week.

Community Health Partnership contends that it is reducing these hours because it now interprets the Department’s policies concerning the payment of family members for supportive home care services to bar payment for supervision and limit payment to hands-on services. When it did not produce or provide a citation to any written policy at the hearing, I told its worker that I could not rely upon a policy unless I could read it. After the hearing, the worker submitted an August 30, 2007, memorandum from Monica Deignan, the Managed Care section chief, to Family Care MCO directors that provided guidelines for paying family caregivers. In addition to this document, it sent another document that included a section titled *Guideline for authorizing types of services, number of hours and rate of pay for family caregivers*. This second document appears to have been last updated in September 2009, but its source is unclear because the copy sent to me did not include a citation or the front page. Community Health Partnership’s denial appears to be based upon the language in that section, which states in its pertinent part:

In general, family members may be compensated for services/supports needed that exceed the typical care-giving/support responsibilities for any family member of the same age, and would be considered a “special care-giving responsibility” due to the member’s disability.

- a. Family members can be informed that, typically, the MCO does not pay family members for activities that a relative/family member would normally provide another family member as a matter of course in the usual relationship among members of a family.
- Services that are typically assumed to be the responsibility of family members are routine laundry, meal preparation, shopping, usual cleaning, general supervision, non-medical supervision, assisting with mobility, companionship and transportation/escorting.
  - Services that are considered to exceed the typical care-giving/support responsibilities of a family member are toileting, bathing (other than set-up), other personal care the member is unable to do for himself or herself, frequent laundry due to incontinence/illness, medical miles (these should be billed to common carrier/MA), complete transfer assist, or other unique services that may be considered by the IDT for consumer –specific situations.

I will assume that this is a legitimate document, but it does not require the outcome sought by Community Health Partnership. The overriding principle laid down in the cited section is that family members should be paid for services they normally would not have to provide to a person the age of the family member

they are caring for. The specific examples provided in the guideline, including the one pertaining to supervision, use the word *typically*, meaning that they do not provide a basis for prohibiting these types of services regardless of the circumstances. Rather, the examples constitute a statement indicating that under normal circumstances the family member would provide these services even if the person cared for had extraordinary needs. For example, a parent would usually not be compensated for feeding or watching a disabled three-year-old because the parent must do this anyway. Nor would a parent be compensated for taking an adult child out for an occasional cup of coffee because socializing is a normal part of a parent-child relationship regardless of age. But the petitioner is 25 year old, and parents generally do not have to constantly watch over and supervise someone this age.

Moreover, this document is only a guideline. As a guideline it can help a worker interpret statutes, administrative code provisions, and the contract between the Department and Community Health Partnership, but it cannot override those sources of legal authority. The contract between Community Health Partnership and the Department indicates that supportive home care services include “[o]bservation of the participant to assure...companionship for the participant (excluding hands -on care).” *Contract for Family Care Program between the Wisconsin Department of Health Services, Division of Long-Term Care and Community Health Partnership*, p.277. It is clear that the petitioner requires his mother’s observation to have any companionship other than when he is at his workshop and that the hours his mother devotes to this observation go well beyond the normal companionship between a mother and her 25-year-old son.

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. In this matter, Community Health Partnership is trying to change the present state of affairs by reducing his supportive home care services, so it has the burden of proving that something about the situation has changed so that he no longer requires 40 hours of care per week. As noted, it is uncontested that his needs have not decreased and have probably increased. Thus, there is no factual basis for reducing the services.

Because Community Health Partnership has not established a factual basis for reducing the petitioner’s supportive home care, it must demonstrate that the law has changed or that it made a legal error when it previously awarded 40 hours of care per week. If Community Health Partnership incorrectly interpreted the law in the past, it can correct this error even if it would reduce the petitioner’s benefits because there is no grandfather clause that guarantees the continuation of improperly received benefits. But in this matter Community Health Partnership’s sole legal reason for seeking the reduction is a policy that was already in effect when it made its earlier decision allowing 40 hours of supportive home care and which, when looked at in its entirety, can be viewed as providing continued support for the requested hours. Moreover, this policy cannot be read to conflict with the provision in Community Health Partnership’s contract with the Department that allows supportive home care for observation of the petitioner to assure companionship for him. Based upon this, I find that Community Health Partnership has neither shown that the petitioner’s needs have declined nor that it incorrectly determined those needs in the past. Therefore, it must continue to provide 40 hours of supportive home care to him each week.

I am aware that Community Health Partnership no longer is the petitioner’s CMO. Any order applies to its successor CMO.

### **CONCLUSIONS OF LAW**

1. The petitioner’s mother can use supportive home care hours to watch over and supervise him.
2. The petitioner’s supportive home care needs have not decreased in the last year.
3. The petitioner is entitled to 40 hours of supportive home care per week

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the petitioner's current CMO with instructions to continue to fund 40 hours of supportive home care for the petitioner each week and certify to the Division of Hearings and Appeals within 10 days of the date of this decision that it has done so. The petitioner's current CMO is bound by this decision. Community Health Partnership shall provide that CMO with a copy of this decision.

**REQUEST FOR A REHEARING**

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

**APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,  
Wisconsin, this 4th day of January, 2013

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\sMichael D. O'Brien  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin \DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on January 4, 2013.

Community Health Partnership  
Office of Family Care Expansion