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[REDACTED]

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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

MPA/145236

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**PRELIMINARY RECITALS**

Pursuant to a petition filed November 13, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on February 28, 2013, at Green Bay, Wisconsin.

The issue for determination is whether the Department erred in its modification of PA request # [REDACTED] for speech and hearing therapy, oral function therapy and related evaluations.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: Theresa Walske, MS, CCC-SLP (in writing)  
Division of Health Care Access and Accountability  
1 West Wilson Street, Room 272  
P.O. Box 309  
Madison, WI 53707-0309

**ADMINISTRATIVE LAW JUDGE:**

John P. Tedesco  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Brown County. Petitioner is a five year old boy with an autism diagnosis.

2. Petitioner's provider, Cerebral Palsy, Inc. ("CP") has provided therapy for petitioner since 2011 pursuant to prior authorization by ForwardHealth. CP submitted a third prior authorization request for speech and hearing therapy, oral function therapy, and related evaluations on 8/16/12. The PA requested reimbursement in an amount of \$11,187.60.
3. Petitioner currently receives early education services and speech and language services through the DePere School District.
4. Petitioner also receives in-home autism every day for up to six hours services through Applied Behavior Analysis.
5. The Department modified the prior authorization to allow the oral function evaluation and 13 (rather than 52) visits for oral function therapy. The Department did not approve the speech evaluation or the speech therapy.
6. Petitioner filed a timely request for hearing.

### DISCUSSION

Speech and language therapy is an MA-covered service, subject to prior authorization after the first 35 treatment days. Wis. Adm. Code § DHS 107.18(2). In determining whether to approve such a therapy request, the Bureau employs the generic prior authorization criteria found at § DHS 107.02(3)(e). Those criteria include the requirements that a service be medical necessary, appropriate, and an effective use of available services. "Medically necessary" services are those "required to prevent, identify or treat a recipient's illness, injury, or disability. Wis. Adm. Code § DHS 101.03(96m)(a).

Included in the definition of "medically necessary" at § DHS 101.03(96m)(b) are the requirements that services be of proven medical value or usefulness, that services not be duplicative of other services, and that services be cost effective when compared to alternative services accessible to the recipient. When speech therapy is requested for a school age child in addition to therapy provided by the school system, the request must substantiate the medical necessity of the additional therapy as well as the procedure for coordination of the therapies. Prior Authorization Guidelines Manual, Speech Therapy, page 113.001.02. It is up to the provider to justify the provision of the service. Wis. Adm. Code § DHS 107.02(3)(d)6.

During the fair hearing process, it is generally accepted that the state or county agency, as the party which has taken the action appealed from bears the burden of proof of the propriety of that action. *See State v. Hanson*, 98 Wis.2d 80, 295 N.W.2d 209 (Ct.App.1980). Like most public assistance benefits, however, the initial burden of demonstrating eligibility for any particular benefit or program at the operational stage falls on the applicant, *Gonwa v. Department of Health and Family Services*, 2003 WI App 152, 265 Wis.2d 913, 668 N.W.2d 122 (Ct.App.2003). In other words, it was petitioner's burden to demonstrate that she qualified for the requested continued speech and language services.

An applicant will need to demonstrate that the procedure for which he or she seeks approval is "medically necessary." A "medically necessary" service is

[A] medical assistance service under ch. DHS 107 that is:

(a) Required to prevent, identify or treat a recipient's illness, injury or disability; and

(b) Meets the following standards:

1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;

\* \* \*

5. Is of proven medical value or usefulness and, consistent with s. HFS 107.035, is not experimental in nature;
6. Is not duplicative with respect to other services being provided to the recipient;
7. Is not solely for the convenience of the recipient, the recipient's family or a provider;
8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

*Wis. Admin. Code* § DHS 101.03(96m). It is also notable that the ForwardHealth program is a public benefit program that provides basic health care. It is not designed to provide the ideal or optimal health services that could benefit an individual.

The crux of the Division's denial of petitioner's request is that the petitioner has not established that private speech and oral function therapy is medically necessary. With regard to the oral function therapy, the Department notes that the therapy provided from August 4, 2011 to July 20, 2012 has shown little effect. The Department notes that there have been two PA's during that time covering 78 visits. The Department notes that therapy services cannot be extended if no progress is shown, see *Wis. Admin Code* § DHS 107.18(3)(e)1. The Department notes that the treatment goals have change barely at all since the initiation of therapy. The provider did not provide any objective data showing progress from my review of the record. The Department is correct that no meaningful progress is demonstrated by this record. The Department also notes that some progress identified with relation to petitioner's adding new foods to his diet, and ability to eat at the table, etc. are not attributable to his private therapy and are as likely a result of the home program supplied to the family. The Department argues that the minimal progress shown does not warrant the frequency of visits requested. I agree that the reduction from 52 visits to 13 visits is appropriate based on this record.

With regard to the speech therapy, the Department argues that the requested private services are duplicative. Also included in the definition of "medically necessary" at § DHS 101.03(96m) are the requirements that services not be duplicative of other services, and that services be cost effective when compared to alternative services accessible to the recipient. When speech therapy is requested for a school age child in addition to therapy provided by the school system, the request must substantiate the medical necessity of the additional therapy as well as the procedure for coordination of the therapies. Prior Authorization Guidelines Manual, Speech Therapy, page 113.001.03. It is up to the provider to justify the provision of the service. § DHS 107.02(3)(d)6.

Prior hearing decisions have held consistently that where speech therapy is provided in school, it would not be cost effective for MA to cover private therapy. If the private therapy covers a situation that school therapy does not address, it has been found that the services are not duplicative. See, for example, the final Decision in DHA Case No. MPA-48/16180, (*Wis. Div. Hearings Appeals*, August 21, 1997) where the evidence showed that the petitioner had a unique oral deficiency that the school therapist was not trained to address. Also see the Decision in DHA Case No. MPA-51/41838 (*Wis. Div. Hearings Appeals*, November 18, 1999), where the school therapist was working on building vocabulary while the private therapist was working on the physical process of vocalizing sounds.

The Department, by then-Deputy Secretary Susan Reinardy held in DHA Final Decision No. MPA-37/80183 (*Wis. Div. Hearings Appeals*, February 16, 2007) (DHFS), another speech therapy appeal, that

“the deciding factor in whether services are duplicative is not the [therapy] technique utilized by the therapists, but the goals and outcomes being addressed by the therapists.” *Id.* at 2. It does not matter, for example, if one provider addresses group activities with peers and the other one-on-one activities with an adult. A requested service duplicates “an existing service if the intended outcome of the two services is substantially the same.” *Id.* at 3. Her decision specifically rejected additional therapy because the recipient “‘needs’ more intense services than the school provides.”

That holding rests on the principle that “Medicaid may not pay for two services if both services have the same intended outcome or result with respect to the medical condition the services are intended to address.” *Id.* at 4. The Department has made it clear that the “intended outcome” test must be read broadly. In DHA Final Decision No MPA-49/82886, a decision reiterating the principle laid down in MPA-37/80183, the Department’s then-Deputy Secretary pointed out that the intended outcome was the same if both therapists were working to develop similar functional skills. The unstated rationale underlying the deputy secretary’s decision is that federal law requires school districts to meet the special needs of its students and the department will not allow a district’s failure to comply with this obligation provide the reason for funding another source of therapy.

In this case the petitioner’s father argued that the school services are insufficient because petitioner only has limited time in a group setting. He explained that he believes that his son needs one-on-one therapy with a speech therapist. Petitioner also receives intensive in-home services up to six hours every day. A portion of this therapy is designed with the goal of improving articulation skills. I fully appreciate that more services may indeed be better for petitioner, or that the one-on-one setting of the private therapy may be best for a child with petitioner’s specific issues. I also understand that the private provider may simply be a better therapist. ForwardHealth is not intended to provide the most ideal, optimal or comprehensive services, but only basic health services. Under the rules and these facts, the services are duplicative.

### **CONCLUSIONS OF LAW**

The Department did not err in its modification of the PA request.

**THEREFORE, it is ORDERED**

That this appeal is dismissed.

### **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 29th day of March, 2013

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\sJohn P. Tedesco  
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 March 29, 2013.

Division of Health Care Access And Accountability