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

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In the Matter of

██████ ██████  
c/o ██████ ██████  
████████████████████  
████████████████████

DECISION

MPA/148112

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**PRELIMINARY RECITALS**

Pursuant to a petition filed March 15, 2013, 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 April 23, 2013, at Shawano, Wisconsin.

The issue for determination is whether the Department erred in its denial of the request for prior authorization # ██████████ for speech therapy and oral function therapy as well as related evaluations.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

██████ ██████  
c/o ██████ ██████  
████████████████████  
████████████████████

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 is a resident of Shawano County. He is certified for MA.

2. On January 3, 2013, a prior authorization request (# [REDACTED]) was submitted on the petitioner's behalf for speech and language therapy (SLT) and oral function therapy and related evaluations, at a cost of \$5,907. Following a re-submission, the Division issued written notice of denial on February 27, 2013.
3. The Division's basis for denial was that inadequate documentation was submitted to establish the medical necessity for the therapy. Specifically, the petitioner has not shown progress in therapy, and other services are meeting his needs.
4. The petitioner, age five, was adopted at age two from a foreign country, and had an unrepaired bilateral complete cleft lip and palate at that time. The petitioner underwent a corrective surgery in July, 2009; however, a hole remains in the palate. The child continues to have fistulas which result in abnormalities in air pressure impacting his ability to shape sounds due to air going out of his nose. Another corrective surgery with a bone marrow transplant will not be scheduled until age eight, due to a need for further physical maturation.
5. The child has had verbal speech/swallowing therapy from [REDACTED] since September, 2009. At his 2009 initial evaluation, the child had receptive language skills at 13.4 month age equivalence, and expressive language skills at an 11.5 months age equivalence. In May 2012 this was 18 months.
6. Petitioner receives services through his school district.
7. In case #MPA/140138 (May 2012), the Administrative Law Judge authorized SLT related to obtaining an SGD for the petitioner after denial by the Department.
8. In case # MPA/140054 (May 2012), the ALJ affirmed the Department's denial of SLT related to a majority of the goals in the plan of care and authorized SLT with regard to two goals stating: "The evaluation did not supply updated age-equivalence language scores. That alone is an adequate reason for denial. After over two years of SLT, the child's intelligibility is stuck at a very non-functional 5 percent."
9. In case # MPA/146105 (February 2013), this ALJ authorized the SGD device after denial by the Department.

### 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. The Department argues that the provider did not provide any objective data showing progress as is required. See PA/Therapy Attachment Completion Instructions at Section VI (July 2012). The provider, on the other hand explained that it cannot administer standardized tests any more than once per year, and that it was told by Department personnel that it did not have to provide test scores every six months. The provider testified that while the progress was not quantified in an age-equivalent representation with the PA request, the progress is shown in the treatment plan documentation and can be discerned through interpretation of those plans. Obviously, the Department was not persuaded that there has been progress. To prevail on appeal the petitioner would then have to convince the administrative law judge that the Department is incorrect. The provider, at the time of hearing, testified as to current status of expressive language, articulation, and receptive language. But, the provider did not offer test results at hearing either. It appears based on my review of the record that the last testing may have been done in January 2012. I understand the argument that testing is not indicated more frequently than once a year. But, this does not explain why the provider could not come into the hearing in April 2013 with updated test scores in order to convince me that there has been adequate progress. The oral representations of progress seemed to me to be mere estimations created at the spur of the moment based on my questioning. The program rules require a description of progress in "specific, measurable, objective, and functional terms." Such a requirement is reasonable. And, an ALJ must apply the law and rules as they exist. CP has been through this process before in

which the Department denies the PA for this same reason and CP, Inc. testifies to progress though such progress is not actually documented. This was apparently sufficient to persuade in a separate appeal in 2012 with regard to a very limited scope of the sought services. But, given that history, I am confused as to why CP, Inc. would file another PA request lacking required documentation and come to hearing still lacking the documentation that is required by the program rules (see PA/TA Completion Instructions). The Department is correct that the provider did not supply the required indications of progress and that no meaningful progress is sufficiently demonstrated by this record.

The Department also 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. The Department’s illustrations of the duplication are not convincing. Based on this record, I find that the two services are not duplicative, but the denial of the PA was still appropriate based on the lack of demonstrated progress.

As for the oral function therapy, this was described by the provider as dealing primarily with speech articulation issues via oral motor skills and oral placement for speech sounds. There was even less testimony and documentation supporting the need for this therapy. This request fails under the same reasoning as provided above.

It may behoove the petitioner and the provider to consider a new PA request in which progress is appropriately documented using objective criteria and testing. But, on this record, I am unable to come to a conclusion that the provider has met its burden to show that the therapy is medically necessary and that the Department committed an error by denying the request.

### CONCLUSIONS OF LAW

The Department did not err in its denial of the PA request for SLT and oral function therapy.

**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 30th day of May, 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 May 30, 2013.

Division of Health Care Access And Accountability