



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWK/151494

PRELIMINARY RECITALS

Pursuant to a petition filed August 21, 2013, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Bayfield County Human Services in regard to Medical Assistance, a hearing was held on September 19, 2013, at Washburn, Wisconsin.

The issue for determination is whether the petitioner continues to qualify for the Children’s Long-Term Waiver.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: Carrie Linder (ADRC)
Bayfield County Human Services
117 East 5Th St
PO Box 100
Washburn, WI 54891-0100

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Bayfield County.

2. The petitioner receives Intensive Behavioral Intervention (EIBI) Services and Consultative Behavior Intervention (CBI) Services through the Children's Long-Term Support Waiver (CLTS).
3. The county agency seeks to end the petitioner's enrollment in CLTS because it contends that the petitioner did not receive at least 120 hours a month of EIBI services or at least 40 hours a month of CBI services.
4. The county agency presented no documentation of the hours of services the petitioner received.

DISCUSSION

The petitioner is diagnosed with autism and has been receiving intensive behavioral services funded through the Children's Long-Term Support Waiver (CLTS). He qualifies for the waiver because he has autism and suffers from a severe emotional disturbance. *See Medicaid Home & Community-Based Services Waivers Manual*, § 2.02D. The county agency seeks to end his participation in the waiver because it contends that he has not been receiving the number of hours of services required for benefits to continue.

The petitioner has been receiving Early Intensive Behavioral Intervention (EIBI) Services and Consultative Behavioral Intervention (CBI) Services. Both services "use behavioral treatment methods to change socially important behaviors in measurable and meaningful ways in the child's daily life." *Medicaid Home & Community-Based Services Waivers Manual*, Appendix E, SPC 512 and 512.10. To qualify for the waiver, children must require EIBI at intensive levels of service or CBI at consultative levels of service. The intensive level of service is between 30 and 40 hours a week and the consultative level is between 10 and 20 hours of face-to-face treatment per week. If the child does not receive this level of services, the agency may end his CLTS participation. *Id.*

The agency presented no documentation of the hours of services the petitioner received. When I pointed this out to its representative, she seemed miffed that she was expected to present documentation when the Division of Hearings and Appeals did not specifically request it before the hearing. Fair hearings are somewhat informal, but they are adversarial proceedings. While the agency's representatives are not lawyers, they are expected to have some basic knowledge of what is required to prove their case. 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. By seeking to end the petitioner's benefits, the agency is the moving party. The Department acknowledged the principle laid down in *Hanson* in *Final Decision ATI-40/87198* where Deputy Secretary Richard Lorang ruled on August 17, 1995, that in any fair hearing concerning the propriety of an agency action, the county or state agency has the burden of proof to establish that the action it took was proper given the facts of the case. In the matter before me, the agency's burden is by the preponderance of the credible evidence. Its entire case rests upon its assertion that the petitioner did not receive enough hours of services. Without some documentation of this, it cannot prove its case. Therefore, the petitioner remains eligible for CLTS.

I note to the petitioner that if he is not in fact receiving the required number of hours of the services described in this decision, he must begin doing so. If he does not, the agency can bring another action to end those services.

CONCLUSIONS OF LAW

The county agency has not established by the preponderance of the credible evidence that the petitioner failed to receive the level of services required to continue receiving CLTS.

THEREFORE, it is

ORDERED

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it certify to the Division of Hearings and Appeals that the petitioner remains eligible for CLTS.

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 17th day of October, 2013

\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 October 17, 2013.

Bayfield County Human Services
Bureau of Long-Term Support