



STATE OF WISCONSIN  
Division of Hearings and Appeals

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In the Matter of

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

DECISION

MPA/153437

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**PRELIMINARY RECITALS**

Pursuant to a petition filed November 12, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Department of Health Services Division to deny a prior authorization request for private duty nursing, a hearing was held on December 23, 2013, at Waukesha, Wisconsin.

The issue for determination is whether Petitioner meets the criteria necessary for continued private duty nursing services (PDN).

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, Room 651  
Madison, Wisconsin 53703

By: Cindy Zander, RN  
Division of Health Care Access and Accountability  
1 West Wilson Street, Room 272  
P.O. Box 309  
Madison, WI 53707-0309

**ADMINISTRATIVE LAW JUDGE:**

David D. Fleming  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Waukesha County.
2. PA # [REDACTED] was filed on or about June 20, 2013 and sought 70 hours per week of private duty nursing services for Petitioner for 52 weeks commencing July 27, 2013. The total cost was noted to be \$145,600.00. That request was approved in part – the time period was reduced to July 27, 2013

through November 14, 2013 to permit time to transition Petitioner to alternate levels of care. No appeal was filed until November 12, 2013, along with the appeal for this case.

3. The decision for PA # [REDACTED], DHA case # 153435, is issued at the same time as the decision here and concludes that the appeal of the modification of that PA is untimely.
4. Another PA (# [REDACTED]) was filed on behalf of Petitioner that again sought private duty nursing for Petitioner for the 12 month period beginning November 14, 2013. That prior authorization was denied. No PAs were submitted seeking alternate levels of care.
5. Petitioner is 23 years of age (DOB 3/4/90) and lives in the community with her family. Her diagnoses as noted on the prior authorization/plan of care attachment include spina bifida, restrictive lung disease, paraplegia, neurogenic bladder, back decubitus, asphyxia, a fractured femur, congenital diplegia, recurrent urinary tract infections, paralytic ileus, kidney reflux and Arnold Chiari Malformation. She has a ventricular shunt. She has a G-tube for nutrition and medications though she can take nutrition and water by mouth.

Her physician orders include nursing to assess cardiac, respiratory, gastrointestinal, genitourinary, neurological, hydration and nutritional status. Nursing is to provide all medications and perform straight catheterization every 2-4 hours, bladder irrigation twice a day, bowel stimulation every 2-4 hours, cleaning of g-tube site with soap daily, soft splinting of left-hand and assisting the range of motion exercises. Nursing is also to monitor for seizures, provide tracheal suctioning as needed, apply oxygen as needed, apply a BiPAP machine as needed and to 'pump shunt' as needed.

6. The reason for the denial here is that the Department determined that Petitioner does not require more than eight hours of skilled nursing services; therefore, does not qualify for private duty nursing but is willing to consider a mix of other services for Petitioner under the home health services and personal care worker categories of care. It has not, however, received prior authorization request for a combination of home health aide, skilled nursing and/or personal care worker services. It contends that Petitioner's family and provider have known that this transition was to take place; that was the reason for the extension of services from July to November 2013.

### DISCUSSION

When determining whether to approve therapy, the Medicaid program must consider the generic prior authorization review criteria listed at *Wis. Admin. Code, §DHS 107.02(3)(e)*:

(e) *Departmental review criteria.* In determining whether to approve or disapprove a request for prior authorization, the department shall consider:

1. The medical necessity of the service;
2. The appropriateness of the service;
3. The cost of the service;
4. The frequency of furnishing the service;
5. The quality and timeliness of the service;
6. The extent to which less expensive alternative services are available;
7. The effective and appropriate use of available services;
8. The misutilization practices of providers and recipients;
9. The limitations imposed by pertinent federal or state statutes, rules, regulations or interpretations, including medicare, or private insurance guidelines;
10. The need to ensure that there is closer professional scrutiny for care which is of unacceptable quality;
11. The flagrant or continuing disregard of established state and federal policies, standards, fees or procedures; and
12. The professional acceptability of unproven or experimental care, as determined by consultants to the department.

"Medically necessary" means 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;
2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided;
3. Is appropriate with regard to generally accepted standards of medical practice;
4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
5. Is of proven medical value or usefulness and, consistent with s. DHS 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).*

In order to receive Medicaid payment for private duty nursing services in individual must require skilled nursing interventions for at least eight hours per day. *See Wisconsin Administrative Code, §DHS 107.11 and 107.12.* All private duty nursing requests require prior authorization for Wisconsin Medicaid payment. *See Wisconsin Administrative Code, §DHS 107.12 (2)(a).* Specifically applicable here are the following Code provisions:

**DHS 107.11 Home health services. (1) DEFINITIONS.**

In this section:

...

**(2) COVERED SERVICES.** Services provided by an agency certified under s. DHS 105.16 which are covered by MA are those reasonable and medically necessary services required in the home to treat the recipient's condition. Covered services are: skilled nursing services, home health aide services and medical supplies, equipment and appliances suitable for use in the recipient's home, and therapy and speech pathology services which the agency is certified to provide.

...

Home health services include:

(a) Skilled nursing services provided in a recipient's home under a plan of care which requires less than 8 hours of skilled nursing care per calendar day and specifies a level of care which the nurse is qualified to provide. These are:

...

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**DHS 107.12 Private duty nursing services. (1) COVERED SERVICES.**

(a) Private duty nursing is skilled nursing care available for recipients with medical conditions requiring more continuous skilled care than can be provided on a part-time, intermittent basis. Only a recipient who requires 8 or more hours of skilled nursing care and is authorized to receive these services in the home setting may make use of the approved hours outside of that setting during those hours when normal life activities take him or her outside of that setting. Private duty nursing may be provided according to the requirements under ss. DHS 105.16 and 105.19 when the written plan of care specifies the medical necessity for this type of service.

As with most public assistance benefits 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 is a Petitioner's burden to demonstrate that s/he qualified for the requested continued services by a preponderance of the evidence. It is not the Department's burden to prove that s/he is not eligible.

Further, I note that Medicaid is meant to provide the most basic and necessary health care services at a reasonable cost to a large number of persons and must authorize services according to the Wisconsin Administrative Code definition of medical necessity and other review criteria noted above. It is not enough to demonstrate a benefit; rather, all of the tests cited above must be met.

Direction as to how to calculate hours of nursing care required comes from the Department's provider Handbook:

To determine if a member receives eight or more hours of direct skilled nursing services, add up the total hours of direct skilled nursing care provided by all caregivers, including home health agencies, independent nurses, and skilled cares provided by family or friends. If the total time required daily for these cares is equivalent to eight or more hours, the member is eligible for PDN. The POC is required to include the actual amount of time to be spent on medically necessary direct cares that require the skills of a licensed nurse.

For this purpose, Medicaid-covered skilled nursing services may include, but are not limited to, the following:

- Injections.
- Intravenous feedings.
- Gastrostomy feedings (include the time needed to begin, disconnect, and flush — not the entire time the feeding is dispensing).
- Nasopharyngeal and tracheostomy suctioning.
- Insertion and sterile irrigation of catheters.
- Application of dressings involving prescription medications and aseptic techniques.
- Treatment of extensive decubitus ulcers or other widespread skin disorders.

<https://www.forwardhealth.wi.gov/WIPortal/Online%20Handbooks/Display/tabid/152/Default.aspx?ia=1&p=1&sa=29&s=2&c=365>

The Department submitted a detailed explanation as to its reasons for denying this PA. Exhibit # 3. That explanation included a breakdown of the skill level needed to perform the various medical tasks needed by Petitioner:

- G-tube feedings - a skilled nursing task as to starting, ending and flushing the g-tube. The continuous drip of an up to an 8 hour feeding does not need skilled nursing attention can be delegated to a home health aide or a personal care worker.
- Suctioning - tracheal suctioning is a skilled nursing task.
- Oxygen saturation - measurements may be taken by a home health aide or a PCW fellow the skills of a nurse may be needed for initial administration of action and adjustment of flow rate.
- BiPAP machine - placement and removal may be done by a home health aide or personal care worker.
- Seizures - skilled nursing is needed for respiratory compromise where administration of oxygen and/or administration of medications are needed. Seizure precautions may be taken by a home health aide or a PCW.
- Straight line catheterizations may be done by a home health aide.
- Bladder irrigation - this is a skilled nursing activity.
- Medications - this may be performed by a home health aide unless administration is the g-tube.

- Oral feedings - may be performed by a home health aide or PCW special training if there are swallowing difficulties.
- Vital signs - this may be delegated to a home health aide or personal care worker.
- Passive range of motion - may be delegated to home health aide or personal care worker.

The Department does not dispute the need for skilled nursing services; rather, the Department contends that skilled nursing, home health aide and personal care workers can be used in combination to meet Petitioner's needs. It maintains that medical documentation does not demonstrate that Petitioner's condition has been unstable. As an example, the last emergency rule visit for evaluation of the seizure was in 2010. Petitioner has no scheduled or as needed medicines ordered for seizures in her plan of care. A September 2012 annual physical exam documented Petitioner as being medically stable. Ultimately, the Department concluded that a the skilled nursing tasks required for Petitioner are tasks that could be accomplished via nursing visits and nurse delegated tasks monitored by a nurse during those visits. Given all of this, the Department concluded that Petitioner does not need eight hours per day of skilled nursing interventions.

I emphasize again that the Department recognizes Petitioner's need for complete care and the complexity of her diagnoses but has determined, and communicated to Petitioner's caregivers, that 8 hours per day of hands on skilled nursing is not needed but that the complete care required can be provided by a combination of nurse, home health aide and personal care worker personnel. Further, home healthcare services include skilled nursing services of less than eight hours per day. *See Wis. Admin. Code, § DHS 107.11.*

Petitioner's mother represented her at the hearing. Her position is really an argument that Petitioner's care is so complex given the various diagnoses and medical tasks that the combination leaves Petitioner in such fragile state that only private duty nursing can meet her needs. She maintains that it is the PDN service that keeps Petitioner as stable as she is.

As this case reaches the Division of Hearings and Appeals, the bottom line question is whether Petitioner continues to meet the standard necessary for private duty nursing for the number of hours approved through mid-November 2013. The parties agree that Petitioner has a number of serious medical diagnoses which individually, and certainly in combination, result in a myriad of medical problems requiring numerous medical tasks or interventions or potential interventions. The Department has, however, shown that Petitioner is stable and that many of the medical tasks can be medically and legally assigned to a home health aide or personal care worker. The case advanced on behalf of Petitioner is more of a subjective argument based on the complexity of Petitioner's medical issues. What is not provided on behalf of Petitioner is a comprehensive breakdown of precisely what medical interventions must be provided by a registered nurse versus what could be provided by a home health aide versus what can be provided by a personal care worker. There is no comprehensive breakdown describing at minimum – the medical task, the frequency of the task, the time needed for each task, the level of medical training required to perform the various medical tasks and the legally required level of training necessary to perform various medical interventions.

Ultimately a decision by the Division of Hearings and Appeals requires an application of law to the facts of the case. As such, a Division of Hearings and Appeals decision is a determination as to whether those facts meet the requirements of the law, thus the decision is a legal one not a medical one. Here the Petitioner has not shown that she needs 8 hours per day of private duty nursing or that the Department assertion that a combination of nursing visits, home health aide and personal care worker services can safely meet Petitioner's needs is incorrect.

*NOTE: Petitioner's family should be aware that Petitioner's provider will not receive a copy of this Decision but that she is free to provide it to the provider.*

**CONCLUSIONS OF LAW**

That the evidence does not indicate that the request for Medicaid payment for private duty nursing services for Petitioner for the period beginning mid November 2013 meets the standards necessary for payment by Medicaid.

**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, Room 651, 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 Milwaukee,  
Wisconsin, this 28th day of February, 2014

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\sDavid D. Fleming  
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 February 28, 2014.

Division of Health Care Access and Accountability