



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

In the Matter of

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

DECISION

FCP/155441

PRELIMINARY RECITALS

Pursuant to a petition filed February 12, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Continuum in regard to Medical Assistance, a hearing was held on April 15, 2014, at New Richmond, Wisconsin.

The issue for determination is whether the petitioner continues to be entitled to five days a week of adult day services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: T.J. Adkins
Continuum
28526 US Hwy 14
Lone Rock, WI 53556

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) resides in community-based residential treatment facility in St. Croix County.

2. The petitioner participates in the Family Care Program through Continuus, her care management organization.
3. The petitioner has been attending the [REDACTED] since 2000. She now attends five days a week for six hours a day. Continuus notified her in writing on December 9, 2013, that it seeks to reduce her attendance to three days a week for six hours a day.
4. Day services cost \$313.12 per week if provided five days a week and \$187.92 if provided three days a week.
5. The petitioner's brother also attends that center five days a week for six hours a day.
6. The petitioner is a 61-year-old cognitively disabled woman who requires assistance with eating, dressing, bathing, and toileting. She can walk and transfer herself and is able to go into the community with supervision.
7. The petitioner's member-centered service plan includes the following outcomes:
 - a. [She] want to participate in community activities and socialize with people around her.
 - b. [She] wants to be in a familiar environment so she can stay healthy and safe.
 - c. [She] wants to participate in her ADLs/IADLs as much as she can.
8. The petitioner has been diagnosed with Alzheimer's. There is no evidence concerning how severe this is.
9. The petitioner receives sensory inputs routinely on a schedule at the day center. At her CBRT, she only receives sensory inputs sporadically because the people there must perform other tasks and sensory techniques are not a priority.
10. The petitioner occasionally sleeps while at the center.

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 contemplated process is to test the applicant's functional eligibility, then her financial eligibility, and, if she meets both standards, to certify her 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 is a 61-year-old developmentally disabled woman who requires assistance with all of her activities and instrumental activities of daily living except walking and transferring. She receives Family Care Medical Assistance through Continuus. Her services include attendance five days a week for six hours a day at [REDACTED], where she has been going since 2000. Continuus seeks to reduce her attendance to three days a week.

The petitioner’s service plan includes a member-centered service plan with the following outcomes:

1. [She] want to participate in community activities and socialize with people around her.
2. [She] wants to be in a familiar environment so she can stay healthy and safe.
3. [She] wants to participate in her ADLs/IADLs as much as she can.

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, Continuus has the burden of proof because it is trying to change the present state of affairs by reducing petitioner’s hours at the adult day center.

Continuus’s contract with the Department requires that its “[s]ervices must be sufficient in amount, duration, or scope to reasonably be expected to achieve the purpose for which the services are furnished.” *2014 Contract Between Department of Health and Human Services and Continuus*, Article VII.A.2. The petitioner’s file indicates that she was diagnosed with Alzheimer’s in 2012 and Continuus contends she gets little benefit from the day services because sleeps most of the time while there.

The problem with this assertion is that it offers no testimony to support it. Its contention is based entirely on case notes made by the petitioner’s former case manager. These notes are hearsay. It is true that the rules of evidence generally do not apply to administrative hearings. Wis. Stat. § 227.45. Nevertheless, administrative decisions cannot be based solely upon uncorroborated hearsay. *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987). The rules of evidence do allow an exception to the hearsay rule for regularly kept business records, but this exception does not apply to records whose circumstances indicate a lack of trustworthiness. Wis. Stat. § 908.03(6). Lack of trustworthiness does not depend upon establishing that the person preparing the record is deceitful or dishonest. Rather, it is only necessary to establish that circumstances that led to the record’s preparation would cause the preparer to align with a party. Thus, records prepared in anticipation of litigation have long fallen outside of business record exclusion. *See Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943). In Wisconsin, our supreme court has ruled that records prepared by the state crime laboratory do not qualify for the exception, even though

few doubt the competence or integrity of its workers. *State v. Williams*, 2002 WI 58, 253 Wis.2d 99, 644 N.W.2d 919 (2002). In the petitioner's matter, her case manager was preparing the records at least in part to justify reducing the petitioner's services. This means that the records she prepared were prepared under circumstances that lack trustworthiness. There is no corroboration of the assertion that the petitioner sleeps most of the time she is at the center, so I cannot accept the statement. Finally, even if the record could be admitted, it is contradicted by testimony from the petitioner's son that she only takes occasional naps while there.

Continuus presented no evidence indicating how far the petitioner's Alzheimer's has advanced. This is important because its case depends in part upon her alleged inability to continue to function well enough to gain any advantage from the center. Nor did it present any other evidence from medical personnel. None of the workers from the CBRF, who could offer insights into the petitioner's situation and needs testified. Continuus had four of its workers at the hearing, but they had little or no first-hand knowledge of the petitioner's situation. The petitioner has been going to the center since around 2000. It is unclear how long she has been going five days a week, but it has been for at least several years. She has been going this often because his CMO has periodically reviewed the evidence and determined that this is the amount of time there she needs to meet the outcomes established for her. Although Continuus seeks to reduce her time at the center, it provided no admissible evidence about why all the CMO's previous findings that she required five days at the center to meet her outcomes are no longer valid.

Continuus is left to argue that the services at the center are not cost effective and duplicate those she receives in her CBRF. Cost effectiveness and duplication are considerations because all Medicaid services must be medically necessary, and cost effectiveness and duplication are components of medical necessity. *See Wis. Admin. Code, § DHS 101.03(96m); see also 2014 Contract Between Department of Health and Human Services and Continuus, Article I, Definitions.* But the cheapest service is not always the most cost effective. For example, a manual wheelchair is cheaper than a power wheelchair, but it would not be cost-effective to provide a manual wheelchair to a quadriplegic who could not propel it. Cost effectiveness balances the cost to one party against the needs of the other. Continuus must still show that the reduced service is sufficient to be reasonably expected to achieve its purpose. It presented too little evidence comparing the services the petitioner receives from her CBRF and the center to establish that going to the center three days a week will now adequately meet her outcomes to participate in community activities and socialize with people around her, be in a familiar environment so she can stay healthy and safe, and participate in her activities and instrumental activities of daily living as much as she can. Because Continuus has not proven by the preponderance of the credible admissible evidence that three days a week at the center will meet her needs, it must continue to allow her to go there five days a week..

CONCLUSIONS OF LAW

The petitioner's MCO is contractually obligated to continue to provide day services for the petitioner at [REDACTED] five days a week for six hours a day because that is the amount, duration and scope of services that are reasonably expected to allow her to meet her outcomes.

THEREFORE, it is

ORDERED

That this matter is remanded to Continuus with instructions that within 10 days of the date of this decision it certify that it has continued to provide day services for the petitioner at [REDACTED] five days a week for six hours a day.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 8th day of May, 2014

\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 May 8, 2014.

Continuus

Office of Family Care Expansion

■■■■■■■■■■@wisconsin.gov