



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

FCP/155442

PRELIMINARY RECITALS

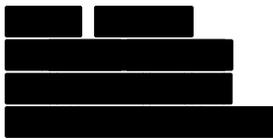
Pursuant to a petition filed February 12, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Continuum in regard to Medical Assistance, a hearing was held on April 15, 2014, at New Richmond, Wisconsin.

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

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



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 a community-based residential treatment facility in St. Croix County.

2. The petitioner participates in the Family Care Program through Continuus, his care management organization.
3. The petitioner has been attending the [REDACTED] since 2000. He now attends five days a week for six hours a day. Continuus notified the petitioner in writing on December 9, 2013, that it seeks to reduce his 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 sister also attends that center five days a week for six hours a day.
6. The petitioner is a 64-year-old non-verbal, developmentally-disabled man who depends upon others for assistance with eating, dressing, bathing, and toileting. He can walk but needs assistance on uneven surfaces and stairs. He cannot prepare his meals, manage his money or medications, do his laundry, use the telephone, or drive a car. He requires constant supervision.
7. The petitioner's member-centered service plan includes the following outcomes:
 - a. [He] wants to be given the opportunity to interact socially and develop relationships.
 - b. [He] wants more sensory input in order to process his physical environment.
8. The petitioner's needs have not changed in the last several years.
9. The petitioner receives sensory inputs routinely on a schedule at the day center. At his CBRT, he only receives sensory inputs sporadically because the people there must perform other tasks and sensory techniques are not a priority.
10. The petitioner spends a great deal of time by himself. At the center, he often stays next to the door and greets people with a grunt.
11. There is only one resident in the petitioner's home during the day. He does not get along with that person.

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 his financial eligibility, and, if he meets both standards, to certify his 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 64-year-old developmentally-disabled nonverbal man who requires assistance with all of his activities and instrumental activities of daily living except walking and transferring. He receives Family Care Medical Assistance through Continuum. His services include attendance five days a week for six hours a day at [REDACTED], where he has been going since 2000. Continuum seeks to reduce his attendance to three days a week.

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

1. [He] wants to be given the opportunity to interact socially and develop relationships.
2. [He] wants more sensory input in order to process his physical environment.

Continuum does not claim that either of these outcomes is unnecessary; rather it claims that the outcomes can be met more cost-effectively with less time at the center. Because the needs can be met at the CBRF, Continuum contends the center’s services also are not needed because they duplicate services he already receives. 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, Continuum 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.

Continuum’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 Continuum*, Article VII.A.2. The petitioner’s mental and physical ability has not changed in the last several years, and Continuum does not argue that he requires less opportunity to interact socially and develop relationships or requires less sensory input in order to process his physical environment. Nor does it argue that [REDACTED] does not help him meet these needs. This means that Continuum has the burden of proving that the reduced services it proposes are sufficient to allow him to interact socially and develop relationships and to have adequate sensory input to process his physical environment.

It appears that Continuum’s ultimate goal is to eliminate day services completely. It also appears that Continuum believes whatever option costs it the least must be considered the most cost-effective regardless of any other circumstances. It listed three options: continuing to fund services for five days a

week, reducing services to three days a week, or terminating day services. If offers the following comment on the options:

Reducing day services to 3 days per week supports [Petitioner's] outcomes and allows the IDT to assess whether the service is a need for him. While this is not the most cost effective option, it allows for a slow reduction in services if it determined that day services are no longer needed in the future.

Cost effectiveness is a consideration because all Medicaid services must be medically necessary, and cost effectiveness is a component of medical necessity. (Duplication of services is also a component 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. Continuus must still show that the reduced service is sufficient to be reasonably expected to achieve its purpose.

Continuus produced only about a minute of testimony concerning the petitioner at the hearing. It argued that he can get sensory inputs at his CBRF, that he spends a good deal of time alone and does not talk to people most of the day at the center, and that he will still get whatever benefits the center offers because he will continue to go there three days a week. All of these assertions were conclusions unsupported by evidence. Continuus did not question the benefits attributed to sensory techniques and thus their effectiveness is not an issue. The little evidence presented by either side on the sensory inputs indicated that the center has a room set aside for them and the petitioner receives those inputs at regular intervals. The petitioner's brother testified that the CBRF has two staff persons who occasionally use some sensory techniques, if they have the time. Continuus could not provide any details about the sensory programs of either the center or the CBRF.

The petitioner may spend time alone and not communicate much with others, but until a qualified psychologist familiar with him testifies otherwise, I am going to assume that he, like most humans, requires regular personal contact, regardless of his limitations. Part of the contact he has at the center is seeing his sister, who also goes there five days a week for six hours a day. Their brother testified that all except one of the persons at the CBRF, a man the petitioner does not get along with, is gone throughout the day. This means he gets little personal contact there. At the center, he sees people come and go and often greets them, albeit with a grunt.

I disagree with logic behind Continuus's argument that the petitioner's needs will still be met if he goes to the center three days a week. If he can get the same socialization and sensory benefits at his CBRF, then he does not need to go to the center at all. If he does not get the same benefits at the CBRF, it is up to Continuus to demonstrate that the benefits he receives from attending the center three days a week will be similar to those he receives from attending five days a week. Services can have diminishing marginal utility, but Continuus needs to do more than assert that its proposed reduction will continue to meet his needs. He has been going to the center since around 2000. It is unclear how long he has been going five days a week, but it has been for at least several years. He has been going this often because his CMO has periodically reviewed the same evidence Continuus is looking at now and determined that this is the amount of time that is needed to meet his medical needs. Although Continuus seeks to change his time at the center, it presented no medical evidence, it presented no testimony from workers at either the CBRF or the center who could offer insights into the petitioner's situation and needs, and its own four employees at the hearing had little or no first-hand knowledge of the petitioner's situation. In short, it provided no evidence why all the CMO's previous findings that the petitioner required five days at the center to meet his needs no longer hold true.

Administrative hearings are less formal than court trials, but they remain adversarial proceedings. This means that the parties are expected to support their positions with credible evidence from those who can shed light on the situation. Neither party in this matter did this particularly well. The petitioner's main witness was his brother, who sees him two or three times a year for about 20 minutes. But the petitioner does not have the burden of proof because he is not trying to change the present state of affairs. Continuous, which does have that burden, presented no credible evidence proving that he will meet social and sensory needs by going to the center three days a week. Therefore, even though fewer days at the center would cost less, Continuous has not met its burden of proving that these reduced services will continue to meet his needs. .

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 him to meet his outcomes.

THEREFORE, it is

ORDERED

That this matter is remanded to Continuous 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