



FH
[REDACTED]

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

In the Matter of

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

DECISION

MPA/167412

PRELIMINARY RECITALS

Pursuant to a petition filed July 17, 2015, 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 August 13, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the Department of Health Services, Division of Health Care Access and Accountability (DHS) correctly denied the Petitioner's request for private duty nursing services.

NOTE: The record was held open to allow the Petitioner's mother to submit additional medical documentation. A discharge summary from Children's Hospital of Wisconsin has been marked as Exhibit 8 and entered into the record. DHS's response has been marked as Exhibit 9.

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

ADMINISTRATIVE LAW JUDGE:

Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. On January 6, 2015, DHS approved a December 2014 request for 60 hours per week of private duty nursing services; the approval was for 13 weeks. (Exhibit 6, pg. 5 – attachment 1)
3. On February 17, 2015, DHS also approved a January 2015 request for 70 hours per week of private duty nursing services. This was approved for 13 weeks with the admonition that the time was to be used to transition the Petitioner to an alternate level of care, because she did not require at least 8 hours per day of private duty nursing services. (Exhibit 6, pg. 5 – attachment 2)
4. On April 30, 2015, [REDACTED] submitted, on behalf of the Petitioner, a request for private duty nursing services, 70 hours per week for 52 weeks at a cost of \$364,000.00. (Exhibit 7, pg. 8)
5. The physician order in the Prior Authorization Care Plan Attachment indicates that the skilled nursing services were requested for the following tasks:
 - Assessment of temperature, pulse, respiration rate, blood pressure, oximeter readings, weight, cardiac function, genitourinary output, gastrointestinal output, hydration, pain, and seizure activity.
 - Administering prescribed medications via g-tube
 - Monitoring positioning to keep Petitioner's airway open
 - Deep suctioning Petitioner's airway as needed
 - Providing g-tube feedings as required
 - Performing OT, PT or ST services as instructed
 - Teaching Petitioner's foster family about cares as needed.

(See Exhibit 7, pg. 11)
6. On May 19, 2015, DHS sent [REDACTED] a letter, asking them to clarify what skilled nursing interventions were being provided and to submit supporting documentation, such as a seizure log or suctioning log. (Exhibit 7, pgs. 20-21)
7. In response, [REDACTED] sent a number of letters, but did not provide any seizure logs or suctioning logs. (Exhibit 7, pgs. 22-30; Testimony of Ms. Beck)
8. On June 30, 2015, DHS sent the Petitioner and [REDACTED] letters advising them that the request for private duty nursing services was denied. (Exhibit 7, pgs. 31-36)
9. The Petitioner is three years old and has a complex medical history. She has been diagnosed with developmental delays, laryngomalacia, GERD, asthma, hypotonia, drug exposure in utero and generalized seizure disorder, (Exhibit 6, pg. 5; Exhibit 7, p. 9)
10. The Petitioner cannot take nutrition orally, so is fed via g-tube. (Exhibit 7, pg. 16)
11. The Petitioner was most recently hospitalized from July 25, 2015 to August 5, 2015, because she had a fever, labored breathing and a seizure. (Exhibit 8)

DISCUSSION

Medicaid is meant to provide the most basic and necessary health care services at a reasonable cost to a large number of persons. Therefore, DHS must authorize services according to the Wisconsin

Administrative Code definition of medical necessity and the other review criteria noted below. All of the tests cited below must be met.

The generic prior authorization review criteria is 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).

As with most public assistance benefits the initial burden of demonstrating eligibility for any particular benefit or service 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, the Petitioner bears the burden of proving that her request for private duty nursing services meets the approval criteria.

In order to receive Medicaid payment for private duty nursing services an 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).

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.

See

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

“Skilled Nursing Services” are also defined in Wis. Admin. Code §DHS101.03(163):

“Skilled nursing services” means those professional nursing services furnished pursuant to a physician's orders which require the skills of a registered nurse or licensed practical **nurse** and which are provided either directly by or under the supervision of the registered nurse or licensed practical nurse.

Note: Examples of services which would qualify as skilled nursing services are:

- (a) Intravenous, intramuscular, or subcutaneous injections and hypodermoclysis or intravenous feeding;
- (b) Levin tube and gastrostomy feedings;
- (c) Nasopharyngeal and tracheotomy aspiration;
- (d) Insertion and sterile irrigation and replacement of catheters;
- (e) Application of dressings involving prescription medications and aseptic techniques;
- (f) Treatment of extensive decubitus ulcers or other widespread skin disorder;
- (g) Heat treatments which have been specifically ordered by a physician as part of active treatment and which require observation by nurses to adequately evaluate the patient's progress;
- (h) Initial phases of a regimen involving administration of medical gases; and
- (i) Rehabilitation nursing procedures, including the related teachings and adaptive aspects of nursing that are part of active treatment, e.g., the institution and supervision of bowel and bladder training programs.

It should be noted that, “a member's condition may be such that a service that would ordinarily be considered unskilled may be considered a skilled nursing service, because the service can only be safely and effectively provided by a nurse.” *Topic #2150 of the On-Line Provider Handbook*

The physician order in the Prior Authorization Care Plan Attachment indicates that the skilled nursing services were requested for the following:

1. Assessment of temperature, pulse, respiration rate, blood pressure, oximeter readings, weight, cardiac function, genitourinary output, gastrointestinal output, hydration, pain, and seizure activity.
2. Administering prescribed medications via g-tube
3. Monitoring positioning to keep Petitioner's airway open
4. Deep suctioning Petitioner's airway as needed
5. Providing g-tube feedings as required
6. Performing OT, PT or ST services as instructed
7. Taking seizure precautions
8. Teaching foster family about cares as needed.

(See Exhibit 7, pg. 11)

Of the tasks listed, the only task that clearly falls within the definition of skilled nursing services is the administration of g-tube feedings.

According to DHS's nurse consultant, DHS denied the request for private duty nursing, because the medical documentation submitted on behalf of the Petitioner did not explain why the remaining tasks could only be safely and effectively provided by a nurse or why a less skilled healthcare worker like a home health aide could not safely perform the tasks.

This is a close case, given the complexity of the Petitioner's medical history and her need for monitoring, but it does not appear that the [REDACTED] has provided sufficient information to approve the request for private duty nursing.

Reviewing the letters submitted by [REDACTED], [REDACTED], [REDACTED], and [REDACTED], a physician's assistant, their primary concerns were Petitioner's issues with emesis and aspiration during g-tube feedings and seizure activity. (See Exhibits 3, 4, 5 and Exhibit 7, pgs. 27-39)

As previously discussed, there appears to be no dispute that skilled nursing services are required for administering the Petitioner's g-tube feedings.

With regard to seizure activity, the [REDACTED] [REDACTED] [REDACTED] initially indicated that the Petitioner has two or more seizures a day, but after DHS requested further information, [REDACTED] indicated that there were three or more seizures a day. It is unclear why this claim changed. More troubling is the fact that [REDACTED] has not provided a seizure log, so there is virtually no evidence showing the frequency with which the Petitioner experiences seizures, how severe they are, how they are managed or what is being done to try to control them.

I note that the discharge summary from Petitioner's most recent hospitalization, which lasted 11 days, does not note an issue with frequent, multiple, daily seizures that required intervention. (See Exhibit 8) It only noted that the child was brought to the emergency room after having a seizure at an urgent care

¹ This nurse's last name in her signature was not legible and her name was not printed on her letter/summary.

center. The discharge summary indicated that the Petitioner initially had frequent vomiting during g-tube feeds, but at discharge was tolerating her feeds without emesis/vomiting. The discharge summary did note that the child needed intermittent oral and nasal suctioning, but the discharge instructions do not contain any directions to follow up with private duty nursing services.

Petitioner's mother raised an additional concern regarding Petitioner's need for oral suctioning. Petitioner's mother indicated that the Petitioner requires suctioning 8-10 times a day, because she vomits her g-tube feedings. The administrative rules indicate that nasopharyngeal and tracheotomy suctioning are considered skilled nursing tasks, but there is no indication that the Petitioner needs this. Oral suctioning is not listed as a skilled nursing task and it is unclear from the record why a home health aide would not be able to safely perform this task.

Petitioner's mother also raised concerns about the child pulling out her g-tube. However, Ms. Beck indicated that if a nurse was not present at the time, that a home health aide could call one to the scene, if it were needed. Ms. Beck further pointed out that private duty nurses are not present 24 hours per day, and as such, Petitioner should already have a plan in place to address those occasions when tubing becomes dislodged.

Looking at the record as a whole, it is found that the Petitioner has shown the need for skilled nursing services for G-tube feedings only. The physician order in the prior authorization care plan attachment does not indicate how many G-tube feedings are required, but the document submitted by [REDACTED] indicates the Petitioner has g-tube feedings four times per day and the hospital discharge summary indicates the child needs four cans of Pediasure per day. This is not likely to take 8 hours per day. As such, the Petitioner does not qualify for private duty nursing services.

As the DHS consultant points out, the Petitioner's needs can be met through Home Health Services under Wis. Admin. Code §DHS 107.11, which allows coverage of skilled nursing services, less than 8 hours per day, as well as home health aide services, for medical tasks that do not require the skills of a nurse, but cannot be safely delegated to a personal care worker.

This case is very troubling, because when DHS sent [REDACTED] the approval for private duty nursing in January 2015, it indicated in the notice, "This case is borderline to meeting PDN criteria. At next submission please submit daily suction and seizure logs w/frequency, type and intervention, use of neb tx. Please include pulmonology and GI notes, PCP clinic notes and update on surgery..." Yet, [REDACTED] does not appear to have followed through with this directive. (Exhibit 5, attachment 1)

In February 2015, when DHS sent [REDACTED] approval for 13 weeks of private duty nursing, it told them, "The documentation does not support the medical necessity of PDN services. There are not at least 8 hours/day of skilled care required. 13 weeks approved to allow for transition to alternate level of care." (Exhibit 5, attachment 2) Again, there does not appear to have been any follow through with this, as Petitioner was not transitioned to the care of a homehealth aide and reduced skilled nursing services.

Petitioner should note that if the [REDACTED] has a seizure log, suctioning log, or equivalent treatment notes, that it can submit a new prior authorization request with that information. If that new request is denied the Petitioner may then file a NEW request for fair hearing.

I note to the Petitioner that [REDACTED] will not receive a copy of this Decision. The Petitioner and her mother might wish to share this decision with them.

CONCLUSIONS OF LAW

DHS correctly denied the Petitioner’s request for private duty nursing services.

THEREFORE, it is

ORDERED

That the petition is dismissed.

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 Milwaukee,
Wisconsin, this 30th day of September, 2015.

\sMayumi M. Ishii
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 September 30, 2015.

Division of Health Care Access and Accountability