

1997-98 SESSION
COMMITTEE HEARING
RECORDS

Committee Name:

*Joint Committee for
Review of
Administrative Rules
(JCR-AR)*

Sample:

- Record of Comm. Proceedings
- 97hrAC-EdR_RCP_pt01a
- 97hrAC-EdR_RCP_pt01b
- 97hrAC-EdR_RCP_pt02

- Appointments ... Appt
-
- Clearinghouse Rules ... CRule
-
- Committee Hearings ... CH
-
- Committee Reports ... CR
-
- Executive Sessions ... ES
-
- Hearing Records ... HR
-
- Miscellaneous ... Misc
- 97hr_JCR-AR_Misc_pt29a_SofC
- Record of Comm. Proceedings ... RCP
-

1997 Service of complaints —

SENATOR RICHARD GROBSCHMIDT
CO-CHAIRMAN

Room 404 • Hamilton
Madison, WI 53707
Phone: 608-266-7505



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIRMAN

Room 125 West, • State Capitol
Madison, WI 53703
Phone: 608-264-8486

JOINT COMMITTEE FOR
REVIEW OF ADMINISTRATIVE RULES

MEMORANDUM

To: Members, JCRAR
From: Senator Richard Grobschmidt, Co-Chairman
Representative Glenn Grothman, Co-Chairman
Date: February 20, 1997
Re: Service of Lawsuit

Pursuant to s. 227.40(5), Stats, the Joint Committee for Review of Administrative Rules has been served with notice in the matter of *Thomas W. Reimann v. Governor Tommy Thompson & the Joint Committee on Finance*. A copy of the lawsuit is attached for your review.

Subchapter III of Chapter 227, Stats, establishes an action for declaratory judgment in the circuit court for Dane County to be the primary means for judicial review in a dispute concerning the validity of an administrative rule. Subject to the approval of the Joint Committee on Legislative Organization, the Joint Committee for Review of Administrative Rules may choose to be made a party to the suit, and thereby be entitled to be heard.

If you are interested in a further pursuit of the rights of the JCRAR under this suit, please forward your request in writing to the offices of the co-chairmen of the committee.

State of Wisconsin : Circuit Court : DANE County

Name: THOMAS W. REIMANN
POST OFFICE BOX 351
Address: WAUPUN WISCONSIN 53963

City, State, Zip:

Plaintiff,

vs.

Name: GOVERNOR TOMMY THOMPSON
ROOM 115 EAST, STATE CAPITOL
Address: JOINT COMMITTEE ON FINANCE
ROOM 116 SOUTH, STATE CAPITOL
City, State, Zip: MADISON WISCONSIN 53707
Defendant.

File No. 97CV0306
97IP0018

SUMMONS

DECLARATORY JUDGMENT

30701

(Case Classification Type)

(Code No.)

THE STATE OF WISCONSIN

To each person named above as a defendant:

You are hereby notified that the plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within ~~20~~³⁰ (45) days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is:

Clerk of Circuit Court

DANE County Courthouse

210 MARTIN LUTHER KING BLVD

MADISON WISCONSIN 53709

and to THOMAS W REIMANN
plaintiff's attorney, whose address is:

POST OFFICE BOX 351

WAUPUN WISCONSIN 53963

State of Wisconsin
County of Dane
I hereby certify this is a true
copy of the original Summons
and Complaint, filed in my office

Attest: *[Signature]*
Clerk of Courts
by Deputy Clerk

You may have an attorney help or represent you.

If you do not provide a proper answer within ~~20~~ (45) days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 9th day of January, 1997.

Thomas Reimann or _____
Plaintiff Plaintiff's Attorney's

State Bar No. _____

Address: Post Office Box 351
Waupun, WI 53963

Phone: _____

10
11
12

DANE COUNTY, WI

JAN 17 3 33 PM '97

CIRCUIT COURT

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

THOMAS W. REIMANN
POST OFFICE BOX 351
WAUPUN WISCONSIN 53963,

97CV0306

97IP0018

Plaintiff,

-v-

Case No. _____

GOVERNOR TOMMY THOMPSON
ROOM 115 EAST, STATE CAPITOL
& JOINT COMMITTEE ON FINANCE
ROOM 116 SOUTH, STATE CAPITOL
MADISON WISCONSIN 53707
IN THEIR OFFICIAL AND
INDIVIDUAL CAPACITIES,

DECLARATORY JUDGMENT
30701

Defendants,

COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW the plaintiff, Thomas W. Reimann, appearing pro-se, and as for a cause of action alleges and shows to this court as follows:

J U R I S D I C T I O N

This action is commenced pursuant to §§ 806.04(2) and 227.40(1), Wisconsin State Statutes. Plaintiff seeks declaratory relief and injunctive relief.

P A R T I E S

1. Plaintiff Thomas W. Reimann is a State of Wisconsin prisoner currently confined at the Waupun Correctional Institution. (hereinafter "WCI"). His address is: Post Office Box 351, Waupun, Wisconsin 53963;

17-1111

DANE COUNTY, WI

JAN 17 3 33 PM '91

CIRCUIT COURT

2. Defendant Tommy Thompson, (hereinafter "Thompson") is employed by the State of Wisconsin as the Governor of the State of Wisconsin. His address is: Room 115 East, State Capitol, Madison, Wisconsin 53707;

3. Defendant Joint Committee on Finance, (hereinafter "The Committee") is an agency of the State of Wisconsin. Their address is: Room 116 South, State Capitol, Madison, Wisconsin 53707;

4. Defendants' are sued in their individual and official capacities;

F A C T S

5. Plaintiff was sentenced to an aggregate prison sentence of 36 years, which commenced in 1990;

6. Among plaintiff's convictions are the delivery of a controlled substance, possession of controlled substance and obtaining a controlled substance by fraud;

7. In September of 1990 the defendants' adopted and promulgated an administrative "rule" which prohibits all inmates' convicted of drug offenses from being paroled;

8. This "rule" has not been properly promulgated and adopted in compliance with § 227.40(4)(a), Stats., and is therefore invalid;

9. This "rule" violates the Wisconsin separation of powers doctrine by conferring power upon The Committee which usurps the power of the legislature who deemed the plaintiff to be eligible for parole;

10. The "rule" violates the ex post facto clause enacted by Article 1, § 10 of the United States Constitution and Aerticle 1, § 12 of the Wisconsin Constitution as it is effectively making the penalties for drug offenders much more onerous than when the crime(s) were committed and applying this punishment retroactively;

11. The promulgation of this "rule" also exceeds the statutory authority of the Committee and is therefore invalid as provided by § 227.40(4)(a), Stats;

12. The "rule" also violates the plaintiff's right to Equal Protection and Due Process as mandated by the 6th & 14th Amendments to the United States Constitution as it was specifically enacted to deny parole to drug offenders while allowing individuals convicted of more serious offenses such as sexual assault, child molestation, murder, etc., to be eligible for parole consideration;

DEMAND FOR RELIEF

WHEREFORE, the plaintiff respectfully requests that this court grant him the following relief:

- a. Issue a declaratory judgment rendering the aforementioned "rule" null & void;
- b. Issue a permanent injunction enjoining the defendants' from enforcing this "rule";
- c. Plaintiff further demands a hearing to contest the validity of this rule as mandated by § 227.42(1), Stats.;

Respectfully Submitted,

Thomas Reimann

Thomas Reimann pro-se
Post Office Box 351
Waupun, Wisconsin 53963

DATED: This 9th day of Jan, 1997;

STATE OF WISCONSIN

CIRCUIT COURT

DANE

COUNTY

Plaintiff/
Petitioner: THOMAS REIMANN
PO BOX 351
Address: WAUPUN WIS 53963

-VS-
Defendant/
Respondent: TOMMY THOMPSON &
JOINT COMMITTEE ON FINANCE
Address: STATE CAPITOL
MADISON WIS 53707

INDIGENCY
AFFIDAVIT ~~AND~~
97CV0306
97IP0018
Case No. 97CV0306

CIRCUIT COURT
DANE COUNTY, WIS.
JAN 17 9 32 AM '97

AFFIDAVIT

Under oath, I swear or affirm that:

- 1. Because of my poverty, I am unable to pay or give security for costs in the action;
- 2. I believe that I am entitled to a favorable disposition;
- 3. The nature of my cause or defense is stated in an attached document;
- 4. I have no source of income, except: prison wages, I have \$5.00 in my account;
and owe \$3956.00 in fines to Branch 11, Dane County Circuit Court;
- 5. I own no property of value, except: N/A

Subscribed and sworn to before me this date
January 7, 1997
[Signature]
Notary Public/Clerk of Circuit Court, State of Wisconsin
My commission expires 8-23-98

Signature of Plaintiff/Petitioner
Tom Reimann
Date
Jan 7, 1997

ORDER

The above affidavit is approved, pursuant to s.814.29, Wis. Stats.
IT IS ORDERED that this action may be commenced and prosecuted, or defended, without being required to give security for costs and without payment of the clerk's filing fees, and that the sheriff shall serve all necessary papers without payment of service fees.
IT IS FURTHER ORDERED that if costs are recovered, the amount shall be used to pay the filing and service fees waived by this order.

The above affidavit is not approved.

BY THE COURT:

(Circuit Court Judge)

(Clerk)

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

State ex rel. Wisconsin
Thomas W. Reimann

v.

Governor Tommy Thompson
and
Joint Committee on Finance

97CV0306

CASE NO. 97 IP 0018

DANE COUNTY, WI
FEB 3 8 45 AM '97
CIRCUIT COURT

ORDER WAIVING COSTS AND FEES (Prisoner/Pro-Se)

Upon reading and filing the foregoing affidavit of Thomas W. Reimann
pro se, in the above entitled action, and on motion of the petitioner;

IT IS ORDERED that the petitioner Thomas W. Reimann pro se,
be and hereby is permitted to commence or defend the above entitled action without first
posting security for costs, or without first making payment for service and filing fee; and

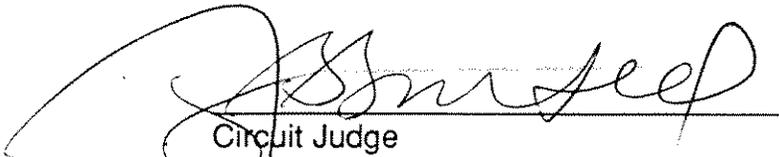
IT IS FURTHER ORDERED that the Clerk of said Circuit Court accept for filing and
so file all pertinent and relative papers without costs therein; and

IT IS FURTHER ORDERED that the Sheriff serve all papers herein without first
requesting payment of a service fee; and

IT IS FURTHER ORDERED that should costs be recovered in this action, then costs
shall first be applied to any and all costs herein waived.

Dated this 31st day of January, 1997.

BY THE COURT:



Circuit Judge

Hon. Angela B. Bartell

SERVED PERSONAL SUBSTITUTE AT 9:54 A M
THIS 19 DAY OF FEBRUARY 19 97
AT THE CITY OF MADISON
RICHARD F. RAEMICH
BY [Signature]
Deputy Sheriff

February 24, 1997

Sen. Richard Grobschmidt, Co-Chair
Joint Committee for Review of Administrative Rules
100 N. Hamilton, Rm. 404
Madison, WI 53702

Re: Hall v. DHFS, Milwaukee Co. Circuit Ct., Case No. 97CV000902

Dear Sen Grobschmidt:

Enclosed with this letter is a copy of the petition which was filed January 30, 1997, in the above-referenced matter. The case includes a challenge to guidelines followed by the Department of Health and Family Services in determining coverage for Medical Assistance private duty nursing services. The challenge is based on adoption of guidelines without going through formal rulemaking.

Please contact me if you have any questions about this matter.

Sincerely,



Roy Froemming
Managing Attorney
Developmental Disabilities Advocacy

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

CIVIL

DANIEL HALL, a minor, by his mother,
MAUREEN HALL,

97CV000902

Petitioner,

PETITION FOR REVIEW
OF ADMINISTRATIVE DECISION

v.

WISCONSIN DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,

Case No.

FILED
MILWAUKEE COUNTY

Respondent.

Case Code: 30607

JAN 30 1997

The petitioner, Daniel Hall, by his mother, Maureen Hall, and by his attorneys, the Wisconsin Coalition for Advocacy, by Roy Froemming, and the Legal Aid Society of Milwaukee, by Paula Lorant, respectfully petitions this court, pursuant to § 227.52, Wis. Stats., for a review of the decision made and entered by the respondent Wisconsin Department of Health and Family Services on January 2, 1997, entitled *In the Matter of Daniel Hall*, case no. MPA-40/#97398, and for grounds of this petition allege that:

1. Petitioner Daniel Hall, referred to below as "Daniel," is an eight-year-old resident of Milwaukee County, who currently resides at Shorewood Heights Health Care Center, 3710 Oakland Ave., Shorewood, WI 53211. Maureen Hall is his mother, and resides at 4128 N. 67th St., Milwaukee, WI 53216.

2. Petitioner is certified as an eligible recipient of benefits under the Wisconsin Medical Assistance Program, §§ 49.43-49.497, Wis. Stats., referred to below as "WMAAP."

3. Respondent Wisconsin Department of Health and Family Services (referred to below as DHFS) is the state agency

responsible for administration of the Medical Assistance program, and has its mailing address at P.O. Box 7850, Madison, WI 53707-7850.

4. DHFS receives federal funds to operate the Medical Assistance program pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*

5. Petitioner has severe and multiple disabilities as a result of a brain infection at about six weeks of age. His disabilities and health challenges include: receiving nutrition, hydration, and multiple medications exclusively through a nasogastric tube; difficulty swallowing and clearing oral secretions resulting in the need for frequent suctioning and increased risk of pneumonia and lung collapse; extreme temperature instability requiring frequent monitoring and control; and frequent seizures. Daniel is non-ambulatory and blind, and incontinent of bladder and bowel. He suffers from extreme developmental delay and is essentially semi-comatose. He is completely dependent on others for all cares.

6. Except for occasional hospital admissions, Daniel has lived in his parents' home since he became disabled, and has received in-home nursing services funded by WMAP.

7. Daniel has received private-duty nursing services, defined as more than eight hours of nursing services per day, since 1988. Under WMAP rules, private-duty nursing must be authorized and periodically reauthorized by DHFS under a process called "prior authorization." Since 1990, DHFS has provided

prior authorization for 24-hour-per-day in-home nursing services for Daniel.

8. Care needs which Daniel may experience at any time, and which cannot be scheduled for specific time periods, include but are not limited to: assessment for respiratory distress, and response to congestion or aspiration, including oral and deep suctioning, repositioning, administration of oxygen, pounding his chest, respiratory treatments, and giving extra fluids; monitoring temperature and responding to temperature fluctuations, which can cause physical damage; monitoring the naso-gastric tube, and replacing it if it becomes dislodged; constantly monitoring intake and output; changing diapers; and assessing the interrelationship of respiratory function, temperature, seizure activity, gastric function and intake and output, and intervening where necessary.

9. Due to his temperature instability, Daniel is not able to go outside his home and on many days is unable to leave his room or bed.

10. The WMAP covers private-duty nursing provided either by a licensed home health agency or by independent nurses. In recent years, Daniel's care has been provided by independent nurses, each of whom must submit separate prior authorization requests.

11. In August, 1996, the Bureau of Health Care Financing (referred to below as BHCF), a division of DHFS, notified Mrs. Hall in multiple notices, dated August 5, August 9 and August 27, 1996, that the prior authorization requests of each of

the independent nurses providing services to Daniel were being modified to reduce total authorized private-duty nursing services from 24 hours per day to 16 hours per day, based on a determination by DHFS that Daniel's parent could provide care for Daniel for eight hours per day.

12. Mrs. Hall, on Daniel's behalf, filed timely appeals of the modifications in prior authorization for private-duty nursing.

13. There has been no change in Daniel's condition or circumstances in the year prior to August, 1996, which would require a reduction in skill level, intensity, or frequency of the services required by Daniel. In the year prior to August, 1996, there has been no change in circumstances which would increase the ability of Daniel's parent to provide these services.

14. Since 1990, Daniel's condition has progressively deteriorated and his care needs have increased, in part due to damage caused by respiratory infections and to increased temperature instability.

15. Daniel's father, Steven Hall, has been totally disabled since October, 1993, due to a brain injury. He does not live in the home with Daniel's mother and is not a competent caregiver for Daniel. The decision by DHFS assumes that the cares no longer covered by private duty nurses can be provided solely by Daniel's mother.

16. Mrs. Hall has three other children who live at home, a son age 18 and two daughters age 11 and 6. In addition to her

responsibilities as a parent, Mrs. Hall must provide assistance for her disabled husband.

17. From November 18, 1996, through January 10, 1997, Mrs. Hall had been employed outside the home. She plans to resume employment outside of the home on February 10, 1997. Her employment schedule will be 9:00 a.m. to 6:00 p.m., Monday, Tuesday, Wednesday, and Friday, plus 7:45 a.m. to 2:00 p.m. every Saturday. In addition, Mrs. Hall continues to operate a business from her home.

18. Mrs. Hall has had no formal medical or nursing training.

19. The cares required by Daniel Hall require the skills of a registered or licensed nurse. If his parent is not available to provide care, Daniel's care needs can only be met by a nurse.

20. The individual responsible for providing care to Daniel must provide a high level of hands-on care, must be able to monitor him visually at least every 10 minutes, must remain within hearing range of his monitors, and must be able to respond immediately to changes in condition requiring intervention.

21. The type, complexity, duration and intensity of services required by Daniel Hall and the limitations on the movements and activities of the care provider are far in excess of the types of cares typically provided by parents to children of Daniel's age.

22. Acting as Daniel's caretaker for any extended period is incompatible with acting as a parent for other minor children.

23. DHFS has adopted and applied general policies and statutory interpretations concerning the denial of otherwise covered private-duty nursing services based upon a "parenting" exclusion or parental availability, but has not promulgated these policies and interpretations as rules as required by §227.10, Wis. Stats.

24. The first two notices of modification in authorized services from BHCF, dated August 5 and August 9, 1996, contained notice of appeal rights but no notice of a right to continuing benefits pending appeal. The third notice indicated that there was a right to continuing benefits pending appeal if the appeal was filed within 10 days. BHCF subsequently informed Mrs. Hall that coverage for 24-hour-per day nursing would be continued pending appeal, but that payments would be recouped from the nurses if the appeal was unsuccessful.

25. The independent nurses providing services to Daniel prior to August, 1996 were unable and unwilling to continue to provide services pending appeal given the risk that they might not be paid for their services.

26. As a result of DHFS failure to fund services pending appeal and Mrs. Hall's inability to meet his care needs and her other responsibilities, Daniel was placed at Shorewood Heights Health Care Center pending the result of the appeal.

GROUND FOR RELIEF

1. DHFS misinterpreted HFS 107.12, Wis. Admin. Code, because private-duty nursing services cannot be excluded from coverage as "parenting" tasks. HFS 107.12 Wis. Admin. Code

contains no "parenting" exclusion even though such an exclusion is included in other administrative code sections not applicable to this case.

2. DHFS misinterpreted state and federal rules and policies in that "parenting" and "medical necessity" standards do not extend to a requirement that parents provide extended nursing services of the type, intensity and duration required in this case.

3. DHFS failed to follow its own written policies as published in the *Medical Assistance Provider Handbook*, Part L.II.A., which provides that any provision of covered services by household members must be voluntary.

4. DHFS failed to follow its own policies as stated by the BHCF in that it requires Mrs. Hall to provide services of a type not typically provided by parents to children of Daniel's age.

5. DHFS policies, as applied in this case, discriminate on the basis of disability in that medically necessary services which parents do not typically provide to same-age children are covered by the WMAP for children without extensive, long-term health care needs but are excluded from coverage for children with extensive, long-term health care needs, in violation of the Americans with Disabilities Act, 42 U.S.C. §§794 and 12132. Such policies also violate HFS 104.01(2), Wis. Admin. Code.

6. In determining whether Mrs. Hall is "available" to provide nursing care for Daniel, the decision in this case contains an error of both fact and law in that it fails to consider Mrs. Hall's responsibilities to her other children and

her husband, the need for her to maintain her household, her need to work both in and outside the home on weekdays and weekends, and her need for some social and recreational aspects of life. It further errs in failing to find that Mrs. Hall is in fact unavailable to provide the type and level of cares Daniel requires for the periods of time required by the decision.

7. DHFS policies and interpretations of a "parenting" exclusion and/or parental availability as applied in this case to deny coverage are invalid because of DHFS' failure to follow the rule-making procedures of Ch. 227, Wis. Stats.

8. The decision in this case contains an error of both fact and law in holding that Daniel's cares could be performed by a home health aide, when BHCF specifically conceded that, in the absence of his parent, Daniel's needs can only be met by a nurse.

9. The decision in this case improperly relies on the allegations of Daniel's care in a nursing home, when evidence concerning the nature of that care was specifically excluded from evidence.

10. The decision in this case contains an erroneous finding of fact that is not supported by substantial evidence in concluding that Daniel is not subject to sudden emergencies that require instant response by a nurse who must perform a complicated intervention.

11. The decision in this case is internally inconsistent, in that, although it finds that Mrs. Hall is "extremely knowledgeable and adept" at caring for Daniel, it explains her demon-

strated inability to do so by a finding that she was "inadequately prepared."

12. The procedures adopted in this case denied Daniel due process of law under the Constitutions of the United States and Wisconsin and in violation of federal and state regulations, in that Daniel was not able to obtain continuation of ongoing, essential nursing services between the BHCF initial decision and the final decision of DHFS after hearing on his appeal due to BHCF's policy of recouping continued benefits pending appeal from providers if the appeal is unsuccessful.

REQUESTS FOR RELIEF

1. To declare as a matter of law that WMAP coverage of private-duty nursing services that otherwise meet WMAP criteria for coverage may not be denied on the ground that a parent is available to provide services that could otherwise only be provided by someone with the skills of a licensed or registered nurse, unless the parent voluntarily agrees to provide the services.

2. To declare that Respondent may not apply a different standard as to the nature of "parenting" to parents of children with extensive, long-term disabilities than it applies to children without extensive, long-term disabilities.

3. To declare that DHFS policies and interpretations on the denial of coverage based upon a "parenting" exclusion or parental availability, as applied in this case, are invalid because of the failure to follow the required rule-making procedures of Ch. 227, Wis. Stats.

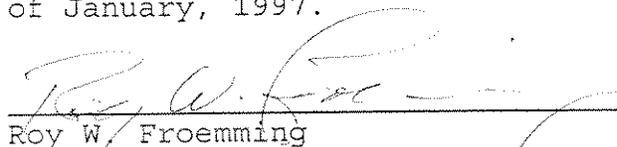
4. To declare that where a DHFS action results in the termination or reduction of home health, personal care, or private-duty nursing services, the recipient must be given advance notice and the opportunity to receive continuing benefits pending a fair hearing decision, and that DHFS may not recover the benefits paid pending the hearing decision from the provider of these services.

5. To reverse Respondent's decision in this matter, and order Respondent to reinstate prior authorization of 24-hour-per-day private-duty nursing services for Petitioner.

6. To award Petitioner his costs and reasonable actual attorney fees under § 227.485, Wis. Stats.

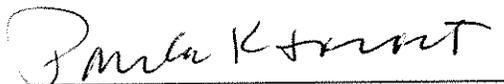
7. To grant such other relief as the court deems appropriate.

Dated this 27 day of January, 1997.



Roy W. Froemming
Attorney for Petitioner
Wis. State Bar # 1016628

Wisconsin Coalition for Advocacy
16 N. Carroll St., Suite 400
Madison, WI 53703
(608) 267-0214



Paula Lorant
Attorney for Petitioner
Wis. State Bar # 1016598

Legal Aid Society of Milwaukee
229 E. Wisconsin Ave., Suite 200
Milwaukee, WI 53202
(414) 765-0600

FEB 26 1997

SENATOR RICHARD GROBSCHMIDT
CO-CHAIRMAN

Room 404 • Hamilton
Madison, WI 53707
Phone: 608-266-7505



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIRMAN

Room 125 West • State Capitol
Madison, WI 53703
Phone: 608-264-8486

JOINT COMMITTEE FOR
REVIEW OF ADMINISTRATIVE RULES

MEMORANDUM

To: Members, JCRAR
From: Senator Richard Grobschmidt, Co-Chairman
Representative Glenn Grothman, Co-Chairman
Date: February 25, 1997
Re: Service of Lawsuit

Pursuant to s. 227.40(5), Stats, the Joint Committee for Review of Administrative Rules has been served with notice in the matter of *Hall v. DHFS*. The case was filed in the Milwaukee County Circuit Court on August 27, 1996, and the case number is 97-CV-000902. A copy of the Petition for Review of Administrative Action is attached.

Section 227.52, Stats, allows any person whose interests are substantially affected by the outcome of state agency administrative decisions to pursue legal redress pursuant to the strictures of Chapter 227. Subject to the approval of the Joint Committee on Legislative Organization, the Joint Committee for Review of Administrative Rules may choose to be made a party to the suit, and thereby be entitled to be heard.

If you are interested in a further pursuit of the rights of the JCRAR under this suit, please forward your request in writing to the offices of the co-chairmen of the committee.

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

CIVIL

DANIEL HALL, a minor, by his mother,
MAUREEN HALL,

97CV00093

Petitioner,

PETITION FOR REVIEW
OF ADMINISTRATIVE DECISION

v.

WISCONSIN DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,

Case No.

FILED
JAN 30 1997

2/24/97 by hand

Respondent.

Case Code: 30607

JAN 30 1997

The petitioner, Daniel Hall, by his mother, Maureen Hall, and by his attorneys, the Wisconsin Coalition for Advocacy, by Roy Froemming, and the Legal Aid Society of Milwaukee, by Paula Lorant, respectfully petitions this court, pursuant to § 227.52, Wis. Stats., for a review of the decision made and entered by the respondent Wisconsin Department of Health and Family Services on January 2, 1997, entitled *In the Matter of Daniel Hall*, case no. MPA-40/#97398, and for grounds of this petition allege that:

1. Petitioner Daniel Hall, referred to below as "Daniel," is an eight-year-old resident of Milwaukee County, who currently resides at Shorewood Heights Health Care Center, 3710 Oakland Ave., Shorewood, WI 53211. Maureen Hall is his mother, and resides at 4128 N. 67th St., Milwaukee, WI 53216.

2. Petitioner is certified as an eligible recipient of benefits under the Wisconsin Medical Assistance Program, §§ 49.43-49.497, Wis. Stats., referred to below as "WMAP."

3. Respondent Wisconsin Department of Health and Family Services (referred to below as DHFS) is the state agency

responsible for administration of the Medical Assistance program, and has its mailing address at P.O. Box 7850, Madison, WI 53707-7850.

4. DHFS receives federal funds to operate the Medical Assistance program pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq.

5. Petitioner has severe and multiple disabilities as a result of a brain infection at about six weeks of age. His disabilities and health challenges include: receiving nutrition, hydration, and multiple medications exclusively through a nasogastric tube; difficulty swallowing and clearing oral secretions resulting in the need for frequent suctioning and increased risk of pneumonia and lung collapse; extreme temperature instability requiring frequent monitoring and control; and frequent seizures. Daniel is non-ambulatory and blind, and incontinent of bladder and bowel. He suffers from extreme developmental delay and is essentially semi-comatose. He is completely dependent on others for all cares.

6. Except for occasional hospital admissions, Daniel has lived in his parents' home since he became disabled, and has received in-home nursing services funded by WMAP.

7. Daniel has received private-duty nursing services, defined as more than eight hours of nursing services per day, since 1988. Under WMAP rules, private-duty nursing must be authorized and periodically reauthorized by DHFS under a process called "prior authorization." Since 1990, DHFS has provided

prior authorization for 24-hour-per-day in-home nursing services for Daniel.

8. Care needs which Daniel may experience at any time, and which cannot be scheduled for specific time periods, include but are not limited to: assessment for respiratory distress, and response to congestion or aspiration, including oral and deep suctioning, repositioning, administration of oxygen, pounding his chest, respiratory treatments, and giving extra fluids; monitoring temperature and responding to temperature fluctuations, which can cause physical damage; monitoring the naso-gastric tube, and replacing it if it becomes dislodged; constantly monitoring intake and output; changing diapers; and assessing the interrelationship of respiratory function, temperature, seizure activity, gastric function and intake and output, and intervening where necessary.

9. Due to his temperature instability, Daniel is not able to go outside his home and on many days is unable to leave his room or bed.

10. The WMAP covers private-duty nursing provided either by a licensed home health agency or by independent nurses. In recent years, Daniel's care has been provided by independent nurses, each of whom must submit separate prior authorization requests.

11. In August, 1996, the Bureau of Health Care Financing (referred to below as BHCF), a division of DHFS, notified Mrs. Hall in multiple notices, dated August 5, August 9 and August 27, 1996, that the prior authorization requests of each of

the independent nurses providing services to Daniel were being modified to reduce total authorized private-duty nursing services from 24 hours per day to 16 hours per day, based on a determination by DHFS that Daniel's parent could provide care for Daniel for eight hours per day.

12. Mrs. Hall, on Daniel's behalf, filed timely appeals of the modifications in prior authorization for private-duty nursing.

13. There has been no change in Daniel's condition or circumstances in the year prior to August, 1996, which would require a reduction in skill level, intensity, or frequency of the services required by Daniel. In the year prior to August, 1996, there has been no change in circumstances which would increase the ability of Daniel's parent to provide these services.

14. Since 1990, Daniel's condition has progressively deteriorated and his care needs have increased, in part due to damage caused by respiratory infections and to increased temperature instability.

15. Daniel's father, Steven Hall, has been totally disabled since October, 1993, due to a brain injury. He does not live in the home with Daniel's mother and is not a competent caregiver for Daniel. The decision by DHFS assumes that the cares no longer covered by private duty nurses can be provided solely by Daniel's mother.

16. Mrs. Hall has three other children who live at home, a son age 18 and two daughters age 11 and 6. In addition to her

responsibilities as a parent, Mrs. Hall must provide assistance for her disabled husband.

17. From November 18, 1996, through January 10, 1997, Mrs. Hall had been employed outside the home. She plans to resume employment outside of the home on February 10, 1997. Her employment schedule will be 9:00 a.m. to 6:00 p.m., Monday, Tuesday, Wednesday, and Friday, plus 7:45 a.m. to 2:00 p.m. every Saturday. In addition, Mrs. Hall continues to operate a business from her home.

18. Mrs. Hall has had no formal medical or nursing training.

19. The cares required by Daniel Hall require the skills of a registered or licensed nurse. If his parent is not available to provide care, Daniel's care needs can only be met by a nurse.

20. The individual responsible for providing care to Daniel must provide a high level of hands-on care, must be able to monitor him visually at least every 10 minutes, must remain within hearing range of his monitors, and must be able to respond immediately to changes in condition requiring intervention.

21. The type, complexity, duration and intensity of services required by Daniel Hall and the limitations on the movements and activities of the care provider are far in excess of the types of cares typically provided by parents to children of Daniel's age.

22. Acting as Daniel's caretaker for any extended period is incompatible with acting as a parent for other minor children.

23. DHFS has adopted and applied general policies and statutory interpretations concerning the denial of otherwise covered private-duty nursing services based upon a "parenting" exclusion or parental availability, but has not promulgated these policies and interpretations as rules as required by §227.10, Wis. Stats.

24. The first two notices of modification in authorized services from BHCF, dated August 5 and August 9, 1996, contained notice of appeal rights but no notice of a right to continuing benefits pending appeal. The third notice indicated that there was a right to continuing benefits pending appeal if the appeal was filed within 10 days. BHCF subsequently informed Mrs. Hall that coverage for 24-hour-per day nursing would be continued pending appeal, but that payments would be recouped from the nurses if the appeal was unsuccessful.

25. The independent nurses providing services to Daniel prior to August, 1996 were unable and unwilling to continue to provide services pending appeal given the risk that they might not be paid for their services.

26. As a result of DHFS failure to fund services pending appeal and Mrs. Hall's inability to meet his care needs and her other responsibilities, Daniel was placed at Shorewood Heights Health Care Center pending the result of the appeal.

GROUND FOR RELIEF

1. DHFS misinterpreted HFS 107.12, Wis. Admin. Code, because private-duty nursing services cannot be excluded from coverage as "parenting" tasks. HFS 107.12 Wis. Admin. Code

contains no "parenting" exclusion even though such an exclusion is included in other administrative code sections not applicable to this case.

2. DHFS misinterpreted state and federal rules and policies in that "parenting" and "medical necessity" standards do not extend to a requirement that parents provide extended nursing services of the type, intensity and duration required in this case.

3. DHFS failed to follow its own written policies as published in the *Medical Assistance Provider Handbook*, Part L.II.A., which provides that any provision of covered services by household members must be voluntary.

4. DHFS failed to follow its own policies as stated by the BHCF in that it requires Mrs. Hall to provide services of a type not typically provided by parents to children of Daniel's age.

5. DHFS policies, as applied in this case, discriminate on the basis of disability in that medically necessary services which parents do not typically provide to same-age children are covered by the WMAP for children without extensive, long-term health care needs but are excluded from coverage for children with extensive, long-term health care needs, in violation of the Americans with Disabilities Act, 42 U.S.C. §§794 and 12132. Such policies also violate HFS 104.01(2), Wis. Admin. Code.

6. In determining whether Mrs. Hall is "available" to provide nursing care for Daniel, the decision in this case contains an error of both fact and law in that it fails to consider Mrs. Hall's responsibilities to her other children and

her husband, the need for her to maintain her household, her need to work both in and outside the home on weekdays and weekends, and her need for some social and recreational aspects of life. It further errs in failing to find that Mrs. Hall is in fact unavailable to provide the type and level of cares Daniel requires for the periods of time required by the decision.

7. DHFS policies and interpretations of a "parenting" exclusion and/or parental availability as applied in this case to deny coverage are invalid because of DHFS' failure to follow the rule-making procedures of Ch. 227, Wis. Stats.

8. The decision in this case contains an error of both fact and law in holding that Daniel's cares could be performed by a home health aide, when BHCF specifically conceded that, in the absence of his parent, Daniel's needs can only be met by a nurse.

9. The decision in this case improperly relies on the allegations of Daniel's care in a nursing home, when evidence concerning the nature of that care was specifically excluded from evidence.

10. The decision in this case contains an erroneous finding of fact that is not supported by substantial evidence in concluding that Daniel is not subject to sudden emergencies that require instant response by a nurse who must perform a complicated intervention.

11. The decision in this case is internally inconsistent, in that, although it finds that Mrs. Hall is "extremely knowledgeable and adept" at caring for Daniel, it explains her demon-

strated inability to do so by a finding that she was "inadequately prepared."

12. The procedures adopted in this case denied Daniel due process of law under the Constitutions of the United States and Wisconsin and in violation of federal and state regulations, in that Daniel was not able to obtain continuation of ongoing, essential nursing services between the BHCF initial decision and the final decision of DHFS after hearing on his appeal due to BHCF's policy of recouping continued benefits pending appeal from providers if the appeal is unsuccessful.

REQUESTS FOR RELIEF

1. To declare as a matter of law that WMAP coverage of private-duty nursing services that otherwise meet WMAP criteria for coverage may not be denied on the ground that a parent is available to provide services that could otherwise only be provided by someone with the skills of a licensed or registered nurse, unless the parent voluntarily agrees to provide the services.

2. To declare that Respondent may not apply a different standard as to the nature of "parenting" to parents of children with extensive, long-term disabilities than it applies to children without extensive, long-term disabilities.

3. To declare that DHFS policies and interpretations on the denial of coverage based upon a "parenting" exclusion or parental availability, as applied in this case, are invalid because of the failure to follow the required rule-making procedures of Ch. 227, Wis. Stats.

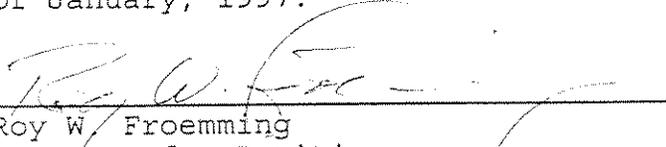
4. To declare that where a DHFS action results in the termination or reduction of home health, personal care, or private-duty nursing services, the recipient must be given advance notice and the opportunity to receive continuing benefits pending a fair hearing decision, and that DHFS may not recover the benefits paid pending the hearing decision from the provider of these services.

5. To reverse Respondent's decision in this matter, and order Respondent to reinstate prior authorization of 24-hour-per-day private-duty nursing services for Petitioner.

6. To award Petitioner his costs and reasonable actual attorney fees under § 227.485, Wis. Stats.

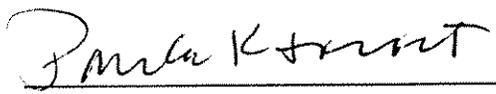
7. To grant such other relief as the court deems appropriate.

Dated this 29 day of January, 1997.



Roy W. Froemming
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229 E. Wisconsin Ave., Suite 200
Milwaukee, WI 53202
(414) 765-0600

APR 03 1997

3-29-97

Dear: Richard

I hope you can help me?

Am sending you copies out of my big what my attorney filing in the appeal Court.

I'm 100% innocent of this case. I had the DNA test done to prove my innocence.

Am writing to you to ask you if you can help me with my case so it can go faster.

If you have any questions please contact me at.

Steve Avery
Fox Lake Corr.Inst.
P.O. Box 147
Fox Lake, Wis. 53933

Thank you
for your time
and your help

Steve Avery

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 96-3027

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant.

BRIEF OF
DEFENDANT-APPELLANT

STATEMENT OF THE CASE

On the afternoon of July 29, 1985, someone viciously attacked P.B.¹ near Nesotah Beach in Manitowoc County, Wisconsin. Steven Avery subsequently was charged and convicted following a jury trial in Manitowoc County Circuit Court of first-degree sexual assault, attempted murder, and false imprisonment regarding that incident

¹ As he did in the lower court, Mr. Avery uses only the victim's initials, P.B., as identification in this brief. While he submits that he is innocent and that she mistakenly identified him as her attacker, there is no doubt that P.B. was subjected to a savage attack by someone. Mr. Avery does not seek to embarrass her in any way with his motion or this appeal.

(R94-96; R111).² The court, Hon. Fred H. Hazlewood, presiding, sentenced him to a total of 32 years imprisonment on March 10, 1986 (R105), and entered judgment (R103).

P.B. was the sole eyewitness against Mr. Avery, and the only one to identify him as the perpetrator. Approximately 16 other witnesses testified that Avery was elsewhere at the time of the attack. The jury nonetheless convicted, this Court affirmed on Avery's direct appeal, *State v. Steven Avery*, Appeal No. 86-1831-CR (Ct. App. 8/5/87) (R129), and the Supreme Court denied his petition for review on October 13, 1987 (R130).

On June 13, 1995, new counsel filed a motion with the circuit court seeking release of certain trial exhibits for scientific testing in anticipation of a post-conviction motion under Wis. Stat. §974.06 (R133). Specifically, the defendant sought to perform DNA analysis on the fingernail scrapings taken from the victim by state agents while performing a "sex crimes kit" soon after the assault. The fingernail scrapings were identified in the crime lab report as containing trace amounts of human blood but, at the time of trial, a

² Throughout this brief, references to the record will take the following form: (R__ : __), with the R__ reference denoting record document number and the following : __ reference denoting the page number of the document. Where the referenced material is contained in the Appendix, it will be further identified by Appendix page number as App. __.

ISSUES PRESENTED FOR REVIEW

1. Whether the results of DNA analysis of fingernail scrapings from the victim, revealing the presence of DNA which could not have come from either the victim or the defendant and which most likely came from the true perpetrator of this offense, constitute newly discovered evidence mandating a new trial.

The circuit court held that the newly discovered evidence did not mandate a new trial.

2. Whether Avery is entitled to remand for an evidentiary hearing on his due process claim for a new trial on the grounds that the Manitowoc County Sheriff's Department had identified an alternative suspect living in Sheboygan County who matched the description of the perpetrator but failed to provide that material, exculpatory information either to Avery's trial counsel or to Avery's counsel on the initial appeal.

The circuit court summarily denied Avery's supplemental motion which raised this due process claim.

v. Denny, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984) (discussing admissibility of "alternative suspect" evidence). A reasonable jury rationally could conclude on the facts here that the likelihood that the 8 allele came from the true perpetrator, rather than from speculative casual contact in that small window of opportunity between the assault and the completion of the sex crimes kit, is just too high to ignore.

The Court also cannot ignore the fact that this was an extremely close case even at the first trial without the DNA evidence (R144:22). As the circuit court recognized, "there was a lot of evidence" and "a strong, strong case on Mr. Avery's side" (R144:26).

Where, as here, the verdict is already of questionable validity, additional evidence of relatively minor importance can be sufficient to create a reasonable doubt. *United States v. Agurs*, 427 U.S. 97, 113 (1976).

P.B. was the *only* witness to identify the defendant as the perpetrator, while approximately 16 other witnesses testified that he was elsewhere at the time and could not have committed the crime. P.B.'s initial description of the perpetrator also did not match Avery. Although she claimed to have had "a very good closeup look at his face" (R111:281), and to be absolutely certain about her identification

of Avery (*id.*:297, 300, 303-05), P.B. stated soon after the assault that her attacker had brown eyes (*id.*:315-16, 342). Avery, however, has and had blue eyes (*id.*).⁷

P.B.'s attacker wore white, jockey-type underwear (R111:319-21); Avery neither wore underwear nor even owned any (*id.*:728, 764). The attacker attempted to strangle P.B., beat her in the face, and broke her nose, causing severe bleeding (*id.*:311-12), the type of conduct which one would expect to result in evidence under the perpetrator's fingernails. *Cupp v. Murphy*, 412 U.S. 291, 292 (1973) ("evidence of strangulation is often found under the assailant's fingernails"). Yet, while there was dirt in Avery's fingernail scrapings, indicating that he did not do a good job of washing them, the state crime laboratory technician found no blood (R111:384-85).

3. The circuit court's decision was based on faulty assumptions.

The circuit court's error in denying Avery's motion appears to have arisen from two core misconceptions, one of law and one of fact. The legal misconception was that Avery must bear the burden of proving the likelihood of a different result by clear and convincing

⁷ The Supreme Court has recognized that "the evolution over time of a given eyewitness's description can be fatal to its reliability." *Kyles*, 115 S.Ct. at 1571. See also *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (reliability depends in part on the accuracy of prior description).



Laboratory Corporation of America
1912 Alexander Drive
Research Triangle Park, NC 27709
1-800-533-0567

CERTIFICATE OF ANALYSIS

March 6, 1996

Shellow, Shellow and Glynn
222 East Mason Street
Milwaukee, Wisconsin 53202
Attn: Mr. Robert Henak

Agency #: Wisconsin v. Avery

Victim(s): Bernstein, Penny
Subject(s): Avery, Steven

FS Lab #: F9500624

Evidence Submitted: via Federal Express
(#8605843584)

Date Received: 01/04/96

Item 004-1 One sealed box containing blood sample listed as from Steven Avery.

Evidence Submitted: via Federal Express
(#8605843595)

Date Received: 01/05/96

Item 005-5 One sealed bag containing blood sample listed as from Penny Bernstein.

Item 005-6 One sealed bag containing sample listed as fingernail scrapings right hand.

Evidence Submitted: via Federal Express
(#8605817791)

Date Received: 02/01/96

Item 032-1 One sealed envelope containing four (4) slides with mounted hairs.

Results:

Deoxyribonucleic acid (DNA) was isolated from the above listed evidence and characterized through the polymerase chain reaction (PCR) at the following genetic systems:

F9500624

Alleles Detected

<u>Item</u>	<u>Sample</u>	<u>TPOX</u>	<u>TH01</u>	<u>CSF</u>
004-1	S. Avery	9, 11	10	7
005-5	P. Beernstein	9, 11	6, 7	4, 6
005-6	Fingernail/prep #1	9, 11	b	NA
005-6	Fingernail/prep #2	8, 9, 11	6, 7 ^a	b

a= Additional activity detected, however, it fails to meet reporting standards.
 b= Activity detected, however, it fails to meet reporting standards.

Based upon the results listed above:

The DNA profile obtained from prep #1 of the fingernails (Item 005-6) is consistent with the DNA profile obtained from the blood sample of Penny Beernstein (Item 005-5). Although the activity detected at the TH01 and CSF genetic systems fails to meet reporting standards, there is no activity foreign to Penny Beernstein (Item 005-5).

The DNA profile obtained from prep #2 of the fingernails (Item 005-6) is consistent with a mixture of DNA from Penny Beernstein (Item 005-5) and at least one other individual. Steven Avery (004-1) can not be excluded as a possible contributor to this mixed sample, however, there are additional alleles present which could not have been contributed by either of these individuals. No statistical estimates will be provided for this mixed sample.

Insufficient DNA was isolated from the hair (Item 032-1) to characterize through polymerase chain reaction (PCR) analysis.

The results have been reviewed independently by the undersigned and are correct as reported.

Sworn to and subscribed
 before me this 11th day
 of March, 19 96
 at Research Triangle Park, NC.

Tanya M. Selis
 Notary Public
 State of North Carolina
 My commission expires Mar 22, 1998

Anita L. Matthews
 Anita L. Matthews, M.S.
 Assistant Director, Forensic Identity

Meghan E. Clement
 Meghan E. Clement, M.S.
 Assistant Director, Forensic Identity