

Appellant: [REDACTED]
For: Medical Assistance – Prior Authorization
Agency: UCare
Docket: 222880

**DECISION OF
STATE AGENCY
ON APPEAL**

On June 14, 2019, Human Services Judge Zemenay Wondwossen held a hearing under Minnesota Statutes, section 256.045, subdivision 3.¹

The following person appeared at the hearing:

[REDACTED] Appellant
[REDACTED] Appellant's mother
Phil Duran, Attorney for Appellant
Chelsea Micheals, UCare representative
Tarra Grammenos, American Sign Interpreter

The human services judge, based on the evidence in the record and considering the arguments of the parties, recommends the following Findings of Fact, Conclusions of Law, and Order.

¹ The Minnesota Department of Human Services conducts state fair hearings pursuant to Minnesota Statutes, section 256.045, subdivision 3. The Department also conducts maltreatment and disqualification hearings on behalf of the Minnesota Departments of Health and Education pursuant to Minnesota Statutes, sections 626.556, subdivision 10j; and 626.557, subdivision 9d.

STATEMENT OF ISSUES

The issue raised in this appeal is: Whether UCare (Agency) correctly denied the Appellant's prior authorization request for gender-confirming surgery because the Appellant is under 18 years.

Recommended Decision: The Agency incorrectly denied the prior authorization request, and its action should be reversed.

PROCEDURAL HISTORY

1. On March 27, 2019, the Agency sent the Appellant a written notice regarding its decision to deny authorization for gender-confirming surgery because the Appellant is under 18 years of age. *Exhibit 2*. On April 15, 2019, the Appellant filed an internal appeal with the Agency. *Id.* On May 6, 2019, the Agency upheld its decision. *Id.* On May 13, 2019, the Appellant's representative filed an appeal with the Appeals Office. *Exhibit 1*.

2. On June 14, 2019, the human services judge held an in-person evidentiary hearing on the matter. The record was left open to receive additional documents from the Appellant's representative. The record closed on July 4, 2019, consisting of three exhibits.²

FINDINGS OF FACT

1. Appellant is a 14-year-old biological female transitioning to male with a history of gender dysphoria, anxiety, and depression. *Exhibit 2*. He is on testosterone which he has been on since December 12, 2017, which is prescribed by Family Tree. *Id.* He binds with GC2B which makes his ribs sore and makes his back ache. *Id.* According to his therapist, the Appellant has a well-documented, persistent gender dysphoria; he experiences a marked incongruence between his authentic gender and sex assigned at birth. *Exhibit 1*. Appellant continues to deal with social anxiety, which is exacerbated by chest dysphoria and worries that others can see his binder and will misgender him and possibly "out" him. *Id.* Appellant's therapist recommended continued participation in therapy to manage the Appellant's anxiety and mood symptoms while pursuing surgical treatment. *Id.* Both the Appellant and his mother concurred and have regular appointments scheduled with the Appellant's therapist. *Id.*

² *Appeal Request and Attachments, Exhibit 1; State Agency Appeals Summary and Attachments, Exhibit 2. Minutes of DHS Health Services Advisory Council (November 16, 2016), Exhibit 3.*

2. On March 19, 2019, the Appellant's provider, Dr. Marie Claire, a Plastic and Reconstructive Surgeon, submitted a prior authorization request for bilateral mastectomy or gender-confirming surgery. *Exhibit 2*.

3. On March 27, 2019, the Agency denied the Appellant's prior authorization request on the grounds that the Appellant is 14 years old and therefore does not meet the criteria for Gender Reassignment Surgery; this procedure requires a minimum age of 18 years. *Exhibit 2*. The Agency stated that its decision is based on Minnesota Rules 9505, InterQual Criteria for Gender Reassignment Surgery, Minnesota Health Care Program Gender-Confirming Surgery, and UCare Medical Policy for Gender-Confirming Surgery. *Id.* Appellant filed an internal appeal, but the Agency upheld its decision. *Id.*

4. Appellant concedes that in the Minnesota Health Care Program (MHCP) Provider Manual, DHS has articulated a requirement that for any gender-confirming surgery, the "Recipient must be 18 years of age or older." *Exhibit 1*. On this basis, the Agency denied coverage for the Appellant. *Id.* Appellant admits that he is not 18 years of age. *Id.* Appellant understands that the Agency's decision was based on the relevant MHCP Provider Manual. *Id.* However, the Appellant challenges the Department of Human Services' (DHS') authority to arbitrarily restrict access to surgery solely for those age 18 and over. *Id.* Appellant asserts that DHS lacks that authority, that the basis for the denial is invalid, and therefore the denial must be overturned in its entirety. *Id.* To that end, the Appellant sets forth the following arguments:

- A. In November 2016, DHS Health Services Advisory Council (HSAC) issued a document containing a number of recommendations to DHS regarding the circumstances under which it should cover gender-confirming surgeries, in response to (a) regulations issued by the Obama Administration regarding the application of the Affordable Care act nondiscrimination requirements to federally-funded plans, such as MA, and (b) a lawsuit filed in state court challenging the validity of a then-effective statute barring the use of MA funds for gender-confirming surgeries at all. Among HSAC's recommendations to DHS was that surgeries be restricted solely to those age 18 or older. DHS put these recommendations onto its website and into its Provider Manual and has been enforcing them since then since, including the age 18 requirement at issue in this matter. Therefore, DHS did not engage in rule-making in this process. *Exhibit 1*.
- B. The HSAC recommendations are not "DHS Medical Policy" and cannot be enforced. In order to implement policy which has general applicability and which directly affects the rights available to the public, DHS must get through the rule-making process. If it fails to do so, it may not enforce a policy statement, as if it were properly implemented rule, to the detriment of the public. *Appeal of Jongquist*, 460 N.W. 2d 915 (Minn. App. 1990).

- C. To the extent that DHS has simply included the HSAC recommendations within its Provider Manual, the Minnesota Supreme Court has explicitly held that DHS provider manuals are “advisory” in nature. See *Doe v. Department of Public Welfare*, 257 N.W. 2d 816 (Minn. 177). In *Doe*, the Court reviewed the Department’s denial of MA coverage for gender-confirming surgery, which the department had based on its Medical Assistance Program Physician’s Handbook. *Id.* at 818. The Court observed that “the provisions included within the handbook are only advisory in nature and do not have the effect of law.” *Id.* at 819-820. The Court struck down the Department’s practice of using its advisory handbook to deny transition-related care and provided unambiguous direction to the Department moving forward. The Court held that the medical necessity of each applicant requesting funding of transsexual surgery must be considered individually, on a case-by-case basis. *Id.* at 820.
- D. Appellant contends that the World Professional Association for Transgender Health (WPATH), whose Standards of Care are broadly recognized by providers, insurers, and agencies such as DHS, as guiding the care of gender dysphoria, has explicitly articulated that procedures such as those the Appellant seeks can be medically necessary in the context of treating gender dysphoria, even when seen as not medically necessary outside of that context. *Exhibit 2*. Minn. R. 9505.0175, subp. 25 defines medical necessity in terms of services that are “recognized as the prevailing standard or current practice by the provider’s peer group.” The point of reference, therefore, is not insurer’s practice, but providers’ practice. *Exhibit 1*.
- E. DHS itself has acknowledged that its exclusions are not enforceable. DHS Co-Chief Judge Ngoc Nguyen signed off on an administrative decision proposed by Human Services Judge James Watchke-Koranne in Docket No. 207454, whose outcome bears on this matter. In that case, the individual was a transgender woman seeking coverage for particular procedures which were included in the same Provider Manual pages as the age-18 requirement. DHS acknowledged that the particular Manual Pages were “recommendations” and that the relevant point of reference are provider practices, not insurer practices. *Id.* Critically, Judge Watchke-Koranne held that because WPATH Standards provided for case-by-case review of such requests, and that because these were the prevailing treatment guidelines, they superseded the Provider Manual pages. As a result, the individual was eligible for coverage for those procedures regardless of the fact that the Provider Manual explicitly stated otherwise. *Id.* The analysis here is identical. The age-18 requirement DHS has arbitrarily imposed is part of the same document which DHS has already acknowledged is superseded by the WPATH Standards, which also explicitly provide for the possibility of coverage for the type of surgery the Appellant seeks. The WPATH standards state that “refusing timely medical intervention for adolescents might prolong gender dysphoria and contribute to an appearance that could provoke abuse and stigmatization. Withholding puberty suppression and subsequent feminizing or

masculinizing hormone therapy is not a neutral option for adolescents.” Accordingly, the outcome must be the same: if the Appellant satisfies the WPATH criteria, his surgery is covered, irrespective of DHS’ Provider Manual. *Id.*

- F. Appellant has the full support of his providers, who unambiguously state that the bilateral mastectomy would be medically necessary in his case. *Id.*
- G. In sum, DHS’ effort to restrict gender-confirming surgeries, specifically bilateral mastectomies for transgender male minors, is an unpromulgated and thus unenforceable rule; it violates actual, promulgated rule; conflicts with the prevailing treatment guidelines; runs afoul of relevant Minnesota supreme Court decisions; ignores recent court orders to provide medically necessary care; and has effectively been rejected by DHS itself. There is no basis on which this denial can be affirmed. *Id.*

5. Appellant’s physician, Marie Claire, MD, wrote that the Appellant is a good candidate for a gender-affirming surgery with bilateral simple mastectomy, and noted that, according to Minnesota case law and WPATH standards of care with an appropriate letter of support from a mental health provider, top surgery/mastectomy is medically necessary for the treatment of gender dysphoria. *Exhibit 1.* In addition, Elizabeth Henderson Shreve, MSW, LICSW, who is a qualified Mental Health Profession and had four therapy sessions with the Appellant completed a Diagnostic Assessment with particular clinical attention on assessing gender identity development and its interaction with other mental health symptoms. *Id.* In her opinion, the Appellant experiences a marked incongruence between his authentic gender and sex assigned at birth, and that medical intervention is necessary to alleviate the persistent distress of chest dysphoria and reduce the impact of dysphoria on the Appellant’s social anxiety and mood and improve his overall mental health and well-being. *Id.* She wrote that the Appellant reports occasional passive, intrusive thoughts about suicide that do not cause distress and that he manages through adoptive self-talk. *Id.* Appellant tends to experience these thoughts more often when his dysphoria is activated. *Id.* Appellant continues to deal with social anxiety, which is exacerbated by chest dysphoria and worries that others can see his binder and will misgender him and possibly “out” him. *Id.* Appellant’s anxiety and depression are currently addressed through participating in therapy. *Id.* The remaining mood and anxiety symptoms are linked to gender dysphoria and intensify when the Appellant is aware of feminine aspects of body shape (chest, waist, hips). *Id.* Hormone therapy has partially alleviated symptoms and will continue to affect body shape. Appellant’s chest and binder are the most externally visible sources of dysphoria and social anxiety. *Id.* Ms. Shreve recommended continued participation in therapy to manage anxiety and mood symptoms while pursuing surgical treatment. *Id.* Both the Appellant and his mother concurred and they have regular therapy appointments scheduled with Ms. Shreve. *Id.*

6. Ms. Shreve noted that, although the Appellant is not a legal adult, the Appellant has age-appropriate capacity to make fully informed decisions and consent to treatment.

Exhibit 1. Also, the Appellant's mother and representative, [REDACTED], consents to the requested surgery. *Testimony of [REDACTED].*

7. At the hearing, the Appellant testified that he consents to the requested surgery and fully understands the consequences of his decision. *Testimony of Appellant.*

8. UCare stated that its decision to deny the requested surgery was primarily based on the DHS Provider Manual. Further, UCare stated that they are not familiar with the WPATH standards. *Testimony of Chelsea Micheals.*

CONCLUSIONS OF LAW

1. This appeal Commissioner of Human Services has jurisdiction over this appeal under Minnesota Statutes, section 256.045, subdivision 3. This appeal is timely and the Commissioner of Human Services has jurisdiction over this appeal under Minnesota Statutes, section 256.045, subdivision 3(a).

2. An enrollee may request a state fair hearing only after receiving notice that an adverse benefit determination was upheld in the Managed Care Organization ("MCO") appeal process. *42 C.F.R. §438.408(f)(1)*. However, this requirement is deemed to have been met if the MCO failed to adhere to the notice and timing requirements of the MCO appeal process. *Id.* The enrollee must request a state fair hearing no later than 120 calendar days from the date of the MCO's notice of resolution. *42 C.F.R. §438.408(f)(2)*.

3. The Medical Assistance program requires prior authorization for certain medical services. *Minn. Stat. § 256B.0625, subd. 25*. Medical Assistance services that require prior authorization must:

- a. be medically necessary as determined by prevailing medical community standards or customary practice and usage;
- b. be appropriate and effective to the recipient's medical needs;
- c. be timely, considering the recipient's current medical condition;
- d. be furnished by an appropriately credentialed provider;
- e. be the least expensive appropriate alternative available; and
- f. represent an effective and appropriate use of medical assistance funds.

Minn. R. 9505.5030.

4. "Medically Necessary" means a health service that is consistent with the recipient's diagnosis or condition and:

- a. is recognized as the prevailing standard or the current practice by the provider's peer group; and
- b. is rendered . . . to achieve a level of physical or mental function consistent with prevailing community standards for diagnosis or condition; or
- c. is a preventive health service under part 9505.0355.

Minn. R. 9505.0175, subp. 25.

5. Gender-confirming surgery (GCS) is considered medically necessary when a person has been diagnosed as having gender dysphoria and meets established criteria. *Minnesota Health Care Programs (MHCP) Provider Manual. Physician and Professional Services, Gender Confirming Surgery.* All of the following criteria must be met before coverage of GCS can be authorized:

- Recipient must be 18 years of age or older
- Submit documentation supporting that the client has lived in the gender role that is congruent with their gender identity for at least 12 continuous months
- Submit written referrals from clinicians qualified in the behavioral aspects of gender dysphoria. The referral letters must meet the following requirements:
- **Genital surgery:** A written referral from two independent clinicians with expertise in transgender health, one of whom has an established and ongoing relationship with the client.
- The referral letters may be from behavioral health professionals, the client's treating provider (physician, nurse practitioner, clinical nurse specialist), or both.
- A referral letter from a behavioral health provider must include a recent diagnostic assessment.
- In the absence of a diagnostic assessment, the client's medical provider (physician, nurse practitioner or clinical nurse specialist) must complete a psychosocial assessment. Include the psychosocial assessment components.
- **Chest surgery:** A written referral from one clinician with expertise in transgender health and who has an established and ongoing relationship with the patient.
- If the referral letter is from a behavioral health provider, it must include a recent diagnostic assessment.

6. The World Professional Association for Transgender Health (WPATH) criteria for

mastectomy and creation of a male chest in FtM patients are: (1) Persistent and well-documented gender dysphoria; (2) Capacity to make a fully informed decision and to consent for treatment; (3) Age of majority in a given country (if younger, follow the SOC for children and adolescents; and (4) If significant medical and mental health concerns are present, they must be reasonably well controlled. *Standards of Care Version 7 WPATH*.

7. Surgical treatments for gender dysphoria can be initiated by a referral (one or two, depending on the type of surgery) from a qualified mental health professional. The mental health professional provides documentation – in the chart and/or a referral letter – of the patient’s personal and treatment history, progress and eligibility. Mental health professionals who recommend surgery share the ethical and legal responsibility for that decision with the surgeon. One referral from a qualified mental health professional is needed for breast/chest surgery (e.g. mastectomy, chest reconstruction, or augmentation mammoplasty). *28 Standards of Care Version 7 WPATH*. The recommended content of the referral letter for surgery is as follows: (1) The client’s general identifying characteristics; (2) Results of the client’s psychosocial assessment, including any diagnoses; (3) The duration of the mental health professional’s relationship with the client, including the type of evaluation and therapy or counseling to date; (4) An explanation that the criteria for surgery have been met, and a brief description of the clinical rationale for supporting the patient’s request for surgery; (5) A statement about the fact that informed consent has been obtained from the patient; (6) A statement that the mental health professional is available for coordination of care and welcomes a phone call to establish this. *Id.*

8. When requesting prior authorization for medical assistance services, a medical provider must submit all required forms, materials, reports, progress notes, admission histories, and other information that substantiate the requested service is medically necessary to treat the recipient. *Minn. R. 9505.5010, subp. 1*. The provider bears the burden of establishing compliance with prior authorization criteria. *Minn. R. 9505.5010, subp. 1, 3, and 4*. Drugs which are not in the drug formulary or which have not received prior authorization are not eligible for payment under medical assistance. *Minn. R. 9505.0220*.

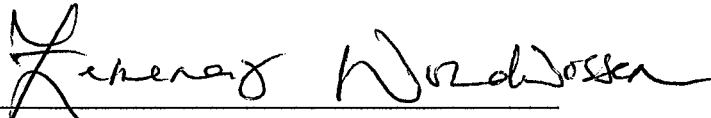
9. Here, there is no dispute that the Appellant is a minor. Also undisputed is that the MHCP Provider Manual requires that a recipient seeking gender-confirming surgery (GCS) must be 18 years or older. However, as the Minnesota Supreme Court held in *Doe v. Department of Welfare*, the Provider Manual is advisory and should not be the basis for the denial of the Appellant’s request for GCS because the Agency did not take into account the WPATH Standards of Care, which have a broad recognition by providers, insurers, and agencies as guiding the care of gender dysphoria and have explicitly articulated that such procedures can be medically necessary. As such, the point of reference should be the

provider's practice, not the insurer's practice. A mental health professional has supplied a letter which supports that gender-confirming surgery is medically necessary for the Appellant. The WPATH standards of care indicate that mastectomy is the prevailing standard of care in the Appellant's case and such procedure is rendered to achieve a level of physical or mental function consistent with prevailing community standards for the Appellant's diagnosis. Besides the criteria of age, the Appellant has met all the criteria for mastectomy under the DHS and WRATH standards. Appellant has shown by the preponderant of the evidence that GCS is medically necessary and the Agency's reliance on the age provision is inconsistent with the statutory definition of medical necessity. The proper focus is on prevailing community standards and customary practice and usage. People develop physically and emotionally at different times. The severity of the condition of gender dysphoria may vary from person to person irrespective of age. For the foregoing reasons, I find that the Agency was incorrect to deny the Appellant's prior authorization request for gender-confirming surgery. The Agency's action should be reversed.

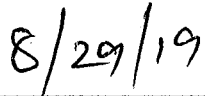
RECOMMENDED ORDER

Based on all of the evidence, I recommend that the Commissioner of Human Services:

- REVERSE the Agency's denial of the Appellant's request for gender-confirming surgery.




Zemenay Wondwossen
Human Services Judge



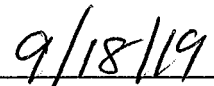
Date

ORDER

On behalf of the Commissioner of Human Services and for the reasons stated above, I adopt the recommended Findings of Fact, Conclusions of Law, and Recommended Order as the final decision of the Department of Human Services.



Ngoc Nguyen
Co-Chief Human Services Judge



Date

cc: [REDACTED] Appellant
UCare, Terry Ell
JustUs Health, Phil Duran
Department of Human Services, Margaret Manderfeld

FURTHER APPEAL RIGHTS

This decision is final unless you take further action.

Appellants who disagree with this decision should consider seeking legal counsel to identify further legal action. If you disagree with this decision, you may:

- **Request the appeal be reconsidered.** The request must state the reasons why you believe your appeal should be reconsidered. The request may include legal arguments and may include proposed additional evidence supporting the request. If you propose additional evidence, you must explain why the evidence was not provided at the hearing. **The request must be in writing and be made within 30 days of the date this decision was issued by the co-chief human services judge.** You can mail the request to: Appeals Division, Minnesota Department of Human Services, P.O. Box 64941, St. Paul, MN 55164-0941. You can also fax the request to (651) 431-7523. **You must send a copy of the request to the other parties.** To ensure timely processing of your request, please include the name of the human services judge assigned to your appeal and the docket number. The law that describes this process is Minnesota Statutes, section 256.0451, subdivision 24.
- **Start an appeal in the district court.** This is a separate legal proceeding that you must start **within 30 days of the date this decision was issued by the co-chief human services judge.** You start this proceeding by: 1) serving a written copy of a notice of appeal upon the Commissioner of Human Services and upon any other adverse party of record; and 2) filing the original notice and proof of service with the court administrator of the county district court. The law that describes this process is Minnesota Statutes, section 256.045, subdivision 7.³

³ County agencies do not have the option of appealing decisions about Supplemental Nutrition Assistance Program (SNAP), Minnesota Family Investment Program (MFIP), or Diversionary Work Program (DWP) benefits to district court under 7 Code of Federal Regulations, section 273.15(q)(2), and Minnesota Statutes, section 256J.40. A prepaid health plan may not appeal this order under Minnesota Statutes, section 256.045, subdivision 7.