



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

In the Matter of

[REDACTED]

DECISION

CWA/145844

PRELIMINARY RECITALS

Pursuant to a petition filed December 7, 2012, under Wis. Admin. Code § HA 3.03, to review a decision by an agent of the Wisconsin Department of Health Services' Division of Long Term Care, Bureau of Long-Term Support (BLTS or Bureau), in regard to IRIS benefits, a hearing was held on January 8, 2013, by telephone.

The issue for determination is whether the Department's agent correctly discontinued IRIS payment for the petitioner's personal care nursing services, effective December 14, 2012.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

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

By: Andrea Loasby, Participant Services Spec.
IRIS Consultant Agency
Madison, WI

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Jefferson County. He is eligible for, and enrolled in, the IRIS program. IRIS is a self-directed personal care program, created by a Medicaid waiver.

2. The petitioner, age 35, is a quadriplegic who requires tracheotomy tube care, catheterization, and night-time ventilator use. He resides with his parents. The parents are not registered or licensed practical nurses.
3. Prior to December 14, 2012, the petitioner's IRIS service plan (Plan) contained 116 hours monthly of IRIS-funded personal care nursing service, *in addition to* 24-hours per day Medicaid-funded private duty nursing services. The Plan also enables him to receive 61 hours of supportive home care (SHC) monthly through IRIS. The 116 hours monthly of personal care nursing service was performed by the petitioner's parents. Prior to December 2012, the parents' services were incorrectly coded on the Plan, suggesting that they were providing additional SHC.
4. The petitioner's case was reviewed in December 2012. On December 4, 2012, the IRIS Consultant Agency issued a letter to the petitioner. It advised that, beginning December 14, 2012, the IRIS program would no longer include payment for the 116 hours monthly of personal care nursing service in the Plan. The petitioner appealed.
5. The IRIS Consultant Agency discontinued IRIS funding of personal care nursing services because IRIS is not supposed to cover the cost of a service that can be obtained through the Medicaid program. Nursing services are covered by the Medicaid program. Additionally, to the extent that the 116 nursing care hours were overlapping a private duty nurse's hours, the duplication of nursing care is prohibited. When such duplication occurs, it is possible to include payment to the second person (other than the nurse) for personal care worker services, if two people are needed for care tasks. A personal care worker is paid less than the \$16 hourly paid for personal care nursing service.

DISCUSSION

The Include, Respect, I Self-Direct (IRIS) program was developed pursuant to a Medical Assistance waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(j) of the Social Security Act. This Section 1915(c) waiver document is available at <http://www.cms.gov/MedicaidStWaivProgDemoPGI/MWDL/list.asp>. IRIS is a fee-for-service, self-directed personal care program.

The federal government has promulgated 42 C.F.R. §441.450 - .484 to provide general guidance for this program. Those regulations require that the Department's agent must assess the participant's needs and preferences, and then develop a service plan based on the assessed needs. *Id.*, §441.466. The service plan may include personal care and homemaker services. *Id.*, §440.180(b). Further, "all of the State's applicable policies and procedures associated with service plan development must be carried out ..." *Id.* §441.468.

I. JURISDICTION.

The first concern here is whether jurisdiction is present to review the IRIS Consultant Agency's action. The federal waiver document makes the following declaration regarding Medicaid fair hearing rights being applicable to IRIS agency actions:

The State provides an opportunity to request a Fair Hearing under 42 CFR Part 431, Subpart E to individuals: (a) who are not given the choice of home and community-based services as an alternative to the institutional care specified ... ; (b) are denied the service(s) of their choice or the providers(s) of their choice; or (c) whose services are denied, suspended, reduced or terminated. The State provides notice of action as requested in 42 CFR §431.210.

...

§1915(c) Home and Community-Based Services Waiver, Appendix F. In this case, the IRIS Consultant Agency has terminated IRIS-paid personal care nursing services, so subject-matter jurisdiction is present.

II. TERMINATION OF NURSING SERVICES DUE TO MEDICAID COVERAGE OF THE SAME SERVICE.

The federal self-directed personal assistance services rule requires that a state have an approved § 1915(c) waiver document before an IRIS-type program can be offered. 42 C.F.R. § 441.452(a). Turning to Wisconsin's federal waiver document, there is a clear directive to not cover nursing services that are covered by the State Medicaid Plan:

C-1/C-3 Service Specifications

Nursing Services

Service Definition (*Scope*):

Nursing services are those medically necessary, skilled nursing services that may only be provided safely and effectively by a nurse practitioner, a registered nurse, or a licensed practical nurse working under the supervision of a registered nurse. The nursing services provided must be within the scope of the Wisconsin Nurse Practice Act and are not otherwise available to the participant the Medicaid state plan. Nursing services may include periodic assessment of the participant's medical condition when the condition requires a skilled nurse to identify and evaluate the need for medical intervention or to monitor and/or modify the medical treatment services provided by non-professional care providers. Services may also include regular, ongoing monitoring of a participant's fragile or complex medical condition as well as the monitoring of a participant with a history of noncompliance with medication or other medical treatment needs.

Specify applicable (if any) limits on the amount, frequency or duration of this service:

Excludes services available through the Medicaid State Plan. ...

§ 1915(c) Home and Community-Based Services Waiver, #0485R0100, Appendix C.

The Department's IRIS policy document, *IRIS Program Policies*, available at <http://www.dhs.wisconsin.gov/bdds/IRIS/IRISPolicySummary.pdf>, echoes the federal waiver document requirement, at "IRIS Funding for Goods, Supports and Services," Policy SC 16.1.

The petitioner's parents stated that there sometimes are lapses in private duty nursing coverage, at which time they step in and provide care. They typically do not use all of the 116 monthly hours previously allowed in the Plan.

Even though the parents' action and request are understandable, the terms of the federal government's permission to this state to offer the IRIS program does not allow IRIS payment for nursing services when nursing service is available through the state plan. It is available under Wisconsin's plan, so IRIS coverage of additional nursing services is not possible. Additionally, the waiver document requires someone with a nursing degree to be providing this service as a condition of payment. That also appears to be a barrier to payment to the parents in this case.

CONCLUSIONS OF LAW

1. The Department's agent correctly eliminated the 116 monthly hours of personal care nursing service from the petitioner's Plan, because nursing services are available through the state Medicaid plan.

THEREFORE, it is

ORDERED

That the petition is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found 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 served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 1st day of March, 2013

\sNancy J. Gagnon
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 March 1, 2013.

Bureau of Long-Term Support