



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

FCP/145913

PRELIMINARY RECITALS

Pursuant to a petition filed December 13, 2012, under Wis. Admin. Code § DHS 10.55, to review a decision by the Care Wisconsin in regard to Medical Assistance, a hearing was held on January 30, 2013, at West Bend, Wisconsin.

The issues for determination are whether the case management organization (CMO) correctly discontinued Petitioner's day treatment services with a specific provider and whether the Division of Hearings and Appeals has legal authority to review the termination of the contract by the case management organization (CMO) with that provider.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

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

By: Carmen Lord
Care Wisconsin
Madison, WI

ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Washington County.

2. Petitioner is a Family Care Program (FCP) participant. One of the services in place for him was day center treatment services at Our Place Day Services.
3. Petitioner was sent a notice dated December 7, 2012 that informed him that his day treatment services at Our Place were to be discontinued effective December 28, 2012. The reason for the discontinuance was that the CMO staff concluded that with only one staff person for every 4 participants at Our Place Petitioner was independent enough to discontinue Our Place services. More specifically, the CMO discontinuance letter informed Petitioner that while he needed assistance in setting up an activity he didn't require supervision throughout the activity, that he is independent in his personal cares, that he is friendly, communicates well and initiate interactions with peers and, finally, is able to participate in community activities separate from Our Place that are open to the general community.
4. Petitioner filed an appeal with the Division of Hearings and Appeals on December 13, 2012 to contest the discontinuance of the Our Place services. The Division of Hearings and Appeals ordered that Petitioner's Our Place benefits be continued pending a decision in this matter.
5. Petitioner is diagnosed with insulin dependent diabetes, GERD, hyperlipidemia, hypertension, frozen shoulder, polyneuropathy, mild background retinopathy, anxiety disorder, depression and rosacea. Petitioner does have a history of falls and uses a rollator walker. He is independent in his other activities of daily living. He does receive treatment from the psychiatrist and counseling. He does take medications; some of which are for his behavioral/emotional health issues. He can be volatile, yelling and swearing at others, when upset. He will also slam things or hit things with his fist. He has in the past engaged in self-injurious behaviors, specifically cutting himself. Petitioner does work part-time at Our Place on their party planning committee. He then works at the parties. This is paid employment.
6. On January 3, 2013 the CMO sent a letter to Our Place indicating that the CMO was terminating its contract with Our Place Day Services, LLC effective March 5, 2013. The CMO indicated they were not satisfied with the performance of Our Place Day Services.

DISCUSSION

The Division of Hearings and Appeals can only exercise authority that has been delegated to it. With respect to Family Care the Wisconsin Administrative Code delegates hearing authority where the appeal is directly to the Division of Hearings and Appeals as follows:

...

- (a) Denial of eligibility under s. DHS 10.31 (6) or 10.32 (4).
- (b) Determination of cost sharing requirements under s. DHS 10.34.
- (c) Determination of entitlement under s. DHS 10.36.
- (d) Failure of a CMO to provide timely services and support items that are included in the plan of care.
- (e) Reduction of services or support items in the enrollee's individual ized service plan, except in accordance with a change agreed to by the enrollee.
- (f) An individualized service plan that is unacceptable to the enrollee because any of the following apply:
 1. The plan is contrary to an enrollee's wishes insofar as it requi res the enrollee to live in a place that is unacceptable to the enrollee.
 2. The plan does not provide sufficient care, treatment or support to meet the enrollee's needs and identified family care outcomes.
 3. The plan requires the enrollee to accept care, treatment or support items that are unnecessarily restrictive or unwanted by the enrollee.
- (g) Termination of the family care benefit or involuntary disenrollment from a CMO.

(h) Determinations of protection of income and resources of a couple for maintenance of a community spouse under s. DHS 10.35 to the extent a hearing would be available under s. 49.455 (8) (a), Stats.

(i) Recovery of incorrectly paid family care benefit payments as provided under s. DHS 108.03 (3).

(j) Hardship waivers, as provided in s. DHS 108.02 (12) (e), and placement of liens as provided in ch. HA 3.

(k) Determination of temporary ineligibility for the family care benefit resulting from divestment of assets under s. DHS 10.32 (1) (i).

...

Wis. Admin. Code, § DHS 10.55(1); also see Stats., §46.287.

It is clear that the discontinuance of Petitioner's Our Place services does fall within the legal authority of the Division of Hearings and Appeals. On that issue alone both sides have valid points.

As noted at Finding # 3, the CMO points out that Petitioner has made significant gains in his ability to interact with his environment and is very independent. Further, the CMO argues that it has made efforts to transition Petitioner to other places for day treatment and to encourage Petitioner to work with the DVR as to employment opportunities.

Petitioner argues that it is vital for him to have the structured activities at Our Place and that if he is left alone too long his behavior regresses, with outbursts more likely and he can return to the cutting behaviors. He also notes that he will lose his only source of income. The counseling staff at the county agency wrote in support of Petitioner continuing at Our Place as did other people who know Petitioner. See Exhibit D.

I am less sanguine than the CMO about Petitioner's independence and ability to cope apart from the Our Place services. Indeed, the referral to other day services by the CMO suggests that Petitioner's independence is fragile. I am, therefore, directing that Petitioner's Our Place services continue to March 5, 2013. Continuing Petitioner's Our Place services beyond March 5, 2013 is another issue.

The Standard Contract (Contract) between the Department of Health Services and the CMOs provides significant detail as to how CMOs manage their FCP responsibilities and, globally, the document directs communication between the CMO and the Department as to contracting and subcontracting for services. There is no delegation of authority to the Division of Hearings and Appeals as to the issue of the termination of the contract between the CMO and Our Place Day Services, LLC. *See Standard Contract, §VIII found at <http://www.dhs.wisconsin.gov/mltc/2013/2012Contract.htm>.* Further, Petitioner has not pointed to any law or rule or Contract provision that indicates that Division of Hearings and Appeals possesses such authority. I do note that CMOs have to notify the Department if a contract is terminated and, if the Department finds that member access to care is compromised, the Department has remedies available under the contract. *See Contract at §VIII, L and §XVI, D.* This suggests that the terminated provider and/or its consumers may contact the Department directly but, again, there is no authority delegated to the Division of Hearings and Appeals as to this issue.

CONCLUSIONS OF LAW

1. That the best available evidence indicates that Petitioner's day services at Our Place should continue through March 5, 2013.
2. That the Division of Hearings and Appeals does not have authority to act as to the issue of the termination of the contract between the CMO and Our Place Day Services, LLC.

THEREFORE, it is

ORDERED

That this matter is remanded to the case management organization with instructions to take the steps necessary to continue Petitioner's benefits with Our Place Day Services, LLC. through March 5, 2013.

In all other respects this appeal 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 Milwaukee,
Wisconsin, this 1st day of March, 2013

\sDavid D. Fleming
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.

Care Wisconsin
Office of Family Care Expansion