



FH
[REDACTED]

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

In the Matter of

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

DECISION

CWA/149774

PRELIMINARY RECITALS

Pursuant to a petition filed June 04, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on July 26, 2013, at Sheboygan, Wisconsin.

The issue for determination is whether the agency properly limited the hours of supportive home care that can be provided to the Petitioner by her parents/legal guardians.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Respondent:

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

By: Jill Spear
Bureau of Long-Term Support
1 West Wilson

Madison, WI

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Sheboygan County. She is enrolled in the IRIS program.

2. On April 26, 2013, the Petitioner's Individual Support and Service Plan (ISSP) was updated. The ISSP includes Supportive Home Care (SHC) of 448 hours/month @ \$15/hour beginning March 1, 2013 and Personal Care of 234 hours/month @ \$12.07/hour beginning December 21, 2012. The ISSP states that SHC and Personal Care are to be provided by "various providers." The ISSP also includes Respite care of 48 hours/month by "various providers."
3. The Petitioner's mother (CT) and stepfather (ET) currently provide all of her supportive home care and personal cares. CT is the Petitioner's legal guardian. The Petitioner is an adult.
4. On April 22, 2013, the agency issued a Notice of Action to the Petitioner reducing the care hours provided by CT and ET to 100 hours/week effective May 4, 2013. The Petitioner requested to allow CT and ET to bill up to 157.38 hours/week.
5. On June 4, 2013, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

The IRIS (Include, Respect, I Self-Direct) 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. IRIS is a statewide self-directed home and community-based waiver program. Within their individually assigned monthly budget allocation, IRIS participants use public funds and natural supports to craft creative support and service plans that meet their self-identified long-term care outcomes and maximize their independence. See the Medicaid Eligibility Handbook, §37.1.1.

The federal Department of Health and Human Services, Centers for Medicaid and Medicare Services, approved a waiver for the IRIS program based on a "Request for a Renewal to a §1915(c) Home and Community-Based Services Waiver" for the WI Self Directed Support Waiver-DD (0484.R01.00) implemented January 1, 2011. Appendix C of the Waiver states:

In Wisconsin, legally responsible persons who may be paid include relatives, spouse and guardians. These individuals may provide specific services as noted by the checkbox as noted in service specifications within Appendix C provided they meet specified qualifications. Specifically, these services are: daily living skills training, respite care, supported employment, nursing services, 1 – 2 bed Adult Family Home, Customized Goods and Services, Specialized Transportation, Specialized Transportation 2, and Supportive Home Care.

Services that are considered to be similar to personal care are defined as those services that are scheduled and planned and occur with face-to-face physical proximity to a participant for the purpose of completing or assisting with an activity of daily living or an instrumental activity of daily living. In situations where the participant resides with their spouse or relatives, they would only be paid for services and supports to the participant for need that exceed normal household or family support functions as part of a shared household such as meal prep and clean up, general household upkeep, or lawn mowing. However, if the participant has needs that exceed these norms such as having daily incontinence requiring daily laundry, or assistance or supervision with eating these supports/services could be paid for when provided by a spouse, relative, or legal representative (guardian or power of attorney). Additionally, IRIS has a conflict of interest policy that addresses situations where household members are being paid more than 40 hours a week to monitor and ensure that the provision of services is in the best interest of participants. . .

Additionally, the ICA institutes an additional review and oversight of all required practices anytime the number of care giving hours exceeds 40 hours per week. This includes the following:

- 1) The IRIS Consultant will discuss whether the proposed caregiving structure adequately addresses care needs and meets health and safety assurances. . .
- 3) The IRIS Consultant assures that any conflict of interest is identified and addresses in accordance with IRIS policy. . .

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 (including health status) as a condition of IRIS participation. Id., §441.466. The Department's agent must also develop a service plan based on the assessed needs. Further, "all of the State's applicable policies and procedures associated with service plan development must be carried out ..." Id. §441.468. The Wisconsin IRIS program has adopted policies, including the following pertinent policy related to conflict of interest:

It is the IRIS Program policy to identify and mitigate situations that may represent a conflict of interest. The policy explains the process to identify a conflict of interest, as well as options to lessen or remove a conflict. . . When a conflict of interest, or the appearance of a conflict of interest exists, the IRIS Program is required by federal requirements to ease or remove the conflict. This may require the participant to make a different choice related to the provider of supports or services if the conflict of interest cannot be resolved.

A conflict of interest is present when a person, or an agency, is involved in helping a participant make decisions that would benefit the person or agency making the decision. This might mean the person making or guiding the decision receives employment, money or other gain, such as an offset to daily living cost. . .

Examples of conflict of interest situations covered by this policy include:

The guardian or Power of Attorney elects to be a paid service provider for the person for whom he or she is responsible to make decisions. . .

IRIS Policy 5.02.1.

Wisconsin IRIS has also adopted the following pertinent policy:

This policy communicates expectations for authorizing caregiving hours and limits on the hourly rate for the provision of SHC, self-directed personal care or similar services. . . Additional IRIS Consultant Agency review and oversight is required of any situation when the number of paid caregiving hours exceeds 40 per week. . .

The agency representatives testified that the ISSP developed and approved by the agency and CT includes services to be provided by "various providers." The representatives testified that it was never meant to have CT and ET be the only providers. They assert the conflict of interest policy identifies this situation as a possible conflict of interest and they are required, by federal law, to mitigate such conflicts. The agency further testified that it is available to assist in finding a suitable provider for the Petitioner and that CT and ET can continue to provide care to the Petitioner until other provider(s) are hired. It argues that it is in the Petitioner's best interests to have additional providers identified to provide services. The agency

asserts that a back-up plan for providers is needed for emergency situations and it also indicated that there needs to be flexibility in such situations.

The IRIS waiver and policies are clear that the agency must identify and mitigate any possible conflicts of interest. In this case, there is a possible conflict of interest in the Petitioner's mother, CT, being her guardian and primary caregiver. The conflict of interest policies are meant to safeguard the health and safety of the participant as well as provide assurances that limited funds are being used appropriately. In this case, the agency mitigated the potential conflict of interest by limiting the hours that CT and ET can provide cares to the Petitioner finding that the Petitioner's health and safety require that she use various providers in addition to CT and ET. The evidence indicates that CT and ET are excellent caregivers to the Petitioner. However, the agency points out that, though CT and ET are good providers, it is to the Petitioner's benefit to have additional providers in the event that CT and ET are unable to provide care or experience difficulties as a result of being her only providers.

CT and ET represented the Petitioner at the hearing. They testified that they primarily filed an appeal because they need more time to find another service provider for the Petitioner and are concerned about the ability to find a suitable provider. They noted that the Petitioner will be moving to her own home as soon as they find appropriate caregivers. They also expressed concern about what would happen if a hired provider suddenly quits or is unable to work on a particular day. They are worried that they will not having the ability to provide care over 50 hours/week (100 hours/week total) for her in an emergency or in the event that another provider cannot be found or is unable to provide cares on a particular day.

The agency has a duty to assure services are provided in accordance with the Petitioner's ISSP to ensure her health and safety. While it can mitigate the potential conflict of interest here by limiting the hours of caregiving by CT and ET, it must allow flexibility for CT and ET to provide cares in excess of 50 hours/week each for the Petitioner until additional suitable providers can be identified and in situations where hired caregivers are unable to provide cares on a particular day or at a particular time. The agency provided assurances at the hearing that they will be flexible in allowing CT and ET to provide additional care in such situations. CT and ET must, on the other hand, be actively seeking to identify additional caregivers to assist them with Petitioner's cares. As noted by the agency at the hearing, if suitable providers cannot be found, the agency will re-evaluate the ISSP.

CONCLUSIONS OF LAW

The agency is required to mitigate any possible conflict of interest and therefore has the authority to limit the number of hours of CT and ET to mitigate the conflict of interest in being the Petitioner's only caregivers.

THEREFORE, it is

ORDERED

That the petition be, and hereby 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 30th day of August, 2013

\sDebra Bursinger
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 August 30, 2013.

Bureau of Long-Term Support