



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]

DECISION

CWA/151019

PRELIMINARY RECITALS

Pursuant to a petition filed July 31, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long Term Support - Wisconsin IRIS in regard to Medical Assistance, a hearing was held on October 30, 2013, at Milwaukee, Wisconsin.

NOTE: The record was held open to allow the parties to supplement the record. Wisconsin IRIS submitted a Medicaid Waiver Services Summary Definitions, effective prior to October 17, 2013; a Medicaid IRIS Services Definitions and Codes Manual that became effective October 17, 2013, an Amended Decision issued by ALJ Cochrane on May 25, 2012, and a letter sent by ALJ Cochrane to Ms. [Redacted] on August 3, 2012. These documents have been marked Exhibits 22, 23, 24, and 25 respectively; they have been entered into the record.

Ms. [Redacted] submitted a response on November 13, 2013, which has been marked as Exhibit 26 and entered into the record.

Mr. [Redacted] submitted responses on November 1, 2013 and November 19, 2013, which have been marked and entered into the record as Exhibits 27 and 28 respectively.

The issue for determination is whether Wisconsin IRIS (the agency) correctly denied coverage for Petitioner’s admission/expenses for “Family Nights”, Mother’s Day Brunch, Brewer’s Games, Billiard’s Games, a Christmas Lights Tour, Mitchell Park Concerts, House on the Rock, an Apple Holler Sleigh Ride, Wisconsin State Fair, Milwaukee County Zoo, Italian Fest, Summer Fest, the Milwaukee Public Museum, the East Troy Electric Train Christmas Railroad, and Movie Theatres.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted]

[Redacted]

Respondent:

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

By: Jody Brassfield, Section Chief – IRIS
Bureau of Long-Term Support
1 West Wilson Street
Madison, WI 53703

Sue Henkes, Participant Services Specialist
IRIS Consultant Agency
1 South Pickney Street
Suite 320
Madison, WI 53703-2887

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County and receives services through IRIS, a Medicaid waiver program.
2. Petitioner suffers from a seizure disorder and from the effects of a traumatic brain injury. (Exhibit 6, pg. 2)
3. On June 20, 2013, the agency sent Petitioner a notice indicating that the agency was denying his request for coverage of his costs and the costs of his caregivers to attend “Family Nights”, Mother’s Day Brunch, Brewer’s Games, Billiard’s Games, a Christmas Lights Tour, Mitchell Park Concerts, House on the Rock, an Apple Holler Sleigh Ride, Wisconsin State Fair, Milwaukee County Zoo, Italian Fest, Summer Fest, the Milwaukee Public Museum, the East Troy Electric Train Christmas Railroad and Movie Theatres. (Exhibit 1)
4. Petitioner filed a request for fair hearing that was received by the Division of Hearings and Appeals on July 31, 2013. (Exhibit 1)
5. The Department of Health Services, Bureau of Long Term Support reviewed Petitioner’s appeal and approved funding/coverage for the costs of Petitioner’s caregivers to attend “Family Nights”, Mother’s Day Brunch, Brewer’s Games, Billiard’s Games, a Christmas Lights Tour, Mitchell Park Concerts, House on the Rock, an Apple Holler Sleigh Ride, Wisconsin State Fair, the Milwaukee County Zoo, Italian Fest, Summer Fest, the Milwaukee Public Museum, the East Troy Electric Train Christmas Railroad, Brewer Game Parking and Movie Theatres. The care giver expenses were deemed supportive home care/personal care services. However, Petitioner’s costs were denied coverage. (Testimony of Mr. Brassfield and Ms. [REDACTED]; See Exhibit 22, pg. 33)

DISCUSSION

The petitioner receives medical benefits under IRIS, which stands for Include, Respect, I Self-Direct. This program is a fee-for-service alternative to Family Care, PACE, or Partnership for individuals requesting a long-term care support program in Family Care counties. *Medicaid Eligibility Handbook*, § 37.1.1.

It is Petitioner’s desire that IRIS pay for his admission and related costs to attend “Family Nights”, Mother’s Day Brunch, Brewer’s Games, Billiard’s Games, a Christmas Lights Tour, Mitchell Park Concerts, House on the Rock, an Apple Holler Sleigh Ride, Wisconsin State Fair, the Milwaukee County Zoo, Italian Fest, Summer Fest, the Milwaukee Public Museum, East Troy Electric Train Christmas Railroad, and Movies. Petitioner’s mother indicated that an example of a “Family Night” might be going out to brunch after church. It is the agency’s contention that IRIS funds may not be used to cover such expenses.

BURDEN OF PROOF

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. State v. Hanson, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). In a case involving a new request for services from IRIS, the applicant has the initial burden to show that the requested services meet the program's guidelines for approval. In cases where there has been a termination of services, the agency bears the burden to prove it acted correctly.

Petitioner's mother testified credibly that Petitioner was previously given a budget for "community integration activities" and that he used money from that budget to pay for costs associated with recreational activities such as family outings, trips to the museum or festivals. Petitioner's mother and step-father indicated that over time, they were told IRIS policies were changing or implementation of those policies was changing. Petitioner's mother and step-father testified that in developing the current Individual Support and Service Plan they were told that costs associated with Petitioner's participation in recreational/community integration events could no longer be covered.

It is questionable whether the agency's denial of coverage for recreational activities is a termination of an on-going service, given that attendance at these separate events is not on-going service, but rather a series of one-time expenses. However, even if the burden of proof falls upon the agency, the record supports the agency's actions.

MAY IRIS FUNDS BE USED TO COVER PARTICIPANT COSTS FOR RECREATIONAL/COMMUNITY INTEGRATION EVENTS?

It is the contention of Wisconsin IRIS that either federal or state law prohibits coverage of a participant's costs to attend recreational activities, although the agency was unable to clearly articulate an argument explicitly rooted in existing law or policy. Thus, this analysis will begin with the Federal Regulations that enable self-directed waiver programs under Medicaid.

The IRIS program, as an MA Waiver service, may include the following services:

- (1) Case management services.
- (2) Homemaker services.
- (3) Home health aide services.
- (4) Personal care services.
- (5) Adult day health services.
- (6) Habilitation services.
- (7) Respite care services.
- (8) Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.
- (9) Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization.

42 CFR § 440.180(b)

Recreational activities are not specifically listed above. As such, in order to be covered, recreational activities must constitute a service requested by the agency and approved by CMS (The Centers for Medicare and Medicaid Services) as cost effective and necessary to avoid institutionalization.

First, there is nothing in the record to support the contention that CMS has approved funding for participants' costs for recreational/community integration activities. Second, there is no evidence that attendance at the requested recreational activities is a cost effective means of avoiding institutionalization. On the contrary, if community integration is the goal, this writer has personal knowledge of free activities that Petitioner can participate in. The Milwaukee Public Museum is free on Mondays (<http://www.mpm.edu/plan-visit/visitors/ticket-prices>); the Milwaukee Art Museum is free on the first Thursday of the month

(<http://mam.org/visit>); there are free concerts in the Milwaukee County Parks (<http://county.milwaukee.gov/ConcertsintheParks11320.htm>); Mitchell Domes is free on Mondays 9:00 to 12:00 (<http://county.milwaukee.gov/HoursAdmissionMap10117.htm>); Bastille Day has no admission (<http://www.easttown.com/events/bastille-days>); the Greek festival has no admission (<http://wistatefair.com/wsfp/events/greek-fest/>); and the Milwaukee County Zoo has six free days over the course of a year (<http://www.milwaukeezoo.org/events/familyfreeday2013.php>). Third, there is no evidence in the record that Petitioner is at imminent risk of being placed in an institution, if he does not attend the requested recreational activities.

Based upon the foregoing, it is found that the requested funding of Petitioner's costs for attending recreational events is not permitted by 42 CFR § 440.180(b).

42 CFR §441.482 further describes permissible purchases in self-directed programs:

- (a) Participants, or their representatives, if applicable, may, at the State's option, use their service budgets to pay for items that increase a participant's independence or substitute (such as a microwave oven or an accessibility ramp) for human assistance, to the extent that expenditures would otherwise be made for the human assistance.
- (b) The services, supports and items that are purchased with a service budget must be linked to an assessed participant need or goal established in the service plan.

Unlike a microwave oven that substitutes for a supportive home care worker preparing meals, going to a recreational event, such as a concert, festival or Brewer's game is not something that a person can substitute for human assistance to accomplish a task. For Petitioner, the contrary is true; going to a recreational event requires assistance of a personal care worker.

Going to recreational events does not increase a person's independence to the extent expenditures would be made for human assistance. Again, Petitioner's participation in recreational events requires assistance from a personal care worker. In addition, there is no evidence that Petitioner's past attendance at such programs has decreased his reliance upon personal care workers. Indeed, it is undisputed that Petitioner cannot go anywhere without assistance.

Based upon the foregoing, it is found that funding for Petitioner's participation in recreational events is not permissible under 42 CFR §441.482.

At the hearing there was much discussion about IRIS policies. It should be noted that the costs for recreational/community integration activities that Petitioner requests falls under "customized goods and services". Per the Medicaid Waiver Services Summary Definitions manual in effect at the time in question, the requested customized service, support or good, cannot be prohibited by Federal and State statutes and regulations, or guidance including the State's Procurement Code. (See Exhibit 22, pg. 10) Thus, because funding for Petitioner's participation in recreational/community integration events is not permissible under 42 CFR § 440.180(b) and 42 CFR §441.482, they are not covered by the IRIS program.

Petitioner's parents argue that IRIS should pay for his participation in recreational activities, because it did so in the past and changed its policies without notice. The frustration felt by Petitioner's parents over the agency's implementation of the IRIS program is understandable. However, the federal regulations are controlling and have been in place since 2009. (The code of federal regulations may be viewed at: www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR) If IRIS covered the cost of Petitioner's participation in recreational activities in the past, it did so in error.

OTHER MATTERS

Petitioner's mother and step-father asked that a guardian ad litem be appointed for Petitioner and that an Independent Monitor be appointed to oversee the IRIS programs interactions with Petitioner. (See Exhibit 28)

The Division of Hearings and Appeals is without jurisdiction to grant these requests. See Wis. Admin. Code §HA 3.

CONCLUSIONS OF LAW

Wisconsin IRIS (the agency) correctly denied coverage for Petitioner's admission/expenses for "Family Nights", Mother's Day Brunch, Brewer's Games, Billiard's Games, a Christmas Lights Tour, Mitchell Park Concerts, House on the Rock, an Apple Holler Sleigh Ride, Wisconsin State Fair, the Milwaukee County Zoo, Italian Fest, Summer Fest, the Milwaukee Public Museum, the East Troy Electric Train Christmas Railroad and Movie Theatres.

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 Milwaukee,
Wisconsin, this 22nd day of November, 2013.

\sMayumi M. Ishii
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 November 22, 2013.

Bureau of Long-Term Support