



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION ON REHEARING

FCP/150477

PRELIMINARY RECITALS

Pursuant to a petition filed June 29, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the Western Wisconsin Cares-FCP in regard to Medical Assistance, a hearing was held on August 27, 2013. A decision was issued on September 16, 2013, which dismissed the petitioner's appeal. The petitioner timely requested a rehearing, which was granted due to a procedural flaw in the first hearing. A new hearing was then held, and the record was held open for 28 days for briefs, which were received.

The issue for determination is whether the FC CMO correctly reduced the petitioner's Supportive Home Care (SHC) hours for community integration from eight hours to four hours weekly.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Kelly Schoberg, social worker
Western Wisconsin Cares-FCP
LaCrosse, WI

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [redacted]) is a resident of La Crosse County.

2. The petitioner has an ongoing FC case. She had been receiving 8 hours of SHC weekly.
3. The petitioner's case underwent an annual review in the spring, 2013. On June 4, 2013, the FC Care Management Organization (CMO), issued a *Notice of Action* to the petitioner. The *Notice* advised that the petitioner's SHC hours would be reduced to four hours weekly, effective June 21, 2013. The CMO reduced the hours because (1) it was substituting a less expensive group setting activity for the petitioner in lieu of the one-on-one supervised community outings covered with SHC hours, and (2) the petitioner does not display the severe behaviors that warrant eight hours of weekly service. The petitioner requested a local grievance review of this decision; the result of that review was to leave the reduction in place. The petitioner then filed a fair hearing request, and aid was continued pending appeal.
4. The petitioner, age 56 at the time of hearing, is diagnosed with mild mental retardation, anxiety, and depression. She also has a gait disturbance, which precludes her from walking long distances. The petitioner resides with her non-disabled sister and the sister's husband; they provide excellent support for the petitioner. The petitioner does not currently have severe behavior issues, although she has had them in the past.
5. The petitioner cannot go on community outings without supervision, due to her mental and physical limitations. One of the one-to-one supervised community outings that the petitioner may lose at the four SHC hours service level is her long-standing practice of going out to have her fingernails professionally done every week. She looks forward to this outing for its social interaction and as being part of her routine. The other four outings that are done every week on a one-to-one basis with SHC hours are a walk, a swim at the Days Inn Hotel pool, volunteer visiting at a nursing home, and a restaurant breakfast.
6. The cost savings created by the June 2013 proposed service change was \$165.33 monthly. The CMO offered another service plan revision in November 2013 that also reduced SHC hours to four hours weekly, and swapped in some time at a workshop provider for supervised small group activity time with Independent Living Choices. The cost savings from the November 2013 suggestion was \$149.57 monthly.

DISCUSSION

The Family Care program is supervised by the Wisconsin Department of Health Services, and is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized at Wis. Stat. § 46.286, and is further described at Wis. Admin. Code, ch. DHS 10.

The CMO must develop an Individual Service Plan (ISP) in partnership with the client. Wis. Admin. Code § DHS 10.44(2)(f). The ISP must reasonably address all of the client's long-term needs to assist the client to be as autonomous as possible, while also being cost effective. While the client has input, the CMO does not have to provide all services the client desires if there are less expensive alternatives to achieve the same results. *Id.*, 10.44(1)(f). ISPs must be reviewed periodically. *Id.*, 10.44(j)(5).

The issue here is whether the CMO erred in reducing the petitioner's SHC hours from eight to four hours weekly, and by substituting a group setting activity to make up for the lost time. There are no standards written in the law on how to make such a determination. It comes down to the general criteria for determining authorization for services – medical appropriateness and necessity, cost effectiveness, statutory and rule limitations, and effectiveness of the service. *Id.*, § DHS 107.02(3)(e). The CMO does have a written policy that limits SHC for accompaniment of persons without severe behavioral problems to community activities to four hours weekly.

While it is correct that the standard under Wis. Admin. Code § DHS 10.44(2)(f)(3) specifically includes that the ISP should assist the enrollee to be as self-reliant and autonomous "as possible and desired" by

the enrollee, it is also the long-standing position of the Department, affirmed in many fair hearing decisions, that the FC participant does not have “unfettered choice” in deciding what supports Family Care provides to serve him/her, what living arrangements will be provided by Family Care, and exactly how the care plan is to be configured.

The petitioner will continue to go to a sheltered employment setting weekly, regardless of whether she has four or eight hours of SHC time. Her group activities include a mall walking group, and her one hour weekly at ORC Wellness Center is included in the ISP. If the petitioner opted for small group activities (2-4 persons) with Independent Living Choices, likely activities in that group would be swimming and working out at the YMCA, trips to the library, and other activities. The petitioner would prefer to have her historical five weekly community outings to continue to be with one-to-one support, including her weekly trek to a nail salon, rather than in a group setting. Her family is concerned that this change in routine will result in a decline in the petitioner’s behaviors, as the group setting may not be appropriately stimulating. The CMO insists that the group setting should be appropriate.

At rehearing, the petitioner’s counsel cites *Olmstead v. L.C.*, 119 S.Ct. 2176 (1999) for the proposition that the reduced SHC hours/nail salon trip is an unnecessary segregation of a disabled person from the community, contrary to the Americans with Disabilities Act (ADA). *Olmstead* held that the ADA’s proscription of discrimination requires that states place mentally disabled persons in community settings rather than institutions, when appropriate. The petitioner is already in a community setting, and no one is talking about institutionalizing her. If supervision of trips to a nail salon are denied, there is no discrimination against the petitioner as a mentally disabled person, because a non-disabled Medicaid recipient would never be granted the service of a companion to a beauty salon appointment by the Medicaid program. Family Care is a branch of the Medicaid program, hence, the comparison.

In my original decision, I stated: “I can see no strong argument against at least trying what the CMO proposes. If the petitioner’s condition should deteriorate under the new regimen, the petitioner may ask the CMO to re-visit the ISP and add more SHC hours at that time.”

I remain unpersuaded that a trial with some reduction of one-to-one service in exchange for group activity is unreasonable. If the petitioner wishes to continue her weekly nail salon trip with the SHC one-to-one time that remains, she can do so. These outings are hers to prioritize. The one-to-one outing that appears most expendable is the trek to a hotel pool for swimming. How is the petitioner practicing her community social skills in a pool with strangers? The Independent Living Choices approach of taking her to a YMCA in the community seems just as, if not more, appropriate.

Although I am not persuaded that a portion of the eight SHC hours cannot be swapped for group activity time, I am in no way implying that the petitioner’s “natural supports” – *i.e.*, her sister – should be expected to pick up the slack on these one-to-one activities. The sister is clearly doing outstanding work, and should not be expected to do more.

To conclude, it is reasonable for the petitioner to *try* an ISP with reduced SHC hours, and corresponding increased group activity hours. If her behavior deteriorates with reduced SHC hours, the parties should revisit this issue in the next, 2014 ISP. I will order a reduction to six SHC hours weekly until such time as a new ISP is developed. This is essentially the swapping out of one of the five weekly, one-on-one outings, for group activity time. Reduction of *one* solo outing was selected because it appears that at least one group exercise activity is available to the petitioner weekly. Because Independent Living Choices’ activity program was not well established at the time of hearing, I was not confident that two weekly substitutions are actually available. If the petitioner adapts well to the substitution of one of the weekly one-on-one outings, the CMO can re-visit its desire to drop to four SHC hours weekly at the next ISP development session.

CONCLUSIONS OF LAW

1. Reduction of the petitioner's weekly SHC hours for one-on-one community outings from eight hours to six hours, where group activity time will be substituted for the reduced hours, is a reasonable action to be undertaken on a trial basis.

THEREFORE, it is**ORDERED**

That the petition is *remanded* to the CMO with instructions to modify the petitioner's existing ISP by reducing SHC hours to six hours weekly, and compensating for that reduction with group activity time. This action shall be taken within 10 days of the date of this Decision. In all other respects, the petition is dismissed.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 30th day of April, 2014

\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 April 30, 2014.

Western Wisconsin Cares-FCP
Office of Family Care Expansion