



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

In the Matter of



DECISION

FCP/151009

The attached proposed decision of the hearing examiner dated January 22, 2014, is hereby modified as follows and as such is adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed July 30, 2013, under Wis. Admin. Code, §DHS 10.55, to review a decision by Milwaukee County Dept. of Family Care discontinue eligibility for the Family Care Program (FCP), a hearing was held on November 6, 2013, at Milwaukee, Wisconsin. A hearing scheduled for September 25, 2013 was rescheduled at the petitioner's request. The record was held open 51 days for submission of briefs, which were received from both parties.

The issue for determination is whether the agency correctly sought to close petitioner's FCP case because she did not pay her monthly spend-down.

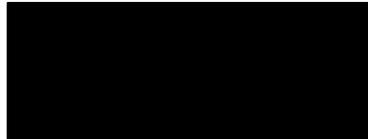
There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By: Lillian Alford

Milwaukee County Dept. of Family Care
901 N. 9th St., Rm. 307C
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. Petitioner enrolled in the FCP effective April 1, 2013. Because her income was \$3,259.16, petitioner was in the "Group C" eligibility category, meaning that she would have to incur monthly medical expenses to get her income down to the Medical Assistance (MA) medically needy income limit of \$591.67. By a notice dated March 25, 2013, the agency informed her that she was eligible but would have a monthly spend-down of \$2,273.56.
3. When that notice was sent no assessment of out-of-pocket medical/remedial expenses had been completed. See Exhibit P-125. In May, 2013, petitioner submitted her list of out-of-pocket expenses that she considered to be medical/remedial.
4. On May 31, 2013, the FCP agency notified petitioner that most of the items on petitioner's list were non-covered by the FCP package. No appeal rights were provided.
5. At some point later the agency reduced petitioner's monthly payment to \$2,153.77 retroactively, giving her credit for out-of-pocket pharmacy expenses.
6. Petitioner did not pay any monthly payment to the agency. On July 8, 2013, the agency sent petitioner a notice informing her that her FCP eligibility would end August 1 because she had not paid her "cost share or spenddown." Petitioner appealed and benefits were continued pending this decision.
7. Petitioner began to make payments on the liability in August, 2013.
8. On October 8, 2013, petitioner's attorney sent the agency a letter requesting a waiver of the spend-down. The request was denied verbally on October 23, 2013.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized under Wisconsin Statute, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10. See also Medicaid Eligibility Handbook, Chapter 29, available at www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm.

A person who receives both a Medical Assistance card and FCP, and is not on "regular MA" because of excess income, is classified as being in Group A, Group B, or Group C. Group A is for person who receives SSI or certain other benefits that are not relevant here. Petitioner does not fit within Group A. Group B status is available to a person who has gross income below the Community Waivers MA income limit of \$2,130. Handbook, §39.4.1. Petitioner's gross income of \$3,259.16 places her over the income limit for Group B status. Therefore, petitioner is relegated to Group C status. To be *eligible* under Group C, the recipient's income minus expenses must be under \$591.67.

A person in Group C is subject to a spend-down for income that exceeds the "medically needy income limit of \$591.67, minus the \$20 unearned income disregard and the health insurance premium expense. Handbook, §39.4.1 – "EBD Medically Needy Limits."

In somewhat confusing fashion, FCP allows for subtraction of medical/remedial expenses paid by the client as a deduction from her income to determine *eligibility* for the program. See the Department's form F-20919, section IV (if gross income minus disregard, insurance premiums, medical/remedials, and MA card coverable services is higher than \$591.67, the person is ineligible for FCP). However, the Department's instructions go on to direct the agency to *then* compute the *spend-down* amount by only

subtracting the \$20 unearned income disregard, a health insurance premium, and the \$591.67 medically needy income limit from her income. When petitioner first applied for FCP the agency thus calculated the spend-down as shown below:

Gross Income	\$3,259.16
Minus unearned income disregard	- 20.00
Minus health insurance premium	373.93 (private insurance plus Medicare premium)
Minus "medically needy" income limit	- 591.67
Monthly spend-down	\$2,273.56

Although not an issue in this case, the agency correctly determined petitioner's spend-down according to Department policy. The issue is what happens to petitioner's case after the spend-down is calculated.

Although out-of-pocket medical/remedial expenses are not considered in determining the spend-down amount, they return to the calculation of how much the person pays to the agency monthly. Since out-of-pocket medical/remedial expenses are part of a spend-down, the amount the person pays to the agency is reduced by the amount the person incurs on her own. That is why the agency reduced petitioner's monthly payment to \$2,153.77 when it budgeted allowed medical/remedials. Petitioner's spend-down itself was not reduced; her monthly payment to the FCP agency was reduced.

I. TERMINATION FOR FAILURE TO PAY MONTHLY OBLIGATION

Wis. Stat., §46.286(2) provides that a person who is financially eligible for FCP must pay a cost share, and failure to pay the cost share is a ground for ineligibility. In this case, however, petitioner does not have a cost share. The spend-down is an amount that makes her eligible for the program. A review of the Wisconsin Administrative Code, §DHS 10.34, reveals detailed instructions for determining a cost share for an eligible person; however, that section is silent on the calculation of and collection of a monthly spend-down. As in the statute, the code provision makes clear that failure to pay a cost share could lead to ineligibility. The section also provides for a waiver of the cost share if it will cause undue hardship. Again, those provisions apply specifically to a cost share for someone already eligible for FCP. Petitioner does not have a cost share; she has a spend-down that is calculated to bring her income down to make her eligible. An individual's failure to meet the monthly spend-down obligation means that the person has failed to meet the financial eligibility requirements for the program for that month.

Thus arises the first issue advocated by petitioner. The agency seeks to end petitioner's FCP eligibility for failure to pay her spend-down, but the statute and code are silent as to the process for determining and paying the spend-down or the penalty for failing to pay a spend-down.

A review of the Department's MA Handbook is somewhat enlightening. §29.5.2.4 provides that a person can be dis-enrolled for failure to pay her cost share, but the provision says the following: "ES should enter "N" to the question" Are you meeting your cost share/spend down obligation?" on the *Managed Care* section of the Family Care page in CWW, run eligibility and confirm. This will end the Family Care enrollment according to adverse action logic. A CARES notice will be sent to the recipient informing them of the termination of eligibility."

At that point the Department itself equates the cost share and spend-down obligations. That is the only mention in the FCP section of the Handbook of a possible penalty for failure to meet a *spend-down* obligation.

Since FCP is a home and community based program, I next looked to Chapter 28 of the Handbook, the section that discusses such programs in general. §28.5.2 provides:

The spenddown obligation is the amount a Group C waivers participant must incur monthly in medical/remedial expenses and/or Medicaid card services to lower countable income to the Medically Needy Income limit (See 39.4 EBD Assets and Income Tables) The care manager monitors and documents that this occurs monthly.

A single Group C waivers participant must:

1. Incur, **and**
2. Be held financially responsible for the spenddown amount on a monthly basis.

Thus the Handbook, at least, requires a community based program participant to both incur and be responsible for the monthly spend-down amount. (Fascinatingly, the Handbook provision goes on to say that a married Group C participant must incur and **pay** the spend-down; I have no idea whether the Department meant “be held financially responsible” and “pay” to be equivalent.)

To add to the complexity of the issue here, petitioner points out that Medicaid spend-down rules require a person to incur medical bills to meet a spend-down; the rules do not require the person to actually pay the bills to meet the spend-down. There is no question that individuals throughout the state are eligible for MA due to medical bills incurred at hospitals and clinics without ever actually paying the bills. However, in this case the FCP Managed Care Organization (MCO) essentially is the provider, and thus it would be a contradiction to force the MCO to provide services without being paid by the participant. In the FCP, while it is true that a person has simply to incur expenses to meet the spend-down, the provider is the FCP MCO for all but out-of-pocket medical/remedials. The FCP recipient enters the program agreeing to abide by its law and policies. As pointed out by Ms. Alford in her response brief, the MCO is responsible for collecting amounts owed by the client, and the client is informed that she must make the payments to continue eligibility, as petitioner was in the March 25, 2013 eligibility notice (Attachment C to Ms. Alford’s brief).

The confusion is caused by the Department’s, and FCP agency’s, use of the term “spend-down.” The spend-down is the amount the person must incur to become eligible. At issue here is not the spend-down, however. It is the participant’s *financial obligation* to the FCP MCO that is at issue. The financial obligation is the amount of the spend-down that the participant must pay to the MCO to receive FCP services. Although the Department uses the word “spend-down” (or as in the Handbook, “spenddown” without a dash), the proposed discontinuance in this case is not due to a failure to pay a spend-down but the failure to pay the financial obligation that the person agrees to pay when she enters the program. I thus do not find the potential discontinuance of FCP because the participant does not pay her financial obligation to be unlawful. She agrees to make all required payments when she enters the program.

I conclude that an FCP agency can discontinue eligibility for failure to pay the monthly financial obligation. I will not uphold the discontinuance in this case, however, because I believe that the agency erred in determining petitioner’s financial obligation.

II. DETERMINATION OF REMEDIAL EXPENSES

Under the rules and policies described above, petitioner was doomed to failure from the start. Essentially all of her monthly income except \$611.67 (the MA income limit plus the \$20 disregard) had to go to either the spend-down or health insurance. However, petitioner’s monthly housing costs alone are \$975.19 (a \$586.19 mortgage/property tax payment, \$40 monthly homeowners insurance, \$195 condo fee, plus utilities that average \$154 per month). See Exhibit P-116. She has to eat as well. From the moment she signed the FCP contract, petitioner could not possibly pay her monthly financial obligation.

Why would an agency even allow a person in petitioner's situation to enter the program knowing that her monthly living expenses far exceed the money that will be available to her after she enters the program?

I note that from here I will discuss only remedial expenses instead of the phrase "medical/remedials." Medical expenses are prescribed by doctors and only come up in cases of co-pays or services that occurred before the person became eligible for MA. All expenses at issue in this case are remedial ones.

Petitioner's response to the question above was to request that at least part of her housing cost be considered a remedial expense. Evidence shows that due to petitioner's various medical conditions, her condominium is her only, or at least her best, possible place of residence. As noted at page 11 of her brief, it is agreed by the agency that petitioner cannot reside in a nursing home or other type of group home. Thus, she argues, her relatively high monthly housing expenses are critically related to her health. The definition of remedial expenses is as follows: "a cost paid by a medicaid purchase plan recipient that may be considered to be related to that person's health, employment or disability. The cost is not reimbursable by another source such as medicare, medical assistance, private insurance or an employer." Wis. Admin. Code, §DHS 101.03 (152m). The Handbook defines them at §15.7.3:

Remedial expenses are costs incurred for services or goods that are provided for the purpose of relieving, remedying, or reducing a medical or health condition. These are expenses that are the responsibility of the member and cannot be reimbursable by any other source, such as Medicaid, private insurance, or employer.

Some examples of remedial expenses are:

1. Case management.
2. Day care.
3. Housing modifications for accessibility.
4. Respite care.
5. Supportive home care.
6. Transportation.
7. Services recognized under s. 46.27, Wis. Stats.
8. Community Options Program, that are included in the person's service plan (sic).

Remedial expenses do not include housing or room and board services.

The Department clearly intends to exclude housing costs from the definition of remedial expenses.

Prior to her enrollment in FCP and again on May 13, 2013, petitioner submitted a list of items to the MCO that she purchases and considers necessary for relieving her conditions. Exhibit p-124. The MCO responded by denying FCP coverage of the items because they are not included in the FCP benefit package, citing a policy document (it is unclear whether it is a Department-wide document or a local MCO document). Exhibit P-126. Petitioner argues that some of those items are included as FCP items specifically in the Department's waiver application, but they are clearly excluded as FCP items by the program here. The question therefore is whether those items can be included as remedial expenses in determining petitioner's monthly financial obligation. The MCO denied petitioner's request that her obligation be reduced for any of the expenses.

First, although the agency representatives stated that the determination of what expenses are remedial is not appealable, I believe that it is an appealable issue. An FCP participant's appeal rights are extremely broad under Wis. Stat., §46.287(2), including the catch-all that she may contest any decision, omission, or action of the MCO. Clearly the determination of the amount of her financial obligation is a major

decision impacting her eligibility. Wis. Stat § 46.287(2)(a)1.b. provides a right to a fair hearing in regard to the determination of cost sharing. It is unreasonable to believe that a dispute over whether expenses should be considered remedial for purposes of the spend-down calculation cannot be appealed.

When I look at the list of expenses petitioner submitted, Exhibit p-124, I see a number that clearly strike me as “relieving, remedying, or reducing” petitioner’s medical conditions. It is clear to me that these items do not have to be MA or FCP covered items (aspirin, for example, is an over-the-counter item not covered by MA, but it still could fall under the definition of remedial). I believe that some of the items would not be remedial (such as shampoo and detergent because everyone uses those items; they are not unusual to petitioner due to her health condition). I will not go through the list individually because that is the MCO’s job, and at this point it simply denied all the expenses without comment. It needs to address the items more thoroughly. Again, I note that the list includes prescription drug co-pays that have already been counted as medical expenses.

III. PETITIONER’S INABILITY TO PAY HER MONTHLY FINANCIAL OBLIGATION

Finally, I come to the absolute gist of the case. As I noted above, it does not matter how many remedial items petitioner is credited for in her financial obligation calculation. Her housing expense alone makes it impossible for her to pay her financial obligation. When a person applies for FCP in such a situation, one of two things can occur. The first would be to simply deny FCP as being untenable for the person’s financial situation. If a person who applies for FCP with gross income higher than \$2,130 (thus making her a Group C applicant) also has housing costs higher than \$611.67, the person by actual fact will not possibly be able to meet her financial obligation to the MCO. Once housing, food, and other essentials are paid, it would not matter what the person’s financial obligation would be, she could not possibly meet it. That axiom is crystal clear in this case. Petitioner cannot meet her monthly financial obligation; she cannot pay for her housing and other necessary expenses while also paying her monthly financial obligation to the MCO, and petitioner made that clear to the MCO from the moment she was told about her financial obligation. Thus the agency should not have granted eligibility in the first place.

I cannot believe that to be the Department’s intent. Otherwise it would be virtually impossible for a Group C person to participate in the FCP unless her monthly housing costs were extremely low, an unlikely probability for a person whose health is compromised enough that she meets the FCP level of care requirement.

The second option is more reasonable and actually is already being utilized. Coincidentally I conducted a hearing on January 15, 2014 in case no. FCP-154041, also involving a Milwaukee client and the Milwaukee County Dept. of Family Care. ██████████ represented the client in the case, but Rosaida Schrank represented the agency instead of Ms. Alford. In that case the client’s income also was above \$2,130, making her a Group C participant. She too had a monthly spend-down to meet. Unlike petitioner, however, that client resided in assisted living instead of her own home. The monthly room and board for the assisted living facility was \$993. Thus, like petitioner, by actual fact that client could not possibly meet her monthly spend-down and pay her monthly rent. In that case the MCO essentially writes off \$461.33 per month and charges the client room and board of \$531.67. The client thus has a monthly financial obligation due to the MCO plus a monthly rent of \$531.67 (the issue in the case was the calculation of the client’s gross income versus available income and thus is different from the issue here).

In that case the MCO writes off or waives part of the client’s financial obligation to the MCO. It does so automatically; the client did not have to request the waiver. I see no overriding reason why the same result cannot happen in this case where the client lives at a home that she owns, recognizing that any accommodation the FCP makes for the petitioner would, in essence, allow the petitioner to increase her

equity in her home at the expense of the public assistance program. I find that the intent of the FCP is to make individuals like petitioner eligible where possible, and that a similar waiver could occur here.

There is precedent for such an action. I located a fair hearing decision that ordered such a waiver for a Group C participant. In decision no. FCP/137094, issued February 12, 2012, ALJ Gagnon ordered the FCP agency to waive part of the petitioner's "cost share" under that section so that the client could meet her financial obligation. Although the decision talked about the "cost share" exclusively, in fact the person was a Group C participant with a monthly spend-down because her monthly gross income was over \$3,000. That decision was issued and implemented without comment by the agency or the Department. [I put a redacted copy of that decision into petitioner's file.]

It should be clear that a *hardship* waiver is not available for purposes of making an individual *eligible* for medical assistance. Meeting a spend-down obligation is a condition of eligibility for participation in the FCP. However, it does not appear to be the intent of the FCP for a FCP member living in her or his own home to be placed at a financial disadvantage over a FCP member living in an assisted living facility, who may receive a reduction in the obligation due an MCO as an 'in lieu of' residential service that reduces the member's room and board expense. Petitioner may request a waiver or accommodation of her financial obligation to the MCO from the Department, based upon policy considerations rather than hardship, which would allow her to remain in her own home.

IV. CONCLUSION

I will remand the case to the agency with instructions to re-determine petitioner's monthly *financial obligation* to the MCO retroactive to the start of her eligibility. The agency should determine the correct amount of petitioner's monthly medical/remedial expenses that should be used to reduce her financial obligation, and provide notice of appeal rights for any denial of a requested expense. The petitioner may apply directly to the Department for a waiver or accommodation that would allow petitioner to live in her home *and* participate in the program. Since petitioner has made some payments to the MCO since August, 2013, the agency then can determine if petitioner still owes for the backdated months or even if she is entitled to a refund.

I note finally that I will not address the various constitutional issues raised by petitioner. As is well known, the Division of Hearings and Appeals does not have authority to address constitutional issues, and furthermore, my decision would avoid the need to address constitutional issues.

CONCLUSIONS OF LAW

1. An FCP MCO can terminate a participant for failing to pay a monthly financial obligation because the participant agrees contractually to make the payment when she enters the program.
2. The cost of housing cannot be considered a remedial expense even if the particular residence is necessary for health purposes.
3. The agency failed to determine petitioner's monthly remedial expenses correctly.
4. Because petitioner's monthly housing costs are higher than the available income remaining after her spend-down is computed, the petitioner may apply to the Department for a waiver or accommodation so that petitioner is provided a monthly financial obligation that she is capable of paying and that allows her to remain in her own home.

THEREFORE, it is

ORDERED

That the matter be remanded to the agency with instructions to re-determine petitioner's monthly *financial obligation* to the MCO retroactive to the start of her eligibility. The agency should determine the correct amount of petitioner's monthly medical/remedial expenses that should be used to reduce her financial obligation. The petitioner may apply to the Department for a waiver or accommodation so that petitioner can afford to live in her home *and* participate in the program. The agency shall do so within 10 days of a final decision in this case subject to any delays necessary for verification purposes.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875 **and** to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 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, WI, 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 request (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 8th day
of May, 2014.

Kevin E. Moore
Kevin E. Moore, Deputy Secretary
Department of Health Services



STATE OF WISCONSIN
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PROPOSED DECISION

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2. Be held financially responsible for the spenddown amount on a monthly basis.

Thus the Handbook, at least, requires a community based program participant to both incur and be responsible for the monthly spend-down amount. (Fascinatingly, the Handbook provision goes on to say that a married Group C participant must incur and **pay** the spend-down; I have no idea whether the Department meant “be held financially responsible” and “pay” to be equivalent.)

To add to the complexity of the issue here, petitioner points out that Medicaid spend-down rules require a person to incur medical bills to meet a spend-down; the rules do not require the person to actually pay the bills to meet the spend-down. There is no question that individuals throughout the state are eligible for MA due to medical bills incurred at hospitals and clinics without ever actually paying the bills. However, in this case the FCP Managed Care Organization (MCO) essentially is the provider, and thus it would be a contradiction to force the MCO to provide services without being paid by the participant. In the FCP, while it is true that a person has simply to incur expenses to meet the spend-down, the provider is the FCP MCO for all but out-of-pocket medical/remedials. The FCP recipient enters the program agreeing to abide by its law and policies. As pointed out by Ms. Alford in her response brief, the MCO is responsible for collecting amounts owed by the client, and the client is informed that she must make the payments to continue eligibility, as petitioner was in the March 25, 2013 eligibility notice (Attachment C to Ms. Alford’s brief).

The confusion is caused by the Department’s, and FCP agency’s, use of the term “spend-down.” The spend-down is the amount the person must incur to become eligible. At issue here is not the spend-down, however. It is the participant’s *financial obligation* to the FCP MCO that is at issue. The financial obligation is the amount of the spend-down that the participant must pay to the MCO to receive FCP services. Although the Department uses the word “spend-down” (or as in the Handbook, “spenddown” without a dash), the proposed discontinuance in this case is not due to a failure to pay a spend-down but the failure to pay the financial obligation that the person agrees to pay when she enters the program. I thus do not find the potential discontinuance of FCP because the participant does not pay her financial obligation to be unlawful. She agrees to make all required payments when she enters the program.

I conclude that an FCP agency can discontinue eligibility for failure to pay the monthly financial obligation. I will not uphold the discontinuance in this case, however, because I believe that the agency erred in determining petitioner’s financial obligation.

II. DETERMINATION OF REMEDIAL EXPENSES

Under the rules and policies described above, petitioner was doomed to failure from the start. Essentially all of her monthly income except \$611.67 (the MA income limit plus the \$20 disregard) had to go to either the spend-down or health insurance. However, petitioner’s monthly housing costs alone are \$975.19 (a \$586.19 mortgage/property tax payment, \$40 monthly homeowners insurance, \$195 condo fee, plus utilities that average \$154 per month). See Exhibit P-116. She has to eat as well. From the moment she signed the FCP contract, petitioner could not possibly pay her monthly financial obligation. Why would an agency even allow a person in petitioner’s situation to enter the program knowing that her monthly living expenses far exceed the money that will be available to her after she enters the program?

I note that from here I will discuss only remedial expenses instead of the phrase “medical/remedials.” Medical expenses are prescribed by doctors and only come up in cases of co-pays or services that occurred before the person became eligible for MA. All expenses at issue in this case are remedial ones.

Petitioner’s response to the question above was to request that at least part of her housing cost be considered a remedial expense. Evidence shows that due to petitioner’s various medical conditions, her condominium is her only, or at least her best, possible place of residence. As noted at page 11 of her brief, it is agreed by the agency that petitioner cannot reside in a nursing home or other type of group home. Thus, she argues, her relatively high monthly housing expenses are critically related to her health. The definition of remedial expenses is as follows: “a cost paid by a medicaid purchase plan recipient that may be considered to be related to that person's health, employment or disability. The cost is not reimbursable by another source such as medicare, medical assistance, private insurance or an employer.” Wis. Admin. Code, §DHS 101.03 (152m). The Handbook defines them at §15.7.3:

Remedial expenses are costs incurred for services or goods that are provided for the purpose of relieving, remedying, or reducing a medical or health condition. These are expenses that are the responsibility of the member and cannot be reimbursable by any other source, such as Medicaid, private insurance, or employer.

Some examples of remedial expenses are:

1. Case management.
2. Day care.
3. Housing modifications for accessibility.
4. Respite care.
5. Supportive home care.
6. Transportation.
7. Services recognized under s. 46.27, Wis. Stats.
8. Community Options Program, that are included in the person's service plan (sic).

Remedial expenses do not include housing or room and board services.

The Department clearly intends to exclude housing costs from the definition of remedial expenses.

Prior to her enrollment in FCP and again on May 13, 2013, petitioner submitted a list of items to the MCO that she purchases and considers necessary for relieving her conditions. Exhibit p-124. The MCO responded by denying FCP coverage of the items because they are not included in the FCP benefit package, citing a policy document (it is unclear whether it is a Department-wide document or a local MCO document). Exhibit P-126. Petitioner argues that some of those items are included as FCP items specifically in the Department’s waiver application, but they are clearly excluded as FCP items by the program here. The question therefore is whether those items can be included as remedial expenses in determining petitioner’s monthly financial obligation. The MCO denied petitioner’s request that her obligation be reduced for any of the expenses.

First, although the agency representatives stated that the determination of what expenses are remedial is not appealable, I believe that it is an appealable issue. An FCP participant’s appeal rights are extremely broad under Wis. Stat., §46.287(2), including the catch-all that she may contest any decision, omission, or action of the MCO. Clearly the determination of the amount of her financial obligation is a major decision impacting her eligibility. It is unreasonable to believe that a dispute over whether expenses should be considered remedial cannot be appealed.

When I look at the list of expenses petitioner submitted, Exhibit p-124, I see a number that clearly strike me as “relieving, remedying, or reducing” petitioner’s medical conditions. It is clear to me that these items do not have to be MA or FCP covered items (aspirin, for example, is an over-the-counter item not covered by MA, but it still could fall under the definition of remedial). I believe that some of the items would not be remedial (such as shampoo and detergent because everyone uses those items; they are not unusual to petitioner due to her health condition). I will not go through the list individually because that is the MCO’s job, and at this point it simply denied all the expenses without comment. It needs to address the items more thoroughly. Again, I note that the list includes prescription drug co-pays that have already been counted as medical expenses.

III. PETITIONER’S INABILITY TO PAY HER MONTHLY FINANCIAL OBLIGATION

Finally, I come to the absolute gist of the case. As I noted above, it does not matter how many remedial items petitioner is credited for in her financial obligation calculation. Her housing expense alone makes it impossible for her to pay her financial obligation. When a person applies for FCP in such a situation, one of two things can occur. The first would be to simply deny FCP as being untenable for the person’s financial situation. If a person who applies for FCP with gross income higher than \$2,130 (thus making her a Group C applicant) also has housing costs higher than \$611.67, the person by actual fact will not possibly be able to meet her financial obligation to the MCO. Once housing, food, and other essentials are paid, it would not matter what the person’s financial obligation would be, she could not possibly meet it. That axiom is crystal clear in this case. Petitioner cannot meet her monthly financial obligation; she cannot pay for her housing and other necessary expenses while also paying her monthly financial obligation to the MCO, and petitioner made that clear to the MCO from the moment she was told about her financial obligation. Thus the agency should not have granted eligibility in the first place.

I cannot believe that to be the Department’s intent. Otherwise it would be virtually impossible for a Group C person to participate in the FCP unless her monthly housing costs were extremely low, an unlikely probability for a person whose health is compromised enough that she meets the FCP level of care requirement.

The second option is more reasonable and actually is already being utilized. Coincidentally I conducted a hearing on January 15, 2014 in case no. FCP-154041, also involving a Milwaukee client and the Milwaukee County Dept. of Family Care. ██████████ represented the client in the case, but Rosaida Schrank represented the agency instead of Ms. Alford. In that case the client’s income also was above \$2,130, making her a Group C participant. She too had a monthly spend-down to meet. Unlike petitioner, however, that client resided in assisted living instead of her own home. The monthly room and board for the assisted living facility was \$993. Thus, like petitioner, by actual fact that client could not possibly meet her monthly spend-down and pay her monthly rent. In that case the MCO essentially writes off \$461.33 per month and charges the client room and board of \$531.67. The client thus has a monthly financial obligation due to the MCO plus a monthly rent of \$531.67 (the issue in the case was the calculation of the client’s gross income versus available income and thus is different from the issue here).

In that case the MCO writes off or waives part of the client’s housing expense. It does so automatically; the client did not have to request the waiver. I see no reason why the same result cannot happen in this case where the client lives at a home that she owns. That takes me back to Wis. Admin. Code, §DHS 10.34(4), the subsection that allows the agency to waive part of the monthly cost share to avoid undue hardship. In essence, by writing off part of the assisted living resident’s monthly room and board, that is what the MCO is doing in the case cited above, even though, by doing so, the agency allows the person to pay less than the mandated financial obligation requires under the spend-down rule. I find that the intent of the FCP is to make individuals like petitioner eligible where possible, and that a similar waiver should occur here.

There is precedent for such an action. I located a fair hearing decision that ordered such a waiver for a Group C participant. In decision no. FCP/137094, issued February 12, 2012, ALJ Gagnon ordered the FCP agency to waive part of the petitioner's "cost share" under that section so that the client could meet her financial obligation. Although the decision talked about the "cost share" exclusively, in fact the person was a Group C participant with a monthly spend-down because her monthly gross income was over \$3,000. That decision was issued and implemented without comment by the agency or the Department. [I put a redacted copy of that decision into petitioner's file.]

IV. CONCLUSION

I will remand the case to the agency with instructions to re-determine petitioner's monthly *financial obligation* to the MCO retroactive to the start of her eligibility. The agency should determine the correct amount of petitioner's monthly medical/remedial expenses that should be used to reduce her financial obligation. The agency then should determine an amount to waive under Wis. Admin. Code, §10.34(4) so that petitioner can afford to live in her home *and* participate in the program. In other words, the agency should take action to determine an amount that petitioner is capable of paying monthly so that she can participate in FCP and live in her home. Since petitioner has made some payments to the MCO since August, 2013, the agency then can determine if petitioner still owes for the backdated months or even if she is entitled to a refund.

I note finally that I will not address the various constitutional issues raised by petitioner. As is well known, the Division of Hearings and Appeals does not have authority to address constitutional issues, and furthermore, my decision would avoid the need to address constitutional issues.

CONCLUSIONS OF LAW

1. An FCP MCO can terminate a participant for failing to pay a monthly financial obligation because the participant agrees contractually to make the payment when she enters the program.
2. The cost of housing cannot be considered a remedial expense even if the particular residence is necessary for health purposes.
3. The agency failed to determine petitioner's monthly remedial expenses correctly.
4. Because petitioner's monthly housing costs are higher than the available income remaining after her spend-down is computed, the agency should determine an amount that it can waive under Wis. Admin. Code, §10.34(4) so that petitioner is provided a monthly financial obligation that she is capable of paying.

THEREFORE, it is

ORDERED

That the matter be remanded to the agency with instructions to re-determine petitioner's monthly *financial obligation* to the MCO retroactive to the start of her eligibility. The agency should determine the correct amount of petitioner's monthly medical/remedial expenses that should be used to reduce her financial obligation. The agency then should determine an amount to waive under Wis. Admin. Code, §10.34(4) so that petitioner can afford to live in her home *and* participate in the program. The agency shall do so within 10 days of a final decision in this case subject to any delays necessary for verification purposes.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat., §227.46(2).

Given under my hand at the City of Madison,
Wisconsin, this 22 day of January, 2014



Brian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals