



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWA/151886

PRELIMINARY RECITALS

Pursuant to a petition filed September 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 December 19, 2013, at [REDACTED], Wisconsin. The petitioner failed to appear at his originally scheduled hearing. He requested a rehearing on November 12, 2013. That was granted on November 21, 2013.

The issue for determination is whether the IRIS program correctly seeks to disenroll the petitioner because it cannot ensure that it will ensure his health and safety needs.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Jill Speer

Bureau of Long-Term Support
1 West Wilson
Madison, WI

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Jackson County.
2. The petitioner is a 61-year-old man who had a stroke that caused weakness on his right side, which in turn interferes with his ability to do activities and instrumental activities of daily living.

He also has open wounds that require specialized care. He requires care equivalent to that found in a nursing home.

3. The petitioner participates in the Wisconsin IRIS program, a fee-for-service delivery system set up under a federal medical assistance waiver as an alternative to the Family care Program.
4. The petitioner's sole caregiver is [REDACTED]. IRIS conducted a background check before hiring [REDACTED]. On May 1, 2013, he was charged with two felony counts of possession with intent to deliver prescription drugs in Monroe County Case No. 2013 CF 179. He has entered into a deferred prosecution agreement.
5. [REDACTED] threatened the IRIS worker in front of the petitioner on September 25, 2013, telling him, "I will find out where you live and you will be sorry. I know your full name and phone number and that's all I need." He went on to state that what he was saying was not a threat and added, "My private investigator will take care of things."
6. [REDACTED] cannot provide care to the petitioner at level equivalent to that found in a nursing home.
7. The petitioner's transient lifestyle, his failure to inform the IRIS program where he lives, and his refusal to consider any worker other than [REDACTED] put his health and safety at risk.

DISCUSSION

Medical Assistance-Waiver recipients must be allowed the option of directing their own cares. IRIS is waiver program built to allow self-directed supports. The petitioner receives benefits through this program, which stands for Include, Respect, I Self-Direct. It 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 that was developed pursuant to waiver obtained through section 6087 of the Deficit Reduction Act of 2005 (DRA) and section 1915(j) of the Social Security Act. The waiver document providing the program's authority is available at <http://www.cms.gov/MedicaidStWaivProgDemoPGI/MWDL/list.asp>. The federal government's general guidance for the program is found at 42 C.F.R. § 441.450 – 484. Those regulations require the Department's agent to assess the participant's needs and preferences, and then develop a service plan based on the assessed needs. *Id.*, § 441.466. The service plan may include personal care and homemaker services. *Id.*, §440.180(b). Further, "all of the State's applicable policies and procedures associated with service plan development must be carried out ..." *Id.* § 441.468. Wisconsin IRIS policies are found online at <http://www.dhs.wisconsin.gov/bdds/iris/IRISPolicySummary.pdf>.

Wisconsin IRIS policies allow the program to end a participant's enrollment when one or more of these conditions exist:

- The participant's health and safety is at risk.
- Purchasing authority is mismanaged. For example, this includes but is not limited to:
 - o Fraud.
 - o Misrepresentation or willful inaccurate reporting of information.
- The participant moves to an ineligible living arrangement.
- The participant resides in a hospital, skilled nursing facility or state institution for longer than three months after the admission date to the facility. Note that if the participant informs the IRIS Program one of these settings will be a permanent living setting, then this is considered a voluntary disenrollment. The participant receives a Fair Hearing Notice related to his or her appeal rights.
- Failure to comply with Medicaid functional or financial requirements. This includes participating in the minimal number of required Support and Service Plan reviews.
- Failure to pay a Medicaid cost share or to meet Medicaid spend-down obligations.
- The participant does not identify a need for any IRIS Program service or support.

Id.

The program seeks to end the petitioner's enrollment. It contends his health and safety is at risk because he refuses to hire any caregiver other than [REDACTED]. There are no allegations of any specific harm Mr. [REDACTED] has done to the petitioner. Rather the IRIS worker with the most direct contact with Mr. [REDACTED] and the petitioner, Mr. [REDACTED], contends that Mr. [REDACTED] has been concerned primarily with his own interests rather than the petitioner's and that Mr. [REDACTED] has acted belligerently toward the petitioner and Mr. [REDACTED]. Much of IRIS's case depends upon an anonymous source who did not testify at the hearing. It appears that the anonymous source was the petitioner's roommate, but it is unclear if there was more than one source. The tenor of the IRIS program's allegations is found in the case notes it submitted for the hearing and which I have summarized below:

7/30/12: [REDACTED] had received several anonymous reports of concerns about [REDACTED]. The petitioner contends that there is no problem, although he told [REDACTED] he must pull his own weight. The petitioner noted that all roommates have some form skirmishes but he feels safe and has absolutely no issues with his roommate.

10/8/12: The contract lasted 4 hours and 15 minutes. [REDACTED] followed up about his concerns with [REDACTED]. He encouraged the petitioner to "seek alternative workers to decrease dependence on primary care worker as [petitioner] is realizing that a break from his worker would be beneficial." [There is no documentation of petitioner ever saying he needed a break from his worker.] The petitioner told Mr. [REDACTED] that he felt fine and his legs felt "perfect."

11/30/12 [REDACTED] received an anonymous call that an employee of the petitioner was abusing him. The petitioner's roommate informed [REDACTED] that the petitioner had moved into town. This roommate thought [REDACTED] was manipulating the petitioner because the petitioner enjoyed the house and thus had no reason to leave. The roommate invited the petitioner to move back into house but would not allow [REDACTED] to do so because he does not like the way [REDACTED] treats the petitioner. Roommate asked to remain anonymous and [REDACTED] said he would. [Because these notes were submitted with the hearing materials, this information would now be available to the petitioner and anyone the petitioner showed the materials to.]

12/7/12: [REDACTED] called the petitioner to discuss a report of abuse.

12/11/12: The contact lasted 2 hours The petitioner said he is like a father to [REDACTED] and that he pays all of [REDACTED]'s bills. He also said he does not want to continue doing so, but that [REDACTED] is difficult if he does not get his own way. According to the petitioner, [REDACTED] is often disrespectful and does not offer support at times it is inconvenient for him to do so. He said [REDACTED] just got a new job but he did not know how long he could keep it because he had a hard time doing so.

12/14/2012: The contact lasted 5 hours. Mr. [REDACTED] discussed with the petitioner that [REDACTED] might be verbally and financially abusing the petitioner. The petitioner was paying for [REDACTED]'s room and board.

4/14/13: The contact lasted 3 hours. The petitioner had knee surgery. He said he had signed one-year lease to remain in his home in [REDACTED]. [REDACTED] was in [REDACTED]. The petitioner says [REDACTED] planned to move near him. He said he did not want [REDACTED] to live in his house because he had lost residences due to [REDACTED]'s "stupidity." The petitioner was still paying for [REDACTED]'s room and board in [REDACTED].

4/29/13: [REDACTED] was upset with Mr. [REDACTED] about not getting paid on time. He hollered and hung up on Mr. [REDACTED].

7/13/13: The petitioner provided a third party with an email indicating he lived in [REDACTED]. The petitioner called and said he lived in a campground for a month. Mr. [REDACTED] received information that the petitioner was evicted from the [REDACTED] house because [REDACTED] living there. [This would be the fourth eviction because of [REDACTED] living with him.] [REDACTED] claims he left house in [REDACTED] because it was sold and he only had month-to-month lease. [This contradicts the petitioner's earlier assertion that he had signed a one-years lease. The petitioner said [REDACTED] is doing a good job of taking care of him and he is having a lot of fun at the campground. In response to

being told that his daughter was approved to care for him, Mr. ██████ said that the petitioner “exclaimed that ‘█████ says it is up to him if he wants to give up his hours to other people.’ ” When told that ██████ is his employee, the petitioner said, “ ‘█████ argues with me all the time about who is the boss..’ ”

7/5/13: The petitioner cannot move into property in ██████ because the home owner will not allow ██████ on the property.

8/2/13: ██████ called IRIS and indicated that the petitioner has an infection in his leg that ██████ can't take care of. The petitioner had not been able to provide a permanent address or phone number for last two months.

9/24/13: Mr. ██████ made an unannounced visit to address on file for the petitioner. An elderly woman answered and said she had been there for two months and did not know who had been there earlier.

9/25/13 and maybe 9/27/13: Mr. ██████ made an unannounced visit. ██████, in response to ██████'s question about his residence, said he had never lived on Main Street but rather lived with the petitioner since they had returned to ██████. When Mr. ██████ told the petitioner that he was unable to direct his own cares because of issues about his health and safety in regard to his primary caretaker. ██████ told the petitioner, in what ██████ considered a threatening manner, to say something. ██████ then said the visits could not continue if ██████ threatened him. ██████ said he was going to contact his lawyer. He then told ██████ “I will find out where you live and you will be sorry. I know your full name and phone number and that's all I need.” He went on to state that what he was saying was not a threat and that, “My private investigator will take care of things.”

The agency must prove by the preponderance of the credible evidence that the petitioner's health and safety is at risk. In making this determination, I will not consider the statements of the anonymous source cited by the IRIS program's witnesses. The statements are vague because they never indicate exactly what Mr. ██████ allegedly did to the petitioner. Further, without the anonymous source's presence at the hearing, there is no way to determine the statement's credibility. People have histories, and those histories are relevant. In addition to not considering the anonymous source's statements, I find insufficient evidence to establish that ██████'s behavior has, to this point, actually harmed the petitioner. The petitioner did have surgery, but he had serious health problems to begin with. Nor is there evidence of any physical abuse.

But the IRIS program does not have to show actual harm. Rather, as pointed out earlier, it must establish that the petitioner's health and safety is *at risk*. The IRIS policies offer no guidance on what constitutes risk, but I assume that the risk must be more than a remote possibility. The petitioner has had a stroke that has left his right side weakened and interferes with his ability to care for himself and move about. These limitations cannot be accommodated with simple adaptations. *Long Term Care Functional Screen, August 8, 2013*. The fact that he is in the IRIS program means that he is not only disabled but requires the care generally found in a nursing home. This in turn mean that his caretaker must be capable of providing care at this level.

The first fact relevant to the health risks faced by the is that the petitioner moved at least four times in a little over a year. By his own statements, three of these were because of “█████'s stupidity.” In addition, there is strong circumstantial evidence that Mr. ██████ caused the fourth move as well. The petitioner said in an April 14, 2013, meeting with his IRIS worker, Mr. ██████, that he had a one-year lease on his residence. On July 13, 2013, he told his worker that he moved because the place had been sold and he had a month-to-month lease. Both statements cannot be true, and, given the underlying circumstances, it is more likely that he was telling the truth the first time and Mr. ██████'s actions caused him to move. These constant moves pose a health risk to the petitioner because his medical condition requires that he live in a place that will accommodate his disability. For several month, he moved from campground to campground. He is an adult, and even with his disability should be able to camp occasionally. But it stretches the imagination to assume that living this way for several months does not pose a danger to his

health and safety. For example, he has frequent open wounds that would be difficult to treat in a campground.

In addition to living transiently, he did so without telling his worker where he lived. The IRIS program bestows considerable independence on its recipients. But the program and its workers have a duty to supervise those within the program to ensure their safety. Although the program did not establish that Mr. [REDACTED] caused any actual harm to the petitioner, it did establish that he was the type of person who would put his own interests above the health of the petitioner's: He has made statements that indicated he considers himself in charge of the petitioner rather than the petitioner being in charge of him. He either lived with the petitioner or had the petitioner paying for his room and board. He was responsible for the petitioner's many moves. His statements telling Mr. [REDACTED] in late September that he knew where he lived were boorish at best, and possibly criminal. The program has a duty to ensure that those caring for its participants can do so adequately, and the vigilance the program must exercise over workers increases when a worker engages in the type of conduct Mr. [REDACTED] has. When the program does not know where the petitioner lives it can exercise this oversight.

Finally, in regard to Mr. [REDACTED], I have taken notice of an entry in CCAP, the online database for Wisconsin circuit courts. It shows that a [REDACTED] [REDACTED], born on January 25, 1989, and living in [REDACTED], Wisconsin, was charged on May 1, 2013, with two felony counts of possession with intent to deliver prescription drugs. *Monroe County Case No. 2013 CF 179*. He has entered into a deferred prosecution agreement. Although the IRIS program did not raise this at the hearing, I assume it is the same person who cares for the petitioner. A later case in the system (driving after license suspension for at least the fourth time) indicates that lives on Main Street in [REDACTED], an address that Mr. [REDACTED] asked the petitioner if he was still at. In addition, the petitioner said that Mr. [REDACTED] was like a son to him; the petitioner is 61 and Mr. [REDACTED] is 23. Although a deferred prosecution agreement does not result directly in a conviction, it is rare that a person would agree to such a disposition if the state did not have enough evidence to convict him. Possessing prescription drugs with the intent to sell them directly affects the petitioner's health and safety because he presumably takes a several prescription drugs that would be readily available for Mr. [REDACTED] to steal.

The IRIS program gives its recipients a good deal of latitude about whom they hire to care for them. This recognizes that friends and family members can learn how to provide good care even if they have no formal training in medicine. Nevertheless, one must remember that persons in this program require the care generally provided in a nursing home. The evidence has established that Mr. [REDACTED] has caused the petitioner to move repeatedly, has caused him to live in unsafe situations considering his condition, has caused him to disappear from any oversight by the IRIS program, does not put his needs first, engages in belligerent behavior that is inconsistent with caring for a disabled person, and illegally sells prescription drugs that probably are readily available to steal from the him. Such a person cannot by himself ensure the health and safety of a person who requires the level of care found in a nursing home. Added to this is that the petitioner was complicit in much of Mr. [REDACTED]'s behavior. The IRIS program has waited over a year from when the problems began to develop to when it finally took action to end the petitioner's enrollment in the program. I find that his own actions, which he has had time to correct, made it impossible for the IRIS program to ensure his health and safety. Therefore, although it has not been established that the petitioner has suffered actual harm, the program correctly seeks to end his benefits because his health and safety is at risk.

CONCLUSIONS OF LAW

The IRIS program correctly seeks to end the petitioner's participation in the program because his behavior and choice of a caretaker put his health and safety at risk.

THEREFORE, it is

ORDERED

The petitioner's 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, Room 651, 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 Madison,
Wisconsin, this 8th day of January, 2014

\sMichael D. O'Brien
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 January 8, 2014.

Bureau of Long-Term Support