



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWA/157284

PRELIMINARY RECITALS

Pursuant to a petition filed April 30, 2014, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to a requested IRIS service component, a hearing was held on July 17, 2014, by telephone. A hearing set for June 26, 2014, was rescheduled at the petitioner's request.

The issue for determination is whether the IRIS program correctly declined to continue authorization of personal trainer funding for the petitioner.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
By: [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Sue Hanks, Quality Serv. Mgr.
IRIS Consultant Agency

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Manitowoc County. He is enrolled in the IRIS program.
2. IRIS is a self-directed personal care program, created by a Medicaid waiver.

3. The petitioner, age 28, has diagnoses of seizure disorder, ADHD, obsessive-compulsive disorder, cognitive disability, and osteopenia related to Apert Syndrome. Apert syndrome is a genetic disorder consisting of progressive bone and joint deformities with premature fusion of bones, and and foot deformities, fused finger and toe joints, craniofacial anomalies and Sprengel's deformity. Sprengel's deformity is a shoulder (scapula) deformity that may limit one's ability to lift arms above the head. In 2011, the petitioner underwent a bone density study which shows areas of low bone density and a moderate fracture risk for the right forearm and a high fracture risk for the left forearm.

The petitioner is able to eat, toilet, transfer and ambulate independently. He requires verbal cues and supervision for dressing and bathing. He resides with his mother.
4. Prior to June 30, 2014, the petitioner's IRIS service plan (Plan) contained 13 hours monthly of IRIS-funded personal trainer service, at \$20 hourly. The Plan also enables him to receive 91 hours of supportive home care (SHC) monthly through IRIS. The personal trainer service was performed by a non-family member, Dan Strong. After 20 months of training with Strong, the petitioner's follow-up bone density test showed minimal change in the right forearm, but an improvement (5.3%) in left forearm fracture risk from high to moderate. Medication (oral bisphosphonates) can also be used to improve bone density, but said medication can have significant side effects.
5. On April 2, 2014, the IRIS Consultant Agency issued a letter to the petitioner. It advised that, beginning June 30, 2014, the IRIS program would no longer include payment for the personal trainer service in the Plan. It advised that personal trainer services could only be offered on a time-limited basis. The petitioner appealed.
6. The IRIS Consultant Agency discontinued IRIS funding of personal trainer services because IRIS is not supposed to cover the cost of a service that does not reduce the recipient's need for human assistance or increase the recipients' independent functioning.

DISCUSSION

The Include, Respect, I Self-Direct (IRIS) 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. This Section 1915(c) waiver document is available at <http://www.cms.gov/MedicaidStWaivProgDemoPGI/MWDL/list.asp>. IRIS is a fee-for-service, self-directed personal care program.

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, 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.

I. JURISDICTION.

The first concern here is whether jurisdiction is present to review the IRIS Consultant Agency's action. The federal waiver document makes the following declaration regarding Medicaid fair hearing rights being applicable to IRIS agency actions:

The State provides an opportunity to request a Fair Hearing under 42 CFR Part 431, Subpart E to individuals: (a) who are not given the choice of home and community-based services as an alternative to the institutional care specified ... ; (b) are denied the

service(s) of their choice or the providers(s) of their choice; or (c) whose services are denied, suspended, reduced or terminated. The State provides notice of action as requested in 42 CFR §431.210.

...

§1915(c) Home and Community-Based Services Waiver, Appendix F. In this case, the IRIS Consultant Agency has terminated IRIS-paid personal trainer services, so subject-matter jurisdiction is present.

II. TERMINATION OF PERSONAL TRAINER SERVICES.

The federal self-directed personal assistance services rule requires that a state have an approved § 1915(c) waiver document before an IRIS-type program can be offered. 42 C.F.R. § 441.452(a). Wisconsin has such a federal waiver document, and it contains no specific allowed service category for “personal trainer.” It does have a service category of “customized goods and services.” *§ 1915(c) Home and Community-Based Services Waiver*, #0485R01.05., Appendix C-1, p.86. The Waiver’s requirements for approved services in this category include (1) that it meets an assessed long term support need, (2) that the support is not available through another source, and (3) that it will maintain the participant’s safety in the home/community *or* will decrease dependence on other Medicaid-funded services, *or* will maintain/improve the participant’s functioning related to the disability *or* will increase the participant’s access to the community.

The federal code language governing waiver programs such as IRIS allows for coverage of the following categories of 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).

The relevant federal code also contains this language:

§441.482 Permissible purchases.

(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.

Id., § 441.482.

The Department's IRIS policy document, *IRIS Policy Manual (Manual)* available at <http://www.dhs.wisconsin.gov/publications/P0/P00708.pdf> (viewed in August 2014), does not provide further elaboration.

I am unclear as to how the previous provision of trainer services was "necessary to avoid institutionalization," as required by § 440.180(b). Putting that aside, I do understand why the trainer services were initially approved for a period of time. The trainer was able to increase the petitioner's strength and balance such that he is now able to successfully and safely ride a bicycle to various locations in the community. He is not able to drive a car, so this was an enhancement to his ability to independently access the community. However, that objective has now been attained. I am not persuaded that continued personal trainer services are needed to maintain this acquired skill.

The petitioner argues that twice weekly personal trainer services are needed to increase/maintain bone density. The program asserts that the petitioner is now strong enough to use less expensive exercise services in the community, such as the YMCA (\$45 monthly membership fee, versus \$160 for the trainer). Also, the program asserts that the trainer should have developed a home exercise program for the petitioner, which could be overseen by his Supportive Home Care worker (his mother).

I agree with the program that it is time for the petitioner to transition to a less expensive exercise program. A weight-bearing exercise program would seem to be appropriate to maintain bone density. *See*, <http://www.webmd.com/osteoporosis/living-with-osteoporosis-7/weight-training>. Twice weekly personal training is overkill. As it happens, this Judge has had a personal trainer in the past. The trainer does an evaluation, and sets up an exercise program. He then adjusts the program, adding difficulty, after several weeks, not after a few days. A person does not "outgrow" their exercise program in a few days.

Referring back to the federal code language, additional personal training after 20+ months to add bone density does not appear "necessary to avoid institutionalization." Also, now that use of a bicycle has been mastered, additional personal training does not appear to "increase a participant's independence or substitute for human assistance, to the extent that expenditures would otherwise be made for the human assistance." Thus, discontinuance of this service is appropriate.

CONCLUSIONS OF LAW

1. The Department's agent correctly eliminated the 13 monthly hours of personal trainer service from the petitioner's Plan, because the service is not necessary to avoid institutionalization.

THEREFORE, it is

ORDERED

That the petition is dismissed.

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, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **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, 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 15th day of August, 2014

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on August 15, 2014.

Bureau of Long-Term Support