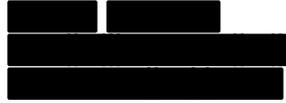




STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

CWA/158610

PRELIMINARY RECITALS

Pursuant to a petition filed June 24, 2014, under Wis. Admin. Code § HA 3.03, to review a decision by Wisconsin Department of Health Services' Division of Long Term Care, Bureau of Long-Term Support (BLTS or Bureau), in regard to IRIS benefits, a hearing was held on August 6, 2014, by telephone.

The issues for determination are (1) whether the IRIS program agency correctly determined that IRIS funds cannot be used to pay care provider [REDACTED] due to past convictions, and (2) whether there is jurisdiction to decide this issue.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



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Respondent:

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

By: John O'Keefe, IRIS Program/Policy Analyst
Bureau of Long-Term Support
1 West Wilson
Madison, WI

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. The petitioner is financially eligible for the IRIS program, and has been enrolled in the program for some time. IRIS is a self-directed personal care program, created by a Medicaid waiver.

3. The petitioner, age 63, is physically disabled. She has a history of two strokes and a brain surgery. The petitioner requires personal care worker and supportive home care worker services.
4. The petitioner is using her adult daughter, [REDACTED] [REDACTED], as a caregiver. She desires to have IRIS program funds used to pay [REDACTED] for her caregiving services.
5. [REDACTED] [REDACTED] was convicted of forgery, in violation of Wis. Stat. § 943.38, in September 1999. The Wisconsin Department of Health Services maintains a list of criminal offenses that case a person to be permanently barred as an IRIS caregiver. A § 943.38 conviction is on the permanent bar list.
6. The petitioner requested that [REDACTED] [REDACTED] be allowed to be an IRIS-funded caregiver in 2011. On November 30, 2011, the IRIS agency issued written notice to the petitioner advising that [REDACTED] [REDACTED] was ineligible to be hired as her IRIS employee. The basis for her ineligibility was her prior criminal convictions. The notice did not advise the petitioner that she had a right to appeal this determination.
7. On June 29, 2012, the IRIS agency issued another written notice to the petitioner advising that [REDACTED] [REDACTED] was ineligible to be hired as her IRIS employee. The basis for her ineligibility was her prior criminal convictions. The notice did not advise the petitioner that she had a right to appeal this determination. Both negative notices advised the petitioner that:

While the IRIS program does not allow this applicant to be employed with you as employer, the person may be permitted to work through an agency that would serve you. The rules that govern agency caregivers are different than for workers where you are the employer. With a caregiver agency, the hiring decision, worker training and supervision is completed by the caregiver agency. If you would like to have this person serve as your caregiver, please suggest that they apply for employment at a caregiver agency in your area.

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.

Both the federal Medicaid waiver statute and the pertinent federal rule require the Department to have safeguards to assure that these public funds can be accounted for:

§ 441.302 State assurances.

Unless the Medicaid agency provides the following satisfactory assurances to CMS, CMS will not grant a waiver under this subpart and may terminate a waiver already granted:

... (b) *Financial accountability*— The agency will assure financial accountability for funds expended for home and community-based services, provide for an independent audit of its waiver program (except as CMS may otherwise specify for particular waivers), and it will maintain and make available to HHS, the Comptroller General, or other designees, appropriate financial records documenting the cost of services provided under the waiver, including reports of any independent audits conducted.

42 C.F.R. § 441.302. Such safeguards include a requirement that responsible caregivers be hired, who are not likely to defraud the program.

The Department's IRIS policy document, *IRIS Policy Manual (Manual)* available at <http://www.dhs.wisconsin.gov/publications/P0/P00708.pdf> (viewed in September 2014), at § 1.2F.1, provides limited further elaboration, including a caregiver background check requirement.

Before deciding whether ██████████'s conviction makes her a risk to the program's accountability, it must be determined that there is jurisdiction to consider the merits of the appeal. First, this appeal was not filed on time. Appeals that concern a negative action taken against a recipient's Medical Assistance, include MA sub-program like the IRIS waiver program, must be filed within 45 days of the effective date of the negative action. *See*, Wis. Stat. § 49.45(5); Wis. Admin. Code § 3.05(3); DHA Decision no. CWA/158610 (May 2011). A negative action includes a denial, reduction or termination of benefits, or a refusal to pay for services on behalf of the recipient. However, the petitioner correctly notes that the negative notices issued to her did not identify the 45-day limit.

The Department states that the appeal limit was not identified because the employee bar is not an appealable issue. I agree with the Department. There is no specific statutory basis for IRIS appeals. The state code section that identifies the topics over which the Division of Hearings and Appeals has jurisdiction contains this pertinent passage:

HA 3.03 Right to appeal. (1) Any person applying or receiving medicaid, food stamps, social services or public assistance may appeal any of the following administrative actions of the department or an agency:

(a) Denial of an application for benefits or the overt denial of the right to apply.

(b) ...

(f) For the COP program and medicaid waiver services, the denial of eligibility for services or reduction or termination of services as provide in s.46.27(7m(, Stats.). ...

Wis. Admin. Code § HA 3.03(1). The petitioner has not suffered an eligibility denial, or a reduction or termination in the amount or type of services in her service plan. Thus, this office lacks jurisdiction to review the IRIS program's determination that a specific caregiver cannot be used to provide services listed in the service plan. But *see*, DHA Decision no. CWA/134614 (October 17, 2011), in which jurisdiction is assumed but not discussed.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals lacks jurisdiction to review the IRIS program's determination that, due to a prior criminal conviction, a specific caregiver cannot be used to provide services listed in the petitioner's service plan.

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 17th day of September, 2014

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



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on September 17, 2014.

Bureau of Long-Term Support