



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
[Redacted]
[Redacted]

DECISION

CWA/161171

PRELIMINARY RECITALS

Pursuant to a petition filed October 10, 2014, 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 February 13, 2015, at West Bend, Wisconsin.

The issue for determination is whether the agency properly seeks to discontinue the Petitioner's participation in the IRIS program based on its determination that the Petitioner no longer meets the nursing home level of care requirement for IRIS eligibility.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted]
[Redacted]
[Redacted]

Petitioner's Representative:

[Redacted]
[Redacted]
[Redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Carrie Lopez Mulvaney
Bureau of Long-Term Support
1 West Wilson

Madison, WI

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [Redacted]) is a resident of Washington County.

2. Petitioner's diagnoses include Stargardt's Disease (legal blindness) and large vestibular aqueduct syndrome (profound deafness).
3. On September 9, 2013, the agency completed the Petitioner's annual Long Term Care Functional Screen (LTCFS) assessment. The assessor concluded the Petitioner meets the Physical Disability (PD) target group. The assessor concluded the Petitioner is independent with all Activities of Daily Living (ADLs) with the exception of eating, for which the Petitioner requires assistance at a Level 1 due to his visual impairment. The assessor also concluded the Petitioner requires assistance with the following Instrumental Activities of Daily Living (IADLs): meal preparation (Level 2), medication administration and management (Level 2), money management (Level 1), laundry/chores (Level 2), telephone use (Level 1) and transportation (Level 2). The assessor found the Petitioner requires overnight care. The Petitioner is not currently working but would need assistance to work at a Level 2 if working. The assessor also found he needs no assistance with communication and has no cognition, behavior or mental health issues.
4. On September 30, 2014, the agency completed the Petitioner's annual LTCFS assessment. The assessor concluded the Petitioner meets the PD target group. Further, the assessor concluded the Petitioner is independent with all ADLs with the exception of eating, for which the Petitioner requires assistance at a Level 1 due to his visual impairment. The assessor also concluded the Petitioner requires assistance with the following IADLs: meal preparation (Level 2), medication administration and management (Level 1), money management (Level 1), laundry/chores (Level 2), telephone use (Level 1) and transportation (Level 2). The assessor found the Petitioner requires overnight care. The Petitioner is not currently working but would need assistance to work at a Level 2 if working. The assessor also found he needs no assistance with communication and has no cognition, behavior or mental health issues.
5. On September 30, 2014, the agency issued a Notice of Action to the Petitioner informing him that the agency determined he no longer meets the nursing home level of care and that it will terminate his IRIS participation.
6. On October 10, 2014, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

The IRIS (Include, Respect, I Self-Direct) 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(c) of the Social Security Act. The IRIS program is bound by the terms of this waiver. The waiver specifies that the IRIS program was designed as an alternative to Wisconsin's managed care programs – Family Care and Family Care Partnership.

The petitioner seeks to continue enrollment in the IRIS program. IRIS requires participants to meet MA Waiver financial and non-financial criteria. *Id.*, 37.1.3. The agency contends the petitioner no longer meets the required nursing home level of care.

The Petitioner's representative argues that the waiver language regarding level of care criteria is the same for both Family Care and IRIS:

The IRIS waiver application states that “the level of care criteria are the same as the criteria for Medicaid reimbursement of care in nursing home level of care in Wisconsin.” (IRIS Waiver Application, *supra*, *app. B-6.e.* The Family Care waiver application uses essentially identical language: “The levels of care criteria are the same as the criteria for Medicaid reimbursement of nursing facility care in Wisconsin.” Wisconsin's Application for 1915(c) HCBS Waiver for Elderly and PD Target Groups, approved 1/1/10, *app. B-6.d.* The Family Care program has defined the criteria referred to in its waiver

application in Wisconsin Admin. Code §DHS 10. It therefore follows that the regulations definition should apply to the IRIS program as well.

Petitioner's Exhibit #1, Brief of Petitioner, 1/16/2015, page 2.

I find the Petitioner's argument to be persuasive. IRIS is designed as a self-directed alternative to Family Care and the waiver language indicates the level of care criteria are the same for both the IRIS program and the FC program. Therefore, those who would qualify at a nursing home level of care for Family Care must also qualify at that level for IRIS.

The nursing home level of care, which is also referred to as the comprehensive level of care, is described as follows at Wis. Adm. Code, § DHS 10.33(2)(c):

A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening::

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
 - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
 - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self neglect or resistance to needed care.

Wis. Adm. Code, § DHS 10.33(2)(c).

Activities of daily living, or ADLs, refer to "bathing, dressing, eating, mobility, transferring from one surface to another such as bed to chair and using the toilet." Wis. Adm. Code, § DHS 10.13(1m). Instrumental activities of daily living, or IADLs, refer to "management of medications and treatments, meal preparation and nutrition, money management, using the telephone, arranging and using transportation and the ability to function at a job site." Wis. Adm. Code, § 10.13(32)

Agencies must determine eligibility using a uniform functional screening tool prescribed by the Department. Wis. Adm. Code, § DHS 10.33(2)(a). The problem with this requirement is that the Department has changed the screening tool to better comply with the federal government's long-term waiver provisions, but it has not changed the administrative code to reflect these changes. See DHA Decision No. CWA/155857. Numerous DHA decisions have held that because the administrative code has the force of law, an ALJ must follow the code rather than the screening tool. See CWA/139759,

CWA/162373, CWA/155857, CWA/150560, CWA/152538 and CWA/156141. I agree with those decisions and therefore apply the code provisions in DHS 10 to this case.

There is no dispute between the agency and the Petitioner that the Petitioner requires assistance with one (1) ADL and six (6) IADLs. There is no dispute that his condition and his need for assistance has not changed from the assessment in 2013 to the assessment in 2014 with the exception of the level of assistance needed for medication administration and management which changed from a Level 2 in 2013 to a Level 1 in 2014.

Based on the undisputed evidence that the Petitioner requires assistance with six IADLs, I conclude that the Petitioner meets the nursing home level of care criteria in DHS 10.33(2)(c)3 because he cannot safely or appropriately perform at least five IADLs.

CONCLUSIONS OF LAW

The Petitioner meets the nursing home level of care criteria because he cannot safely or appropriately perform at least five IADLs.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to take all administrative steps necessary to rescind its Notice of Action issued to the Petitioner on September 30, 2014 and to continue the Petitioner's participation in the IRIS program at a nursing home level of care. These actions shall be completed within 10 days of the date of this decision.

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 Milwaukee,
Wisconsin, this 13th day of March, 2015

\sDebra Bursinger
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 March 13, 2015.

Bureau of Long-Term Support

