



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

CWK/162654

The attached proposed decision of the hearing examiner dated April 14, 2015, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

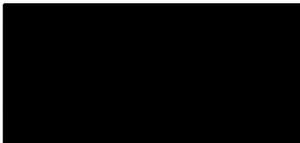
Pursuant to a petition filed December 15, 2014, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Milwaukee Cty Disability Services Division-DSD in regard to Medical Assistance, a hearing was held on February 25, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the agency erred in its termination of CLTS waiver services for petitioner due to use of an “out-of-network” provider.

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: Nancy Dumas

Milwaukee Cty Disability Services Division-DSD
1220 W. Vliet Street, Suite 300
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.
2. Petitioner is a minor child with autism. She was diagnosed in January 2013.
3. Petitioner applied for CLTS services in February 2013.
4. She began working with therapist [REDACTED] in February 2013. Services were covered by private insurance. [REDACTED] is a licensed behavior analyst in the state of Wisconsin through the state Department of Safety and Professional Services. His license was issued in October 2010. [REDACTED] is a qualified provider of intensive autism services under the CLTS waiver in Waukesha and Racine Counties.
5. In June 2013, petitioner was placed on the CLTS wait list.
6. In September 2013, [REDACTED] applied to become an approved intensive autism services provider under the CLTS waiver in Milwaukee County. Milwaukee County did not act on his application.
7. By September 2014, petitioner became eligible for the CLTS program as she has reached the top of the wait list. Her therapist, [REDACTED] was still not an approved provider as Milwaukee County had not begun to process his application.
8. When petitioner declined to participate in autism therapy with a new provider and maintained that she wished to continue therapy with [REDACTED] Milwaukee County terminated her from CLTS by notice dated December 3, 2014 and with an effective date of 12/15/14 (the notice of action mistakenly refers to 12/15/13).
9. Petitioner appealed.

DISCUSSION

The CLTS program started on January 1, 2004 after the federal Department of Health and Human Services informed the state department that federal MA funding would no longer be available for in-home autism services. The department drafted and released the Interim Medicaid Home and Community-Based Waivers Manual (“the Manual”) that became effective with the start of the CLTS program. The Manual also covers the Community Integration 1A and 1B programs and the Traumatic Brain Injury Waiver program.

The Manual provides that an individual must meet several eligibility criteria for these programs, one of which is level of care. Manual, §2.07D. In addition, the child must be part of a waiver target group. Those groups include children with developmental disabilities, those with physical disabilities, and those with severe emotional disturbance. Manual, §2.02.

The petitioner was diagnosed with autism in January 2013. She applied for CLTS services in September 2013. In September 2014, she became eligible for services and was receiving only case management services. Her therapy with her chosen autism therapist was covered by her family’s employer-based insurance. The Milwaukee agency informed petitioner that she was required to choose one of its ten “in-network” autism therapists. Petitioner communicated her intent to continue to use her chosen provider so she was terminated from the waiver program by the agency.

There is no dispute that petitioner is eligible for the services aside from the discrete issue in raised in this case related to choice of provider. The agency contends that petitioner’s continued intent to seek services from an “out-of-network” provider, [REDACTED], made her ineligible for CLTS services and justified the termination.

According to the Waiver application:

In accordance with 42 CFR § 431.151 [sic should actually cite §431.51], a participant may select any willing and qualified provider to furnish waiver services included in the service plan unless the state has received approval to limit the number of providers under the provisions of § 1915(b) or another provision of the Act.

Application for 1915(c) HCBS Waiver (January 1, 2012) at 6.E. The agency did not argue or provide any documentation showing that the state had received such approval to limit the number of providers. The other exceptions allowing agencies to limit providers include setting fees, setting reasonable qualifications, for targeted case management services only, and other enumerated exceptions not applicable here. *See* 42 CFR §§ 431.52 & 431.54.

The published guidance for the waiver provisions explains:

HCBS waivers must comply with §1902(a)(23) of the Act and 42 CFR § 431.51 which require that Medicaid beneficiaries must be allowed to obtain services from **any willing and qualified provider of a service**. A willing provider is a provider who agrees to accept a state's payment as payment in full for rendering a service and to abide by all other Medicaid provider requirements, including executing a provider agreement. A qualified waiver provider means an individual or entity that meets the qualifications that are specified in Appendix C-3 for the service that the provider renders. All qualified providers must be permitted to participate in the waiver program and have a provider agreement with the Medicaid agency if they chose to do so unless a state has secured a waiver of §1902(a)(23) to place restrictions on providers (e.g., by requesting a waiver under the §1915(b)(4) authority).

HSBC Waiver Instructions, Technical Guide and Review Criteria, January 2008 (CMS, Department of Health and Human Services) at p. 57 (Free Choice of Provider) (emphasis added). It is notable that [REDACTED] is a qualified Medicaid CLTS provider of intensive autism services in other counties in Wisconsin including Racine and Waukesha. Presumably, he has thus executed a provider agreement and agreed to abide by Medicaid requirements already. The CMS guidance additionally provides:

Except when a §1915(c) waiver operates concurrently with a waiver granted under §1915(b) of the Act waiving §1902(a)(23) with respect to Medicaid beneficiary free choice of provider, any willing and qualified provider must be afforded the opportunity to enroll as a Medicaid provider. A willing provider is an individual or entity that executes a Medicaid provider agreement and accepts the state's payment for services rendered as payment in full. A qualified provider is a provider that meets the provider qualifications set forth in the approved waiver. The state must provide for the continuous, open enrollment of waiver service providers.

A state may not place obstacles in the way of open provider enrollment (e.g., by selecting only a limited number of providers to furnish a waiver service through an RFP process, requiring that a provider be capable of furnishing services on a statewide basis or requiring that a provider contract with a governmental entity (other

than the Medicaid agency) or affiliate with an Organized Health Care Delivery System). States have latitude in establishing qualifications to ensure that providers possess the requisite skills and competencies to meet the needs of the waiver target population. However, a state may not specify qualifications that are unnecessary to ensure that services are performed in a safe and effective manner. When CMS reviews the qualifications associated with each waiver service, it examines whether the proposed qualifications create obstacles to the enrollment of all willing and qualified providers.

Id. at p. 122-3 (Open Enrollment of Providers) (emphasis added).

The Department and the petitioner disagree on the propriety of the Milwaukee agency's "network" of intensive autism providers to which it limits CLTS enrollees. Petitioner asserts that under the federal provisions an enrollee is granted its free choice of a provider as long as that provider is qualified to provide the sought services. Petitioner argues that [REDACTED] is the chosen provider and that the agency may verify qualifications but may not arbitrarily require petitioner to choose another provider if [REDACTED] is qualified and willing to comply with Medicaid rules.

As the agency explained it, enrollees are given the required free choice, but only from the *limited* providers on the list (see ex. #2). It asserts that the ten providers Milwaukee has offered are sufficient. The agency's position is that it limits the number of provider to those on its approved provider list consistent with its agency leadership's vision as this is the right size and right approach. The agency stressed that its enrollees have sufficient scheduling flexibility with the ten providers in its network. Unless there is an increased need, or some provider drops off the network, the agency does not foresee a reason to review qualifications for providers who are requested by enrollees and apply to have their qualifications reviewed. Indeed, the agency conceded that it has been years since a new provider was added to the list.

The federal regulations and the waiver documentation allow "free choice" limited only by requiring the provider be qualified, willing to provide services, and to comply with Medicaid rules. The limitation to ten providers in this case appears arbitrary and contrary to the federal waiver provisions. The "network" appears to be the very limitation prohibited by the waiver program guidance by CMS in boldface above. At hearing, the only explanation was that agency leadership had determined that this was the way to efficiently administer the program – again the "right size" strategy. But, there was no legal authority offered at hearing.

At hearing, the ALJ asked both parties to provide legal authority regarding its position on the creation of a limited network. While petitioner submitted a persuasive written argument as well as citations and copies of the CFR and other authority (see ex. #7), the agency representatives elected not to submit anything.

CONCLUSIONS OF LAW

1. The agency erred in its termination of CLTS eligibility based on failure to select an "in-network" provider.
2. The Milwaukee County agency's administration of the CLTS program by limitation to "in-network" intensive autism treatment providers is in conflict with federal law.

THEREFORE, it is

ORDERED

That the agency is ordered within 10 days to:

1. Re-enroll petitioner in the CLTS program; and,
2. Take all actions necessary to enroll the Petitioner's chosen provider as a CLTS-waiver service provider in Milwaukee County, subject only to the willing and qualified standard.

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, 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 10th day
of June, 2015.



Thomas J. Engels, Deputy Secretary
Department of Health Services