



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

In the Matter of

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

DECISION

CWA/162681

PRELIMINARY RECITALS

Pursuant to a petition filed December 16, 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 03, 2015, at Wisconsin Rapids, Wisconsin.

The issue for determination is whether the agency correctly reduced SHC hours from to 290 hours per month to 91.25.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Respondent:

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

By: Carrie Haugen
Bureau of Long-Term Support
1 West Wilson

Madison, WI

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Wood County.
2. Petitioner is a member of the IRIS Program.

3. Petitioner has been receiving 290 hours per month of supportive home care. Some of that allocation has been used for tasks that are more appropriately skilled nursing.
4. Petitioner's parents are among the SHC caregivers.
5. Petitioner also receives 77 hours per month of personal care worker hours.
6. The petitioner asked for an increase in SHC to 354 including time for bill paying, office work, yardwork and weed control at the family home. The agency analyzed SHC need.
7. Following the analysis, the agency granted 91.25 hours of SHC and sought Medicaid funding for the skilled nursing tasks outside of the IRIS program.
8. The agency also terminated respite hours.
9. Petitioner appealed.

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 care nursing services, so subject-matter jurisdiction is present.

II. TERMINATION OF SERVICES DUE TO MEDICAID COVERAGE OF THE SAME SERVICE.

The program had previously been funding nursing services, which are approved at a 21 hours per day and 7 day per week level, with funding designated as supportive home care funds. This was error.

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). Turning to

Wisconsin's federal waiver document, there is a clear directive to not cover nursing services that are covered by the State Medicaid Plan:

C-1/C-3 Service Specifications
Nursing Services
Service Definition (*Scope*):

Nursing services are those medically necessary, skilled nursing services that may only be provided safely and effectively by a nurse practitioner, a registered nurse, or a licensed practical nurse working under the supervision of a registered nurse. The nursing services provided must be within the scope of the Wisconsin Nurse Practice Act and are not otherwise available to the participant the Medicaid state plan. Nursing services may include periodic assessment of the participant's medical condition when the condition requires a skilled nurse to identify and evaluate the need for medical intervention or to monitor and/or modify the medical treatment services provided by non-professional care providers. Services may also include regular, ongoing monitoring of a participant's fragile or complex medical condition as well as the monitoring of a participant with a history of noncompliance with medication or other medical treatment needs.

Specify applicable (if any) limits on the amount, frequency or duration of this service:

Excludes services available through the Medicaid State Plan. ...

§ 1915(c) Home and Community-Based Services Waiver, #0485R0100, Appendix C.

The Department's IRIS policy document, *IRIS Program Policies*, available at <http://www.dhs.wisconsin.gov/bdds/IRIS/IRISPolicySummary.pdf>, echoes the federal waiver document requirement, at "IRIS Funding for Goods, Supports and Services," Policy SC 16.1.

Supportive home care services are a permissible cost under the IRIS Waiver. See Application for a §1915(c) Home and Community-Based Services Waiver, Waiver Number WI.0485.R01.00, Effective January 1, 2011. SHC services are permitted as follows:

Supportive Home Care (SHC) is the provision of a range of services for participants who require assistance to meet their daily living needs, ensure adequate functioning in their home and permit safe access to the community.

Supportive home care services include:

1. Personal Services

- a. Assistance with activities of daily living such as eating, bathing, grooming, personal hygiene, dressing, exercising, transferring and ambulating;
- b. Assistance in the use of adaptive equipment, mobility and communication aids;
- c. Accompaniment of a participant to community activities;
- d. Assistance with medications that are ordinarily self-administered;
- e. Attendant care;
- f. Supervision and monitoring of participants in their homes, during transportation (if not done by the transportation provider) and in community settings;
- g. Reporting of observed changes in the participant's condition and needs; and
- h. Extension of therapy services. "Extension of therapy services" means activities by the SHC worker that assist the participant with a PT/OT or other therapy/treatment plan. Examples of these activities include assistance with exercise routines, range of motion exercises, standing by during therapies for safety reasons, having the SHC worker read the

therapist's directions, helping the participant remember and follow the steps of the exercise plan or hands on assistance with equipment/devices used in the therapy routine. It does not include the actual service the therapist provides.

2. Household Services

- a. Performance of household tasks and home maintenance activities, such as meal preparation, shopping, laundry, house cleaning, simple home repairs, snow shoveling, lawn mowing and running errands;
- b. Assistance with packing/unpacking and household cleaning/organizing when a participant moves.

3. Room and board costs for SHC providers who "live in" are allowable under this SPC.

Application for a §1915(c) Home and Community-Based Services Waiver, Waiver Number WI.0485.R01.00, Effective January 1, 2011 (emphasis added).

Petitioner previously had a physician order for 24 hour per day coverage. Due to an improvement in condition, the physician order was modified to call for 21 hour per day coverage for five days per week. The agency argues that this 21 hour per day nursing requirement should apply to the weekend as well and be paid with Medicaid funds. This is a reasonable position. If petitioner needs 21 hours of nursing on a Friday I cannot understand why he would need no skilled nursing on Saturday or Sunday. It would be appropriate to seek a PA approval for the additional 42 hours of PDN.

The agency calculated the number of specific SHC hours needed per month at 5.5. The agency then concluded that allowing 3 hours of SHC per day would allow for coverage and supervision for 24 hours of the day, thus arriving at the approved 91.25 hours per month. Petitioner failed to persuade me that this is unreasonable. He will have either a skilled nurse or a caregiver with him 24 hours per day. He also already gets 77 hours per month of personal care worker hours which is an additional 2.5 hours per day. Thus, a person is paid to be with petitioner 24 hours per day. And, for 2.5 hours per day there are two people paid to be working with him.

The parents in this case act as caregivers and provide some of the SHC. This reduction will mean less funds available for SHC that are potentially payable to the parents and the parents cannot be paid for the skilled nursing hours through Medicaid. But, the petitioner's needs are covered and that is what is the critical piece here. Petitioner's mother argued that there are many responsibilities for her and her husband and they should be paid for all of these such as the time taken to balance her son's checkbook or shoveling the driveway of the family home. The family's time is not compensable if the tasks are those which would have to be completed as part of the normal shared household duties. *See Waiver* at Appendix C-2(d). Thus, the parents cannot be paid by IRIS funds for things like pulling weeds in their front yard.

But her son's needs should be able to be covered by the 91.25 hours of SHC and 77 hours of personal care time per month. Even though the parents' objection is understandable, the terms of the federal government's permission to this state to offer the IRIS program does not allow IRIS payment for nursing services when nursing service is available through the state plan. It is available under Wisconsin's Medicaid plan, so IRIS coverage of additional nursing services, or inaccurately designating these services as SHC is not possible. Additionally, the waiver document requires someone with a nursing degree to be providing the nursing-specific tasks as a condition of payment. That also appears to be a barrier to payment to the parents in this case.

CONCLUSIONS OF LAW

1. The Department’s agent correctly reduced SHC hours to 91.25 on the petitioner’s Plan, because nursing services are available through the state Medicaid 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 5th day of March, 2015

\sJohn P. Tedesco
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 5, 2015.

Bureau of Long-Term Support