



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted case name]

DECISION

CWA/162966

PRELIMINARY RECITALS

Pursuant to a petition filed December 30, 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 January 20, 2015, at Racine, Wisconsin.

NOTE: The Petitioner was allowed to supplement the record. Petitioner's mother submitted Exhibits 11 through 16, which were an e-mail from [Redacted] dated January 7, 2015; two letters from [Redacted], a provider; a letter from the [Redacted] agency; a letter from [Redacted]; a letter from [Redacted] and a letter from [Redacted].

[Redacted], the Department of Health Services' section chief from the Office of IRIS Management, submitted an e-mail in response to the Petitioner's first five exhibits. It has been marked as Exhibit 17 and entered into the record.

Petitioner's mother submitted her comments in reply to [Redacted]'s e-mail. That has been marked as Exhibit 18 and entered into the record.

The issue for determination is whether the Division of Hearings and Appeals has jurisdiction over the rate at which a service may be paid.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted names and addresses of petitioners]

Respondent:

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

By: Carrie Haugen, Quality Services Specialist
The Management Group (tmg), an IRIS consulting agency

1 South Pickney Street, Suite 320
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:
Mayumi M. Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Racine County.
2. On May 29, 2014, the Department of Health Services (DHS) sent the Petitioner a notice, indicating that it approved respite services in the amount of 96 hours per week at a rate of \$65.00, for a period of six months. (Exhibit 10, attachment E)
3. DHS approved this level of service, because Petitioner's guardians reported having difficulty maintaining reliable staff. DHS notified the Petitioner's guardians that once new staff was hired, the respite care rate would be decreased to the original hourly rate of \$15.00 per hour. (Id.)
4. On October 7, 2014, an IRIS Budget Amendment Request was completed on behalf of the Petitioner, seeking respite services through [REDACTED]; 96 hours per month at a rate of \$65.00 an hour. Petitioner's guardians signed the signature page of the request on October 27, 2014. (Exhibit 10, attachments C and D)
5. The provider, [REDACTED], will only allow a registered nurse to provide respite services to the Petitioner, because of her complex medical condition. [REDACTED] charges \$65.00 per hour for nursing services. (Exhibit 7; Exhibit 10, attachment C, pg. 7)
6. On December 26, 2014, DHS sent the Petitioner and her guardians a notice indicating that she was previously receiving 16 hours of respite services at \$15.00 an hour, but that DHS was approving 96 additional hours, at the rate of \$15.00 per hour, for a total of 112 hours per month at \$15.00 per hour. (Exhibit 12; Exhibit 10, attachment F)
7. DHS indicated that the \$65.00 rate for a registered nurse to provide respite services was not appropriate, because the Petitioner did not qualify for private duty nursing services, two years earlier in 2012. (Id.)
8. The Petitioner's guardians, on behalf of Petitioner, filed a request for fair hearing that was received by the Division of Hearings and Appeals on December 30, 2014. (Exhibit 1)
9. Petitioner is 22 years old with several diagnoses including, but not limited to cognitive impairment, cerebral palsy, Pierre Robin syndrome, seizure disorder, scoliosis, contractures, encephalopathy, anxiety, respiratory issues, blindness and sensorineural hearing loss. She is non-verbal and non-ambulatory. (Exhibit 10, attachment I)
10. Three other agencies refused to provide respite services to the Petitioner, because they felt her medical conditions were too complex for their respite workers.¹ (Exhibit 10, attachment C, pg. 7; Exhibits 13-15)
11. The last time the Petitioner received Private Duty Nursing (PDN) services through Medical Assistance was in late 2012/early 2013, when DHS determined that the Petitioner did not require enough hours of skilled nursing care, to qualify for coverage of PDN service. However, DHS approved 84 hours per week of PDN services for a period of 13 weeks to allow the Petitioner and her family to transition the Petitioner to a lower level of care. (Exhibit 10, attachment G)

¹ One agency indicated in April 2014, that it would provide a home health aide, at a rate of \$23.75 per hour, but that it did not have staff available to provide the services at that time. That agency indicated that it would contact the Petitioner's mother with updates regarding staff availability. (Exhibit 16)

12. Petitioner's family has not requested additional PDN services since that time. (Testimony of Petitioner's mother/Guardian)

DISCUSSION

The petitioner receives medical benefits under IRIS, which stands for Include, Respect, I Self-Direct. This program is a fee-for-service alternative to Family Care, PACE, or Partnership programs for individuals requesting a long-term care support program in Family Care counties. *Medicaid Eligibility Handbook*, § 37.1.1.

It is undisputed that the Petitioner requires 112 hours per month (about 3.75 hours per day) of respite care services, so her parents, her primary caregivers, can have a break and avoid burn-out. It is undisputed that Petitioner has previously received respite services at a rate of \$15.00 per hour. What the parties dispute is whether a rate of \$65.00 should be approved so that the Petitioner may receive respite services from a registered nurse.

Petitioner's parents seek \$65.00 per hour, so that a registered nurse from [REDACTED] can provide the respite care. DHS contends that it is reasonable and customary to pay \$15.00 an hour for respite services.

An IRIS participant's right to appeal a decision by the Department of Health Services is rooted in Wis. Admin. Code §DHS 104.01(5)(a), which states, that "Applicants and recipients have the right to a fair hearing in accordance with procedures set out in this subsection when aggrieved by action or inaction of the agency or the department..."

However, the scope of that appeal right is limited by Wis. Admin. Code §DHS 104.01(5)(b) which states that, "the purpose of the fair hearing is to allow a recipient to appeal department actions which result in the denial, discontinuation, termination, suspension or reduction of the recipient's MA benefits..."

In the case at hand, the benefit in question is respite care, but there has been no denial of respite services; no discontinuation, no termination or suspension of respite services, and the number of hours of respite services was actually increased not increased. The only thing in dispute is the rate at which those services may be paid.

Per Wis. Admin. Code §DHS 104.01(5)(b), the rate at which a particular service will be paid, falls outside the scope of issues that may be appealed.² Consequently, the Petitioner's appeal must be dismissed.

Though the Petitioner did not frame the issue in terms of whether nursing services should be approved for respite purposes, DHS also noted that IRIS cannot pay for a registered nurse to provide respite care, because skilled nursing services are covered by fee-for-service Medicaid.

Fee-for-service Medicaid will pay for private duty nursing, when an individual requires skilled nursing intervention for at least eight hours per day. *See Wisconsin Administrative Code, §107.12* If a patient requires skilled nursing services for less than eight hours per day, fee-for-service will cover those nursing services under their home health provisions. *See Wisconsin Administrative Code, §DHS 107.11(2)(a)*

Per section 6.0 of the IRIS Policy Manual (Exhibit 10, attachment L), IRIS participants must maximize the State Medicaid plan benefits, before using IRIS waiver funds. The Petitioner has not submitted a request for prior authorization of private duty nursing services, since those services ended in 2013, two

² This decision is consist with the holding in the final decision for case FCP-134141, issued by Deputy Secretary Kitty Rhoades, stating that the Division of Hearings and Appeals had no jurisdiction to order an increase in the rate at which a private duty nurse is paid. The Petitioner in that case received self-directed supports through the Family Care program.

years ago. As such, there is no basis, at this time, upon which to find the Petitioner has maximized her fee-for-service Medicaid benefits. So, Petitioner's appeal must be dismissed on this basis, as well.

If Petitioner's needs are so acute or complex that she requires private duty nursing services while her parents are away, she should have her provider submit a prior authorization request to Medicaid for those services.

CONCLUSIONS OF LAW

The Division of Hearings and Appeals does not have jurisdiction to consider the merits of an appeal, concerning the rate at which a service should be paid.

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 Milwaukee,
Wisconsin, this 24th day of February, 2015.

\sMayumi M. Ishii
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 February 24, 2015.

Bureau of Long-Term Support