FH
[redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

FCP/165738

PRELIMINARY RECITALS

Pursuant to a petition filed April 30, 2015, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. in regard to Medical Assistance, a hearing was held on June 09, 2015, at Sheboygan, Wisconsin.

NOTE: On June 23, 2015, ALJ Ishii contacted the parties to inquire about what happened with Community Care's grievance and appeal committee, in order to determine the timeliness of Petitioner's appeal. Petitioner's mother submitted a two-page fax, indicating that she did not receive a written copy of the committee's decision. That fax has been marked as Exhibit 5 and entered into the record. Community Care submitted a copy of a letter dated March 31, 2015 that was sent to the Petitioner, not to his mother, advising the Petitioner that the committee decided to uphold the denial of 1:1 services at Petitioner's day program.. The letter has been marked as Exhibit 6 and entered into the record. A copy of Exhibit 6 has been provided to the Petitioner's mother with this decision.

The issue for determination is whether Community Care, Inc. correctly denied the Petitioner's request for 1:1 assistance while in his day program.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Tammi Hemenway, Family Care Case Manager
Community Care Inc.
205 Bishops Way
Brookfield, WI 53005

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

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Sheboygan County.
2. Petitioner is 34 years old and has both cognitive and physical limitations cause by a traumatic brain injury. (Exhibit 4: testimony of Petitioner's mother)
3. Petitioner began acting out during his day program at [redacted] around November/December 2014, around the same time a caregiver (not an employee of [redacted]) hit the Petitioner. (Testimony of [redacted] – Director of Day Services at [redacted]; testimony of [redacted] Program Manager at [redacted])
4. Petitioner's outbursts include yelling, swearing, making verbal threats, grabbing staff, hitting and making sexually provocative comments. (Exhibit 4; testimony of [redacted] – Director of Day Services at [redacted]; testimony of [redacted] Program Manager at [redacted])
5. Petitioner acts out 4-5 times per day, and needs 1 on 1 intervention to be redirected. He also requires 1 to 1 assistance when he gets up to walk, because he is a fall risk. (Testimony of [redacted])
6. At [redacted], there are about 35 patients to 12-15 staff members. (Testimony of [redacted])
7. On January 14, 2015, Petitioner's mother and his day program requested 1 to 1 staffing during transportation to Petitioner's day program at [redacted] and during his participation in the day program, itself, because the Petitioner had started acting out more frequently. (Testimony of Ms. Hemenway)
8. Community Care utilized a resource allocation decision tool (RAD), including input from one of their Behavioral Health Consultants. (Testimony of Ms. Hemenway)
9. On February 9, 2015, Community Care sent the Petitioner, in care of his mother, a Notice of Action, advising him that his request for 1:1 staffing at his day program was denied, but that he would be allowed to have 1:1 staffing during transportation to the day program. (Exhibit 4)
10. On an unspecified date, the Petitioner's mother filed an appeal with Community Care's grievance and appeal committee. (Exhibits 1 ad 6)
11. On March 31, 2015, the committee sent to the Petitioner, and not to his mother/legal guardian, a letter advising him that the denial of 1 on 1 staffing at his day program was upheld, because the committee felt that more time should be allowed for implementation of the Behavioral Support Plan to see if it is effective. (Exhibit 6)
12. Petitioner's mother filed a timely request for fair hearing that was received by the Division of Hearings and appeals on April 30, 2015. (Exhibit 1)

DISCUSSION

The Family Care Program is a subprogram of Wisconsin's Medical Assistance (MA) program and is intended to allow families to arrange for long-term community-based health care and support services for older or impaired family members without resort to institutionalization, *Wis. Stats.* §46.286; *Wis. Admin. Code* §DHS 10.11. It is, in short, a long-term care benefit for the elderly, people with physical disabilities and those with developmental disabilities. *Medicaid Eligibility Handbook (MEH), §38.2.*

An individual, who meets the functional and financial requirements for Family Care, participates in Family Care by enrolling with a Care Management Organization (CMO), which, in turn, works with the

participant and his/her family to develop an individualized plan of care. *See Wis. Stats.* §46.286(1) *and Wis. Admin. Code* §DHS 10.41. The CMO, in this case Community Care, implements the plan by contracting with one or more service providers.

Wis. Admin. Code DHS 10.41(2) states that:

> Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department's contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n (c) and ss. 46.275, 46.277 and 46.278, Stats., the long-term support community options program under s. 46.27, Stats., and specified services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and <u>meet the needs of enrollees</u> as identified through the individual assessment and service plan.
>
> *Emphasis added*

The aforementioned administrative code further notes that day services are among the services that typically will be required to be available. *Id.*

Wis. Admin. Code §DHS 10.44(2) (e) 1 and 2, requires Petitioner's health and safety to be considered in determining Petitioner's strengths and long term goals. Further, the Wisconsin Administrative Code states that the CMO, through its case management team, shall monitor the health and <u>safety</u> of the enrollee**.** Wis. Admin. Code §DHS 10.44(2)(d)3, *emphasis added.*

Wis. Admin Code DHS 10.44(2)(f) states that the CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee that meets all of the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e) 1.
2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e)(2) and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes. …

Petitioners desired outcomes are listed as follows:

1. Improved Incontinence
2. Improved ability to eat independently and politely
3. Employment
4. Ambulate within the community
5. Participation in an a behavior support plan

(Exhibit 4)

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. <u>State v. Hanson</u>, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). In a case involving the reduction of services, the agency bears the burden to prove it correctly reduced the services. However, in cases involving the request for new services, the burden of proof falls on the Petitioner to show

that the requested service meets approval criteria. *See* Estate of Gonwa ex rel Gonwa v. DHFS, 265 Wis.2d 913, 668 N.W.2d 122, 2003 WI App. 152

In order to achieve his long term goal of obtaining employment, the Petitioner participates in activities at a day program located at [redacted]. (Exhibit 4) The Petitioner seeks approval for 1 on 1 staffing while at his day program.

It is undisputed that to ensure the Petitioner's safety during transportation and transition into the day program, that he needs 1 on 1 staffing, because he will unbuckle his seat belt and confront / try to hit other passengers in the vehicle, which is dangerous for both the Petitioner and the other passengers. (Testimony of Ms. Hemenway; Exhibit 4)

Community Care denied 1 on 1 staffing at the day program, because it determined that other more cost-effective measures were available such as individual counseling in conjunction with implementation of a Behavior Support Plan. (Testimony of Ms. Hemenway) The Grievance and Appeals Committee upheld the denial of 1:1 counseling, because it felt a Behavior Support Plan should be given a chance to work.

With regard to counseling, no one has provided me with any documentation showing how much counseling costs versus 1:1 staffing. As such, there is no way to know which option is more cost-effective. However, it appears that the Grievance and Appeals Committee found cost-effectiveness dependent upon whether a Behavior Support Plan would actually work.

The Behavior Support Plan was agreed upon and signed by the parties in early May 2015. (See Exhibit 4) According to [redacted], the Behavior Support Plan has been disseminated and is currently being implemented by staff at [redacted]. However, it seems too early to tell whether the plan is actually working. According to the testimony of [redacted], the Program Manager at [redacted], she has not yet seen any significant changes in the Petitioner's behavior and that he is acting out frequently.

If Petitioner is making threats, being verbally abusive, engaging in physically aggressive behavior or using sexually provocative language, then he is not only a danger to other participants, he poses a risk to himself. Indeed, it is completely foreseeable that another participant in the [redacted] program might act out aggressively toward the Petitioner, in response to his gestures, threats or provocative comments. Therefore, it is found that 1 on 1 services are necessary to ensure the Petitioner's own safety and well-being, until it can be determined whether the combination of counseling with the Behavior Support Plan is effective. Consequently, it is found that 1 on 1 services may be approved for six months pursuant to §DHS 10.44(2)(d) and (e).

Ms. Hemenway testified that Community Care is concerned that the 1 on 1 staffing will be used as a crutch and that staff at [redacted] will not actually follow the Behavior Support Plan to try and prevent outbursts. However, if [redacted] fails to implement the Behavior Support Plan, then it could be argued that the day program is not a safe environment that will support the Petitioner's outcome and there would be grounds to move the Petitioner to another facility for his day program. In addition, if the Petitioner is injured or harms another participant because [redacted] failed to implement the Behavior Support Plan, [redacted] might be held liable for the Petitioner's injuries, as well as the participant's injuries. As such, it would be in everyone's best interests, including [redacted], to make sure the Behavior Support Plan is implemented faithfully.

CONCLUSIONS OF LAW

Community Care incorrectly denied Petitioner's request for 1 on 1 staffing at [redacted].

THEREFORE, it is **ORDERED**

That Community Care approve coverage of 1 on 1 staffing for the Petitioner while at his day program at [redacted], for a period of six months. Community Care shall take all administrative steps to complete this task within ten days 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 30th day of June, 2015.

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\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 June 30, 2015.

Community Care Inc.
Office of Family Care Expansion