



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION

CWA/165704

PRELIMINARY RECITALS

Pursuant to a petition filed April 29, 2015, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to IRIS, a Medical Assistance (MA) – related program, a hearing was held on September 10, 2015, at Madison, Wisconsin. The hearing record was held open for submission of briefs, which were received.

The issue for determination is whether the Department’s agent correctly dis-enrolled the petitioner from the IRIS program, due to concerns about his financial mismanagement while participating in the program.

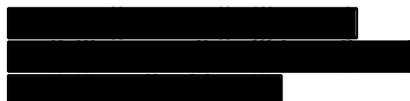
There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By: Atty. [Redacted]
Reinhart Boerner Van Dueren, S.C.

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Green Lake County. He is certified for MA.
2. The petitioner is financially eligible for the IRIS program, and has been enrolled in the program since 2009. IRIS is a self-directed personal care program, created by a federal Medicaid waiver.

The program is administered by the Wisconsin Department of Health Services, and its contracted agent, TMG.

3. The petitioner, age 36, is disabled. He has diagnoses of autism, mental retardation, cerebral palsy, Tourette's syndrome, OCD, kidney disease, bowel/bladder incontinence, and has the cognitive functioning of a two-year old. The petitioner requires hands-on assistance with all activities of daily living (ADLs), such as bathing, dressing, grooming, eating, toileting, mobility, and transferring, as well as all "instrumental activities of daily living." Supervision is required around the clock, and two persons are required for ADLs.
4. The petitioner resides in a one bed Adult Family Home (Home) owned and operated by [REDACTED] his father.
5. On June 5, 2014, [REDACTED] signed the 2014 My Cares Instruction Sheet (*i.e.*, a service plan), which declared that SDPC workers services cannot be billed while the patient is hospitalized.
6. [REDACTED] is the petitioner's sister, and guardian since 2008. She is a licensed Physician's Assistant. Since 2010, she has annually received education and materials on appropriate billing while a participant is hospitalized. [REDACTED] was responsible for authorizing both timesheets and vendor invoicing throughout 2014, and has been given education on appropriate billing annually through the SDPC program.
7. On November 9, 2010, [REDACTED] signed a My Cares Instructions Sheet, which states that IRIS SDPC services cannot be billed during a participant's hospitalization. She signed similar sheets barring SDPC during hospitalizations on September 19, 2012, July 30, 2013, and June 10, 2014.
8. In 2014, the petitioner was authorized for 215 hours monthly of SDPC, and 248 hours a month of respite care in the first instance.
9. Respite care hours are only to be billed when a participant's primary caregiver (here, the Home run by [REDACTED]) is not providing care.
10. The petitioner was hospitalized from July 4 through July 7, 2014, and again from August 31 through September 3, 2014. While he was hospitalized, [REDACTED] or other non-hospital care workers were present in the hospital.
11. [REDACTED] was on an out-of-state vacation on July 4, 2014. On July 6, 2014, he returned home early from the vacation, and went to the petitioner's hospital.
12. Neither the Wisconsin Department of Health Services nor TMG were notified of the hospitalizations in Finding #10 until after the petitioner was released and returned home. [REDACTED] did report the hospitalizations within a week of discharge to [REDACTED], the assigned IRIS Consultant.
13. [REDACTED] was the petitioner's IRIS Consultant from 2010 until her resignation in March 2015. She made in-home visits to the petitioner at least annually and had multiple meetings with [REDACTED]. [REDACTED] was aware of the IRIS policy prohibiting billing to IRIS during a participant's hospitalization. However, she testified that she has no recollection of telling [REDACTED] or [REDACTED] of the prohibition against billing while hospitalized. If she did not advise them of this billing prohibition, she acted incompetently.
14. [REDACTED] submitted Care and Supervision hours claims, through the Home, for the entirety of both hospitalizations. These hours were approved and invoiced by both [REDACTED] and [REDACTED]. Self-Directed Personal Care (SDPC) hours were submitted while the petitioner was hospitalized. These hours were approved by both [REDACTED] and [REDACTED]. Respite hours were also submitted while the petitioner was hospitalized. For the petitioner's July 2014 hospitalization, [REDACTED] submitted bills to IRIS for 166 hours of care (96 Home hours, 41 respite hours, 29 SDPC hours). [REDACTED] or other personal home care workers were present at the hospital for all of the claimed hours.

15. For the petitioner's September 2014 hospitalization, ██████ submitted bills to IRIS for 144 hours (96 Home hours, 36 respite hours, 12 SDPC hours).
16. Allegations of mismanagement and/or fraudulent practices were reported to the IRIS agency in March 2015. A Fraud Allegation review and Assessment (FARA) inquiry was performed, with the results that the agency "substantiated" a finding of funds mismanagement and/or fraudulent practices.
17. On April 23, 2015, DHS, upon TMG's recommendation, issued written notice to the petitioner advising that he would be involuntarily dis-enrolled from the IRIS program, effective May 9, 2015. The notice advised the petitioner that he was being dis-enrolled because he mismanaged his IRIS funds. Specifically, he engaged in "fraudulent billing, including ... billing while in a hospitalized setting." The IRIS policy referenced in the notice was *IRIS Policy* 3.03.1 (October 1, 2011).
18. There is no evidence in this hearing record that any person from the Department spoke to ██████ prior to the April 2015 disenrollment notification.
19. The amount overbilled to IRIS for the two 2014 hospitalizations totaled \$3,035.82. Prior to hearing, ██████ repaid DHS the \$3,035.82 related to the two hospitalizations. For the March 2014 through February 2015 fiscal year, the ██████ home billed the IRIS program \$87,822.28.

DISCUSSION

I. INTRODUCTION.

The issues presented are whether (1) the petitioner's representative made claims in violation of IRIS rules, and (2) if so, whether those violations constituted funds mismanagement significant enough to warrant dis-enrollment from IRIS. Where a participant challenges a disenrollment decision, the Department's agent has the burden of proof, by a preponderance of the credible evidence. Wis. Admin. Code § HA 3.09(4).

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 https://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/waivers_faceted.html (*Waiver Application*). 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 respite 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.

Both the federal Medicaid waiver statute and the pertinent federal rule require the Department to assure that correct records are kept to assure that these public funds can be accounted for:

§ 441.302 State assurances.

Unless the Medicaid agency provides the following satisfactory assurances to CMS, CMS will not grant a waiver under this subpart and may terminate a waiver already granted:

(a) *Health and Welfare*—Assurance that necessary safeguards have been taken to protect the health and welfare of the recipients of the services. ...

(b) *Financial accountability*— The agency will assure financial accountability for funds expended for home and community-based services, provide for an independent audit of its waiver program (except as CMS may otherwise specify for particular waivers), and it will maintain and make available to HHS, the Comptroller General, or other designees, appropriate financial records documenting the cost of services provided under the waiver, including reports of any independent audits conducted.

42 C.F.R. § 441.302.

The Department's IRIS policy document, *IRIS Policy Manual (Manual)* available at <https://www.dhs.wisconsin.gov/publications/p0/p00708.pdf> (viewed in 2016), does call for disenrollment for funds mismanagement. The current disenrollment language is found at § 13.8B.

II. RESPITE/SDPC/CARE & SUPERVISION HOURS CANNOT BE BILLED WHILE A PARTICIPANT IS HOSPITALIZED.

It is very clear that that Respite, SDPC, or Care & Supervision hours cannot be billed to IRIS while a participant is hospitalized. The federal rule applicable to all community-based MA waiver programs requires that waiver dollars not be spent for inpatient hospital (or other institutional) care:

(b) If the agency furnishes home and community-based services, as defined in §440.180 of this subchapter, under a waiver granted under this subpart, the waiver request must—

(1) Provide that the services are furnished—

(i) Under a written person-centered service plan (also called plan of care) that is based on a person-centered approach and is subject to approval by the Medicaid agency.

(ii) Only to beneficiaries who are not inpatients of a hospital, NF, or ICF/IID; ...

42 C.F.R. § 441.301(b)(1). See also, 42 C.F.R. § 441.302(a)(5); *Waiver Application* at C1 – Respite service definition #3; *Manual*, § 2.3C.4, Short Term Institutional Stays.

III. DIS-ENROLLMENT IS APPROPRIATE FOR FUNDS MISMANAGEMENT.

The controlling federal rule allows disenrollment for reasons proffered by the State and approved by the federal government. 42 C.F.R. § 441.458. Wisconsin has identified the participant's mismanagement of purchasing authority as a basis for involuntary dis-enrollment in its approved Waiver application. See, *Waiver Application*, Appendix E1 Overview (12 of 13). Note that "mismanagement" is the test, not fraud.

Here, DHS relies on its IRIS disenrollment policy that was in force in 2014:

Participants may be involuntarily disenrolled from IRIS when one or more of these conditions exist:

...

Purchasing authority is mismanaged. For example, this includes but is not limited to:

- Possible fraud.
- Misrepresentation or willful inaccurate reporting of services.

...

IRIS Policy 3.03.1 (October 1, 2011).

The petitioner, through his guardian, did mismanage his purchasing authority in 2014. [REDACTED] “stood in the petitioner’s shoes” in managing purchasing authority; for community services waiver programs, “all references to individuals (*i.e.*, participant] include the role of the individual’s representative.” 42 C.F.R. 441.301(c)(1). The guardian was the only person authorized to sign off on the petitioner’s billings. She mismanaged this authority by billing for respite care, personal care, and AFH care hours while the petitioner was in a hospital, twice. The remaining questions are whether her mismanagement can be excused (1) due to lack of notice of billing requirements or (2) a subsequent procedural failing by the Department or its agent.

Guardian [REDACTED] was annually given written notice of the prohibition against billing SDPC hours while the participant is hospitalized, including in June 2014. Respondent’s Exhibit E. She apparently chose to not make copies of the documents that she signed before returning them, thereby making them unavailable for future reference. In hearing testimony, she indicated that she did not read the billing prohibition language. That is not a mitigating excuse. If it were an acceptable extenuation, all guardians could decline to read the prohibition and incorrectly bill for personal care time while their wards were institutionalized, in contravention of the federal rules. [REDACTED] also incorrectly placed great reliance on [REDACTED]’s statements to her regarding appropriate billing. I do believe that she relied on [REDACTED] after observing her explanation that she is a pre-occupied working mother, and the contrast between her tremulous testimony and that of the over-confident [REDACTED]. This is a clear conflict of interest for provider [REDACTED]. The federal rule prohibits, with good reason, a provider from serving as a participant’s IRIS representative. 42 C.F.R § 441.480; *Manual*, § 13.3., IRIS Representative. Here, the guardian was improperly allowing the provider to function as the *de facto* IRIS representative.

Less importantly, [REDACTED] also testified that he was unaware of the ban against billing SDPC and waiver respite hours while his son was hospitalized. I did not believe that he had never been told of this prohibition. *See*, Respondent’s Exhibit E-18. He may have forgotten about it, or simply chose to ignore it because it did not square with his inflated view of his son’s care needs while hospitalized. In the end however, the question is whether [REDACTED], as legal guardian and IRIS representative, mismanaged purchasing authority. She did.

IV. TERMINATION PROCEDURES.

The federal waiver rule directs the State to offer additional information to a participant who is mismanaging services:

(d) *Support system*. States must provide, or arrange for the provision of, a support system that meets the following conditions:

...

(3) Offers additional information, counseling, training, or assistance, including financial management services under either of the following conditions:

(i) At the request of the participant...

(ii) When the State has determined the participant, or participant’s representative, if applicable, is not effectively managing the services identified in the service plan or budget.

(4) The State may mandate the use of additional assistance, ... or may initiate an involuntary disenrollment in accordance with §441.458, if, after additional information, counseling, training or assistance is provided to a participant (or participant's representative, if applicable), the participant... has continued to demonstrate an inability to effectively manage the services and budget.

42 C.F.R. § 441.464(d).

Critically, the federal disenrollment rule declares that a State must specify the conditions for involuntary disenrollment, and that the federal government must approve those conditions. *Ibid.*, §441.458(a),(b). The approved conditions are found in the *Waiver Application* at Appendix E-1, m:

m. Involuntary Termination of Participant Direction.

...

The IRIS Consultant Agencies or the Fiscal//Employer Agents may make the recommendation to the DHS to terminate a participant's enrollment in the IRIS waiver, but *the SMA makes the final decision*. IRIS Consultant Agencies are expected to bring concerns to the SMA when they arise so that the SMA can assist with addressing issues before termination is considered. *The DHS role includes a conversation with the participant and any legal representative of the person*, as well as a review of the case file and all relevant documentation.

This *Waiver Application* language requiring a DHS conversation with the participant's legal representative is quoted in the Department's *Manual* section on disenrollment at § 13.8B, which indicates that this is the Department's policy in disenrollment cases.

The petitioner argues that required involuntary termination procedures were not followed. After reading the *Waiver Application*, I must agree. DHS was required to at least attempt a conversation with the guardian. Based on the hearing record, it did not do so. ██████ testified that she had never heard Consultant ██████'s voice (██████ testified telephonically) prior to hearing. More significantly, the guardian testified that no one from TMG or the Department had a conversation with her about defective billing from June 2014 through the date of the disenrollment notice. This is a violation of a procedure that the Department has promised to the federal government it will follow. The failure to follow this procedure makes the involuntary termination premature.

The agency's concern that the petitioner was mismanaging IRIS funds is justified. Involuntary disenrollment from the IRIS program would have been appropriate, if the Department had followed its own procedures. The petitioner argues that the Department did not follow its procedures, and the hearing record has no evidence to rebut that assertion. The Department has the burden of showing that termination was appropriate and that its procedures were followed; the burden has not been met on the procedural issue.

As an aside, the petitioner requested attorney's fees as the prevailing party. Such fees are only granted if the government agency was not "substantially justified" in its position. TMG, on the Department's behalf, was substantially justified in its position. A review of IRIS involuntary disenrollment decisions from this office from the last several years shows no decision in which an administrative law judge blocked disenrollment for failure to converse with the enrollee's legal representative. I suspect this is so because no enrollee raised the procedural issue. I cannot prevent the petitioner's attorney from filing a costs motion under Wis. Admin. Code § HA 3.11 *after* issuance of this Decision, but at this juncture I cannot imagine that the motion will be successful.

CONCLUSIONS OF LAW

1. In regard to two hospitalizations in 2014, the petitioner's guardian mismanaged this IRIS participant's purchasing authority.
2. The Department's agent correctly sought to dis-enroll the petitioner from the IRIS program.
3. The Department failed to follow all of the procedural requirements for disenrollment found in its *Waiver Application*, Appendix E-1.

THEREFORE, it is**ORDERED**

That the petition is remanded to the Department with instructions to cease efforts to disenroll the petitioner from IRIS for the overbilling related to the 2014 hospitalizations. The Department shall take this action 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 Madison,
Wisconsin, this 26th day of May, 2016

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on May 26, 2016.

Bureau of Long-Term Support

Attorney [REDACTED]

Attorney [REDACTED]