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[REDACTED]

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

In the Matter of

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

DECISION
Case #: CWA - 202831

PRELIMINARY RECITALS

Pursuant to a petition filed on August 10, 2021, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support regarding Medical Assistance (MA), a hearing was held on October 27, 2021, by telephone. A hearing was initially set for September 29, 2021 but was rescheduled per Petitioner’s request.

The issue for determination is whether the agency correctly terminated supportive home care-companion care coverage.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Petitioner's Representative:

Attorney [REDACTED]
Disability Rights Wisconsin
1655 University Dr
Menasha, WI 54952

Respondent:

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

By: [REDACTED]
Bureau of Long-Term Support
PO Box 7851
Madison, WI 53707-7851

ADMINISTRATIVE LAW JUDGE:

Nicole Bjork
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Manitowoc County and is enrolled in the IRIS program. Petitioner's diagnoses include obstructive hydrocephalus causing traumatic brain injury, seizure disorder, hypokalemia, gastrostomy PEG tube placement, hyponatremia, congenital scoliosis with lumbar spine fusion, spina bifida, ventriculi peritoneal shunt, chronic tracheostomy, ventilator dependent, acute and chronic respiratory failure with hypercapnia, pleural effusion, and cystostomy in place with artificial bladder. Petitioner requires hands on cares for all activities of daily living (ADLs) including bathing, dressing, eating, mobility in home, toileting and transferring. Petitioner further requires hands on cares for all instrumental activities of daily living (IADLs) including meal prep, medication administration and management, money management, laundry/chores, telephone use, and transportation. Petitioner requires overnight care. Petitioner requires assistance with range of motion exercises, ostomy care, repositioning, oxygen, tracheostomy care, tube feedings and ventilator care. There is no dispute that Petitioner requires 24 hour assistance.
2. On June 21, 2021, a Long Term Care Functional Screen (LTCFS) was completed on Petitioner, which confirmed that Petitioner requires assistance in all areas and that she met the federal definitions for physical disability and developmental disability.
3. Petitioner's Individual Support and Services Plan (ISSP) for the plan year between October 1, 2020 through September 30, 2021 consisted of an annual budget of \$71,250.84. Part of the budget was for Petitioner's care, which included SHC and within that SHC, companion care.
4. Since 2013, private duty nursing (PDN) has been listed on Petitioner's plans. However, during an annual review in 2020, an agency nurse consultant noted that Petitioner was on a mechanical ventilator almost 24/7 and that time would thus be considered skilled nursing per IRIS policy. The nurse consultant noted that while the Physician Plan of Care (PPOC) ordered 12 hours of PDN, Petitioner was actually eligible for 24/7 skilled nursing care. At that time, a caregiver task schedule list was given to Petitioner's caregivers in order to determine what tasks were being performed and how long those tasks took. Petitioner's caregivers returned the completed list in August 2020. Upon review of the caregiver task list, the nurse consultant noted that Petitioner actually only required 10.5 hours per week of SHC and that the rest of Petitioner's care would be covered by PDN. The consultant further noted that Petitioner would no longer be eligible for companion care since her care needs could be met between the PDN and SHC. However, given the Covid-19 pandemic, changes were not made to Petitioner's SHC hours, including companion care, at that time.
5. In July 2021, nearly a year after the nursing consultant observed that Petitioner met the requirements for PDN care 24 hours per day, the agency moved forward with terminating Petitioner's companion care hours and reducing Petitioner's SHC hours since, by that time, Petitioner became fully eligible to receive PDN care 24 hours a day, 7 days a week.
6. On July 29, 2021, the agency sent Petitioner a notice informing her that her companion care hours were being terminated because her cares could be met with her 24 hour PDN coverage and 10.5 hours per week of SHC.
7. Petitioner filed a timely appeal of the termination of her companion care.

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.

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 supportive home 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.

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). Wisconsin's federal waiver document contains a clear directive that the IRIS program does not cover nursing services that are covered by the State Medicaid Plan except in cases where nursing service needs exceed the State MA Plan's allowable services. See § 1915(c) Home and Community-Based Services Waiver, Appendix C, C-1/C-3 Service Specifications, Nursing Services. Wisconsin's approved IRIS waiver can be found at <https://www.dhs.wisconsin.gov/iris/hcbw.pdf>.

Private duty nursing services are covered by MA under Wis. Admin. Code, §DHS 107.12. Such services may be provided in a home setting when the recipient's medical condition requires more continuous skilled care than can be provided on an intermittent basis. §DHS 107.12(1)(a). PDN services are available only when the person requires at least 8 hours of services daily. Id. According to DHS Chapter 105 and Wisconsin Nurse Practice Act (Wisconsin Statutes Chapters 440 & 441), private duty nursing services must be provided by a licensed nurse.

The IRIS Policy Manual discusses PDN services as follows:

6.4 Private Duty Nursing (PDN)

Wisconsin Medicaid covers private duty nursing (PDN) for participants with medical conditions that require eight or more hours of skilled nursing in a 24-hour period. PDN is defined under Wisconsin Administrative Code § DHS 107.12. PDN includes the skilled nursing services for ventilator-dependent life-support participants, as well as for participants not dependent on a ventilator. Participants with medical conditions requiring less than eight hours of skilled care in a 24-hour period are eligible for skilled nursing from a home health agency through Wisconsin Medicaid as defined under Wisconsin Administrative Code § DHS 107.11 (2a). **IRIS Medicaid Waiver participants qualifying for PDN must maximize the state Medicaid plan benefit prior to using IRIS waiver funds. Once the participant maximizes Medicaid state plan PDN services to the approved amount eligible, the participant may use IRIS waiver services, such as respite and supportive home care, for the provision of non-skilled care for those IRIS participants who are not authorized to receive 24 hours of skilled care. If an IRIS participant is eligible to use this Medicaid state plan benefit, then the participant may not opt to use IRIS funds in lieu of the Medicaid card to pay for unlicensed staff or family to provide this or similar services.** The Code of Federal Regulations (CFR) § 440.180 defines "Home and Community-Based Services" (including services provided by the IRIS Program) as, "...services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this chapter." Nurses in independent practice (NIP/PDN nurses) provide PDN services, including services for recipients dependent on a ventilator for life support. The NIP/PDN delivers services to Medicaid recipients and, due to being classified as Medicaid providers, must meet certification in order to provide Medicaid PDN services.

6.4A Private Duty Nursing and Personal Care

Even though the primary purpose for PDN does not include provision of personal care services, nursing care remains similar to personal care. It is reasonable to assume that monitoring for any health condition, such as seizures, vital signs, or suctioning, does not prohibit the NIP/PDN from performing basic nursing cares integral to the recipient's health, such as care in hygiene, hydration, nutrition, dressing, grooming, mobility, toileting, transferring, keeping linens clean and dry, and other comparable tasks.

The facts are largely undisputed in this matter. Petitioner requires assistance with all activities of daily living, instrumental activities of daily living and supportive home care activities. Petitioner is dependent on a ventilator almost 24/7. Care for individuals using a ventilator is a skilled nursing service and must be provided by a licensed professional. Petitioner is eligible to receive private duty nursing/skilled nursing care as part of the MA State Plan. She is also eligible for 10.5 hours per week of SHC. The issue is that Petitioner was previously eligible for SHC-companion care services, which the agency determined that all of her cares could be met between the PDN cares and SHC hours per week, excluding companion care.

The IRIS waiver defines supportive home care (SHC) services to 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 ordinarily self-administered;
- e. Assistance with making and attending appointments;
- f. Attendant care;
- g. Supervision and monitoring of participants in their homes, during transportation (if not done by the transportation provider), and in community settings;
- h. Reporting observed changes in the participant's condition and needs;
- i. Extension of therapy services. "Extension of therapy services" includes activities by the SHC worker which assist the participant with Physical Therapy/Occupational Therapy or other therapy/treatment plan. Examples 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. The extension of therapy services does not include the actual therapist-provided service; and,
- j. Medication reminder services and electronic support equipment, provided via a phone call, text message or electronic notification, in the home.

2. Household Services

- a. Performance of household tasks and home maintenance activities including meal preparation, shopping, laundry, house cleaning, simple home repairs, snow shoveling, lawn mowing, running errands, paying bills (at the direction of the participant); and,
- b. Assistance with packing/unpacking and household cleaning/organizing when a participant moves.

§ 1915(c) Home and Community-Based Services Waiver, Appendix C., C-1/C-3 Service Specification, Supportive Home Care.

The agency thus argues that, per IRIS policy, participants who qualify for PDN must maximize the state Medicaid plan prior to using IRIS waiver funds. Once maximized, the participant can then use IRIS waiver services such as respite or SHC for the provision of non-skilled care. The agency argues that, in this case, Petitioner is trying to use SHC-companion care in lieu of PDN care, which is not authorized. The agency notes that SHC-companion care cannot be used for any assistance that requires skilled nursing, such as Petitioner's use of a ventilator.

Petitioner's representative argued that Petitioner is not required to use the PDN care simply because it is available. In support of that argument, Petitioner's representative submitted numerous decisions from the Division of Hearings and Appeals that were related to supportive home care and private duty nursing care. I will first note that such decisions are not binding authority. I will further note that, while the subject matter is similar in each, every case is fact specific and the circumstances surrounding those cases were different than the facts in this case. Primarily, in the instant case, Petitioner is eligible to receive 24 hours a day, 7 days a week of private duty nursing. In many of the submitted decisions, those petitioners were not eligible for such care.

Petitioner's representative further noted that Petitioner's condition has not changed, her caregivers have not changed, and Petitioner has done well with the current set-up, which includes companion care. Petitioner's representative noted that since there has not been any change in Petitioner's condition or care, a termination of companion care is unwarranted. While Petitioner's conditions and caregivers have not changed, a change did occur in Petitioner's case. Specifically, a nurse consultant noted for the first time in 2020 that Petitioner was actually eligible to receive 24/7 PDN care, which had previously been missed. While no evidence was submitted as to why this eligibility wasn't noted sooner, the point is that the discovery was made in 2020. After that discovery, the agency chose not to change Petitioner's case at that time because the world was in the middle of a global pandemic. The change then occurred almost a year later, in July 2021.

Petitioner's representative further noted that Petitioner's physician had not ordered 24/7 PDN care. However, just because her physician did not order that care does not mean that she is ineligible. Rather, the facts demonstrate that regardless of what her physician ordered, she is actually eligible for 24/7 PDN care.

The issue is that the Petitioner is eligible for 24/7 PDN and she must use those services first, per policy. Then, she may receive SHC in addition for further necessary unskilled care, which she does in this case. She has been approved for 10.5 hours per week of SHC to further assist her. No argument was made that Petitioner required companion care hours in addition to the SHC hours and 24/7 PDN. Rather, Petitioner argued that companion care could meet her needs and that she did not require 24/7 PDN care. To the extent that Petitioner is requesting equitable relief, meaning that she would like me to determine that she is eligible to use companion care hours in lieu of at least some PDN care, I am without authority to do so.

CONCLUSIONS OF LAW

Based on the laws governing the MA program and IRIS waiver program, I must conclude that the agency correctly terminated Petitioner's companion care hours since she is eligible for PDN care 24 hours per day, 7 days per week and 10.5 hours of SHC assistance per week.

THEREFORE, it is

ORDERED

That this appeal 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, 4822 Madison Yards Way 5th Floor, 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.

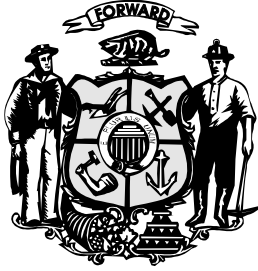
APPEAL TO COURT

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, **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 29th day of November, 2021

\s _____
Nicole Bjork
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 November 29, 2021.

Bureau of Long-Term Support
Attorney [REDACTED]