



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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: FCP - 207586

PRELIMINARY RECITALS

Pursuant to a petition filed on February 6, 2023, under Wis. Admin. Code § DHS 10.55, to review a decision by the Department of Health Services and its contracted agent, MY Choice Family Care, regarding Medical Assistance (MA), a hearing was held on June 22, 2023, by telephone. The hearing was previously scheduled to occur on April 5, 2023, May 4, 2023, and May 31, 2023 but rescheduled pursuant to requests by Petitioner who expressed a need for additional time to prepare.

The issue for determination is whether Petitioner is entitled to Family Care coverage of a placement in an adult family home.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Tim Hennigan
ABC For Health, Inc.
32 N Bassett St
Madison, WI 53703

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703
By: Jennifer Lang, Care Manager
MY Choice Family Care
10201 Innovation Dr, Suite 100
Wauwatosa, WI 53226

ADMINISTRATIVE LAW JUDGE:

Teresa A. Perez
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 23-year old resident of Milwaukee County who receives Medial Assistance long-term care waiver services through the Family Care Program. MY Choice Family Care is Petitioner's managed care organization ("the MCO").
2. Petitioner's mother, [REDACTED], is his legal guardian of the person and he has resided with her his entire life.
3. Petitioner has diagnoses including but not limited to autism spectrum disorder, dependent personality disorder, major depressive disorder, gastroenteritis and colitis, sleep apnea, obesity, severely flat feet, chronic hip and knee pain, hip weakness, and mild osteoarthritis of both knees.
4. Petitioner's long term care needs include:
 - cueing to initiate bathing and washing his body, to dress in weather appropriate clothing, to complete proper hygiene after toileting, with grocery shopping and selecting nutritious food, and with doing laundry and other household chores; and
 - full assistance with medication administration and management, money management, paying bills, preparation of more complex meals.
5. Petitioner also needs assistance with scheduling medical appointments and getting to medical appointments; help with daily decision making; and if he wished to work, would require assistance to be successfully employed.
6. Petitioner has "persistent and significant" relational needs, struggles with anxiety related to thoughts of being alone, and requires frequent reassurance and guidance in day-to-day tasks. Petitioner's Exhibit H and Testimony of [REDACTED].
7. Petitioner receives regular and ongoing treatment and support from several professionals including a care coordinator through Comprehensive Community Services, a psychotherapist, and a psychologist. His primary natural support is his mother.
8. Petitioner is able to communicate with others, use a microwave, prepare a simple meal, eat, move within and outside of his home, transfer, use a telephone, take the bus, and make simple purchases.
9. Petitioner's long term care outcomes include moving out of his mother's home and living as independently as possible. Petitioner, his mother, and his MCO care team agree that it is appropriate for Petitioner to begin to live separately from his mother.
10. Petitioner through his mother requested that Family Care authorize residential services; specifically, placement in an adult family home. The MCO denied that request in October 2022 but the parties continued discussing living arrangements for Petitioner over the next several months.
11. On or about January 18, 2023, MCO staff met with Petitioner and Petitioner's mother to again discuss the request for residential services. The MCO used the Resource Allocation Decision Tool as a framework for considering the request. The MCO also applied its internal policy regarding residential placement.

12. The MCO concluded that permanent placement in a residential facility would not be appropriate because Petitioner's needs could be met and supported in a less restrictive environment; namely, by moving into an apartment with supportive home care assistance or supported living services (referred to as a "supported independent living" or SIL apartment during hearing) tailored to meet his needs.
13. On January 18, 2023, the MCO denied Petitioner's request for authorization of residential services and issued a Notice of Adverse Benefit Determination.
14. Petitioner requested an internal appeal of the MCO's January 18, 2023 decision; the MCO upheld the denial on February 1, 2023.
15. Petitioner filed a timely request for fair hearing regarding the MCO's denial of his request for residential services.

DISCUSSION

Family Care (FC) is a Medical Assistance funded program intended to meet the long term care and health care needs of target groups consisting of frail elders; individuals age 18 and older who have physical disabilities, as defined in Wis. Stat. §[15.197 \(4\) \(a\) 2.](#); and individuals age 18 and older who have developmental disabilities, as defined in Wis. Stat. §[51.01 \(5\) \(a\).](#) FC is administered by the Department of Health Services (DHS). DHS contracts with several managed care organizations (MCOs) throughout the state to provide case management which includes the authorization of allowable and appropriate long term care services for individual FC recipients. Wis. Admin. Code §DHS 10.44(2)(f).

The contract into which every MCO must enter with DHS requires MCOs to determine appropriate long term care services by engaging in a "member-centered planning process" and by applying either the "Resource Allocation Decision" (RAD) method or by applying the terms of service authorization policies designed by the individual MCOs that are explicitly approved by the Department. See Family Care Contract Template, Issued January 1, 2022, Article V, Sec. K (available at <https://www.dhs.wisconsin.gov/familycare/mcos/fc-fcp-2022-generic-final.pdf>).

The issue in this case is whether Petitioner is entitled to Family Care coverage for placement in an adult family home. It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in *Hanson* stated that the policy behind this principle is to assign the burden to the party seeking to change a present state of affairs. Because Petitioner is requesting a new service, the burden falls upon him. To meet that burden, a preponderance of the evidence in the record must establish that he is entitled to Family Care coverage of the requested adult family home placement.

Residential care, including care at adult family homes (AFHs), is included in the Family Care benefit package. See *Wisconsin Department of Health Services, Division of Medicaid Services Family Care Contract (FC Contract), Addendum VIII* (available on-line at <https://www.dhs.wisconsin.gov/familycare/mcos/2022-generic-final.pdf>). Services that may be provided in the setting of an AFH include supportive home care, personal care, and supervision, behavior and social supports, daily living skills training, nursing care, recreational/social activities, and transportation performed by the operator or designee of the operator. *Id. Application for §1915(c) HCBS Waiver: WI.0367.R04.00 – Jan. 1, 2020, Appendix C* (available at <https://www.dhs.wisconsin.gov/familycare/statefedreqs/fc1915cwaiver.pdf>).

MCOs may authorize residential services only if one of the following criteria are met:

- A member’s long-term care outcomes cannot be cost-effectively supported in the member’s home, or
- A member’s health and safety cannot be adequately safe-guarded in the member’s home, or
- Residential care services are a cost-effective option for meeting that member’s long-term care needs.

FC Contract, Addendum VII, Sec. A., Para. 17.

The MCO here contended that Petitioner does not qualify for residential services because his outcomes and health and safety needs can be met in a supported independent living (SIL) apartment, which would be his own home. The MCO further contended that an AFH, which may impose rules and regulations, would not support Petitioner’s goal of living more independently, and that an AFH is not the least restrictive setting in which Petitioner could safely reside.

Petitioner argued that although Petitioner’s needs for assistance with activities of daily living and instrumental activities of daily living might be met by supports provided in an SIL apartment, his need for companionship and emotional support cannot be met in that setting. At hearing, Petitioner’s mother testified that although Petitioner does not need companionship all the time, he does need the comfort of knowing that someone is nearby in the next room and that he cannot be alone for very long.

Petitioner offered letters of support from his family and his individual therapist, both of whom opined that Petitioner would be best served in a “group home”. ██████████, the family therapist, wrote that:

[Petitioner] is not ready to reside on his own yet. He would very much benefit from having onsite availability and support from overnight staff, as well as guidance and support in developing life skills which have been difficult for him to learn at home given the strained and confusing dynamics that occur when he is with his mother.

. . . the right group home arrangement would provide [Petitioner and his mother] an opportunity to safely separate and . . . provide [Petitioner] the necessary opportunity to develop independence and confidence, through the establishment of a safe and secure placement setting that can better support his range of interests and to ingratiate his deep desire for social contact and relations outside of his mother...

. . . [Petitioner would] benefit from a warm and affirming setting, with clear and firm expectations, which are modeled through the conduct and activities of others in the residency.

Petitioner’s Exhibit B. Petitioner’s individual therapist, ██████████, wrote that Petitioner has a need for “social, emotional, and relational support”, that his depressive symptoms are “aggravated by time alone”, that if he becomes isolated, he is at risk of not tending to his basic needs, and that she therefore believes a group home is the best setting for him. Petitioner’s Exhibit H.

To address the concerns identified by Petitioner's mother and his providers, the MCO proposed that Petitioner reside with other Family Care members in a "cluster" of SIL apartments and that he have a roommate. The MCO's witnesses also explained that in this type of setting, there is always at least one caregiver on site but that if the needs of the specific members residing at a particular SIL apartment site cannot be met by one caregiver, then more than one caregiver will be present.

The MCO's witnesses also testified that prior to moving into an SIL apartment, Petitioner would have an assessment to determine the specific supports that he needs and that the supports put into place for him would be tailored to meet his individual needs. The MCO offered a copy of a draft assessment prepared for Petitioner which includes a detailed inventory of his specific needs. The draft includes the following instruction which is of particular relevance to the issues discussed at hearing: "staff should check on Member at each hour (12 times a day) to make sure he is up and doing something productive . . . if Member is laying in bed throughout the day, staff should suggest an activity for him to participate in." See Respondent's Exhibit, pp. 61 – 67 and Petitioner's Exhibit E. The draft further notes that Petitioner enjoys going to get coffee, going to record stores, walking when the weather is nice, playing video games, and going out into the community. Petitioner's mother noted that the draft assessment omitted important factors and the MCO expressed a willingness to edit the draft to include those factors.

None of Petitioner's providers participated in the hearing so I could not determine what they understand the term "group home" to mean; what about the SIL apartment model does not address Petitioner's needs and why they believe a "group home" would be more likely to meet those needs; and why they believe residence in a "group home" would be more likely to prevent him from becoming isolated than living with a roommate in an apartment and within a cluster of apartments inhabited by other Family Care members.

Petitioner did not participate in the hearing either but an e-mail from him was offered as evidence. See Petitioner's Exhibit L. In that e-mail, he explained what he wants in a group home as follows: to be allowed to come and go as he wants; to be allowed to have visitors; and to be able to bring his music equipment with him. There is nothing in the record to suggest that those wishes would go unmet in an SIL apartment.

Petitioner's legal counsel argued that it is not appropriate for the MCO to require Petitioner to "fail first" in an SIL apartment to demonstrate his need for residential placement. I agree that a "fail first" approach to service authorization is not appropriate. And, if the MCO was requiring Petitioner to try out a plainly inadequate service in order to prove that he needs a more expensive service, I would not uphold the MCO's denial. The evidence in the record does not however show that the MCO is engaging in that type of bad faith tactic.

The MCO observed (and Petitioner's mother agreed) that Petitioner was on his own for several days in April 2023 while his mother sought respite care and that he did well, with the support of his providers, his care manager, and his mother. During that time period, not only did Petitioner's community of helpers reach out to check on his well-being by phone, by text, and in person but he also took the initiative to reach out to them for support he felt he needed. In other words, for a few days, Petitioner succeeded at living independently--with support. The MCO's decision that a supported independent living apartment is a good fit for Petitioner and that an AFH is a more restrictive setting is rational and well-supported.

For the reasons set forth above, I find that a preponderance of the evidence in the record did not demonstrate that Petitioner is entitled to Family Care authorization of residential services.

CONCLUSIONS OF LAW

The evidence in the record does not establish that Petitioner is entitled to Family Care authorization of residential services; the MCO's denial of Petitioner's request was thus proper.

THEREFORE, it is ORDERED

Petitioner's 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 North, 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.

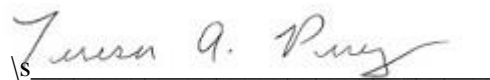
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

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 Madison,
Wisconsin, this 20th day of July, 2023



Teresa A. Perez
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on July 20, 2023.

MY Choice Family Care
Office of Family Care Expansion
Health Care Access and Accountability
Attorney Tim Hennigan