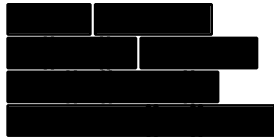




STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION
Case #: CWA - 189467

PRELIMINARY RECITALS

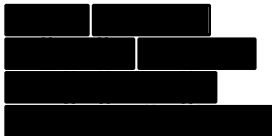
Pursuant to a petition filed on August 21, 2018, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support regarding Medical Assistance (MA), a hearing was held on October 31, 2018, at Madison, Wisconsin.

The issue for determination is whether the agency erred in its reduction in supportive home care hours from 96 hours to 40 hours as set forth in the 7/24/18 Notice of Action with an effective date of 8/8/18.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Pines & Bach LLP
122 West Washington Avenue, Suite 900
Madison, WI 53703

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:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Milwaukee County.

2. Petitioner requires 24/7 care and supervision.
3. Petitioner is authorized to receive 72 hours per week of physician-ordered private duty nursing (“PDN”) services paid by Medicaid and not the IRIS waiver funds.
4. Petitioner is authorized to receive 56 hours per week of personal care worker (“PCW”) services paid by Medicaid and not the IRIS waiver funds.
5. On 7/24/18 the IRIS agency issued a notice informing petitioner that it was reducing supportive home care (“SHC”) hours from 96 hours to 40 hours per week because it determined that the Medicaid-paid services covered the remaining hours of the week.
6. Petitioner’s family has been challenged in trying to staff the entire 72 hours of authorized PDN time.
7. Petitioner appealed.

### 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. This Section 1915(c) waiver document is available at <http://www.cms.gov/MedicaidStWaivProgDemoPGI/MWDL/list.asp>. 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 homemaker 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.

In petitioner’s case, the program had previously been funding nursing services, which are approved at a 21 hours per day and 7 day per week level, with funding designated as supportive home care funds. This was error.

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). Turning to Wisconsin’s federal waiver document, there is a clear directive to not cover nursing services that are covered by the State Medicaid Plan:

C-1/C-3 Service Specifications  
Nursing Services  
Service Definition (*Scope*):

Nursing services are those medically necessary, skilled nursing services that may only be provided safely and effectively by a nurse practitioner, a registered nurse, or a licensed practical nurse working under the supervision of a registered nurse. The nursing services provided must be within the scope of the Wisconsin Nurse Practice Act and are not otherwise available to the participant the Medicaid state plan. Nursing services may include periodic assessment of the participant’s medical condition when the condition requires a skilled nurse to identify and evaluate the need for medical intervention or to monitor and/or modify the medical treatment services provided by non-professional care providers. Services may also include regular, ongoing monitoring of a participant’s fragile or complex medical condition as well as the monitoring of a participant with a history of noncompliance with medication or other medical treatment needs.

Specify applicable (if any) limits on the amount, frequency or duration of this service:  
Excludes services available through the Medicaid State Plan. ...

§ 1915(c) Home and Community-Based Services Waiver, #0485R0100, Appendix C.

The Department's IRIS policy document, *IRIS Program Policies*, available at <http://www.dhs.wisconsin.gov/bdds/IRIS/IRISPolicySummary.pdf>, echoes the federal waiver document requirement, at "IRIS Funding for Goods, Supports and Services," Policy SC 16.1.

Supportive home care services are a permissible cost under the IRIS Waiver. See Application for a §1915(c) Home and Community-Based Services Waiver, Waiver Number WI.0485.R01.00, Effective January 1, 2011. SHC services are permitted as follows:

Supportive Home Care (SHC) is the provision of a range of services for participants who require assistance to meet their daily living needs, ensure adequate functioning in their home and permit safe access to the community.

Supportive home care services 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 that are ordinarily self-administered;
- e. Attendant care;
- f. Supervision and monitoring of participants in their homes, during transportation (if not done by the transportation provider) and in community settings;
- g. Reporting of observed changes in the participant's condition and needs; and
- h. Extension of therapy services. "Extension of therapy services" means activities by the SHC worker that assist the participant with a PT/OT or other therapy/treatment plan. Examples of these activities 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. It does not include the actual service the therapist provides.

2. Household Services

- a. Performance of household tasks and home maintenance activities, such as meal preparation, shopping, laundry, house cleaning, simple home repairs, snow shoveling, lawn mowing and running errands;
- b. Assistance with packing/unpacking and household cleaning/organizing when a participant moves.

3. Room and board costs for SHC providers who "live in" are allowable under this SPC.

Application for a §1915(c) Home and Community-Based Services Waiver, Waiver Number WI.0485.R01.00, Effective January 1, 2011 (emphasis added).

The agency argued at hearing that the physician plan of care orders 72 hours per week of private duty nursing (see ex. #2 at G1). In addition to this, the agency notes that 56 hours of Medicaid-paid personal care hours have been authorized. The agency then concludes that these authorized hours cover most of the hours in a week with only 40 hours remaining. The agency believes that 40 hours of SHC is sufficient and appropriate and results in 24/7 coverage and supervision. As part of this argument, the agency notes that supportive home care hours cannot be substituted for skilled nursing tasks and that the Medicaid-paid services must be maximized under the policy before waiver funds may be used. See *IRIS Policy Manual* (September 2018) at Section 6.4 (“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.”). It follows, according to the agency, that it is not appropriate or permissible for petitioner to use fewer PDN hours and increase SHC hours to make up the difference. Finally, the agency notes that any SHC needs that may go uncovered may be made up with natural supports provided by family.

At hearing, petitioner elicited testimony of his guardian and mother, [REDACTED]. This testimony established that petitioner faces challenges in filling the authorized 72 hours of PDN hours with skilled staff. Petitioner’s mother also explained that most PDN tasks must be completed by staff assigned during daytime hours. She explained that with the difficulty of finding staff to fill the PDN hours, and accomplish the needed tasks, she also sought approval for Medicaid-paid personal care workers who are able to perform some of the skilled tasks. Petitioner’s mother testified that the SHC time that is filled is time in which “we read to him, we kind of hang out with him, we wrestle with him, we put him to bed.” She also explained that petitioner frequently needs to have his blanket re-positioned on his body and also requires incontinence cares overnight. In general, testimony indicated SHC needs and use in evening and overnight.

On cross-examination, petitioner’s mother explained that currently there are only two nurses who are staffed for petitioner: one nurse works on Thursday evenings from 6pm to 9pm, the other will call to offer one Saturday or Sunday each month. Petitioner’s mother stated that they are unable to find nurses to fill the hours. She stated that the needs for nurses are posted on various appropriate boards but they are “not receiving requests to fill those hours” and [REDACTED] has no one available to fill the need. Petitioner’s mother explained that when a nurse is not present, the personal care worker or a family member fills the role in performing the needed skilled care.

Petitioner also offered testimony of [REDACTED] whose agency provides the Medicaid-paid personal care services for petitioner which must be hands-on medically-oriented tasks such as those related to activities of daily living (e.g. bathing, dressing, eating, toileting). She explained that the PCW is not authorized to perform tasks such as observing petitioner or wrestling with him or re-positioning a blanket.

In rebuttal, the agency offered testimony of [REDACTED], the IRIS nurse consultant. She explained that any tasks performed by an unskilled family member cannot be paid under SHC and may only be considered an unpaid natural family support.

The parents in this case act as caregivers and provide some of the SHC. This reduction will mean less funds available for SHC that are potentially payable to the parents and the parents cannot be paid for the skilled nursing hours through Medicaid. But the petitioner’s needs are, in theory, covered by authorized PDN, PCW, and the reduced SHC hours. The petitioner explains that there is a severe shortfall in staffed

hours due to nurse shortage. The IRIS policy allows for natural supports to provide for gaps in staff-coverage. Petitioner's mother explained that there are many responsibilities for her and her husband and they should be paid for all of these such as wrestling with her child or placing a blanket on him during the night. The family's time is not compensable if the tasks are those which would have to be completed as part of the normal shared household duties. *See Waiver* at Appendix C-2(d). Petitioner, in part, argues that there are more SHC-type tasks that need to be completed in a day than the average of 5 hours and 45 minutes per day that 40 hours per week allows. That may be so. But I am not persuaded that payment for all of those things done by the parents like reading or playing must be paid for.

Finally, petitioner argues that the 56 hours of PCW hours are only authorized at that level because of the shortage of nurse availability. Petitioner suggests that if nurses were available then the PCW hours used would be less than 56 because of a concern the PCW would have about incurring sanctions for supplantation of services. The minimal testimony of [REDACTED] did not establish this and the documentary evidence presents me with 72 hours and 56 hours authorized. I will accept those authorized hours as an existing fact and will not speculate as to what might happen if staffing were different. As for any other tasks other than SHC tasks, no matter how this is described in argument by counsel, ultimately it appears that petitioner is seeking payment for tasks or time performed by family members because they are doing some of the things PDN's or PCW's would be doing if staffed fully (I realize that petitioner will not agree with this interpretation). The rules do not allow for this. The IRIS agency is limited by the waiver and it is not within its discretion or its responsibility to allow waiver funds for services that should be covered by Medicaid card coverage.

Even though the parents' objection is understandable, the terms of the federal government's permission to this state to offer the IRIS program does not allow IRIS payment for nursing services when nursing service is available through the state plan. It is available under Wisconsin's Medicaid plan, so IRIS coverage of additional nursing services, or inaccurately designating these services as SHC is not possible. Additionally, the waiver document requires someone with a nursing degree to be providing the nursing-specific tasks as a condition of payment. That also appears to be a barrier to payment to the parents in this case.

### CONCLUSIONS OF LAW

The Department's agent correctly reduced SHC hours to 40 on the petitioner's Plan, because nursing services and PCW services are available through the state Medicaid plan.

**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, 4822 Madison Yards Way, 5<sup>th</sup> 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.

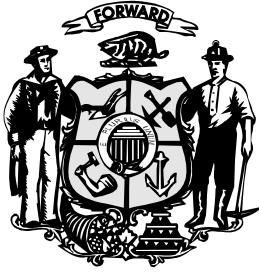
**APPEAL TO COURT**

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 3rd day of January, 2019

\s \_\_\_\_\_  
John P. Tedesco  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin \DIVISION OF HEARINGS AND APPEALS**

Brian Hayes, Administrator  
Suite 201  
5005 University Avenue  
Madison, WI 53705-5400

Telephone: (608) 266-3096  
FAX: (608) 264-9885  
email: [DHAmail@wisconsin.gov](mailto:DHAmail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 3, 2019.

Bureau of Long-Term Support  
Attorney [REDACTED]