

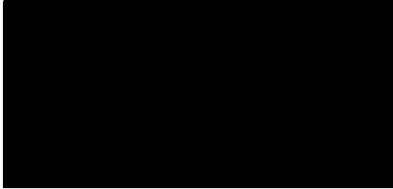


State of Wisconsin DIVISION OF HEARINGS AND APPEALS

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November 5, 2019



RE:



Case No. FCP - 192893


Dear Parties:

Enclosed is a copy of the Final Decision in the above-referenced matter.

Sincerely,



Supervisor

- c: ADRC of Milwaukee County - email
- Office of Family Care Expansion - email
- Health Care Access and Accountability - email
-  - email



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



In the Matter of



FINAL DECISION
Case #: FCP - 192893

The attached proposed decision of the hearing examiner dated July 3, 2019, is modified as follows and, as such, is hereby adopted as the final order of the Department.

PRELIMINARY RECITALS

Pursuant to a petition filed on March 14, 2019, under Wis. Admin. Code § DHS 10.55, to review a decision by the Department of Health Services through its agent, the ARC of Milwaukee County, regarding Family Care, a Medical Assistance (MA) home and community-based long term care waiver program, a hearing was held on April 16, 2019, by telephone.

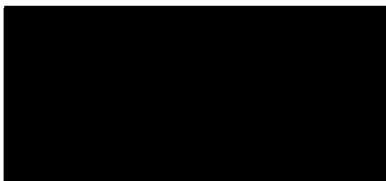
- At hearing, Petitioner's Exhibits 1 and 2 were received. The hearing record was held open until Friday, April 19, 2019 to allow Petitioner to submit a copy of a signed Family Care enrollment form. That document was timely received and marked as Petitioner's Exhibit 3. The undersigned administrative law judge later requested that the parties submit a copy of the About Your Benefits notice dated 11/27/2018. Petitioner provided that document and it was marked and received as Petitioner's Exhibit 4 without objection from the agency.
- The agency did not submit any exhibits.

The issue for determination is whether Petitioner's Family Care Program enrollment may be adjusted to include the time period October 31, 2018 through February 6, 2019.

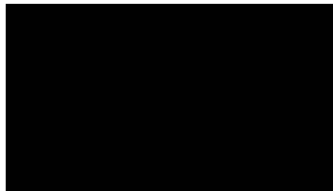
There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By: [REDACTED]
 ARC of Milwaukee County
 Aging Resource Ctr-Suite 300
 1220 W Vliet St
 Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:
 Teresa A. Perez
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County who has resided at [REDACTED] a community-based residential facility since at least October 2018.
2. Petitioner’s Power of Attorney for Health Care was activated on July 25, 2017 after two physicians certified him to be incapacitated pursuant to Wis. Stat. §155.05(2). On January 18, 2018, the Milwaukee County Circuit Court found Petitioner to be incompetent and appointed a guardian of the estate. See Petitioner’s Exhibits 2-A and 2-D.
3. On October 25, 2018, Petitioner’s court-appointed legal guardian of the estate faxed a request to the Milwaukee County Department on Aging (i.e., Milwaukee County’s aging resource center) to initiate the functional eligibility determination process (i.e., completion of a long term care functional screen) required for long term care waiver programs including, of interest to Petitioner, Family Care. See Petitioner’s Exhibit 2-A.
4. The aging resource center (RC) received the fax sent by Petitioner’s guardian on October 25, 2018 but, in error, did not initiate the process for a long term care functional screen (LTCFS) to be completed. See Petitioner’s Exhibit 2-A and Testimony of [REDACTED].
5. On October 31, 2018, Petitioner’s attorney filed a Wisconsin Medicaid for the Elderly, Blind or Disabled Application via fax with Milwaukee Enrollment Services (MILES) (i.e., Milwaukee County’s income maintenance agency). The application included a cover letter which stated that Petitioner was requesting Family Care benefits for his care at [REDACTED] and that Petitioner’s guardian had already requested a functional assessment. See Petitioner’s Exhibit 2-B.
6. MILES issued a notice on or about November 27, 2018 indicating that Petitioner had been enrolled in the Elderly, Blind, Disabled (EBD) Medical Assistance Deductible program. The notice did not address Petitioner’s request for Family Care or Community Waivers. See Petitioner’s Exhibit 4 and Testimony of [REDACTED] and [REDACTED].
7. Neither MILES nor the RC notified Petitioner in writing or orally that his October 2018 application for Family Care would not be processed within 30 days and neither agency notified him in writing of his right to appeal that delay.
8. On December 6, 2018, Petitioner’s legal representative contacted MILES to inquire why Petitioner had been enrolled in the EBD Medical Assistance Deductible--a program he had not requested--and to determine the status of his Family Care application. At that time, MILES staff indicated that MILES had received no communication from the RC regarding the completion of a LTCFS and that Petitioner should contact the RC. Testimony of [REDACTED] and Petitioner’s Exhibit 2-C.

9. On December 9, 2018, Petitioner's attorney submitted to the RC a second request for a functional screen (which is dated December 11, 2018) with which she included a copy of the first request and proof that the first request had been submitted on October 25, 2018 (i.e., six weeks earlier). Petitioner's attorney included a cover letter in which she requested that the functional screen be completed promptly in light of the delay. See Petitioner's Exhibit 2-D.
10. On or about January 8, 2019, the RC met with Petitioner to complete a functional assessment and on or about that date, the RC completed the functional screen. See Petitioner's Exhibit 2-C and Testimony of [REDACTED]
11. Sometime between January 11, 2019 and January 17, 2019, the RC provided Petitioner's guardian of the estate a Family Care enrollment form. On January 17, 2019, Petitioner's guardian signed the enrollment form and submitted it to the RC. See Petitioner's Exhibits 2-C and 3.
12. On February 4, 2019, Petitioner's legal representative contacted MILES to determine why Petitioner had still not been enrolled in Family Care. MILES staff confirmed that MILES had received a referral from the ARC indicating that Petitioner had been found functionally eligible for long term care waiver services but stated, in error, that Petitioner needed to submit additional verification before MILES could determine his financial eligibility. In fact, Petitioner provided the verification in question in October. Petitioner's legal representative alerted MILES to that fact and MILES staff was able to find the verification in question within the agency's files. Testimony of [REDACTED] and Petitioner's Exhibit C.
13. On February 6, 2019, the RC was notified by MILES that Petitioner was financially eligible for Family Care. Testimony of [REDACTED]
14. On February 7, 2019, Petitioner was enrolled into Family Care. MILES notified Petitioner of his enrollment via notice dated February 8, 2019. Testimony of Catherine Moe and Petitioner's Exhibit 1.
15. On March 14, 2019, Petitioner filed an appeal of the February 7, 2019 Family Care enrollment date. See Petitioner's Exhibit 1.

DISCUSSION

Family Care is a medical assistance waiver program that provides appropriate long-term care services for elderly or disabled adults. Wis. Stat. § 46.286; *see also* Wis. Admin. Code, Chapter DHS 10. To be eligible, a person must meet the program's financial and non-financial criteria, including functional criteria. Wis. Admin. Code, §§ DHS 10.32(1)(d) and (e). The Department's responsibility for processing applications and determining eligibility for Family is set forth in Wis. Admin. Code §DHS 10.31(6) which provides as follows:

6) ELIGIBILITY DETERMINATION.

(a) Decision date. Except as provided in par. (b), *as soon as practicable, but not later than 30 days from the date the agency receives an application* that includes at least the applicant's name, address, unless the applicant is homeless, and signature, the agency shall determine the applicant's eligibility and cost sharing requirements for the family care benefit, using a functional screening and a financial eligibility and cost-sharing screening prescribed by the department. If the applicant is a family care spouse, the agency shall notify both spouses in accordance with the requirements of s. 49.455 (7), Stats.

(b) Notice. The agency shall notify the applicant in writing of its determination. If a delay in processing the application occurs because of

a delay in securing necessary information, *the agency shall notify the applicant in writing that there is a delay in processing the application, specify the reason for the delay, and inform the applicant of his or her right to appeal the delay by requesting a fair hearing under s. DHS 10.55.*

[Emphasis added].

Once a person meets all of the program’s eligibility criteria, he is “entitled to enroll in a care management organization and to receive the family care benefit.” Wis. Admin. Code § DHS 10.36(1). However, there is no explicit timeline for completing enrollment once eligibility is confirmed. Wis. Admin. Code § DHS 10.41(1) provides that: “The family care benefit is available to eligible persons **only through enrollment in a care management organization** (CMO) [now referred to as managed care organizations or MCOs] under contract with the department” [emphasis added]. Strictly applying this code provision can lead to harsh results. With many entities involved in the administration of the Family Care Program—income maintenance agencies, resource centers, and managed care organization eligibility determinations sometimes get lost in the shuffle and are not processed within the 30-day timeframe outlined by Wis. Admin. Code § DHS 10.31(6). When this happens, applicants, through no fault of their own, are at risk of delayed enrollment.

In her proposed decision, the ALJ stated that the stringent application of Wis. Admin. Code § DHS 10.41(1) would work an untenable result by prohibiting the Department or the Division of Hearings and Appeals from fashioning appropriate remedies when errors cause delays in the processing of applications. The ALJ is correct that an Administrative Law Judge’s authority is limited to the strict application of the statutes and administrative code.

“The Division of Hearings and Appeals does not make or change law or policy. It can only decide whether or not the parties in cases over which it has authority have followed and/or correctly applied the law and policy.”

In re, DHA Case No. FCP-192876 (Wis. Div. Hearings & Appeals September 3, 2019) (DHS).

Over the past several years, the Department has issued final decisions that mitigate the harshness of this type of strict application. See e.g., *In re* ██████████, DHA Case No. 16-7655 (Wis. Div. Hearings & Appeals March 21, 2016) (DHS) and *In re* ██████████, DHA Case No. 17-3457 (Wis. Div. Hearings & Appeals Sept. 15, 2016) (DHS). In those cases, the Department found that where there is an agency error that causes a delay in the processing of an individual’s application for Medical Assistance (i.e., a determination of an individual’s financial and non-financial eligibility by the income maintenance agency) and, in turn, a delay in the individual’s enrollment in an MCO, the Department may adjust the individual’s enrollment date. In both of these cases the final decision to adjust the individual’s enrollment date was made by the Department rather than by DHA. The Department, as the agency charged by statute with the ‘general supervision of the medical assistance program’ may take actions necessary for the proper administration of the program; *see*, Wis. Stat. § 49.45(2)(a). That authority has not been, and cannot be, delegated by the Department to DHA Administrative Law Judges; *see*, 42 U.S.C. §1396a(a)(5), mandating that a designated single state agency operate the state’s medical assistance program. In Wisconsin that state agency is the Department of Health Services.

Petitioner contended and has established that, like the above-referenced prior final decisions, this case involves errors that caused a delay in his enrollment into Family Care. Unlike the facts relevant to those prior decisions however, this case features errors by both the aging resource center and the income maintenance agency. These errors include the following: (1) the aging resource center’s (RC) failure to screen Petitioner for functional eligibility for ten weeks from the date of his first request which was made in October 2018; (2) the joint failure of MiLES and the RC to process Petitioner’s application for Family

Care within 30 days; (3) the failure of either Miles or the RC to, as required by Wis. Admin. Code §10.31(6)(b), issue written notice of the delay in processing the application and of his right to file an appeal regarding that delay; (4) Miles's failure to recognize that it had all required financial verification on file once the RC referred Petitioner's application back to Miles after finally completing the functional screening process on or about January 10, 2019—thereby further delaying Petitioner's enrollment until February 7, 2019.

The RC representative at hearing, who offered clear and forthright testimony, acknowledged that the RC erred by not promptly processing Petitioner's faxed October 25, 2018 request to be screened for Family Care eligibility. No representative from the income maintenance agency participated in the hearing but the RC representative offered knowledgeable testimony regarding the respective roles of the two entities in this case and how the Family Care application process should ideally proceed. It is undisputed that Petitioner's application for Family Care was not processed in 30 days. Wis. Admin Code §10.31(6) does not specify whether the 30 day timeframe is intended to begin from the date an EBD Medicaid application is filed with the income maintenance agency or from the date a request for a functional screen is filed with the RC. (In this case, both of those documents were filed in October 2018 so it isn't critical to grapple with that lack of regulatory clarity.) Yet, no one from either the RC or the income maintenance agency notified Petitioner in writing of the delay in the processing of his application for Family Care and of his right to file an appeal, as required by Wis. Admin Code §10.31(6)(b). Even after Petitioner's attorney alerted both entities that there had been a delay, the required notice was not issued. However, the only 'remedy' an ALJ has for this failure is to order the Department, through the appropriate county agency, to provide the missing written notice explaining the reason for the delay, as required by statute, or to complete the eligibility determination (if not already completed). An ALJ has no authority to further 'fashion an appropriate remedy', as was suggested by the ALJ in her proposed decision¹. The adjustment of an established enrollment date due to delays or errors in the eligibility determination process is a form of equitable relief, as a matter of 'fairness' for which a legal remedy is unavailable or inadequate.

The RC representative suggested that an appropriate remedy here might be for the enrollment date to be set at January 17, 2019, the date the RC received an enrollment form from Petitioner's representative. Her suggestion is consistent with *In re* [REDACTED], one of the final decisions cited above, which found that a signed enrollment form was required. However, the Petitioner was not responsible for a delay in signing the enrollment form until January 2019, rather it was the agency's inaction that caused the delay. The Petitioner could not have submitted an enrollment form earlier than January 2019 because the RC had not assigned his case to a worker nor notified him of the importance of signing an enrollment form promptly. Nothing in the record suggests that there is any way for an individual to obtain an enrollment form without someone from the RC providing the form. And, the agency cited no legal authority or policy that would inform an applicant of the need to sign an enrollment form².

The ALJ notes in her proposed decision that although the RC did not complete a LTCFS until January 2019, the activation of Petitioner's Power of Attorney for Health Care in July 2017; the Milwaukee County Circuit Court's granting of a petition for guardianship based on incompetency in January 2018; his on-going residence in a CBRF; and a letter submitted by his physician that his functional abilities in

¹ "It is long and well established that the Division of Hearings and Appeal's hearing examiners lack the authority to render a decision on equitable arguments or grounds"; *see*, *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977).

² Wis. Stat. § 46.286(3)(a) states that receipt of the Family Care benefit is through *enrollment* in a care management organization. Further, as noted previously, Wis. Admin. Code § DHS 10.41(1) states that the family care benefit is available *only through enrollment* in a care management organization. Thus, the statute and admin code provide clear notice that enrollment in an MCO is required in order to receive the Family Care program benefits. It is, however, the responsibility of a resource center to complete the enrollment process with applicants, including the signing of an enrollment form, so imputing this delay to the Petitioner would not be appropriate.

October 2018 were no greater than as of the date the physician signed the letter (i.e., December 2018) together may lead to a reasonable conclusion that the agency's tool for screening functional eligibility would have yielded the same result in October or November 2018, had the RC timely processed Petitioner's request. Additionally, the ALJ notes that the Miles issued notice in late November 2018 that the Petitioner was financially eligible for EBD medical assistance³; *see*, Finding of Fact # 6.

From this information the ALJ determined that October 31, 2018 should be the appropriate date for the Petitioner's enrollment in the Family Care program. However, this October 31st date ignores the statutory thirty (30) day time period allowed to complete an eligibility determination, as well as the timing of the actual determination and notice by the IM agency of his financial eligibility for medical assistance in late November. Determining that the Petitioner's enrollment in a Family Care MCO, but for agency error, would have occurred a mere six (6) calendar days after the initial request to the Resource Center is plain error.

There are no statutory or regulatory time requirements for completing enrollment following a finding of eligibility, nor standards for determining whether an adjustment to an established enrollment date might be appropriate. In this matter, the Petitioner was not responsible for the delay in his enrollment until February 2019, and therefore some relief would be appropriate. Given that no difficulties in the functional eligibility process, once commenced, were noted during the hearing, it can be assumed that the statutory 30-day period for eligibility determinations would have been sufficient to determine and confirm Petitioner's functional eligibility. The IM agency issued notice finding the Petitioner financially eligible for a medical assistance program on November 27, 2018, approximately 30 days after receiving his application; *see* Finding of Fact #5. It may be assumed that the Petitioner would have been found financially eligible for the Family Care program at that time also. Although it would normally require some additional time to complete the actual enrollment process, as a matter of equity it is reasonable to find that the Petitioner could have been enrolled in an MCO as early as November 27, 2018, and an adjustment to that date is hereby deemed appropriate.

DHA has recently issued a number of final decisions in which the particular Administrative Law Judge involved determined that agency error had led to a delay in that Petitioner's enrollment in a community waiver program, and provided equitable relief to the Petitioner by adjusting her or his enrollment date. Nothing in this final decision modifies or amends those earlier decisions; however ALJ's should no longer rely on those DHA final decisions as any form of precedent nor continue to 'fashion remedies' in any similar future cases.

In summary, the Department through its agents is required to process an application for Family Care within 30 days (or to provide written notice of the reason for delay), but due to the errors and omissions identified in the Findings of Fact and discussed above that did not occur in this case. While an ALJ does not have authority to 'fashion' an equitable remedy for such a failure, the Department itself does.

In future proceedings in which an ALJ believes an error occurred that prejudiced a Petitioner and that some remedy other than ordering the Department to comply with a statute or administrative rule may be appropriate, the ALJ should outline her or his recommendation for an appropriate remedy and submit that as a proposed decision to the Department's Secretary for review and a final decision.

³ An individual found financially eligible for EBD Medicaid would also very likely be financially eligible for the medical assistance community long-term care waiver programs, so it is assumed for purpose of this decision that he would have also been determined to be financially eligible for the Family Care program had the IM agency also considered long term care waiver programs at that time.

CONCLUSIONS OF LAW

- A preponderance of evidence in the record established that Petitioner likely met financial eligibility and functional eligibility requirements for Family Care from November 27, 2018 through February 6, 2019.
- Errors in the processing of Petitioner's October 2018 application made by the Department through its agents, the Milwaukee Aging Resource Center and Milwaukee Enrollment Services, delayed Petitioner's enrollment into Family Care until February 7, 2019.
- The Department failed to satisfy the requirements of Wis. Admin. Code § DHS 10.31(6)(a) by not issuing a determination regarding Petitioner's eligibility for Family Care within 30 days of the date he applied.
- The Department failed to satisfy the requirement of Wis. Admin. Code § DHS 10.31(6)(b) by not notifying Petitioner in writing that his application for Family Care would not be processed within 30 days.
- An Administrative Law Judge lacks authority to provide any form of equitable remedy or relief.

THEREFORE, it is

ORDERED

That, for the reasons set forth above the Petitioner's enrollment date into the Managed Care Organization be adjusted to November 27, 2018. This action shall be completed within 10 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, 4822 Madison Yards Way, Madison, WI 53705-9100 **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, WI, 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 request (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 5 day
of November, 2019.

A handwritten signature in black ink, appearing to read "Andrea Palm", written over a horizontal line.

Andrea Palm, Secretary
Department of Health Services