



FH
[REDACTED]

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

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

**AMENDED DECISION ON
MOTION TO DISMISS**

Case #: MGE - 207999

PRELIMINARY RECITALS

A petition was filed on March 3, 2023, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § DHS 36.17(5)(am)3 and § HA 3.03(1), to review a decision by the Comprehensive Community Services (CCS) program regarding Medical Assistance (MA). A prehearing was held in the matter on April 7, 2023, at which time the respondent requested the opportunity to file a motion to dismiss based on jurisdictional grounds. The parties agreed that respondent would file a motion to dismiss by April 19, 2023 and petitioner would respond to the motion by April 26, 2023. The parties were requested to submit additional clarifying information, which was received, and the final submittal was received on May 2, 2023. After the hearing, a Final Decision was issued on May 8, 2023 that remanded the matter to the agency for action in accordance with the Order. That Order failed to provide a deadline by which the action was to be taken. This decision now vacates the first decision under Wis. Admin. Code §HA 3.10(1) for purposes of clarifying the Order. The entirety of the Decision is set forth below with the amended Order.

The issue for determination is whether the respondent's motion to dismiss should be granted.

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Mike Soukup
Disability Rights Wisconsin
1502 West Broadway, Suite 201
Madison, WI 53713

Respondent:

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

By:

Attorney Dejan Adzic
Marathon County Corporation Counsel
500 Forest St.
Wausau, WI 54403

ADMINISTRATIVE LAW JUDGE:
Kelly Cochran
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Lincoln County. She is a recipient of MA.
2. On February 3, 2023 [REDACTED], a provider of CCS for Lincoln County, issued a notice of discharge from CCS to the petitioner.
3. Petitioner filed an appeal of the discharge notice on March 3, 2023 with the Division of Hearings and Appeals (DHA).

DISCUSSION

CCS is a MA service provided under Wis. Stat. § 45.46(2)(b)6.Lm and Wis. Adm. Code Chapter 36; see also State MA Plan, Attachment 3.1A, Supplement 1.13d., available online at <https://www.dhs.wisconsin.gov/mandatoryreports/mastateplan/3-1a-supplement1.pdf>.

The provider of CCS in Lincoln County issued a notice to petitioner stating the following:

We have not been able to establish a treatment plan within the timeframe allowed for the abbreviated assessment. This letter is to inform you that you have been discharged from Comprehensive Community Services (CCS). Enclosed is a copy of the discharge summary. You have the right to appeal this decision. To appeal this decision, please submit a written request for review of the determination of need for psychosocial rehabilitation services. Letter should be addressed to:

Bureau of Prevention, Treatment and Recovery
1 W. Wilson Street, Room 850, P.O. Box 7851
Madison, WI 53707-7851

Should you again have the need and desire for services through CCS, you, or anyone on your behalf, could contact the Community Treatment Referral Coordinator at 715-536-9482. The Referral Coordinator and Mental Health Professional will then screen and determine eligibility for readmission to ccs.

Sincerely,
[REDACTED] Clinical Team

The petitioner appealed to the DHA therefrom.

Respondent’s arguments:

The respondent argues that petitioner first had to appeal to the Bureau of Prevention Treatment and Recovery (BPTR), as stated in the notice, prior to filing an appeal with DHA. It therefore argues that this appeal should be dismissed as DHA has not yet retained jurisdiction to hear the appeal. The respondent argues that petitioner erroneously appealed pursuant to Wis. Adm. Code § DHS 104.01(5) and that she should have appealed under Wis. Stat. § 51.61(5) and Wis. Adm. Code §§ DHS 94.28 - 94.29.

CCS is a program authorized under Wis. Stat. §§ 49.45(30e)(b) and 51.42(7)(b). Pursuant to that authority, DHS has promulgated rules for the program under Wis. Adm. Code Chapter DHS 36. Under those rules is provides:

When a consumer is discharged from the CCS program, the consumer shall be given written notice of the discharge. The notice shall include all of the following:

1. A copy of the discharge summary developed under par. (b).
2. Written procedures on how to re-apply for CCS services.
3. **If a consumer is involuntarily discharged from the CCS program and the consumer receives Medical Assistance, the fair hearing procedures prescribed in s. DHS 104.01 (5). For all other consumers, information on how the consumer can submit a written request for a review of the discharge to the department.**

Wis. Adm. Code § DHS 36.17(5)(am)3 (emphasis added). And:

1) The CCS shall comply with the patient rights and grievance resolution procedures in s. 51.61, Stats., and ch. DHS 94, and all of the following:

- (a) Choice in the selection of recovery team members, services, and service providers.
- (b) The right to specific, complete and accurate information about proposed services.
- (c) For Medical Assistance consumers, the fair hearing process under s. DHS 104.01 (5). For all other consumers how to request a review of a CCS determination by the department.

Note: A written request for review of the determination of need for psychosocial rehabilitation services should be addressed to the Bureau of Prevention, Treatment and Recovery, 1 W. Wilson Street, Room 850, P.O. Box 7851, Madison, WI 53707-7851.

(2) The service facilitator shall ensure that the consumer understands the options of using the formal and informal grievance resolution process in s. DHS 94.40 (4) and (5).

Wis. Adm. Code § DHS 36.19.

There is no dispute that petitioner was involuntarily discharged from the CCS program and receives MA.

The respondent also argues that in addition to complying with patient rights and grievance resolution procedures under Wis. Stat. § 51.61 and Chapter DHS 94, for Medical Assistance beneficiaries, CCS must comply with the fair hearing process under DHS 104.01(5). See Wis. Adm. Code § 36.19(1). Respondent argues that, pursuant to Chapter DHS 36, MA beneficiaries are only entitled to *notice* of sec. DHS 104.01(5) appeal procedures, but are not expressly entitled to an appeal as a matter or right at the first level; rather, it argues a hearing under sec/ DHS 104.01(5) would be allowable as a second level review after the grievance is filed with the Bureau of Prevention, Treatment and Recovery and if the petitioner was still aggrieved. The respondent further argues that is not appropriate to use the fair hearing process under sec. DHS 104.01(5) unless petitioner is appealing a benefit and/or eligibility determination made by the DHS because the fair hearing process is only available for certain types of appeals, such as denials, reductions, suspensions or terminations of MA benefits which are decided by the state MA agency, not [REDACTED]. The respondent provided arguments as to why [REDACTED], the service provider, is not the agency/DHS under this program. Under sec. DHS 104.01(5)(b):

The purpose of the fair hearing is to allow a recipient to appeal department actions which result in the denial, discontinuation, termination, suspension or reduction of the recipient's MA benefits. The fair hearing process is not intended for recipients who wish to lodge complaints against providers concerning quality of services received, nor is it intended for recipients who wish to institute legal proceedings against providers. Recipients' complaints about quality of care should be lodged with the appropriate channels established for this

purpose, to include but not limited to provider peer review organizations, consumer advocacy organizations, regulatory agencies and the courts.

Wis. Adm. Code § DHS 104.01(5)(b). Respondent further argues that this Code section expressly prohibits the nature of the petitioner's claims aimed at the CCS program provider and the quality of care services received from the provider.

Petitioner's arguments:

Petitioner argues that she properly appealed by requesting the fair hearing process through DHA for Wisconsin Medicaid participants under Wis. Admin. Code DHS §§ 104.01(5) and 36.17(5)(am)3. She argues that MA participants have a right to appeal when aggrieved by an action which results in denial, discontinuation, termination, suspension, or reduction of a recipient's MA benefits under 42 C.F.R. § 431.220(a) and Wis. Admin. Code DHS §§ 104.01(5). She argues that Wisconsin must establish a hearing system that meets requirements set out in Title XIX of the Social Security Act and Code of Federal Regulations, Title 42, Part 431, Subpart E to ensure it is administered in compliance with federal requirements and due process protections. Petitioner also argues that the fact that DHS has delegated the administration of CCS services to counties (who may then delegate to subcontracted agencies such as ██████), does not permit DHS to eliminate a MA recipient's due process rights, including the right to appeal a proposed involuntary discharge from CCS services, an action that results in a termination or reduction in covered benefits or service. The petitioner provided arguments as to why ██████, the service provider, is the agency/DHS under this program and why respondent is not correct that this appeal is a complaint about the quality of care.

In addition, petitioner argues that the grievance procedures would be futile as she previously attempted to use the grievance procedures in 2022 when she sought review from the BPTR for a previous discharge decision. Petitioner argues that the previous discharge was upheld and done without the features of the fair hearing process, as she was not given an opportunity present evidence, question witnesses or confront the evidence against her before a neutral arbiter, or other features essential to the fair hearing process. She also provided the BPTR review decision, which did not advise her of her right to request a state fair hearing. BPTR's decision upheld the discharge decision and advised her of her option to re-apply for CCS.

In sum, I find that the DHS is empowered to provide due process protections to MA recipients in Wisconsin by way of the federal regulations. It is true that Wisconsin must maintain a hearing system for MA that meets the requirements of the federal regulations. Under those regulations, the Wisconsin hearing system must provide for a hearing before the MA agency, or to the Exchange entity (not relevant here), or by an evidentiary hearing at the local level, with a right of appeal to the MA agency. See 42 C.F.R. § 431.205. Under Wis. Stat. § 51.42 (7)(b) DHS is authorized to make rules for the CCS program. Under Wis. Stat. § 51.61(5), DHS is authorized to create rules for a grievance procedure for the CCS. It specifically states:

The department shall promulgate rules that establish standards for the grievance procedure used as specified in par. (a) by the department, county departments under ss. [51.42](#) and [51.437](#) and service providers. The standards shall include all of the following components:

1. Written policies and procedures regarding the uses and operation of the grievance system.
2. A requirement that a person, who is the contact for initiating and processing grievances, be identified within the department and in each county department under ss. [51.42](#) and [51.437](#) and be specified by each service provider.
3. An informal process for resolving grievances.

4. A formal process for resolving grievances, in cases where the informal process fails to resolve grievances to the patient's satisfaction.
5. A process for notification of all patients of the grievance process.
6. Time limits for responses to emergency and nonemergency grievances, as well as time limits for deciding appeals.
7. A process which patients may use to appeal unfavorable decisions within the department or county department under s. [51.42](#) or [51.437](#) or through the service provider.
8. A process which may be used to appeal final decisions under subd. [7.](#) of the department, county department under s. [51.42](#) or [51.437](#) or service provider to the department of health services.
9. Protections against the application of sanctions against any complainant or any person, including an employee of the department, county department under s. [51.42](#) or [51.437](#) or service provider who assists a complainant in filing a grievance.

Wis. Stat. § 51.61(5)(b).

The DHS has created rules that establish standards for the grievance procedure pursuant to its authority from Wis. Stat. § 51.61(5)(b). Those rules are found at Wis. Adm. Code Chapter 94. If BPTR, the county, or █████ have written policies with respect to the grievance resolution system pursuant to those rules, none were provided for this matter.

Again, the CCS program rules at DHS Chapter 36 were enacted pursuant to authority from Wis. Stat. § 51.42(7)(b). Again, the relevant rules provide:

When a consumer is discharged from the CCS program, the consumer shall be given written notice of the discharge. The notice shall include all of the following:

1. A copy of the discharge summary developed under par. [\(b\)](#).
2. Written procedures on how to re-apply for CCS services.
3. **If a consumer is involuntarily discharged from the CCS program and the consumer receives Medical Assistance, the fair hearing procedures prescribed in s. [DHS 104.01 \(5\)](#). For all other consumers, information on how the consumer can submit a written request for a review of the discharge to the department.**

Wis. Adm. Code § DHS 36.17(5)(am)3 (emphasis added). And:

- 1) The CCS shall comply with the patient rights and grievance resolution procedures in s. [51.61](#), Stats., and ch. [DHS 94](#), and all of the following:
 - (a) Choice in the selection of recovery team members, services, and service providers.
 - (b) The right to specific, complete and accurate information about proposed services.
 - (c) For Medical Assistance consumers, the fair hearing process under s. [DHS 104.01 \(5\)](#). For all other consumers how to request a review of a CCS determination by the department.

Note: A written request for review of the determination of need for psychosocial rehabilitation services should be addressed to the Bureau of Prevention, Treatment and Recovery, 1 W. Wilson Street, Room 850, P.O. Box 7851, Madison, WI 53707-7851.
- (2) The service facilitator shall ensure that the consumer understands the options of using the formal and informal grievance resolution process in s. [DHS 94.40 \(4\)](#) and [\(5\)](#).

Wis. Adm. Code § DHS 36.19.

Under the federal regulations, Wisconsin may provide an evidentiary hearing at the local level, with a right of appeal to the MA agency. See 42 C.F.R. § 431.205(b)(2). Wisconsin has created a local level appeal right for CCS. See Wis. Adm. Code §§ DHS 36.17(5)(am)3 and 36.19. Thus, I agree with respondent that the first level review should have been appealed before filing with the DHA, and therefore this appeal is not ripe for review by DHA. However, I do not find that the notice issued to petitioner was adequate under these rules. The rules require that when the consumer receives MA, the notice of discharge must contain the fair hearing procedures prescribed in sec. DHS 104.01(5). It did not do so.

I add that I understand the previous discharge in 2022 did not contain appeal rights either, however, I do not have jurisdiction over that matter. DHS would be well advised to ensure its CCS review notices comply with the law in the future with respect to the fair hearing process and rights to appeal to DHA.

The hearing set for May 15, 2023 is hereby cancelled accordingly. If petitioner's grievance results in an unfavorable decision and she appeals again to the DHA, this administrative law judge will be assigned to that appeal.

CONCLUSIONS OF LAW

1. The respondent's motion to dismiss is granted as the matter is not ripe for appeal on the merits.
2. The respondent's notice of involuntary discharge was deficient under the law.

THEREFORE, it is

ORDERED

The matter is remanded to the respondent to issue a new notice of discharge to the petitioner containing the language required under Wis. Adm. Code § DHS 36.17(5)(am)3. The agency shall take this action within 10 days of this decision. In all other respects, the 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.

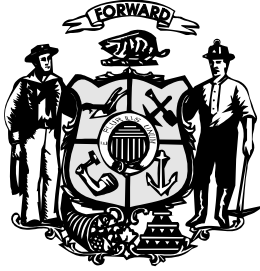
APPEAL TO COURT

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 Milwaukee,
Wisconsin, this 10th day of May, 2023

\s _____
Kelly Cochrane
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 May 10, 2023.

Lincoln County Department of Social Services
Division of Health Care Access and Accountability
Attorney Mike Soukup
Attorney Dejan Adzic