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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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██████████

DECISION
Case #: FCP - 206451

PRELIMINARY RECITALS

Pursuant to a petition filed on September 30, 2022, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. regarding Medical Assistance (MA), a hearing was held on November 30, 2022, by telephone. The hearing was initially set for October 19, 2022, but was rescheduled per Petitioner's request because Petitioner needed additional time to discuss possible representation with Disability Rights of Wisconsin. The hearing was rescheduled and ultimately held on November 30, 2022.

The issue for determination is whether the agency correctly terminated supervision for Portal Recreation events for Petitioner due to that supervision being a duplicative service.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████
██████████
██████████
██████████

Respondent:

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

By: Aisling Gray
Community Care Inc.
205 Bishops Way
Brookfield, WI 53005

ADMINISTRATIVE LAW JUDGE:

Nicole Bjork
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 34-year-old resident of Ozaukee County. He resides in an Adult Family Home (AFH). His primary diagnoses include Down syndrome, autism, epilepsy, and attention deficit hyperactivity disorder.
2. Petitioner is a Family Care Program (FCP) participant. Community Care Inc. is his managed care organization (MCO).
3. Due to Petitioner's medical diagnoses, if Petitioner's attention is not engaged with an activity, he will exhibit behaviors incompatible with his well-being. For example, he has walked away from activities in the past and wandered unsupervised into the community. Further, he can engage in obsessive-compulsive behaviors and can become self-injurious.
4. Petitioner's care plan notes two outcome goals. One is that he will be provided with social/community integration. Specifically, "member will continue to increase independence and ability to communicate by developing new meaningful relationships and improving his daily living skills through new experiences." Exhibit 2, page 22.
5. For the past 14 years, Petitioner has participated in the Portal Recreation (Portal) program which provides him with social/community integration opportunities in accordance with care plan. The Portal program provides Petitioner with a calendar of various community events that he can participate in, including sporting events, festivals, and seasonal events. Petitioner typically has 20-26 different events to choose from. Exhibit 2, page 32.
6. In accordance with a July 13, 2016 Division of Hearings and Appeals decision, Petitioner's plan allowed him to choose three activities per month from the Portal calendar. The decision, case number 157670, noted the necessity of Portal activities to meet Petitioner's needs and goals. Exhibit 2, page 28.
7. On August 16, 2022, Petitioner's MCO, Community Care, Inc., sent him a notice informing him that his supervision for Portal Recreation events would be terminated because the MCO believed that Petitioner's outcomes were being supported in other ways. Specifically, the notice stated that Portal Recreation was not cost-effective because he had other options for supervision in the community through his AFH and Adult Day Program (ADP). Thus, Community Care believed supervision at Portal Recreation events was duplicative.
8. Petitioner filed an appeal of the termination.
9. Both parties agree that Petitioner requires social integration and that integration into the community is part of Petitioner's care plan.

DISCUSSION

Family Care (FC) is a Medical Assistance funded waiver program authorized by the Center for Medicare and Medicaid Services (CMS) and is 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 managed care organizations (MCOs) throughout the state to provide case management to FC enrollees. Case management includes the identification and authorization of allowable and appropriate long term care services for individual FC recipients. Wis. Admin. Code, §DHS 10.44(2)(f).

The contracts between DHS and the individual MCOs require 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, (available at <https://www.dhs.wisconsin.gov/familycare/mcos/fc-fcp-2022-generic-final.pdf>). Regardless of

the particular service authorization process or policy utilized, the Family Care Contract prohibits an MCO from denying “services that are reasonable and necessary to cost-effectively support the member’s long term care outcomes identified in the comprehensive assessment as well as those necessary to assist the member to be as self-reliant and autonomous as possible.” Id. at Article V., Sec. K.2.a.

Services provided under FC are determined through an individual assessment of enrollee needs and values and detailed in an individual service plan (ISP) unique to each enrollee. When determining whether a service is necessary, the agency must review, among other things, the medical necessity of the service, the appropriateness of the service, the cost of the service, the extent to which less expensive alternative services are available, and whether the service is an effective and appropriate use of available services. Wis. Adm. Code, §DHS 107.02(3)(e)1.,2.,3.,6. and 7. "Medically necessary" means a medical assistance service under ch. DHS 107 that is:

- (a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
- (b) Meets the following standards:
 1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
 2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided;
 3. Is appropriate with regard to generally accepted standards of medical practice;
 4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
 5. Is of proven medical value or usefulness and, consistent with s. HFS 107.035, is not experimental in nature;
 6. Is not duplicative with respect to other services being provided to the recipient;
 7. Is not solely for the convenience of the recipient, the recipient's family, or a provider;
 8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
 9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Adm. Code, §DHS 101.03(96m).

Both parties agree that social/community integration is necessary to achieve Petitioner’s outcome goals. For the past 14 years, such integration was achieved through Portal activities. Yet, the MCO chose to terminate supervision for Portal activities because it believed that supervision to be duplicative.

In a hearing such as this, 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. Thus, it is the MCO’s burden to demonstrate that supervision at Portal events is now duplicative after being covered for 14 years.

The MCO representative, Aisling Gray, offered brief testimony. Ms. Gray testified, “We agree that he needs community integration.” However, Ms. Gray believed that Petitioner could obtain such integration through his AFH, which also provided social events. Ms. Gray further believed that he could obtain such integration through the ADP. No further testimony was provided other than the general statement that Petitioner’s integration needs could be met through his adult family home and his adult day program.

Petitioner’s mother testified on his behalf. Petitioner’s mother acknowledged that the AFH he resides in does provide some activities. However, she noted that not many activities are offered and that some of these

activities are in-house (watching a Packer game together). Petitioner's mother noted that there is no calendar of events offered in advance for residents to choose which activities they'd like to attend. Rather, the home will plan events that may not come to fruition due to staffing issues. For example, the MCO noted that the home had 12 events planned for October 2022. However, four of those events were canceled due to staffing. Additionally, while Petitioner liked his housemates, his mother noted that social activities with his same housemates does not provide him with community integration and new meaningful relationships, which is one of his care plan goals.

In contrast, Petitioner's mother noted that Portal offers 20-26 different activities every month, ranging from sporting events, to festivals, to seasonal events, and more. Petitioner is able to choose three activities that specifically interest him. These activities provide him with an opportunity to meet new people and integrate with the community, which are his care plan goals. Further, the activities are specific to Petitioner's interests. Due to Petitioner's medical diagnoses, he will wander if not interested in the activity and can engage in self-harming behavior.

Additionally, Petitioner's mother noted that Petitioner's adult day program, Balance, does not provide the requisite social/community integration. Balance is more focused on pre-vocational and daily living skills. Petitioner performs job-like functions through various forms of volunteering. Further, with Balance, Petitioner is solely with other disabled individuals. Petitioner is not out in the community at-large forming new relationships.

In response, the MCO representative did not address any of the noted issues with both the AFH and ADP in meeting Petitioner's social/community integration needs. Rather, the MCO representative again generally stated that she believed the AFH and ADP could meet Petitioner's needs.

Petitioner's mother further provided an abundance of evidence detailing the necessity of the Portal activities and that Petitioner's needs were not being met anywhere else. Petitioner's mother produced letters from Petitioner's physician, Dr. [REDACTED], and Portal Social and Recreation manager, [REDACTED]. Both expressed the need for Petitioner to continue with the Portal activities as those needs were not being met elsewhere. Petitioner's mother also produced the Portal activity calendars for several months, demonstrating the stark contrast between Portal activities and the AFH activities. Petitioner's mother also produced emails between herself and the AFH related to the lack of activities available to Petitioner. Exhibit 2.

The MCO representative's only response to the plethora of evidence submitted by Petitioner's mother was that the MCO was not disputing Petitioner's need for social/community integration.

With the evidence and testimony at hearing, I cannot find that the MCO has met its burden to show that it correctly discontinued Petitioner's supervision at Portal events. The limited number of participants in the AFH activities and the limited variety of activities and exposure to the community is especially relevant to Petitioner's outcome of socialization/community integration. No evidence was presented that engaging in the same type of activities with the same few people month after month is equivalent to the variety of activities and large number of participants offered by the Portal program. Also, the types of activities offered by Portal are more community-oriented and provide Petitioner with greater access to the community.

Based on the totality of the evidence, I find that the MCO has not met its burden of demonstrating that Petitioner's care plan goal of increased socialization/community integration is being met by the activities scheduled in his adult family home or adult day program.

CONCLUSIONS OF LAW

The agency has not met its burden to show that it correctly terminated Petitioner's supervision for Portal Recreation activities.

THEREFORE, it is

ORDERED

That this matter is remanded to the Family Care Program and the MCO to re-instate Petitioner's participation in the Portal Recreation program retroactive to September 4, 2022. These actions shall be completed within 10 days of the date 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 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.

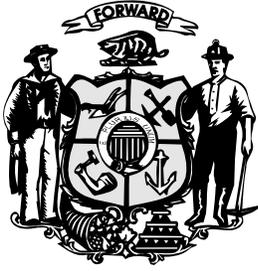
APPEAL TO COURT

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 30th day of January, 2023

\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 January 30, 2023.

Community Care Inc.
Office of Family Care Expansion
Health Care Access and Accountability