



FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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

DECISION
Case #: CWA - 215921

PRELIMINARY RECITALS

Pursuant to a petition filed November 15, 2024, under Wis. Admin. Code, §HA 3.03, to review inaction by the Division of Long-Term Care regarding the Include, Respect, I Self-Direct (IRIS) program, a hearing was held on January 16, 2025, by telephone.

The issue for determination is whether the Division of Hearings and Appeals has authority to order the Department to act on an application for a restraint waiver.

PARTIES IN INTEREST:

Petitioner:

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

Respondent:

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

By: Sue Rothe, First Person Care Consultants
Division of Long-Term Care
PO Box 7851
Madison, WI 53707-7851

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 24-year-old resident of Rock County.

2. Petitioner is eligible for IRIS with First Person Care Consultants as his consulting agency. Petitioner's mother is his authorized representative and primary caretaker.
3. Petitioner has autism, epilepsy, disruptive mood dysregulation, and intermittent explosive disorder. Caregivers have learned that when he becomes aggressive/combatative, he can be calmed by a "bear hug" restraint. While restraints are generally not allowed for Medicaid Waiver clients, the Department does provide a process for specific waivers. In 2023, the Division of Medicaid Services (DMS) review panel granted approval for petitioner's caregiver to use the bear hug restraint. Petitioner's Exhibit 2. The approval expired June 21, 2024.
4. Petitioner's mother reapplied for the restraint approval on May 1, 2024. After some glitches caused the application to be returned and resubmitted, it expired after six months. The IRIS agency then resubmitted the application in early December, 2024, on petitioner's behalf.
5. Petitioner's mother filed this appeal contesting the DMS inaction on the restraint application. As of the hearing date the DMS still had not made a decision on the application.

DISCUSSION

The IRIS program was developed pursuant to a Medical Assistance (MA) waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(c) of the Social Security Act. It is a self-directed personal care program.

The federal government has promulgated 42 C.F.R. §441.300 - .310 to provide general guidance for this program. Those regulations require that the Department's agent must assess the participant's needs and preferences (including health status) as a condition of IRIS participation. *Id.*, §441.301(c)(2). The Department's agent must also develop a service plan based on the assessed needs.

The IRIS program is a Medical Assistance long term care waiver program that serves elderly individuals and adults with physical and developmental disabilities. IRIS is an alternative to Family Care, Partnership, and PACE—all of which are managed long term care waiver programs. The IRIS program, in contrast, is designed to allow participants to direct their own care and to hire and direct their own workers. The broad purpose of all of these programs, including IRIS, is to help participants design and implement home and community-based services as an alternative to institutional care. See *IRIS Policy Manual*, §1.1B.

The IRIS program is operated entirely by State policy with little detail in statutes or the Wisconsin Administrative Code. State policies governing administration of the IRIS program are included in the *IRIS Policy Manual* (available at www.dhs.wisconsin.gov/publications/P0/P00708.pdf), *IRIS Work Instructions* (available at www.dhs.wisconsin.gov/publications/P0/P00708a.pdf), and *IRIS Service Definition Manual* (available at www.dhs.wisconsin.gov/publications/p00708b.pdf).

Generally MA providers are not allowed to restrain clients/participants. The Department has guidelines on restrictive measures published in Manual no. P-02572. It allows for a waiver of the restrictive measure prohibition in certain instances following an application to the Department. Such an application was approved for petitioner in 2023, allowing the bear hug restraint. Petitioner's mother has filed a new application following the expiration of the 2023 waiver, but the Department still has not acted on it after eight months.

Petitioner has appealed the inaction to the Division of Hearings and Appeals. I cannot find any authority to act on the appeal. The guideline Manual provides that a disallowed waiver can be grieved to the Bureau

of Quality and Oversight. However, the decision of that office is final. There is nothing in the Manual that would suggest an appeal to the Division of Hearings and Appeals is available. See petitioner's exhibit 9, which is the Restricted Measure Review flow chart – the chart does not include the option of appealing to the Division of Hearings and Appeals.

The reason for the lack of appeal is simple. Although petitioner's mother has framed this appeal as one by petitioner – the IRIS participant – the Restricted Measure policy is not a benefit to the IRIS participant. It is an allowance to the caregiver. Petitioner's mother acknowledged that fact when she testified that *she* was afraid of being charged for using the bear hug. Petitioner's mother thus attempts to create a hearing right for herself by grafting her son's name onto the case as petitioner.

The *IRIS Policy Manual*, section 11.1A, describes situations that can be appealed to the Division of Hearings and Appeals. It also allows grievances of any action or inaction by the IRIS program. Participants may appeal the following:

- Reduced, terminated, or denied requests for services;
- Denied request for payment;
- Failure to provide services or items included in a participant's support and service plan in a timely manner;
- Failure to resolve appeal or grievance in a timely manner; and
- Unacceptable support and service plan because it:
 - Requires participant to live somewhere they do not choose to live;
 - Fails to provide sufficient care, treatment, or support; or
 - Requires the participant to accept care, treatment, or support that is unnecessarily restrictive or unwanted.

None of those items suggest a right to appeal the results of a Restricted Measure Review. As noted, the restricted measure waiver is not a service to petitioner, it is an allowance to the caregiver. Possibly this appeal could be fashioned as an appeal of the failure to resolve a grievance in a timely manner, but no grievance has been filed as far as I can tell, and further, petitioner's mother's grievance is not with the IRIS consulting agency, but with the Department.

There is a general appeal provision in Wis. Stat., sec. 227.42(1) allowing appeals in certain situations, but such an appeal is not allowed if there is legislative intent that the interest is not protected by an appeal right. The Department's specific disallowance of a right to appeal makes evident that it did not intend to give participants a right to appeal Restrictive Measures determinations.

Finally, as a matter of fact, petitioner and his caregivers have not been harmed by the Department's inaction. During the hearing, the First Person Care Consultants representatives acknowledged that caregivers are still given leeway to use the bear hug on petitioner while the waiver request is pending, as long as the incident is reported (in petitioner's mother's defense, it does not appear that she understood that there was no penalty for using the bear hug while the application is pending). It was stated that petitioner's mother has done an excellent job of reporting, and the agency is satisfied with her actions.

Therefore, I will dismiss the appeal because first, there is no evidence that the Division of Hearings and Appeals has authority to review Restrictive Measure issues, and second, petitioner and his caregivers are not harmed by the delay in the waiver application because the IRIS agency is allowing the bear hug restriction while the waiver application is pending.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals does not have authority to order the Department to act on a Restrictive Measures waiver because the Department has not provided an appeal right on such decisions.
2. Petitioner and his caregivers are not harmed by the delay in the waiver application because the IRIS agency is allowing the use of the requested restricted measure while the application is pending.

THEREFORE, it is

ORDERED

That the petition for review is hereby 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.

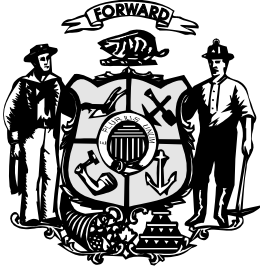
APPEAL TO COURT

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 22nd day of January, 2025

\s _____
Brian C. Schneider
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 22, 2025.

Bureau of Long-Term Support