FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION
Case #: CWA - 195974

PRELIMINARY RECITALS

Pursuant to a petition filed on September 26, 2019, 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 December 12, 2019, at Milwaukee, Wisconsin. A hearing was initially set for November 20, 2019, but was rescheduled to December 12, 2019, per Petitioner's request so that his attorney could attend.

The issue for determination is whether the agency correctly disenrolled Petitioner from the IRIS program due to Petitioner's refusal to comply with IRIS program requirements and for health and safety risks that Petitioner was unable or unwilling to resolve.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

[redacted]

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:
Nicole Bjork
Division of Hearings and Appeals

FINDINGS OF FACT

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

2. Petitioner has cerebral palsy, seizure disorder, paralysis, and an intellectual disability. He has a colostomy and is subject to urinary tract infections. He requires 24 hour supervision and has been an IRIS participant for at least several years, with TMG as his care management agency.

3. For over 7 years, Petitioner has had a sole caregiver, [redacted]. [redacted] is also wheelchair bound. No evidence was presented that [redacted]'s health conditions affect his ability to be an adequate caregiver for Petitioner.

4. On August 24, 2017, the agency issued a notice to Petitioner notifying him that he was being disenrolled from the IRIS program because having only one caregiver was deemed unsafe and because Petitioner failed to communicate changes to TMG or use his MA authorized personal care worker (PCW) hours. Petitioner filed a timely appeal of that notice.

5. On March 13, 2018, the Division of Hearings and Appeals issued a decision regarding the appeal noted in Finding of Fact #4. In that decision, Administrative Law Judge Brian Schneider noted that several months passed between the filing of the appeal and the hearing date due to Petitioner's requests as he attempted to come to a resolution with TMG prior to hearing. During that period, ALJ Schneider noted that Petitioner made attempts to resolve communication issues with the agency and also that Petitioner began utilizing his MA authorized PCW hours (with [redacted] as the hired caregiver) and that Petitioner hired two backup caregivers (that still had to be trained). Since Petitioner made great strides towards complying with the agency's requests since the notice of disenrollment, ALJ Schneider concluded that a disenrollment from the program was not warranted at that time but that he expected Petitioner to follow through on all steps to resolve issues with TMG. ALJ Schneider noted, "Petitioner knows that he must comply with these requirements, so I would expect him to be on his best behavior." Exhibit F3.

6. On June 21, 2019, TMG received an adult protective services report regarding an incident reported by [redacted] staff. The report alleged that Petitioner arrived for a medical procedure and was noted to be wearing dirty clothing, having feces on his wheelchair, that his Foley catheter was overflowing and that he required a bath before the procedure could be performed. No one from TMG contacted the social worker that completed the report to verify the information contained in that report.

7. After TMG received the adult protective services report, IRIS consultant [redacted] created a risk agreement regarding the need for additional caregiver support.

8. On July 1, 2019, [redacted] spoke with Petitioner and his caregiver regarding concerns that [redacted] was subject to caregiver burnout and the health risks that created for both [redacted] and Petitioner. Petitioner refused to consider adding any other caregiver into the home due to his fear of being abused by a caregiver. [redacted] then asked Petitioner to consider assistance in the home that had nothing to do with physically caring for Petitioner, such as enrolling in a meal delivery service and also having a cleaning service come into the home so that those tasks could be removed from [redacted]. Petitioner again refused to have anyone other than [redacted] care for him, perform all cleaning and all meal preparations. TMG gave Petitioner 10 days to provide a backup plan and to either add additional caregivers, additional caregiving services or arrange for routine respite care.

9. In early August 2019, Petitioner informed TMG that he would attend a day program 2-3 days per week at [redacted] and would add an occasional overnight respite stay for emergencies. TMG did not find this solution to fully mitigate the risks to his health and safety associated with one sole caregiver providing all tasks and duties.

10. On August 27, 2019, the agency sent a notice of disenrollment to Petitioner. The notice stated that the agency had ongoing health and safety issues with Petitioner's choice to have only one caregiver perform all tasks and that those issues had not been fully mitigated, including Petitioner's failure to have a backup plan or have enough workers to complete all tasks. The notice cited IRIS Policy 7.1A.1 which notes that participants may be involuntarily disenrolled from IRIS when there has been a refusal to comply with IRIS program requirements or when there are health and safety risks that participants are unable or unwilling to resolve.

11. Petitioner filed a timely appeal of the notice of disenrollment.

DISCUSSION

The 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. It is a self-directed personal care program.

Chapter 7 of the *IRIS Policy Manual: Work Instructions (IRIS Manual*) governs disenrollments from the program. Specifically, § 7.1A.1 sets forth the involuntary disenrollment business rules:

> The Department of Health Services (DHS), Office of IRIS Management (OIM), reserves the right to disenroll IRIS participants based on noncompliance with IRIS policy in the following areas:
>
> a. Failure to utilize IRIS funding (No Spend)
> b. No contact
> c. Residing in an ineligible living setting
> d. Health and safety risks that participants are unable or unwilling to resolve
> e. Substantiated fraud
> f. Mismanagement of budget authority
> g. Mismanagement of employer authority
> h. Refusal to comply with IRIS Program requirements
> i. Failure to pay cost share
> j. Loss of financial eligibility
> k. Loss of functional eligibility

There is no dispute that the agency has the authority to disenroll a participant when there are health and safety risks that the participant is unable or unwilling to resolve. Further, there is no dispute that the agency has the authority to disenroll a participant for the refusal to comply with IRIS program requirements.

In this case, the agency has had numerous conversations with Petitioner regarding the health and safety risk of having only one caregiver. Petitioner is noted to have significant caregiving needs. Exhibit C. Further, in addition to performing all physical caregiving duties for Petitioner, [redacted] also performs all of the cooking and cleaning in Petitioner's home. While the sole caregiver concerns have existed for some time, the issue escalated when the agency received an adult protective services report that Petitioner showed up at [redacted] for a procedure and was noted to be dirty and unkempt. The report itself is hearsay.

The statutory rules of evidence, including the rule against hearsay, do not apply to this hearing. Wis. Stat. §227.45(1). There is no legal basis for excluding this evidence on grounds that it is hearsay. The report was admitted over Petitioner's objection.

However, there is a difference between properly admitted evidence and substantial evidence. The decision of the Administrative law judge ("ALJ") must be supported by substantial evidence. *Gehin v. Wisconsin Group Insurance Board*, 278 Wis.2d 111, 134 (2005) Substantial evidence is "that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion." *Id.* at 132-133 (Internal citations omitted.)

It is the longstanding rule in Wisconsin that in administrative hearings uncorroborated hearsay evidence alone does not constitute "substantial evidence", regardless of its reliability. *Id.* at 118, citing *Folding Furniture Works v. Wisconsin Labor Relations Board,* 232 Wis. 170, 189 (1939). Under this "legal residuum" rule, ALJs are not empowered to base findings solely upon uncorroborated hearsay. *Ibid.* See also *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987) and *Outagamie County v. Town of Brooklyn*, 18 Wis. 2d 303, 312 (1962).

Since no evidence was presented to corroborate that Petitioner arrived at [redacted] dirty and unkempt, that report was not proof that [redacted] was neglecting his caregiving duties. Thus, the report was not considered in this decision. Therefore, the issue turns to whether a sole caregiver under these circumstances presents a significant health and safety risk due to caregiver burnout.

There is no dispute that Petitioner has great affection for [redacted] and that [redacted] and Petitioner have an extremely close relationship. However, Petitioner's level of codependency on [redacted] is understandably concerning to the agency. Caregiver burnout is a valid concern and can lead to health and safety risks. The agency's options to mitigate those health and safety risks, such as enrolling in home meal delivery service, hiring a cleaning service, adding an additional caregiver, were reasonable. However, Petitioner refused the options presented by the agency to mitigate those risks.

During the hearing, Petitioner's testimony was that he adamantly refused to have any service bring in meals or clean his home so that [redacted]'s duties could be reduced. Petitioner vehemently objected to anyone entering the home because Petitioner was abused by caregivers in the past. Petitioner's fears are understandable. However, the assistance mentioned, meal delivery and cleaning, would not provide any physical contact with Petitioner and such services could only benefit Petitioner and lighten the load on [redacted].

TMG representative, [redacted], credibly testified that she has had numerous conversations with Petitioner regarding the agency's concerns for his health and safety with having only one caregiver perform all tasks. [redacted] noted that the agency has attempted to work with Petitioner on numerous occasions by offering multiple options in order to come to an acceptable agreement that would address these health and safety concerns while meeting Petitioner's concerns regarding abuse from outside caregivers. However, [redacted] testified that Petitioner refuses to even consider any outside assistance in his home and this refusal prevents the agency from ensuring his health and safety, something the agency is required to do.

On the other side, Petitioner argued that a prior DHA decision, dated March 13, 2018, found that [redacted] as a sole caregiver was a safe and healthy option. However, that argument simplifies that decision. The decision does not conclude that a sole caregiver presented no health and safety risks or that caregiver burnout wasn't a valid concern. Rather, the decision found that because Petitioner acknowledged the agency's concerns and made great strides to cooperate with the agency to alleviate those concerns, by adding PCW hours, hiring backup caregivers, and communicating more effectively, that demonstrated that Petitioner was willing to accept additional care so that [redacted] wouldn't burn out. Essentially, because Petitioner was willing to cooperate to address TMG's concerns, Petitioner was entitled to another shot at maintaining IRIS services. That decision was also clear that the ALJ expected Petitioner to, "be on his best behavior," and comply with all IRIS requirements. Since that decision, no evidence was presented

that the backup caregivers actually ever provided any assistance to mitigate the caregiver burnout concerns.

In the prior appeal, Petitioner demonstrated his willingness to comply with the agency's requests in order to address the health and safety concerns associated with having a sole caregiver. In contrast, during this current appeal, Petitioner refused to even acknowledge that there was a safety concern with only having one caregiver perform all caregiving, cooking and cleaning. Petitioner refused to allow any outside caregiver into his home. Petitioner refused meal assistance or cleaning assistance, even if such assistance occurred while Petitioner was outside of the home for an activity. Petitioner has difficulty speaking for extended periods of time and submitted five pages of written arguments regarding why [redacted] should be his one and only caregiver and why he refused to consider any outside caregiver. Again, in the current instance, Petitioner is refusing to address the health and safety risks associated with having one caregiver and instead arguing why one caregiver is good enough. This is a huge contrast to the prior appeal when he acknowledged the agency's concerns and demonstrated a willingness to cooperate.

Since Petitioner is completely unwilling to entertain any sort of additional assistance in his home, the agency cannot ensure a safe and healthy environment for Petitioner. While Petitioner had stated that he would attend days at [redacted] to offer respite, there was no evidence submitted that Petitioner actually entered into an agreement with [redacted] where he would be *routinely* cared for 2-3 times per week..

I do not take lightly the effect the IRIS disenrollment will have on Petitioner. Petitioner appears to be emotionally and psychologically attached to [redacted] in an extremely codependent relationship. However, given Petitioner's refusal to allow anyone to assist [redacted] and the failure to demonstrate that he is actually enrolled in a weekly day program at [redacted] (not just occasionally), the very real health and safety risks of having one caregiver have not been mitigated. If Petitioner had been willing to accept any sort of assistance or demonstrate any concrete action towards routine respite, the decision would be different. But after reviewing Petitioner's own five page statement, it is clear that Petitioner isn't interested in any option that removes [redacted] as his sole caregiver for all duties related to Petitioner's care and home. Since the agency's concerns have not been mitigated and Petitioner is not interested in mitigating those concerns, the agency cannot ensure Petitioner's health and safety in the IRIS program, which it is required to do.

Disenrollment from the IRIS program does not necessarily mean that Petitioner is ineligible for all services; Petitioner might have to apply for Family Care or another program that does not include self-directed services but instead has more involvement from agency case managers to make certain that services are provided.

CONCLUSIONS OF LAW

The agency correctly disenrolled Petitioner from the IRIS program for failure to resolve health and safety risks.

THEREFORE, it is ORDERED

That this 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, 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 6th day of January, 2020

\s_____
Nicole Bjork
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
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on January 6, 2020.

Bureau of Long-Term Support
[redacted]