



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION
Case #: FCP - 211094

PRELIMINARY RECITALS

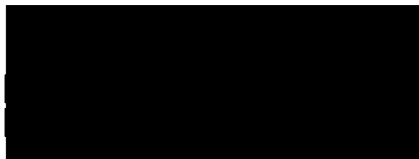
Pursuant to a petition filed on November 17, 2023, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. regarding Medical Assistance (MA), a hearing was held on January 4, 2024, by telephone. The hearing record was held open until January 9, 2024 to allow Petitioner's representative to submit additional supporting documentation and until January 12, 2024 to allow Respondent to reply. Petitioner's representative submitted a letter brief, a prior decision issued by the Division of Hearings and Appeals, [REDACTED] licensing information, information regarding [REDACTED], and documents from Community Care including Petitioner's member centered plan, a semi-annual assessment, and Community Care's Member Handbook. Respondent submitted a written reply. All documents were submitted timely and have been incorporated into the hearing record.

The issue for determination is whether the adult day program services requested by Petitioner constitute a duplication of services that he receives from the community based residential facility where he resides.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Patti Noble
Board on Aging & Long Term Care
1402 Pankratz St #111
Madison, WI 53704

Respondent:

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

By: Mark Schroeder, Community Care Program Manager
Community Care Inc.
205 Bishops Way
Brookfield, WI 53005

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

FINDINGS OF FACT

1. Petitioner is a 69-year old resident of Waukesha County who has received Family Care benefits through Community Care, a managed care organization (“MCO”), since 2010.
2. Petitioner suffered anoxic encephalopathy at age 3 and has consequent intellectual disabilities. Petitioner has other medical diagnoses including but are not limited to: dementia without behavioral disturbance, depression, generalized anxiety disorder.
3. Petitioner’s goals include remaining in the least restrictive environment that meets his care and safety needs, to have his socialization needs met, and to participate in activities.
4. Petitioner has resided at [REDACTED], a community based residential facility (“CBRF”) since January 2023.
5. Community Care pays [REDACTED] a negotiated rate to provide Petitioner “all-inclusive care”. [REDACTED] is therefore expected, as part of its contract with Community Care, to provide Petitioner with activities and socialization in addition to all other cares and supports that he requires.
6. Petitioner has attended adult day program services at [REDACTED] (“[REDACTED]”) five days a week from 8:00AM to 3:00PM since January 16, 2023. Community Care has paid for those services.
7. The programming offered by [REDACTED] focuses on recreation, communication, opportunity for socialization, community involvement, and working on independence skills.

[REDACTED] offers 4 – 5 scheduled activities in addition to unscheduled activities each day. Scheduled activities take place both on-site and in the community. Participants choose what activities, if any, they would like to participate in.

[REDACTED] has four vehicles and offers participants a chance for community involvement every day. Activities in the community that [REDACTED] regularly offers include “lunch club”, going bowling, site seeing, going to the zoo, participating in food drives, and visiting a coffee shop that employs individuals with special needs. Petitioner chooses to go into the community several times a month.

On-site activities that [REDACTED] regularly offers include therapy (e.g., art therapy, music therapy, pet therapy), entertainment (e.g., petting zoo, guitar player, magician, and other booked entertainers); independence skills (e.g., participants may clean up after lunch or fold laundry).

Approximately 50 individuals attend [REDACTED] and there are 14 staff.

The participants at [REDACTED] are involved in developing the activities calendar each month.

8. During the year that Petitioner has attended [REDACTED], the owner / operator of [REDACTED] has observed his demeanor change. Whereas he was initially uncertain, shy, and stubborn, he has since made friends with whom he socializes, chooses to join activities, and is cooperative.
9. Petitioner’s guardian has observed Petitioner develop self-confidence and a sense of purpose since he began to attend [REDACTED].
10. Petitioner has described his adult day programming as “his job” and expressed to his care manager and his guardian that he enjoys going there and wishes to continue.
11. [REDACTED] is an 8-bed CBRF. There are currently seven residents there.
12. [REDACTED] is staffed by one caregiver per shift whose responsibilities include preparing, serving, and cleaning up after meals; providing residents with all of their cares; passing medications, responding to emergencies, and running activities.
13. [REDACTED] offers activities including arts and crafts, word puzzles, television, Connect 4, and coloring books. [REDACTED] also offers some in-house entertainment. The amount and scheduling of these activities is unknown.
14. [REDACTED] does not provide routine transportation for outings into the community.
15. On October 6, 2023, Community Care issued a notice to Petitioner advising him that the authorization for day programming would be terminated because he lives in an “all inclusive facility where activities and socialization is provided.”
16. Petitioner filed an internal appeal of the termination of day programming and, on November 14, 2023, Community Care’s Grievance and Appeal Committee upheld that determination.

DISCUSSION

Family Care (FC) is a Medical Assistance funded program 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 several managed care organizations (MCOs) throughout the state to provide case management which includes the authorization of allowable and appropriate long term care services for individual FC recipients. Wis. Admin. Code §DHS 10.44(2)(f).

The issue in this case is whether the MCO acted appropriately in terminating Petitioner’s adult day programming based on a finding that it is duplicative of services that he receives from the CBRF where he resides. 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, the burden falls upon the MCO to prove that it had a reasonable basis upon which to terminate Petitioner’s adult day programming.

The administrative code chapter that governs Family Care sets forth the following requirements relevant to the process MCOs must employ in making service authorization determinations. The first step the administrative code mandates is an identification of every enrollee's "needs and strengths" in several areas including autonomy and self-determination, communication, mental health and cognition, and community integration. See Wis. Admin. Code §DHS 10.44(2)(e)1. Next, the MCO must identify "long-term care outcomes" that "are consistent with the values and preferences" of enrollees in a variety of areas including self-determination of daily routine, services, activities and living situation, social roles and ties to family, friends and community, and desired level and type of participation in community life. See Wis. Admin. Code §DHS 10.44(2)(e)2.

The MCO is then required to develop an individual service plan that meets the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e) 1.
2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e) 2. and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.
3. Is cost-effective compared to alternative services or supports that could meet the same needs and achieve similar outcomes.

Wis. Admin. Code §DHS 10.44(2)(f).

Community Care contended that the requested adult day programming that Petitioner wishes to continue receiving at [REDACTED] is duplicative of activities offered by [REDACTED]. Community Care based that contention on the fact that the CBRF is paid an "all-inclusive fee". In other words, the CBRF has agreed to provide its residents who are Family Care members all the services they require including opportunities for socialization and activities. Community Care argued that Petitioner therefore does not need to obtain socialization opportunities and other activities elsewhere. Mark Schroder, the Program Manager with Community Care, testified that [REDACTED] could have chosen to contract for a lesser non-inclusive fee and that had the CBRF done so, the MCO would have been willing to authorize ongoing adult day programming for Petitioner at [REDACTED].

Community Care's argument is reasonable but to prevail based on that argument, Community Care must show that the CBRF is, in fact, providing the socialization and activities that the MCO is paying them to provide. Just because the CBRF is paid to provide all services does not, in fact, prove that the CBRF is providing all services.

Petitioner's representative and guardian and the owner/operator of [REDACTED] all appeared at hearing and offered detailed testimony regarding the variety of the activities included in the adult day programming at [REDACTED] and of program members' participation in selecting the types of activities that will be offered each month. Petitioner's care manager testified that she has seen musicians and other entertainers when she has visited [REDACTED] and that they have crafts and puzzle books that Petitioner enjoys. The MCO did not however offer any additional detail regarding the activities or opportunities for socialization offered by the CBRF.

The owner/operator of [REDACTED] also offered detailed testimony regarding the extent to which [REDACTED] programming allows Petitioner to get out into the community. Moreover, both she and Petitioner's guardian testified that he regularly takes part in those community outings. When asked whether the CBRF offers transportation for outings, the MCO's witnesses testified that they did not know.

Based on the evidence in the record, I am persuaded that adult day programming is needed to meet Petitioner's long term care outcomes—specifically but not limited to his wish to engage in the community. And, Petitioner has been able to engage in the community not only by going on community outings routinely offered by [REDACTED] but also by simply attending [REDACTED] where he has a large number of peers with whom to interact and forge relationships. The evidence in the record did not establish that the CBRF is providing sufficient adult day programming to meet this particular Petitioner's needs.

For the reasons set forth above, I am remanding this matter to the MCO with instructions to continue providing Petitioner the services that he has been receiving at [REDACTED].

If circumstances change and the MCO begins to offer more robust adult day programming and/or the MCO locates another provider that offers sufficient programming to meet Petitioner's needs, the MCO is not precluded from switching Petitioner's provider.

Finally, I note that there was a question at hearing as to whether the Division of Hearings and Appeals could consider the MCO's related termination of transportation to and from adult day program services at [REDACTED]. The MCO argued that DHA could not do so because Petitioner did not explicitly appeal the termination of transportation and because transportation is a separate service authorization. I concur. Petitioner may however make a new request from the MCO to authorize transportation to and from [REDACTED], given the outcome of this hearing, and if that request is denied, Petitioner may file an appeal regarding that denial.

CONCLUSIONS OF LAW

A preponderance of evidence in the record did not establish that the adult day programming that Petitioner receives from [REDACTED] is duplicative of services that he receives from [REDACTED].

THEREFORE, it is

ORDERED

The matter is remanded to Community Care to, within ten days of the date of this decision, authorize ongoing adult day programming for Petitioner at [REDACTED] and ensure that Petitioner receives documentation confirming that authorization.

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.

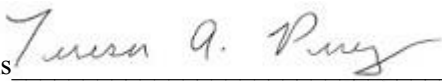
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

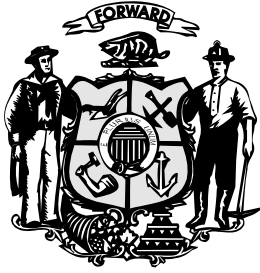
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision 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 12th day of February, 2024


s _____

Teresa A. Perez
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 February 12, 2024.

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

