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

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In the Matter of



**DECISION**  
Case #: FCP - 213572

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**PRELIMINARY RECITALS**

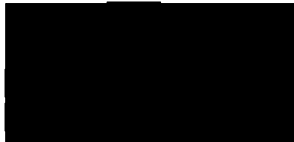
Pursuant to a petition filed on May 29, 2024, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. regarding Medical Assistance (MA), a hearing was held on September 4, 2024, by telephone.

The issue for determination is whether the agency correctly terminated supervision of after-hours recreation activities as a duplication of services.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

**Petitioner:**



**Petitioner's Representative:**

Attorney Jules Plumitis  
Disability Rights Wisconsin  
6737 W. Washington St. Suite 3230  
Milwaukee, WI 53214

**Respondent:**

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

By: Maureen Ansay  
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 resident of Ozaukee County. Her primary diagnoses include mitochondrial disorder, POTS, IDD, dysautonomia, low back pain, cerebral ataxia, cholecystitis, convulsive syncope, chronic pain, depression, dysphagia, seizure disorder, anxiety, legally blind, obesity, obsessive compulsive disorder, optic atrophy, peripheral neuropathy, PTSD, spina cord compression, spondylosis, and urinary retention.
2. Petitioner has participated in the Family Care Program (FCP) since 2016. Petitioner's managed care organization (MCO) is Community Care, Inc. Petitioner requires assistance with numerous activities of daily living (ADLs) as well as instrumental activities of daily living (IADLs).
3. Up until April 28, 2024, Petitioner resided with her mother her entire life. Her mother was her primary caregiver. Between 2016 and April 28, 2024, the agency authorized numerous supports to assist Petitioner's mother with her care, including durable medical equipment, caregivers, counseling services, physical therapy, day program participation, and supervision for after-hours [REDACTED] recreational programs (typically from 4:00 pm to 8:00 pm). The supervision for [REDACTED] after-hours recreational programs was approved during this time to provide Petitioner's mother with respite time as well as provide Petitioner with social and recreational opportunities.
4. In November 2022, Petitioner's mother and the MCO discussed residential placement for Petitioner. It was becoming increasingly difficult for Petitioner's mother to find caregivers. The agency discussed what residential placement would mean for Petitioner, including how that would impact Petitioner's participation in after-hours [REDACTED] recreation activities. The MCO explained that if Petitioner moved into a residential facility, those after-hours [REDACTED] recreation activities would no longer be authorized because the facility would be contractually responsible for providing activities for Petitioner and the MCO could not approve duplicative services. At that time, Petitioner and her mother were looking at a specific residential facility that would have met all of Petitioner's needs and desires. Unfortunately, that facility did not have any openings. Petitioner remained residing with her mother.
5. Beginning in February 2024, Petitioner began attending day programming. Day programming provides social, recreational, and community opportunities for Petitioner.
6. In February 2024, Petitioner's mother and the MCO began to again discuss placement in a residential facility. Petitioner's mother noted that securing caregivers continued to be difficult and that as she was getting older, the physical requirements of caring for Petitioner were more challenging.
7. In March 2024, a potential residential facility became available. Petitioner had very specific requirements for a residential facility. The facility had to be in Ozaukee County and would need to provide her with her own room. Further, the facility had to be wheelchair accessible and have caregivers that could aid with Petitioner's G-tube. This facility met those requirements. Further, it was contractually required to assist residents with attending day programs or work programs.

8. On April 2, 2024, an MCO worker again reiterated to Petitioner's mother what changes would occur if Petitioner moved into a residential facility. Specifically, the MCO worker discussed budget changes and what is included in an all-inclusive residential facility. Petitioner's mother was informed that Petitioner would be allowed to continue to participate in day programs as this specific residential facility contracted for that. However, she was informed that after-hours [REDACTED] recreational activities would no longer be covered because such activities are part of the all-inclusive rate at the facility. Petitioner and her mother toured the residential facility and met with the residential provider. After meeting with the MCO worker, touring the home, and meeting with the provider, Petitioner and her mother chose to apply for placement in this adult family home (AFH), understanding the implications of that move.
9. On April 23, 2024, an MCO worker spoke with Petitioner's mother and reiterated earlier conversations that once Petitioner moved into a residential facility, supervision for [REDACTED] after-hours recreational activities would no longer be covered because the residential facility was contractually obligated to provide supervision and also recreational activities.
10. On April 23, 2024, the MCO sent a notice to Petitioner informing her that supervision of after-hours recreational activities would be terminated as that was duplicative of services she was already receiving. Petitioner appealed that determination to the MCO Grievance and Appeals Committee.
11. On April 28, 2024, Petitioner moved into the AFH.
12. In May 2024, the Grievance and Appeals Committee upheld the determination to terminate supervision for [REDACTED] after-hours recreational activities.
13. Petitioner filed an appeal with the Division of Hearings and Appeals. As part of the appeal, she submitted a letter from the owner of her residential facility. He stated that Petitioner would benefit from attending [REDACTED] after-hours recreational programs because those programs provide a better fit for Petitioner's desires and needs. He noted that recreational programs are provided by his residential facility, but that the [REDACTED] programs include going to restaurants, theater, swimming, hiking in the park, musicals, plays, scavenger hunts, bowling, horseback riding, and other activities that allow Petitioner to spend time with her friends.
14. During the hearing, Petitioner's mother testified on her behalf and noted that Petitioner has spent years attending these after-hours [REDACTED] and has cultivated friendships during that time. Petitioner considers these to be her best friends and her community. If she no longer participates in the after-hours recreational program, she will not see her best friends. Further, her mother testified that these activities also provide Petitioner with exercise, which she needs.
15. Upon questioning, Petitioner's mother agreed that Petitioner could still meet with her best friends outside of [REDACTED] recreational activities, but that would be extremely difficult to do as they all have different schedules and she's unsure of their phone numbers. Petitioner's mother noted that these scheduled events made it easier for the friends to come together. Petitioner's mother also acknowledged that Petitioner is able to take walks and bike ride to exercise.
16. Petitioner, by her attorney, stated that this situation appears to be an administrative billing issue because day program services are allowed and therefore after-hours recreational programs should be allowed. Petitioner's representative further argued that the AFH is not able to provide the same level of recreation, socialization, and community integration as [REDACTED] recreation programs.

## 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). Emphasis added.

Both parties agree that social/community integration is necessary to achieve Petitioner's outcome goals. For the past 8 years, such integration was partly achieved through [REDACTED] activities. Supervision of [REDACTED] activities was approved 8 years ago because Petitioner resided with her mother, who was her primary caregiver. [REDACTED] activities, offered between 4:00 pm and 8:00 pm, provided respite time for Petitioner's mother as well as an opportunity for Petitioner to engage in the community and form social relationships.

However, Petitioner's circumstances changed when she moved into an AFH. The AFH is contractually required to provide recreational activities for their residents. The evidence presented establishes that the AFH does in fact provide recreational activities. However, these activities are not the same level that Petitioner had become accustomed to through the [REDACTED]. The recreational activities appear to be offered at the home as opposed to out in the community. However, no evidence was submitted as to what these activities are or why they are inferior to the [REDACTED]. Based upon the evidence, it appears Petitioner is not as interested in the AFH activities because they do not involve her best friends that she has made attending [REDACTED] events.

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. The MCO is terminating this service but argues that it was Petitioner's move to the AFH that triggered the termination of the service and that Petitioner and her mother understood that a move to an AFH would end [REDACTED] supervision.

Evidence submitted by the MCO establishes that MCO representatives informed Petitioner's mother multiple times over the course of two years that if Petitioner moved to an AFH, supervision of [REDACTED] activities would end because it would be duplicative of events offered by the AFH. As noted in the regulations above, the MCO cannot approve duplicative services.

Petitioner's representative argued that Petitioner and her mother were notified that [REDACTED] supervision would end if Petitioner entered an AFH, but that they didn't agree with it. Petitioner found herself in a situation where her mother was having a harder time caring for her and caregivers were hard to find. Therefore, Petitioner and her mother had to choose between staying with her mother under those circumstances or choosing a living situation that would remove [REDACTED] supervision. The biggest hardship for Petitioner with [REDACTED] supervision removal appears to be that she would like to see her best friends.

The agency further noted that Petitioner does attend day programming multiple times a week that offers recreational and social programs as well as activities in the community. This, coupled with activities presented by the AFH, meets Petitioner's needs. Yet, without her best friends present, Petitioner does not feel these activities meet her needs.

Further, Petitioner's mother testified that Petitioner used the [REDACTED] activities to exercise. However, upon questioning, Petitioner is currently able to exercise in other ways on her own. Further, Petitioner could meet with her best friends outside of [REDACTED], but it would require a lot of organizing and someone to volunteer to supervise Petitioner.

With the evidence and testimony at hearing, the MCO has offered multiple outlets for Petitioner's social and recreational needs. She attends day program services outside of her AFH multiple times per week. No evidence was submitted that the day program wasn't satisfactory to meet her needs other than that her best friends all attended [REDACTED]. Further, her AFH does provide additional activities above what she is being offered during the day program. I understand that these services are not her ideal services because she misses her friends. However, the MCO is not required to provide duplicative services in order to meet a participant's exact wishes and desires. Further, Petitioner's representative submitted a prior DHA

decision regarding this same issue. However, the facts of that case were completely different to the current matter. Under the circumstances of this case and based on the evidence presented, I cannot find that the MCO erred in terminating supervision for [REDACTED] activities.

### CONCLUSIONS OF LAW

The agency met its burden in terminating Petitioner’s supervision for [REDACTED] services after she moved into an AFH that provides recreational activities.

**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, 5<sup>th</sup> 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.

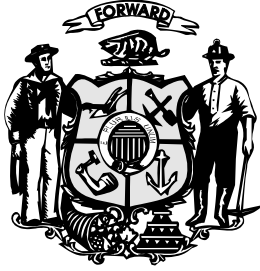
### **APPEAL TO COURT**

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 24th day of September, 2024

\s \_\_\_\_\_  
Nicole Bjork  
Administrative Law Judge  
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on September 24, 2024.

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