



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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

DECISION
Case #: CWK - 202242

PRELIMINARY RECITALS

Pursuant to a petition filed on June 3, 2021, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Kenosha County Human Service Department regarding CWK, a hearing was held on August 3, 2021, by telephone.

The issue for determination is whether the agency correctly developed an Individual Service Plan (ISP) for the Petitioner's CLTS waiver services.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Respondent:

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

By: [REDACTED]
Kenosha County Human Service Department
8600 Sheridan Road
Kenosha, WI 53143

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Kenosha County. He is 8 years old and lives with his aunt who has been appointed as his guardian. She is his primary caregiver. His primary diagnoses are autism and ADHD. He attends school during the day and requires childcare before and after school. Academically, he is one year behind peers. He takes medications for hyperactive behavior. He hits family and peers when frustrated. He has increased behavioral issues (hitting, throwing items, tantrums) with changes in routine. He is resistive to personal cares because of sensory issues with water and soap. He requires assistance with bathing, grooming tasks and cleansing after toileting. He receives speech therapy at school and is on a waiting list for occupational therapy services.
2. Petitioner has been receiving CLTS services through the Dane County CLTS waiver agency until he moved to Kenosha County in or about 2021.
3. On June 15, 2020, an Individual Service Plan (ISP) was developed for the Petitioner. His Level of Care was noted to be "High". He was approved to receive 40 hours/week of respite care for the period of August 23, 2020 – December 31, 2020, 48 hours/week of respite care for the period of January 1, 2021 – June 30, 2021, and an additional 4 days/month of respite care for the period of March 19, 2021 – June 30, 2021. The Petitioner's guardian used some of the hours for childcare services for the Petitioner before school. She anticipates returning to work soon after having been on a medical leave and wishes to continue to use childcare services.
4. The Petitioner relocated to Kenosha County. The Petitioner's guardian requests to continue the ISP developed by Dane County. At the time of the Petitioner's relocation, he was due to have an annual recertification review. Dane County and Kenosha County determined that Kenosha County would do the recertification review.
5. On May 24, 2021, the Kenosha County CLTS waiver agency, Kenosha Human Development Services, conducted an assessment of the Petitioner. The interdisciplinary team determined the Petitioner requires a "medium" level of care.
6. On June 3, 2021, Kenosha County issued a notice to the Petitioner's guardian informing her that childcare services for the Petitioner would no longer be funded as respite care by the waiver program. It further informed her that the agency approved 30 hours/month for weekday respite and two weekends/month of respite services. The notice indicated the Petitioner would continue to receive services approved through Dane County through June 12, 2021, and the services approved by Kenosha County would be effective June 13, 2021.
7. On June 3, 2021, the Petitioner's guardian filed an appeal with the Division of Hearings and Appeals.
8. On August 1, 2021, Kenosha County developed a proposed ISP that includes CLTS waiver funding for 25 hours/month of respite care, 30 hours/month of supportive home care during the school year, 100 hours/month of supportive home care during summer months, 25 hours/week of respite care for 4 weeks of school breaks, 18 hours/month of daily living skills training, and 4 days/month of respite care (2 weekends/month). The proposed ISP also includes Medicaid funding for a personal care worker, ABA, mileage, speech and occupational therapy, a sleep clinic, psychiatric visits for medication monitoring, and pediatric and dental visits. The proposed ISP also includes CCOP funding for swim lessons and Wisconsin Shares funding for childcare.

DISCUSSION

The CLTS program started in Wisconsin on January 1, 2004. Supported with MA funds, the CLTS program serves persons under the age of 22 who have a developmental disability, physical disability, or a

severe emotional disturbance. The Wisconsin Department of Health Services released the Medicaid Home and Community-Based Services Waivers Manual (Manual) to assist in administering the CLTS program. See, online at <https://www.dhs.wisconsin.gov/waivermanual/index.htm> .

There is no dispute that the petitioner is eligible for the CLTS program. The issue is whether Kenosha County's modification to the Petitioner's ISP meets the program requirements.

Petitioner recently relocated from Dane County to Kenosha County. Dane County developed his previous service plan. At the time of his relocation, the Petitioner was due for his annual recertification review. Kenosha County and Dane County agreed that Kenosha County would complete the recertification review.

Kenosha County asserts that it correctly assessed the Petitioner's needs during its review. It notes that the agency is required to coordinate all benefits that the Petitioner may be eligible for and incorporate those into the service plan, including MA, HealthCheck, other state and county programs, and school-based and educational services.

There is no dispute between the parties that the Petitioner requires respite care and child care services. The issue is the level of services and how they should be funded. In the ISP developed by Dane County, respite care was used to fund the child care services required for the Petitioner. Kenosha County asserts that the regulations do not allow respite funding to be used for child care in this situation. Kenosha County reduced the funding for respite care but added funding for supportive home care and daily living skills training in the ISP. Kenosha County also proposes to have the Petitioner receive personal care services, ABA therapy, mileage, speech and occupational therapy, sleep clinic, psychiatric visits, pediatric visits and dental visits through MA. In addition, it proposes to have CCOP fund swim lessons and Wisconsin Shares to fund child care for the Petitioner.

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 Department of Health Services acknowledged the principle laid down in *Hanson* in Final Decision ATI-40/87198 where Deputy Secretary Richard Lorang ruled on August 17, 1995, that in any fair hearing concerning the propriety of an agency action, the county or state agency has the burden of proof to establish that the action it took was proper given the facts of the case.

The CLTS waiver regulations require at least one review per year. CLTS Waiver Manual, §§ 7.3 and 7.5. A thorough assessment must be completed at the review and all a participant's assessed needs must be addressed on the ISP. *Id.* The participant-focused assessment is meant to provide a comprehensive illustration of the participant's circumstances, preferences, and needs, including a review of pertinent records and related information obtained from medical, educational, and other service providers. Among other factors, the assessment must include a review of the participant's social history, emotional and cognitive functioning, behaviors, social participation and existing formal and informal social supports, community participation and involvement, potential benefits and risks associated with identified behaviors, and available resources and how they're managed. Manual, § 7.3. The ISP must be participant-centered and include outcomes and supports and services that reflect the participant's needs and preferences. Manual, § 7.4. An ISP review must evaluate the effectiveness of the ISP which should include a discussion about ongoing or changing needs or anticipated changes. Any changes in services or service providers must be described and outcomes updated accordingly. Manual, § 7.5.

All MA and other public and private benefits available to a participant must be accessed before waiver funding can be used for services available through other programs. Manual, §§ 4.4.2 and 4.4.3.

As noted earlier, the primary dispute between the parties is the level of respite care and whether child care can be funded by the waiver. In general, waiver funds can be used only for child care needs that are above and beyond the cost of basic child care. Manual, § 4.6.4. However, the Manual allows for respite care services to take place in community settings, including a family or group child care center that is licensed by the state. In addition, respite care services can take place in a caregiver's home or the participant's home. Respite care services are meant to "maintain and strengthen the participant's natural supports by easing the daily stress and care demands for their family, or other primary caregiver(s), on a short-term basis. These services provide a level of care and supervision appropriate to the participant's needs while their family or other primary caregiver(s) are temporarily relieved from daily caregiving demands." Manual, § 4.6.17.1.

As the payor of last resort, it is not only reasonable but necessary for the agency to develop a plan that utilizes all other funding sources for services before using waiver funds. The Wisconsin Shares program provides child care subsidies to individuals who meet eligibility criteria. The Petitioner's guardian does not believe she will qualify for the services because she requires overnight care and flexibility due to a fluctuating work schedule. She stated she has applied for Shares in the past when she was working full-time, and she was denied because she was over the income limit. It is my understanding from her testimony that her employment situation is different at this time. The Shares program is available to parents with difficult and fluctuating schedules, including overnight. If the Petitioner applies for the Shares program and is either denied or is otherwise unable to find adequate child care, then Kenosha County would need to review the case and can make waiver funds available, per respite care provisions in the Manual, if no other funding source can be utilized.

The primary objection by the Petitioner's guardian to the proposed ISP by Kenosha County is the fact that the previous ISP was working well for the Petitioner. Though I understand her objection to making changes when there is a plan that works well for the Petitioner, Kenosha County presented a reasonable explanation for its ISP and how it will meet the Petitioner's needs. While there is a reduction in the number of respite hours funded, Kenosha County's plan meets the needs that were previously funded with respite hours by adding supportive home care, daily living skills training, and services funded by MA, CCOP and Wisconsin Shares. If the Petitioner is denied services by MA or Wisconsin Shares, she can request that Kenosha County review the case and add services that can be funded by the waiver when there is a denial from other programs.

In addition to the issue of which services are appropriate and the appropriate funding source, there is a dispute regarding whether the Petitioner requires a "high" level of care (as previously determined by Dane County) or a "medium" level of care (as determined by Kenosha County). Kenosha County representatives testified that participants with 1 – 2 diagnoses are generally categorized as needing a "medium" level of care. The Petitioner has a confirmed diagnosis of autism and an unconfirmed diagnosis of ADHD. Dane County representatives testified that the Petitioner has always been categorized at a "high" level of care. Neither party identified any policy or regulation regarding this categorization of his level of care or exactly how this impacted the ISP. The ISP must address all his needs regardless of whether he is at a "medium" or "high" level. I conclude that Kenosha County appears to have had a reasonable basis for categorizing the Petitioner at a "medium" level based on one confirmed diagnosis. I do not have sufficient basis to reverse this decision without more evidence regarding the policies for categorizing the Petitioner at a "high" level of care.

CONCLUSIONS OF LAW

Kenosha County correctly developed an ISP for the Petitioner with reduced respite hours and additional services including supportive home care, daily living skills training and other services funded through MA, CCOP and Wisconsin Shares.

THEREFORE, it is

ORDERED

That the Petitioner’s 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.

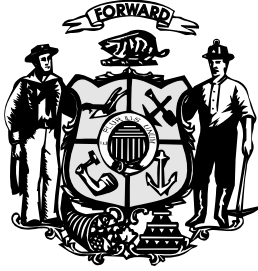
APPEAL TO COURT

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 17th day of September, 2021

\s _____
Debra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on September 17, 2021.

Kenosha County Human Service Department
Bureau of Long-Term Support