



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

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In the Matter of

(petitioner)

DECISION

FCP-40/63048

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**PRELIMINARY RECITALS**

Pursuant to a petition filed April 22, 2004, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Office of Strategic Finance (OSF) in regard to Family Care Program (FCP), a hearing was held on June 23, 2004, at Fond Du Lac, Wisconsin. A hearing set for May 25, 2004, was rescheduled at the petitioner's request.

The issue for determination is whether the petitioner must move to a new CBRF to remain in the FCP.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:  
(petitioner)

Represented by:  
Patrick T. Berigan  
Suite 678  
2040 West Wisconsin Avenue  
Milwaukee, WI 53233

Wisconsin Department of Health and Family Services  
P.O. Box 7850  
Madison, WI 53707-7850.

Kate Thiel, Lead Supervisor, Goodwill (By Telephone)  
Milwaukee County Department on Aging  
Schlitz Park, Suite 180  
235 West Galena Street  
Milwaukee, Wisconsin 53212-3948

**ADMINISTRATIVE LAW JUDGE:**

Joseph A. Nowick  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Fond du Lac County.
2. The Milwaukee County Disability Services Division placed the petitioner in Takodah House CBRF in Fond du Lac County. At the age of 60, the petitioner voluntarily enrolled in the Milwaukee County Department on Aging's Care Management Organization (CMO). The CMO administers the Wisconsin Family Care benefit in Milwaukee County.

3. The CMO has a Preferred Provider Network with 146 residential facilities of which Takodah House is not one. The CMO advised the petitioner that it would not pay for the petitioner's care at Takodah House.
4. Besides the fact that facility was not within the CMO's provider network, the CMO also did not want to provide case management to a client in Fond du Lac County. Finally, the CMO believes that certain people on staff of the Takodah House have a history of abuse and poor care.
5. The CMO met with the petitioner and her family and indicated that she would have to leave Takodah House. They offered approximately three alternative facilities in Milwaukee County that could provide equivalent care. The petitioner refused and requested this hearing.
6. Since residing at Takodah House, the petitioner has done well and has made new friends. She also has a part-time job in the area.

### **DISCUSSION**

The Family Care Program which is supervised by the Department of Health and Family Services, is designed to provide appropriate long-term care services for elderly or disabled adults. Wis. Stat. § 46.2805(4) (1999-00); Wis. Admin. Code § HFS 10.13(21) (October 2000). The Family Care Benefit is available to eligible persons only through enrollment in a CMO. See Wis. Admin. Code § HFS 10.41(1) (October 2000). Application for the Family Care Benefit must be made to the agency serving the county, tribe or family care district in which the person resides. Wis. Stat. § 46.287(2)(a)1. (1999-00); Wis. Admin. Code § HFS 10.55(3) (October 2000). The Family Care Program procedures and eligibility requirements are found in the Wisconsin Administrative Code, Chapter HFS 10.

When a person enrolls in FC and is eligible, the agency must perform an assessment to identify the person's needs, strengths, and long term outcomes. See Wis. Adm. Code, §HFS 10.44(2)(e). The agency then must develop an individual service plan (ISP) for the enrollee that addresses those needs, services, and outcomes. See §HFS 10.44(2)(f). If the enrollee and the agency do not agree with the ISP, the enrollee may file a grievance with the agency, request a department review, or request a fair hearing. §HFS 10.44(2)(f)5. Wis. Adm. Code, §HFS 10.55(1) provides that a person may request a fair hearing on matters which include, but are not limited to the following:

- (a) Denial of FC eligibility.
- (b) Determination of cost sharing requirements.
- (c) Determination of entitlement for FC eligibility.
- (d) Failure of the agency to provide timely services and support as required in the ISP.
- (e) Reduction of services or support items in the ISP...

Section HFS 10.44, Wis. Admin Code, contains the applicable standards for performance for a CMO. In par. (2)(e)1, the CMO must identify the needs and strengths of each enrollee in many areas. The CMO must then develop an ISP that 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. See HFS 10.44(2)(f), Wis. Admin Code. The circumstances under which the CMO can adjust services are as follows:

- a. Whenever a significant change occurs in the enrollee's health, functional capacity or other circumstances.
- b. When requested by the enrollee, the enrollee's representative, the enrollee's primary medical provider, or an agency providing services to the enrollee.

c. As often as necessary in relation to the stability of the enrollee's health and circumstances, but not less than every 180 days.

See HFS 10.44(2)(j)5, Wis. Admin Code. Based on the continuing ISP, the CMO is obligated per HFS 10.44(3) to do service monitoring which includes all the following:

(a) Develop and implement standards for CMO service provider qualifications and written procedures and protocols for assessing whether providers meet the standards. Provider qualification standards established by a CMO shall meet or exceed standards that are specified in its contract with the department.

(b) Develop and implement written procedures and protocols that assure that services furnished are consistent with the needs and strengths identified under sub. (2) (e) 1., the long-term care outcomes identified under sub. (2) (e) 2. and the individual service plan under sub. (2) (f) for each enrollee.

(c) Develop and implement written procedures and protocols that assure that enrollee problems related to services are detected and promptly addressed.

(d) Maintain a process to consider an enrollee's request to receive services from a provider who does not have an agreement with the CMO for providing services to the CMO's enrollees. The CMO shall arrange for services with non-CMO providers if the enrollee's request is authorized by the CMO. Instances where the enrollee's request for a non-CMO provider is warranted include all of the following:

1. When the CMO does not have the capacity to meet the identified needs of its enrollees.
2. When the CMO does not have the specialized expertise, specialized knowledge or appropriate cultural diversity in its network of providers.
3. When the CMO cannot meet the enrollee's need on a timely basis.
4. When transportation or physical access to the CMO providers causes an undue hardship to the enrollee.

There is no requirement that the CMO use any particular provider to enable it to meet its responsibilities, as long as the use of a particular provider does not in some way conflict with the other parts of the ISP.

The petitioner disagrees with the CMO's attempt to change her residential placement to a CBRF other than Takodah House. The petitioner is happy at Takodah House, its size and the fact that there are nice residents for her to socialize with. She also likes the staff. The petitioner and her family believe that it would be psychologically difficult for her to move to a different facility, even though she has only lived at Takodah House for about one year. The CMO opposes payment to Takodah House because that CBRF is not within the CMO's provider network. Also, the CMO believes that certain people on staff of the Takodah House have a history of abuse and poor care. The cost of the Takodah House CBRF was not identified by the CMO as being a roadblock to its use. The CMO wishes to place the petitioner in another CBRF but one located in Milwaukee County. There were no specifics presented at the hearing on the three alternatives except for a few unsubstantiated criticisms from the petitioner's family.

The skeletal legal guidance that pertains to determining what services must be placed in an individualized service plan (ISP) is as follows:

**HFS 10.44 Standards for performance by CMOs.**

...

(2) CASE MANAGEMENT STANDARDS. The CMO shall provide case management services that meet all of the following standards:

...

(f) The CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee, with the full participation of the enrollee and any family members or other representatives that the enrollee wishes to participate. ... The service plan shall meet all of 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.
4. Is agreed to by the enrollee, except as provided in subd. 5.
5. If the enrollee and the CMO do not agree on a service plan, provide a method for the enrollee to file a grievance under s. HFS 10.53, request department review under s. HFS 10.54, or request a fair hearing under s. HFS 10.55. ...

...

*(emphasis added)*

Wis. Admin. Code §HFS 10.44(2)(f). There is a policy decision-making “guide” supplied by the Department of Health and Family Services, labeled as *Resource Allocation Decision Method*. That guide directs the parties to identify the patient’s needs, desired outcomes, how the needs can be met, and applicable policy. It then asks, “Which option is the most effective and cost-effective in meeting the desired outcome?”

The cost-effectiveness requirement referenced at §HFS 10.44(2)(f)3 and the policy rubric is apparently not an issue here. Thus, this decision must turn on whether the requested CBRF placement will reasonably and effectively address the petitioner’s long-term care needs and “outcomes.”

The issue of the qualifications of the staff at Takodah House is not controlling here. The petitioner has the mistaken belief that her wishes totally control the selection of resources used by the CMO. Taken to its logical extreme, the FCP would soon be bankrupt because each participant would demand a placement that would be ideal for him or her. *If* an opening is immediately available at one of the three Milwaukee CBRF’s, *and if* such a placement would reasonably and effectively meet her care needs and rational desired outcomes, placing the petitioner in that facility would be a required alternative. Because there was nothing in the record as to the merits of the alternative CBRF’s, neither party was able to identify any pluses or minuses in the care provided at these facilities. No one denied that a CBRF setting, as opposed to staying in her home or going to a nursing home, is the appropriate setting to meet the petitioner’s care needs. The bottom line is that if any of the alternatives presented by the CMO is a reasonable placement choice within the CMO’s provider network exists, I agree that the CMO could insist upon that alternative, *subject to availability*.

The question then is whether the petitioner must immediately move. It is clear that the petitioner's family did not review the merits of the alternatives, as they believed that she has a right to remain at Takodah House under any circumstances. While the petitioner and her family should be allowed to get more information on the alternative CBRF's in Milwaukee or Fond du Lac, it would be unfair to the CMO to allow this to drag on. I will give the petitioner 30 days from the date of this decision to decide on an alternative approved by the CMO. During that time, I expect that the CMO will provide as much information as possible about these alternatives. I would also suggest that the petitioner explore the offer by the CMO at the hearing to include alternatives in Fond du Lac.

The possible unavailability of a placement at any of the alternatives acceptable to the CMO would partially change the result in this case. Theoretically, the petitioner would be left with no residential placement until there was an opening. This result of "no care" would not be acceptable, as the petitioner's long-term care needs would not be "reasonably and effectively" addressed.

Given this potential outcome, the petitioner should remain at Takodah House until there is an opening at least one of the reasonable alternatives acceptable to the CMO as discussed above. It makes no sense to pull the petitioner from Takodah House to a second "holding" CBRF for what could be as little as 30 days only to then move her again. This means that the CMO must at least temporarily fund her placement at Takodah House. State code is clear in allowing the CMO to go outside of its provider network under certain circumstances. See Wis. Admin. Code §HFS 10.44(3)(d). (For a similar result, see the decision by ALJ Nancy Gagnon in FCP-32/49813.)

#### **CONCLUSIONS OF LAW**

The CMO may decline to fund CBRF services at Takodah House, a CBRF that is not within the CMO's provider network, after the CMO offers an actual placement (as opposed to a waiting list slot) to the petitioner at another appropriate CBRF.

**NOW, THEREFORE, it is** **ORDERED**

That the petition herein be remanded to the Milwaukee County Department on Aging's CMO with the instructions to continue to fund the petitioner's care at Takodah House from the date of this decision and continuing for 30 days *or* until an opening becomes available for the petitioner at a minimum of one of the reasonable alternatives acceptable to the CMO as discussed above, whichever is later. These actions shall be taken within 10 days of the date of this Decision. In all other respects, the petition for review be and the same is hereby dismissed.

#### **REQUEST FOR A NEW HEARING**

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found 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 no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Family Care Program must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of  
Madison, Wisconsin, this 20th day of  
July, 2004

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/s/ Joseph A. Nowick  
Administrative Law Judge  
Division of Hearings and Appeals  
428/JAN

cc: Ann Blewett - Milw. Cty - e-mail  
Lori Dalka - Fond Du Lac Co. - e-mail  
Nora Gomez - Milw. Co. - e-mail  
Lois Greene For Jackson -Milw. Cty - e-mail  
Jenifer Harrison-Metastar - e-mail  
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