



STATE OF WISCONSIN  
Division of Hearings and Appeals

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In the Matter of

██████ ██████  
██████████████████  
██████████████████████████████

DECISION

FCP/169988

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**PRELIMINARY RECITALS**

Pursuant to a petition filed November 4, 2015, under Wis. Admin. Code § DHS 10.55, to review a decision by the Care Wisconsin First, Inc. in regard to Family Care, a Medical Assistance (MA) – related program, a hearing was held on January 12, 2016, by telephone. A hearing set for December 15, 2015, was rescheduled at the petitioner’s request.

The issue for determination is whether the Department discontinued the petitioner’s Family Care benefit due to lack of *nonfinancial* eligibility.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

██████ ██████  
██████████████████  
██████████████████████████████

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Respondent:

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

By: ██████ ██████, care mgr.  
Care Wisconsin Inc.  
2802 International Lane  
Madison, WI 53704-3124

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Brown County.

2. The Family Care program is a nursing home diversion program for low-income, targeted groups, such as the disabled and elderly. The petitioner, age 46, is not elderly. The petitioner has been found to be disabled (SSI) with a developmental disability by the Social Security Administration. He had been receiving benefits as a disabled person through MA-related CIP/COP waiver through his county agency since at least 2009.
3. The petitioner switched over to the MA-related Family Care (FC) program on July 1, 2015. At that juncture, he was re-screened for nonfinancial eligibility. As a result of a September 9, 2015, functional screening, the FC program determined that the petitioner was no longer functionally eligible for the program. On September 11, 2015, the FC agency issued notice to the petitioner advising that he did not fit into a target eligibility group for the Family Care program and was no longer eligible for “nursing home level” FC benefits for failure to satisfy the nursing home related functional eligibility requirements of the program. The petitioner timely appealed.
4. The petitioner has diagnoses of intellectual disability and diverticulitis. For purposes of FC program eligibility, the petitioner has a “long-term condition.”
5. *ADLs*. The petitioner is ambulatory and independent in bathing, dressing, grooming, eating, toileting, and transferring.
6. *Instrumental ADLs*. The petitioner is independent in meal preparation, taking his medication, managing money, doing laundry and household chores, using the telephone, and driving a car. The petitioner is employed cleaning offices part-time at [REDACTED] [REDACTED]. The petitioner has had a job coach since he began his [REDACTED] employment in 2010. He does not always understand his job expectations, and the coach helps him to achieve that understanding and be more productive. The petitioner does not require overnight supervision, is fully communicative, does not have a memory impairment, is not physically resistive to care, does not wander, has not demonstrated self-injurious behavior, is not violent towards others, and does not engage in substance abuse.

### DISCUSSION

The Family Care Long Term Care (FC) program is a long-term care benefit that serves target groups consisting of elderly people (65 or over), people with physical disabilities and those with developmental disabilities. *See*, Wis. Stat. §46.286, and Wis. Admin. Code ch. DHS 10, and the FC § 1915(c) waiver document #0368.R02.00, available at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Home-and-Community-Based-1915-c-Waivers.html>. The Department’s policy instructions for FC eligibility require a person to meet “full benefit EBD Medicaid ... non-financial requirements.” *Medicaid Eligibility Handbook (MEH)*, § 29.3.1, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>. The nonfinancial requirements for EBD Medicaid are that a person must be elderly, blind, or disabled to Social Security Disability/SSI standards. *See*, Wis. Stat. § 49.47(4)(a)4; 42 C.F.R. § 441.301(b)(6)(i), cross-referencing 42 C.F.R. § 435.540 [federal rule]. Additionally, a person within one of the target groups must require nursing-home level care, even though s/he lives outside of a nursing home. Wis. Stat. § 46.286(1)(a).

In order to qualify for FC services, with certain exceptions not applicable here, a person’s functioning must be such that they would otherwise require institutional care. Wis. Stat. §46.286(1)(a). Essentially, a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

In this case, the Department found that the petitioner no longer fit its definition of being a member of the Developmental Disability “target group” because he has too few or no limitations in the areas (“domains”) of self-care (ADLs), IADLs, communication, learning mobility and self-direction. Additionally, even if the petitioner fit within the DD target group, his functioning is at a level that does not require nursing home

care. Therefore, he is no longer eligible for the program. The petitioner agrees that he can perform all ADLs independently, and that he can do IADLs independently most of the time. He wishes to maintain benefits, and hopes to retain his job coach.

#### I. THE DD TARGET GROUP TEST.

The Department's first rationale for ending the petitioner's FC eligibility is its assertion that he no longer fits within the Developmental Disability (DD) target group. The petitioner receives SSI for his intellectual disability. However, Department policy apparently says that this is not enough to be in the DD target group. Policy, as captured in a "decision tree," requires the intellectually disabled person to also have poor functioning in at least three of the following domains: self-care, independent living, communication, learning, mobility, and self-direction. I have reviewed the Department's online federal waiver application document, especially Appendix B, and find no definition of DD, and no mention of the "domains requirement." Thus, the legal source for the "domains requirement" remains unclear to me.

State statute and code do not contain the "domains requirement." The FC enabling statute says that an adult may be eligible for FC if he has a developmental disability "as defined in s.51.05(a):"

#### **46.286 Family care benefit.**

**(1) ELIGIBILITY.** A person is eligible for, but not necessarily entitled to, the family care benefit if the person is at least 18 years of age; has a physical disability, as defined in s. 15.197 (4) (a) 2., or a developmental disability, as defined in s. 51.01 (5) (a), or is a frail elder; and meets all of the following criteria:

**(a) Functional eligibility.** A person is functionally eligible if the person's level of care need, as determined by the department or its designee, is either of the following:

**1m.** The nursing home level, if the person has a long-term or irreversible condition, ...

The cross-referenced section 51.05(a) contains a definition that does *not* include poor functioning in specific domains:

**(5)(a)** "Developmental disability" means a disability attributable to brain injury, cerebral palsy, epilepsy, autism, Prader-Willi syndrome, intellectual disability, or another neurological condition closely related to an intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability, which has continued or can be expected to continue indefinitely and constitutes a substantial handicap to the afflicted individual. "Developmental disability" does not include dementia that is primarily caused by degenerative brain disorder.

Wis. Stat. § 51.05(a). Similarly, the FC administrative code definition of developmental disability makes no mention of a requirement that the participant be functioning poorly in specific domains:

**(16)** "Developmental disability" means a disability attributable to brain injury, cerebral palsy, epilepsy, autism, Prader-Willi syndrome, mental retardation, or another neurological condition closely related to mental retardation or requiring treatment similar to that required for mental retardation, that has continued or can be expected to continue indefinitely and constitutes a substantial handicap to the afflicted individual. "Developmental disability" does not include senility that is primarily caused by the process of aging or the infirmities of aging.

Wis. Admin. Code § DHS 10.13(16).

The petitioner has inadequate functioning in only one domain – learning. I remain unclear as to the legal authority for ending his FC eligibility for allegedly not fitting into the DD target group. However, assuming for the sake of argument that he still does fit in this target group, his FC was correctly ended due to lack of functional eligibility. Functional eligibility is discussed below.

## II. THE DHS SCREENING TOOL DETERMINATION: NOT FUNCTIONALLY ELIGIBLE AT THE “NURSING HOME CARE LEVEL.”

The Wisconsin Department of Health Services has made efforts to improve the statewide accuracy of functional assessments by implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained screener. This screener asks the applicant/recipient questions about his/her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs.

The assessor then submits the “Functional Screen Report” to the Department’s Division of Long Term Care. See <http://dhs.wisconsin.gov/LTCare/FunctionalScreen/Index.htm>. The cross-referenced Level of Care (LOC) Functional Screen form reiterates the skeletal definitions from the federal Medicaid rules for admittees to Intermediate Nursing Care and institutional Developmental Disability facilities. The Department then evaluates the Long Term Functional Screen data by computer programming to see if the applicant/recipient meets any of the nursing levels of care.

The petitioner’s diagnoses are not in dispute. The parties agree that the petitioner is able to perform all ADLs independently. He can also independently perform his IADLs. He does struggle with completing paperwork. When the petitioner’s functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner does not have care needs at the nursing home level.

## III. INDEPENDENTLY OF THE DHS LOC ALGORITHM, I CONCLUDE THAT THE PETITIONER DOES NOT MEET THE COMPREHENSIVE FUNCTIONAL CAPACITY LEVEL AT THIS TIME.

The petitioner argues that he needs help via a job coach, which makes the continuation of FC program benefits necessary for him.

Independently of the DHS computerized result, this ALJ’s overall sense of the petitioner’s care level is that it does not rise to the “comprehensive functional capacity level” required in the state code. In code, the verbally expressed standard (as opposed to a computer algorithm) for the requisite level of care is as follows:

### **DHS 10.33 Conditions of functional eligibility.**

...

**(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY.** (a) *Determination.* Functional eligibility for the family care benefit shall be determined pursuant to s. 46.286 (1), Stats., and this chapter, using a uniform functional screening prescribed by the department. To have functional eligibility for the family care benefit, the functional eligibility condition under par. (b) shall be met and, except as provided under sub. (3), the functional capacity level under par. (c) or (d) shall be met.

(b) *Long-term condition.* The person shall have a long-term or irreversible condition.

(c) *Comprehensive functional capacity level.* A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from

another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. *The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting **both** of the following conditions:*
  - a. *The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.*
  - b. *The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self-neglect or resistance to needed care.*

*(emphasis added)*

Wis. Admin. Code §DHS 10.33(2)(a)-(c) (November 2009). IADLs are defined at §DHS 10.13(32).

The petitioner can perform all ADLs and IADLs unassisted. Thus, the only relevant test under which the petitioner would meet the functional eligibility test is the sixth one – having a complicating condition that limits independence as evidenced by requiring frequent medical/social intervention to safely maintain acceptable health/developmental status. The petitioner does benefit from having a job coach for his employment at [REDACTED]. However, this is not an intervention needed to maintain his health. Therefore, the petitioner does not meet the code standard for the comprehensive functional capacity level of the functional eligibility test. Discontinuance of his Family Care eligibility was correct.

**CONCLUSIONS OF LAW**

1. The petitioner does not have care needs at the comprehensive functional capacity level at this time; therefore, he currently does not satisfy the functional eligibility requirements of the FC program.

**THEREFORE, it is**

**ORDERED**

That the petition 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, 5005 University Avenue, Suite 201, 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, Madison, Wisconsin 53703, **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 15th day of February, 2016

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\sNancy J. Gagnon  
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 15, 2016.

Care Wisconsin First, Inc  
Office of Family Care Expansion  
Health Care Access and Accountability