



FH
[REDACTED]

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

In the Matter of

[REDACTED]

DECISION

CWK/143684

PRELIMINARY RECITALS

Pursuant to a petition filed September 07, 2012, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Outagamie County Department of Human Services in regard to Medical Assistance, a hearing was held on October 03, 2012, at Appleton, Wisconsin.

The issue for determination is whether the Department erred in its denial of continued eligibility under the CLTS Waiver due to not meeting ICF/MR (DD) level of care criteria.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By: Evelyn DeFatte-Singh

Outagamie County Department of Human Services
401 S. Elm Street
Appleton, WI 54911-5985

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Outagamie County.

2. Petitioner is five years old.
3. Petitioner has a diagnosis of pervasive developmental disorder.
4. Petitioner had been enrolled in the Childrens' Long Term Supports Waiver services program, under the Developmental Disability level of care, for several years. He received in-home autism services under the waiver.
5. In August 2012, the agency, by Lutheran Social Services representative Amy Bastian, conducted an assessment of petitioner's eligibility through the use of the CLTS Functional Screen (exhibit#6). On August 20, 2012, the Department of Health Services notified Ms. Defatte-Singh and Ms. Bastian that petitioner no longer met CLTS level of care criteria for eligibility.
6. On August 22, 2012, the Department sent notice to petitioner's mother, informing her that petitioner would no longer be enrolled in the waiver program effective October 1, 2012.
7. Petitioner filed a timely appeal.

DISCUSSION

I. INTRODUCTION

The CLTS program started on January 1, 2004, after the federal Department of Health and Human Services informed Wisconsin that federal MA funding would no longer be available for in-home autism services. The Wisconsin Department of Health and Family Services released the *Medicaid Home and Community-Based Services Waivers Manual (Manual)* to assist in administering the CLTS program. The *Manual* also covers the Community Integration 1A and 1B programs, and the Brain Injury Waiver program. It can be found on the internet at <http://dhfs.wisconsin.gov/bdds/waivermanual/index.htm>.

The *Manual* requires a person to meet several eligibility criteria for the CLTS program, including disability and meeting an institutional level of care. *Manual*, §2.01 – 2.02 (2010). The disability determination is made for the agency by the Wisconsin Disability Determination Bureau. If the child clears this hurdle, the second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. See 42 C.F.R. §435.225(b)(1).

The level of care criteria are found in the *Manual* at Appendix A-10 (cross-referenced from *Manual* §2.07D), which defines and describes childhood care levels. There is no dispute that the petitioner does not satisfy the Hospital, Nursing Home or SED care levels described in the *Manual*. *Id.* The ICF/DD care level is for individuals who suffer from mental retardation or a developmental disability.

A brief explanation of the Functional Screen is instructive. The Wisconsin Department of Health Services has made efforts to improve the statewide consistency of level of care decisions by designing and implementing a computerized level of care assessment screening system. This system relies upon a face-to-face interview with a screener who has at least a bachelor of science degree in a health or human services related field, with at least one year of experience working with the target populations (or, if not, an individual otherwise specifically approved by the Department based upon like combination of education and experience), and who has been trained and met all requirements to do so by completing a Department sanctioned training program.

This screener asks the applicant/recipient or the parents at a periodic review, numerous 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 results for the applicant/recipient to the Department. The Department then processes the data by computer programming to see if the applicant/recipient meets a certain level of care.

In this case, Ms. Bastian at Lutheran Social Services, applied the screening tool to the facts of the petitioner's case. When the petitioner's functional ability scores were entered into a DHS computer algorithm, the result was a DHS conclusion that the petitioner does not have care needs at ICF/MR (DD) level of care. Thus, the agency acted consistently with the DHS-directed result.

Some energy was expended during the hearing and in the briefing to prove or disprove that the agency screener did a sufficiently thorough examination of the petitioner's functional abilities. However, what matters here is the correctness of the conclusion, not the evaluation process. Thus, we must turn to whether the child, in fact, has care needs at a CLTS level of care, based on the preponderance of the credible evidence.

II. ICF/DD ANALYSIS.

The criteria for the various CLTS levels of care are set forth and defined in the *Institutional Levels of Care-CLTS* publication by the Department of Health Services, updated February 2011 and available at: http://www.dhs.wisconsin.gov/bdds/waivermanual/CLTS_LOC.pdf. The ICF/DD level applies to a child with (1) a cognitive disability and at least a 30% delay in aggregate intellectual functioning, (2) substantial functional limitations, and (3) a need for active treatment. All three of these major criteria must be met to qualify for this care level. The Department did not dispute the autism spectrum diagnosis (#1) or the active treatment element (#3). The Department has based its decision to discontinue CLTS services based on the element #2 – the absence of substantial functional limitations in petitioner's case.

The Department bases its denial on the results of the CLTS Functional Eligibility Screen. The screen was completed by Ms. Amie Bastian at Lutheran Social Services. While the screen itself (exhibit #6) does not result in a conclusion on its face, Ms. Bastian wrote a letter (exhibit #5) in which she concludes:

It is acknowledged that [REDACTED] lacks impulse control which can interfere with his communication and interactions with other children. [REDACTED] can also get aggressive at times, especially if he sees other children as a threat. All things considered, at this time [REDACTED] does not display extensive functional limitations in areas of development measured by the Functional Screen.

The Screen does not demonstrate an analysis of how a conclusion is reached. There are no numeric scores or scoring rubrics or matrices. But, given that the screen is really just a way to record facts, that is not unexpected because the recorded facts are then subjected to computer analysis which produces the result/conclusion. My review must then consider whether the DHS algorithm that processed the data into a conclusion reached a properly supported result. It did not.

The Department found no “substantial functional limitations” on petitioner’s part. Substantial Functional Limitations are defined, for the purposes of CLTS level of care at pages 4-6 of the *Institutional Levels of Care-CLTS* publication:

SUBSTANTIAL FUNCTIONAL LIMITATIONS

The child demonstrates substantial functional limitations when compared to the child’s age group and each limitation must be expected to last *at least 12 months* from the date of review. These limitations must be the direct result of the child’s cognitive disability or similar diagnosis from Criterion 1, and must place the child at risk of institutionalization in an ICF/MR in the absence of extensive, consistent, and direct adult intervention to assist the child in overcoming the limitations, significantly beyond the level of intervention similar aged peers typically require. **The child must demonstrate substantial functional limitations in ONE or more of the following developmental domains: (1) communication, or (2) social competency, or (3) activities of living.**

(Emphasis added). Deficits in Social Competency are further explained in *Institutional Levels of Care-CLTS*, Appendix A:

Social competency includes children's ability to form relationships, interest in and skills needed to maintain positive relationships with adults and children, ability to understand the perspective and feelings of others, and skills needed to get along well in a group setting (for example, conflict resolution skills).

(Emphasis added). This is the key factor in this case. Ms. Bastian’s conclusion, quoted above, acknowledges “that [REDACTED] lacks impulse control which can interfere with his communication and interactions with other children. [REDACTED] can also get aggressive at times .” Yet she relates the conclusion that the aggression and impulsivity do not lead to a finding of a deficit in social competency? Why not? I have no question that she utilized the screening tool as it is intended to be used. A DHS algorithm provided a conclusion. Ms. Bastian related that conclusion. The county agency also acted upon that DHS conclusion. But, no one at the hearing attempted to explain why the behaviors petitioner demonstrates do not amount to a social competency deficit. It is clear to me that they do currently reflect such a deficit.

Exhibit #4 includes numerous letters from petitioner’s therapists, teachers, physicians, and his parents. Christina M. Iyama-Kurtycz, MD, is an Associate Professor of Medicine at UW-American Family Childrens’ Hospital and its highly respected Waisman Center. She notes petitioner’s:

aggression and impulsive behaviors...hitting, kicking, pushing, spitting, and choking other children at recess and throughout the day. An adult has to be with him 1:1 every minute....I consider his behavioral disturbance to be severe...[h]e needs the continuation of his autism services the have the best chance of coming out of this point of his life with socially appropriate

skills and the social knowledge to achieve a successful longterm outcome.”

Karen Lim Kane, Ph.D, Licensed Clinical Psychologist at the Waisman Center, in an August 2012 psychological evaluation, specifically recommended that petitioner “continue to participate in intensive behavioral intervention services to address autism spectrum issues.” She adds by letter dated September 27, 2012 that “continuation of autism services is imperative. ”

There are other letters, including one from two of petitioner’s teachers, that illustrate the types of behaviors petitioner exhibits on a daily basis that result in his peers being afraid of petitioner: stabbing at another student with a fork at lunch, pushing peers to the ground, and biting and pinching peers. Petitioner’s therapist explained that these behaviors have been reduced in frequency but still occur from **5-10 times in a day**.

Appendix A of the *Institutional Levels of Care-CLTS* indicates that:

A child has a substantial functional limitation in social competency if the child consistently exhibits **ONE** of the following characteristics within the child’s age group:

* * *

4 - 5 years old

- Does not take turns in play.
 - Does not share toys, or wait for his/her turn in a group game.
- Does not insist on trying to do things independently.
 - Willingly allows others to help him/her in all activities throughout the day.
- Does not have an awareness of another child’s need for help or feelings.
 - Does not recognize when another child is happy, sad or hurt.

The behaviors described by numerous individuals, including at the hearing by petitioner’s parents, are consistently exhibited and are at least as severe as those described above. The behaviors certainly indicate that petitioner “does not have an awareness of another child’s...feelings.” I cannot understand how the Department (or its algorithm) could conclude that the behaviors do not amount to a substantial functional limitation. I have no doubt that the petitioner’s physicians and psychologists and therapists are in the best position to determine whether continuing autism services are necessary for this young child. Since no one else could explain it, aside from stating that this is how the functional screen scored it, I reverse the Department conclusion.

CONCLUSIONS OF LAW

The Department erred in its determination that petitioner is not eligible for continued CLTS Waiver Services.

THEREFORE, it is

ORDERED

This matter is remanded to the Department and its county agent with instructions to reverse its denial of eligibility for CLTS Waiver services and continue eligibility for the ICF/MR (DD) level of care retroactive to October 1, 2012. This action shall be completed within 10 days.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge 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.

To ask for a rehearing, 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 for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be 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 served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 13th day of November, 2012

John P. Tedesco
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 November 13, 2012.

Outagamie County Department of Human Services
Bureau of Long-Term Support