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

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In the Matter of

[REDACTED]

DECISION

MKB/145407

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**PRELIMINARY RECITALS**

Pursuant to a petition filed August 16, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Disability Determination Bureau (DDB or Bureau) in regard to Medical Assistance (MA), a hearing was held on January 10, 2013, by telephone. At the petitioner's request, the hearing record was held open for 21 days for submission of more medical information, which was received.

The issue for determination is whether the whether the petitioner is disabled for purposes of the Katie Beckett MA/CLTS Waiver programs.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
By: [REDACTED], mother  
[REDACTED]

Respondent:

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

By: No Appearance

Disability Determination Bureau  
722 Williamson St.  
Madison, WI 53703

**ADMINISTRATIVE LAW JUDGE:**

Nancy J. Gagnon  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Walworth County. He resides with his parents in the community.

2. The petitioner applied for MA as a disabled person, as a condition of satisfying Child Long-Term Support (CLTS) Waiver eligibility criteria, on April 12, 2012. The Department denied that application, due to lack of sufficient disability, on August 2, 2012. The petitioner requested reconsideration, and an unfavorable reconsideration decision from the Department's Disability Determination Bureau (DDB) was issued on November 15, 2012.
3. DDB determined that the petitioner is not disabled because, although his impairment is "severe," it does not meet, medically equal, or functionally equal the severity of a listed impairment. More specifically, his impairment allegedly does not cause sufficiently marked and severe functional limitations.
4. The petitioner, age four, is diagnosed with Pervasive Developmental Disorder (autism spectrum) and hyperactivity disorder. Problems emerged around age two. He has age-level motor skills, poor speech articulation (although most speech is understandable), and poor social skills. Peer interaction is especially weak. He displays inappropriate behaviors related to his hyperactivity. He participates in a 4K program, but does not receive special therapies through a school IEP. Private occupational therapy was recommended in the fall of 2012.
5. *Listing 112.10 Criteria:* The petitioner has qualitative deficits in the development of reciprocal social interaction and communication. Deficits have also been observed in imaginative activity during play. However, the child does not have a "marked" delay in the areas of cognition, personal functioning (self care), or in his social functioning. The petitioner does have a marked delay in the area of concentration/persistence/pace.

"Functional Equivalence" Domain Criteria

6. In the domain of acquiring and using information, the petitioner has no limitation. He does not have a cognitive disability; rather, his IQ is estimated to be above average. He is able to verbalize requests. The child has historically been able to follow directions, and is able to follow classroom routines. He knows colors and shapes.
7. In the domain of attending and completing tasks, DDB concluded the petitioner has a "less than marked limitation." He has historically been able to follow directions, but does not always currently choose to do so. He has trouble taking turns. The child takes the medication Vyvanse for hyperactivity. His psychiatric treatment note from January 14, 2013, states that the child was not able to focus or concentrate throughout the 30 minute session. He was agitated and unable to listen or follow any directions. The child was jumping from the sofa to the floor, constantly interrupting, and constantly "getting into the father's face." The child has a *marked* limitation in this domain.
8. In the domain of interacting and relating with others, the DDB concluded that petitioner has a "less than marked" limitation. At his preschool, the child used adequate vocabulary and grammar to express himself, interpreted the meaning of facial expressions of others, introduced relevant topics of conversation, used language appropriate to the listener, related experiences, respected adults, followed rules, and sought attention appropriately. He did display trouble playing cooperatively with other children and in expressing anger appropriately. Evaluator Cornelia Green, PhD, noted that the child's "communicative interactions are effective and age appropriate." See, Exhibit 1, report dated July 25, 2012. The child has a less than marked limitation in this domain at this time.
9. In the domain of moving about and manipulating objects, the petitioner does not have a limitation. The child walks independently, and has normal flexibility, range of motion, and posture. The petitioner did not argue that he has a limitation in this domain.
10. In the domain of caring for himself, the petitioner can undress himself. The petitioner self-feeds with a spoon, drinks from an open cup, and tolerates all food textures. He continues to require assistance with grooming and bathing, due to his lack of thoroughness. Although he is able to

pull clothes on and off, he cannot manipulate fasteners. The petitioner has not been responsive to toilet-training. He does not engage in self-injurious behavior. The petitioner has a less than marked limitation in this domain.

11. In the domain of health and physical well-being, the petitioner has no physical disabilities. No vision concerns have been noted. The petitioner concedes that he has no limitations in this domain.

### DISCUSSION

The petitioner desires to be found eligible for CLTS Waiver services. As a condition of eligibility, he must be found “disabled,” at the level required for federal SSI eligibility.

#### I. DEFINITION OF CHILDHOOD DISABILITY.

To be considered a disabled person, an applicant must meet the tests used by the Social Security Administration to determine disability for Supplemental Security Income (SSI) benefits. For SSI purposes, a disabled child must have a medically determinable physical or mental impairment, or combination of impairments, that causes marked and severe functional limitation, and that can be expected to last for at least a year. 20 C.F.R. §416.906. More specifically, 20 C.F.R. §416.911(b) declares:

If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments: (1) Must meet, medically equal, or functionally equal the requirements of the listings, [appendix 1 of Subpart P of 20 C.F.R, Part 404], or (2) Would result in a finding that you are disabled under sec. 416.994a ...

[§416.994a pertains to a child who has been previously found to be disabled by DDB]

A sequential process is used to apply these definitions to a specific case. 20 C.F.R. §416.924. The first test in the sequence is whether the claimant is performing “substantial gainful activity.” Because the petitioner is not working, he passes this first test.

The second sequential test is whether the claimant has an impairment or combination of impairments that is “severe.” If the impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, it is not severe. 20 C.F.R. §416.924(c). The Disability Determination Bureau (DDB) has conceded that the petitioner’s impairment is severe, so he passes the second test.

The third sequential test element is the heart of the dispute here. The third test considers whether the child has an impairment(s) that *meets, medically equals, OR functionally equals* in severity any impairment that is listed in Appendix 1 of Subpart P of Part 404 of the regulations (Listings). 20 C.F.R. §416.924(d). DDB

determined that the petitioner did not meet this requirement, and that he is therefore not disabled for SSI/CLTS purposes.

II. THE PETITIONER'S CONDITION DOES NOT *MEET* OR *MEDICALLY EQUAL* THE LISTINGS AT SECTION 112.10.

There is a specific section of the Listings – sec. 112.10 -- that deals with an autism diagnosis. That section can be viewed online at [www.ssa.gov/disability/professionals/bluebook/112.00-MentalDisorders-Childhood.htm](http://www.ssa.gov/disability/professionals/bluebook/112.00-MentalDisorders-Childhood.htm). The autism Listing at sec.112.10 of Appendix 1 requires that a child have the following:

**112.10 *Autistic Disorder and Other Pervasive Developmental Disorders*** : Characterized by qualitative deficits in the development of reciprocal social interaction, in the development of verbal and nonverbal communication skills, and in imaginative activity. Often, there is a markedly restricted repertoire of activities and interests, which frequently are stereotyped and repetitive.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Medically documented findings of the following:

1. For autistic disorder, all of the following:

a. Qualitative deficits in the development of reciprocal social interaction;

and

b. Qualitative deficits in verbal and nonverbal communication and in imaginative activity; and

c. Markedly restricted repertoire of activities and interests;

or

2. For other pervasive developmental disorders, both of the following:

a. Qualitative deficits in the development of reciprocal social interaction;

and

b. Qualitative deficits in verbal and nonverbal communication and in imaginative activity;

*and*

B. For older infants and toddlers (age 1 to attainment of age 3), resulting in at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or, *for children (age 3 to attainment of age 18), resulting in at least two of the appropriate age-group criteria in paragraphs B2 of 112.02.*

*(emphasis added)*

The cross-referenced criteria at §112.02 paragraph B2 refer to the four functional areas of cognition, social functioning, personal functioning, and deficiencies of concentration/persistence/pace. A “marked” delay must be present in two of these functional areas. The petitioner does not meet or medically equal the autism listing because objective testing shows that he does not have a “marked” delay in the areas of cognition, personal functioning, and social functioning. The next question is whether he *functionally equals* an appropriate Listing standard.

### III. THE PETITIONER’S CONDITION DOES NOT *FUNCTIONALLY EQUAL* THE SECTION 112.10 LISTINGS.

The Listings describe impairments that are significant enough to cause "marked and severe" functional limitations. This phrase is a term of art in children’s disability rules. In general, a child's impairment(s) is of "listing-level severity" if it results in “marked” limitations in two broad areas of functioning, or “extreme” limitations in one such area. 20 C.F.R. §416.925.

"Marked" and "extreme" limitation are defined at 20 C.F.R. 416.926a(e). Marked limitation means, when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations below the norm for the test (but less than three standard deviations). Or, for children from age three to age eighteen, it means "more than moderate" and "less than extreme." Expressed another way, a marked limitation seriously interferes with a child’s day -to-day functioning. Marked limitations must be present in two “domains.”

In comparison, "extreme" limitation means a score three standard deviations below the norm or, for children age three to age eighteen, no meaningful function in a given area. See 20 C.F.R. §416.926a(e)(3). Fortunately, the petitioner does not have the extreme limitation of "no meaningful function" in a given area.

To return to a discussion of whether the petitioner has “marked” limitations in two domains, the SSI rule identifies six domains to be reviewed: (1) Acquiring and using information, (2) Attending and completing tasks, (3) Interacting and relating with others, (4) Moving about and manipulating objects, (5) Caring for yourself, and (6) Health and physical well-being. 20 C.F.R. §416.926a(b)(1). I conclude that, although the petitioner has some limitations in multiple domains, the petitioner does not have a *marked* limitation in any domain, other than that of attending and completing tasks.

For the domain of *acquiring and using information*, a child between the ages of three and six should be able to learn and use the skills needed to help him/her read, write, and do arithmetic when he/she is older:

For example, listening to stories, rhyming words, and matching letters are skills needed for learning to read. Counting, sorting shapes, and building with blocks are skills needed to learn math. Painting, coloring, ... are some of the skills needed in learning to write. Using words to ask questions, give answers, follow directions, describe things, explain what you mean, and tell stories allows you to acquire and share knowledge and experience of the world around you. All of these are called “readiness skills,” and you should have them by the time you begin first grade.

20 C.F.R. §416.926a(g)(2)(iii).

Per the evaluations submitted, the petitioner's overall intellectual functioning is at least in the average range. See Finding #6. Based on the foregoing, I conclude that the petitioner has no limitation in the domain of acquiring and using information.

Regarding the domain of ***attending and completing tasks***, the child must focus and maintain attention, and begin and finish activities. *Id.*, (h), intro. A partial description of the skills within this domain is as follows:

(h) *Attending and completing tasks*. In this domain, we consider how well you are able to focus and maintain your attention, and how well you begin, carry through, and finish your activities, including the pace at which you perform activities and the ease with which you change them. ... As a preschooler, you should be able to pay attention when you are spoken to directly, sustain attention to your play and learning activities, and concentrate on activities like putting puzzles together or completing art projects. You should also be able to focus long enough to do many more things by yourself, such as getting your clothes together and dressing yourself, feeding yourself, or putting away your toys. You should usually be able to wait your turn and to change your activity when a caregiver or teacher says it is time to do something else.

*Id.*, (h)(2)(iii). DDB takes the position that the petitioner has some limitations, but that they are less than marked. I disagree, and conclude that the petitioner does have a marked limitation in this domain.

In the next domain of ***interacting and relating with others***, DDB determined that the child has a less than marked limitation, and I agree. Those domain skills are as follows:

(iii) *Preschool children (age 3 to attainment of age 6)*. At this age, you should be able to socialize with children as well as adults. You should begin to prefer playmates your own age and start to develop friendships with children who are your age. You should be able to use words instead of actions to express yourself, and also be better able to share, show affection, and offer to help. You should be able to relate to caregivers with increasing independence, choose your own friends, and play cooperatively with other children, one-at-a-time or in a group, without continual adult supervision. You should be able to initiate and participate in conversations, using increasingly complex vocabulary and grammar, and speaking clearly enough that both familiar and unfamiliar listeners can understand what you say most of the time.

*Id.*, (i)(2)(iii).

Regarding the domain of ***moving about and manipulating objects***, the child must be able to move his/her body from one place to another and have adequate fine motor skills:

As a preschooler, you should be able to walk and run with ease. Your gross motor skills should let you climb stairs and playground equipment with little supervision, and let you play more independently; e.g., you should be able to swing by yourself and may start learning to ride a tricycle. Your fine motor skills should also be developing. You should be able to complete puzzles easily, string beads, and build with an assortment of blocks. You should be showing increasing control of crayons, ... .

Per Finding #9, the petitioner has no limitations in this domain, which is a conclusion he does not contest.

For the domain of *caring for yourself*, a child between three and six should be able to take care of his/her health, possessions and living area, per this description:

You should want to take care of many of your physical needs by yourself (e.g., putting on your shoes, getting a snack), and also want to try doing some things that you cannot do fully (e.g., tying your shoes, climbing on a chair to reach something up high, taking a bath). ...

*Id.*, (k)(2)(iii). Per the information in Finding #10, I conclude that the petitioner has a less than marked limitation in this domain.

Finally, in the domain of *health and physical well-being*, the child must have a disorder or be taking medications/treatments with physical effects that make it difficult to perform activities independently. Examples in the rule of marked physical effects include the need for an organ transplant, the need for a life-sustaining device, the need for 24 hour per day medical supervision, infants weighing less than 2,000 grams at birth, and gastrostomy. *Id.* (l),(m). Fortunately, the petitioner has none of these enumerated needs. He appears to be in generally good health, with no physical disabilities. The petitioner agrees that he does not have a limitation in this domain.

As I noted at the beginning of Discussion section III, for a child's condition to functionally equal the severity of a Listing, the child must have a marked limitation in two of the six domains. This child has a "marked" limitation in only one domain, so I must uphold DDB's decision that he is not disabled for Katie Beckett MA/CLTS purposes at this time. As the child continues to develop and grow older, it is possible that more of his functional deficits will achieve the "marked" level. If that should occur, the petitioner should feel free to file a new MA/CLTS application.

### **CONCLUSIONS OF LAW**

1. The petitioner's condition does not meet or medically equal the autism listing at Section 112.10.
2. The petitioner's condition does not functionally equal the autism listing because the petitioner does not have a marked limitation in two domains; marked limitation in two domains is required for functional equivalence to a listing standard.
3. The DDB correctly determined that the petitioner is not disabled for CLTS purposes at this time.

**THEREFORE, it is**

**ORDERED**

That the petition is dismissed.

### **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 4th day of February, 2013

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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 4, 2013.

Walworth County Department of Human Services  
Bureau of Long-Term Support  
Division of Health Care Access and Accountability