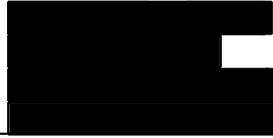




**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of



DECISION

CWK/145595

PRELIMINARY RECITALS

Pursuant to a petition filed November 27, 2012, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Brown County Human Services in regard to Medical Assistance, a hearing was held on January 29, 2013, at Green Bay, Wisconsin.

The issue for determination is whether the Department erred in determining that petitioner does not meet any of the CLTS Waiver levels of care.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

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

By: Laurie Mapes

Brown County Human Services
Economic Support-2nd Floor
111 N. Jefferson St.
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Brown County.
2. Petitioner is 8 years old. He has an autism spectrum disorder diagnosis.

3. Petitioner has an individualized education plan (IEP) and receives support at his school for speech therapy, a social group, and occupational therapy. He has an aide in school who assists him. Petitioner is in third grade which is the appropriate grade level given petitioner's age. Petitioner needs prompting in the school setting. He does well at academics and operates at grade level with extra support. He needs extra time to complete certain assignments or tests.
4. Petitioner is not currently under the care of a physician or psychologist or psychiatrist.
5. Petitioner does not take any medication.
6. Petitioner at time has aggressive outbursts including toward his mother, father, and younger sibling. The outbursts were described at hearing as involving grabbing, swinging hands, squeezing, pinching, hitting and pushing.
7. Petitioner sometimes has tantrums or meltdowns when he gets frustrated. Petitioner also does not appreciate that certain behavior is wrong.
8. Petitioner was on the Children's Long Term Support (CLTS) Waiver wait list until 11/2012.
9. On 11/12/12 the Department completed the CLTS functional screen and determined that petitioner did not meet the level of care for services under the waiver.
10. On November 13, 2012 the Department sent a letter to petitioner informing him that he was denied eligibility for the CLTS waiver program as he did not meet any of the applicable levels of care (LOC).

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. The level of care criteria are found in the *Manual's* Appendix A-10. The nursing home level of care and the hospital level of care are clearly not applicable here and will not be discussed. The remaining two LOC's are the only real possibilities under these facts.

II. SEVERE EMOTIONAL DISTURBANCE (“SED”) ANALYSIS.

The SED Level of Care requires (1) a diagnosis of an emotional and/or behavioral problem diagnosed under the American Psychiatric Association classification system, (2) diagnosis/symptoms that have lasted at least six months and are expected to last for one year or longer, (3) the child must receive or require services from at least two of a number of listed service systems (one system if the intensity is expected to be three hours or more per week), and (4) the child must have severe symptomology or dangerous behaviors.

The fourth criterion, severe symptomology, includes seven possible standards. The first four are that the child will be found to have severe symptoms if he has either currently, within the past three months, or twice within the past year, any of the following: psychosis, suicidality, violence, or anorexia/bulimia. Each is set forth in greater detail in the Manual and petitioner does not meet any of these four standards.

Standards V through VII reflect the Dangerous Behaviors category. These include high-risk behaviors, such as running away and substance abuse. These are not present here. Self-injurious behaviors such as self-cutting or self-biting make up Standard VI and those do not apply in this case. Standard VII is a group of behaviors listed under “Aggressive or Offensive Behavior toward Others.” It includes true threats to kill and sexually inappropriate behavior including aggression, abuse and molestation. The only subgroup of Standard VII that I find at all applicable is:

Hitting, Biting, or Kicking: Pattern of physically aggressive behaviors not explained by the age or lack of maturity of the aggressor and results in serious harm to others.

Appendix A-10 at p.16. The petitioner’s relatives described “meltdowns” or tantrums, grabbing, hitting, pinching, and squeezing. But, following the hearing and considering the testimony of the parents and relatives and review of exhibits, I am unconvinced that this behavior cannot be explained by the age and maturity of petitioner. It may be that it is so severe as to be unexplainable, but I can only base my decision on the evidence presented. The evidence was insufficient for me to reach that conclusion. Most of the behaviors described by the witnesses seem typical of a frustrated eight year old. After this ALJ’s repeated effort at hearing to have petitioner’s parents describe the seriousness of these outbursts, petitioner’s father explained that if petitioner and his brother are playing and the brother does something petitioner does not like then petitioner will punch his brother. The father explained that “sometimes it’s because of something as simple as [the little brother] picking up a car that [petitioner] did not want him to pick up.” Such behavior is not even close to the type of dangerous behavior contemplated by the program rules.

III. 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 (see Appendix A-10). The ICF/DD level applies to a child who meets ALL THREE of the following criteria: (1) a cognitive disability that results in a substantial learning impairment, (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.

Petitioner has been diagnosed with autism spectrum disorder which is one of the DD LOC diagnoses. But, the Department found no “substantial learning impairment” on petitioner’s part. According to the *Institutional Levels of Care-CLTS* manual, “substantial learning impairment is described as follows:

The diagnosis must have resulted in the child having **substantial learning impairments** as measured by **ONE** of the following:

1. A 30% (25% if the child is under one year of age) or greater delay in aggregate intellectual functioning, based on valid, standardized and norm referenced measures of aggregate intellectual functioning; OR 2/7/2011 INTERMEDIATE CARE FACILITY (ICF/MR) LEVEL OF CARE – 4
2. A score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean on valid, standardized and norm referenced measures of aggregate intellectual functioning.

The cognitive disability criterion is not met solely based on diagnosis, but must result in a substantial learning impairment as defined above. For example, children with Autism Spectrum Disorders, Cerebral Palsy or Spina Bifida without a substantial learning impairment do not meet the ICF/MR LOC. They may be evaluated against the Nursing Home level of care screen in the case of a child with Cerebral Palsy or Spina Bifida, or the Psychiatric Hospital level of care screen in the case of a child with an Autism Spectrum Disorder.

For example, children who would MEET Criterion 1- Cognitive Disability:

- A 12-year-old child with Down Syndrome and a full scale IQ of 56. *This child has a diagnosis similar to a Cognitive Disability and a substantial impairment in learning, based on an IQ of 56 on the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), a valid, standardized and norm referenced measure of aggregate intellectual functioning, and therefore meets Criterion 1.*
- A 2-year-old child diagnosed with global developmental delays who has a 30% delay in cognitive development based on valid, norm referenced Birth-3 testing. *This child has a diagnosis similar to a Cognitive Disability and has a measured substantial impairment in learning and therefore meets Criterion 1.*

For example, children who would NOT MEET Criterion 1- Cognitive Disability:

* * *

- ***A child whose school testing shows evidence of learning disabilities that require a more structured educational environment plus other special modifications to address the child's individual learning style. The child continues to reason, problem-solve, and learn at a reasonable functional level even though she is behind same aged peers. This child's functional limitations with regard to cognitive capacity do not demonstrate substantial impairments in learning and therefore this child would not meet Criterion 1. [(emphasis added)].***

*The Cognitive Disability Criterion must be met before considering Criterion 2: Substantial Functional Limitations. If the Cognitive Disability Criterion is not met, the reviewer **must stop here**, but may consider levels of care other than ICF/MR (DD), if appropriate.*

While it is clear that petitioner has delays, in this case petitioner has provided no evidence that he has such a substantial learning impairment. I find no evidence supporting such a finding by the preponderance of the evidence in this record. Petitioner's circumstance appears to most closely resemble this last example which the *Manual* states does not meet Criterion 1 and thus is not eligible under the DD level of care.

Although the finding of no substantial learning impairment would end the inquiry, for the purposes of this appeal I will also note that I do not find that petitioner has a substantial functional limitation in social competency (which is really the only one that was argued by petitioner). The Department also 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).

Petitioner argued primarily that petitioner suffers from limitations in social skills. Petitioner points to certain incidents to illustrate this. Petitioner's mother explained that petitioner has a friend where the two will play chase on the playground. The mother stated "someone who wants to participate in that is a friend in [petitioner]'s eyes." It seems to me that this would actually qualify as a friend for many eight year old boys. But, she also explained that petitioner has "gone into meltdown mode" when having playdates with classmates over little things like not being able to find a particular Lego piece he wants. Again, this does not seem substantial. In fact, such behaviors seem typical for an 8 year old boy.

Petitioner's parents repeatedly stated that they need help and support. But, the CLTS waiver is not for every child with autism, or for every family that needs support. The resources are limited and the program has specific criteria that must be met to ensure that the most severe cases get the services. This is not a close case based on the record. Petitioner does not meet the criteria.

I note that this Decision is based on the *entire* record including hearing testimony of all witnesses and all exhibits. Petitioner's mother comments in her January 22, 2013 letter to this Division that she does not believe that the functional screen tool used by the department in its assessment and determination could capture the "full picture of [petitioner]'s situation." I wish to make clear that this Decision is not an affirmance of the functional screen or its accuracy. At hearing, the petitioner had the opportunity to present any admissible evidence to explain the "full picture" and persuade me that the determination made by the Department was wrong. That is, the petitioner had full and fair opportunity to prove that he meets the various criteria for any one of the program's levels of care. I repeatedly encouraged petitioner's parents to provide me with information to illustrate that the circumstances rise to such a level rather than simply reflecting a boy and a family with challenges. The evidence, in its entirety, has not so persuaded me and I therefore affirm the Department determination.

CONCLUSIONS OF LAW

The Department did not err in its denial of CLTS eligibility.

THEREFORE, it is

ORDERED

That this appeal 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 March, 2013

\sJohn 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 March 4, 2013.

Brown County Human Services
Bureau of Long-Term Support