



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[Redacted]
[Redacted]
c/o [Redacted] and [Redacted]
[Redacted]
[Redacted]

DECISION

CWK/146603

PRELIMINARY RECITALS

Pursuant to a petition filed January 14, 2013, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Dane County Department of Human Services in regard to Medical Assistance, a hearing was held on February 08, 2013, at Madison, Wisconsin. During that February 8, 2013 hearing, the petitioner's representative (his father) requested that the hearing record be held open until March 8, 2013 for documents submitted during the hearing and documents submitted after the hearing to be sent to the Dane County agency representative for a reconsideration decision. The petitioner's parents asserted they believed that [Redacted] met the Level of Care guidelines.

This Administrative Law Judge (ALJ) sent a March 12, 2013 letter to Ms. Radloff at the county agency with a copy of the following Exhibits and documents submitted to DHA: a) Treatment Plan summary of progress, February, 2013; b) Initial treatment plan from the Wisconsin Early Autism Project (WEAP); c) Progress notes for October through December, 2012 from WEAP and the Friendship Tree Preschool; and d) Developmental Evaluation report from Group Health Cooperative, Dr. Caitlin Stone. In that same letter, this ALJ requested that Ms. Radloff review the enclosed copies of letters/documents, and submit a detailed reconsideration summary to me at the Division of Hearings and Appeals (DHA) by March 29, 2013 with a copy of that reconsideration summary letter to be sent to the petitioner's parents as his representatives. Ms. Radloff sent a March 27, 2013 letter to DHA, but that letter was not received at DHA. DHA requested that the county agency re-send that letter to DHA and to the petitioner during June, 2013, and Ms. Radloff sent a June 11, 2013 letter with an attached copy of her March 27, 2013 letter to DHA and to petitioner. That June 11, 2013 cover letter confirmed that petitioner's parents were granted until June 28, 2013 to submit to DHA any response to Ms. Radloff's March 27, 2013 letter. The petitioner's representative failed to submit any response to DHA by June 28, 2013 or even by the date of this decision.

The issue for determination is whether the county agency correctly denied the petitioner's December, 2012 application for the COP Waiver and Children's Long Term Support services program due to his not meeting the Level of Care requirement necessary to be eligible for those programs.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[Redacted]
[Redacted]
c/o [Redacted] and [Redacted]
[Redacted]
[Redacted]

Representative:

[Redacted] [Redacted], father
[Redacted]
[Redacted]

Respondent:

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

By: Angela Radloff, community program specialist, written submissions
Dane County Department of Human Services
1202 Northport Drive
Madison, WI 53704

ADMINISTRATIVE LAW JUDGE:
Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 4 year old resident of Dane County who resides with his parents.
2. Petitioner is diagnosed with autism spectrum disorder and attends Wisconsin Early Autism Project (WEAP) 30 hours per week.
3. Petitioner does have some problems with interacting with his peers, and difficulty with adapting to changes in his routines due to his Autism. [REDACTED] can be “fearless,” and does not always understand the consequences of his actions.
4. Petitioner has a large vocabulary and uses sentences to request things that he needs or wants. In his IEP testing, petitioner scored generally in the average range in his receptive and expressive language with some delays, and generally in the average range in cognitive skill development (verbal and non-verbal reasoning) with some delays. He does not have any delays in his ability to perform ADLs.
5. During November, 2012, petitioner’s parents applied on behalf of the petitioner for the Children’s Long Term Support (CLTS) Waiver.
6. On December 10, 2012, the Department’s agent, Family Support and Resource Center screener, [REDACTED] [REDACTED], completed the CLTS functional screen and determined that petitioner did not meet any of the levels of care for services under the waiver.
7. On December 18, 2012 the Department sent a letter to petitioner’s parents informing them that their son, [REDACTED], was denied eligibility for the CLTS waiver program as he did not meet any of the applicable levels of care (LOC).
8. On March 24, 2013, the county agency completed a second CLTS functional screen of the petitioner and again concluded that petitioner did not meet any of the required levels of care for services under the waiver.

DISCUSSION

I. INTRODUCTION

The MA Community Waiver Programs (e.g., Community Integration Program, Community Options Program - Waiver) are partially funded by the federal government through the Medical Assistance (MA) program. These Waiver programs must meet federal requirements, including MA regulations when applicable. To receive services through the Waiver programs, a person must be currently eligible for MA, have institutional-level care needs, and be elderly or disabled. *Medicaid Eligibility Handbook (MEH)*,

§28.1, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/>, and the *MA Waivers Manual (Manual)*, at http://dhfs.wisconsin.gov/lte_cop/waivermanual/index.htm.

To meet the functional eligibility requirement (*i.e.*, to have institutional-level care needs), a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. *Manual*, §2.07; 42 C.F.R. §§ 435.217 & 435.441.301(b). To be found or remain eligible, the applicant must undergo an assessment of his/her needs and functioning.

II. THE DHS COMPUTERIZED SCREENING TOOL DETERMINED THAT THE PETITIONER IS NOT FUNCTIONALLY ELIGIBLE AT ANY LEVEL OF CARE.

The Wisconsin Department of Health Services has made efforts to improve the statewide efficacy of functional/LOC assessments by implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained quality assurance screener who has experience working with long term care consumers. This screener asks the applicant, or a recipient at a periodic review, many 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" for the applicant to the Department's Division of Long Term Care. The Department then runs the Long Term Functional Screen data (or "tool") through a computer program to see if the applicant/recipient meets any of the nursing levels of care.

Initially, the Department employed a statistical consultant to test the use of the "tool" (or "LOC" form) and the reliability of the outcomes obtained in using the tool and the computer analysis program. The consultant concluded that the use of the functional screen resulted in a high degree of reliability and consistency. The LOC form is available at <http://www.dhs.wisconsin.gov/forms/F0/f00366.pdf> and it is designed to incorporate the skeletal definitions from the federal Medicaid rules for Nursing Care and institutional Developmental Disability facilities.

The petitioner's diagnosis of autism spectrum disorder is not in dispute. The agency assessor determined in the screenings of December 10, 2012 and March 24, 2013, that petitioner was able to perform his ADLs and basically performed in the average range in cognitive and language. See above Findings of Fact. 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, hospital, SED, or ICF/MR levels. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

The petitioner's parents disagreed in part with the assessor's characterization of [REDACTED]. They asserted that [REDACTED] has delays not only personal safety, but also in learning and receptive/expressive communication and self-cares. However, based on the proffered testimony and reliable evidence in the hearing, I conclude that the assessor made the correct entries into the LOC form, which in turn resulted in the computer program's determination that the petitioner does not currently have care needs at an institutional level.

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 problems with social interactions and some 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 and peer interactions. Petitioner's father indicated that [REDACTED] needed 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.

There is some allegation that the functional screen tool used by the department in its assessment and determination do not fully capture 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.

As indicated in the above Preliminary Recitals, petitioner's parents were provided the opportunity to respond to Ms. Radloff's reconsideration summary by June 28, 2013, but failed to do so. The petitioner was unable to refute the Department's case. Accordingly, based upon the above, I must conclude that the county agency correctly denied the petitioner's December, 2012 application for the COP Waiver and Children's Long Term Support services program due to his not meeting the Level of Care requirement necessary to be eligible for those programs.

As dicta, if the petitioner's conditions worsen, the petitioner's parents may wish to reapply on his behalf for Waiver benefits.

CONCLUSIONS OF LAW

The county agency correctly denied the petitioner's December, 2012 application for the COP Waiver and Children's Long Term Support services program due to his not meeting the Level of Care requirement necessary to be eligible for those programs.

THEREFORE, it is ORDERED

The petition for review herein be and the same is hereby 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 29th day of July, 2013

\sGary M. Wolkstein
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 July 29, 2013.

Family Support & Resource Center
Bureau of Long-Term Support