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

In the Matter of

██████████ ██████████
c/o ██████████ ██████████
██████████
████████████████████

DECISION

MKB/147240

PRELIMINARY RECITALS

Pursuant to a petition filed February 09, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance – Katie Beckett Program, a telephone hearing was held on March 29, 2013. At the request of the petitioner, the record was held open for 20 days for the issuance of an Interim Decision directing the Bureau of Long-Term Support to review additional documents produced at the hearing, and re-determine petitioner’s eligibility.

The issue for determination is whether respondent correctly denied petitioner’s Medicaid eligibility under the provisions of the Katie Beckett program.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

██████████ ██████████
c/o ██████████ ██████████
██████████
████████████████████

Respondent:

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

Written Appearance by: Barbara Behrend, MS, RN
Bureau of Long-Term Support
1 West Wilson
Madison, WI

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is an 11 year old resident of Door County.

2. The petitioner is diagnosed with Fanconi's Anemia, developmental delay, adjustment disorder with anxiety and depression, attention deficit hyperactivity disorder, celiac disease, dyslexia, tactile sensory sensitivities, and hypoplastic thumbs. Exhibit 2.
3. Petitioner applied for Wisconsin Medicaid through the Katie Beckett program on August 29, 2012. On January 4, 2013, the respondent notified petitioner that it had determined that the petitioner did not meet the requirements necessary to be eligible for the Katie Beckett program. Exhibit 1.
4. On February 9, 2013, an appeal was filed on the Petitioner's behalf with the Division of Hearings and Appeals.

DISCUSSION

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting disabled children, who would otherwise be institutionalized, to receive MA while living at home with their parents. 42 U.S.C. 1396a(e)(3); 42 C.F.R. §435.225; Wis. Stat., §49.46(1)(d)4. The Bureau is required to review Katie Beckett waiver applications in a five-step process. The first step is to determine whether the child is age 18 or younger and disabled. Petitioner has met this first standard. 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. The Bureau determined that petitioner does not require this level of care. (The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child.)

The Bureau developed a policy manual, issued in January, 1993, which defines and describes childhood care levels. See Katie Beckett Program Policies and Procedures. The level of care criteria were amended in 1994 and 1996. The criteria for developmental disabilities were amended again in 1999 and 2004.

Petitioner does not satisfy the hospital level of care standard. She is not in need of acute medical care, and there is no assertion that she is in need of psychiatric hospitalization.

The remaining levels of care which can be attained for eligibility purposes are nursing home levels of care: Intensive Skilled Nursing (ISN), Skilled Nursing Facility care (SNF), Intermediate Care Facility care (ICF), and ICF care for persons with Developmental Disabilities at Level 1 or Level 2 (ICF-DD1 and ICF-DD2).

To qualify for an ISN care level, a patient must need services requiring specialized nursing assessment skills and have complex health care needs requiring specific nursing or medical interventions. Examples of persons who would meet this care level are those requiring daily enteral/parenteral nutritional services, continuous oxygen therapy, continual tracheostomy services, sliding scale insulin, peritoneal dialysis, or AIDS treatment. Manual, Ch. IV, pp. 63-64. Petitioner is not at this care level.

SNF level services are defined as "professional nursing services furnished pursuant to a physician's orders which require the skills of a registered nurse or licensed practical nurse which are provided either directly by or under the supervision of the registered nurse or licensed practical nurse." Wis. Adm. Code, §HFS 101.03(163). A child requiring SNF care would have a long term illness or disability of varying stability, and would need daily, direct, comprehensive interventions to maintain a stable health status; the child would continue to be at risk for changes in condition due the condition's complexity. Manual, p. 67. While petitioner is subject to changing conditions, she is relatively stable medically and more importantly does not need daily, comprehensive medical intervention.

ICF level services are for a child with a long term, relatively stable disability that requires basic nursing services daily. The child is at risk of changes in condition, and overall ability to function is diminished. The Manual's ICF criteria are that the child must have (A) a long-term disability, (B) diminished functional

capacity, and (C) the need for restorative nursing services. Id., pp. 73-74. While petitioner has a long-term disability, and she might meet the definition of diminished functional capacity, she has not established the necessity of restorative nursing services.

Such services include, but are not limited to, complex transfers, extensive therapeutic exercises, special skin or wound care, non-routine ostomy care, frequent repositioning, special medical procedures, and assistance with adaptive equipment. The services require direct hands on assistance, typically are time consuming, and necessary to perform several times each day. Ibid., p. 74. Importantly for this case, the Manual goes on to state on page 74: “The need for personal services alone, such as minimal help with bathing and dressing, does not indicate the need for services. Also the need for supervision and direction to complete tasks does not meet the requirement for **direct assistance.**” Bold-type in original. While petitioner does receive regular therapy, such services are not the equivalent of the nursing services described in the Manual.

To meet an ICF-DD level the person must have a developmental disability and the need for active treatment. The definition of developmental disability for a child under age five is that he must have a substantial cognitive impairment or have a condition closely related to cognitive disability that is likely to continue indefinitely, that results in substantial functional limitations when compared to age appropriate activities in at least one developmental domain. ICF/MR-DD care screen, page 1-2 (October, 2004). It is the cognitive disability that must cause the functional limitation; a child without a cognitive impairment but who has functional limitations must be reviewed under a different level of care screen.

I have reviewed petitioner’s records and can find no indication that she has a cognitive impairment as defined. Because petitioner does not have a cognitive impairment, she would not qualify for ICF/MR-DD.

Clearly petitioner has multiple, ongoing medical concerns. She, however, not not established the the respondent has erred in determining that she does not meet the level of care requirements for Katie Beckett eligibility at this time. That does not mean that she cannot reapply if her condition worsens or changes to require more hands-on assistance, particularly if she gets close to needing the bone marrow transplant that is expected. I further note that it is the long-standing position of the Division of Hearings & Appeals that the Division’s hearing examiners lack the authority to render a decision on equitable, or fairness, arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. As such, while I certainly empathize with petitioner’s situation, and applaud her providers’ support as noted in the file, I must conclude that the respondent has correctly determined that the petitioner does not presently meet a Katie Beckett program level of care.

CONCLUSIONS OF LAW

Petitioner does not meet a level of care required for Katie Beckett eligibility at this time.

NOW, THEREFORE, it is **ORDERED**

That 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 28th day of May, 2013

\sPeter McCombs
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 May 28, 2013.

Bureau of Long-Term Support
Division of Health Care Access and Accountability