



FH

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

In the Matter of

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

DECISION

MKB/148136

PRELIMINARY RECITALS

Pursuant to a petition filed March 18, 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, a telephone hearing was held on April 22, 2013.

The issue for determination is whether the agency properly discontinued the Petitioner's eligibility under the Katie Beckett program.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: Patsy Bansley, 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 a 9 year old resident of Jefferson County.
2. Petitioner has received Katie Beckett MA since 2004 under a Nursing Home (NH) level of care. In 2013 the program reviewed petitioner's eligibility. Subsequent to that review, the program

informed petitioner on February 20, 2013, that her eligibility would be terminated because it found that she no longer met the required level of care.

3. Petitioner has Fanconi Anemia. Symptoms include developmental delays, defects in her organs, malformed thumbs, and bone marrow defects. She has a history of seizures, and will require a bone marrow transplant at some point in the future. Petitioner receives required nutrition via nighttime g-tube feedings.
4. Petitioner is small in stature. She has learning disabilities which are addressed by an Individual Education Plan (IEP). Testing has verified that petitioner is behind her peers in reading, sentence comprehension and spelling, though she tests at grade level in math.
5. Petitioner is not substantially impaired cognitively.
6. On March 18, 2013, an appeal was timely 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. Wis. Stats., § 49.47(4)(c)1m. The agency is required to review Katie Beckett waiver recertification applications in a five-step process. The first step is to determine whether the child is age 18 or younger and disabled. Petitioner continues to meet 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 agency determined that Petitioner no longer meets any level of care criteria. (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). Specifically, the agency determined that the Petitioner no longer meets the Nursing Home Level of Care that she previously met.

The Institutional Level of Care Manual states the following regarding the Nursing Home Level of Care:

The child with a Nursing Home – Physical Disabilities (PD) Level of Care has a long-term medical or physical condition, which significantly diminishes his/her functional capacity and interferes with the ability to perform age appropriate activities of daily living at home and in the community. This child requires an extraordinary degree of daily assistance from others to meet everyday routines and special medical needs. The special medical needs warrant skilled nursing interventions that require specialized training and monitoring that is significantly beyond that which is routinely provided to children. *The intensity and frequency of required skilled nursing interventions must be so substantial that without direct, daily intervention, the child is at risk for institutionalization within a nursing home.*

A child may be assigned this level of care if the child meets BOTH of the criteria listed below for Physical Disability. The criteria are:

1. The child has a diagnosis of a medical/physical condition resulting in needs requiring long-term care services; and;
2. The child requires skilled Nursing Interventions and/or has Substantial functional Limitations requiring hand-on assistance from others throughout their day.

Institutional Levels of Care Manual, updated February 2011 (hereinafter “Manual”), p. 22.¹

The Manual indicates that to meet criteria #2 regarding skilled nursing interventions and/or substantial functional limitations, the child must meet one of two standards:

Standard I: The child must demonstrate both a need for skilled nursing/therapeutic intervention plus two substantial functional limitations:

A. Needs and receives at least one skilled nursing intervention listed below that must be performed daily and is reasonably expected to continue at least six months.

OR

B. Needs and receives at least two skilled nursing/therapeutic interventions listed below that must be performed at least weekly . . .

Daily Skilled Nursing Interventions that apply to both Item A and B above are limited to the following and do not include site care: . . . Tube feedings: G-tube

C. The child exhibits substantial functional limitations when compared to age appropriate activities in at least two of the seven specific areas listed below that are reasonably expected to last at least one year. . .

1. Learning. A 30% (25% if the child is under one year of age) or greater delay or a score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean based on valid, standardized and norm referenced measures of aggregate intellectual functioning.

2. Communication: A substantial functional limitation in communication is defined as a 30% (25% if under one year) or greater delay or a standard score of at least 2 (1.5 if under one year) standard deviations below the mean on valid, standardized and norm referenced measures of both expressive and receptive communication functioning.

3. Self Care. Refer to Appendix B. . . Child must demonstrate a deficit in at least one of the following five areas of self-care: bathing, grooming, dressing, toileting, eating.

. . .

Standard II. The child must have substantial functional limitations requiring daily direct hands on assistance in at least four of the seven specific areas listed below that are reasonably expected to last for at least one year. There is no requirement of skilled nursing or therapeutic intervention for this standards.

1. Learning . . .

2. Communication . . .

3. Bathing . . .

4. Grooming or Dressing . . .

5. Eating . . .

6. Toileting . . .

7. Mobility. . .

¹ The agency’s written basis for denial indicates that eligibility was determined based on the Level of Care criteria dated January, 2010. I note that the latest update to the criteria is dated February, 2011 and will use that criteria here in reviewing the agency’s determination.

Appendix B: A substantial functional limitation is a child's inability to perform daily functions without extensive, hands-on assistance significantly beyond the age at which similar aged peers typically require such assistance. This assistance must be needed by the child to complete the task or function at all, rather than to complete the task better, more quickly or to make the task easier.

In order for a limitation to be considered a substantial functional limitation, it must:

- Be the direct result of the child's disability; and
- Be exhibited most of the time; and
- Result in the child needing extensive, direct, hands-on adult intervention and assistance beyond the level of intervention similar aged peers typically require in order to avoid institutionalization.

In addition, the child must

- Require the assistance consistently, and
- Require the assistance for at least the next 12 months, and
- Require the assistance to complete the function across all settings, including home, school and community.

The basis for the agency's denial was that the Petitioner does not require daily nursing interventions and does not have substantial functional limitations. The agency has the burden of proof in a benefit discontinuance case. See, e.g., *State v. Hanson*, 98 Wis. 2nd 80 (Wis. App. 1980). That burden is the preponderance of the credible evidence. If the agency presents a prima facie case supporting its position the Petitioner may rebut that case. In this case, I find the Department's written position is conclusory without specific demonstration or analysis as to why or how it made its findings.

The Petitioner has diagnosis of Fanconi Anemia with body structure and functional abnormalities related to this diagnosis. In this case, the Petitioner's nutritional needs are met with daily G-tube feedings. She has received nutrition via g-tube since shortly after her birth. I could find no indication in the record that there is any prospect of moving petitioner off of her reliance on the g-tube feedings. In addition, she has a history of esophageal atresia, Celiac disease, dumping syndrome and food allergies (barley, gluten, oates, rye and wheat). Exhibit 2. Therefore, she requires constant supervision and assistance during any feeding episodes. Based on this evidence, the Petitioner meets the criteria of requiring at least one skilled nursing intervention daily.

With regard to substantial functional limitations, the evidence indicates the Petitioner has limitations with regard to learning, bathing, grooming/dressing, toileting and eating. The agency contends that the Petitioner has no substantial functional limitations but provides no specific evidence with regard to how it arrived at that conclusion. I do not know, and the record does not reflect, if the previous determination finding the Petitioner eligible for Katie Beckett considered her limitations to be substantial in these areas. If so, it is the agency's burden to demonstrate that the Petitioner no longer meets the criteria. Without more evidence, I cannot make a determination that she no longer meets the criteria. Based on the evidence that was submitted, as well as testimony from petitioner's parents, it appears that she does have a significant functional limitation in learning, bathing, grooming/dressing, toileting and eating.

There is sufficient evidence to demonstrate substantial functional limitations with regard to self-care. The Petitioner requires regular assistance with learning, communication, bathing, grooming/dressing, toileting and eating.

The Petitioner previously met the criteria for eligibility for the Katie Beckett program. The evidence presented for this hearing demonstrates that the Petitioner requires a daily skilled nursing intervention and

has substantial functional limitations in learning, bathing, grooming/dressing, eating and toileting. In finding the Petitioner is no longer eligible, the burden is on the agency to demonstrate why the Petitioner does not meet the eligibility criteria. In this case, the agency's evidence is insufficient for me to determine what has changed in the agency's view with regard to the Petitioner's limitations and why the agency found she no longer meets the criteria.

CONCLUSIONS OF LAW

The agency did not properly deny Petitioner's eligibility for the Katie Beckett program.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency with instructions to restore Petitioner's Katie Beckett eligibility. This must be done within 10 days of the date of this decision.

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 June, 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 June 4, 2013.

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