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

In the Matter of

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

DECISION

MKB/148160

PRELIMINARY RECITALS

Pursuant to a petition filed March 20, 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 hearing was held on April 29, 2013, at Appleton, Wisconsin.

The issue for determination is whether the Department erred in its determination that petitioner does not meet any of the Levels of Care (LOC) to qualify for Katie Beckett Eligibility.

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
By: Barbara Behrend, MS RN
Bureau of Long-Term Support
1 West Wilson

Madison, WI

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 11-year old resident of Outagamie County.
2. Petitioner has conditions of hydrocephaly, developmental delay, and an intracranial shunt.

3. Petitioner has been enrolled in the KB program since 2001.
4. Petitioner bathes himself, but needs assistance getting in and out of the tub. Petitioner brushes his own teeth. He is independent in eating. Petitioner dresses himself and only requires assistance getting his foot braces on. Petitioner is independent toileting but needs help wiping due to having a short forearm and only 4 fingers on one hand.
5. Petitioner performs well in school in reading and spelling. He has tested above grade level in both.
6. Petitioner does not have substantial functional limitations as a result of his cognitive disability.
7. Petitioner does not need daily skilled nursing interventions.
8. Petitioner does not demonstrate severe symptomology or dangerous behaviors.

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. Sec. 49.47(4)(c)1m, Wis. Stats. The agency is required 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 does not require this level of care.

There currently are four levels of care: hospital, SED, nursing home, and care facility for the developmentally disabled (ICF-DD). They are defined in: *Institutional Levels of Care – Children’s Long Term Support Programs In Wisconsin*, effective February, 2011.¹ The only one that appears arguable to me is the DD LOC as petitioner clearly does not need the intense skilled nursing interventions of the Nursing Home LOC.

ICF/DD ANALYSIS.

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.

The Department’s letter of March 25, 2013 addresses only briefly the reasons why the Department deems petitioner not eligible under the DD LOC. The consultant writes “[c]urrent documentation does not support that [petitioner] has a diagnosis of a cognitive disability (i.e. mental retardation) or exhibits adaptive behaviors similar to a child with a substantial cognitive impairment.” This is incorrect. The consultant proceeds to state that Petitioner has been diagnosed with hydrocephalus, intracranial shunt, developmental delay. According to the CLTS Levels of Care, such diagnoses are sufficient to qualify a person for the “cognitive disability” criterion.

According to the CLTS LOC Manual regarding the determination of a cognitive disability:

The child must have a diagnosis of Cognitive Disability (i.e. Mental Retardation) or a similar diagnosis that substantially impairs learning.

The following diagnostic categories are considered diagnoses similar to Cognitive Disability or Mental Retardation for purposes of Criterion 1:

¹ See http://www.dhs.wisconsin.gov/bdds/waivermanual/CLTS_LOC.pdf.

- *Autism Spectrum Disorders*
- ***Brain Injury or Brain Damage***
- *Cerebral Palsy*
- ***Developmental Delay***
- *Down Syndrome*
- *Endocrine Disorders*
- *Fetal Alcohol Syndrome/Effects*
- ***Genetic or Chromosomal Disorders***
- *Metabolic Disorders*
- *Prader Willi Syndrome*
- *Rett's Syndrome*
- *Seizure Disorder*
- *Spina Bifida*
- *Tuberous Sclerosis*

The diagnoses of hydrocephaly and developmental delay appear to me to fit within the specifically designated conditions of developmental delay and genetic or chromosomal disorders would seem to apply. Certainly the diagnoses are akin to brain damage or injury and Down Syndrome. I am not persuaded that “[c]urrent documentation does not support that [petitioner] has a diagnosis of a cognitive disability.” In fact, I find the contrary.

The record also supports the finding that petitioner’s cognitive disability results in a substantial learning impairment. 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.**

The Department notes that the record shows a score of 52 on the Wechsler full-scale IQ test in 2006. The consultant notes that there were questions regarding validity of the test. The consultant states scores on certain other tests but does not tie them in to any argument as to whether they do or do not reflect a 30% or greater delay or how such scores support the Department argument, if at all. The consultant then proceeds to describe petitioner’s performance in the classroom – all of which leads me to a conclusion that the child does have a substantial learning impairment.

Finally, the consultant also states that petitioner “does not have substantial functional impairments.” Under the rules of the Manual:

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

OR

2. **Social Competency:** Refer to APPENDIX A. This Appendix lists deficits in social skills by age groups that demonstrate a substantial functional limitation in social competency.

OR

3. **Activities of Daily Living:** Refer to APPENDIX B. This Appendix describes the degree of deficit a child **must** demonstrate in activities of daily living to meet a substantial functional limitation based on the child’s age. One of the following requirements must be met:

For children 5 years of age or older, such a degree of deficit must be evidenced in at least **TWO** of the following six activities of daily living categories.

- a) Bathing or Grooming
- b) Dressing or Toileting
- c) Eating
- d) Mobility or Transfers
- e) Meal Preparation
(18 years old or older only)
- f) Money Management
(18 years old or older only)

In this case, the record shows that petitioner receives minor assistance with bathing, grooming, dressing and toileting. But these needs appear directly related to petitioner physical impairment, not his cognitive impairment, and the limited assistance her receives does not lead to a finding that the functional impairments relating to ADL's is substantial. The record does not indicate or lacks the required documentation to support a finding that there are substantial communication or social competency limitations of the type required under the program criteria. The DD LOC does not apply under the facts of this case.

CONCLUSIONS OF LAW

The Department did not err in denying Katie Beckett eligibility because petitioner does not meet any of the required LOC.

THEREFORE, it is

ORDERED

That this matter 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 6th day of June, 2013

\sJohn P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

David H. Schwarz
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on June 6, 2013.

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