



FH  
[REDACTED]

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

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In the Matter of

[REDACTED]  
[REDACTED]  
c/o [REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

CWA/148528

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**PRELIMINARY RECITALS**

Pursuant to a petition filed April 04, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Dodge County Department of Human Services in regard to Medical Assistance, a telephone hearing was held on May 14, 2013.

The issue for determination is whether respondent correctly concluded that petitioner is no longer eligible for the Children's Long Term Supports Waiver program (CLTS).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
c/o [REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: Chris Shanahan

Dodge County Department of Human Services  
143 E. Center Street  
Juneau, WI 53039-1371

**ADMINISTRATIVE LAW JUDGE:**

Peter McCombs  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Dodge County.
2. Petitioner has been diagnosed with autism, developmental delay, and Pervasive Developmental Disorder (Not Otherwise Specified) [PDD-NOS]. Petitioner has responded well to therapy and

has demonstrated increased proficiency in his language and academic skills; he struggles in the area of socialization. Exhibit 3. Petitioner suffers from night terrors, and has behavior issues, including self-harming behavior (twisting and pulling his hair out).

3. Petitioner was receiving intensive early intervention treatment from March of 2009 through November of 2011. From November, 2011, through September of 2012, petitioner switched to the post-intensive model; In September of 2012, the petitioner shifted to the consult model. Exhibit 2.
4. Petitioner received a letter from the respondent's Division of Long Term Care dated March 1, 2013, notifying him that his CLTS services would be discontinued effective March 31, 2013 because he no longer meets the level of care (LOC) requirements. Exhibit 1.

## 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 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.

I conclude that the petitioner has demonstrated eligibility per the first three criteria. 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, exhibited any of the following: psychosis, suicidality, violence, or anorexia/bulimia. Each is set forth in greater detail in the *Manual* and the record does not demonstrate that petitioner meets 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 the Functional Screen Report prepared by respondent indicates that petitioner does twist and pull out his hair when agitated, which has previously resulted in development of a bald patch. Petitioner's hair is now kept very short in order to prevent repetition of this behavior.

Standard VII, finally, 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 mother described "meltdowns" or tantrums, grabbing, hitting, pinching, and squeezing. The Functional Screen report noted that hitting at school has resulted in the imposition of a behavior plan at school.

The evidence regarding self-injurious behavior and aggressive/offensive behavior was insufficient for me to conclude that it comprised the type of dangerous behavior contemplated by the program rules. Specifically, the hair pulling behavior seems to have been largely ameliorated by keeping petitioner's hair shorter. Similarly, petitioner has not demonstrated that petitioner's physically aggressive behaviors have resulted in serious harm to others.

### 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](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 certain subjects, 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.

I note that this Decision is based on the *entire* record including hearing testimony of all witnesses and all exhibits. Petitioner's mother commented at hearing that she was concerned that the functional screen tool used by the department in its assessment and determination did not capture the full picture of petitioner's situation. One of petitioner's providers wrote:

...[petitioner] has deficits that directly impact his daily functioning and require support. [Petitioner] will greatly benefit from this ongoing support, and it will be critical in the upcoming years. Thus far, [petitioner] has many strengths that we have tried to build upon. He demonstrates proficiency in several academic areas, is socially motivated, has

built some positive peer relationships, and is very creative. In that respect, I believe it would be a disservice to let [petitioner's] progress hide his deficits.

Exhibit 3.

This is a very close case. While I empathize with petitioner's situation, the CLTS waiver is not for every child with autism, nor 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. I wish to make clear that this Decision is not an affirmation 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. The evidence, in its entirety, has not persuaded me that petitioner continues to meet a requisite level of care today, 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 27th day of June, 2013

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\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 27, 2013.

Dodge County Department of Human Services  
Bureau of Long-Term Support