



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWK/149690

PRELIMINARY RECITALS

Pursuant to a petition filed May 29, 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 (MA) - based Children's Long-Term Support Waiver (CLTS) eligibility, a hearing was held on June 26, 2013, by telephone.

The issue for determination is whether the agency correctly sought to discontinue the petitioner's CLTS eligibility. Specifically, the question is whether or not the petitioner meets the programs' institutional "level of care" requirement.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
By: [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

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

By written submission of Angela Radloff, DD Program Spec.
Dane County Department of Human Services
1202 Northport Dr.
Madison, WI 53704

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Dane County.
2. The petitioner is disabled.
3. The petitioner had had an ongoing CLTS Waiver certification for approximately one year. On May 30, 2013, the county agency advised the petitioner that her CLTS eligibility would be discontinued effective June 8, 2013. The petitioner timely appealed, and her aid was ordered continued pending appeal. The agency's basis for discontinuance is that the petitioner does not satisfy the level of care eligibility criterion for the program. In making its determination, the agency assigned scores to the petitioner's functional deficits and had the Wisconsin Department of Health Services run those scores through a computerized care level "screen." The result of that computerized determination was the decision by DHS that the recipient does not have care needs at an institutional level.
4. The petitioner, age five, has been diagnosed with autism spectrum disorder, which is a pervasive developmental disorder. It is analogous to a cognitive disability for the purpose of this analysis.
5. The petitioner does not meet the Hospital level of care because she does not have a severe life-threatening condition requiring daily active interventions to sustain life.
6. The petitioner does not meet the Nursing Home level of care because her general physical health is now stable, and she is not at "high risk for sudden changes in medical status." The petitioner does not currently receive IV feedings, ostomy-related cares, G-tube feedings, aspiration, dialysis, catheter use, application of dressings, treatment of decubitus ulcers or other wounds, prescribed heat treatments, or administration of medical gases.
7. The petitioner's expressive and receptive language skills, as tested by the Clinical Evaluation of Language Fundamentals (CLEF) in 2013, were within normal limits. Testing from May 2013 by the ABA provider, yielded scores for phonemic awareness and working memory that were *not* more than two standard deviations below the mean. The same testing yielded age equivalence scores of at least age-four-and-nine-months for verbal ability, thinking ability, cognitive efficiency, and working memory. The child has been receiving ABA therapy for 25 hours weekly, and has benefited greatly from that service. The child does continue to display a lack of social interaction with persons other than her parents, delayed communication skills, rigidity, and need for repetition.
8. The petitioner is able to sit, stand, walk, and transfer independently. She is independent in eating, dressing (except fasteners), and toileting. She requires assistance with combing her hair and satisfactory tooth-brushing.

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 (now the Department of Health 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.

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 (2011). 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. There is no dispute that the petitioner does not satisfy the Hospital, SED, or Nursing Home care levels described in the *Manual*. *Id.* The ICF/DD care level is for individuals who suffer from mental retardation or a developmental disability.

II. ICF/DD ANALYSIS.

The ICF/DD level applies to a child with (1) a cognitive disability and at least a 35% delay in aggregate intellectual functioning, (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. First, the child must have been diagnosed as having a cognitive disability by qualified professional; that has occurred here (autism spectrum disorder). Because the child receives ABA therapy, I believe she also satisfies the “need for active treatment” criterion, which is the third criterion. However, the record does not establish that the child’s language abilities continue to be at least 35% delayed. Thus, the child does not meet the first major criterion. (The second criterion is a substantial functional limitation in one of the following domains: Communication, Social Competency, or Activities of Daily Living.)

This child did have language abilities that were delayed by 35% when she became eligible for the CLTS program. The ABA therapy has helped her tremendously, so much so that she is no longer sufficiently delayed to qualify for this program. Her therapist argues that at least two years of ABA therapy are recommended, as a period of learning consolidation is needed to assure that the child retains her progress. This may be so. However, I can find no authority in the program’s waiver document that allows me to consider this information and to then achieve a different result here. The program rules and policies look to the child’s current performance, without consideration of likelihood of her regression. Thus, I conclude that the child was correctly discontinued from the CLTS program.

CONCLUSIONS OF LAW

1. The petitioner currently has care needs that are *not* at an institutional level of care (ICF-DD).
2. The Department correctly sought to discontinue the petitioner’s CLTS Waiver eligibility for failure to satisfy the institutional level of care requirement.

THEREFORE, it is

ORDERED

That the petition herein be 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 22nd day of August, 2013

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Wayne J. Wiedenhoef, Acting Administrator
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 August 22, 2013.

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