



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

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In the Matter of

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

DECISION

CWT/150810

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**PRELIMINARY RECITALS**

Pursuant to a petition filed July 20, 2013, under Wis. Admin. Code §HA 3.03 , to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on August 15, 2013, at Waukesha, Wisconsin.

The issue for determination is whether Petitioner meets the requisite level of care under the Children's Long Term Support Waiver - Autism.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

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

Respondent:

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

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

Madison, WI

**ADMINISTRATIVE LAW JUDGE:**

Debra Bursinger  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Waukesha County.

2. Petitioner is a 4 year old child with diagnoses that include autism, developmental delay, hypotonia and maternally inherited 4q duplication.
3. In May, 2013, Petitioner's autism was categorized as mild-moderate based on the Childhood Autism Rating Scale. He was administered the Wechsler Preschool and Primary Scale of Intelligence III and scored 79 on the full scale intelligence quotient. A score of 79 is within 2 standard deviations and a delay of less than 30% from the norm. The tests administered to Petitioner in May, 2013 also indicated significant delays in language skills and adaptive behavioral functional skills.
4. Petitioner cannot independently care for himself. He needs assistance with dressing, bathing, toileting, eating, grooming. He lacks safety awareness.
5. Petitioner has an IEP from ██████████ Schools for the 2013-14 school year. The IEP notes that the Petitioner has a significant developmental delay and speech and language impairment. It also notes that his developmental delays impact his ability to participate like his peers in many areas including fine and gross motor skills, play skills, social interactions, academic readiness and language (receptive and expressive) skills. It further notes delayed functional daily living skills in dressing and toileting. It notes that he wanders and may leave the room or put non-edible materials in his mouth.
6. Petitioner applied for coverage under the Children's Long Term Support Waiver and the Family Support Program.
7. On June 27, 2013, the agency notified Petitioner that it found him eligible for the Family Support Program based on Nursing Home Level of Care. It further notified the Petitioner that it found him not eligible for the Children's Long Term Support Waiver – Autism based on not meeting the eligibility for a developmental disability or psychiatric institution level of care.

### DISCUSSION

The various community waiver programs offered under Wisconsin's Medical Assistance (MA) are designed to allow the state to realize savings by providing services in the community to recipients who might otherwise be institutionalized. Applicants for these programs must meet the financial and non-financial requirements for MA coverage and must also require a level of care comparable to that offered in intermediate care facilities, nursing homes or other institutions. See Medicaid Eligibility Handbook (MEH), §28.1, available online at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>.

Petitioner in this case was found to be ineligible for the Children's Long Term Support Waiver and the Family Support Program because he did not meet the requisite level of care. The levels of care (LOC) are described in detail in the Wisconsin Department of Health Services Medicaid Home & Community Based Services Waiver Manual, Appendix A-10: Institutional Levels of Care—Children's Long Term Support Programs in Wisconsin (updated February 2011)(LOC), available online at [http://www.dhs.wisconsin.gov/bdds/waivermanual/CLTS\\_LOC.pdf](http://www.dhs.wisconsin.gov/bdds/waivermanual/CLTS_LOC.pdf). Four levels of care are described: Intermediate Care Facility, Psychiatric Hospital, Nursing Home and Hospital.

The Intermediate Care Facility Level of Care requires that the child meet three criteria:

1. The child has a diagnosis of a Cognitive Disability that substantially impairs learning and that is expected to continue indefinitely; and
2. The child demonstrates Substantial Functional Limitations when compared to age appropriate activities that are expected to last a year or longer; and
3. The child has the Need for Active Treatment.

LOC at p. 3.

The first criterion requires that the child must have a diagnosis of Cognitive Disability (i.e. Mental Retardation) or a similar diagnosis that substantially impairs learning. Petitioner does have such a diagnosis. The second component of the first criterion is that the diagnosis results in the child having substantial learning impairments. Substantial learning impairments are measured by:

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. 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.

LOC at p. 3-4. The record does not contain any information to suggest that petitioner was experiencing a 30% or greater delay in aggregate intellectual function or a score of at least two standard deviations below the mean in aggregate intellectual functioning. The record in this appeal contains evidence that the Petitioner's score on a valid, standardized and norm referenced measure of aggregate intellectual functioning is within 2 standard deviations and a delay of less than 30%.

The Petitioner's parents testified that the Petitioner has significant developmental delays of more than 50% in social/emotional skills, play/cognitive skills, language and self-help skills. This is supported by the Petitioner's IEP which notes that he has significant developmental delays that impact his ability to participate with peers including fine and gross motor skills, play, social interactions, academic readiness and receptive and expressive language skills.

Testing done by Dr. Rudman and Dr. Heffelfinger reach similar conclusions that Petitioner has overall cognitive functioning that is low average, receptive language skills that are average, motor functioning skills that are moderately delayed and significant delays in adaptive functioning and social skills. His autism is noted to be in the mild-moderate range. The issue is that the Petitioner's aggregate intellectual functioning is 79, which is low average. This is the standard by which eligibility is determined. The Petitioner's parents and Dr. Rudman argue that the agency must consider the fact that though he has low average cognitive functioning, he is not able to apply his cognitive knowledge to day-to-day functioning. While I would agree with the Petitioner's representatives that he has substantial learning impairments, I am bound by the criteria and the standards set forth in the policies and regulations. Specifically, I do not have equitable powers and cannot deviate from what law and policy dictate. See *Oneida County v. Converse*, 180 Wis.2d 120, 125, 508 N.W.2d 416 (1993). Because the test results do not demonstrate aggregate intellectual functioning of greater than 30% delay or at least 2 standard deviations below the mean, I am required to conclude that the Petitioner does not meet the Intermediate Care Facility Level of Care.

The Psychiatric Hospital Level of Care-Severe Emotional Disturbance has four criteria, all of which must be met. They are:

1. The child has a Diagnosis of a mental health condition; and
2. The child's mental health diagnosis or symptoms related to the diagnosis have existed and are expected to persist for a specific Duration of time; and
3. The child is in need of Involvement with Service Systems related to mental health support; and
4. The child exhibits Severe Symptomology or Dangerous Behaviors at a specific intensity and frequency of required interventions such that without this direct, daily community-based intervention, the child is at risk for institutionalization within a psychiatric hospital.

LOC at 8. In considering the Psychiatric Hospital Level of Care, it is sufficient to note that the fourth criterion requires that the patient demonstrate psychotic symptoms, suicidality, violence, anorexia/bulimia, or dangerous behaviors. The Petitioner's parents testified that the Petitioner has no safety awareness and engages in dangerous behaviors as a result such as grabbing knives, scissors or hot items. These are not the type of dangerous behaviors contemplated by the regulations because they are not the type of behaviors that would place Petitioner at risk for institutionalization within a psychiatric hospital. Petitioner does not meet the Psychiatric Hospital Level of Care.

The Nursing Home Level of Care-Physical Disabilities has two criteria, both of which must be met. They 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 hands on assistance from others throughout their day.

LOC at 22. The agency concedes that the Petitioner meets this level of care which means he is eligible to receive services related to his physical disabilities under the Family Support Program.

The Hospital Level of Care-Physical Disabilities is applicable when

1. The child needs Frequent and Complex Medical Care that requires the use of equipment to prevent life-threatening situations; and
2. The child's complex skilled medical interventions are expected to persist for a specific Duration of time; and
3. The child's overall health condition must require Continuous Assessment of an Unstable and Life-Threatening Condition.

LOC at 29. In the first criterion for this level of care, the child must require complex skilled medical care, which includes tracheostomy care, ventilator care, IV access, oxygen, total parenteral nutrition, a rehabilitation program for brain injury or coma and dialysis. Id. There is no indication on this record that Petitioner requires any care at this level; Petitioner does not meet the Hospital Level of Care.

### **CONCLUSIONS OF LAW**

The agency correctly determined that petitioner's condition does not meet any of the levels of care required for coverage under the Children's Long Term Support Waiver - Autism.

**THEREFORE, it is**

**ORDERED**

That the petition be, and hereby 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 Milwaukee,  
Wisconsin, this 7th day of October, 2013

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\sDebra Bursinger  
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 October 7, 2013.

Bureau of Long-Term Support