



STATE OF WISCONSIN  
Division of Hearings and Appeals

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FCP/151025

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**PRELIMINARY RECITALS**

Pursuant to a petition filed July 31, 2013, under Wis. Admin. Code § DHS 10.55, to review a decision by the iCare in regard to Family Care Partnership eligibility, a hearing was held on August 28, 2013, by telephone. [The petitioner inappropriately left an *ex parte* voicemail message for the Administrative Law Judge on the day after hearing, asking for a two-week extension in which submit materials. The Administrative Law Judge did not respond. Also, no new documentation was submitted through the date of this Decision.]

The issue for determination is whether the agency correctly determined that the petitioner no longer satisfies the functional eligibility requirement for the Family Care Partnership program (FCP).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: Atty. Elizabeth Bartlett, General Counsel  
iCare  
1555 N. Rivercenter Drive  
Suite 206  
Milwaukee, WI 53212

**ADMINISTRATIVE LAW JUDGE:**

Nancy J. Gagnon  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.

2. The petitioner has been a recipient of FCP benefits since May 2012. To remain eligible for FCP, the recipient must periodically undergo functional screening to determine whether she continues to have functional care needs at the requisite level. The petitioner underwent such a functional screening in June 2013.
3. As a result of the 2013 functional screening, the FCP program determined that the petitioner was no longer functionally eligible for the program. On July 3, 2013, the FC agency issued notice to the petitioner advising her that she was no longer eligible for “nursing home level” FC benefits due to her failure to satisfy the nursing home related functional eligibility requirements of the program. The petitioner timely appealed, and aid has been continued pending decision issuance.
4. The petitioner, age 54, has diagnoses of depression, arthritis, diabetes, obesity, and asthma. For purposes of FCP program eligibility, the petitioner has a “long-term condition.”
5. *ADLs.* The petitioner is ambulatory and independent in bathing, eating, dressing, toileting, transferring and grooming. When bathing, the petitioner uses a shower bench, but that does not make her dependent on a caregiver for that task.
6. *Instrumental ADLs.* The petitioner is able to independently take her medication, perform household chores, do laundry with the use of a wheeled cart, and manage her money. The petitioner is capable of preparing non-elaborate meals. She is independent in the use of a telephone. The petitioner is not employed. She does not require overnight supervision, and no documentation from a medical provider of a diagnosis of a cognitive deficit has been submitted into this record. The petitioner is fully communicative, is not physically resistive to care, does not wander, has not demonstrated self-injurious behavior, is not violent towards others, and does not engage in substance abuse. *See, Exhibits 1, 2.* She was coherent during the hearing.

### DISCUSSION

The Family Care Partnership program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for physically/developmentally disabled or elderly adults through managed care organizations. Whenever the local Family Care Partnership program decides that a person is to be terminated from the program, the client is allowed to file a fair hearing request. The petitioner did so here.

In order to qualify for FCP services, with certain exceptions not applicable here, a person’s functioning must be such that they would otherwise require institutional care. The requirement of needing institutional care, and its determination methodology, are the same for the Family Care Partnership program as for Family Care. *See, Wis. Stat. §46.286(1)(a) and Wis. Admin. Code ch. DHS 10.* Essentially, to meet the functional eligibility requirement, a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

#### I. THE DHS COMPUTERIZED SCREENING TOOL DETERMINED THAT THE PETITIONER IS NOT FUNCTIONALLY ELIGIBLE AT THE “NURSING HOME CARE LEVEL.”

The Wisconsin Department of Health Services has made efforts to improve the statewide efficacy of functional assessments by designing and implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a quality assurance screener who has at least a bachelor of science degree in a health or human services related field, with at least one year of experience working with the target populations (or, if not, an individual otherwise specifically approved by the Department based upon like combination of education and experience); who has been trained and met all requirements to do so by completing a Department sanctioned web-based training program, and have experience working with long term care consumers.

This screener asks the applicant, or a recipient at a periodic review, questions about his/her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits (as occurred here) the "Functional Screen Report" for the applicant to the Department's Division of Long Term Care. The Department then treats the Long Term Functional Screen data (or "tool") by computer programming to see if the applicant/recipient meets any of the nursing levels of care.

In the initial implementation of the "functional screen" process, the Department employed a statistical consultant to test the use of the "tool" (the Level of Care Functional Screen form, or "LOC" form) and the reliability of the outcomes obtained in using the tool and the computer analysis program. The consultant prepared an academic report finding that the use of the functional screen resulted in a high degree of reliability and consistency. Current policy requires the Department's local agent to utilize this system. See <http://dhs.wisconsin.gov/LTCare/FunctionalScreen/Index.htm>. The cross-referenced Level of Care (LOC) Functional Screen form reiterates the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities.

The petitioner's diagnoses are not in dispute. The assessor determined in June 2013, that the petitioner was able to perform all ADLs independently. When the petitioner's functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner does not have care needs at the nursing home level. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

## II. INDEPENDENTLY OF THE DHS LOC ALGORITHM, I CONCLUDE THAT THE PETITIONER DOES NOT MEET THE COMPREHENSIVE FUNCTIONAL CAPACITY LEVEL AT THIS TIME.

The petitioner argues that she has care needs, due to her pain, which makes the continuation of FC program benefits necessary for her.

Independently of the DHS computerized result, this ALJ's overall sense of the petitioner's care level is that it does not rise to the "comprehensive functional capacity level" required in the state code. In code, the verbally expressed standard, as opposed to a computer algorithm, for the requisite level of care is as follows:

### **DHS 10.33 Conditions of functional eligibility.**

...

(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY. (a) *Determination*. Functional eligibility for the family care benefit shall be determined pursuant to s. [46.286 \(1\)](#), Stats., and this chapter, using a uniform functional screening prescribed by the department. To have functional eligibility for the family care benefit, the functional eligibility condition under [par. \(b\)](#) shall be met and, except as provided under [sub. \(3\)](#), the functional capacity level under [par. \(c\)](#) or [\(d\)](#) shall be met.

(b) *Long-term condition*. The person shall have a long-term or irreversible condition.

(c) *Comprehensive functional capacity level*. A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.

2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. **The person cannot safely or appropriately perform 5 or more IADLs.**
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
  - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
  - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self-neglect or resistance to needed care.

(emphasis added)

Wis. Admin. Code §DHS 10.33(2)(a)-(c) (November 2009). IADLs are defined at §DHS 10.13(2). The petitioner can perform all ADLs unassisted, although she does them slowly. However, the slow pace of accomplishing the task does not mean that assistance is required to perform the task.

Turning to IADLs, the petitioner has *not* established that she cannot appropriately perform laundry/household chores (due to pain), or manage money. The petitioner suggests that she cannot independently prepare complicated meals because she has pain after prolonged task performance. However, the expectation here is just simple meal preparation. Further, the petitioner seems to be getting enough nutrition as she is not underweight and has not documented recent weight loss. The petitioner's personal care worker, her niece, testified that the worker ends up preparing the petitioner's meals and doing her laundry, due to the petitioner's slow movement related to pain. This testimony was less persuasive than that of the two nursing assessors who evaluated the petitioner in June 2013. Because the petitioner does not lack the ability to perform five or more IADLs, she does not meet the code standard for the comprehensive functional capacity level of the functional eligibility test.

**CONCLUSIONS OF LAW**

1. The petitioner does not have care needs at the comprehensive functional capacity level at this time; therefore, she currently does not satisfy the functional eligibility requirements of the FCP program.

**THEREFORE, it is**

**ORDERED**

That the petition 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 8th day of October, 2013

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\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](mailto:DHAmail@wisconsin.gov)  
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on October 8, 2013.

iCare  
Office of Family Care Expansion