



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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

DECISION

CWK/153895

PRELIMINARY RECITALS

Pursuant to a petition filed December 05, 2013, under 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 January 21, 2014, at Racine, Wisconsin.

The issue for determination is whether the agency properly determined that the Petitioner no longer meets the Level of Care requirements necessary to be eligible for the Wisconsin Children's Long-Term Support (CLTS) Medicaid Home and Community-Based Services Waiver effective December 21, 2013.

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, Room 651
Madison, Wisconsin 53703

By: Susan Lambert

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 Racine County. He is 5 years old and lives at home with his family.

2. In April, 2011, the Petitioner was diagnosed with Autism Spectrum Disorder. His score was 40 which is in the severe symptoms range.
3. Since July 7, 2011, Petitioner has been receiving In-Home Treatment Services 20-35 hours/week with Sonnenberg.
4. Petitioner was found eligible for the CLTS waiver, meeting the ICF DD level of care in or about 2011.
5. On September 18, 2012, an assessor completed a Long-Term Care Functional Screen (LTCFS) report on the Petitioner. With regard to "Behaviors", the screen notes that the Sonnenberg Treatment Plan dated July 13, 2012 indicates Petitioner has tantrums (kicking, screaming and flailing body) to escape a demand. This behavior was noted to occur an average of three times/week. It is also noted to be unpredictable. It is further noted that the behavior only happens at home. The screen also indicates Petitioner needs assistance with bathing, dressing, grooming and toileting. For communication, the screen notes that Petitioner does not follow two step instructions, does not understand at least 3 prepositions and does not combine 3 or more words into a meaningful sentence. It further notes that he cannot accurately identify at least 5 shapes and cannot group objects by category. He does not take turns in play and does not have an awareness of another child's need for help or feelings. He requires prompts to communicate in full sentences. He needs verbal prompts and cues to correctly identify shapes. Goals with Autism Treatment Services include reciprocating play with others, communicating his wants and needs, sitting and attending, prepositions, engaging others, and playing with toys appropriately. School has incorporated peer modeling to teach Jake turn taking, initiating peer interaction, initiating play skills. He is not able to pick up on social cues. He receives OT 140 minutes/month and speech therapy 40 minutes/week.
6. On September 4, 2013, the Petitioner was rescreened with the LTCFS tool. The assessor noted that the Petitioner is currently receiving 24 – 27 hours/week of therapy from Sonnenberg. It indicates that he exhibits physical aggression that includes hitting, kicking, screaming, throwing things, grabbing and squeezing. These are reported to be situational incidents during times of frustration and anxiety, change in routine and limitations with communication and understanding. It is also noted that these behaviors are not to purposefully harm others. The assessor indicates the Petitioner requires assistance with bathing, grooming, dressing and toileting. He is on a special diet. He requires assistance with cutting up food. He follows two step instructions that are part of his daily routine but has difficulty if instructions are new or more than two step. He does not understand at least 3 prepositions in unfamiliar single step instructions though his special education teacher reports he demonstrates an understanding of prepositions. He is able to match objects that are similar but cannot group objects by category. He is able to count to 29, count objects by 10 and knows all 26 letters/shapes/colors. He is able take turns in play at times but does not have awareness of another child's need for help or feelings.
7. In November, 2013, Petitioner was evaluated by Dr. Jennifer Koop at Children's Hospital. His diagnoses included Autism Spectrum Disorder and Intellectual Disability. He received a score of 30.5 on the Childhood Autism Rating Scale which is in the mild to moderate symptoms range. As part of the evaluation, Petitioner was administered the Wechsler Preschool and Primary Scale of Intelligence – IV receiving a full IQ score of 78.
8. On March 22, 2013, the Racine Unified School District developed an IEP with an implementation date of April 15, 2013. The IEP indicates that Petitioner's receptive language score from the Preschool Language Scale 5 has increased by 10 points. It further indicates that he demonstrates good expressive vocabulary skills, including analogies and that he often speaks in 5 word sentences. It further states that Petitioner has "much knowledge" and that he "likely knows far more than he can indicate on tests and can become internally/externally distracted."

9. On November 22, 2013, the agency issued a Notification of Waiver Program Termination to the Petitioner informing him that he no longer meets MA waiver program functional/level of care eligibility criteria for Developmental Disabilities.
10. On December 5, 2013, an appeal was filed on behalf of the Petitioner with the Division of Hearings and Appeals.

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 (DDB). 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 level of care criteria are found in the Manual's Appendix A-10. The nursing home level of care and the hospital level of care are not applicable here and will not be discussed. The Intermediate Care Facility (ICF) Developmental Disabilities (DD) Level of Care (LOC) and the Psychiatric Hospital Severe Emotional Disturbance (SED) Level of Care are most applicable and analysis of each follows.

II. INTERMEDIATE CARE FACILITY DEVELOPMENTAL DISABILITIES LEVEL OF CARE

To meet the Developmental Disability level of care (also known as ICF-MR), the child must meet three criteria. Criteria #1 requires the child to have a cognitive disability that substantially impairs learning and is expected to continue indefinitely. Criteria #2 requires that the child demonstrates substantial functional limitations when compared to age appropriate activities that are expected to last a year or longer. Criteria #3 requires a need for active treatment.

The agency concluded that the Petitioner does not meet Criteria #1. Because he did not meet the first criteria, the agency did not analyze whether the Petitioner met the remaining criteria.

To meet the cognitive impairment standard for Criteria #1, the child must not only have a diagnosis of cognitive disability but also have a substantial learning impairment that is measured as a 30% or greater delay in aggregate intellectual functioning based on valid, standardized and norm referenced measures or a score of at least two standard deviations below the mean on valid, standardized and norm referenced measures of intellectual functioning.

The agency concluded that the Petitioner does not meet this criteria based on his score on the Childhood Autism Rating Scale – 2nd Edition administered in November, 2013 by Dr. Jennifer Koop. The Petitioner received a score of 30.5 which is in the mild to moderate symptoms range. As part of the evaluation, Dr. Koop administered the Wechsler Preschool and Primary Scale of Intelligence in November, 2013. The Petitioner's full IQ score is 78. Further, the agency relied on information in the Petitioner's IEP from

March 22, 2013 indicating that his receptive language score from the Preschool Language Scale increased by 10 points. The agency also noted information in the IEP that indicates the Petitioner demonstrates good expressive vocabulary skills and speaks in 5 word sentences. Further, the agency relied on information in the IEP that the Petitioner “has much knowledge and likely knows far more than he can indicate on tests and can become internally/externally distracted.”

The Petitioner’s mother appeared on his behalf at the hearing. She presented a convincing argument as to why the agency should not base its decision just on the Petitioner’s IQ score or on any particular test score. She noted the Petitioner’s limitations in a number of areas and argued that the agency should look at more than just the test scores to determine if the Petitioner has substantial learning impairments. The agency noted that the IQ test is not the only intellectual functioning test that can be used and that the Petitioner can be tested with other tests that indicate aggregate intellectual functioning. The Petitioner’s mother also argued that the agency should not use the same criteria for continuation of the waiver as for initial eligibility, asserting that a child is expected to show improvement with services and therapy but this should not result in a discontinuation of the child’s eligibility. While the Petitioner’s mother makes a persuasive argument, I am bound by the agency’s rules as set forth in the Manual and do not have authority to rule in equity. The Petitioner’s test scores do not meet the criteria and therefore I am required to affirm that the agency properly determined he does not meet the DD level of care.

I note that this decision does not prohibit the Petitioner from being re-tested and re-applying based on additional evidence that may demonstrate that he meets the level of care criteria.

III. PSYCHIATRIC HOSPITAL SEVERE EMOTIONAL DISTURBANCE LEVEL OF CARE

To meet the SED LOC, the child must meet four criteria. The agency concedes that the Petitioner meets Criteria #1 which requires diagnosis of a mental health condition. The agency concedes that the Petitioner meets Criteria #2 which requires the mental health condition to have persisted for at least six months and is reasonably expected to persist for one year or longer. The agency asserts that the Petitioner does not meet Criteria #3 and #4.

Criteria #3A requires that a child currently be receiving or requiring services in connection with his or her mental health diagnosis from at least two of the following service systems:

1. Mental health services
2. Child Protective Services
3. Criminal Justice System
4. Formal Service Plan for In-School Supports (an IEP specifically for Emotional/Behavioral Disability (EBD) programming or an IEP that contain an active Behavioral Intervention Plan (BIP)).
5. Substance Abuse Services.

The agency asserts that the Petitioner does not meet this criteria. Based on the evidence submitted, I conclude that the agency properly determined that the Petitioner does not meet Criteria #3A. The agency concedes that the Petitioner does meet Criteria #3B which requires receiving services from one of the five service systems with service at least 3 hours/week. Because the Petitioner is receiving in-home therapy 20 – 35 hours/week, he meets Criteria #3B.

Criteria #4 requires the child to meet at least one of seven standards of severe symptomology or dangerous behaviors:

1. Psychotic Symptoms (delusions, hallucinations and/or loss of contact with reality).
2. Suicidality.

3. Violence (acts that endanger another person's life and cause the victim to require inpatient admission to a hospital or use of a weapon against another person or bomb threats).
4. Anorexia/bulimia.
5. Multiple Dangerous Behaviors. A child must exhibit behavior in at least two of the four behavior categories consistently during the past 6 months and must reasonably be expected to engage in the behaviors during the next six months. The behaviors must occur at a specified frequency and require interventions. The behaviors must be related to the child's mental health diagnosis and be of a nature and severity that result in psychiatric hospitalization without direct, daily intervention.
 - A. High Risk Behaviors: running away, substance abuse, dangerous sexual contact.
 - B. Self-injurious Behaviors: self-cutting, burning, strangulation, severe self-biting, tearing at or out body parts, inserting harmful objects into body orifices, head banging.
 - C. Aggressive or Offensive Behaviors toward Others: applicable to children only six years of age and older.
 - D. Lack of Behavioral Controls: destruction of property/vandalism, theft or burglary.
6. Dangerous Behavior plus Substantial Social Competency Impairment: must meet one of the 4 dangerous behaviors plus demonstrate a functional limitation in social competency or demonstrate one of the following:
 - A. behavioral or emotional problems resulting in failing grades in the majority of classes or inability to conform to school schedule for most of the day, occurring consistently over the past six months; or
 - B. Currently needs in-school supports for emotional and/or behaviors problems as evidence by IEP for EBD programming or active BIP.

The agency found that the Petitioner does not meet Criteria #4. Based on the evidence, I conclude the agency properly determined that the Petitioner does not meet this criteria. While there is some evidence of behavioral issues, there is no evidence that suggests that the Petitioner's condition meets any of the listed criteria for dangerous behaviors.

In summary, the evidence does not demonstrate that the Petitioner meets the ICF DD or Psychiatric Hospital SED Levels of Care as defined in the Manual. Therefore, I must affirm the agency's determination.

CONCLUSIONS OF LAW

The agency properly determined the Petitioner does not meet the ICF DD or Psychiatric Hospital SED Levels of Care and is not, therefore, eligible for the Children's Long-Term Support Medicaid Home and Community-Based Services Waiver.

THEREFORE, it is

ORDERED

That the Petitioner's 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, Room 651, 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 25th day of February, 2014

\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 February 25, 2014.

Bureau of Long-Term Support