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[REDACTED]

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

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

CWA/154068

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 10, 2013, under Wis. Admin. Code § HA 3.03, to review a decision by the Rock County Department of Social Services in regard to a variant of Medical Assistance (MA) benefits, a hearing was held on January 29, 2014, at Janesville, Wisconsin.

The issue for determination is whether the county agency correctly discontinued the petitioner from CIP II, an MA Community Waiver program, due to lack of functional eligibility ("level of care").

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Rena Cross, social worker  
Rock County Department of Social Services  
1900 Center Avenue  
PO Box 1649  
Janesville, WI 53546

**ADMINISTRATIVE LAW JUDGE:**

Nancy J. Gagnon (telephonically)  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Rock County.
2. The petitioner has received services through the CIP II Waiver program (Waiver) since 2011. His case underwent an annual eligibility recertification in November 2013. An assessment of his

functional abilities was performed by a social worker, using the Department's Long Term Care Functional Screen, on November 12, 2013. The result of the LTCF Screen was a finding that the petitioner did not have care needs at the nursing home level, and that he was therefore no longer eligible for Waiver services.

3. On November 22, 2013, the county agency issued a *Human Services Agency Action Notice (Notice)* to the petitioner. The *Notice* advised that his Waiver eligibility was ending on December 9, 2013. The petitioner appealed on December 10, 2013. The petitioner continues to be eligible for MA, which supplies him with 3.5 hours of personal care worker services weekly, plus other benefits.
4. The petitioner, age 38, resides in the community with his spouse. His diagnoses are diabetes, hypertension, high cholesterol, asthma, arthritis in the left knee, diabetic neuropathy in both legs, congestive heart failure, and obesity (390 pounds). He requires light physical assistance with bathing (help in and out of shower), and physical help with lower body dressing. He does not require physical assistance with upper body dressing, eating, home mobility (uses a cane), toileting, or transfers. He is capable of using the telephone, managing money, and driving. The petitioner does not require overnight supervision, is not mentally ill, does not abuse drugs, and has adequate cognition and communication ability.
5. The petitioner is currently capable of administering his insulin injections. When he was initially found to be eligible for Waiver services, the screener indicated that he needed physical assistance for insulin injections.

### DISCUSSION

The MA Community Waiver Programs (*e.g.*, Community Integration Program, Community Options Program - Waiver) are partially funded by the federal government through the Medical Assistance (MA) program. These Waiver programs must meet federal requirements, including MA regulations when applicable. To receive services through the Waiver programs, a person must be currently eligible for MA, have institutional-level care needs, and be elderly or disabled. *Medicaid Eligibility Handbook (MEH)*, §28.1, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/>, and the *MA Waivers Manual (Manual)*, at [http://dhfs.wisconsin.gov/ltc\\_cop/waivermanual/index.htm](http://dhfs.wisconsin.gov/ltc_cop/waivermanual/index.htm).

To meet the functional eligibility requirement (*i.e.*, to have institutional-level care needs), a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. *Manual*, §2.07; 42 C.F.R. §§ 435.217 & 435.441.301(b). To be found or remain 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/LOC assessments by implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained quality assurance screener who has experience working with long term care consumers. This screener asks the applicant/recipient 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 the "Functional Screen Report" for the applicant to the Department's Division of Long Term Care. The Department then runs the Long Term Functional Screen data (or "tool") through a computer program to see if the applicant/recipient meets any of the nursing levels of care.

Initially, the Department employed a statistical consultant to test the use of the “tool” (or "LOC" form) and the reliability of the outcomes obtained in using the tool and the computer analysis program. The consultant concluded that the use of the functional screen resulted in a high degree of reliability and consistency. The LOC form is available at <http://www.dhs.wisconsin.gov/forms/F0/f00366.pdf> and it is designed to incorporate the skeletal definitions from the federal Medicaid rules for Nursing Care and institutional Developmental Disability facilities.

The petitioner’s diagnoses are not in dispute. 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.

The petitioner disagreed with the assessor’s characterization of his current medication administration help needs. He can take his oral medications independently. He argues that he needs help with insulin injections, because the injection sites on his abdomen sometimes get sore or hard, necessitating injection at other body locations that are harder to reach. The petitioner does not have manual dexterity issues that prevent self-injection. The assessor observed the petitioner successfully self-inject insulin during the November home visit. His physician has advised the screener that there is no reason that the petitioner could not self-inject his insulin. *See*, Exhibit 3, Dr. Murdy document from January 29, 2013, 1:02 p.m. Based on the proffered evidence, I conclude that the assessor made the correct entries into the LOC form, which in turn resulted in the computer program’s determination that the petitioner does not currently have care needs at an institutional level.

## II. INDEPENDENTLY OF THE DHS LOC ALGORITHM, I CONCLUDE THAT THE PETITIONER DOES NOT MEET THE INSTITUTIONAL LEVEL OF CARE REQUIREMENT AT THIS TIME.

The petitioner argues that he has care needs which make the continuation of MA Waiver program benefits necessary for him.

Looking at legal definitions, rather than the computer program result, federal law requires that a person have care needs at an institutional level (hospital, nursing home) as a condition of adult MA Waiver eligibility. The petitioner is not arguing that he has regular care needs that require hospitalization. Federal law defines a nursing facility as follows:

(a) *Nursing Facility Defined.*—In this title, the term “nursing facility” means an institution (or a distinct part of an institution) which—

(1) is primarily engaged in providing to residents—

(A) skilled nursing care and related services for residents who require medical or nursing care,

(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons, or

(C) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities,

and is not primarily for the care and treatment of mental diseases;

42 U.S.C. 1396r(a). Of particular note is the requirement that a resident must need a health-related service above the level of room and board. Because housekeeping services are a "room and board" item, rather than a health-related service, the need for housekeeping services alone cannot qualify a person for the CIP II Waiver. Rehabilitation services (*e.g.*, physical therapy) are not being regularly received in this case, per the record before me.

Turning to the provision of skilled nursing care, the Wisconsin Administrative Code defines levels of nursing care as follows:

**(31)** "Skilled nursing facility" means a nursing home which is licensed by the department to provide skilled nursing services.

**(32)**

**(a)** "Skilled nursing services" means those services furnished pursuant to a physician's orders which:

1. Require the skills of professional personnel such as registered or licensed practical nurses; and

2. Are provided either directly by or under the supervision of these personnel.

**(b)** In determining whether a service is skilled, the following criteria shall be used:

1. The service would constitute a skilled service where the inherent complexity of a service prescribed for a resident is such that it can be safely and effectively performed only by or under the supervision of professional personnel;

2. The restoration potential of a resident is not the deciding factor in determining whether a service is to be considered skilled or unskilled. Even where full recovery or medical improvement is not possible, skilled care may be needed to prevent, to the extent possible, deterioration of the condition or to sustain current capacities; and

3. A service that is generally unskilled would be considered skilled where, because of special medical complications, its performance or supervision or the observation of the resident necessitates the use of skilled nursing personnel.

...

**(10)** "Intermediate nursing care" means basic care consisting of physical, emotional, social and other rehabilitative services under periodic medical supervision. This nursing care requires the skill of a registered nurse for observation and recording of reactions and symptoms, and for supervision of nursing care. Most of the residents have long-term illnesses or disabilities which may have reached a relatively stable plateau. Other residents whose conditions are stabilized may need medical and nursing services to maintain stability. Essential supportive consultant services are provided.

Wis. Admin. Code § DHS 132.13(10), (31),(32).

The petitioner is not receiving, and does not require, skilled nursing services, because he does not require a service that must be provided by, or under the supervision of, a registered or licensed practical nurse. He also does not require intermediate nursing care services. That is because the type of help that he needs can be provided without use of a registered nurse for observation and recording of reactions/symptoms. Therefore, the petitioner does not require nursing services, as defined under the MA rules above, and he thus does not qualify for CIP II services.

### CONCLUSIONS OF LAW

1. The Department correctly determined that the petitioner is no longer eligible for CIP II services, due to his failure to require institutional level care.

**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, 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 Madison,  
Wisconsin, this 31st day of January, 2014

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\sNancy J. Gagnon  
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 January 31, 2014.

Rock County Department of Social Services  
Bureau of Long-Term Support