FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]
c/o [redacted]
[redacted]

DECISION

CWK/155590

PRELIMINARY RECITALS

Pursuant to a petition filed February 18, 2014, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Family Support & Resource Center/ the Department of Health Services' Division of Long Term Care (Department) in regard to Medical Assistance (MA) - based Children's Long-Term Support Waiver (CLTS) eligibility, a hearing was held on April 2, 2014, at Madison, Wisconsin. The hearing record was held open for two days for a submission from the petitioner, which was received.

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

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]
By: [redacted]
[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By written submission of: Angela Radloff
DD Program Specialist
Dane Co. Dept. of Human Services
Madison, WI

ADMINISTRATIVE LAW JUDGE:
Nancy J. Gagnon (telephonically)
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 an ongoing Katie Beckett MA certification and was eligible for the CLTS Waiver for approximately the last nine years. On January 21, 2014, the county agency advised the petitioner that his CLTS and Katie Beckett MA eligibility would be discontinued effective February 20, 2014. The petitioner timely appealed, and his 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 13, has been diagnosed with attention deficit disorder, and autism spectrum disorder, which is a pervasive developmental disorder. It is analogous to a cognitive disability for the purpose of this analysis. The petitioner has an IQ of 91, and is 35% delayed in aggregate intellectual functioning. The child engages in head-banging when he does not get his way. His score on the Adaptive Behavior Assessment System Test placed him below the 1st percentile (per school psychologist [redacted]). He receives occupational therapy, physical therapy, and speech therapy services at least weekly.
5. SED-related facts: The petitioner is not psychotic or suicidal, and does not engage in acts that endanger others. He has not required inpatient psychiatric hospitalization.
6. The petitioner does not meet the Hospital level of care because he does not have a severe life-threatening condition requiring daily active interventions to sustain life.
7. The petitioner does not meet the Nursing Home level of care because his general physical health is now stable, and he 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.
8. The petitioner is able to sit, stand, walk, and transfer independently. He is independent in eating. The petitioner requires hands-on assistance with bathing, grooming, dressing, and toileting.

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. It can be found on the internet at http://www.dhs.wisconsin.gov/ltc_cop/waivermanual/index.htm (viewed in 2014).

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). 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). The record does establish that the child's language abilities are 35% delayed. Thus, the child does 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. At hearing, documentation from treating professionals established that the child's communication is at least two standard deviations below the mean. The child has a substantial functional limitation in at least the domain of Communication. Thus, I conclude that the child has a substantial functional limitation that meets the second criterion. Because the child receives occupational therapy (twice weekly), physical therapy (once weekly), speech therapy (three or more times weekly), I believe he also satisfies the "need for active treatment" criterion.

Also, the Department's reviewer relied in part on comments from a treating physician, [redacted], M.D. The reviewer made this observation: "Dr. [redacted] indicates in his evaluation that [redacted] did well on his state testing and is intelligent enough to tolerate college." This Judge is skeptical that an autistic child with an IQ of 91 is college material. The state testing results are not identified. At hearing, a letter dated February 17, 2014 from Dr. [redacted] was introduced. It states that the child's likelihood of being able to function independently when older is "quite low – he will likely need a group home or long-term living facility environment as an adult." The letter goes on to state that the child is developmentally and cognitively delayed in multiple developmental domains, and urges continuation of CLTS services.

CONCLUSIONS OF LAW

1. The petitioner currently has care needs that are at an institutional level of care (ICF-DD).

2. The Department incorrectly discontinued the petitioner's CLTS Waiver/Katie Beckett MA eligibility for failure to satisfy the institutional level of care requirements.

THEREFORE, it is **ORDERED**

That the petition herein be remanded to the county agency with instructions to continue to process the petitioner's CLTS Waiver/Katie Beckett MA certification renewal in accord with the Conclusions above. The agency shall report back to this office that it is continuing to process the renewal, within 10 days of the date of this Decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or 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 filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 7th day of May, 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 May 7, 2014.

Family Support & Resource Center
Bureau of Long-Term Support