



STATE OF WISCONSIN  
Division of Hearings and Appeals

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In the Matter of

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

DECISION

MKB/156941

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**PRELIMINARY RECITALS**

Pursuant to a petition filed December 13, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Wisconsin Department of Human Services, by the Disability Determination Bureau, in regards to the denial of Medical Assistance – Katie Beckett Program certification, a telephone hearing was held on May 12, 2014, at Wisconsin Rapids, Wisconsin. At the request of the petitioner, the record was held open for 10 days for the submission of additional information.

The issue for determination is whether the Department, by the Disability Determination Bureau, correctly denied the petitioner's application for Katie Beckett Program certification because he is not disabled under Social Security Regulations.

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: No Appearance  
Disability Determination Bureau  
722 Williamson St.  
Madison, WI 53703

**ADMINISTRATIVE LAW JUDGE:**

Kenneth D. Duren, Assistant Administrator  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a 9 year-old resident of Wood County, living at home with his parents.

2. On or about May 14, 2013, [REDACTED], diagnosed the petitioner as having attention deficit hyperactivity disorder (ADHD); anxiety disorder, not otherwise specified; semantic/pragmatic language disorder; and generalized academic difficulties with “concerns for emerging dyslexia”.
3. On July 9, 2013, the petitioner filed an application with the Department’s Katie Beckett Program seeking certification under the program for Medical Assistance.
4. In completing the requisite application, the petitioner and his parents noted that he is independent in all gross motor abilities; has no adaptive aids for mobility; and has no listed self-care deficits in toileting, eating, or dressing. In addition, no current medical or nursing care needs or equipment usages were indicated in the application. The application did indicate that the child received an unspecified amount of occupational therapy and speech & language therapy from the school system and a fee-for-provider entity; and he receives an unspecified level of counseling for anxiety from a provider, and from the so-called Orton-Gillingham Reading system.
5. The child is well-behaved in the classroom and respectful of his teachers. He is now in fourth grade, and he tested at or near grade appropriate levels in both reading and math in August, 2013. See, Exhibit #3, at p. 3. His most recent WKCE score was rated “proficient”, in the 66<sup>th</sup> percentile, with a scaled score of 493. His math score was in the 93<sup>rd</sup> percentile, rated “advanced”.
6. On October 29, 2013, the Department, by the Disability Determination Bureau (“DDB”), issued a letter Notice to the petitioner and his parents informing them that his application for certification in the Katie Beckett Program had been denied because it had been determined that his conditions do not meet childhood disability standards under Social Security regulations.
7. On December 13, 2013, the petitioner and his parents filed a request with the DDB for reconsideration of the disability denial determination of October 29, 2013.
8. The DDB’s Mental Health Consultants rated the petitioner as possessing an impairment or combination of impairments that is severe, but do not meet, medically equal, or functionally equal any listed child impairment. See, CHILDHOOD DISABILITY EVALUATION FORM(S), DATED 10/25/13([REDACTED]) and 4/14/2014 ([REDACTED] & [REDACTED], CCC-SLP). Both evaluations determined that the petitioner had no limitations in the domains of “Moving About and Manipulating Objects” and “Health and Physical Well-Being”. Both evaluations also determined that the petitioner had “less than marked” limitations in all other four domains, including “Acquiring and Using Information”, “Attending and Completing Tasks”, “Interacting and Relating With Others”, and “Caring For Yourself”.
9. Consultant Propper stated in her EVALUATION, (10/25/2013) this summary:

PMD notes from ASPIRUS DOCTORS CINIC include 03/04/2013 WCC. Anxiety regarding various worries indicated, though these are the parent’s worries (mortality, quality of relationships, etc), not the child’s. Moodiness is noted. Math ability, sibling relationships, and personality reported good. Child takes Vynase 60 mg/day, every day, for long-standing Dx ADHD. The past year is described as “phenomenal” with teachers reporting significant progress in behavior and maturation. Child still shows some sensory and anxiety issues. Child also noted to have had successful surgical repair of R inguinal hernia by Hx. Dx noted: Disruptive Behavior Disorder, Asperger’s syndrome, by Hx; and currently Dx ADHD combined type, Semantic/pragmatic language d/o, and being monitored for Pervasive Developmental d/o.
10. Consultant King stated, in the parts relevant here, in her EVALUATION, (04/14/2014) this summary:

He saw PhD [REDACTED] [REDACTED] for a family therapy session on 4/17/13. He had symptoms consistent with panic attacks, was chewing on his clothing, and was prone to stomach aches. He worried about negative interactions with peers. He

also said he was feeling more optimistic about school. He saw OT [REDACTED] on 4/17/13 and had made some nice improvements. He saw SLP [REDACTED] on 4/17 and 5/22/13. His speech intelligibility was normal and scores were average range. He was highly distractible but gave a good effort throughout evaluations. The diagnosis was pragmatic language disorder. There is MER of Aspirus Clinics MDs from 2/21/12 to 5/28/13. No severe physical impairment is documented. The 3/4/13 note of MD Leibert shows his response to vynase was positive and he was doing so much better.

\*\*\*\*\* (ALJ Note: paragraph omitted here)

His 3<sup>rd</sup> grade IEP teacher completed a form on 10/14/13. Academic skills are at or nearly at grade level. He has slight problems in (ALJ's Explanatory Note: reference here by Consultant is to "domain numbers".) II and III and obvious problems handling frustration and responding to his own mood changes. He can get very anxious and unfocused when stressed. His regular 3<sup>rd</sup> grade teacher completed a form on 10/6/13. She reported serious problems in II and III as well as many obvious and slight problems. With medication, he can independently attend and complete tasks. Peers accept his unique qualities, but he needs prompting to find a partner and doesn't seem to have close friendships. He is typically more cooperative with her than with other adults. He uses a sensory chew tube and breathing techniques to help calm himself. The chew tube can become a distraction or interfere with communication if he forgets to take it out of his mouth when speaking.

11. The petitioner has been described by his treating psychologist, [REDACTED] [REDACTED], Ph.D., as follows:

To summarize he struggles with anxiety, peer relations, attention/concentration, frustration tolerance, sensory issues, self-care and some learning challenges. He has experienced good progress but only with significant supports and adaptations from his caregivers.

See, SSI Childhood Disability Claims Report by [REDACTED], fax-stamped 2/24/2014.

12. A recent evaluation by CCC-SLP performed on December 2, 2013, stated as follows:

***Pragmatic Skills:***

As mentioned above, record review indicates [REDACTED] has difficulty with many aspects of social language, including conversation maintenance, participating in groups, asking for assistance, and handling conflicts with peers. [REDACTED] reported to this therapist that he has more friends at school this year and doesn't get picked on as much as last year. He also said he doesn't like to talk about his feelings and hides sometimes so that he doesn't get hurt. He is resistant to discussing his personal feelings unless he is with a friend or adult that he is very comfortable with. [REDACTED] was able to verbalize what it means to be a good friend when asked, and responded it means treating others as you want to be treated and having respect.

**DISCUSSION**

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting children under age 18, who are totally and permanently disabled under Social Security criteria, to receive Medical Assistance while living at home with their parents. Wis. Stat. §49.47(4)(c)1m. The Bureau of

Developmental Disabilities Services is required to review "Katie Beckett" waiver applications in a five-step process. The first step is to determine whether the child is age 18 or younger and disabled. The disability determination is made for the Bureau by 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. The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child.

“Disability” is defined as an impairment or combination of impairments that substantially reduces a child’s ability to function independently, appropriately, and effectively in an age-appropriate manner, for a continuous period of at least 12 months. Katie Beckett Program Policies and Procedures Manual, page 32. Current standards for childhood disability were enacted following the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The current definition of a disabling impairment for children is as follows:

If you are a child, a disabling impairment is an impairment (or combination of impairments) that causes marked and severe functional limitations. This means that the impairment or combination of impairments:

- (1) Must meet or medically or functionally equal the requirements of a listing in the Listing of Impairments in appendix 1 of Subpart P of part 404 of this chapter, or
- (2) Would result in a finding that you are disabled under § 416.994a.

20 C.F.R. §416.911(b). §416.994a, referenced in number (2) above, describes disability reviews for children found disabled under the *prior* law.

The process of determining whether an individual meets this definition is sequential. See 20 C.F.R. §416.924. First, if the claimant is doing "substantial gainful activity", he is not disabled and the evaluation stops. Petitioner is not working, so he passed this step.

Second, physical and mental impairments are considered to see if the claimant has an impairment or combination of impairments that is severe. If the impairment is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, it will not be found to be severe. 20 C.F.R. §416.924(c). Petitioner was determined to have a severe impairment by the DDB.

Next, the review must determine if the claimant has an impairment(s) that meets, medically equals or functionally equals in severity any impairment that is listed in appendix 1 of subpart P of Part 404 of the regulations. The DDB found that petitioner does not meet the listings.

The purpose of the Listing of Impairments is to describe impairments that are considered severe enough to result in "marked and severe" functional limitations. This is a term of art in the new disability rules for children, and "severe", when coupled with "marked" in this phrase, has a different meaning than "severe" as used in the second step above. In general, a child's impairment(s) is of "listing-level severity" if it results in marked limitations in two broad areas of functioning, or extreme limitations in one such area. 42 C.F.R. §416.925(b)(2).

"Marked" limitation and "extreme" limitation are defined in the regulations at 20 C.F.R. §§416.926a(e)(2), (3). Marked limitation means, when standardized tests are used as the measure of functional abilities, a valid score that is two standard deviations below the norm for the test (but less than three standard deviations). For children from ages three to age eighteen, it means "more than moderate" and "less than extreme". The regulation provides that a marked limitation “may arise when several activities or functions are limited or even when only one is limited as long as the degree of limitation is such as to interfere seriously with the child's functioning.” In comparison, "extreme" limitation means a score three standard

deviations below the norm or, for children ages three to age eighteen, no meaningful function in a given area.

I have reviewed the information in the file and compared that information to the Listings. I must agree with the DDB determination that petitioner does not meet or medically equal any of the Listings.

Petitioner has no significant physical impairments. Clearly petitioner's major impairments are his mental health conditions. The relevant Listings, at section 112, include organic mental disorders, autistic disorder and other pervasive development disorders, and attention deficit hyperactivity disorder, all of which are relevant here. See, Listings 112.02, .10, and .11. To be found to meet any of those listings for a child 12 – 18 years of age, the disorders must result in a level of severity that includes two of the following areas set out in Listing 112.00, summarized as follows:

- a. marked impairment in age-appropriate cognitive/communicative function;
- b. marked impairment in age-appropriate social functioning;
- c. marked impairment in age-appropriate personal functioning;
- d. deficiencies of concentration, persistence, or pace resulting in frequent failure to complete tasks in a timely manner.

I find that petitioner does not have marked limitations in two of the four categories listed at number 112.00(C)4. The evidence does not establish that there are marked impairments in any of these first three categories requiring that level of marked impairment. He has limitations, to be sure, but I cannot conclude these are marked. His grades are at age level. His scores on the WKCE are proficient and advanced. He has some friends. He has relatively normal relationships with his parents and his teachers. His application reports an ability to do most daily functional chores for a boy his age, with prompts and supervision, i.e., eating, dressing, hygiene, transport, school work, and play. There is some indication that he is readily distractible, and that he may have deficiencies in concentration, persistence, pace or frequent failure to complete tasks in a timely manner; but academically he is nowhere near two standard deviations away from the normative. Based upon the record, I cannot conclude that he has a marked rating or above in any of these four areas. As a result, his conditions do not meet or equal a listing.

If a child does not meet or equal the Listings, the last step of the analysis is the assessment of functional limitations as described in sec. 416.926a of the regulations. This means looking at what the child cannot do because of the impairments in order to determine if the impairments are functionally equivalent in severity to any listed impairment.

To be found disabled, the child must have “marked” limitations in two of the six domain areas, or an “extreme” limitation in one of the areas. 20 C.F.R. §416.926a(b)(2).

The DDB found that petitioner has “no limitations” in “moving about and manipulating objects” and in “health and well-being” domains.

Likewise, the DDB found that he has a “less than marked” rating in the domains for “acquiring and using information”, “interacting and relating with others”, “caring for himself” and “attending and completing tasks”. I have reviewed the Teacher Questionnaires received from two of the boy's 3<sup>rd</sup> grade teachers, the psychological records, the therapy records, Mrs. [REDACTED]'s testimony and the medical records, and I fully agree with those findings in all six domains.

The petitioner's mother testified anecdotally as to the child's past inability to ride a bike, though now he can. She reports that he has difficulty kicking a ball, and cannot catch a ball. She reports that he can throw, but cannot control the direction of the throw. She asserts that this means he is at least “less than marked” in this domain rather than the determined “no limitation”. She testified that he needs supports at school.

(Which he receives.). And an understanding teacher. (Which he also seems to have.) He requires no distractions. (The school IEP specifically works to eliminate distractions.) She admits that he is performing at grade level academically, but reports difficulties in completing his homework on time. (The IEP limits him to one hour of homework each night as part of his plan.) She reports in her testimony that he does not dress, brush his teeth, clean himself, or do his homework without repeated prompting and assistance. She says that he showers with assistance, and will not brush his hair. He can toilet, but needs help wiping. She testified that he cannot tie his shoes, and has trouble with snaps. She reports that he is a sloppy eater, but that he can use utensils.

EBD Teacher [REDACTED] reports almost across-the-board, ratings of “no problem” and “slight problem” in all six domains in a Questionnaire reply describing the boy during the 13 months he has known him.

Regular Teacher [REDACTED] did not note any limitations in “moving about and manipulating objects” and in “health and well-being”. In the other four domains, [REDACTED] observed no problems in the “acquiring and using information domain”. In the “attending and completing tasks” section of the questionnaire, she ignored the instruction to mark “a rating for each activity” and frequently marked 2, 3 & 4 ratings of 1-5 in an attempt to convey wide fluctuations in his abilities. She did the same method in the domain ratings for “interacting and relating with others”. In that domain, 10 of 13 activities had a checkmark at “no problem”, but six entries had multiple checkmarks, three of the six did not have any “1” check marked. Finally, in the “caring for himself or herself” section, she gave the boy “no problem” in 4 of 10 activities; a “slight problem” in 3 of 10 activities; an “obvious problem” rating of three in 2 of 10 categories; and no rating in the coordination of medicines activity line, noting he takes his medications at home. Her failure to follow instructions undercut the reliability or usefulness of her responses.

Clearly petitioner has limitations in attending and completing tasks, and in “interacting and relating with others”, but I cannot conclude that they are “more than moderate,” as necessary to be considered a “marked” limitation. In fact, they appear to me to be more closely approaching “slight problems”, particularly considering his above average academic functioning as demonstrated by his grades. I reach the same conclusion about his ability to care for himself. This is a 9-year old boy with ADHD and elements of Asperger’s Disorder; he requires direction, supervision, prompts and assistance to perform his hygiene and eating regimens, but he can do them. This domain is also properly assessed at less than marked.

My review of the record concludes that he presents with no “marked” or “extreme” rating in any of the six domains. Thus he does not present with the requisite two “marked” ratings or one “extreme” rating to meet the disability test. I must concur with the Disability Determination Bureau’s finding that he is “not disabled” and therefore the Department correctly denied his application for the Katie Beckett Program.

If the petitioner’s condition were to worsen, he would be well-advised to re-apply and provide new clinical documentation at that time.

### **CONCLUSIONS OF LAW**

Petitioner is not disabled as that term is used for Katie Beckett MA purposes.

**NOW, THEREFORE, it is ORDERED**

That the petition for review herein be and the same is hereby dismissed.

**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 6th day of June, 2014

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\sKenneth D. Duren, Assistant Administrator  
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 June 6, 2014.

Bureau of Long-Term Support  
Division of Health Care Access and Accountability