



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
Redact
[REDACTED]

DECISION

MKB/160584

PRELIMINARY RECITALS

Pursuant to a petition filed September 15, 2014, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance (MA), a hearing was held on October 1, 2014, at Milwaukee, Wisconsin. The hearing record was held open for 10 days for submissions, which were received.

The issue for determination is whether the Division correctly discontinued the petitioner's Katie Beckett MA, due to failure to satisfy the institutional level of care eligibility criterion.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
Redact
[REDACTED]

Respondent:

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

By written submission of Patsy Bansley, RN
Bureau of Long-Term Support
1 West Wilson
Madison, WI

ADMINISTRATIVE LAW JUDGE:

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

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.

2. The petitioner has been eligible for Katie Beckett MA since February 2007. On August 8, 2014, the Division of Long Term Care issued written notification of discontinuance of Katie Beckett MA, to be effective September 8, 2014. The petitioner timely appealed.
3. The petitioner has a long-term disability.
4. The agency's basis for denial is that the petitioner does not satisfy the level of care eligibility criterion for the program.
5. The petitioner, age 8 at the time of hearing, has diagnoses of tricuspid atresia, transposition of the great arteries, ventricular septal defect, interrupted aortic arch with ductal dependent systemic blood flow, chronic lung disease, and a digestive system disorder.
6. The petitioner does not currently receive ostomy-related cares, tube feedings, aspiration, oxygen, dialysis, catheter use, IV use, application of dressings, tracheostomy care, treatment of decubitus ulcers or other wounds, or prescribed heat treatments. She formerly required G-tube feedings, but that service was discontinued in October 2013.
7. Learning: The petitioner attends regular, rather than special education, classes in school. She repeated first grade and struggles with math (below 20th percentile). She recognizes all letters and sounds. No evidence was proffered to suggest that she is mentally retarded.
8. Assistive technology is not needed for communication. The child communicates verbally, but can be hard to understand. As a result of past open heart surgery, she has some vocal cord paralysis, which limits her speech volume. She receives speech therapy through an outpatient agency, which is working on fluency and comprehension. Therapy is provided by the therapist at a frequency of less than six times weekly. Although her expressive language skills are significantly delayed, receptive language skills are mildly delayed. There is no indication that she is hearing impaired. Thus, the child does not have a substantial functional limitation in the area of communication, because she must be at least 30 percent delayed in both expressive and receptive language use.
9. In the area of self-care, the child requires physical assistance with bathing, hair brushing, tooth brushing, and manipulation of clothing fasteners. The petitioner feeds herself by mouth with utensils and toilets at an age-appropriate level of independence. She does require assistance with fine motor activities such as opening bottles.
10. Mobility: the petitioner has age appropriate gross motor skills. She does not have a substantial functional limitation in the domain of mobility.
11. Regarding social competence, the child is social, likeable, but socially immature. She prefers to play with children who are three to four years younger than herself. The petitioner is well-liked by peers. No high-risk or self-injurious behaviors have been observed.

DISCUSSION

I. INTRODUCTION

The purpose of the Katie Beckett MA subset is to encourage cost savings to the government by permitting children under age 18, who are totally and permanently disabled under Social Security criteria and who require institutional level care, to receive MA while living at home with their parents. Sec. 49.46(1)(d)4, Wis. Stats.; 42 C.F.R. §435.225(b)(1). The income and assets of the parents of such children are disregarded.

The disability determination is made for the agency by the Wisconsin Disability Determination Bureau. In this case, the child has been found to be disabled. 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 level of care criteria are found in two policy sources: (1) a manual developed by the Wisconsin Bureau of Developmental Disability Services, *Medicaid Home and Community-Based Waivers Manual (Manual)*, which defines and describes childhood care levels, and (2) more generally, the attachment to the CLTS Waiver document approved by the federal government. *State of Wisconsin Section 1915(c) CLTS Waiver Document*, Appendix D-2.

A successful Katie Beckett participant must pass one of the care levels described in the *Manual*. There is no dispute that the petitioner does not satisfy the Hospital or SED (psychiatric hospitalization) care levels described in the manual. *Id.*, pp. 48-65. The ICF/DD1 and ICF/DD2 care levels are for individuals who suffer from mental retardation or a developmental disability that gives rise to functional limitations similar to mental retardation. The fourth and final level of care is the Nursing Home level of care. The *Manual* formerly contained benchmarks for three gradations of nursing home care levels (Intensive Skilled Nursing/ISN, Skilled Nursing Facility/SNF, and Intermediate Care Facility/ICF) but, in current policy, these levels have been collapsed into one level of benchmarks that most closely resemble the old ICF level. The Nursing Home care level requirements pertain here, and are discussed further below.

II. NURSING HOME CARE LEVEL DESCRIPTION.

The federal MA statute provides only a minimal, unhelpful definition of what constitutes care at a “nursing facility” (*i.e.*, a nursing home):

(a) “Nursing facility” defined

In this subchapter, 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 USC1396r(a).

The Department has fleshed out the status and care needs of a nursing facility patient in the *Manual* level of care policy. See, http://www.dhs.wisconsin.gov/bdds/waivermanual/app_a.htm, Appendix A-10. The pediatric Nursing Home level of care is broken down into three alternative standards. The *Exceptional*

Circumstances Standard is for children with a long term disability and a prognosis of death, recurrent cancer, or impending transplant. The Exceptional Circumstances Standard is not applicable here.

Standard I requires (1) a diagnosis that results in a long-term disability, and (2) medical/physical needs that require either (a) one substantial daily nursing intervention or (b) at least twice weekly multiple nursing interventions, and (3) substantial functional limitations in at least *two* of the following: learning, communication, self-care, mobility, social competency, or work for children over 16. Under Standard I, the nursing intervention must be on a list of procedures identified in the policy (*e.g.*, respiratory treatments).

Alternatively, *Standard II* requires (1) a diagnosis that results in a long-term disability, (2) medical/physical needs that require long-term care needs, and (3) substantial functional limitations in at least *four* of the following: learning, communication, mobility/transfers, bathing, toileting, dressing/grooming, eating, or mobility. Limitations must be expected to last at least one year. Standard II is not applicable here.

III. I CONCLUDE THAT THE PETITIONER DOES NOT REQUIRE NURSING HOME LEVEL CARE AT THIS TIME.

I conclude that the petitioner's care needs, although significant, are not currently at a nursing home care level. In policy, the standard for the requisite level of care is the declaration stated in Discussion section II above. The broad outline of the policy is that the patient's care needs are such that s/he requires services "above the level of room and board and that can be made available only through institutional facilities." Wis. Admin. Code § DHS 101.03(89).

Applying the more specific policy articulation from the *Manual* of what constitutes nursing facility/nursing home level of care needs above, I note that there is no serious disagreement that the petitioner has a diagnosis that results in a long-term disability. Thus, the policy requirement of a long-term disability in all Standards has been met.

The second component of the analysis under the policy Standard I is that the child have medical needs that require either one substantial daily nursing intervention, or multiple restorative/rehabilitative nursing interventions during the week. This child's *daily* cares no longer include a nursing level substantial hands-on intervention every day.

Standard II requires that the child have a substantial functional limitation in at least four of seven designated areas (learning, communication, bathing, grooming or dressing, eating, toileting, mobility). The child does have a functional limitation in the area of grooming. She is borderline in the learning domain, and bathing skills are not sufficiently established in the hearing record. Substantial functional limitations are not present in the other designated areas. Thus, the child does not qualify under Standard II.

If the petitioner should revert to requiring G-tube feedings in the future, she should immediately re-apply for the Katie Beckett program.

CONCLUSIONS OF LAW

1. The petitioner’s diagnosis results in a long-term disability.
2. The petitioner does not have care needs that are at an institutional level of care at this time.
3. The agency correctly discontinued the petitioner’s Katie Beckett MA certification, based on failure to satisfy the “level of care” eligibility requirement.

THEREFORE, it is

ORDERED

That the petition is 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 15th day of December, 2014

\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 December 15, 2014.

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