FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Redact
Redact
Redact

DECISION

CWK/161219

PRELIMINARY RECITALS

Pursuant to a petition filed October 14, 2014, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Redact in regard to Medical Assistance, a hearing was held on December 02, 2014, at Madison, Wisconsin. At the request of the parties, the record was held open for two weeks for the petitioner's parents to send new evidence to the county agency for its review, and then for the submission of closing arguments by both parties to DHA and to each other. The closing arguments are received into the hearing record.

The issue for determination is whether the county agency correctly discontinued the petitioner's CLTS Waiver and Medicaid services effective October 23, 2014, due to no longer meeting the Level of Care.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Redact
Redact
Redact

Representative:

Redact
Redact

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Rec Redact, community program specialist
Redact
101 Nob Hill Rd
Suite 201
Madison, WI 53713

ADMINISTRATIVE LAW JUDGE:
Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 15 year old resident of Dane County who resides with his father and mother, Redact, and his brother.

2. The petitioner is diagnosed with Asperger's (academically high functioning Autism). In his November 24, 2014 letter, Dr. Redact evaluation of petitioner states in part: "Redact's adaptive behavior functioning is very delayed across all functional areas assessed that would be expected on his measured cognitive ability and what is expected for a person his age. These delays are reported in expressive, receptive, and written communication; self-care, domestic care, and community functioning; as well as a variety of interpersonal and social domains." Petitioner is 2-3 standard deviations below the mean for activities of daily living, despite doing very well in academic subjects.

3. Redact has been meeting the functional level of care for the Katie Beckett program since age 3, and as of September, 2013 was determined to meet the CLTS Waiver at the Severe Emotional Disturbance (SED) Level of Care.

4. Petitioner is in 10th grade in the Redact, and receives special educational services based upon his Individual Education Plan (IEP).

5. The petitioner receives 3 ½ hours per week from the following mental health services: a) 2 hours per week of Redact therapist and Rehab counselor Redact, who has worked with Redact for nearly five years on a weekly basis. She works on building social, communication and academic skills. Redact has a diagnosis of Asperger's, and this has resulted in "difficulties with maintaining peer relationships and communicating his thoughts and feelings in socially appropriate manners; and b) 1½ hours per week of therapy from Redact at Redact working on petitioner's social skills training in a group session.

6. During 2014, petitioner received mental health services from the Redact center for two hours per week for "Transitioning Together" conducted by Dr. Redact; b) petitioner see his psychologist, Dr. Reda Redact for mental health and behavioral issues on a regular basis; c) Redact has been involved in social skills classes at Achieving Collaborative Treatment (ACT) with therapist, Matt Nonemacher at WEAP.

7. Redac Redact, Ph.D has been Redact's psychotherapist since November 8, 2010. In his letter, Dr. Redact indicated that Redact has **anger management issues** and problems with basic communication skills with peers. His needs are chronic, and will likely require lifelong supportive mental health interventions. He has benefits from home-based services and those services are needed to continue.

8. Based upon his fall, 2014 CLTS Functional screen, the county agency sent a September 23, 2014 letter to the petitioner's parents stating that Redact's eligibility for the Children's Long Term Support (CLTS) Home and Community Base Services Waivers would discontinue effective October 23, 2014, due to no longer meeting any Level of Care. See Exhibit 1. That letter notice indicated the following reasons for the CLTS discontinuance: a) he does not demonstrate significant communication issues; b) incorrectly stated that "he receives no mental health services and does not display significant emotional issues or behavioral challenges;" c) "he does not meet the Severe Emotional Disturbance level of Care"; and d) he does not meet the Developmental Disabilities or Physical Disability Levels of Care.

9. In her September 29, 2014 letter, petitioner's general pediatrician, Dr. Redact stated in pertinent part: ". . . He especially continues to have struggles with appropriate peer interaction in school and social settings. In my opinion, he continues to meet the eligibility criteria for CLTS due to persistent developmental disabilities. Loss of services will be highly detrimental to retaining the skills he has developed and for any hope for continued progress."

10. In her October 12, 2014 letter, Redact therapist (and coordinator of home therapy), Redact, indicated that she has worked with Redact for nearly five years on a weekly basis. She works on building social, communication and academic skills. Redact has a diagnosis of Asperger's, and this has resulted in "difficulties with maintaining peer relationships and communicating his thoughts and feelings in socially appropriate manners. Without assistance from myself and others that are funded by the CLTS Waiver, Redact's progress will likely halt and regress. It is my belief that there were several inaccuracies in the letter from Ms. Redact explaining the reasons for terminating services, and thus the decision should be reversed."

11. Redact exhibits potentially dangerous **Severe Emotional Disturbance** (SED) behavior regarding the following **very inappropriate sexual behavior**: a) Redact has found it difficult not to stare at other boys in the boy's locker room, and has made inappropriate comments and humiliated another boy in the locker room; b) Redact tends to touch himself in inappropriate ways in public which makes his peers very uncomfortable; c) Redact has told several boys at school that he loves them in front of other peers, and kissed them without their permission; d) one student had pressured Redact into kissing another student, and he may be vulnerable to being pressured into unsafe and inappropriate actions (Redact's November 30, 2014 letter). The petitioner lacks social awareness around privacy behaviors related to toileting, showering, and dressing.

12. The petitioner's inappropriate sexual behavior (as described in Finding of Fact #11 above) could result in institutionalization in the criminal justice system.

DISCUSSION

I. INTRODUCTION

The Children's Long Term Support (CLTS) waiver 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. *See*, http://www.dhs.wisconsin.gov/ltc_cop/waivermanual/index.htm (viewed in June 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 (2010). 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, Nursing Home or ICF/DD 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. SED ANALYSIS.

The SED level applies to a child with the following:

1. A diagnosis of a recognized mental illness,
2. The diagnosis/symptoms have been present for 6 months and the are expected to persist for at least one year,
3. The child requires services from at least two of five enumerated service systems, *and*
4. The child exhibits severe symptomology or dangerous behaviors of sufficient intensity that, without daily community-based intervention, s/he would be at risk for institutionalization in a psychiatric hospital.

There is agreement that the petitioner has diagnoses of a mental illness that has been present for at least six months, and is expected to be present for at least another year. The child requires services from at least two of the named service systems (mental health and special school services).

The Department denied eligibility here because it believes that this child no longer exhibits sufficiently severe symptomology to be at risk of psychiatric institutionalization if daily intervention is not provided. The program's treatment professionals have developed a policy list of what constitutes symptoms that would lead to institutionalization. They include psychosis, suicidality (actual attempts), engaging in acts that endanger the lives of others, and anorexia/bulimia. The petitioner does not contend that he has psychosis, suicidality or anorexia/bulimia.

Another symptom category is "dangerous behaviors." This category has four subsets: (1) High-risk behaviors, (2) Self-Injurious behaviors, (3) **Aggressive/Offensive Behaviors**, or (4) **Lack of Behavioral Controls**. The High-Risk Behaviors subset consists of running away, substance abuse, or dangerous sexual contact. The petitioner's parents provided evidence that these behaviors are present. Aggressive/Offensive Behavior toward Others is defined as (a) serious threats of violence, (b) **sexually inappropriate behavior**, (c) abuse/torture of animals, (d) hitting, biting or kicking that seriously harms others, (e) public masturbation, (f) urinating on another or smearing feces, or (g) verbal abuse. Finally, lack of Behavioral Controls is defined as destruction of property/vandalism, or theft/burglary. The petitioner does not allege that he is currently engaging in property destruction or theft.

The petitioner does meet the standards in the "dangerous behavior" category of Aggressive/Offensive Behavior toward Others or Lack of Behavioral Controls. Specifically, he engages in the following **very inappropriate sexual behavior**: a) Redact has found it difficult not to stare at other boys in the boy's locker room, and has made inappropriate comments and humiliated another boy in the locker room; b) Redact tends to touch himself in inappropriate ways in public; c) Redact has told several boys at school that he loves them in front of other peers, and kissed them without their permission; and d) one student had pressured Redact into kissing another student, and he may be vulnerable to being pressured into unsafe and inappropriate actions.

The county agency representative was unable to refute that Redact does engage in dangerous sexual behavior. The burden of proof was upon the county agency to establish that it correctly discontinued the petitioner's CLTS and Medicaid services due to no longer meeting the SED level of care. The county agency failed to meet its burden of proof. Accordingly, based upon the above, I conclude that the county agency incorrectly discontinued the petitioner's CLTS Waiver and MA services effective October 23, 2014 because petitioner continues to meet the SED Level of Care.

CONCLUSIONS OF LAW

The county agency correctly discontinued the petitioner's CLTS Waiver and Medicaid services effective October 23, 2014, due to no longer meeting the Level of Care.

THEREFORE, it is **ORDERED**

The matter is remanded to the county agency with instructions to restore the petitioner's CLTS and Wisconsin Medicaid services retroactive to October 23, 2014, 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 20th day of January, 2015

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\sGary M. Wolkstein
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 20, 2015.

Redact

Bureau of Long-Term Support