



STATE OF WISCONSIN  
Division of Hearings and Appeals

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In the Matter of

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

DECISION

MKB/163678

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**PRELIMINARY RECITALS**

Pursuant to a petition filed February 01, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code §HA 3.03(1), to review a decision by the Department of Health Services (DHS) in regard to Medical Assistance (MA), a telephonic hearing was held on March 17, 2015, at Kenosha, Wisconsin. The record was held open 88 days to allow petitioner's mother time to provide additional information, which was received. The information was forwarded to the DHS for review, which occurred, and the DHS issued a letter to the parties on July 1, 2015 stating that its determination was unchanged.

The issue for determination is whether the agency correctly discontinued the petitioner's Katie Beckett MA eligibility because the petitioner does not meet the "level of care" requirement.

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: written submittal of Patsy Bansley, RN  
Bureau of Children's Services  
1 West Wilson  
PO Box 7850  
Madison, WI 53707-7850

**ADMINISTRATIVE LAW JUDGE:**

Kelly Cochrane  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner is a resident of Kenosha County. He is now 11 years old and resides with his family.
2. Petitioner has been receiving Katie Beckett MA since 2012. His previous eligibility was based on meeting the Nursing Home (NH) Level of Care (LOC).
3. By a letter dated January 9, 2015, the DHS informed petitioner's parents that petitioner no longer meets the Level of Care requirements necessary for eligibility for Katie Beckett MA.
4. The petitioner is diagnosed with autonomic dysfunction, abdominal pain, segmental and somatic dysfunction of head and cervical region, synthetic allergy, and he is on a bowel program.
5. Petitioner needs some assistance getting in and out of the tub and with his hair and face. He is able to dress himself, needing occasional assistance with some article of clothing. He can feed himself but is on an organic diet with multiple food restrictions. He is able to toilet himself, but has occasional incontinence and chronic constipation. He can walk independently but may use a walker or wheelchair as needed.
6. Petitioner has a 504 Plan through the [REDACTED]
7. Petitioner does not exhibit substantial learning impairments measured by a 35% or greater delay in aggregate intellectual functioning, based on norm referenced measures or a score of at least 2 standard deviations below the mean on norm referenced measures of aggregate intellectual functioning.

### DISCUSSION

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting disabled children, who would otherwise be institutionalized, to receive MA while living at home with their parents. Sec. 49.47(4)(c)1m, Wis. Stats. The agency 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. Petitioner continues to meet this first standard. 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 agency determined that petitioner no longer requires this level of care. (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.)

There currently are four levels of care: hospital (HOS), psychiatric (SED), nursing home (NH), and care facility for the developmentally disabled (ICF-DD). They may be reviewed online at <https://www.dhs.wisconsin.gov/clts/cltsloc.pdf>. Petitioner was previously eligible for the program on the basis that he met the NH care level.

The ICF-DD level is for individuals with extreme cognitive impairments similar to mental retardation. The SED is for children with severe emotional disorders. The petitioner does not possess any significant cognitive or emotional disorders sufficient to rise anywhere near meeting these levels. The HOS level of care requires that the child need frequent and complex medical care that requires the use of equipment to prevent life-threatening situations. There is no evidence to suggest he meets this level either. Thus, I discuss the NH LOC.

The child with a NH LOC has a long-term medical or physical condition, which significantly diminishes his/her functional capacity and interferes with the ability to perform age appropriate activities of daily living (ADLs) at home and in the community. *Id.* at p.22. Such a child also requires an extraordinary degree of daily assistance from others to meet everyday routines and special medical needs. These special medical needs must warrant skilled nursing interventions that require specialized training and monitoring that is significantly beyond that which is routinely provided to children. The LOC requires

that the intensity and frequency of required skilled nursing interventions must be so substantial that without direct, daily intervention, the child is at risk for institutionalization within a nursing home. *Id.* I reiterate the LOC requirements at issue here:

**SKILLED NURSING INTERVENTIONS AND/OR SUBSTANTIAL FUNCTIONAL LIMITATIONS**

The child must meet **ONE** of the two Standards (I-II) described below.

**STANDARD I: Skilled Nursing Interventions PLUS Substantial Functional Limitations**

The child must demonstrate **BOTH** a need for Skilled Nursing/Therapeutic Intervention **PLUS TWO** substantial functional limitations (**A PLUS C, OR B PLUS C**):

A. Needs and receives at least **ONE** Skilled Nursing Intervention listed below that must be performed **daily** and is reasonably expected to continue *at least six months*.

OR

B. Needs and receives at least **TWO** Skilled Nursing/Therapeutic Interventions listed below that must be performed at least **weekly** (*or at the frequency noted below*) and are both reasonably expected to continue *at least six months*.

**Daily Skilled Nursing Interventions** that apply to **BOTH item A and B** above are limited to the following and do not include site care:

- **IV access:** peripheral or central lines for fluids, medications or transfusions.

Does not include the use of a port.

- **Tracheostomy care**

- **Oxygen:** oxygen use includes only skilled tasks such as titration, deep suctioning and checking blood saturation levels.

- **Total Parenteral Nutrition (TPN)**

- **Tube feedings:** G-tube, J-tube or NG-tubes

- **Dialysis:** hemodialysis or peritoneal, in home or at clinic.

- **Respiratory treatments:** chest PT, C-PAP, Bi-PAP, IPPB treatments. This does not include inhalers or nebulizers.

- **Wound or special skin care:** only applies if process takes more than one hour a day.

**Additional Skilled Nursing/Therapeutic Interventions** that can **ONLY be applied for item B** above:

- **Bowel or ostomy:** digital stimulation, ostomy site care, changing wafer, and irrigation.

- **Urinary catheter:** straight catheters, irrigations, instilling medications.

- **Physical, occupational, or speech therapy:** only applies if the child is involved in six or more sessions per week with professional therapists.

**NOTE:** Medication administration for a reasonably stable condition, including topical or oral medication, eye drops, inhalers, nebulizers, growth hormone injections, insulin injections, or chemotherapy, is not considered a skilled nursing intervention.

**PLUS**

C. The child exhibits **Substantial Functional Limitations** when compared to age appropriate activities in at least **TWO** of the seven specific areas listed below that are reasonably expected to last *at least one year*.

1. **Learning:** A 30% (25% if the child is under one year of age) or greater delay or a score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean based on valid, standardized and norm referenced measures of aggregate intellectual functioning.

2. **Communication:** A substantial functional limitation in communication is defined as a 30% (25% if under one year) or greater delay or a standard score of at least 2 (1.5 if under one year) standard deviations below the mean on valid, standardized and norm referenced measures of BOTH expressive and receptive communication functioning.

3. **Self Care:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in activities of daily living (self care) to meet a substantial functional limitation based on the child's age. Child must demonstrate a deficit in at least

ONE of the following five areas of self care:

1. Bathing
2. Grooming
3. Dressing
4. Toileting
5. Eating

4. **Mobility:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in mobility to meet a substantial functional limitation based on the child's age. The inability to run or to move long distances or between environments related to stamina or ease of movement is NOT a mobility deficit.

5. **Social Competency:** Refer to APPENDIX A. This Appendix lists deficits in social skills by age groups that demonstrate a substantial functional limitation in social competency.

6. **Work:** Needs direct, hands-on assistance every day to perform their job, significantly beyond the typical assistance needed by other employees with similar duties to complete their job duties. This applies only to children over 16 years or age.

7. **Meal Preparation or Money Management:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in meal preparation or money management to meet a substantial functional limitation based on the child's age. This applies only to children over 18 years of age.

For example, children who would MEET Criterion 2 - Skilled Nursing Interventions and/or Substantial Functional Limitations through Standard I:

- A 5-year-old child requires oxygen daily and needs frequent monitoring due to being at high risk for alterations in respiratory status. She has been on oxygen for over a year. She is unable to walk and needs to be lifted in and out of the bathtub and placed on/off the toilet. Although she is very independent in other areas of self care, it is expected that she will need assistance from others in bathing, toileting and mobility for a year or longer. *She has one daily skilled nursing intervention and two substantial functional limitations (self care and mobility) that meet the duration requirements.*

- A 15-month-old child has been tube fed since he was an infant and continues to require g-tube feedings six times/day. He is unable to move himself around his environment except by rolling. Due to his status of being g-tube dependent, he needs assistance in eating; an activity of daily living. Although he continues to make steady progress, he will have deficits in mobility and eating for at least a year. *He has one daily skilled nursing intervention and two substantial functional limitations that meet the duration requirements.*

- A 10-year-old child is dependent on others for cathing several times a day. In addition, she receives six therapy session weekly (2 sessions of Occupational Therapy, 2 sessions of Physical Therapy and 2 sessions of Speech Therapy). By valid testing results, her receptive and expressive communication skills are both delayed by more than 30% and she needs daily assistance in toileting since she is incontinent. She has been cathed by others since early childhood. She has needed and received therapy since she was an infant. Her need for assistance in toileting and her delays in communication are both expected to last a year or longer. *She has two skilled nursing/therapeutic interventions under item B above that occur at least weekly and two substantial functional limitations (communication and self care: toileting) that meet the duration requirements.*

For example, children who would NOT MEET Criterion 2 - Skilled Nursing Interventions and/or Substantial Functional Limitations through Standard I:

- A 6-year-old child requires periodic oxygen use but is otherwise substantially stable and not at risk for frequent changes, and does not need complex nursing interventions. She requires supervision when bathing for safety, needs help getting her clothes on in the morning and assistance wiping herself after a bowel movement but is independent in all other areas. *This child does not have the required skilled nursing needs.*

• A 7-year-old child who has a g-tube that is accessed for administration of medication when he is sick. He receives 2 sessions of speech therapy weekly through school. He is very oral defensive and needs help brushing his teeth. He has a valid, full scale IQ score of 74. *He has two skilled nursing/therapeutic interventions, but neither meet the frequency requirement of weekly. In addition, for the therapy to apply it would need to be at least six sessions per week. He does have substantial functional impairments in two areas (learning and self care: grooming) but does not meet the other requirements for this standard.*

**STANDARD II: Substantial Functional Limitations**

The child must have substantial functional limitations requiring daily direct hands on assistance in at least **FOUR** of the seven specific areas listed below that are reasonably expected to last for *at least one year*. There is no requirement of skilled nursing or therapeutic interventions for this Standard.

1. **Learning:** A 30% (25% if the child is under one year of age) or greater delay or a score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean based on valid, standardized and norm referenced measures of aggregate intellectual functioning.
2. **Communication:** A substantial functional limitation in communication is defined as a 30% (25% if under one year) or greater delay or a standard score of at least 2 (1.5 if under one year) standard deviations below the mean on valid, standardized and norm referenced measures of BOTH expressive and receptive communication functioning.
3. **Bathing:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in bathing to meet a substantial functional limitation based on the child's age.
4. **Grooming or Dressing:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in grooming or dressing to meet a substantial functional limitation based on the child's age.
5. **Eating:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in eating to meet a substantial functional limitation based on the child's age.
6. **Toileting:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in toileting to meet a substantial functional limitation based on the child's age.
7. **Mobility:** Refer to APPENDIX B. This Appendix describes the degree of deficit required in mobility to meet a substantial functional limitation based on the child's age. The inability to run or to move long distances or between environments related to stamina or ease of movement is NOT a mobility deficit.

**NOTE:** Minor to moderate global delays in several of the seven areas listed above does not meet the Substantial Functional Limitation Criterion. A significant delay in an area not listed above, such as a behavioral concern or the inability to participate in extra-curricular activities, also does not meet the required Substantial Functional Limitation.

For example, children who would MEET Criterion 2 - Skilled Nursing Interventions and/or Substantial Functional Limitations through Standard II:

- A 13-year-old boy with advanced muscular dystrophy who is unable to walk or transfer from place to place. He needs hands on assistance from others to bathe, get his clothes on/off and to use the toilet. *Child demonstrates needs in four (bathing, dressing, toileting, mobility) of the seven specific areas of substantial functional limitations.*
- A 9-year-old child with Spina Bifida relies on others to complete her bowel program daily and receives physical therapy twice a week. She has a urinary catheter but can complete the tasks associated with it independently. She is mobile but must use a walker at all times and a wheelchair for long distances. Due to a limited range of motion, she needs help with dressing and bathing. *Child demonstrates needs in four (bathing, dressing, toileting, mobility) of the seven specific areas of substantial functional limitations. Note this child did not qualify under Standard I because her skilled nursing needs do not meet the definitions*

*and frequency requirements.*

For example, children who would NOT MEET Criterion 2 - Skilled Nursing Interventions and/or Substantial Functional Limitations through Standard II:

- A 9-year-old boy in the early stages of muscular dystrophy who falls occasionally, but continues to walk independently and is able to manage daily care functions with minimal assistance or simple home modifications. *Although this child may have needs in multiple areas of substantial functional limitations in the future, he is not demonstrating them at this time.*
- An 8-year-old child with Spina Bifida and a Non-Verbal Learning Disorder has problems with balance, endurance and falls occasionally. She has difficulty with jumping, running and keeping up with peers. She is able to walk independently with the use of leg braces and engages in self-care activities with minimal assistance. Her communication and learning are within normal limits. *This child does not demonstrate any of the seven areas of substantial functional limitation.*
- A 10-year-old child with a cardiac condition and digestive system disorder who requires no skilled nursing interventions and has no substantial functional limitations in learning or communication and attends school most of the time. She has substantial functional limitations in three areas: bathing, grooming, and toileting. While there are delays that interfere with her everyday life in other listed areas, none rise to the substantial level and cannot be used to meet a substantial functional limitation. *This child has only three of the seven areas of substantial functional limitation.*
- A 16-year-old child was in a car accident two months ago. He is recovering well but is not expected to be able to walk ever again. He is able to propel a manual wheelchair and is learning proper transferring techniques. He has a catheter that he is learning to use on his own and he must take suppositories and enemas to help empty his bowels. Currently he needs others to assist him in most activities of daily living (bathing, dressing, grooming, and toileting). Within the next 6 months it is expected that he will be able to regain his independence in all areas except for toileting and mobility. *Only two of the seven areas of substantial functional limitations meet the duration requirement of being expected to last at least one year.*

*If Criteria 1 and 2 are BOTH met, the child meets the Nursing Home (Physical Disabilities) level of care.*

#### **EXCEPTIONAL CIRCUMSTANCES CRITERIA**

Due to the need for nursing home care under the following unique and severe conditions, if a child possesses **ONE** of the five listed criterion, s/he meets a Nursing Home (physical disability) Level of Care:

1. **Terminal condition:** A verified prognosis of death within 12 months from date of review.
2. **Transplant pending:** Imminent transplant within 12 months from date of review.
3. **Stage IV cancer:** Diagnosis occurred no more than 12 months prior to date of review.
4. **Recurrent cancer:** Recurrence occurred no more than 12 months prior to date of review.
5. **Post transplant:** Transplant occurred no more than 12 months prior to date of review.

*Id.*

In this case, the agency agrees that petitioner is disabled and requires one substantial daily nursing intervention. However, the agency argues that petitioner has not shown that he has substantial functional limitations in at least *two* of the requirements (Learning, Communication, Self Care, Mobility, Social Competency, Work, Meal Preparation or Money Management) above. A substantial functional limitation is “a child's inability to perform daily functions without extensive, hands-on assistance significantly beyond the age at which similar aged peers typically require such assistance. This assistance must be needed by the child to complete the task or function at all, rather than to complete the task better, more quickly, or to make the task easier.” *Id.* at p. 35.

This is not meant to diminish the challenges petitioner faces, however, I must agree based on the evidence before me that the petitioner does not show substantial limitations in at least two of the categories. Because the child does not meet the LOC criteria, the agency discontinued his eligibility for the program. Accordingly, I must find that the DHS has correctly discontinued the petitioner's Katie Beckett Program certification because he no longer meets the NH level of care, or any other institutional level of care. The discontinuance action must be affirmed.

I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. If petitioner develops better evidence or his conditions worsen, he can always reapply.

### CONCLUSIONS OF LAW

The agency correctly discontinued the petitioner's Katie Beckett MA eligibility because the petitioner does not meet the "level of care" requirement.

**THEREFORE, it is**

**ORDERED**

The petition for review herein be 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 Milwaukee,  
Wisconsin, this 13th day of July, 2015

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\sKelly Cochrane  
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 July 13, 2015.

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