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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FCP/166744

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**PRELIMINARY RECITALS**

Pursuant to a petition filed June 16, 2015, under Wis. Admin. Code § DHS 10.55, to review a decision by the Milwaukee County Department Family Care - MCO in regard to Medical Assistance, a hearing was held on July 14, 2015, at Milwaukee, Wisconsin.

The issue for determination is whether the agency correctly determined that the petitioner was no longer functionally eligible for the Family Care Program at the nursing home level of care.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

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

By: Lillian Alford  
Milw Cty Dept Family Care - MCO  
901 N 9th St  
Milwaukee, WI 53233

**ADMINISTRATIVE LAW JUDGE:**

Corinne Balter  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. On May 21, 2015 the Family Care team completed a long-term care functional screen. The computerized result of the screen determined that the petitioner was no longer functionally eligible for the Family Care Program at the nursing home level of care.

3. The Family Care Program sent the petitioner a notice stating that he was no longer eligible for program at the nursing home level of care. The petitioner timely appealed that notice.
4. The petitioner needs assistance with bathing, grocery shopping for meal preparation, and laundry and chores. When the petitioner was enrolled in the Family Care Program at the nursing home level of care, he received supportive home care for assistance with those tasks.
5. The petitioner has diabetes. He has further conditions related to his diabetes. The petitioner's diabetes has become better managed while enrolled in the Family Care Program. The petitioner is more stable now than when he enrolled in the Program in November 2014.

### DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized in the Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10.

Wis. Adm. Code, §DHS 10.33(2) provides that an FCP applicant must have a functional capacity level of comprehensive or intermediate; I note here that Wis. Stat., §46.286, uses the terms “nursing home” and “non-nursing home” levels just as the agency in this case. If the person meets the comprehensive (nursing home) level, she is eligible for full services through a care management organization (CMO), including Medical Assistance (MA). Wis. Adm. Code, §DHS 10.36(1)(a). If the person meets the intermediate (non-nursing home) level, he is eligible for full services only if he is in need of adult protective services, he is financially eligible for MA, or she is grandfathered as described in §DHS 10.33(3). Wis. Adm. Code, §DHS 10.36(1)(b). A person eligible under the non-nursing home level is eligible for less FCP services.

Wis. Adm. Code, §DHS 10.33(2)(c) describes comprehensive functional capacity:

(c) *Comprehensive functional capacity level.* A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
  - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.
  - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or

time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self neglect or resistance to needed care.

Wis. Adm. Code, §DHS 10.33(2)(d) describes intermediate functional capacity:

d) *Intermediate functional capacity level.* A person is functionally eligible at the intermediate level if the person is at risk of losing his or her independence or functional capacity unless he or she receives assistance from others, as is evidenced by a finding from application of the functional screening that the person needs assistance to safely or appropriately perform either of the following:

1. One or more ADL.
2. One or more of the following critical IADLs:
  - a. Management of medications and treatments.
  - b. Meal preparation and nutrition.
  - c. Money management.

Activities of daily living or ADLs include bathing, dressing, eating, mobility, transferring from surface to another. Wis. Adm. Code, §DHS 10.13(1m). Instrumental activities of daily living or IADLs include management of medications and treatments, meal preparation and nutrition, money management, using the telephone, arranging and using transportation and the ability to function at a job site. Wis. Adm. Code, §DHS 10.13(32).

Agencies must determine eligibility using a uniform functional screening tool prescribed by the Department. Wis. Admin. Code §DHS 10.33(2)(a). The problem with this requirement is that the Department has changed the screening tool to better comply with the federal government's long-term waiver provisions, but it has not changed the administrative code to reflect these changes. *See DHA Decision No. CWA 156141.* Because the Administrative Code has the force of law, I must follow it rather than the screening tool.

The petitioner is independent in all of his ADLs except for bathing. The petitioner also needs assistance with two IADLs including meal preparation, and laundry and chores. In this case the screen matches the administrative code in this case. The petitioner needs assistance with one ADL and one critical IADL. The petitioner does not have a cognitive impairment. The Family Care Program has helped the petitioner. His diabetes has become better managed, and as a result the petitioner has become more stabilized both mentally and physically. During the hearing, the petitioner was very alert, and able to jump in and correct or supplement the Family Care team's testimony at various points. Given the petitioner's limitations, he is eligible for the Family Care program at the non-nursing home level of care.

The agency representative testified that she had reviewed the code, and that it appeared that he was eligible for the nursing home level of care under the administrative code. This is incorrect. The code and screen match. The petitioner needs assistance with one ADL, two IADLs, with one being a critical IADL. He does not have a cognitive impairment. Thus, he is eligible based upon the administrative code at the non-nursing home level of care.

### **CONCLUSIONS OF LAW**

The agency correctly determined that the petitioner was no longer functionally eligible for the Family Care Program at the nursing home level of care.

**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 Milwaukee,  
Wisconsin, this 20th day of July, 2015

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\sCorinne Balter  
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 20, 2015.

Milw Cty Dept Family Care - MCO  
Office of Family Care Expansion