

- [REDACTED]
2. The petitioner receives Family Care Medical Assistance through Continuum at the nursing home level of care. Continuum notified him on September 15, 2015, that it would end his benefits because he no longer meets the nursing home level of care.
 3. The petitioner is a 23-year-old man diagnosed with Asperger's and attention deficit disorder.
 4. The petitioner has a driver's license. He drives a company car. He has had two accidents because of inattentive driving.
 5. The petitioner works 15 – 20 hours a week at the local YMCA without any restrictions or the need for a job coach.
 6. The petitioner can recite each medication he takes without difficulty. He sometimes needs to be reminded to take them.
 7. The petitioner can make routine decisions for himself but has a guardian and seeks help for non-routine decisions.
 8. The petitioner has abused drugs and alcohol but there is no longer a concern about doing so again if he was on his own.
 9. The petitioner exercises, reads, watches television, and shops in and out of the community on his own.
 10. The petitioner can cook, clean, feed himself, bathe, and take care of his own personal hygiene.
 11. The petitioner often needs reassurance when performing activities such as shopping and cooking.

DISCUSSION

The petitioner receives Family Care medical assistance benefits at the nursing home level of care. His care maintenance organization, Continuum, seeks to end his benefits because it contends that he no longer requires this level of care. To continue receiving benefits, he must demonstrate by the preponderance of the credible evidence that his impairments hinder his ability to perform a wide array of activities and instrumental activities of daily living.

The Family Care Program is a health-service delivery system authorized by Wis. Stat. § 46.286 and comprehensively described in Wis. Admin. Code, Chapter DHS 10. It is designed to increase the ability of the frail elderly and those under 65 with disabilities to live where they want, participate in community life, and make decisions regarding their own care. It places a recipient under the roof of a single private provider that receives a uniform fee, called a capitation rate, for each person it serves. The provider is responsible for ensuring that the person receives all the Medicaid and Medicare services available to him. The theory behind the program is that it will save money by providing recipients with only the services they need rather than requiring that they enroll in several programs whose services may overlap. Each CMO signs a contract with the State of Wisconsin that sets forth exactly what services it must provide.

The nursing home level of care, which is also referred to as the comprehensive level of care, requires a person to demonstrate that he requires substantial help from another person by proving that he cannot perform some specified combination of activities and instrumental activities of daily living:

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.

- [REDACTED]
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. Admin. Code, § DHS 10.33(2)(c).

Activities of daily living, or ADLs, refer to “bathing, dressing, eating, mobility, transferring from one surface to another such as bed to chair and using the toilet.” Wis. Admin. Code, § DHS 10.13(1m). Instrumental activities of daily living, or IADLs, refer to “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. Admin. Code, § 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.* [REDACTED]. Because the administrative code has the force of law, I must follow it rather than the screening tool.

The petitioner is a 23-year-old man diagnosed with Asperger’s, a high-functioning form of autism, and attention deficit disorder. He lives in a group home but hopes to leave soon. Those supporting him agree that leaving the group home is a realistic goal, but believe that he will not be ready to do so for about five years. He has no significant physical problems that impair his ability to perform his activities of daily living. He can perform all of his instrumental activities of daily living to at least some degree, although he needs reassurance for some of them.

Those speaking for the petitioner contend that he paints too rosy of a picture of his situation. They also contend that in order to successfully make the transition to living on his own he requires the assistance he now receives. This may be true, but I have no equitable powers and must determine whether he continues to meet the nursing home level of care according to the law and evidence in front of me. In essence, the nursing home level of care means that a person requires the level of care generally received in an institution.

Although the petitioner continues to have significant problems, I found little evidence that he contuse to meet the nursing home level of care. He works 15 – 20 hours a week at the local YMCA doing the same chores as other employees without any restrictions or the need for a job coach. He has a driver’s license. He has had two accidents because of inattentive driving, but his driving is reliable enough that his employer lets him drive a company car. He can make routine decisions for himself but has a guardian and

seeks help for non-routine decisions. He exercises, reads, watches television, and shops in and out of the community on his own. He can cook, clean, feed himself, bathe, and take care of his own personal hygiene. Although he has abused drugs and alcohol, there is little concern about his doing so again if he lived on his own. As mentioned before, for many of these tasks—including cooking and shopping—he needs reassurance to perform them. Nevertheless, I was struck by the ease with which he could list his many medications. Others testified that he sometimes forgets to take them if he is not reminded. But so do doctors and lawyers and social workers.

As mentioned, he has no real trouble performing his activities of daily living. Because he can perform his ADLs, he must show that he cannot adequately perform five of his instrumental activities of daily living, that he has a cognitive impairment and cannot perform four of his IADLs, or that he has a complicating condition that limits his ability to meet his needs independently.

Looking at his problems performing his instrumental activities of daily living in a manner most favorable to him, the only areas he has any impairment are medication management, meal preparation, and money management. And even in these areas it is questionable whether his limitations reach the level meant to be covered by the regulations. Regardless, what limitations he has pertain to three IADLs, so even if he is assumed to have a cognitive impairment, he does not have enough limitations in this area to remain eligible for the program.

This means that to continue to meet the nursing home level of care, he must demonstrate that he has a complicating condition that limits his ability to independently meet his needs. He does not require frequent medical or social intervention to safely maintain an acceptable health or developmental status. Nor does he require frequent changes in service due to intermittent or unpredictable changes in his condition. And he does not require a range of medical or social interventions due to a multiplicity of conditions. Thus he does not meet the first prong of the required two-part test he must meet to demonstrate he has a complicating condition. This means that it is unnecessary to show that he meets the second part.

Based upon this, I find that he is no longer eligible for Family Care at the nursing home level of care under Wis. Admin. Code, § DHS 10.33(2)(c)2.

CONCLUSIONS OF LAW

The petitioner does not meet the nursing home level of care.

THEREFORE, it is

ORDERED

The petitioner's appeal 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 6th day of January, 2016

\sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 6, 2016.

Continuus
Office of Family Care Expansion
Health Care Access and Accountability