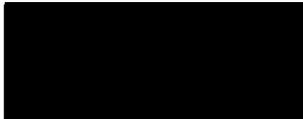




**STATE OF WISCONSIN  
Division of Hearings and Appeals**

In the Matter of



DECISION

FCP/169534

The attached proposed decision of the hearing examiner dated March 16, 2016, is modified as follows and, as such, is hereby adopted as the final order of the Department.

**PRELIMINARY RECITALS**

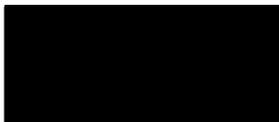
Pursuant to a petition filed October 20, 2015, under Wis. Admin. Code § DHS 10.55, to review a decision by the ContinuUs in regard to Medical Assistance, a hearing was held on December 01, 2015, at Baraboo, Wisconsin. The record was held open for the submission by both parties of written closing arguments to the Division of Hearings and Appeals (DHA). Both parties timely submitted their briefs to DHA which are received into the hearing record.

The issues for determination are: a) whether the Family Care Program (FCP) correctly discontinued petitioner's FCP nursing home level of care and supportive home care (SHC) effective November 1, 2015 due to no longer meeting nursing home level of care; and b) whether petitioner would qualify for nursing home level of care due to inclusion of her use of adaptive aids for ADL based upon recent circuit court decisions on the same issue.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:



Representative:

Christine Gabron, supervising attorney  
Disability Rights of Wisconsin  
131 W. Wilson Street, Suite 700  
Madison, WI 53704

Respondent:

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

By: Ava Gray, ContinuUs supervisor  
ContinuUs  
28526 US Hwy 14  
Lone Rock, WI 53556

**ADMINISTRATIVE LAW JUDGE:**

Gary M. Wolkstein  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner is a resident of Sauk County.
2. The petitioner has been enrolled in the Family Care Program (FCP) in the target group of Physical Disability due to her diagnosis of spina bifida. She requires a wheelchair for mobility.
3. On October 6, 2015, the petitioner participated in her annual Long Term Care Functional screen which resulted in a determination of non-nursing home level of care.
4. On October 15, 2015, the petitioner participated in a functional re-screening which resulted in the same eligibility determination.
5. The petitioner needs assistance with two Instrumental Activities of Daily Living (IADLs): meal preparation and transportation. She requires assistance with laundry and cleaning tasks. She has daily incontinence that does require laundry to be performed more frequently. Due to mobility limited to a wheelchair, she is unable to shovel, sweep, mop or vacuum.
6. The county agency sent an October 12, 2015 Notice of Decision to the petitioner stating that her Community Waivers Family Care Program benefits would discontinue effective November 1, 2015, due to a change in her level of care.
7. After the hearing, post-hearing briefs were submitted to the Division of Hearings and Appeals (DHA), which are received into the hearing record. See above Preliminary Recitals.
8. The hearing record is uncontested that the petitioner needs adaptive aids for the following Activities of Daily Living (ADLs): a) bathing (uses shower chair and grab bars); b) mobility (uses wheelchair or scooter in home); and c) toileting (uses grab bars).
9. Two recent Wisconsin Milwaukee circuit court decisions have overturned Wisconsin Department of Health Services' final decisions, and concluded that a Family Care Program recipient would qualify at the Nursing Home Level of Care if that recipient requires adaptive equipment for three ADLs per DHS 10.33(2)(c)1. Those decisions are: a) D.B. vs. Wisconsin Department of Health services, No. 14-CV-10612 (Wis. Cir. Ct. Milwaukee County Sept. 17, 2015); and b) J.J. vs. Wisconsin Department of Health services, No. 14-CV-10707 (Wis. Cir. Ct. Milwaukee County September 25, 2015).
10. The Department did not appeal either of the circuit court decisions indicated in Finding of Fact #9 above.

## DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for physically/developmentally disabled or elderly adults. *See*, Wis. Stat. §46.286, and Wis. Admin. Code ch. DHS 10. Whenever the local Family Care program decides that a person is to be terminated from the program, or have her services reduced, the client is allowed to file a fair hearing request. The petitioner did so in the instant appeal.

In order to qualify for FC services, with certain exceptions not applicable here, a person's functioning must be such that they would otherwise require institutional care. Wis. Stat. §46.286(1)(a). To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

The Wisconsin Department of Health Services has made efforts to improve the statewide accuracy of functional assessments by implementing a computerized functional assessment screening system. This system relies upon a face-to-face interview with a trained quality assurance screener. The petitioner met

with a screener as part of an annual reassessment process. Policy requires the local screener to then enter this data into the Department's functional screen computer program. See <http://dhs.wisconsin.gov/LTCare/FunctionalScreen/Index.htm>. The Level of Care (LOC) Functional Screen form and program reiterate the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities. When the petitioner's functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner does not have care needs at the nursing home level. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

However, the computer program infrequently yields a result that is not consistent with state code. In the code, the standard for the requisite level of care is as follows:

**DHS 10.33 Conditions of functional eligibility.**

...

**(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY. (a) Determination.**

Functional eligibility for the family care benefit shall be determined pursuant to s. 46.286 (1), Stats., and this chapter, using a uniform functional screening prescribed by the department. To have functional eligibility for the family care benefit, the functional eligibility condition under par. (b) shall be met and, except as provided under sub. (3), the functional capacity level under par. (c) or (d) shall be met.

(b) *Long-term condition.* The person shall have a long-term or irreversible condition.

(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.

(Emphasis added)

Wis. Admin. Code §DHS 10.33(2)(a)-(c). IADLs are defined at §DHS 10.13(2).

The hearing record is uncontested that petitioner cannot perform two IADL unassisted (e.g., meal preparation and transportation).

During the hearing and in its brief, ContinuUs argued the Family Care Program correctly discontinued the petitioner's FCP eligibility effective November 1, 2015, due to no longer meeting the Nursing Home level of care based upon two functional screens on October 6, 2015 and October 15, 2015. However, during the hearing and in her briefs, petitioner's counsel, Attorney Christine Gabron, argued that petitioner continued to qualify at the nursing home level of care due to inclusion of her use of adaptive aids for Activities of Daily Living (ADLs): bathing (grab bars, shower chair); mobility (wheelchair or scooter in home); and toileting (grab bars) pursuant to two recent and on point Milwaukee Circuit Court decision a) D.B. vs. Wisconsin Department of Health Services, No. 14-CV-10612 (Wis. Cir. Ct. Milwaukee County Sept. 17, 2015) by J.J. vs. Wisconsin Department of Health services, No. 14-CV-10707 (Wis. Cir. Ct. Milwaukee County September 25, 2015). There is no dispute in the hearing record that petitioner requires the use of adaptive aids, and that petitioner needs assistance with two Instrumental Activities of Daily Living (IADLs): meal preparation and transportation.

In D.B. vs. Wisconsin Department of Health Services, (a case with basically an identical fact situation to petitioner's) Milwaukee Circuit Court Judge Timothy Dugan overturned the Department Secretary's final decision of a proposed decision by DHA, and found that D.B. qualified at the nursing home level of care (LOC) because she required assistive devices in order to complete her ADLs of bathing, mobility and toileting, and needed assistance with the IADL of transportation. Judge Dugan stated in pertinent part:

The web-based LTCFS application made the final decision for B's level of care eligibility. The application uses the DHS's "level of care logic" to make those decisions. That programmed logic differs from the Administrative Code in a number of material ways. One difference is in the treatment of adaptive equipment when evaluating certain activities of daily living. The LTCFS logic counts an ADL "if some degree of help is needed . . . or if adaptive equipment is required." If, as in the case of B's May 2013 LTCFS, the screener finds that the person is independent in completing the activity safely, the LTCFS logic will still find that the person needs assistance – equivalent to needing human assistance – if the person requires adaptive equipment to safely complete the ADL."

In the instant case, petitioner's basic facts are identical to D.B.'s case. The petitioner needs adaptive aids for the same ADLs as D.B. During the hearing and in its brief, ContinuUs responded that their screeners correctly followed the functional screen instructions. However, it appears that the adaptive equipment is not discussed in any of the materials of instructions given to the in-person screeners. Judge Dugan stated in pertinent part:

If one person's LTCFS screener inputs the use of adaptive aids and the person is found to be eligible for the nursing home level of care, the decision will never be brought up to the DHS. If another person's screener does not input the use of adaptive aids and the finding of ineligibility is appealed, however that person will lose their case. Only when such decisions are brought to the DHS does the Administrative Code prevail over the LTCFS logic. This inconsistency is inappropriate, and it illustrates why the Court should apply the carefully worked program logic of the LTCF and not the DIIS's new interpretation. The DHS may change the LTCFS logic to be consistent with the Administrative Code, but until then the interpretation in the screen logic applies. Because the DHS's decision conflicts with this interpretation, it must be reversed.

Similarly, Milwaukee Circuit Court Judge David Hansher in JJ vs Wisconsin Department of Health services, used the same legal basis to overturn DHA's decision and found that the petitioner would qualify at the nursing home level of care if the applicant's screener correctly noted the use of adaptive aids (use of a walker). Judge Hansher stated in pertinent part:

The LTCFS logic counts an ADL "If some degree of help is needed ... or if adaptive equipment is required." So even if the screener finds that the person is independent in completing the activity safely and scores him or her a "0," the LTCFS logic will still find that the person has a need equivalent to needing human assistance if he or she requires adaptive equipment to safely complete the ADL. This difference in treatment of adaptive equipment is not discussed in any material or instruction given to screeners.

In its brief, the Family Care Program argued that the two recent circuit court decisions have no precedential application to the instant case. In addition, the Department asserted that DHS continues to disagree with the reasoning in those circuit court decisions, and alleges that "nothing should be assumed from the fact that DHS elected not to seek higher reviews." DHS is correct that the circuit court decisions are not binding precedence. However, Attorney Gabron convincingly argued that those cases are "persuasive," as both cases are appeals from DHA fair hearings on almost identical fact situations, and both appeals of those DHA decisions were overturned based upon the same legal reasoning. In addition, ContinuUs argued that DHS intended to clarify the functional screen instructions regarding adaptive aids at some point in the future. If that written clarification takes place, it may change the result in future decisions, however, I am only reviewing the screen instructions as they were written during the period of petitioner's November 1, 2015 FCP level of care discontinuance.

In the instant case, the hearing record confirms that petitioner requires the use of adaptive aids for the three ADLs of bathing, mobility in the home, and toileting, and that petitioner requires assistance with two IADLS of meal preparation and transportation. The Department is correct that the prior decisions upon judicial review of similar cases have no precedential value herein. However, the Department was advised that clarification of the instructions was needed, and to date the Department has made no such clarification. Therefore, based upon the almost identical fact situations to the petitioner's in the above two recent Court Decisions, I conclude that petitioner would continue to qualify for nursing home level of care due to inclusion of her use of adaptive aids for.

#### CONCLUSIONS OF LAW

1. The two prior decisions relied upon by the petitioner, issued upon judicial review in cases with similar facts, have no precedential value herein
2. Those decisions, although not binding in the matter, provide reasoning that, in light of the Department's inaction to subsequently amend the Functional Screening instructions, may be informative in this matter.
3. The discontinuance of petitioner's FCP services effective November 1, 2015, based upon a theory of lack of functional eligibility, was inconsistent with prior judicial findings in matters with similar fact patterns.

**THEREFORE, it is**

**ORDERED**

That the matter is remanded to the Department to ensure that, within 10 days, the petitioner's Family Care functional assessment reflects a nursing home level of care (NHLOC), and that petitioner's benefits from November 1, 2015 going forward reflect a NHLOC, until such time as the petitioner's functional eligibility is next determined.

**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.

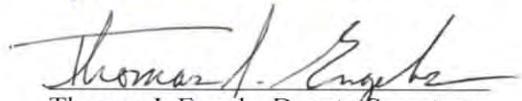
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

**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, WI, 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 request (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 7<sup>th</sup> day  
of September, 2016.

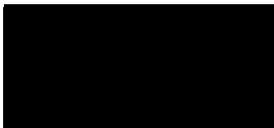
  
Thomas J. Engels, Deputy Secretary  
Department of Health Services



STATE OF WISCONSIN  
Division of Hearings and Appeals

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In the Matter of



PROPOSED DECISION

FCP/169534

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There appeared at that time and place the following persons:

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Representative:

Christine Gabron, supervising attorney  
Disability Rights of Wisconsin  
131 W. Wilson Street, Suite 700  
Madison, WI 53704

Respondent:

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

By: Ava Gray, ContinuUs supervisor  
ContinuUs  
28526 US Hwy 14  
Lone Rock, WI 53556

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner is a resident of Sauk County.
2. The petitioner has been enrolled in the Family Care Program (FCP) in the target group of Physical Disability due to her diagnosis of spina bifida. She requires a wheelchair for mobility.
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10. The Department did not appeal either of the circuit court decisions indicated in Finding of Fact #9 above.

**DISCUSSION**

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for physically/developmentally disabled or elderly adults. *See*, Wis. Stat. §46.286, and Wis. Admin. Code ch. DHS 10. Whenever the local Family Care program decides that a person is to be terminated from the program, or have her services reduced, the client is allowed to file a fair hearing request. The petitioner did so in the instant appeal.

In order to qualify for FC services, with certain exceptions not applicable here, a person's functioning must be such that they would otherwise require institutional care. Wis. Stat. §46.286(1)(a). To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

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<http://dhs.wisconsin.gov/LTCare/FunctionalScreen/Index.htm>. The Level of Care (LOC) Functional Screen form and program reiterate the skeletal definitions from the federal Medicaid rules for Intermediate Nursing Care and institutional Developmental Disability facilities. When the petitioner's functional ability scores were entered into the DHS algorithm, the result was a DHS conclusion that the petitioner does not have care needs at the nursing home level. Thus, the petitioner was found to be ineligible going forward, consistent with the DHS-directed result.

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(2) DETERMINATION OF FUNCTIONAL ELIGIBILITY. (a) *Determination*. Functional eligibility for the family care benefit shall be determined pursuant to s. 46.286 (1), Stats., and this chapter, using a uniform functional screening prescribed by the department. To have functional eligibility for the family care benefit, the functional eligibility condition under par. (b) shall be met and, except as provided under sub. (3), the functional capacity level under par. (c) or (d) shall be met.

(b) *Long-term condition*. The person shall have a long-term or irreversible condition.

(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:

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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.

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In its brief, the Family Care Program argued that the two recent circuit court decisions have no precedential application to the instant case. In addition, the Department asserted that DHS continues to disagree with the reasoning in those circuit court decisions, and alleges that "nothing should be assumed from the fact that DHS elected not to seek higher reviews." DHS is correct that the circuit court decisions are not binding precedence. However, Attorney Gabron convincingly argued that those cases are "persuasive," as both cases are appeals from DHA fair hearings on almost identical fact situations, and both appeals of those DHA decisions were overturned based upon the same legal reasoning. In addition, ContinuUs argued that DHS intended to clarify the functional screen instructions regarding adaptive aids at some point in the future. If that written clarification takes place, it may change the result in future decisions, however, I am only reviewing the screen instructions as they were written during the period of petitioner's November 1, 2015 FCP level of care discontinuance.

In the instant case, the hearing record confirms that petitioner requires the use of adaptive aids for the three ADLs of bathing, mobility in the home, and toileting, and that petitioner requires assistance with two IADLS of meal preparation and transportation. Based upon the relevant and almost identical fact situations to the petitioner's in the above two recent Court Decisions, I conclude that petitioner would continue to qualify for nursing home level of care due to inclusion of her use of adaptive aids for ADLs based upon recent circuit court decisions on the same issue.

#### **CONCLUSIONS OF LAW**

1. The petitioner remains at the nursing home level of care, therefore, she satisfied the functional eligibility requirements of the FC program for continued supportive home care hours as of November 1, 2015.
2. The discontinuance of petitioner's FCP services effective November 1, 2015, based upon a theory of lack of functional eligibility, was incorrect.

**THEREFORE, it is**

**ORDERED**

That the petition is remanded to the Family Care Program agency with instructions to restore the petitioner's Family Care Program nursing home level of care benefits from November 1, 2015 forward, in accord with the Conclusions of Law above, within 10 days of the date this Proposed Decision is adopted in a final decision by the Secretary if so adopted.

**NOTICE TO RECIPIENTS OF THIS DECISION:**

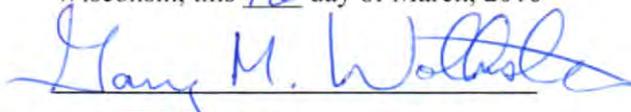
This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2). 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 16 day of March, 2016



Gary M. Wolkstein  
Administrative Law Judge  
Division of Hearings and Appeals