



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

In the Matter of

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

DECISION

MKB/169987

PRELIMINARY RECITALS

Pursuant to a petition filed November 06, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance (MA), a telephonic hearing was held on December 10, 2015.

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: by written submittal of: Michelle Green, RN
Bureau of Long-Term Support
1 West Wilson
PO Box 7850
Madison, WI

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Outagamie County. He is now 10 years old and resides with his family.

2. Petitioner has been receiving Katie Beckett MA since 2013. His previous eligibility was based on meeting the Severe Emotional Disorder (SED) Level of Care (LOC).
3. By a letter dated October 20, 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 Oppositional Defiance Disorder (ODD) and Anxiety Disorder.
5. Petitioner needs no assistance with his Activities of Daily Living (ADLs) which include bathing, grooming, toileting, dressing, eating or mobility.
6. Petitioner has an IEP through the [REDACTED]. He can use a special padded room in his school when his behaviors escalate. He takes a cab to and from school to keep his behaviors down. His school days start after and end before the other children in school. He has been suspended from school twice in the 2015 school year due to aggressive behaviors against his teacher and principal.

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 SED care level.

The ICF-DD level is for individuals with extreme cognitive impairments similar to mental retardation. 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. 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. There is no evidence to suggest he meets these levels. Thus, I discuss the SED LOC.

The SED is for children with severe emotional disorders. *Id.* I reiterate the LOC requirements at issue here:

The child with a Psychiatric Hospital - Severe Emotional Disturbance (SED) Level of Care has a long-term, severe mental health condition diagnosed by a licensed psychologist or psychiatrist. In addition, this child demonstrates persistent behaviors that create a danger to self or others, requiring ongoing therapeutic support in order to be able to live at home and in the community. *The intensity and frequency of the required ongoing therapeutic support must be so substantial that without the support the child is at risk of inpatient psychiatric hospitalization.*

A child may be assigned this level of care if the child meets **ALL FOUR of the criteria listed below** for Severe Emotional Disturbance. The criteria are:

1. The child has a **Diagnosis** of a mental health condition; and
2. The child's mental health diagnosis or symptoms related to the diagnosis have existed and are expected to persist for a specific **Duration** of time; and
3. The child is in need of **Involvement with Service Systems** related to mental health support; and
4. The child exhibits **Severe Symptomology or Dangerous Behaviors** at a specific intensity and frequency of required interventions such that without this direct, daily community-based intervention, the child is at risk for institutionalization within a psychiatric hospital.

1. DIAGNOSIS

The child has a diagnosis that meets **ALL** of the following:

A. Is currently diagnosed with at least one of the specific mental health diagnoses listed below by a licensed psychologist or psychiatrist for whom diagnosing the particular mental health disorder is appropriate to their specialization and within the scope of their training and practice.

AND

B. The mental health diagnosis must be made through a process of standardized testing, using a norm-referenced tool, or a thorough professional assessment of the child's symptoms based upon professionally accepted diagnostic standards and methods.

AND

C. The diagnosis must have resulted in the child having needs that must be addressed through long-term support services and that are the direct focus of a mental health home and community-based treatment plan for this child.

The following diagnostic categories under the classification system in the American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders (DSM-IVR)* are considered:

Acute Stress Disorder
 Anti-Social Personality Disorder
 Anxiety Disorders
 Asperger's Syndrome (299.80 only)
 Attention-Deficit Disorders
 Autism or Autism Spectrum Disorders
 (299.00 & 299.10 only)
 Bipolar Disorder
 Body Dysmorphic Disorder
 Conduct Disorder
 Depersonalization Disorder
 Depression
 Disruptive Behavior Disorders
 Dissociative Disorders
 Dysthymic Disorders
 Eating Disorders
 Hypochondriasis
 Impulse-Control Disorder
 Mood Disorders
 Obsessive-Compulsive Disorder
 Oppositional Defiant Disorder
 Personality Disorders
 Pervasive Developmental Disorder
 (299.80 only)
 Post-Traumatic Stress
 Psychotic Disorders
 Reactive Attachment Disorder
 Schizophrenia

Sexual and Gender Identity Disorders
 Somatoform Disorders
 Stereotypic Movement Disorder
 Substance-Related Disorders inc.
 Alcohol Abuse (not to include caffeine
 or nicotine addictions)
 Tourette's Syndrome

For example, children who would MEET Criterion 1- Diagnosis:

- A child has a diagnosis of Bipolar Disorder diagnosed by a psychiatrist following a thorough psychiatric assessment that resulted in a comprehensive mental health focused treatment plan.
- A child diagnosed with Autism by his psychiatrist. His doctor administered the Autism Diagnostic Observation Scale (ADOS) and the Childhood Autism Ratings Scale (CARS). The doctor states that he needs 35 hours per week of intensive inhome treatment services for children with Autism.

For example, children who would NOT MEET Criterion 1- Diagnosis:

- A child has a presenting diagnosis of Spinal Muscular Atrophy and is seeing a psychologist to address the emotional aspects of dealing with her long-term physical disability. She has a non-presenting, or secondary diagnosis of Depression.
- A child is on medication that is typically prescribed for children with Attention Deficit Hyperactive Disorder (ADHD), but no formal diagnosis has been made.

*The Diagnosis Criterion must be met before considering Criterion 2: Duration. If the Diagnosis Criterion is not met, the reviewer **must stop here**, but may consider levels of care other than Psychiatric Hospital, if appropriate.*

2. DURATION

The child has the required clinical mental health diagnosis from Criterion 1 and that diagnosis or the symptoms related to that diagnosis must meet **BOTH** of the following:

A. The diagnosis or symptoms have persisted for *at least six months*.

AND

B. The diagnosis or symptoms may reasonably be expected to persist for *one year or longer*. The diagnosing professional must satisfactorily explain the reasons for his or her expectation that the diagnosis or symptoms will persist for one year or longer.

For example, a child who would MEET Criterion 2 - Duration:

- A child has a long history of mental health symptoms, and has been receiving support from a psychologist for over a year with the reasonable expectation of requiring continued care for many years. This child was diagnosed with an Anxiety Disorder two months ago. *Although the diagnosis is relatively new, the child demonstrated symptoms for over six months.*

For example, a child who would NOT MEET Criterion 2 - Duration:

- A child had her first psychotic break last month, was hospitalized, and given a tentative diagnosis of Reactive Attachment Disorder. Prior to this hospitalization she was not exhibiting significant mental health symptoms and was not involved with professionals in the mental health field.

*The Diagnosis AND the Duration Criteria must be met before considering Criterion 3: Involvement with Service Systems. If Criterion 2 is not met, the reviewer **must stop here**, but may consider levels of care other than Psychiatric Hospital, if appropriate.*

3. INVOLVEMENT WITH SERVICE SYSTEMS

The child must meet **ONE** of the following:

A. The child must currently receive or require services in connection with his or her mental health diagnosis (or symptoms) from at least **TWO** of the following five listed Service Systems.

OR

B. The child must currently receive or require services in connection with his or her mental health diagnosis (or symptoms) from only **ONE** of the following five listed Service Systems, if the intensity of that service is or reasonably may be expected to be **THREE hours or more per week**.

Definition of *require*: *Require* is based on the qualified, treating professional's recommendation that a specific service is essential to address the child's identified mental health need. The professional recommendation must be made within the past year. It cannot be solely based on parental desire for services. Most children who *require* these services will be receiving them, but on occasion a parent or child cannot, or will not, participate in recommended services or the recommended services are not available. If the parent or child has refused to access recommended services for over 12 months, then this recommendation is no longer valid.

Service Systems:

1. **Mental Health Services** – These services include psychotherapy, psychiatric hospitalization, community-based day treatment programs and intensive in-home treatment for children with Autism Spectrum Disorders.

The use of psychiatric medications is not considered a mental health service.

However, a visit to a psychiatrist on a regular basis for the prescription and monitoring of these medications is considered a mental health service.

Programs dedicated to substance abuse treatment only are excluded as this type of program is captured below.

2. **Child Protective Services** – Formal ongoing involvement with the child welfare system.

3. **Criminal Justice System** - Includes Juvenile and Adult Justice Systems.

4. **Formal Service Plan for In-School Supports** -

- Child has an Individualized Educational Plan (IEP) specifically for Emotional/Behavioral Disability (EBD) programming. This is defined as special educational support that specifically addresses the emotional and behavioral concerns of the student.

- Child has an Individualized Educational Plan (IEP) for special education support programming that contains an active Behavioral Intervention Plan (BIP). *Active* is defined as interventions are actually implemented *at least three times per week*.

5. **Substance Abuse Services** - Includes day treatment and outpatient services.

NOTE: The Children's Functional Screen asks about a child's need for "clinical case management and service coordination across systems." This item specifically relates to the Comprehensive Community Services benefit, for which the Children's Functional Screen calculates eligibility. It is **not relevant** to the institutional level of care determination for psychiatric hospital.

For example, children who would MEET Criterion 3 - Involvement with Service Systems:

- A child has an IEP at school for support in the Emotional/Behavioral Disability program and the support he receives is more than three hours per week.

Although he only receives support from one service system, that one service provides more than three hours a week of support.

- A child not currently receiving any services has a current recommendation by a PhD clinical psychologist to receive intensive in-home treatment for children with Autism that will be more than three hours a week once the programming begins.

This child meets the criteria by requiring a service, based on a doctor's recommendation within the past year, at more than three hours a week, even though she is not currently receiving the service.

- A child receives psychological therapy once a week and has a BIP in his IEP at school that is implemented daily, approximately 15 minutes a day, but the total time does not amount to three hours a week. *He receives services from two of the eligible service systems.*

- A child whose psychologist recently recommended inpatient care or day treatment, but the family's private health insurance does not cover the cost of care so the family must decline services. *She meets the criteria by requiring a service based on a doctor's recommendation within the past year for more than three hours a week of service even though she is not currently receiving the service.*

For example, children who would NOT MEET Criterion 3 - Involvement with Service

Systems:

- A child is on medication for Depression, receives ongoing case management services and attends hour-long mental health counseling sessions on a weekly basis. She sees a psychiatrist twice a month for medication management. *Since Case Management is not an eligible service, she is only receiving Mental Health Services when two different services are required. The Mental Health Services do not amount to more than 3 hours/week.*
- A child has a BIP in her IEP at school that is implemented daily, approximately 20 minutes a day during the transition to/from the school bus, but the total time does not amount to three hours a week. *She has only one service and it is not more than 3 hours/week.*
- A child whose parents want the child to receive intensive in-home treatment for children with Autism, but there has not been an official recommendation for this treatment by a qualified, treating professional. *Recommendations for services must be from a qualified professional, not just parental desire. The Diagnosis, Duration AND Involvement with Service Systems Criteria must be met before considering Criterion 4: Severe Symptomology or Dangerous Behaviors. If Criterion 3 is not met, the reviewer **must stop here**, but may consider levels of care other than Psychiatric Hospital, if appropriate.*

4. SEVERE SYMPTOMOLOGY OR DANGEROUS BEHAVIORS

The child must meet at least **ONE** of the seven Standards (I-VII) described below at the required definition, intensity, duration, and frequency of the behavior and required interventions.

SEVERE SYMPTOMOLOGY (Standards I-IV)**Standard I: Psychotic Symptoms (A AND B)**

Psychotic Symptoms are defined as delusions, hallucinations, and/or loss of contact with reality.

A. Child must currently have psychotic symptoms, or must have had psychotic symptoms at least once in the past three months or at least twice in the past year; AND

B. Because of psychotic symptoms, child must require direct, daily interventions to avoid institutionalization in a psychiatric hospital.

Standard II: Suicidality (A AND B)

Suicidality is defined as a serious suicide attempt or significant suicidal ideation or plan.

A. Child must have attempted suicide once in the past three months or had significant suicidal ideation or plan in the past month; AND

B. Because of suicidality, child must require direct, daily interventions to avoid institutionalization in a psychiatric hospital.

Standard III: Violence (A AND B)

Violence is defined as acts that endanger another person's life, and that cause the victim to require inpatient admission to a hospital. Additional definitions include the use of a weapon against another person (e.g., gun, knife, chains, or baseball bat), acts of arson (purposeful fire setting) or bomb threats.

A. Child must have committed violence at least once in the past three months or at least twice in the past year; AND

B. Because of commission of violence, the child must require direct, daily interventions to avoid institutionalization in a psychiatric hospital.

Standard IV: Anorexia/Bulimia (A AND B)

Anorexia/Bulimia is defined as life threatening effects of serious eating disorders, as determined by physician. The child must have malnutrition, electrolyte imbalances or body weight/development below 20th percentile due to the eating disorder.

A. Child must have exhibited anorexia/bulimia at least once in the past three months or at least twice in the past year; AND

B. Because of anorexia/bulimia, child must require direct, daily interventions to avoid institutionalization in a psychiatric hospital. For example, children who would MEET Criterion 4 requirements through one of

Standards I-IV:

- A child pulled a knife on a peer in the school cafeteria last month. No one was seriously hurt. Child is receiving therapeutic services on a regular basis to address issues of aggression and violence. *Symptom is current and meets definition of Violence because of use of a weapon. Child is involved in on-going community intervention to avoid hospitalization.*

- A child reveals the suicide pact he has with a friend that was made two weeks ago. The pact spells out exactly how they are going to kill themselves the next time something goes wrong. Child is under a suicide watch both at home and at school. *Plan was made within the last month and meets definition of Suicidality. Child is receiving care in the community to avoid hospitalization.*

For example, children who would NOT MEET Criterion 4 requirements through any of Standards I-IV:

- A child is extremely aggressive and got into many fist fights within the last month resulting in others having to go to the emergency room, but this did not result in admitting victims to the hospital. *This does not meet the definition of Violence.*

- A child has a diagnosis on the Autism spectrum and appears on a daily basis to be disconnected from her environment. She is not considered, in mental health terms, to be hallucinating or out of touch with reality. *This does not meet the definition of Psychosis.*

DANGEROUS BEHAVIORS (Standards V-VII)

The four Dangerous Behaviors categories are:

High-Risk Behaviors

Self-Injurious Behaviors

Aggressive and Offensive Behaviors

Lack of Behavioral Controls

Applicable behaviors for Standards V through VII are defined below.

High-Risk Behaviors:

- **Running Away:** Impulsive flight to unsafe locations with the intention of not returning. These are children who will be living on the street if intervention is not provided.

- **Substance Abuse:** Misuse of prescription medications or use of illegal drugs, alcohol or inhalants; substances that can be inhaled from an aerosol can, a cloth, a cotton ball, a plastic bag or balloon, and will cause a mind-altering effect within 2-5 minutes after inhaling. (This does not include use of tobacco.)

- **Dangerous Sexual Contact:** The child is a victim of sexual behavior; intercourse, oral sex, or other genital contact, even if the child willingly engages in the activity. This includes contact with substantially older sexual partners, or strangers, or people met via the Internet.

The three behaviors above must occur *at least*:

- Once a week** and require interventions such as regular professional treatment, constant “within arm’s reach” supervision, or environmental restraints whenever the behavior occurs; OR

- Once a month** and require very intense intervention such as police involvement or emergency medical treatment whenever the behavior occurs.

Self-Injurious Behaviors:

- **Self-Cutting, Burning or Strangulating:** Repeated and intentional cutting open one’s skin with a sharp object; repetitive, intentional burning one’s skin with a lighter, candle, or stove; strangulation involving the production of unconsciousness or near unconsciousness by restriction of the supply of oxygenated blood to the brain. (Does not include piercing or tattooing.)

- **Severe Self-Biting:** Repeated, intentional and severe biting by child of child’s own body parts, in attempt to rupture skin. (Does not include biting nails or cuticles or biting lip without intent to injure.)

- **Tearing At or Out Body Parts:** Repeated, intentional and severe picking or tearing at body parts in a manner and degree that is likely to cause severe injury. (Does not include picking at a scab or scratches until a body part bleeds, or hair pulling.)

- **Inserting Harmful Objects into Body Orifices:** Repeated and intentional insertion into body orifices of harmful objects that can tear or puncture the skin.

The four behaviors above must occur *at least*:

Once a month and require interventions such as regular professional treatment, constant “within arm’s reach” supervision, environmental restraints, or emergency medical treatment whenever the behavior occurs.

• **Head-banging**: Repeated, intentional and severe banging one’s head against hard surfaces. (Does not include a child who head bangs due to sensory integration or visual/hearing impairments.)

Head-banging must occur *at least*:

Four days a week and require interventions such as regular professional treatment, constant “within arm’s reach” supervision, environmental restraints or emergency medical treatment whenever the behavior occurs.

Aggressive or Offensive Behavior toward Others:

Because of the nature of these types of behaviors as related to early childhood development, ALL of the defined aggressive and offensive behaviors towards others ONLY apply to children **six years of age or older**.

• **Serious Threats of Violence**: Threats to seriously harm or kill one or more other people that are repeated, direct, overt, hostile and perceived by witnesses to be true threats of violence. (Does not include relatively common expressions of anger such as a child who feels he or she has too much homework saying in the cafeteria over lunch, “I hate school, I want to kill my teacher.”)

• **Sexually Inappropriate Behavior**: Sexual behaviors, including sexual activities, comments or gestures, that are not welcomed by others, or sexual molestation or abuse of others. Examples are: aggressive attempts to undress, sexually touch, or have intercourse with others.

• **Abuse or Torture of Animals**: Abusing an animal to find power/joy/fulfillment through the torture of a victim they know cannot defend itself.

The three behaviors above must occur *at least*:

Once a week and require interventions such as regular professional treatment, constant “within arm’s reach” supervision, or environmental restraints whenever the behavior occurs; OR

Once a month and require very intense intervention such as police involvement whenever the behavior occurs.

• **Hitting, Biting or Kicking**: Pattern of physically aggressive behaviors not explained by the age or lack of maturity of the aggressor and results in serious harm to others.

• **Masturbating In Public**: Masturbation deliberately done in public places.

• **Urinating on Another or Smearing Feces**: Intentional urination on another person or intentional spreading of feces onto inappropriate places such as on the floor, walls, or furniture.

• **Verbal Abuse**: Repeated spoken words presented in a threatening, harassing, or violent manner that may reasonably be expected to cause mental or emotional harm.

The four behaviors above must occur *at least*:

Four days a week and require interventions such as regular professional treatment, constant “within arm’s reach” supervision, environmental restraints, police involvement or emergency medical treatment whenever the behavior occurs.

Lack of Behavioral Controls:

• **Destruction of Property/Vandalism**: Intentional destruction of the property of others including breaking windows, slashing tires, spray painting a wall with graffiti, and destroying a computer system through the use of a computer virus.

• **Theft or Burglary**: Taking the property of another without permission, with or without lawful entry. (Does not include taking property from the child’s own home.)

The two behaviors above must occur *at least*:

Four days a week and require interventions such as constant “within arm’s reach” supervision, environmental restraints or police involvement whenever the behavior occurs.

Id.

In this case, the agency agrees that petitioner is disabled and meets the first three criteria of this LOC. I do not disagree. Thus, I turn to criteria #4.

There is no evidence to suggest that petitioner meets the Severe Symptomology Standards I-IV. Under Standards V-VII, petitioner does not appear to meet the severity listed there either. He has eloped from the classroom, but the evidence does not show that he has gone to unsafe locations or is at risk of living on the street due to his impulsivity to flee at times, and does not show that this behavior occurs so regularly that it meets this criteria (once per week). Further, his physical outbursts and destruction of property do not rise to the severity or occurrence rate required here either, which is four days a week and which requires interventions such as regular professional treatment, constant “within arm’s reach” supervision, environmental restraints, police involvement or emergency medical treatment whenever the behavior occurs. If the petitioner’s mother has more evidence to show that these facts are untrue, she can request a rehearing as described below.

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 meet the LOC criteria, and the agency correctly discontinued his eligibility for the program.

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 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 14th day of January, 2016

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on January 14, 2016.

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