



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION
Case #: FCP - 173776

PRELIMINARY RECITALS

Pursuant to a petition filed on April 20, 2016, under Wis. Admin. Code § DHS 10.55, to review a decision by the Care Wisconsin First, Inc. regarding Medical Assistance (MA), a hearing was held on August 30, 2016, by telephone.

The issue for determination is whether the agency correctly determined that petitioner does not have a functional limitation in learning as that applies to the Family Care eligibility determination.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:



Respondent:

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

By: [Redacted]
Care Wisconsin First, Inc.
PO Box 14017
Madison, WI 53708-0017

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES # [Redacted]) is a resident of Columbia County.
2. Petitioner is 45 years old and possesses an intellectual disability.

3. Petitioner has been a member of the Family Care Program (FCP) since 2008.
4. In September 2015, a LTCFS was completed and screener [REDACTED] at Care Wisconsin determined that petitioner met the criteria for DD under the federal definition as he had functional limitations in three of the required areas: (1) independent living, (2) self-care, and, (3) learning.
5. On March 29, 2016, a LTCFS was completed by [REDACTED] at Care Wisconsin. [REDACTED] made a specific notation on the LTCFS that petitioner did meet the criteria for a functional limitation in learning and independent living. At that time, the agency concluded that petitioner was no longer meeting the federal definition of DD and the Department algorithm resulted in a non-nursing home level of care and ineligibility for Family Care.
6. A rescreen was conducted on June 3, 2016 at which time the new screener, [REDACTED], determined that petitioner does not have a functional limitation in learning but instead had functional limitations in independent living and self-care. That LTCFS also resulted in petitioner not meeting the federal DD definition and not meeting the FC eligibility test under the algorithm.
7. On 4/5/16, the agency sent notice to petitioner informing him that he no longer met the level of care required for the full FC Program.
8. Petitioner appealed.

### DISCUSSION

In order to be eligible for FCP a person must have a physical disability, be frail elderly, or have a developmental disability. Wis. Admin. Code § DHS 10.32(1)(c); See also, Wis. Admin. Code § HFS 10.32(1)(c). These are known as the FCP "target population" or "target group." Wis. Admin. Code § HDH 10.13(47). The disabilities must be such that the person requires a level of care equal to the level of a nursing home. DHS Medicaid Eligibility Handbook, §37.1.3. To qualify for a nursing home level of care a person must have a long-term care condition expected to last at least one year. An individual must meet functional eligibility requirements that include meeting the criteria for a target group and level of care criteria.

In this case, the petitioner seeks to be determined to meet the federal definition of DD and to then have his eligibility for the NH LOC redetermined. Petitioner's hope is that the change in designation will effect a change in the result of the DHS algorithm's conclusion relating to NH LOC in the Family Care Program.

The federal definition of "developmental disability" is found at 42 U.S.C. § 15002(8) and states as follows:

(8) Developmental disability

(A) In general. The term "developmental disability" means a severe, chronic disability of an individual that—

- (i) is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (ii) is manifested before the individual attains age 22;
- (iii) is likely to continue indefinitely;
- (iv) results in substantial functional limitations in 3 or more of the following areas of major life activity:

(I) Self-care.

- (II) Receptive and expressive language.
- (III) Learning.
- (IV) Mobility.
- (V) Self-direction.
- (VI) Capacity for independent living.
- (VII) Economic self-sufficiency;

and

(v) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated.

The Department of Health Services has developed a computerized functional assessment screening system (Long Term Care Functional Screen) for determining eligibility for MA waiver programs. The system relies upon a face-to-face interview with a quality assurance screener who has at least a bachelor of science degree in a health or human services related field, with at least one year of experience working with the target populations (or, if not, an individual otherwise specifically approved by the Department based upon like combination of education and experience). The screener asks the applicant, or a recipient at a periodic review, questions about his or her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits the Functional Screen Report for the person to the Department's Division of Disability and Elder Services. The Department enters the Long Term Functional Screen data into a computer program to see if the person meets any of the required levels of care. If the assessor enters information into the functional screen correctly, then it is assumed that the computer will accurately determine Level of Care.

The LTCFS Instructions at Module 2, § 2.6 state as follows:

#### 2.6 FEDERAL Definition of Intellectual/Developmental Disability

A person is considered to have an intellectual disability if he or she has - (i) A level of intellectual disability described in the American Association Intellectual and Developmental Disabilities' Manual on Classification in Intellectual Disability, or (ii) A related condition as defined by 42 CFR 435.1009 which states, "Person with related conditions" means individuals who have a severe, chronic disability that meets all of the following conditions:

- (a) It is attributable to:
  - 1. Cerebral palsy or epilepsy or
  - 2. Any other condition, other than mental illness, found to be closely related to intellectual disability because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of intellectually disabled persons, and requires treatment or services similar to those required for these persons.
- (b) It is manifested before the person reaches age 22
- (c) It is likely to continue indefinitely

(d) It results in substantial functional limitations in three or more of the following areas of major life activity: self-care; understanding and use of language; learning; mobility; self-direction; or capacity for independent living.

The Department has developed an additional tool to assist in determining if an individual meets the federal definition - a Decision Tree for the Intellectual/Developmental Disability Per Federal Definition Target Group on WI Long Term Care Functional Screen. It is this Decision Tree that the county agency is relying on for its determination in this case. Specifically, the county agency asserts that the Petitioner does not meet the federal definition because he does not have functional limitations in three or more of the enumerated categories in Box 6: (1) independent living, (2) self-care, (3) communication, (4) learning, (5) mobility, or (6) self-direction. The agency has already determined that petitioner meets the criteria relating to independent living and self-care.

I note that the LTCFS, the Decision Tree and the Instructions for each tool are not law; rather they are tools or guidance used by the Department and county agencies to assist in determining eligibility for MA waiver programs. But, for the purposes of this appeal, the LTCFS, the Decision Tree and the federal law are aligned in that three or more of the same enumerated deficits are required to meet the federal definition. Thus, the only determination for this appeal is whether petitioner demonstrates a functional limitation in learning. If he does, then it is the third limitation and the basis for the agency's determination that he fails to meet the federal definition is invalid.

In September 2015, a LTCFS was completed and screener ██████████ at Care Wisconsin determined that petitioner met the criteria for DD under the federal definition as he had functional limitations in three of the required areas: (1) independent living, (2) self-care, and, (3) learning. On March 29, 2016, a LTCFS was completed by ██████████ at Care Wisconsin. ██████████ made a specific notation on the LTCFS that petitioner did meet the criteria for a functional limitation in learning and independent living. At that time, the agency concluded that petitioner was no longer meeting the federal definition of DD and the Department algorithm resulted in a non-nursing home level of care and ineligibility for Family Care. A rescreen was conducted on June 3, 2016 at which time the new screener, ██████████, determined that petitioner does not have a functional limitation in learning but instead had functional limitations in independent living and self-care. That LTCFS also resulted in petitioner not meeting the federal DD definition and not meeting the FC eligibility test under the algorithm.

In this case, the agency seeks to change the status quo of existing FCP eligibility, previous nursing home level of care, and previous satisfaction of the federal DD criteria. In such a situation it is the agency that has the burden of proving that something has changed to justify the termination of benefits. The agency was unable to show that anything has changed in petitioner's condition or that I should find Ms. ██████████ conclusions somehow more credible or persuasive than previous screens. The evidence elicited at hearing also leads to my lay conclusion that a functional limitation in learning is present. I find it highly improbable that petitioner's long-existing limitation in learning has somehow resolved itself without explanation.

Based on the evidence presented and on the law as stated at 42 USC 15002(8), I conclude the Petitioner meets the federal definition of developmental disability. This is the relief that was sought by petitioner but does not, per se, effect a change in the algorithm's conclusion after calculating the LTCFS data. The eligibility should be redetermined with the new factor of federal DD included in the input data. If the petitioner remains ineligible per the DHS analysis then petitioner will have to pursue a new and distinct appeal on the eligibility determination.

**CONCLUSIONS OF LAW**

The Petitioner meets the criteria for the Intellectual/Developmental Disability per Federal Definition target group.

**THEREFORE, it is**

**ORDERED**

That this matter is remanded to the agency with instruction that eligibility for the FCP shall be redetermined consistent with the conclusion of law above. This action shall be completed within 10 days of the date of this decision.

**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, **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 27th day of October, 2016

\s \_\_\_\_\_  
John P. Tedesco  
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 October 27, 2016.

Care Wisconsin First, Inc  
Office of Family Care Expansion  
Health Care Access and Accountability

