



**State of Wisconsin DIVISION OF HEARINGS AND APPEALS**

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March 15, 2024



Atty. Jeanne E. Bell  
Fond Du Lac County Department of Social Services  
50 N Portland St  
Fond Du Lac, WI 54935

RE:

  
Case No. CWK - 210726

Dear Parties:

Enclosed is a copy of the Final Decision in the above-referenced matter.

Sincerely,



Amanda Eve  
Legal Associate

c: Moraine Lakes Consortium - email  
Bureau of Long-Term Support - email  
- email

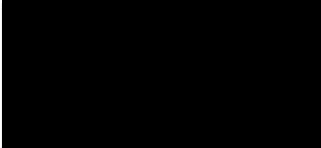


FH  
[REDACTED]

**STATE OF WISCONSIN  
Department of Health Services**

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In the Matter of



**DECISION**  
Case #: CWK - 210726

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The attached proposed decision of the hearing examiner dated December 21, 2023, is modified as follows and, as such, is hereby adopted as the final order of the Department.

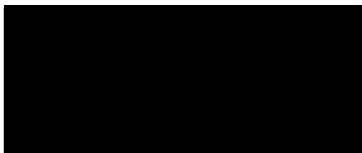
**PRELIMINARY RECITALS**

Pursuant to a petition filed October 19, 2023, under Wis. Admin. Code, § HA 3.03(1), to review a decision by the Fond du Lac County Dept. of Social Services regarding the Children's Long-term Support program (CLTS), a hearing was held on December 6, 2023, by telephone. The record was held open two weeks for petitioner to submit additional information. No additional information was received, but in light of the decision, the additional information would be irrelevant.

The issues for determination are (1) whether a CLTS member can appeal a caretaker's background check results, and (2) if so, whether the agency correctly denied approval of a proposed caregiver's background check.

**PARTIES IN INTEREST:**

Petitioner:



Respondent:

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

By: Atty. Jeanne E. Bell  
Fond du Lac County Dept. of Social Services  
50 N Portland St  
Fond du Lac, WI 54935

**ADMINISTRATIVE LAW JUDGE:**

Brian C. Schneider  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is an 11-year-old resident of Dodge County.
2. Petitioner has been eligible for CLTS for several years. Fond du Lac County DSS began to handle her case in 2022 after she initially was under Dodge County's case management.
3. Petitioner was hospitalized for approximately seven months. When she returned home in the spring, 2023, her mother asked for approval by the CLTS for a caregiver, A.S. (I will use the caregiver's initials for confidentiality purposes), to act as a respite care provider. A.S. was a respite care and personal care worker (PCW) for petitioner when Dodge County handled the case.
4. Fond du Lac County's service coordinator, Ms. Knight, ordered a background check on A.S. The report that was returned showed no disqualifying convictions, but it did show concerning arrests and charges against A.S. In 2015 she was charged in [REDACTED] with misdemeanor theft and disorderly conduct; that charge was dismissed after A.S. completed a deferred prosecution. In September, 2021 A.S. was charged with felony child abuse and misdemeanor disorderly conduct in [REDACTED]; that charge also was dismissed in September, 2022 after A.S. completed a deferred prosecution. Then, in December, 2022, A.S. was charged in [REDACTED] with misdemeanor disorderly conduct with a domestic abuse enhancer; when the background check was done that charge was pending. A.S. eventually pled no contest in late July, 2023 to a county ordinance violation disorderly conduct with domestic abuse enhancer, with a fine as the penalty.
5. Ms. Knight met with petitioner's mother on May 19, 2023, to discuss her concerns over A.S.'s background, that although the record did not include any convictions leading to automatic denial, the findings were negative based on the three charges from 2015, 2021, and 2022. Petitioner's mother wanted to hire A.S. despite that history, but the agency decided to deny approval for A.S. due to compelling justification.
6. On July 26, 2023, the agency sent petitioner's mother a notice that A.S. would not be approved as a respite provider due to the background check results. The notice informed petitioner's mother that she could appeal to the Division of Hearings and Appeals within 90 days. She filed an appeal on October 19, 2023.

### DISCUSSION

The CLTS program started on January 1, 2004 after the federal Department of Health and Human Services informed the state department that federal MA funding would no longer be available for in-home autism services. The department drafted and released the Medicaid Home and Community-Based Waiver Manual for the CLTS Program ("the Manual"), with a current update as of October, 2023. It can be found on the internet at <https://www.dhs.wisconsin.gov/publications/p02256.pdf>.

The CLTS program keeps a registry of qualified providers. Manual, §4.1. The local County Waiver Agency (CWA) can access a provider's status on the registry and can allow approval of a provider if she is qualified on the registry. Manual, §4.2.2. If a new caregiver or a "sole proprietor" caregiver is suggested, the CWA must ensure that a background check is completed. Manual, §4.2.3. From the background check, a caregiver cannot be approved if there has been conviction of a "serious crime" or an offense deemed to be substantially related to the service to be provided. Manual, §4.2.3.1. If a participant requests approval a

specific caregiver, and person's record shows no convictions, but does contain a negative finding, the negative finding must be reviewed with the participant. If the participant nevertheless wants to employ the provider after the review, the CWA must respect the choice unless there is compelling justification not to do so. Manual, §4.2.3.2.

Here petitioner's preferred caregiver had no convictions but did have negative findings, specifically two crimes for which she completed deferred prosecutions, one of which was for child abuse, and a third pending crime that involved domestic abuse. The CWA noted that when a person enters deferred prosecution, she in effect admits to the elements of the crime's charges. See agency submission, exhibit E. Since one of the crimes charged was child abuse, the CWA noted A.S.'s admission to the charge, and noted further that even after going through deferred prosecution twice, A.S. again found herself charged with misdemeanor disorderly conduct with a domestic abuse enhancer in late 2022.

Nevertheless, individual choice of provider is a main tenant of the CLTS program. The CLTS manual clearly states that if the participant wants to employ a provider despite negative findings, in the absence of a conviction, the participant's choice must be respected "unless there is compelling justification not to do so." Manual, §4.2.3.2. While "compelling justification" is not defined, clearly the "compelling justification" must be more than a mere disagreement with the CWA regarding the severity of the negative findings. Merely disagreeing with the CWA could not be a sufficiently compelling justification, or the review of negative findings with the participant would be meaningless and the choice to hire the provider despite negative findings would be never available.

#### **CONCLUSIONS OF LAW**

The CWA must show more than a disagreement regarding the severity of the negative findings in order to override a participant's choice of provider when the prospective caregiver's background check reveals no record of conviction or substantiated finding by a governmental agency of a barring offense, serious crime, or substantially related crime but does contain a negative finding.

**THEREFORE, it is**

**ORDERED**

That the decision by the Fond du Lac County Dept. of Social Services is reversed, and the matter is remanded for a factual determination of whether the Fond du Lac County Dept. of Social Services had a "compelling justification" to not approve A.S. as a respite provider.

#### **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, 4822 Madison Yards Way, Madison, WI 53705-9100 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 15<sup>th</sup> day  
of March, 2024.

  
Kirsten L. Johnson Secretary-Designee  
Department of Health Services



FH  
[REDACTED]

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

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In the Matter of



**PROPOSED DECISION**  
Case #: CWK - 210726

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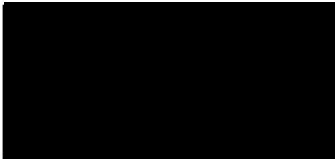
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50 N Portland St  
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**ADMINISTRATIVE LAW JUDGE:**

Brian C. Schneider  
Division of Hearings and Appeals

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### DISCUSSION

The CLTS program started on January 1, 2004 after the federal Department of Health and Human Services informed the state department that federal MA funding would no longer be available for in-home autism services. The department drafted and released the Medicaid Home and Community-Based Waiver Manual for the CLTS Program ("the Manual"), with a current update as of October, 2023. It can be found on the internet at <https://www.dhs.wisconsin.gov/publications/p02256.pdf>.

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nevertheless wants to employ the provider after the review, the CWA must respect the choice unless there is compelling justification not to do so. Manual, §4.2.3.2.

Here petitioner's preferred caregiver had no convictions but did have negative findings, specifically two crimes for which she completed deferred prosecutions, one of which was for child abuse, and a third pending crime that involved domestic abuse. The CWA noted that when a person enters deferred prosecution, she in effect admits to the elements of the crime's charges. See agency submission, exhibit E. Since one of the crimes charged was child abuse, the CWA noted A.S.'s admission to the charge, and noted further that even after going through deferred prosecution twice, A.S. again found herself charged with misdemeanor disorderly conduct with a domestic abuse enhancer in late 2022.

The Manual, §8.3.1.1, allows a CLTS participant to appeal, among other actions, denial of a chosen *qualified* provider. As I pointed out at the start of the hearing, I know of no program under purview of either the Department of Children and Families or the Department of Human Services that allows a participant to appeal the result of a background check, including child care, Kinship Care, foster care, or the Family Care or IRIS programs. Typically, only the caregiver has the option to seek review of the background check results, and I note that petitioner's mother stated that A.S. is contesting the results, so A.S. must have been given an opportunity for review. I conclude the same here, for CLTS purposes. A participant can appeal the denial of a chosen qualified provider, but A.S. is not a qualified provider because she failed the background check. I thus will dismiss this appeal because of my conclusion that petitioner cannot appeal the background check determination.

I note, in case my conclusion is incorrect, the petitioner's mother stressed that A.S. was approved when Dodge County handled her case. However, that approval likely occurred before either of the two most recent charges (the record was held open for copies of A.S.'s approvals as a PCW and respite caregiver; that they were not provided is irrelevant given my conclusion concerning the lack of a right to appeal). Furthermore, although petitioner's mother made a point that A.S.'s most recent charge led to a mere violation of an ordinance, A.S. was charged with a misdemeanor that was plea bargained down, and even then the prosecutor insisted that the domestic abuse enhancer remain in place. Finally, to enter into a deferred prosecution, the charged person must admit to the elements of the crime charged. Wis. Stat., §971.39. Thus, although A.S.'s 2021 child abuse charge was dismissed, she had to admit to the elements of the child abuse charge to enter the deferred prosecution to obtain the subsequent dismissal. The CWA in this instance thus has a defensible argument as to the correctness of its background check determination.

#### CONCLUSIONS OF LAW

A CLTS participant does not have the right to appeal the denial of a caretaker's approval following a caregiver background check.

**THEREFORE, it is**

**ORDERED**

That the petition for review is hereby dismissed.



**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 for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison,  
Wisconsin, this 21st day of December, 2023



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Brian C. Schneider  
Administrative Law Judge  
Division of Hearings and Appeals