



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of



DECISION
Case #: CWK - 213060

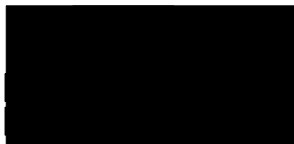
PRELIMINARY RECITALS

Pursuant to a petition filed April 17, 2024, under Wis. Admin. Code, §HA 3.03(1), to review a decision by Rock County Human Services regarding the Children's Long-Term Support Program (CLTS), a hearing was held on July 9, 2024, by telephone. Hearings set for May 22 and June 20, 2024 were rescheduled at the petitioner's request.

The issue for determination is whether the agency correctly denied overnight, out-of-home respite because it could not do a background check on the proposed caregiver's home.

PARTIES IN INTEREST:

Petitioner:



Petitioner's Representative:

Atty. Trevor C. Levenson
Halling & Cayo
320 E. Buffalo Street, Suite 700
Milwaukee, WI 53202

Respondent:

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

By: Atty. Shanna M. Sanders
Rock County Human Services
1900 Center Avenue
Janesville, WI 53546

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Rock County.

2. Petitioner is one of three siblings who have special needs and are eligible for CLTS, with Rock County Human Services as the consulting agency. In January, 2024, petitioner’s mother requested overnight respite care at the home of one of his respite providers through [REDACTED], a home health agency. Up until that point respite had been provided in petitioner’s home.
3. The agency denied the request by a notice dated February 1, 2024, because [REDACTED] has not been qualified as an overnight provider. The specific reason for the denial was that the agency was not allowed to do a background check on other residents in the caregiver’s home; the caregiver herself passed a background check previously.

DISCUSSION

The CLTS program started on January 1, 2004 after the federal Department of Health and Human Services informed the state department (DHS) 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 May, 2024. It can be found on the internet at <https://www.dhs.wisconsin.gov/publications/p02256.pdf>. It does not appear that any changes in the update affect the issue in this matter.

The issue in this and the two companion cases is whether the agency can deny overnight respite care in the home of an otherwise qualified provider if the provider does not agree to a background check of other residents of her home. It is well known that for in-home child care centers and foster homes, background checks are required of all residents of the home. The agency notes that the Manual, §4.2, provides that the DHS and the CLTS waiver agency (CWA) share responsibility for qualifying providers. §4.2.3 provides that CWAs must ensure that background checks be completed for all persons meeting the definition of a caregiver, with “caregiver” defined as regular, direct contact with the CLTS participant. Direct contact is physical proximity to the participant that would allow the opportunity to commit abuse or neglect. Certainly individuals who live in a home where the participant child is spending the night would meet that definition.

That said, the DHS has taken a different, specific approach specific to respite care. The Manual, §4.6.26.2 provides:

When home-based respite care services are provided in a private home other than the home of the participant the following conditions apply:

- o When the planned length of stay is to be **72 hours or less**:
 - The home is the preferred choice of the participant and their primary caregiver, and
 - The caregiver assures that the home is safe and the respite provider is trained and capable of providing the appropriate level of care and supervision needed.

Bold in original. The meaning of that provision is that, at least for respite care, the child’s caregiver (in this case petitioner’s parent) has the final say in the choice of provider. It gives the parent the right to choose the provider whether or not a background check is completed of other household members (and again, the actual care provider in this instance has passed a background check in order to work for [REDACTED]).

A recent Final Decision by the DHS Secretary-Designee sheds light on the issue. In case number CWK-210726, dated March 15, 2024, a proposed decision upholding the denial of a respite care provider following a background check by the county agency was reversed. In pointing out that a parent can

employ a respite provider even if the provider fails the county’s background check (and does not have a conviction of a “serious crime” under Wis. Stat., §48.685(1)(c), the decision reads:

Nevertheless, individual choice of provider is the main tenant (sic) of the CLTS program. The CLTS manual clearly states that if the participant wants to employ a provider despite negative [background check] 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.

Clearly the DHS intends to put substantial authority in the hands of the parent/caretaker. While it could be argued that, at very least, the respite provider’s household members should be tested for possible convictions of serious crimes, it is evident that the DHS does not intend that the respite care provider’s household members need to undergo separate background checks if the parent is confident that the respite home is safe and that the stay will be less than 72 hours. The specific policy regarding overnight respite must take priority over the general caregiver background check requirements.

I conclude that the [REDACTED] caregiver already approved to provide care to petitioner can be used for out-of-home overnight respite without the need for a background check of the caregiver’s other family members, if the petitioner’s parent is sure that the home is safe. I thus will reverse the agency’s denial. I note that I am making no judgment on whether three overnight respites per month are necessary or cost effective; I am only finding that the [REDACTED] caregiver can be utilized without further county agency investigation.

CONCLUSIONS OF LAW

The petitioner’s family can use a qualified caregiver for out-of-home respite if the stays are for less than 72 hours and petitioner’s parents is assured that the placement is safe, without need for background checks of the proposed caregiver’s household members.

THEREFORE, it is ORDERED

That the matter be remanded to the agency with instructions to approve petitioner’s parent’s choice of out-of-home respite caregiver without conducting a background check of the caregiver’s other family members. The agency shall take the action within 10 days 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, 4822 Madison Yards Way, 5th Floor North, 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

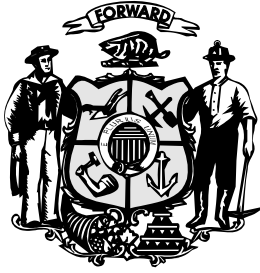
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision 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 15th day of July, 2024



\s _____
Brian C. Schneider
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 July 15, 2024.

Rock Cty Human Services
Bureau of Long-Term Support
Attorney Trevor Levenson



Attorney Shanna Sanders