



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

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

DECISION
Case #: CWK - 211705

PRELIMINARY RECITALS

Pursuant to a petition filed on December 31, 2023, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Columbia County Health & Human Services regarding Medical Assistance (MA), a hearing was held on July 31, 2024, by telephone.

The issue for determination is whether the agency correctly denied petitioner's choice of respite provider, Badger Wellness, based on its determination that Badger Wellness was not a qualified CLTS provider.

This case was consolidated with other cases due to commonality among parties, counsel, and issues. This following cases were consolidated:

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

DHA Case Nos. CWK – 211871
CWK – 211869
CWK – 211867
CWK – 211865
CWK – 211705

There appeared at the time of hearing the following persons:

PARTIES IN INTEREST:

Petitioner:

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

Petitioner's Representative:

Attorney 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. Jessica Hale
Columbia County Health & Human Services

PO Box 136
Portage, WI 53901

ADMINISTRATIVE LAW JUDGE:
John Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Columbia County.
2. Petitioner is enrolled in the Children's Long-Term Support waiver program ("CLTS").
3. Petitioner had previously received respite services under the waiver from provider Badger Wellness, LLC.
4. At some point, the county received information from a third-party that caused concerns within the county as to Badger Wellness personnel's judgment and fitness for the CLTS respite services it provided. The county also considered some clinical notes of participants that mentioned Badger Wellness.
5. At some point, county representatives orally communicated to each petitioner that they would no longer be able to receive CLTS-funded services from Badger Wellness, LLC.
6. No written notice was issued to petitioners.
7. Petitioners wished to continue using Badger Wellness, LLC as their chosen provider.
8. On December 31, 2024 each petitioner filed a request for hearing with the Division.

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 case is whether the agency correctly denied petitioner's choice of respite provider, Badger Wellness, based on its determination that Badger Wellness was not a qualified CLTS provider.

First, this case has some history. This case was previously assigned to another ALJ who allowed the parties to file motions for summary judgment, which is unusual in a fair hearing setting. In these motions, the county made various assertions that were meritless. ALJ decided those motions after taking over this case as the motions had already been filed. This ALJ issued a written interim decision (without appeal rights) which disposed of the various arguments of the parties aside from one. The discussion in that Decision is included below and incorporated herein by reference as part of this Decision (any emphasis in bold is in original Decision).

The overall purpose of Wisconsin's Children's Long-Term Support (CLTS) Waiver Program is to provide necessary supports and services to children from birth through age 21 in Wisconsin who have significant disabilities, who require a level of support that would qualify them for institutional care but who reside at home and in the community, and who satisfy Medicaid financial and non-financial requirements. The goal of the CLTS Waiver Program is to support children with substantial needs, as well as their parents/guardians, by delivering services to assure the child's health, safety and welfare needs in an inclusive home and community setting. A key tenet of the CLTS Waiver Program is that

children are best served within the context of their family and community. See Medicaid Home and Community-Based Services (HCBS) Waiver Manual for the CLTS Waiver Program (October 2023) ("CLTS Manual"), Chapter 2.

The Department of Health Services (DHS) enters into contractual agreements with Wisconsin's county departments to act as the local agency responsible for operating the CLTS Waiver Program, which includes working with families to authorize covered waiver supports and services. All waiver services are furnished pursuant to an individual service plan (ISP). The service plan describes: (a) the waiver services that are furnished to the participant, their projected frequency, and the type of provider that furnishes each service and (b) the other services (regardless of funding source, including state plan services) and informal supports that complement waiver services in meeting the needs of the participant. See CLTS Manual, Chapter 7. These policies are consistent with the service definitions found in the waiver application approved by the Centers for Medicare and Medicaid Services. See Application for 1915(c) HCBS Waiver: Draft WI.036.04.00 - Jan 01, 2022, Appendix C-1/C-3 (available on-line at <https://www.dhs.wisconsin.gov/clts/waiver/1915c-renewal-app.pdf>).

This dispute stems from petitioner's desire for respite services from Badger Wellness, LLC. The CLTS Manual provides the following definitions of respite care:

4.6.26 Respite Care

4.6.26.1 Definition

Respite care services maintain and strengthen the participant's natural supports by easing the daily stress and care demands for their family, or other primary caregiver(s), on a short-term basis.

These services provide a level of care and supervision appropriate to the participant's needs while their family or other primary caregiver(s) are temporarily relieved from daily caregiving demands. Respite care may take place in a residential setting, institutional setting, the home of the participant, the home of a caregiver, or in other community settings.

It is notable that none of the petitioners received a written notice of action denying them their choice of Badger Wellness, LLC as their respite provider. At the prehearing conference held on April 10, 2024 counsel for respondent conceded that no written notice had been sent. Counsel instead explained that the decision was communicated orally by program staff.

According to the CLTS Manual at Section 8.3.1.1:

8.3.1.1 Actions Subject to Appeal

The following CWA actions and decisions concerning CLTS Waiver Program participants are subject to appeal and a fair hearing conducted by the DHA:

- Eligibility denial
- Eligibility termination
- Service denial, including:
- Service suspension
- Service limitation in amount, quantity, or duration

- Service reduction
- Service termination
- **Denial of chosen qualified provider**
- **Denial of requested service**
- Compulsion order for parental payment (refer to § 3.4)

CLTS Manual at 8.3.1.1 (emphasis added). I note that the Waiver language itself is more clear and less limiting with regard to an appealable issue than the CLTS Manual:

*Fair Hearing: The state provides the opportunity to request a Fair Hearing under 42 CFR §431 Subpart E, to individuals: (a) who are not given the choice of home and community-based waiver services as an alternative to institutional level of care specified for this waiver; (b) **who are denied the service(s) of their choice or the provider(s) of their choice**; or (c) whose services are denied, suspended, reduced or terminated. Appendix F specifies the state's procedures to provide individuals the opportunity to request a Fair Hearing, including providing notice of action as required in 42 CFR §431.210.*

Application for 1915(c) HCBS Waiver (January 1, 2022) at 6.G. Even though a notice was not issued, the actions of the agency were a clear and effective denial of the chosen provider. The briefs by the county support this interpretation. A written notice should have issued. Petitioners have a right to appeal to DHA based on the county's action denying CLTS funding for respite services by Badger Wellness.

As to the merits of the county denying CLTS respite care funding for services provided by Badger Wellness, LLC, the county's submissions variously and vaguely argue that the provider is not a contracted entity, is not on the county's list, and is not qualified. According to the Waiver application:

In accordance with 42 CFR § 431.151 [sic should actually cite §431.51], a participant may select any willing and qualified provider to furnish waiver services included in the service plan unless the state has received approval to limit the number of providers under the provisions of § 1915(b) or another provision of the Act.

Application for 1915(c) HCBS Waiver (January 1, 2022) at 6.E. The county did not argue in its written submissions, or provide any documentation showing, that the state had received such approval to limit the number of providers. The other exceptions allowing agencies to limit providers include setting fees, setting reasonable qualifications, for targeted case management services only, and other enumerated exceptions not applicable here. See 42 CFR §§ 431.52 & 431.54.

The published guidance for the waiver provisions explains:

*HCBS waivers must comply with §1902(a)(23) of the Act and 42 CFR § 431.51 which require that Medicaid beneficiaries must be allowed to obtain services from **any willing and qualified provider of a service**. A willing provider is a provider who agrees to accept a state's payment as payment in full for rendering a service and to abide by all other*

Medicaid provider requirements, including executing a provider agreement. A qualified waiver provider means an individual or entity that meets the qualifications that are specified in Appendix C-3 for the service that the provider renders. All qualified providers must be permitted to participate in the waiver program and have a provider agreement with the Medicaid agency if they chose to do so unless a state has secured a waiver of §1902(a)(23) to place restrictions on providers (e.g., by requesting a waiver under the §1915(b)(4) authority).

HSBC Waiver Instructions, Technical Guide and Review Criteria, January 2019 (CMS, Department of Health and Human Services) at p. 53 (Free Choice of Provider) (emphasis added). The CMS guidance additionally provides:

Except when a §1915(c) waiver operates concurrently with a waiver granted under §1915(b) of the Act waiving §1902(a)(23) with respect to Medicaid beneficiary free choice of provider, any willing and qualified provider must be afforded the opportunity to enroll as a Medicaid provider. A willing provider is an individual or entity that executes a Medicaid provider agreement and accepts the state's payment for services rendered as payment in full. A qualified provider is a provider that meets the provider qualifications set forth in the approved waiver. The state must provide for the continuous, open enrollment of waiver service providers.

***A state may not place obstacles in the way of open provider enrollment (e.g., by selecting only a limited number of providers to furnish a waiver service through an RFP process, requiring that a provider be capable of furnishing services on a statewide basis or requiring that a provider contract with a governmental entity (other than the Medicaid agency) or affiliate with an Organized Health Care Delivery System).** States have latitude in establishing qualifications to ensure that providers possess the requisite skills and competencies to meet the needs of the waiver target population. However, a state may not specify qualifications that are unnecessary to ensure that services are performed in a safe and effective manner. When CMS reviews the qualifications associated with each waiver service, it examines whether the proposed qualifications create obstacles to the enrollment of all willing and qualified providers.*

Id. at p. 124 (Open Enrollment of Providers) (emphasis added).

Finally, with regard to provider choice, the CLTS Manual provides:

4.3.1 Participant Choice of Providers

All CLTS Waiver Program participants must be given a choice of qualified service providers as required by 42 CFR §431.51. County waiver agencies (CWAs) are responsible to inform a participant of their right to choose willing and qualified providers. This takes place at each review of the participant's individual service plan (ISP), including but not limited to initial plan development, six-month plan review, and review

during annual recertification. The information given to a participant must include:

- The full range of services available through the CLTS Waiver Program. CWAs may refer participants to the Children's Long-Term Support Waiver Program Supports and Services at a Glance (P-02570).
- A description of all qualified providers available for the services the participant is authorized to receive, as listed in the statewide public CLTS Provider Directory.
- Information about options and processes for the participant to dispute whether other entities or providers could deliver the services authorized for them.

A willing provider is an individual or entity that signs and submits a CLTS Waiver Program Medicaid provider agreement to DHS and accepts as payment in full, amounts paid in accordance with the CLTS Waiver Program Rate Schedule (P-02184) established by DHS for inscope services. A qualified provider meets the standards outlined in the service description and is verified through a joint qualification process completed by DHS and CWAs.

A qualified provider is an individual or entity that has been jointly qualified by DHS and the CWA as outlined in Section 4.2. These providers are listed in the statewide public CLTS Provider Directory. This directory is the sole directory of registered and qualified CLTS Waiver Program providers and may be accessed by participants. CWAs may not maintain or disseminate separate, county-specific provider directory information.

CLTS Manual at 4.3.1.

First, I note that this Interim Decision stems from the motions filed by each party. In conjunction with its motion, the petitioner attached numerous sworn affidavits. The county included one affidavit. I base this Interim Decision on the record in this case at this point including the documents mentioned.

Summary judgment is appropriate when there is no material fact in dispute and the moving party is entitled to judgment as a matter of law. *Casper v. American Intern. South Ins. Co.*, 336 Wis. 2d 267, 800 N.W.2d 880 ¶ 32 (2011); see also Wis. Stat. §802.08(2) and Wis. Admin. Code §HA 1.10(2). On a motion for summary judgment, the facts are construed in favor of the non-moving party. *DeHart v. Wis. Mut. Ins. Co.*, 302 Wis. 2d 564, ¶ 7, 734 N.W. 2d 394 (2007).

First, the County argues in its brief in support of its Motion for Summary Judgment that there is no appealable issue or jurisdiction on the part of DHA to decide an issue. The county refers to the CLTS Manual provision Section 8.3.1.1 on appeals cited above. The county argues that eligibility was not denied or terminated and services were not limited or terminated. The county also suggests that the petitioners were not denied a requested service.

With regard to this argument relating to jurisdiction, and as stated above, it is clear from the record that the county has communicated to petitioner that they may not receive CLTS funding for services by Badger Wellness. The county has conceded that this has been communicated. It is a meritless argument to suggest

that petitioners have not been denied a requested service. Furthermore, this is a clear denial of a provider of choice. It may be that the denial is justified. But, that remains an issue of fact to be explored as petitioners claim Badger Wellness is a “qualified provider” and the county disagrees.

Second, it is wholly unclear from the county’s submissions whether the denial was based on Badger Wellness being not qualified, or them not being a contracted entity with the county, or both. If both, the county fails to explain how the two are related.

As to the merits of the denial, the county’s brief is woefully scant in substance and law. It is not actually clear to me that the facts and law are so against respondent here because it appears that respondent put in little to no effort to present any law or facts for this ALJ to consider. Petitioner may be prevailing in this decision only because it appears that respondent offered nothing of substance. First, with regard to the county’s argument that it no longer has a contract with Badger Wellness so they cannot possibly be a respite provider for petitioner, that argument is pointedly in contravention of the waiver language and the related CMS guidance:

*A state may not place obstacles in the way of open provider enrollment (e.g., by selecting only a limited number of providers to furnish a waiver service through an RFP process, requiring that a provider be capable of furnishing services on a statewide basis **or requiring that a provider contract with a governmental entity** (other than the Medicaid agency) or affiliate with an Organized Health Care Delivery System).*

HSBC Waiver Instructions, Technical Guide and Review Criteria, January 2019 (CMS, Department of Health and Human Services) at p. 124 (emphasis added). The county explains that it no longer has a contract with Badger Wellness. But, having preferred providers in the CLTS program, or requiring providers be in-network, is not a valid or lawful reason for denial of the petitioner’s choice if a provider is otherwise willing and qualified. I note that this reasoning was reinforced by the Department of Health Services Secretary in DHA case number CWK-162654 (Final Decision issued 6/10/15).

The county also argues that Badger Wellness is not a qualified provider. The county cites no statute, CFR, Administrative Code provision, provision of the CLTS Manual, or anything else to support its claim that Badger Wellness is not a qualified provider. It is not clear what the county even believes “qualified provider” means other than being on “Columbia County’s fully qualified provider list” (Resp. 3/21/24 brief at 3). I have reviewed all of the documents submitted by the county. It seems that the county’s argument is simply that because Badger Wellness is not on a list that it is, thereby, not qualified. The county did not cite any criteria for qualification, offer any material information about what authority it has to create lists, explain why it might have removed Badger Wellness from a given list, or what actions DHS may have taken or been involved in with relation to Badger Wellness being “qualified” or not.

On this record, the county has provided no valid basis or supporting evidence at all for its adverse action other than conclusory statements that the provider is not qualified. I would be inclined to grant the petitioner’s motion in full, but I am unsure whether either party actually knows what makes a “willing and qualified provider,” or whether Badger Wellness, LLC is indeed willing and qualified. I cannot remand the matter to order program funding of Badger Wellness’s services to vulnerable children unless I can reach the conclusion of

law that they are willing and qualified. The parties must have an opportunity to present evidence as to that question and also to present argument as to what legal standard and criteria apply to that question in this particular case. A hearing is necessary on that limited issue.

Thus, following hearing on this issue, this Decision addresses the question of whether the agency correctly determined that Badger Wellness was not a “qualified provider” and denied the petitioner the use of Badger Wellness’ services for respite care. 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. Determining a provider fully qualified is a bifurcated process involving both the DHS and the county agency. The *Manual* sets forth the role of each in the process:

4.2.2 CWA Role and Responsibilities—Fully Qualify and Authorize Service Delivery

CWAs access a provider’s information, registration status, and initial qualification documentation via the CLTS Provider Registry.

CWAs complete the following activities to fully qualify a provider. CWAs may fully qualify a provider only for the service(s) that DHS has initially qualified them for and not for any other services.

- *Check the provider’s registration status.*
- *If the provider’s registration is approved, review the provider’s information and initial qualification documentation to confirm it remains current.*
 - *If the provider’s initial qualification documentation is expired or no longer valid, CWAs must notify that provider to update their registration. The CWA may not authorize services until the registration and initial qualification documentation has been updated via the online registration system.*
 - *If the provider chooses not to or is unable to update their registration and qualification documentation, CWAs must notify DHS within 10 calendar days by emailing DHSCLTSPProvider@dhs.wisconsin.gov. Once notified, DHS will remove the provider from the Provider Directory.*
- *Verify if child-specific training or other requirements, such as a caregiver background check, are necessary to fully meet the selected service description.*
- *For agency providers, CWAs are responsible for verifying any certification, license, education, or experience that is required for rendering providers employed by the agency, to fully meet the selected service description. For rendering providers who are employed by provider agencies contracted by the CWA, CWAs can delegate this requirement through their contract with the agency and do not need to maintain documentation of rendering providers’ certification, license, education, or experience on site.*

- *If the provider is fully qualified, authorize the provider to deliver services. Refer to Section 4.5, Service Authorization.*

Part of the county agency's responsibilities involve conducting a background check. 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.

The Manual goes into great detail about the county agency's role in this process. All of these duties pertain to verification of training and certifications and making sure paperwork that has been relied upon is not expired. The manual enumerates each of the duties and responsibilities of the county agency in making its determination. Notably, the *Manual* does not call for, or even mention, a step in the process that would call for the county to make a subjective determination of fitness, character, or judgment of the provider aside from conducting a background check.

Such a step in the CLTS provider approval process, or with regard to qualifications of a respite provider is also not mentioned in the *Manual* section dedicated to the specific qualifications of a respite provider. See *Manual* at Section 4.6.26. There is no general approval of fitness that a county must "check-off" on a respite provider. Had DHS intended to grant such authority to the counties then it certainly would know how to do so. To analogize, the Department of Children and Families requires that day-care providers be "fit and qualified" which is defined in the Administrative Code:

(11) "Fit and qualified" means displaying the capacity to successfully nurture and care for children and may include consideration of any of the following:

(a) Abuse of alcohol or drugs.

(b) A history of a civil or criminal conviction or administrative rule violation that is substantially related to the care of children, as determined under s. [DCF 13.05](#).

(c) Exercise of unsound judgment.

(d) A history of civil or criminal offenses or any other action that demonstrates an inability to manage the activities of a center.

Wis. Admin Code DCF Section 250.03. DHS includes no such requirement that the agency make such a determination.

This now brings us to the actual case at hand. Here the county agency did not determine that Badger Wellness staff or management had a conviction of some serious crime that barred them from being a caregiver or provider. Nor did the agency conduct an analysis applying the factors in *Wis. Admin. Code* DHS 12.06 to determine whether a non-barring conviction, or convictions, are substantially related to client care. Instead, the question before me is whether the county has some overarching authority, not mentioned in the waiver, statute, the Administrative Code or the *Manual* to deny a chosen provider based not on information from a background check but from a report from a third party. I find that the county had no such authority and that the county in this case did not correctly deny the chosen respite provider.

The county's only argument to support its action is that the program gives broad authority to counties to ensure safety of members. See *Manual* at Section 9.2. But this section says nothing about qualifying

providers. This section instead provides certain steps and processes for counties to follow toward the goal of ensuring safety: collaboration among stakeholders, training and education, identifying vulnerable children and youth, and mandatory reporting.

Free choice of provider is a guiding policy consideration in the CLTS program. The waiver, and the CMS and DHS guidance that interprets it, allows only the most limited controls on that choice related to background checks, training, and approval of documentation.

A recent Final Decision by the DHS Secretary-Designee sheds light on the issue as well. In case number CWK-210726, dated March 15, 2024, a decision denying choice 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.

And, the determination in this case was not even based on findings that arose from a background check. There were no barring offense convictions, no convictions that were substantially related to client care, and not even any "negative findings." Clearly the CMS and DHS, and the waiver, intends to put substantial authority in the hands of the parent/caretaker. In this case the county did not present any persuasive argument that the county has the authority to be gatekeeper of CLTS providers aside from the process called for in *The Manual*. In this case, based on the hearing record, the agency erred in its denial of the chosen provider.

CONCLUSIONS OF LAW

The county erred in its denial of petitioner's chosen CLTS respite provider.

THEREFORE, it is

ORDERED

That the agency must reverse its determination that Badger Wellness is not a qualified provider of respite services sought by petitioner under the CLTS program. This action must be completed 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.

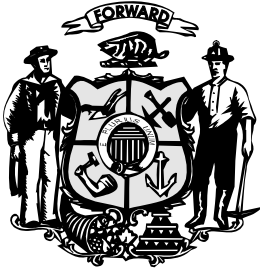
APPEAL TO COURT

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 10th day of September, 2024

\s_____
John 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 September 10, 2024.

Columbia County Health & Human Services
Bureau of Long-Term Support
Attorney Trevor Levenson



Attorney Jessica Hale