BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

_______________________ (MINOR),	:	
Petitioner,	:	
	:	
v.	:	**Docket No.:**
	:	**OSAH-DCH-GAPP-__________-60-Malihi**
DEPARTMENT OF COMMUNITY	:	
HEALTH,	:	
Respondent.	:	

INITIAL DECISION

I. SUMMARY OF PROCEEDINGS

The hearing in this matter was held on May 3, 2013 to determine whether the skilled nursing hours provided to the Petitioner, ______________, under the Georgia Pediatric Program ("GAPP") should be reduced.[1] Petitioner was represented by his parents, Scott and Amy ____________, who appeared *pro se*. Respondent Department of Community Health ("Department") was represented by Brevin Brown, Esq.

After careful consideration of the evidence and the arguments of the parties, the Department's decision to reduce Petitioner's skilled nursing hours is hereby **REVERSED**.

[1] The record closed on May 10, 2013 with this Court's receipt of the transcript.

II. Findings of Fact

A. Petitioner ________'s Medical Condition and Care

a. *Medical history, diagnoses, and health progression*

1.

Petitioner is an eight-and-a-half-year-old Medicaid recipient who is severely disabled. His parents are his primary caregivers. His disabilities stem from a near-drowning incident in 2006, when he was two years old, resulting in an anoxic brain injury. He has multiple secondary diagnoses as a consequence of the resultant brain damage, including seizure disorder, cerebral palsy, gastro-esophageal reflux disease, obstructive sleep apnea, and encephalopathy. He is also a quadriplegic with spasticity and dystonia (a neuromuscular disorder), suffers from chronic sinusitis, cortical vision impairment (i.e., intermittent ability to see), and scoliosis. Functionally, due to these conditions, he is entirely dependent on others to attend to his basic needs, as he cannot move independently, can eat only by way of feeding tubes, is incontinent, and is confined to a wheelchair. His condition is permanent and will not improve, and "[b]arring access to the current level of care, he is guaranteed to worsen." Regardless of his level of care, he is likely to worsen over time simply due to his "chronic micro-aspiration," necessitating that his airway be safeguarded as much as possible to "stem the decline in [the condition of] his lungs." Petitioner's neurological condition is also expected to worsen over time as he ages. (Testimony of Dr. Julie Sedor, Dr. Laura Bleekrode, Ms. ___________.)

b. *Respiratory condition and care*

2.

Petitioner's primary need for care stems for his "severely decreased ability . . . to protect his airway." Two of his personal doctors testified to oppose a decrease in skilled nursing hours—hours they contend are absolutely necessary to safeguarding Petitioner's health and

preventing dangerous hospitalizations. The first was Dr. Julie Sedor, a pulmonologist who has been treating Petitioner since his accident on an ongoing basis every two to four months. She testified that the risks attendant to Petitioner's inability to protect his airways are severe, potentially causing "permanent damaging or scarring of the lungs" due to a "chain reaction of wheezing, increased mucous production, subsequent pneumonia, [and] hypoxia." Other negative outcomes include "severe chronic sinusitis and ear infections, which would then trigger secretions going into his lungs." Dr. Laura Bleekrode, Petitioner's pediatrician since infancy, further confirmed that if the secretions became lodged in his airway, it could lead to the "develop[ment] [of] pneumonia or a respiratory insult that would be life threatening to him." (Testimony of Dr. Sedor, Dr. Bleekrode.)

3.

Dr. Sedor described Petitioner's condition as creating a cyclical, self-destructive pattern. His need for monitoring is constant: bodies are continually producing saliva and other secretions and, therefore, there must be someone present at all times "to control the secretions by either suctioning them or positioning him so he is not inhaling them," as he is incapable of dislodging secretions of his own. His frequent seizures (discussed in detail later) increase the risk of aspiration, necessitating the presence of another to administer "emergency seizure medicines and oxygen and suctioning to remove those secretions." (Testimony of Dr. Sedor, Dr. Bleekrode.)

4.

To address Petitioner's continual need for total assistance, he receives very intense respiratory care, beginning with monitoring through the use of pulse oximetry to detect oxygenation levels. Pulse oximetry indicates when breathing treatments, vest treatments that loosen pooled secretions, and suctioning of these secretions is needed. The goal of the breathing

treatments is to open Petitioner's airways and to maintain good oxygen saturation. A skilled nurse is required to monitor Petitioner's respiratory care, as he or she must be aware of "the nuances of the problems" and to be present to administer the nebulizer and vest treatments. (Testimony of Dr. Sedor, Dr. Bleekrode.)

c. *Seizures*

5.

Petitioner suffers from frequent seizures that occur at a rate of approximately fifty per day. These seizures are of three varieties: absence seizures, drop seizures, and partial seizures. When Petitioner began receiving GAPP services in 2008, he was primarily suffering from small repetitive seizures, called cluster seizures. Since that time, he has begun experiencing mostly drop and partial seizures. Partial seizures—indicated by shaking, eye rolling, and other classic seizure symptoms—"are significantly more dangerous for him." Thus, while his recently-prescribed Clobazam reduced the number of seizures he was experiencing, it increased his level of agitation, necessitating a need for additional monitoring and intervention. Monitoring of his seizures requires close observation, medical knowledge, and skill. A trained medical professional might identify a behavior (e.g., a twitch of the lips) as a seizure only after multiple observations and clues tying that behavior to medical outcomes. The need to identify seizures, as mentioned above, is tied to Petitioner's respiratory condition, as a seizure increases the flow of secretions and the need to clear his airways. A short period of neglect could lead to pneumonia, lack of oxygen, hospitalization, and possibly death. (Testimony of Ms. _________, Ms. Holloway, Dr. Sedor, Dr. Bleekrode; Exhibit R-4.)

d. *Hospital visits*

6.

Petitioner's condition places him at a high risk of hospitalization. Due to the careful care of his parents and the hours of skilled nursing attention that he receives through GAPP, however, he has successfully avoided an overnight admission to the hospital since 2011. Nevertheless, he has had six hospital visits since January of this year. It is important for Petitioner to avoid hospitalizations for two primary reasons. First, his weak immune system places him at risk of contagion from others. Second, the ratio of staff to patients in the hospital can range from one nurse or respiratory therapist for every three to ten patients, all of whom are monitored in separate rooms, as contrasted with the "non-stop" level of attention Petitioner receives at home. Dr. Bleekrode specifically testified that Petitioner's full-time medical needs require at least 60 hours of care and that "reducing the hours would put him at an incredible risk for hospitalization due to his medical needs." (Testimony of Ms. _________, Ms. Holloway, Dr. Sedor, Dr. Bleekrode.)

e. *Other therapies*

7.

Petitioner, in addition to the skilled nursing hours provided by GAPP, receives intense physical, occupational, and speech therapy for a total of eight hours a week. As part of his speech therapy treatment, he is learning to communicate with his mother by means of his eyes, the sole option available to him in light of his inability to verbalize or move. He has had some success with learning this method of communicating, but the progress is sporadic because of his cortical vision impairment. (Testimony of Ms. _____; Exhibit R-11.)

f. *Schooling*

8.

Despite his disabilities, Petitioner attends Lake Windward Elementary School in Johns Creek five days a week for six hours a day. He is accompanied by a nurse who attends to his needs on the school bus and during the school day. He has an individualized education plan for the 2012-2013 school year. (Testimony of Ms. ______, Ms. Holloway; Exhibit R-11.)

B. Petitioner's Enrollment in GAPP

a. *Petitioner's GAPP nursing care*

9.

Petitioner began receiving GAPP assistance in 2008, several years after the onset of his disabilities. According to Department records, initially Petitioner received 40 hours per week of skilled nursing services, which have since been increased to the present 63 hours per week. Petitioner's parents contest this, claiming that he has always received 63 hours per week. The confusion may arise from the fact that Petitioner also has private insurance that covers some of his nursing care. Regardless of the source, however, it appears that Petitioner has had extensive nursing care hours since at least 2008.

10.

The nurses that attend Petitioner at night monitor him closely, suction his secretions, clear his airways, and reposition him. While they can monitor his seizures and take actions in response to them, the nurses cannot directly stop or reduce the number or duration of his seizures. Although it is uncontested that Petitioner suffers from frequent seizures, the Department did not receive or review a seizure log, which nurses ordinarily use to record patient seizures. (Testimony of Dr. Sedor, Dr. Bleekrode, Ms. Holloway.)

b. *Georgia Medical Care Foundation review*

11.

Thomas Underwood, R.N., GAPP Program Specialist, Dr. Suzanne Schuessler, and Melissa Holloway, B.S.N., testified on behalf of the Department. Both Dr. Schuessler and Ms. Holloway are employees of the Georgia Medical Care Foundation (GMCF), which contracts with the Department to review GAPP participants and applicants for program eligibility and hours. Mr. Underwood testified as to the purpose of the GAPP program. Dr. Schuessler and Ms. Holloway, both of whom participated in reviewing Petitioner's file and deciding to reduce his nursing hours, testified about the process and their rationale in ultimately reaching a decision to reduce Petitioner's hours from 63 to 40 hours per week.

12.

The GAPP program was created to serve medically fragile children under the age of 21. The term medically fragile refers to the need for skilled nursing care, i.e., the level of care found in a hospital or skilled nursing home. To determine the amount of skilled nursing care needed by a GAPP recipient, a GMCF medical team considers the "the medical need for care, for skilled care" as determined by medical professionals. (Testimony of Mr. Underwood.)

13.

In reaching the particular determination in this case, Dr. Schuessler reviewed the nursing notes in Petitioner's file and his medical diagnoses. She noted the absence of a seizure log. Ms. Holloway also reviewed Petitioner's nursing notes and file, although she had difficulty deciphering some of these notes. Neither reviewer met with Petitioner or spoke with Petitioner's doctors or any other direct medical provider.[2] On the basis of this paper review, the GMCF team initially decided to reduce Petitioner's nursing hours to 24 per week. Following the receipt of

[2] The third medical reviewer did not testify at the hearing.

three letters from Petitioner's neurologist, pulmonologist, and pediatrician, respectively, opposing the decision, the team issued a written final decision to reduce Petitioner's hours to 48 per week for four weeks and to 40 hours per week until the end of the certification period, March 8, 2013. (Testimony of Dr. Schuessler, Ms. Holloway; Exhibits R-5, -12, -14, -15.)

14.

The Final Determination Letter for Services from the Georgia Pediatric Program provided that the reduction in hours was supported by the following:

- Skilled nursing hours may be reduced over time based on the medical need of the member and the stability of the child's condition (*see* GAPP Manual § 803, Letter of Understanding, Appendix L).

- The nurses['] notes reviewed for the past 3 months document the stability of your child's condition.

- Your child's condition has remained stable with no exacerbations in disease process or hospitalizations since last pre-certification period.

- There is no evidence from the documentation submitted that the current hours are medically necessary to correct or ameliorate the child's medical condition (*see* 42 USCS § 1382(H)(b), O.C.G.A. § 49-4-169.1) and GAPP Manual § 702.2(A).

- GJ-tubes are not so inherently complex to require a professional licensed person on a daily basis. This does not require GAPP nursing hours which require continuous skilled nursing care or skilled nursing care in shifts (GAPP Manual § 601) and it does not meet medical necessity and require the level of care provided in a nursing facility or hospital ([*s*]*ee* 42 CFR § 409.31-409.34 and 42 CFR § 440.10).

- Although your child is having seizures, having skilled nursing will not prevent their duration or intensity.

- Per the Appendix I submitted by PSA Norcross on 11/8/12, a new medication, Clobazam, was added during the last certification period and it has decreased his seizure activity.

- Your child requires pulse oximetry, oxygen PRN, and J-tube/nebulizer medications[,] all of which are not so inherently complex to require a professional licensed person on a daily basis.

- Petitioner is able to attend school 5 days per week, 6 hours per day.

- There is no documentation of recent hospitalizations or exacerbations in condition in the nurses['] notes, or assessment in the Appendix I submitted with the GAPP renewal packet.

- If Petitioner's health status changes, requires hospitalization, or new skilled needs are identified[,] please have his agency contact the GAPP Nurse and update her on these changes.

(Exhibit R-15.)

15.

Ms. Holloway and Dr. Schuessler affirmed the above bases for the decision in their testimony. Where a GAPP recipient reaches a plateau, as Petitioner did, skilled nursing hours will be reduced, because the goal is to look at a GAPP recipient's present needs and not at what might occur in the future. Because Petitioner was attending school, had fewer seizures, and had not been hospitalized recently, the GMCF reviewing team determined that he was in a stable condition ripe for reduced hours. Furthermore, the team examined the type of assistance that Petitioner primarily requires, i.e., assistance with his respiratory condition and close monitoring—needs they determined not so inherently complex to require skilled nursing services. Dr. Schuessler stated that skilled nursing services are needed only to assess Petitioner, and that Petitioner's care, which is extensive, may be provided by a non-skilled aide. Ms. Holloway did not disagree with Drs. Sedor and Bleekrode, but like Dr. Schuessler, found the services needed not to require skilled nursing. Finally, the team reasoned that while Petitioner does suffer from seizures, because a nurse cannot actively reduce the number or intensity of these seizures, there is no need for skilled nursing. (Testimony of Ms. Holloway, Dr. Schuessler.)

16.

Ms. Holloway admitted that the absence of preventative care could lead to increased hospitalization. Nevertheless, she determined that was "no evidence from the documentation that skilled nursing hours would correct or ameliorate Petitioner's condition." While she believes that the law requires "amelioration," she erroneously defines the term to mean "to improve or make better," a definition that supports her determination to reduce Petitioner's nursing care hours. (Testimony of Ms. Holloway.)

17.

Petitioner timely appealed the final decision. (Exhibit R-16.)

III. Conclusions of Law

A. Governing Principles

1.

Medicaid is a joint federal-state program that provides comprehensive medical care for certain classes of eligible recipients whose income and resources are determined to be insufficient to meet the costs of necessary medical care and services. 42 U.S.C. §§ 1396 *et seq.*; *Moore v. Reese*, 637 F.3d 1220, 1232 (11th Cir. 2011). Participation is voluntary, "but once a state opts to participate it must comply with federal statutory and regulatory requirements." *Id.* All states have opted to participate and, thus, each must designate a single state agency to administer its Medicaid plan. *Id.*; 42 C.F.R. § 431.10(a), (b)(1). Georgia has designated the Department of Community Health as the "single state agency for the administration" of Medicaid. O.C.G.A. § 49-2-11(f).

2.

A participating state must provide early periodic screening, diagnostic, and treatment services (EPSDT) to eligible children as needed "to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." 42 U.S.C. § 1396d(r)(5) (emphasis added).

3.

Federal statutes and regulations do not define the terms "correct or ameliorate"; however, Georgia has defined the phrase by statute to mean "to improve or maintain a child's health in the best condition possible, compensate for a health problem, prevent it from worsening, prevent the development of additional health problems, or improve or maintain a child's overall health, even if treatment or services will not cure the recipient's overall health." O.C.G.A. § 49-4-169.1(1) (emphasis added); *see A.M.T. v. Gargano*, 781 F. Supp. 2d 798, 805 (S.D. Ind. 2011).[3] Under applicable federal regulations, when private duty nursing services are determined to be medically necessary for a Medicaid-eligible child, the Department must provide nursing care to the child "that is 'sufficient in amount, duration, and scope to reasonably achieve its purpose,' but 'may place appropriate limits on a service based on such criteria as medical necessity.'" *Moore*, 637 F.3d at 1234, *quoting* 42 C.F.R. §§ 440.230(b) and (d). In determining what amount of skilled nursing hours is medically necessary, both the treating physician and the Department may introduce evidence of medical need. *Id.* The particular number of hours that is medically

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[3] Courts in other states that have interpreted the phrase "correct or ameliorate" have found it to mean "to make better or more tolerable." *A.M.T.*, 781 F. Supp. 2d at 805, *citing Collins v. Hamilton*, 231 F. Supp. 2d 840, 849 (S.D. Ind. 2002). In so finding, the court in *A.M.T.* considered legislative history showing that Congress intended for EPSDT to function as "a preventative health program for children." *Id.* at 806, *citing* H.R. 3299, 101st Cong. § 4213 (1989). It held that failing to consider "a disabled child's potential for regression violates federal Medicaid law," finding it unreasonable to put a Medicaid recipient on a "figurative rollercoaster" by requiring that the child regress before continuing Medicaid services. *Id.* at 807.

necessary is then ultimately determined by the factfinder, here the Court. *Id.* at 1250; *Hunter v. Cook*, 2011 U.S. Dist. LEXIS 109775, at *8 (N.D. Ga. Sept. 27, 2011).

4.

In this case, as in *Moore*, the "pivotal issue" is whether 40 hours of skilled nursing per week is sufficient in amount to reasonably achieve the purpose of correcting or ameliorating Petitioner's condition. *Moore*, 637 F.3d at 1257. The Department bears the burden of proof on this issue.[4] Ga. Comp. R. & Regs. 616-1-2-.07. The standard of proof is a preponderance of evidence. Ga. Comp. R. & Regs. 616-1-2-.21.

5.

As mentioned above, the Medicaid Act requires states to provide necessary medical care to eligible recipients under age twenty-one "whether or not such services are covered under the State plan." 42 U.S.C. § 1396d(r)(5). The Eleventh Circuit Court of Appeals has held that "[t]he language of subsection (r)(5) appears to mandate coverage for all medically necessary treatment for eligible recipients under age twenty-one." *Pittman v. Secretary Fla. Dept. of Health & Rehabilitative Serv.*, 998 F.2d 887, 889 (11th Cir. 1993). Further, "[t]he federal Circuits that have analyzed the 1989 ESPDT [sic] amendment agree that . . . participating states must provide all services within the scope of § 1396d(a) which are necessary to correct or ameliorate defects, illnesses, and conditions in children discovered by the screening services." *S.D. v. Hood*, 391 F.3d 581, 593 (5th Cir. 2004). One such service is private duty nursing. 42 U.S.C. § 1396d(a)(8). Private duty nursing service is defined as "nursing services for recipients who

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[4] In *Moore*, the Eleventh Circuit placed the burden of proof on the plaintiff, who had filed a federal lawsuit contesting the Department's proposed reduction in skilled nursing hours under GAPP, thereby choosing "to forego her right to an administrative hearing." *Moore*, 637 F.3d at 1261. However, the Eleventh Circuit recognized that a state administrative rule may place the burden of proof on that state agency seeking to reduce Medicaid services. *Id.*, *citing* Fla. Admin. Code r. 65-2.060.

require more individual and continuous care than is available for a visiting nurse or routinely provided by the nursing staff of the hospital or skilled nursing facility." 42 C.F.R. § 440.80. These nursing services are provided by a registered nurse or nurse practitioner under the direction of the recipient's physician at the recipient's home, a hospital, or a skilled nursing facility. *Id.*

6.

GAPP is designed to serve eligible children under the age of 20 years 11 months who "require continuous skilled nursing care in shifts." *Part II, Policies and Procedures for the Georgia Pediatric Program* ("*GAPP Manual*") § 601. A child's need for services is determined based on medical necessity, "taking into consideration the overall medical condition of the member, the equipment and the level of care and frequency of care required for the member." *GAPP Manual* § 702.1. A child enrolled in the GAPP program is eligible to receive private duty nursing services, which the *GAPP Manual* refers to as "in-home skilled nursing services." 42 U.S.C. § 1396d(a)(8); *GAPP Manual* § 601.3; *Royal v. Cook*, 2012 U.S. Dist. LEXIS 84537, at *2 (N.D. Ga. June 15, 2012). The number of nursing hours is determined by the child's "specific medical treatment needs . . . and the documented training needs of the primary caregiver." *GAPP Manual* § 702.1.

7.

As suggested above, State policy is that the primary caregiver will eventually be trained and "become competent to assume some responsibility for the care of the child." *GAPP Manual* § 702.1. While this is an admirable policy goal, the Department's policy objectives do not override the State's obligations to administer the Medicaid program in a manner consistent with federal law. 42 U.S.C. § 1396c (state Medicaid plans must comply with federal statute or no

payments will be made); O.C.G.A. § 49-4-18 (compliance with federal Social Security Act is intended); O.C.G.A. § 49-2-11(a) (nothing in Title 49, Social Services, "shall be construed to prevent the acceptance of more than 50 percent federal matching funds.") The State is required to provide medically necessary services for eligible children under the age of 21, regardless of the State's articulated program goals. 42 U.S.C. § 1396d(r)(5); *Pittman*, 998 F.2d at 892.

8.

This Court must decide whether the Department's decision to reduce the Petitioner's skilled nursing hours compromises what is medically necessary to correct or ameliorate the Petitioner's condition. In *Hunter v. Cook*, 2011 U.S. Dist. LEXIS 109775 (N.D. Ga. Sept. 27, 2011), the court considered a case with similar facts to the present one. In that case, the Department had made the decision to reduce the GAPP recipient's skilled nursing hours because it found that he had stabilized, relying on the absence of recent hospitalizations. *Id.* at *3. Furthermore, the Department considered suctioning and nebulizer treatments as services not requiring a skilled nurse and the fact that skilled nursing care cannot influence the progression of the disease. *Id.* at *4, *13. The Department used the testimony of a GMCF physician and nurse reviewer who had not met the plaintiff, but relied solely upon the nursing notes and a doctor's letter, to justify a reduction in the number of skilled nursing hours. *Id.* at *13-14, 21. In contrast to the Department's assertions that the child was stable, the plaintiff's lung specialist testified that his condition was likely to progressively worsen. *Id.* at *5. The physician also testified that the low rate of hospitalizations should be attributed to the high level of care plaintiff had been receiving in his home. *Id.* at *7.

9.

In *Hunter*, the court gave much greater weight to the treating physician's testimony than to the opinion of the GMCF medical personnel, whose opinions were based solely upon paper records. *Id.* at *21, 26. Similarly, this Court gives greater weight to the testimony of Petitioner's two treating physicians, both of whom have known and worked with Petitioner for years and have specialized knowledge of his condition and its likely progress.

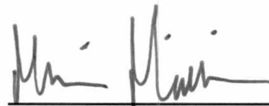
10.

This Court, based upon the evidence presented by the Petitioner and upon observations of Petitioner in the courtroom, finds him to be totally dependent upon others for even the minutest details of everyday care. The testimony of his physicians persuades the Court that Petitioner requires continual skilled care in order not to regress or suffer severe health consequences. Thus, this Court finds that 60 hours of nursing care is medically necessary to "ameliorate" Petitioner's condition, which threatens to worsen in the absence of 60 nursing hours.[5]

IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Department's decision to reduce the hours of skilled nursing care provided to the Petitioner is hereby **REVERSED**. Petitioner is entitled to receive 60 hours of skilled nursing care per week.

SO ORDERED, this the 28th day of May, 2013.



MICHAEL MALIHI, Judge

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[5] While Petitioner had been receiving 63 hours per week of GAPP skilled nursing care, Ms. _______ agreed that 60 hours of care would be sufficient to meet his needs. (Testimony of Ms. ______.)