

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

Petitioner,

v.

GEORGIA DEPARTMENT OF
COMMUNITY HEALTH,
Respondent.

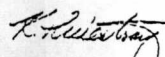
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* Docket No.:
* OSAH-DCH-GAPP-1332919-25-Teate
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* Agency Reference No.: R13-089
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JUN 17 2013

INITIAL DECISION

I. Introduction


Kevin Westray, Legal Assistant

In response to the Department of Community Health's ("DCH") denial of ("EW") application to the Georgia Pediatric Program ("GAPP") for GAPP's medically fragile day care services program ("MFDC"), EW's mother, requested a hearing that was held on May 2, 2013.¹ appeared as personal representative for EW. Trichelle Simmons, Esq. represented DCH. For reasons indicated, Respondent's denial of EW's application for GAPP services is **AFFIRMED**.

II. Findings of Fact

Application for GAPP

1. EW is a one-year-old female with a primary diagnosis of left coronary artery anomaly and secondary diagnoses of failure to thrive and congenital mitral insufficiency. She was last hospitalized on September 27, 2012, for respiratory failure and cardiac surgery. She was discharged to her home on November 9, 2012, following a successful surgery, for post-operative recovery. (Respondent Exhibit 2C and 2D).

2. Due to EW's extensive post-operative care needs, Pediatria Healthcare for Kids – Savannah PDH ("Pediatria") accepted EW into their program on a pro bono basis for twenty-six weeks on November 26, 2012. Pediatria is a pediatric nursing facility that provides medically fragile daycare services that can potentially be approved by GAPP. As of the date of the hearing, EW was receiving up to twelve hours of center-based care per day, five days a week, Monday through Friday, for a maximum of sixty hours per week as recommended by E.W.'s physician, Dr. Michael D. Demauro. When not at Pediatria, E.W. is at home with her family. (Testimony of Peggy Thiedt, R.N., Administrative Director at Pediatria; Respondent Exhibit 2D).

3. Acting on EW's behalf, Pediatria submitted a GAPP application to the Georgia Medical Care Foundation ("GMCF") on December 10, 2012. Peggy Thiedt, R.N., Administrative Director of

¹ The time for issuance of an Initial Decision in the matter was extended to June 18, 2013.

Pediatrics, reviews the patient's medical status prior to filing a GAPP application to determine if the child meets the level-of-care requirements. In finding that EW should continue with skilled nursing services, Ms. Thiedt considered that every four hours EW requires medications, feedings, and monitoring of her condition. Furthermore, she opined that EW receives 95% of her caloric intake through G-tube feedings that can only be administered by a licensed professional or the parent. G-tubes deliver formula directly into the stomach and are necessary in this case because EW is averse to feedings by mouth and does not receive substantial nutrition through eating. She also opines that treatment would ameliorate EW's condition and improve EW's "failure to thrive." (Testimony of Ms. ; Testimony of Ms. Theidt).

4. GMCF reviewed the completed application packet to determine whether it may be medically necessary for EW to receive MFDC. All documents included in the packet were reviewed by the team. Karen Mourneau, R.N., a Pediatric Team Leader for GMCF, who functions both as a GAPP review nurse and sits on the Medical Review Team for meetings, was part of the review team that assessed E.W.'s application. In addition to Ms. Mourneau, the team included Sharon Wilt, M.D., Melissa Holloway, R.N., Tujuana Glenn-Olajide, R.N., and Jennifer Purcell, R.N. (Testimony of Karen Mourneau; Respondent Exhibits 2A, 2B, 2C, 2D, 2E and 2F).

GAPP Program Background

5. Georgia implemented GAPP in August 2002 pursuant to the Medicaid Act. As such, the regulations and procedures implemented by the Department must be consistent with the Medicaid Act. Eligible members are medically fragile with multiple system diagnoses and require continuous skilled nursing care or skilled nursing care in shifts. To be eligible, members must meet the level of care for admission to a hospital or nursing facility. (Testimony of Sharon Collins, R.N., GAPP Specialist).²

6. Subject to appropriate limits on service, based on such criteria as medical necessity or utilization control procedures, GAPP provides the following services: In-Home Skilled Nursing Services; Medical Day Care Services; Transportation Services; and Home Health Aides. The program does not provide respite services. (Testimony of Ms. Collins; Respondent Exhibit 1).

7. A primary care physician develops the applicant's initial plan of care. An application packet or renewal packet is submitted to the GMCF Medical Review Team. GMCF then determines the level of care, the appropriateness of services, and approves or denies admission or continued stay in the GAPP Program. (Testimony of Ms. Collins; Testimony of Karen Mourneau; Respondent Exhibit 1).

8. Georgia regulations for GAPP state that it is a teaching program.³ Thus, primary and

² Sharon Collins, a Nurse Practitioner, has a B.S. in Nursing, a Masters in Neonatal Perinatal Nursing and a PhD in Education. She has worked as a neonatal intensive care nurse and as a nurse practitioner and clinical specialist in neonatal intensive care and high risk obstetrics. (Testimony of Sharon Collins, R.N.).

³ Analogously, teaching patients how to meet their skilled nursing needs themselves or through unskilled caregivers is a common component of medical care upon release from institutional setting following surgical procedures or hospitalizations for other reasons. (Testimony of Sharon Collins, R.N., GAPP Specialist).

secondary caregivers must be trained to provide the skilled nursing services as provided by a registered or licensed nurse when the paid professional is absent. EW's primary caregiver is competent and does provide for EW's care in the absence of the paid professional. Prior to approval for program participation, parents must acknowledge that skilled nursing hours may be reduced over time as they become competent in providing care for their child. (Testimony of Ms. Collins; Respondent Exhibit 1).

Denial of GAPP Application

9. On January 7, 2013, the Initial Determination stated that E.W. was not eligible for the GAPP MFDC services for the following reasons:

The child's condition does not meet hospital inpatient-qualifying criteria which necessitate:

Nursing interventions every 4-8 hours,

Post[-]critical care or weaning monitoring,

Procedures/interventions which require hospitalization/interventions or IV medications which require hospitalization (see CFR § 409.31-409.34 and 440.10).

The child does not meet nursing home skilled level of care admission criteria (see CFR § 409.31-409.34 and 42 CFR § 440.10).

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 § 1382h)(b), O.C.G.A. § 49-4-169.1) and GAPP Manual § 702.2(A)).

Other reason(s):

G-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[.]

Your child requires pulse oximetry, and oxygen which are not so inherently complex to require a professional licensed person on a daily basis. Additionally, the care-givers competency checklists denote caregivers competent to perform all of these activities.

(Respondent Exhibit 4 (emphasis omitted) (citation forms in original)).

10. The caregiver competency checklist denotes that the caregivers are competent to perform both G-tubes and pulse oximetry. Thus, the fact that E.W. cannot find an ordinary daycare that can accommodate her need for G-tube feedings is not determinative in light of the fact that her caregiver is able to administer feedings. (Testimony of Respondent Exhibit 3).

11. After reviewing supplemental medical information GMCF issued the Final Determination of Denial on February 4, 2013. That determination affirmed the above-stated findings. (Respondent Exhibit 4).

12. EW's physician found her to be medically stable, a determination later used by the medical review team in assessing EW's application. Specifically, EW achieved the goal set out in her Plan of Care to "...be medically stable without unplanned hospitalizations due to lack of caregiver skills and understanding." (Respondent Exhibit 2D). EW currently does not experience unexpected hospitalization. (Respondent Exhibit 4).

13. Ms. Morneau, a member of the GAPP review team for MFDC, found that E.W. had sufficient time to recover from her cardiac surgery of November 9, 2012. Because E.W. is now medically stable, she was denied MFDC as she no longer meets a hospital or nursing home level of care. There is no evidence that skilled nursing services would have any impact on E.W.'s heart condition. (Testimony of Karen Morneau).

III. Conclusions of Law

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. §§ 1396-1396v. Each state is required to designate a single state agency to administer its Medicaid plan. In Georgia, that agency is the Department of Community Health. 42 C.F.R. § 431.10(a); O.C.G.A. § 49-2-11(f).

2. A participating state is required to provide "necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services." 42 U.S.C. § 1396d(r)(5). Private duty nursing is an enumerated category of treatment under the Medicaid Act. 42 U.S.C. § 1396d(a)(8). Under Georgia law, "'correct or ameliorate' means 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.

3. 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).

4. GAPP is designed to serve eligible children under the age of 21 who require “skilled nursing care in shifts on a continuous basis.” *Part II, Policies and Procedures for the Georgia Pediatric Program (GAPP)* (“*GAPP Manual*”) (Exhibit R-1), § 702.2. 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.” *Id.* A child enrolled in the GAPP program may be eligible to receive skilled nursing services through MFDC. 42 U.S.C. § 1396d(a)(8); *GAPP Manual* (Exhibit R-1), § 601.

5. “While it is true that, after the 1989 amendments to the Medicaid Act, the State must fund any medically necessary treatment [the recipient] requires . . . , it does not follow that the State is wholly excluded from the process of determining what treatment is medically necessary.” Moore v. Meadows, 324 Fed. App. 773, 774 (11th Cir. 2009). “A private physician’s word on medical necessity is not dispositive.” *Id.* Instead, both the State and Petitioner’s private physician have roles in determining what medical treatment or services are necessary to “correct or ameliorate” Petitioner’s medical conditions. *Id.* In this case, EW’s condition cannot be corrected by the skilled services sought and given the current stability of EW’s condition and the ability of the caretakers to provide all skilled services currently required or assigned or prescribed, further skilled services are not necessary to ameliorate EW’s medical conditions.

6. The Department’s medical review team evaluated EW’s request for skilled nursing services through MFDC. GAPP MFDC may be approved to serve eligible children under age five “who are medically fragile and who also meet institutional level of care criteria which is defined as needing continuous care for an acute condition (hospital level of care) or the nursing facility level of care for a chronic condition.” *Part II, Policies and Procedures for the Georgia Pediatric Program Medically Fragile Daycare* (“*GAPP Manual*”) § 601.1. Thus for a child to qualify for MFDP, the child must require either hospital or nursing level of care.

7. A state Medicaid plan must include reasonable standards for determining eligibility for and the extent of medical assistance “consistent with the objectives of” the Medicaid Act, specifically its EPSDT program. 42 U.S.C. § 1396a(a)(17); *Beal*, 432 U.S. at 444; *Rush*, 625 F.2d at 1155. In Georgia, all GAPP services require prior approval, which is granted on a time-limited basis. *GAPP Manual* § 801. First, the primary care physician develops the applicant’s initial plan of care that is submitted in an application packet or renewal packet. That packet is submitted to a GMCF review team to whom DCH delegates its review. Upon review, a review nurse initially reviews the submission and then presents it to the GMCF Medical Review Team that minimally consists of two registered nurse reviewers and a physician reviewer. The GMCF Team then determines the level of care, the appropriateness of services, and approves or denies admission or continued stay in the GAPP Program. *GAPP Manual* § 601.2.

8. In accordance with eligibility standards and procedures, GMCF determined that EW’s current health status does not require nursing level of care or skilled nursing services. First, the requested services (medication administration, G-tube feedings, and vital sign monitoring) can be performed by a trained caregiver. EW’s caregivers have received training to administer EW’s G-tubes and pulse oximetry and can competently do so. In other words, she does not currently require any nursing services that are so complex that they cannot be performed safely and effectively by her primary caregiver. Second, surgery corrected EW’s heart condition. The

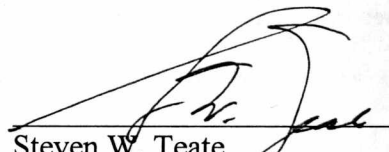
services received at Peditria were on a *pro bono* basis until EW healed from her surgery, which she has done. Finally, there is no evidence that daily skilled nursing services would correct or ameliorate EW's condition.

9. This matter concerns an initial application for benefits under the Medicaid program; therefore, Petitioner bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07(1)(e). The standard of proof is a preponderance of evidence. Ga. Comp. R. & Regs. 616-1-2-.21. EW has not shown, by a preponderance of the evidence, that she meets the requirements for the nursing facility level of care. Thus, EW does not qualify for MFDP, and the Department's decision to deny her request for such services is appropriate as medically unnecessary.

IV. Decision

For reasons indicated, DCH's decision to deny EW's GAPP application for services through its MFDC is hereby **AFFIRMED**.

SO ORDERED, this 14th day of June 2013.


Steven W. Teate
Administrative Law Judge