BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

C.A.,	:	
Petitioner,	:	
	:	**Docket No.:**
v.	:	**OSAH-DCH-GAPP-[redacted]-Miller**
	:	
DEPARTMENT OF COMMUNITY HEALTH,	:	**Agency Reference No. [redacted]**
Respondent.	:	

INITIAL DECISION

I. SUMMARY OF PROCEEDINGS

This matter is an appeal by the Petitioner, C.A., of a decision by the Department of Community Health ("Department") to reduce the quantity of in-home skilled nursing services he receives through the Georgia Pediatric Program ("GAPP") from 72 hours per week to 42 hours per week. The evidentiary hearing took place on October 7, 2013. The Petitioner was present at the hearing, as was his mother, H.A., who acted as his personal representative. The Department of Community Health ("Department"), Respondent herein, was represented by Brevin Brown, Esq.

After careful consideration of the evidence and the arguments of the parties, the Department's decision to reduce the Petitioner's skilled nursing hours is **AFFIRMED**; however, the reduction is **MODIFIED** to provide that the Petitioner will receive 56 hours per week of in-home skilled nursing services.

II. FINDINGS OF FACT

A. History of Petitioner's GAPP Participation

1.

The Petitioner was born on April 21, 1996, and is presently seventeen years old. At age 20 months, he suffered a near-drowning resulting in significant brain damage. His diagnoses include spastic quadriplegic cerebral palsy, seizure disorder, developmental delays, scoliosis, cortical blindness, chronic respiratory failure, asthma, allergic rhinitis, and obstructive sleep apnea. He is non-verbal, non-ambulatory, and uses a wheelchair. The Petitioner is completely dependent on his caregivers to perform all activities of daily living. (Testimony of H.A., Karen Carter, M.D., and Karis Morneau, R.N.; Exhibits P-1, R-6, R-7.)

2.

GAPP is a Medicaid program that provides skilled nursing services to children under age twenty-one, living at home, who are medically fragile and require the type of continuous skilled nursing services that are usually provided in an institutional setting. A skilled nursing service is one that "is so inherently complex that it can be safely and effectively performed only by, or under the supervision of, technical or professional personnel such as registered nurses, licensed practical (vocational) nurses, physical therapists, and speech pathologists or audiologists." (Testimony of Sharon Collins, R.N.; Exhibits R-1 at §§ 601, 601.1, and Appx. R.)

3.

In addition to providing skilled nursing services, GAPP serves as a teaching program, wherein a child's home caregivers learn to perform the necessary medical services when a skilled nurse is not present. As the medical condition of the child stabilizes, the skilled nursing services are reduced to give greater responsibility to the child's caregivers. A service that is considered a skilled nursing service when the child enrolls in the program may be reclassified as an unskilled

service after the child's caregivers have become competent to perform it. The Department reassesses a child's eligibility and need for skilled nursing services under GAPP every three to six months. (Testimony of Ms. Collins and Ms. Morneau; Exhibit R-1 at §§ 702.1, 801, and Appx. R.)

4.

The Petitioner currently receives 70 hours per week of in-home skilled nursing services through GAPP. (Testimony of Ms. A. and Ms. Morneau; Exhibits R-3, R-4.)

5.

In February 2013, the Petitioner, through his physician, Karen Carter, M.D., requested authorization from the Department for the Petitioner to continue receiving 70 hours per week of in-home skilled nursing services through the GAPP program. (Testimony of Ms. Morneau; Exhibit R-6.)

6.

The Department has contracted with the Georgia Medical Care Foundation ("GMCF") to review applications for admission and continued stay in the GAPP Program. GMCF's GAPP review team, which consists of a pediatric physician and four GAPP review nurses with experience in pediatric care, evaluated the Petitioner's request for skilled nursing services. After reviewing the authorization request and supporting documentation, including a statement of medical necessity, the physician's plan of care, and the Petitioner's nursing notes for the three previous months, the team recommended a reduction of the Petitioner's skilled nursing hours from 70 per week to 40 per week. (Testimony of Ms. Morneau; Exhibits R-5, R-6, R-7, R-8.)

7.

On April 22, 2013, GMCF issued an Initial Determination stating that the Petitioner's skilled nursing hours would be reduced from 70 per week to 40 per week, with a four-week weaning period that would begin on May 22, 2013. Thereafter, the Petitioner submitted additional documentation to GMCF for a reconsideration review. The GAPP reconsideration review team, which consisted of the GAPP nurses and a different pediatric physician, reviewed the supplementary information and declined to revise its decision to reduce the Petitioner's skilled nursing hours. (Testimony of Ms. Morneau; Exhibit R-4.)

8.

On May 28, 2013, GMCF issued a Final Determination stating that the Petitioner's skilled nursing services would be reduced from 70 per week to 40 per week, with a four-week weaning period that would begin on June 28, 2013. The Final Determination contained a number of reasons for the decision, as follows:

- Skilled nursing hours may be reduced over time based on the medical needs of the member and the stability of the child's condition (see GAPP Manual § 803, Letter of Understanding, Appendix L).
- The nurse's notes reviewed for the past 3 months document the stability of your child's condition.
- 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).
- Skilled nursing is granted based on those [sic] medically necessary to meet the child's needs.
- 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 (See 42 CFR § 409.31-409.34 and 42 CFR § 440.10).

- Other Reviewer Comments:
    - Per MD letter from Karen Carte [sic], MD[,] "Codie has not been admitted to the hospital within the last 6 months."

The Petitioner timely appealed the Final Determination. (Testimony of Ms. Morneau; Exhibits R-2, R-3 (citation forms in original).)

B. The Petitioner's Current Medical Status

9.

The Petitioner's mother, H.A., is his primary caregiver. She does not work outside the home.[1] Ms. A.'s brother, Anthony Heaton, also lives in the home and assists with his care. However, Mr. Heaton is not competent to perform all of the care that is provided by Ms. A. and the GAPP nurses. (Testimony of Ms. A..)

10.

Physically, the Petitioner is almost completely immobile. Due to his spastic cerebral palsy, his joints are fragile and subject to dislocation. At present, he has a dislocated shoulder and hip. He requires frequent repositioning to maintain his skin integrity and prevent aspiration. Ms. A. is competent to perform this task. (Testimony of Ms. A. and Dr. Carter; Exhibit R-6.)

[1] At the hearing, Ms. A. testified that she needs skilled nurses to care for the Petitioner while she takes a class to prepare for the COMPASS test, which is a prerequisite for admission to the technical college she plans to attend. According to Ms. A., the class is held Monday through Thursday for three and one-half hours, plus afternoons on Tuesday and Thursday. The Court finds this testimony lacking in credibility, given that the nursing notes reveal that GAPP nurses do not cover these hours on a regular basis. Further, the Court is unconvinced that the COMPASS test requires the extensive preparation she described. (Testimony of Ms. Abercrombie.)

11.

The Petitioner is at high risk for aspiration and receives all nutrition and some medications through a gastrostomy tube ("g-tube"). Ms. A. is competent to administer g-tube feedings and medications and to provide appropriate care of the Petitioner's g-tube. (Testimony of Ms. A., Dr. Carter, and Ms. Morneau; Exhibit R-5.)

12.

Some of the Petitioner's respiratory medications are administered through a nebulizer. He receives twice-daily treatments with a chest physical therapy vest, which are followed by cough assist therapy sessions. Additionally, the Petitioner requires periodic nasopharyngeal suctioning to maintain his airway. Ms. A. is competent to perform these tasks. (Testimony of Ms. A., Dr. Carter, and Ms. Morneau; Exhibits P-2, R-5.)

13.

Oxygen is administered to the Petitioner while he is sleeping, and a pulse oximeter monitors his respiratory status. An alarm on the pulse oximeter sounds if his oxygen saturation drops below a designated level. Thus, Ms. A. is able to sleep while the Petitioner sleeps, even in the absence of a nurse, although intervention is required when the alarm sounds. Recently, the Petitioner participated in a sleep study to determine whether his sleep apnea should be treated through use of a continuous positive airway pressure machine. The results of the sleep study had not been received as of the date of the hearing. (Testimony of Ms. Morneau, Dr. Carter, and Ms. A.; Exhibits P-2, R-5, R-6, R-7.)

14.

At times, the Petitioner has frequent seizures. However, most of his seizures are focal seizures, which are short in duration and require no medical intervention. If a seizure lasts more

than five minutes, Diastat is administered. Ms. A. is competent to monitor the Petitioner's seizures and administer medication, if necessary. The Petitioner's most recent administration of Diastat was approximately three months ago. (Testimony of Ms. A., Dr. Carter, and Ms. Morneau; Exhibit R-E, R-F.)

15.

In August 2011, a rod was surgically placed in the Petitioner's spine to correct the curvature caused by scoliosis. Following the surgery, he developed an infection of his cerebrospinal fluid, which led to obstructive hydrocephalus and required the placement of a ventriculoperitoneal shunt. The Petitioner continued to experience recurrent respiratory infections, and he was recently diagnosed with an antibiotic-resistant pseudomonas colonization. He is presently being treated with a 28-day on/off cycle of inhaled antibiotics, which are administered twice daily through his nebulizer. His most recent hospitalization was in July 2013. (Testimony of Ms. A. and Dr. Carter; Exhibits P-2, R-6.)

16.

The Petitioner has not attended school or received homebound services for approximately three years. Due to his frequent respiratory infections and the pseudomonas colonization, his physician has recommended contact isolation. As a result, his nurses wear gowns and gloves when they care for him.[2] (Testimony of Ms. A.; Exhibit P-2.)

17.

Karis Morneau, a registered nurse who serves as the pediatric team leader for GMCF, testified at the hearing that with the exception of skilled nursing assessments, the Petitioner's GAPP nurses have provided no skilled nursing services that his mother is not competent to

[2] However, the Petitioner spends most Sundays at church with Ms. A., which appears to be inconsistent with this recommendation. (Testimony of Ms. A.)

perform. However, the Court observes that his mother's competence does not relieve the Petitioner's need for skilled nursing services that extend beyond nursing assessments, as a single caregiver cannot provide services around the clock. Moreover, due to both the quantity and complexity of his medical needs, including his respiratory symptoms and inability to maintain his own his airway, the Petitioner requires skilled nursing interventions and assessments on a daily basis.[3] Because the Petitioner cannot communicate his own needs, a skilled nurse or trained caregiver must be present at all times. (Testimony of Ms. A., Dr. Carter, and Ms. Morneau; Exhibit R-I.)

III. CONCLUSIONS OF LAW

1.

This matter concerns the proposed reduction of certain benefits provided to the Petitioner under the Medicaid program; therefore, the Department bears the burden of proof. Ga. Comp. R. & Regs. r. 616-1-2-.07. The standard of proof is a preponderance of evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21.

2.

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. 42 C.F.R. § 431.10(a); O.C.G.A. § 49-2-11(f).

[3] Dr. Carter's testimony in this regard was more reliable than that of Ms. Morneau, as Dr. Carter provides medical care to the Petitioner and is acquainted with his specific condition and medical needs. Ms. Morneau, in contrast, has reviewed only a paper record. (Testimony of Dr. Carter and Ms. Morneau.)

3.

A participating state is required to provide certain categories of care to eligible children, including early and periodic screening, diagnostic, and treatment ("EPSDT") services as needed "to correct or ameliorate defects and physical and mental illnesses." 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).

4.

Georgia law defines "correct or ameliorate" as "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.

5.

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).

6.

GAPP is designed to serve medically fragile children under the age of twenty-one who require "skilled nursing care equivalent to the care received in an institutional setting, i.e., hospital or skilled nursing facility." Part II, Policies and Procedures for the Georgia Pediatric Program (GAPP), pub. Apr. 1, 2013 ("GAPP Manual") (Exhibit R-1), § 601.1. A child enrolled in the GAPP program is eligible to receive private duty nursing services.[4] 42 U.S.C. § 1396d(a)(8); id. at § 601.3.

7.

In this case, it is undisputed that the Petitioner is medically fragile, thereby meeting the first requirement for program participation. The second issue is whether the Petitioner meets the standard for the nursing facility level of care.

8.

To meet the standard for the nursing facility level of care, the Petitioner "must require service which is so inherently complex that it can be safely and effectively performed only by, or under the supervision of, technical or professional personnel such as registered nurses, licensed practical (vocational) nurses, physical therapists, and speech pathologists or audiologists." GAPP Manual, Appx. R (Exhibit R-1). Additionally, among other requirements,[5] the Petitioner "must require skilled nursing or skilled rehabilitation services, or both, on a daily basis." Id.

[4] Private duty nursing service is defined as "nursing services for recipients who 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. Through GAPP, these services may be provided only at the recipient's home. GAPP Manual § 601.3.

[5] It is undisputed that the Petitioner meets these other requirements, which are outlined in Appendix R of the GAPP Manual.

9.

Here, it is further undisputed that the Petitioner meets the requirements for the nursing facility level of care. As detailed in the Findings of Fact, above, the Petitioner requires frequent skilled nursing assessments which are so complex that they can be performed safely and effectively only by skilled nurses. The Petitioner also requires other services, such as nasopharyngeal suctioning, g-tube feedings and maintenance, repositioning, and seizure interventions,[6] that can be performed safely and effectively only by skilled nurses or Ms. A.,[7] who has been trained and is competent to perform these tasks. Further, Ms. A. requires periodic supervision by skilled nurses to ensure that she remains competent to perform these services. The Petitioner requires all of these services on a daily basis.

10.

The only contested issue, then, is the number of skilled nursing hours that are medically necessary to correct or ameliorate the Petitioner's particular condition. A child's need for GAPP skilled nursing 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. at § 702.1; see 42 C.F.R. § 440.230(d). However, the skilled nursing care provided must be "sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. § 440.330(b); see Moore v. Reese, 637 F.3d 1220, 1257-58 (11th Cir. 2011).[8]

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[6] The Court declines to credit Dr. Carter's testimony that administering medications via nebulizer is a skilled nursing service. (Testimony of Dr. Carter.)

[7] While it is possible that other caregivers may be trained to perform these tasks, the record contains no evidence that another competent caregiver exists at this time. R.P., Ms. A.'s former boyfriend, had been trained as a secondary caregiver and was competent to perform many tasks, but he no longer lives in the home. (Testimony of Ms. A.; Exhibit P-5.)

[8] In Moore, the Eleventh Circuit elucidated the following guiding principles regarding GAPP:

11.

The Department proposes that 40 hours per week of skilled nursing care are sufficient to fulfill the state's obligation to provide EPSDT services to the Petitioner. According to the Department, the needs of a caregiver should not be considered when this determination is made. Instead, the Department suggests that respite care, to the extent it may be required, should be provided through another Medicaid program, such as the Community Care Services Program ("CCSP").

12.

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(1) Georgia is required to provide private duty nursing services to Moore, who meets the EPSDT eligibility requirements, when such services are medically necessary to correct or ameliorate her illness and condition.

(2) A state Medicaid plan must include 'reasonable standards . . . for determining eligibility for and the extent of medical assistance'—here, the extent of private duty nursing services for Moore—and such standards must be 'consistent with the objectives of' the Medicaid Act, specifically its EPSDT program.

(3) A state may adopt a definition of medical necessity that places limits on a physician's discretion. A state may also limit required Medicaid services based upon its judgment of degree of medical necessity so long as such limitations do not discriminate on the basis of the kind of medical condition. Furthermore, 'a state may establish standards for individual physicians to use in determining what services are appropriate in a particular case' and a treating physician is 'required to operate within such reasonable limitations as the state may impose.'

(4) The treating physician assumes 'the primary responsibility of determining what treatment should be made available to his patients.' Both the treating physician and the state have roles to play, however, and '[a] private physician's word on medical necessity is not dispositive.'

(5) A state may establish the amount, duration, and scope of private duty nursing services provided under the required EPSDT benefit. The state is not required to provide medically unnecessary, albeit desirable, EPSDT services. However, a state's provision of a required EPSDT benefit, such as private duty nursing services, 'must be sufficient in amount, duration, and scope to reasonably achieve its purpose.'

(6) A state 'may place appropriate limits on a service based on such criteria as medical necessity.' In so doing, a state 'can review the medical necessity of treatment prescribed by a doctor on a case-by-case basis,' and may present its own evidence of medical necessity in disputes between the state and Medicaid patients.

Moore, 637 F.3d at 1255 (citations omitted).

The Department concedes that skilled nursing services are not available through CCSP. Therefore, the Department recommends the use of a proxy caregiver, funded by CCSP, to provide the necessary care to the Petitioner. Georgia law expressly allows an individual in need of "health maintenance activities" to select an unlicensed person as a proxy caregiver, "provided that such person shall receive training and shall demonstrate the necessary knowledge and skills to perform documented health maintenance activities, including identified specialized procedures, for such individual." O.C.G.A. § 43-26-12(9)(A), (C). The proxy caregiver may perform "'[h]ealth maintenance activities . . . that, but for a disability, a person could reasonably be expected to do for himself or herself." O.C.G.A. § 43-26-12(9)(C)(ii). However, health maintenance activities "do not include complex care . . . ; do not require complex observations or critical decisions; can be safely performed and have reasonably precise, unchanging directions; and have outcomes or results that are reasonably predictable." O.C.G.A. § 43-26-12(9)(C)(ii). Proxy care must be provided under the orders of a physician, advanced practice registered nurse, or physician's assistant, and training is essential. O.C.G.A. § 43-26-12(9)(A), (C).

13.

The Court rejects both the Department's conclusion that "respite care" is not permitted under GAPP and its proposal that the Petitioner's skilled nursing needs may be met through a proxy caregiver funded by CCSP.

14.

First, the skilled nursing care that the Department characterizes as "respite care" is not only authorized under GAPP, it is required where necessary to correct or ameliorate a child's condition. See Moore, 637 F.3d at 1255. In this case, other than his skilled nurses, Ms. A. is the Petitioner's only trained and competent caregiver. While the Court agrees with the Department that skilled nursing services cannot be offered for the mere convenience of a caregiver, skilled nursing services can and must be offered to minimize the risk to the child caused by caregiver fatigue. A caregiver whose attentiveness and decision-making are impaired by fatigue may be unable to provide sufficient care to a medically fragile child. See Hunter v. Cook, 2013 U.S. Dist. LEXIS 139963, *21-22 (N.D. Ga. Sept. 27, 2013). If the skilled nursing services provided under GAPP do not account for some degree of caregiver fatigue, particularly where only one trained and competent caregiver is present in the home, then the state has not met its duty to offer skilled nursing care that is "sufficient in amount, duration, and scope to reasonably achieve its purpose." See 42 U.S.C. § 440.230(b); Hunter, 2013 U.S. Dist. LEXIS 139963 at *32-37.

15.

The Department's suggestion that the Petitioner's need for skilled nursing care can be met by a CCSP-funded proxy caregiver is similarly flawed. The Department cannot divest itself of its EPSDT responsibility by replacing medically necessary skilled nursing care with unlicensed proxy caregiving services.[9] See 42 U.S.C. § 1396d(r)(5); 42 C.F.R. § 440.230. Furthermore, in light of the Petitioner's complex medical condition, and especially his inability to maintain his own airway, the record contains no evidence that care of the Petitioner "do[es]

[9] By arguing in favor of a proxy caregiver, the Department effectively concedes that only a licensed nurse or other medical professional is authorized by law to perform the tasks necessary to care for the Petitioner. See O.C.G.A. § 43-26-12(9).

not require complex observations or critical decisions; can be safely performed and have reasonably precise, unchanging directions; and ha[s] outcomes or results that are reasonably predictable," as required by the proxy caregiver statute. O.C.G.A. § 43-26-12(9)(C)(ii). Thus none of the Petitioner's medical needs can be met through CCSP.

16.

For the reasons detailed above, the Department's proposal to provide the Petitioner with 40 hours of skilled nursing services per week is insufficient in amount, duration, and scope to reasonably achieve the purpose of correcting or ameliorating his condition. After considering the Petitioner's medical status and his particular skilled nursing needs, as well as the risk of caregiver fatigue if Ms. A. assumes too great a burden for his care,[10] the Court finds that the Petitioner should be afforded 56 hours per week of skilled nursing care. This number of skilled nursing hours does not compromise what is medically necessary to correct or ameliorate the Petitioner's condition. 42 U.S.C. § 1396d(r)(5); O.C.G.A. § 49-4-169.1.

[10] The Court finds that Ms. A. is competent to provide ten to twelve hours of care per day. In addition, because the Petitioner is monitored while he sleeps, he does not require continuous skilled nursing care at night. Based on the evidence of record, it is expected that Ms. A. is able to sleep between four and six hours per night, which accounts for periodic interruptions by the Petitioner's monitoring alarms. This means that Ms. A. is able to provide effective care for between fourteen and eighteen hours per day, or an average of sixteen hours per day. Therefore, if skilled nurses are available 8 hours per day, Ms. A. is able to meet the Petitioner's needs during the remaining hours.

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Department's decision to reduce the Petitioner's skilled nursing hours is **AFFIRMED**; however, the reduction is **MODIFIED** to provide that the Petitioner will receive 56 hours per week of in-home skilled nursing services.

SO ORDERED, this _____ day of November, 2013.

KRISTIN L. MILLER
Administrative Law Judge