

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

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| _____,                         | :                                    |
|                                | :                                    |
| <b>Petitioner,</b>             | :                                    |
|                                | :                                    |
| <b>v.</b>                      | : <b>Docket No.:</b>                 |
|                                | : <b>OSAH-DCH-GAPP-_____ -Miller</b> |
| <b>DEPARTMENT OF COMMUNITY</b> | :                                    |
| <b>HEALTH,</b>                 | :                                    |
|                                | :                                    |
| <b>Respondent.</b>             | :                                    |

**INITIAL DECISION**

**I. SUMMARY OF PROCEEDINGS**

This matter is an appeal by the Petitioner, \_\_\_\_\_, of a decision by the Department of Community Health (“Department”), Respondent herein, to terminate her participation in the Georgia Pediatric Program (“GAPP”). The evidentiary hearing took place on August 28 and September 18, 2013. The Petitioner was present at the hearing, as were her parents, \_\_\_\_\_. The Petitioner was represented by Bonnie Miller, Esq. The Department was represented by Elizabeth Brooks, Esq.

After careful consideration of the evidence and the arguments of the parties, the Department’s decision to terminate the Petitioner’s GAPP participation is **REVERSED**.

**II. FINDINGS OF FACT**

**A. History of Petitioner’s GAPP Participation**

1.

The Petitioner was born on October 20, 1998, and is presently fourteen years old. She suffered an acute brain injury and lung collapse at birth due to a prolapsed umbilical cord, which caused significant and permanent brain damage. She has been diagnosed with spastic

quadriplegia cerebral palsy, microcephaly, mental retardation, profound growth and motor delay, selective antibody deficiency, seizure disorder, asthma, chronic lung disease, swallowing dysfunction, chronic aspiration pneumonia, gastroesophageal reflux disease, chronic otitis media, chronic sinusitis, and right eye amblyopia and exotropia. The Petitioner is also non-verbal, wheelchair-bound, and incontinent. These conditions are permanent and incurable, and the Petitioner is completely dependent on her caregivers to perform all activities of daily living. (Transcript of Hearing August 28, 2013 [“T1.”] 108, 183-186; Transcript of Hearing September 18, 2013 [“T2.”] 8-11; Deposition of E. Brannon Morris, III, M.D. [“Morris Depo.”] 11-13; Deposition of Dean E. Firschein, M.D. [“Firschein Depo.”] 11-13; Exhibits P-3, P-4.)

2.

GAPP is a Medicaid waiver 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.” (T1. 15-16; Exhibit R-2 §§ 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. (T1. 17, 131; Exhibit R-2 §§ 702.1, 801, and Appx. R.)

4.

The Petitioner has participated in GAPP since 2001. Currently, she receives 36 hours per week of in-home skilled nursing services through the program. (Testimony of T1. 55, 130; T2. 23, 76; Exhibit R-5.)

5.

In January 2013, the Petitioner, through her physician and parents, requested authorization from the Department for the Petitioner to continue receiving 36 hours per week of in-home skilled nursing services through the GAPP program. (T1. 17-18, 54-56; Exhibit R-5.)

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 three or more 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 and seizure record for the three previous months, the team decided to terminate the Petitioner's GAPP participation. Prior to making this determination, no one from the review team met with the Petitioner or spoke with any of her direct medical providers. (T1. 18-21, 51-53, 60-61, 67, 157-58; Exhibits R-5, R-7, R-9, R-10.)

7.

On March 22, 2013, GMCF issued a Final Determination stating that the Petitioner's GAPP participation would be terminated as of May 9, 2013, following an eight-week weaning period that would begin on March 14, 2013, 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).
- Services for this child are not required 24 hours per day nor are they required to be ordinarily furnished on an inpatient basis which is a requirement of 42 C.F.R. § 409.31-409.34
- The nurses['] notes reviewed for the past 3 months document the stability of your child's condition.
  - Oxygen saturations are documented to be 94%-96% while on room air.
  - 60[-]day summary states "breakthrough seizures on occasion but frequency has not increased."
- 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 § 1382h)(b), O.C.G.A. § 49-4-169.1[,] and GAPP Manual § 702.2(A)).
- Other reasons:
  - G-tubes are not so inherently complex [as] 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).
- [Petitioner] requires pulse oximetry, oxygen PRN via nasal cannula and g-tube/nebulizer medications[,] all of which are not so inherently complex to require a professional licensed person on a daily basis.
  - Although[] [Petitioner] is having seizures[,] having skilled nursing will not prevent their duration or intensity. The seizure log documents 2-3 seizures per month as reported by primary caregiver.
  - Skilled nursing hours cannot be granted for projected potential problems. It [sic] is to provide for the current skilled need of the child.
  - Skilled nursing is granted, based on medical necessity of child's condition.
  - No need for oxygen reported.
  - There is no documentation of recent hospitalizations or exacerbations in condition in the nurse's notes[] or assessment in the Appendix I submitted with the GAPP renewal packet.
  - Members served by the GAPP program are required to meet the same level of care as for admission to a hospital or nursing facility. (GAPP Manual § 601 (See 42 CFR § 409.31-409.34 and 42 CFR § 440.10)[]).

The Petitioner timely appealed the Final Determination. (T1. 61-62; Exhibits P-15, P-16, P-17, P-18, R-4 [emphasis omitted] [citation forms in original].)

## **B. The Petitioner's Current Medical Status**

### 8.

The Petitioner's mother, C.K., is her primary caregiver, while her father, R.K., serves as a secondary caregiver. Mrs. K does not work outside the home, and she spends almost all of her time caring for the Petitioner. Mr. K works as an independent contractor in insurance restoration and mold remediation, a job that requires him to work long days, including evenings and weekends. The Ks also have a son, R., who is eight years old. (T2. 6-7, 25.)

9.

The Petitioner's GAPP nurses usually work four days per week, in nine-hour shifts. Mrs. K, therefore, provides the bulk of the Petitioner's care. Mr. K helps out when he is not working, and he is competent to perform most tasks associated with the Petitioner's care. Mrs. K's mother, L.J., also cares for the Petitioner periodically. (T1. 130; T2. 66-67, 76.)

10.

The Petitioner is enrolled in \_\_\_\_\_ High School, where she receives one hour of homebound instruction and three hours of classroom education each week. The school system provides the Petitioner with a nurse during the three hours per week she spends at school. (T2. 22-23.)

11.

It is undisputed that the Petitioner requires continuous hands-on care and monitoring to manage her multiple medical conditions. She is unable to communicate or to make voluntary movements. As a result, she cannot be left alone for any period of time. (T1. 117, 141, 189-91; T2. 10-12, 57-58; Morris Depo. 31.)

12.

The most important component of the Petitioner's care centers on her respiratory status, which must be monitored constantly. Because she is unable to swallow or expel her oral secretions, the Petitioner is at a high risk of aspiration and infection. (T1. 108-09, 197-98; T2. 12; Morris Depo. 13, 25-27.)

13.

The Petitioner requires suctioning at least every two hours to protect her airway. If she is not regularly and properly suctioned, she is at risk of aspiration, infection, hospitalization, or even death. Her secretions must be monitored for color, consistency, and odor, to ensure prompt treatment of infections. Suctioning is usually performed orally, using a catheter attached to a suction machine. The catheter is inserted to the back of the Petitioner's throat to stimulate a cough, which helps to loosen her secretions for suctioning. However, the Petitioner resists coughing, and suctioning must be performed nasally when she does not produce a cough with oral suctioning. Mrs. K is competent to perform both oral and nasopharyngeal suctioning. (T1. 111, 198-99, 202-03, 205, 210-11, 250-54, 264-65; T2. 48-50; Firschein Depo. 24-28; Exhibits P-13, R-8.)

14.

The Petitioner's respiratory status must be monitored constantly, and it can change in a short period of time. She receives at least two scheduled nebulizer breathing treatments per day, with more provided on an as-needed basis. The Petitioner's respiratory condition is further complicated by a deficiency in her immune system, which limits her body's ability to fight infection. Consequently, she is treated with a 21-day on/off cycle of inhaled antibiotics as a prophylactic measure. To ensure the stability of her respiratory status, the Petitioner requires periodic respiratory assessments by a skilled professional. Mrs. K, although she has been trained to look for signs of respiratory distress, lacks the expertise of a skilled professional in this area. (T1. 159, 193-95, 199-202, 242, 244-45, 256-57; T2. 41, 45-46, 52; Firschein Depo. 22-23.)

15.

At night, the Petitioner is monitored by a pulse oximeter that measures her oxygen saturation level and heart rate. An alarm on the machine sounds four to five times per night, on average, requiring intervention each time. Mrs. K sleeps in the Petitioner's room, which enables her to respond promptly to the alarm. (T1. 65, 187; T2. 12, 57-58.)

16.

Petitioner has medically intractable epilepsy, which means that her seizures cannot be controlled by medication, and they occur on a daily basis. The Petitioner experiences both generalized tonic-clonic seizures, which are full-body seizures, and focal seizures, which involve only one part of her body. The seizures increase her oral secretions, which cause a corresponding increase in her need for suctioning. If a seizure lasts longer than five minutes, Diastat is administered. The Petitioner's family caregivers are competent to monitor her seizures and administer medication, if necessary. However, most of her seizures do not require medical intervention.<sup>1</sup> (T1. 71-75, 129, 259-61; T2. 53-55; Morris Depo. 11, 21-24; Exhibits P-13, R-8.)

17.

The Petitioner receives all nutrition through a gastrostomy tube ("G-tube"). G-tube feedings take place four times per day. The Petitioner's family caregivers are competent to administer G-tube feedings and medications and to provide appropriate care of the Petitioner's G-tube. (T1. 56-58, 65, 118, 190; T2. 42-44, 82-83; Morris Depo. 26; Exhibits P-13, R-8.)

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<sup>1</sup> The Petitioner's caregivers maintain a seizure log. However, only seizures that are unusual or require medical intervention are documented in the seizure log. The Petitioner's focal seizures, which occur throughout the day, are not usually documented. (T1. 276-78; T2. 80-81; Morris Depo. 37-38; Exhibit R-9.)

18.

The Petitioner requires frequent repositioning to maintain her skin integrity. During the past eighteen months, the Petitioner has developed pressure sores, which have required treatment by a wound specialist. The pressure sores have been categorized as advanced stage II, and are currently being treated with a prescription medication applied with a wound dressing. This type of wound is subject to infection and could become life-threatening without proper care. (T1. 84, 265-67; T2. 62-63; Firschein Depo. 42-43.)

19.

The Petitioner takes more than thirty medications. Some of her medications are administered at regular intervals, while others are administered on an as-needed basis. (T1. 56-58; T2. 37-42; Exhibit R-7.)

20.

Although the Petitioner's condition places her at high risk for hospitalization, she has avoided an overnight hospital stay since December 2011, when she was admitted for treatment of pneumonia. Since birth, however, she has been hospitalized more than seventy-five times. The Petitioner's physicians attribute her recent success at avoiding hospitalization to the skilled nursing services that GAPP provides. (T1. 214; T2. 15-17; Morris Depo. 32; Firschein Depo. 45-46; Exhibits P-7, P-8 at 84-224, P-9, P-10, P-11, P-12.)

21.

Gena Alexander-Albert, M.D., and Dean E. Firschein, M.D., are two of the Petitioner's treating physicians. Both Dr. Albert and Dr. Firschein testified that it is important for the Petitioner to avoid emergency rooms and hospitalization due to her weak immune system and high risk of infection. They expect that if the Petitioner's skilled nursing hours are reduced, she

will require more visits to the emergency room and more hospitalizations, thereby compromising the stability of her medical condition. (T1. 196-97, 214-15; Firschein Depo. 17, 44-47.)

22.

Suzanne Wright Schuessler, M.D., is a pediatrician who reviewed the Petitioner's case as part of GMCF's GAPP review team. Dr. Schuessler testified that although the Petitioner has extensive health problems and requires almost constant hands-on care, she no longer qualifies for the GAPP program because most of her care can be provided by trained family caregivers. Similarly, Melissa Holloway, a GMCF GAPP review nurse, testified that with the exception of skilled nursing assessments, the Petitioner's GAPP nurses have provided no skilled nursing services that her family caregivers are not competent to perform. However, the Court finds that the competence of the Petitioner's family caregivers does not relieve her need for skilled nursing services in its entirety, as her family caregivers are unable to provide services around the clock and in perpetuity.<sup>2</sup> Moreover, due to both the quantity and the complexity of the Petitioner's medical needs, including her respiratory symptoms and inability to maintain her own airway, she requires skilled nursing interventions and assessments on a daily basis.<sup>3</sup> Because the Petitioner cannot communicate her own needs, a skilled nurse or trained caregiver must be present at all

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<sup>2</sup> At the hearing, Mrs. K offered the following testimony regarding the skilled care provided by the Petitioner's GAPP nurses:

It provides my daughter – the opportunity for me to recoup a little bit when they are [] there. And because there is no way someone could do what I do . . . every single day of the week, nonstop, day in, day out and not start to make critical flaws in the care of her. And because, you know, eventually you just – your – your mind doesn't work the way it should. And in – her care requires someone to be on their A-game at all times for her to survive.

(T2. 71.)

<sup>3</sup> In this regard, the testimony of Dr. Alexander-Albert and Dr. Firschein was more reliable than that of Dr. Schuessler and Ms. Holloway, as the Petitioner's treating physicians provide direct medical care to her and are acquainted with her specific condition and medical needs. The Department's witnesses, in contrast, have reviewed only a paper record.

times. For these reasons, the Court declines to rely on the testimony of Dr. Schuessler and Ms. Holloway. (T1. 62-69, 79-90, 141-42.)

### **III. CONCLUSIONS OF LAW**

1.

This matter concerns the proposed termination of certain benefits provided to the Petitioner under the Medicaid program; therefore, the Department bears the burden of proof. 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.

#### **A. Medicaid Overview**

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.

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; see also A.M.T. v. Gargano, 781 F. Supp. 2d 798, 807 (S.D. Ind. 2011) (holding that a disabled child's potential for regression must be considered when determining whether requested services are necessary to correct or ameliorate child's condition).

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).

**B. GAPP Eligibility Requirements**

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-2), § 601.1. A child enrolled

in the GAPP program is eligible to receive private duty nursing services.<sup>4</sup> 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. As to this issue, the Department failed to meet its burden to show that the Petitioner no longer requires a 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-2). Additionally, among other requirements,<sup>5</sup> the Petitioner “must require skilled nursing or skilled rehabilitation services, or both, on a daily basis.” Id.

9.

Federal regulations mandate that “[i]n determining whether a service requires the skill of a licensed nurse, consideration must be given to the inherent complexity of the service, the condition of the beneficiary, and accepted standards of medical and nursing practice.” 42 C.F.R. § 409.44(a). Additionally, “[t]he fact that a skilled nursing service can be or is taught to the beneficiary or to the beneficiary’s family or friends does not negate the skilled aspect of the

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<sup>4</sup> 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.

<sup>5</sup> It is undisputed that the Petitioner meets these other requirements, which are outlined in Appendix R of the GAPP Manual.

service when performed by the nurse.” 42 C.F.R. § 409.44(b)(iii). Determining the need for skilled nursing care requires a “common-sense, non-technical consideration of the patient’s condition as a whole.” Aurora v. Sec’y of U.S. Dep’t of Health & Human Servs., 715 F. Supp. 466, 468 (E.D.N.Y. 1989). In examining whether a child’s condition warrants skilled nursing care, courts have placed significant weight on the child’s treating physicians’ opinion of medical necessity. See, e.g., Moore v. Reese, 637 F.3d 1220, 1255 (11th Cir. 2011); Royal v. Cook, 2012 U.S. Dist. LEXIS 84537, \*25-28.

10.

In this case, the Court finds that the Petitioner meets the standard 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 suctioning and monitoring of secretions, g-tube feedings and maintenance, repositioning, and seizure monitoring and interventions, that can be performed safely and effectively only by skilled nurses or other caregivers who have been trained and are competent to perform these tasks. Further, the Petitioner’s family caregivers require periodic education and supervision by skilled nurses to ensure that they remain competent to perform these services. The Petitioner requires all of these services on a daily basis.

### **C. Determination of Medical Necessity**

11.

Furthermore, the Department failed to establish that the skilled nursing care provided through GAPP is not 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).<sup>6</sup> When the GAPP review team made its determination of medical necessity in this case, it failed to consider the Petitioner’s overall medical condition or to give adequate weight to the level and frequency of care that she requires. After considering all of the evidence, particularly the Petitioner’s inability to maintain her own

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<sup>6</sup> The Eleventh Circuit has elucidated the following guiding principles regarding GAPP:

- (1) Georgia is required to provide private duty nursing services to [a child], who meets the EPSDT eligibility requirements, when such services are medically necessary to correct or ameliorate [the child’s] 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 [the child]—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).

airway, the Court finds that GAPP skilled nursing care is medically necessary to correct or ameliorate her condition.

12.

According to the Department, the needs of a caregiver should not be considered when the determination of medical necessity 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”). 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 by a CCSP provider.

13.

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, Mrs. K is the Petitioner’s only trained and competent caregiver who is consistently present in the home, and the demands placed upon her are rigorous and unremitting. 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.<sup>7</sup> 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 Department refuses to consider the risks inherent in caregiver fatigue, particularly where only one trained and competent caregiver is consistently present in the home, then the state has not met its duty to

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<sup>7</sup> Under the Department’s theory, it is unnecessary to allow Mrs. K time to sleep, maintain the household, or tend to her other child.

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.

14.

Second, the Petitioner’s need for skilled nursing care cannot be met by a CCSP provider. The Department, although it concedes that skilled nursing services are not available through CCSP, recommends the use of a CCSP-funded “proxy caregiver” to provide the necessary care to the Petitioner. However, the Petitioner is not required to accept the services of an unlicensed proxy caregiver as a substitute for the skilled nursing care she requires.

15.

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).

16.

The Department is simply not authorized to divest itself of its EPSDT responsibility by replacing medically necessary skilled nursing care with unlicensed proxy caregiving services.<sup>8</sup> See 42 U.S.C. § 1396d(r)(5); 42 C.F.R. § 440.230. Furthermore, in light of the Petitioner’s complex medical condition, especially her inability to maintain her own airway, the record contains no evidence that care of the Petitioner “do[es] 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.<sup>9</sup>

17.

For the reasons detailed above, the Department’s proposed termination of the skilled nursing services the Petitioner receives through GAPP would leave her with care that is insufficient in amount, duration, and scope to correct or ameliorate her condition. 42 U.S.C. § 1396d(r)(5); O.C.G.A. § 49-4-169.1.

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<sup>8</sup> 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).

<sup>9</sup> To the extent the Department argues that the Petitioner’s care needs can be fulfilled through other programs that do not offer skilled nursing services, such as Children’s Intervention Services, this argument is likewise incorrect. In addition, the services offered through Medicaid home health, another program suggested by the Department, do not include the type of continuous nursing care that the Petitioner requires. O.C.G.A. § 31-7-150(3)(A). While intermittent nursing visits of limited duration may meet the Petitioner’s need for wound care, they would not address many of her other skilled nursing needs.

#### **IV. DECISION**

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Department's decision to terminate the Petitioner's participation in the GAPP in-home skilled nursing program is hereby **REVERSED**. The Petitioner shall continue to receive 36 hours per week of in-home skilled nursing services until the end of the authorization period.

**SO ORDERED, this 18th day of November, 2013.**

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**KRISTIN L. MILLER**  
**Administrative Law Judge**