

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

[REDACTED], Petitioner, v. DEPARTMENT OF COMMUNITY HEALTH, Respondent.	: : : : : : : : : : :	Administrative Action No: OSAH-DCH-GAPP-[REDACTED] Baxter
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INITIAL DECISION

This matter comes before this Court pursuant to an appeal filed by [REDACTED] ("Petitioner") in response to the decision of the Georgia Department of Community Health ("Department") to deny her an increase in skilled nursing hours under the Georgia Pediatric Program ("GAPP"). A hearing was held on October 18 and 30, 2013. For the reasons indicated below, the Department's decision is **REVERSED**.

I. FINDINGS OF FACT

1.

Petitioner is a nineteen-year-old who lives at home. Her mother and father serve as her primary caregivers. Petitioner's diagnoses include Cerebral Palsy, Scoliosis, Developmental Delay, Seizure Disorder, Spasticity, Reactive Airway Disease, Hypothyroid, Feeding problems, Quadriplegia, Severe Mental Retardation, Asthma, Degenerative bone disease, Chronic Pain, Heterotopic ossification, Chronic pulmonary lung disease, Herpex encephalitis, and GERD. (Ex. R-4; Testimony of [REDACTED])

2.

Petitioner is wheelchair or bed dependent, requires a G-tube and J-tube, and has a PICC line. She requires continuous cardiovascular and respiratory assessments and receives multiple medications, including narcotic pain medications, multiple times throughout the day and night through a PICC line and G-Tube or J-Tube. Further, all Petitioner's secretions are measured and replaced which includes suction and drains from the G-Tube and J-Tube. Petitioner also requires deep suction of her lungs multiple times during a day (thirty or more). This care, along

with multiple other skilled services, continues 24-hours a day. (Ex. R-4; Testimony of [REDACTED] & Tracy Henson.)

3.

Dr. Ann-Marie Brooks, M.D., Petitioner's pulmonologist, testified that Petitioner's condition has worsened and requires constant monitoring. Since July 2013, Petitioner respiratory condition has become more compromised, requiring an increase in respiratory therapy and additional oxygen. In addition, Petitioner has had repeated infections. According to Dr. Brooks, Petitioner requires "persistent" and "consistent" therapies to prevent further deterioration. (Testimony of Dr. Brooks.)

4.

Dr. Brooks testified that she has required the use of additional medical equipment on Petitioner including a BiPAP and a rebreather. Usually, Dr. Brooks would keep patients in Petitioner's condition using that equipment in a hospital, but Petitioner would remain in the hospital indefinitely if Dr. Brooks required such care in this case. Petitioner's combination of respiratory problems, pain medication, and the use of a central line make this a difficult case requiring increased skilled nursing care. Unlike a parent, Dr. Brooks noted that a nurse could identify problems and closely monitor Petitioner's multiple nursing needs. (Testimony of Dr. Brooks.)

5.

Three of Petitioner's doctors prescribed 112 hours per week of home nursing assistance.¹ Dr. Brooks testified that it was unrealistic and unsafe to expect a parent to care for Petitioner for more than eight (8) hours a day. (Ex. P-2; Testimony of Dr. Brooks.)

6.

Since July 2013, Petitioner has been to the hospital at least seven (7) times. (Testimony of [REDACTED].)

7.

One of Petitioner's nurses, Tracy Henson, testified regarding Petitioner's rapid decline this year. Henson testified that Petitioner's pain medication is at such high dosages that constant monitoring is required. Further, Henson testified that managing Petitioner's fluids is a difficult

¹ Those doctors include Petitioner's pulmonologist, Dr. Brooks, Petitioner's gastroenterologist, Dr. William Meyers, and Petitioner's pediatrician, Dr. John Long. (Ex. P-2.)

task that requires consideration of numerous variables for which a skilled nurse would be trained to evaluate. (Testimony of Henson.)

8.

The Department implemented GAPP in 2002 as a part of its Medicaid plan to serve children under age 21 who are medically fragile and require continuous skilled nursing care or skilled nursing care in shifts. (Ex. R-1, Part II Policies and Procedures for the Georgia Pediatric Program, Chapter 600 ("GAPP Manual").)

9.

The July 5, 2013 Final Notification indicated that Petitioner did not qualify for increased GAPP services because: (1) Petitioner's recent hospitalization did not change her medically necessary needs; (2) there is no evidence from the documentation submitted that an increase in hours are medically necessary to correct or ameliorate the child's condition; (3) skilled nursing hours cannot be granted for projected potential problems; (4) services for respite purposes is not covered; and (4) there is "no recent change in diagnosis, exacerbation in condition or new skilled needs identified in the documentation submitted to support an increase in hours." (Ex. R-2.)

10.

Respondent's July 5, 2013 denial letter was based on May 2013 and prior documentation. While Petitioner's condition has changed, Respondent's review nurse testified that she does not believe that Petitioner's skilled nursing needs have increased. (Testimony of Karis Morneau.)

11.

Based on a conversation with Petitioner's pediatrician after the filing of this appeal, Respondent's medical doctor now believes that an increase to 98 hours would be appropriate. Petitioner's pediatrician, however, is not even aware of Petitioner's worsening condition over the last several months. (Testimony of Dr. Michael Papciak & [REDACTED].)

12.

At the hearing, Respondent's review nurse and medical doctor testified that they were not up-to-date on Petitioner's worsening condition. Even though Petitioner's parent provided documentation to Respondent or Respondent's attorney, the review nurse and medical doctor had not seen all of that documentation. (Testimony of Karis Morneau & Dr. Michael Papciak.)

II. STANDARD OF REVIEW

This matter concerns a denial of Petitioner's request for an increase in skilled nursing hours; 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. This is a de novo hearing meaning the evidence on the issues in a hearing are not limited to the evidence presented or considered by Respondent prior to its decision. Ga. Comp. R. & Regs. 616-1-2-.21(3). Thus, this Court's decision is not restricted to the information the Respondent relied on in making its July 5, 2013 decision to deny an increase in services.

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. In Georgia, the Department is the single state agency responsible for administering the state Medicaid plan. O.C.G.A. § 49-2-11(f); 42 C.F.R. § 431.10(a).

2.

A participating state is required to provide certain categories of care to eligible children, including early and periodic screening and diagnostic and treatment services ("EPSDT") as needed "to correct or ameliorate defects and physical and mental illnesses." 42 U.S.C. § 1396d(r)(5). Private skilled nursing is an enumerated category of treatment under the Medicaid Act. 42 U.S.C. § 1396d(a)(8).

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); see *A.M.T. v. Gargano*, 781 F. Supp. 2d 798, 805 (S.D. Ind. 2011). 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.*

4.

GAPP is designed to serve eligible children under the age of 21 based on medical necessity determinations. A child enrolled as a member of GAPP is eligible to receive private duty nursing services.

5.

This Court must decide whether the Department's decision to deny Petitioner's request for an increase in skilled nursing hours compromises what is medically necessary to correct or ameliorate Petitioner's condition.

6.

In this case, all three of Petitioner's doctors prescribed 112 hours of skilled nursing care per week, which they deemed medically necessary to ameliorate Petitioner's condition. In contrast, the Department originally found that Petitioner required only 84 hours of skilled nursing care per week. Respondent adjusted its decision to 98 hours per week after its medical doctor spoke with Petitioner's pediatrician. Respondent did not provide sufficient evidence to refute the assessment of Petitioner's three doctors that 112 hours a week in skilled nursing care is medically necessary.

7.

The evidence presented at the hearing shows a child that has experienced a significant decline in health since July 2013 which requires extensive skilled nursing care on an almost continual basis. Her condition has progressively worsened as the year has gone by, but for whatever reason, Respondent has failed to stay up-to-date on Petitioner's current condition. Petitioner has had repeated hospitalizations and infections, an increase in medication, including narcotics, an increase in oxygen, and an addition of new medical equipment. Based on the evidence presented, Petitioner has met her burden in demonstrating that 112 hours per week of skilled nursing care is medically necessary and thus, she is eligible for an increase in GAPP services of 112 hours per week. Accordingly,

IT IS HEREBY ORDERED THAT the Department's determination to deny Petitioner's request for an increase in GAPP services to 112 hours per week is **REVERSED**.

SO ORDERED THIS 5th day of November, 2013.

AMANDA C. BAXTER
Administrative Law Judge