

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

(MINOR), Petitioner,	:	Docket No.:	
	:	OSAH-DCH-KATIE-	MALIHI
v.	:		
	:		
GEORGIA DEPARTMENT OF COMMUNITY HEALTH, Respondent.	:		
	:		

Deepak Jeyaram, Esq.
For Petitioner

Fatih Lengerli, Esq.
For Respondent

INITIAL DECISION

I. SUMMARY OF PROCEEDINGS

Petitioner appealed the decision of Respondent, the Department of Community Health, to terminate his continued coverage under the TEFRA/Katie Beckett Waiver. A hearing was held on December 13, 2013 in Atlanta, Georgia. For the reasons indicated below, Respondent's decision to terminate Petitioner's continued coverage under the Katie Beckett Waiver is hereby **REVERSED**.

II. FINDINGS OF FACT

The Katie Beckett Program

1.

The Katie Beckett Waiver was established in 1982 under the Tax Equity and Fiscal Responsibility Act (TEFRA). The Waiver, which is administered by Respondent, permits the state to ignore family income for certain disabled children for the purposes of determining Medicaid eligibility provided that certain conditions are met. It allows benefits to be provided to children under the age of 18 who qualify as disabled individuals under § 1614 of the Social Security Act and live at home, rather than in an institution. To qualify for participation, applicants must meet specific criteria based on the institutional level of care they require. These criteria are governed by Title 42 of the Code of Federal Regulations. *Exhibit R-1.*

The Katie Beckett Waiver Review Process

2.

Respondent has contracted with the Georgia Medical Care Foundation (GMCF) to review applications for continued eligibility for the Katie Beckett waiver. *Exhibit R-1; Testimony of Lauren Jones.*

3.

Individuals who qualify for the Katie Beckett waiver are subject to periodic assessments by GMCF. During these periodic assessments, the individual's physician submits an information packet—which contains a Physician's Recommendation for Pediatric Care (the DMA-6(A) form), a Level of Care statement, and a Psychological Assessment—to GMCF's Katie Beckett Review Team. The Review Team evaluates the individual based on the information in this

packet to determine whether he or she requires a level of care provided in a hospital, skilled nursing facility, or intermediate care facility.

4.

If during one of these periodic assessments the Review Team determines that the individual is no longer eligible for the Katie Beckett Waiver, it will issue an Initial Denial of Continued Services Letter. This letter informs the individual that they have been denied and delineates the reasons for their denial. The individual then has thirty days from the date of the letter in which to obtain a review of GMCF's decision, during which time they must submit information to support continued qualification for the waiver. *Exhibit R-1; Testimony of Lauren Jones.*

5.

Ms. Lauren Jones, a member of the GMCF review team, testified that, in making the determination of whether an individual meets level of care criteria, the GMCF review team will review all information available to the team that is pertinent to that individual's condition. Although the team gives deference to the recommendations of the individual's physician, Ms. Jones specified that they exercise their professional judgment with regard to eligibility. If an individual's physician indicates that the individual meets hospital level of care, for example, the Review Team would review that individual's condition to ascertain whether they meet criteria for any pertinent level of care and not simply confine their review to hospital level of care criteria. *Testimony of Lauren Jones; Exhibit R-1.*

6.

If GMCF decides not to alter its original determination after reviewing the supplemented information packet, it will issue a Final Denial of Continued Services letter to the individual. The individual then has thirty days in which to request a hearing. Individuals may request that

the services they receive under the program continue while their hearing is pending. *Exhibits R-2, R-3.*

Petitioner's Condition

7.

Petitioner is a seven-year-old male born on August 24, 2006. He was born with arthrogryposis multiplex congenita, a rare musculoskeletal disorder characterized by permanent joint contractures. Patients who suffer from arthrogryposis are incapable of extending the affected extremities. In Petitioner's case, both his upper and lower extremities are affected by the disease. He was born with club feet and his knee, hip, and elbow joints locked in a contracted position. Because Petitioner's ability to use his extremities is limited, his muscles are also severely underdeveloped, further inhibiting his mobility. *Testimony of Dr. Cynthia Brown; Testimony of Kelly Richardson; Exhibit P-4.*

8.

Since his birth, Petitioner has undergone extensive treatments and surgeries to improve the range of motion in his joints and his overall quality of life. When he was approximately one year old, Petitioner underwent bilateral clubfoot surgery. Petitioner has undergone additional surgeries in 2009, 2012, and 2013, including triceps transfer surgery, which involved moving a portion of his triceps muscle to assist his biceps muscle. Although these surgeries have resulted in some improvement in Petitioner's condition, he is still only able to ambulate for short distances with the aid of a walker. He will most likely require additional surgeries on his joints in the future. *Testimony of Dr. Cynthia Brown; Testimony of Kimberly Reynolds; Testimony of Kelly Richardson; Exhibit P-4.*

9.

In addition to surgical intervention, Petitioner's condition is also treated with occupational therapy and physical therapy provided by skilled professionals. Occupational therapy involves a training regimen whereby the subject learns and becomes capable of performing the practical tasks encountered in everyday living, such as tying shoelaces. Petitioner's occupational therapist, Ms. Mai Lee Payne, meets with Petitioner once a week for an occupational therapy session. Petitioner's coverage under Medicaid was recently reduced, and his caregivers were informed that Petitioner was eligible to receive only one occupational therapy session per week. In an effort to supplement Petitioner's occupational therapy, Ms. Payne also provides Petitioner's caregivers with step-by-step instructions on repeating occupational therapy exercises at home. Petitioner's mother and father are very active in assisting Petitioner with this home-based occupational therapy, and often contact Ms. Payne by telephone for assistance. *Testimony of Mai Lee Payne; Testimony of Kelly Richardson; Exhibits P-5, P-6.*

10.

Since he was only a few months old, Petitioner has received physical therapy from Kimberly Reynolds, a licensed physical therapist. Currently, Ms. Reynolds provides physical therapy to Petitioner twice a week. These sessions involve improving Petitioner's physical functions, such as mobility, through various exercises. Petitioner uses adaptive equipment, including a stander, a modified rolling walker, knee-ankle-foot orthoses (KAFOs), ankle-foot orthoses (AFOs), and a hip adductor wedge. Ms. Reynolds assesses this equipment for safety, correct fit, and function and adjusts the equipment if necessary. Although Petitioner has enjoyed tremendous progress from these sessions, Ms. Reynolds testified that Petitioner's need for care will increase as he ages and grows. *Testimony of Kimberly Reynolds; Exhibits P-7, P-8.*

11.

Petitioner currently lives in Calhoun, Georgia with his mother and father and his twin brother. His parents are very supportive and active in all aspects of his care. Petitioner is cognitively on-level with children his age and he attends regular education classes at Calhoun Primary, where he has an Individualized Education Plan and is assisted by a paraprofessional. *Testimony of Kelly Richardson; Exhibit R-9.*

12.

Petitioner has participated in Medicaid through the Katie Beckett Waiver since his birth. Currently, his occupational and physical therapy sessions are covered by Medicaid. Recently, however, his coverage under Medicaid was reduced, allowing for only one occupational therapy session per week. According to Mrs. Kelly Richardson, Petitioner's mother, she attempted to appeal this reduction, but her appeal was submitted after the deadline. *Testimony of Kelly Richardson; Testimony of Dr. Cynthia Brown; Exhibit R-14.*

13.

Dr. Cynthia Brown, MD, is Petitioner's primary care physician, and has cared for Petitioner since his birth. Petitioner also receives care from specialists, including Dr. Jorge Fabregas, MD, an orthopedist, and Dr. Allan E. Peljovich, MD, a hand and upper extremity specialist. *Testimony of Dr. Cynthia Brown; Testimony of Kelly Richardson; Exhibits R-4, R-5, R-7, R-8, R-14, P-4.*

Review of Petitioner's Application for Continued Stay in the Katie Beckett Program

14.

On March 20, 2013, as the time for Petitioner's periodic assessment approached, Dr. Brown submitted a Recommendation for Pediatric Care (the DMA 6(A)) to GMCF. In the

Recommendation form, Dr. Brown certified that Petitioner required the level of care provided by a nursing facility, ICF-MR facility, or hospital but indicated that Petitioner's condition "could not be managed by home- or community-based services." Dr. Brown also submitted a Level of Care Statement to GMCF. In the Level of Care Statement, Dr. Brown did not indicate that Petitioner had any skilled needs, but wrote "2" in the blank next to "PT sessions/wk" and "1" in the blank next to "OT Sessions/wk" in the area of the Statement labeled "Therapy." Dr. Brown also attached a Letter of Medical Necessity to the Information Packet submitted to GMCF. In this letter, Dr. Brown asserted that Petitioner needed physical therapy, occupational therapy, and "aggressive orthopedic evaluation and treatment." *Exhibits R-5, R-6, R-7.*

15.

Respondent conducted a periodic assessment of Petitioner's file on or about April 8, 2013 and determined that he was not eligible for continued coverage under the Katie Beckett Waiver. Respondent sent an Initial Denial of Continued Services letter to Petitioner's caregivers, which explained that Petitioner did not meet the criteria for continued coverage under the Katie Beckett Waiver because:

- [Petitioner] does not require daily skilled/professional nursing services because his condition is not so inherently complex that care cannot be safely and effectively performed by unskilled healthcare personnel as evidenced by documentation submitted which states:
 - Per the DMA6 signed 3/20/2013, at age six years, he carries the diagnoses of arthrogryposis
 - Per the Level of Care Statement, the physician recommends the Nursing Facility level of care; however, he does not order the level of services required to meet criteria under that level of care. PT is ordered at two times per week and OT at one time per week. No nursing services are ordered.
 - Per the IEP, he receives PT at one time per month. OT is listed at one time per month provided by special education staff.
 - Notes from private PT show therapy two times per week.
 - Notes from private OT show therapy at one time per week.
- The child's condition does not meet hospital inpatient-qualifying criteria which necessitates:

- Nursing interventions every 4-8 hours
- Post critical care or weaning monitoring
- Procedures/interventions which require hospitalization/interventions or
- IV medications which require hospitalization
- 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 CFR 409.31-409.34 as evidenced by previous documentation.
- Rehabilitative services are not required five days per week per documentation submitted which is a requirement of 42 CFR 409.31-409.34.

Exhibit R-2.

16.

Upon receiving the Initial Denial Letter from GMCF, Petitioner's caregivers and his providers began compiling supplementary information. On April 12, 2013, Dr. Brown submitted a letter to GMCF. In this letter, Dr. Brown insisted that Petitioner required skilled rehabilitation services on a daily basis. Dr. Brown explained that, although Petitioner required such services daily, Medicaid had recently reduced Petitioner's coverage, and would allow only one occupational therapy session per week. Moreover, explained Dr. Brown, clinics near Petitioner's parents were not open on Fridays. To compensate for their inability to obtain the number of recommended therapy sessions, Petitioner participated in a home therapy program designed by skilled therapists and implemented every day under therapist instruction. Dr. Brown specifically provided in the letter that Petitioner met the criteria for Nursing Facility Level of Care. She concluded her letter by saying that Petitioner enjoyed progress as a result of the therapies made possible by Katie Beckett and warning that Petitioner had a grim prognosis if those therapies were discontinued. *Exhibit R-8.*

17.

After reviewing the supplemental information submitted by Petitioner's caregivers, the Review Team did not alter its determination. GMCF issued a Final Denial of Continued Services letter to Petitioner's caregivers on May 23, 2013, which repeated the findings expressed in the Initial

Denial of Continued Services letter. The Review Team also included in the Letter its conclusions that Petitioner's home exercise program was not considered a skilled service.

Exhibit R-3; Testimony of Lauren Jones.

18.

Petitioner timely appealed Respondent's decision and the matter was brought before OSAH. Petitioner's coverage under the Katie Beckett Waiver continued during the pendency of his appeal. *Exhibit R-12.*

19.

At the hearing on this matter, Dr. Gary Miller, MD, a member of the GMCF Review Team who took part in the reassessment of Petitioner's eligibility for the Katie Beckett Waiver, differentiated between a Level of Care determination and a Peer Review determination of ineligibility. According to Dr. Miller, denial of an application based on Peer Review occurs where the Review Team disputes the physician's conclusion that skilled nursing services are medically necessary to correct or ameliorate the participant's condition. Denials of applications based on the participant's failure to meet Level of Care, on the other hand, occur where the participant does not *actually receive* the required number of skilled nursing services. Dr. Miller provided no testimony as to the medical necessity of the skilled nursing services. The Review Team denied Petitioner's application for continued services, explained Dr. Miller, because Petitioner did not meet the requisite Level of Care. According to Dr. Miller, the denial of continued services under Katie Beckett was based solely on the fact that Petitioner did not receive skilled nursing services five days a week; the documentation indicated that he received only one unit of occupational therapy per week and two units of physical therapy per week.

Testimony of Dr. Gary Miller; Exhibit R-5.

20.

Dr. Brown testified at the hearing on this matter that Petitioner unquestionably met Nursing Facility Level of Care and was therefore eligible for coverage under Katie Beckett. She explained that she had mistakenly indicated on the Level of Care statement that Petitioner *required* only one unit of occupational therapy per week and two units of physical therapy per week. Instead of listing what Petitioner required, explained Dr. Brown, she had listed what Petitioner actually *received*. The current level of services that Petitioner receives—one occupational therapy session and two physical therapy sessions weekly—is insufficient to meet Petitioner’s needs, in Dr. Brown’s judgment. Dr. Brown determined that Petitioner should receive occupational therapy and physical therapy five days a week or more, but circumstances beyond his caregivers’ control limited him to receiving only those units indicated on the Level of Care statement. In her opinion, Petitioner’s condition would regress significantly if the services he requires are not provided. *Testimony of Dr. Cynthia Brown; Exhibit R-5.*

21.

Petitioner’s therapists, Ms. Payne and Ms. Reynolds, also testified at the hearing on this matter. Both therapists testified that Petitioner had exhibited remarkable progress over the course of his therapy, but expressed their professional opinions that Petitioner’s condition would regress substantially if his therapy services were reduced. Indeed, both Ms. Payne and Ms. Reynolds recommended that Petitioner receive significantly more therapy sessions than he currently received. *Testimony of Mai Lee Payne; Testimony of Kimberly Reynolds.*

22.

Petitioner also tendered letters of Dr. Fabregas and Dr. Peljovich, both of whom recommended that Petitioner receive physiotherapy at least five days a week. In his letter, Dr. Peljovich

expressed his opinion that “[p]hysiotherapy is a critical component of [Petitioner’s] treatment” since there were no medications to correct the disease, and surgeries alone could not assist him in achieving the ultimate goal of one day living independently. According to Dr. Peljovich, one day of occupational therapy was “radically insufficient.” *Exhibit P-4*.

III. CONCLUSIONS OF LAW

1.

Because this case concerns the termination of benefits Petitioner receives through the Katie Beckett Program, Respondent 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. The Court “may make any disposition of the matter available to the Referring Agency.” *Id.* “The hearing shall be de novo in nature, and the evidence on the issues in a hearing shall not be limited to the evidence presented to or considered by the Referring Agency prior to its decision.” *Id.*

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 *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).

3.

Respondent provides Medicaid benefits under the Katie Beckett Waiver as described under Section 134 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). To be eligible for services under the TEFRA/Katie Beckett class of assistance, the child must:

- (1) Be eighteen years of age or younger
- (2) Live at home
- (3) Meet the federal criteria for childhood disability and
- (4) **Require the level of care provided in a hospital, skilled nursing facility, or intermediate care facility**

42 U.S.C. § 1396a(e)(3); 42 C.F.R. § 435.225(a) (emphasis added).

4.

The parties stipulated at the hearing of this matter that the only Level of Care relevant to Petitioner's continued eligibility for coverage under the Katie Beckett Waiver is the Skilled Nursing Facility Level of Care. Accordingly, Respondent must demonstrate by a preponderance of the evidence that Petitioner did not meet Skilled Nursing Facility Level of Care.

5.

Skilled Nursing Facility Level of Care is appropriate for individuals who do not require hospital care, but who, on a regular basis, require licensed nursing services, rehabilitation services, or other health-related services ordinarily provided in an institution. GEORGIA DEPARTMENT OF COMMUNITY HEALTH, PART II INFORMATION MANUAL TEFRA/KATIE BECKETT DEEMING WAIVER (hereinafter KATIE BECKETT MANUAL) 6. The individual must require services that are so inherently complex that they can be safely and effectively performed only by, or under the supervision of, technical or professional personnel . . .

AND

the service is one of the following or similar and is required seven days per week:

- Overall management and evaluation of a care plan for an individual who is totally dependent in all activities of daily living,
- Observation and assessment of an individual's changing condition because the documented instability of his or her medical condition is likely to result in complications, or because the documented instability of his or her mental condition is likely to result in suicidal or hostile behavior
- Intravenous or intramuscular injections or intravenous feeding
- Enteral feeding that comprises at least 26 per cent of daily calorie requirements and provides at least 501 milliliters of fluid per day
- Nasopharyngeal or tracheostomy aspiration
- Insertion and sterile irrigation or replacement of uprapubic catheters
- Application of dressings involving prescription medications and aseptic techniques
- Treatment of extensive decubitus ulcers or other widespread skin disorder
- Heat treatments as part of active treatment which requires observation by nurses
- Initial phases of a regimen involving administration of medical gases
- Rehabilitation nursing procedures, including the related teaching and adaptive aspects of nursing, that are part of active treatment

OR

The service is one of the following or similar and is required five days per week:

- Ongoing assessment of rehabilitation needs and potential; services concurrent with the management of a patient care plan,
- Therapeutic exercises and activities performed by PT or OT,
- Gait evaluation and training to restore function to a patient whose ability to walk has been impaired by neurological, muscular, or skeletal abnormality,
- Range of motion exercises which are part of active treatment of a specific condition which has resulted in a loss of, or restriction of mobility,
- Maintenance therapy when specialized knowledge and judgment is needed to design a program based on initial evaluation,
- Ultrasound, short-wave, and microwave therapy treatment,
- Hot pack, hydrocollator, infrared treatments, paraffin baths, and whirlpool treatment when the patient's condition is complicated by circulatory deficiency, areas of desensitization, open wounds, etc. and specialized knowledge and judgment is required,
- Services of a speech pathologist or audiologist when necessary for the restoration of function in speech or hearing

OR

The service is one of the following only if additional special medical complication requires that it be performed or supervised by technical or professional personnel:

- Administration of routine medications, eye drops, and ointments

- General maintenance care of colostomy or ileostomy
- Routine services to maintain satisfactory functioning of indwelling bladder catheters,
- Changes of dressings for non-infected postoperative or chronic conditions,
- Prophylactic and palliative skin care, including bathing and application of creams, or treatment of minor skin problems
- Routine care of incontinent individuals, including use of diapers and protective sheets
- General maintenance care (e.g. in connections with a plaster cast)
- Use of heat as a palliative and comfort measure (e.g. whirlpool and hydrocollator)
- Routine administration of medical gases after a regimen of therapy has been established
- Assistance in dressing, eating, and toileting,
- Periodic turning and positioning of patients,
- General supervision of exercises that were taught to the individual and can be safely performed by the individual including the actual carrying out of maintenance programs

AND

- The service needed has been ordered by a physician
- The service will be furnished either directly by, or under the supervision of, appropriately licensed personnel
- The beneficiary must require skilled nursing or skilled rehabilitation services, or both, on a daily basis.

KATIE BECKETT MANUAL 35-36.

6.

Considering the record in this matter, Respondent failed to demonstrate that Petitioner did not meet the Skilled Nursing Facility Level of Care. Respondent's witnesses testified that Petitioner did not meet the requisite Level of Care because he did not actually receive skilled nursing services five days a week. However, Respondent's own Manual indicates that determination of whether an individual meets the Skilled Nursing Facility Level of Care hinges upon whether such services are *required*. Respondent's Manual repeatedly provides that an individual must require skilled nursing services, without including an additional requirement that such services are actually received by the individual. *See* KATIE BECKETT MANUAL 2 ("To establish Medicaid eligibility for a child under this program, it must be determined that. . . [t]he child **requires** a level of care provided in a hospital, skilled nursing facility, or intermediate care facility")

(emphasis added); *id.* (“[The] reviewer must determine whether the child **requires** the level of care provided in a hospital, nursing facility, or intermediate care facility.”) (emphasis added); *id.* at 6 (“Nursing facility level of care is appropriate for individuals who do not require hospital care, but who, on a regular basis, **require licensed nursing services, rehabilitation services, or other health-related services ordinarily provided in an institution.**”) (emphasis added). Indeed, the Initial and Final Denial of Continued Services Letters sent by Respondent provided that the Review Team’s determination of ineligibility rested upon the conclusion that Petitioner did not require skilled nursing services. *Exhibits R-2, R-3* (“Rehabilitative services are not required five days per week per documentation submitted which is a requirement of 42 CFR 409.31-409.34”). Respondent offered no evidence or testimony to demonstrate that Petitioner did not require skilled nursing services five days a week. Dr. Miller testified that the Review Team’s decision to deny continued services to Petitioner was based on the fact that Petitioner did not receive skilled services five days a week.

7.

Petitioner definitively demonstrated that he requires skilled nursing services at least five days a week and that he is therefore eligible to receive continued services under Katie Beckett. Petitioner’s primary care physician, his specialists, and the skilled professionals who provide him with rehabilitative services all agree that Petitioner requires rehabilitative services at least five days a week. Indeed, these medical professionals, all of whom are personally familiar with Petitioner’s need for care, predicted that Petitioner’s condition would dramatically worsen if the required services were reduced or discontinued.

8.

The fact that an individual actually receives skilled nursing services may, in some cases, indicate that that individual requires such services. Similarly, the fact that an individual does not actually receive skilled nursing services may be an indicator that he or she does not require skilled nursing services. In Petitioner's case, however, the fact that he does not actually receive skilled nursing services five days a week is by no means indicative of a lack of need for such services. Petitioner is unable to receive rehabilitative services in the amounts recommended by his physician due to circumstances unrelated to a determination of what Petitioner actually requires. Petitioner has definitively shown that the skilled nursing services he currently receives are not commensurate with his physician's recommendations. Accordingly, Respondent failed to demonstrate that Petitioner did not meet Skilled Nursing Facility Level of Care.

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, Respondent's decision to deny Petitioner's continued coverage under the Katie Beckett Waiver is hereby **REVERSED**.

As discussed in Paragraph 1 of the Conclusions of Law, the undersigned is authorized to consider the entire record and make any disposition that was available to the agency. Having considered the record in this matter, the undersigned concludes that Petitioner requires skilled nursing services five days a week.

SO ORDERED, this the 3rd day of January, 2014.


MICHAEL MALIHI, Judge