

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

<p>██████████, Petitioner,</p> <p>v.</p> <p>DEPARTMENT OF COMMUNITY HEALTH,</p> <p>Respondent.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>Docket No.:</p> <p>OSAH-DCH-GAPP-██████████-Miller</p>
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INITIAL DECISION

I. SUMMARY OF PROCEEDINGS

This matter is an appeal by the Petitioner, ██████████, of a decision by the Department of Community Health (“Department”) to terminate his participation in the Georgia Pediatric Program (“GAPP”). The evidentiary hearing took place on October 23, 2013. The Petitioner was present at the hearing, as was his mother, ██████████, who acted as his personal representative. The Department of Community Health (“Department”), Respondent herein, was represented by Elizabeth K. 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 **AFFIRMED**.

II. FINDINGS OF FACT

A. History of Petitioner’s GAPP Participation

1.

The Petitioner was born on October 22, 2009, at thirty-six weeks gestation, and is presently four years old. He was exposed to alcohol and marijuana in utero, and he has been hospitalized several times for respiratory and ear infections. He has been diagnosed with failure to thrive, chronic lung disease, asthma, reactive airway disease, developmental delays

gastroesophageal reflux disorder, and hearing impairment. (Testimony of Karis Morneau, [REDACTED]; Exhibit R-5.)

2.

GAPP Medically Fragile Daycare (“GAPP MFD”) is a Medicaid waiver program that provides skilled nursing services to children under age 5, living at home, who are medically fragile and require the type of continuous skilled nursing services that are usually provided in an institutional setting. Through GAPP MFD, these services are provided in a medically fragile daycare setting. The program defines a skilled nursing service as 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 Brian Dowd; Exhibit R-1 at §§ 601, 701, 702.1, and Appx. R.)

3.

In addition to providing skilled nursing services, GAPP MFD 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 Mr. Dowd; Exhibit R-1 at §§ 702.1, 801, 919, and Appx. R.)

4.

The Petitioner currently receives fifty hours per week of skilled nursing care in the medically fragile daycare setting through GAPP MFD. (Testimony of Ms. Morneau.)

5.

In April 2013, the Petitioner, through his physician and mother, requested authorization from the Department for the Petitioner to continue his participation in GAPP MFD. (Testimony of Ms. Morneau; Exhibit R-5.)

6.

The Department has contracted with the Georgia Medical Care Foundation ("GMCF") to review applications for admission and continued stay in GAPP MFD. 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, a plan of care, and the Petitioner's nursing notes for the three previous months, the team decided to terminate the Petitioner's GAPP MFD participation. (Testimony of Ms. Morneau; Exhibits R-5, R-6, R-7.)

7.

On June 28, 2013, GMCF issued a Final Determination stating that the Petitioner's GAPP MFD participation would be terminated as of July 28, 2013, for the following reasons:

- The child's condition does not meet the following hospital inpatient-qualifying criteria:
 - 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 child does not meet nursing home skilled level of care admission criteria (see [42] CFR § 409.31-409.34, and 42 CFR § 440.10).
- The nurse's notes reviewed for the past 3 months document the stability of your child's condition.
- Your child is able to receive some nutrition orally in addition to his G-tube.
- Oxygen saturations are documented to be 98%-100% while on room air.
- Your child requires pulse oximetry spot checks and [G]-tube/nebulizer medications[,] all of which are not so inherently complex [as] to require a professional licensed person on a daily basis.
- Your child's condition has remained stable with no exacerbations in disease process since last pre-certification period.
- There is no documentation of recent exacerbations in condition in the nurse's notes or assessment in the Appendix I submitted with the GAPP renewal packet.
- While your child was seen in the ER twice in January, twice in February and then hospitalized in February for [p]neumonia, Quintavious was discharged home on room air and antibiotics. Quintavious was also seen in the ER 4/19/13 for a head laceration which does not require skilled nursing.
- There is no evidence from the documentation submitted that the current hours are medically necessary to correct or ameliorate the child's medical condition ([s]ee 42 USCS § 1382h)(b), O.C.G.A. § 49-4-169.1[,] and GAPP Manual § 702.2(A)).

- Your child does not require continued administration of medication(s) by trained medical personnel in order [for the medications] to be delivered safely and effectively.
- 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 those [sic] medically necessary to meet the child's needs.
- 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).
- Non-covered GAPP services include “[s]ervices for [backup] support or respite purposes for the primary or secondary caregiver.” (See GAPP Manual § 905 G.)
- Although your child is receiving physical or speech therapy through Medical[ly] Fragile Daycare, those services can be executed by another program called Children Intervention Services (CIS). CIS is provided to Medicaid[-]eligible members from birth to twenty-one (21) years of age with physical disabilities or a developmental delay, which have been prescribed for rehabilitative or restorative intervention services by a physician. Please contact your child's physician or the GAPP Program Specialist at (404) 657-7882 or scollins@dch.ga.gov for further information[.]

The Petitioner timely appealed the Final Determination. (Testimony of Ms. Morneau; Exhibit P-R-4 [citation forms in original].)

B. The Petitioner's Current Medical Status

5.

The Petitioner's mother [REDACTED], is his primary caregiver. The Petitioner attends [REDACTED], a daycare facility for medically fragile children, five days per

week for up to ten hours per day. (Testimony of Ms. Morneau, [REDACTED]; Exhibits R-5, R-7.)

6.

In April 2013, when the Petitioner's application for continued stay in GAPP MFD was submitted, the Petitioner was receiving 75% of his daily calories through a gastrostomy tube ("G-tube"), which delivers nutrition directly to his stomach. He also received respiratory medications through a nebulizer, and the statement of medical necessity indicated that he required one or two sessions per week of speech therapy, physical therapy, and occupational therapy. Since his application was submitted, the Petitioner's condition has improved significantly. (Testimony of Ms. Morneau, [REDACTED]; Exhibits R-5, R-7, R-8, R-9.)

7.

Currently, almost all of the Petitioner's daily caloric intake is by mouth. Although he has a laryngeal cleft, which causes him to aspirate thin liquids,¹ he is able to drink liquids of a nectar consistency. Moreover, thin liquids can be easily thickened for his consumption with the addition of a thickening powder. To the extent he may still require occasional G-tube feedings, [REDACTED] is competent to perform this task. (Testimony of Ms. Morneau, [REDACTED]; Exhibits R-6, R-7, R-9.)

8.

The Petitioner does not require supplemental oxygen, and his oxygen saturation routinely measures 97% or better on room air. [REDACTED] is competent to administer his respiratory

¹ The Petitioner is expected to undergo a surgical procedure to correct the cleft in January 2014. (Testimony of [REDACTED]; Exhibit P-1.)

medications by nebulizer. (Testimony of [REDACTED]; Exhibits P-1, P-2, R-4, R-5, R-6, R-8, R-9.)

9.

The daycare facility provides the Petitioner with physical therapy, occupational therapy, and speech therapy due to his developmental delay and swallowing issues. However, the Petitioner receives direct therapy services only once or twice per month. Further, all of these therapies can be provided outside of a medically fragile daycare, either through the state Medicaid plan or Children's Intervention Services, another Medicaid program. (Testimony of Mr. Dowd, Ms. Morneau, and [REDACTED]; Exhibits R-7, R-8, R-9.)

10.

With the exception of skilled nursing assessments, the daycare facility does not provide the Petitioner with any skilled nursing services that [REDACTED] is not competent to perform. The Petitioner does not require skilled nursing assessments on a daily basis. (Testimony of Ms. Morneau; Exhibit R-5.)

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 services as needed “to correct or ameliorate defects and physical and mental illnesses” 42 U.S.C. § 1396d(r)(5). The Petitioner receives such services through GAPP MFD. See 42 U.S.C. § 1396d(a).

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).

B. GAPP Eligibility Requirements

6.

The GAPP Medically Fragile Daycare program is designed to serve eligible children under age five “who are medically fragile and who also meet institutional level of care criteria which is defined as needing continuous care for an acute condition (hospital level of care) or the nursing facility level of care for a chronic condition.” Part II, Policies and Procedures for the Georgia Pediatric Program Medically Fragile Daycare (“GAPP MFD Manual”) § 601.1 (Exhibit R-1).

7.

In this case, it is undisputed that the Petitioner is medically fragile, thereby meeting the first requirement for program participation. It is further undisputed that the Petitioner does not require a hospital level of care, as he does not need “continuous care for an acute condition.” GAPP MFD Manual § 601.1 (Exhibit R-1). Thus, the only contested issue is whether the Petitioner meets the requirements 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.” Additionally, among other requirements, the Petitioner “must require skilled nursing or skilled rehabilitation services, or both, on a daily basis.” GAPP MFD Manual Appx. R (Exhibit R-1).

9.

The Department proved, by a preponderance of the evidence, that the Petitioner does not meet the requirements for the nursing facility level of care. As set forth in detail in the Findings of Fact, above, the Petitioner does not require any nursing service that is so complex that it cannot be performed safely and effectively by [REDACTED], and he does not require skilled nursing or skilled rehabilitation services on a daily basis.

10.

The Department properly determined that termination of the Petitioner’s GAPP participation 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.

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 GAPP is hereby **AFFIRMED.**

SO ORDERED, this 26th day of November, 2013.

KRISTIN L. MILLER
Administrative Law Judge