

RE: Petitioner

Docket No.: OSAH-DCH-SOURCE Malihi

MAIL TO:




YVONNE HAWKS
DEPARTMENT OF COMMUNITY HEALTH
2 PEACHTREE STREET
40TH FLOOR
ATLANTA, GA 30303

GEORGIA DEPARTMENT OF COMMUNITY HEALTH
HEALTHCARE FACILITIES REGULATION DIVISION
LEGAL SERVICES UNIT, ATTN: APPEALS REVIEWER
2 PEACHTREE STREET, 40th FLOOR
ATLANTA, GA 30303

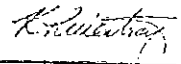
**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

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|-----------------------|---|-------------------------|
| Petitioner, | : | Docket No.: |
| | : | OSAH-DCH-SOURCE- MALIHI |
| v. | : | |
| | : | Agency Reference No. |
| GEORGIA DEPARTMENT OF | : | |
| COMMUNITY HEALTH, | : | |
| Respondent. | : | |


FILED
OS VII
DEC 19 2013

INITIAL DECISION

I. Introduction


Kevin Westray, Legal Assistant

“TR”) appealed the Department of Community Health’s (“DCH’s”) decision to terminate his participation in the Service Options Using Resources in Community Environments program (“SOURCE”). The hearing on this matter was held before the undersigned Administrative Law Judge on December 6, 2013 at the Office of State Administrative Hearings (OSAH) in Atlanta, Georgia. TR appeared at the hearing. Ms. Monica Hood with Atlanta Legal Aid Society appeared at the hearing as TR’s personal representative. Ms. Yvonne Hawks, Esq., represented DCH. The following individuals also appeared and provided testimony at the hearing: Lorrie Stewart, RN, SOURCE Policy Specialist; Kathy Jackson, RN, SOURCE Care Manager; and Ms. Wakina McMichael, a CNA with RediNurse. For reasons indicated below, DCH’s action is **AFFIRMED**.

This record is sealed to protect medical records of TR referenced in hearing exhibits or other documents that were submitted for this hearing. Release of any documents other than this decision can occur only upon review and redaction of TR’s name from the record. Neither Petitioner nor Respondent is authorized to utilize any documents exchanged pursuant to this litigation without redaction of the name of individuals referenced.

II. Findings of Fact

1. TR is a forty-six-year-old Medicaid recipient. He has participated in the SOURCE Program since July 11, 2011. He currently resides alone in his apartment and has no informal helpers. He receives home-delivered meals and personal support services through the SOURCE Program. *Exhibit R-6; Testimony of Wakina McMichael.*

2. TR has been diagnosed with congestive heart failure, morbid obesity, diabetes mellitus, asthma, hypothyroidism, and hypertension. TR has been prescribed medications for congestive heart failure, hypertension, and hypothyroidism. Due to his hypertension and diabetes, TR is on a specialized, low-sodium diet, which he receives in the form of meals delivered to his home by Project Open Hand. He uses a CPAP Machine to help control his asthma at night. TR has suffered no recent hospitalizations or emergency room visits. *Exhibits R-6, R-7, R-8, R-9, P-1.*

3. On April 16, 2013, Ms. Celia Washington, LPN, a SOURCE case manager, visited TR at his home to conduct an assessment of TR's eligibility for continued participation in the SOURCE program using the interRAI Home Care (HC) and SOURCE Assessment Addendum.¹ *Exhibit R-8, R-9.*

4. The assessment shows that TR is independent with regard to most of his activities of daily living (ADLs). TR requires only setup assistance with walking, locomotion, and transfer toilet.² TR requires limited assistance with bathing and dressing his upper and lower body. TR requires no assistance, however, with toilet use, bed mobility, eating, and personal hygiene. TR reported to Ms. Washington that he had suffered no falls in the past thirty days. *Exhibits R-8, R-9.*

5. TR uses a cane to assist him with ambulating around his apartment. TR reported to Ms. Washington that he walked with an unsteady gait and experienced difficulty in both moving to a standing position and turning around. TR also reported experiencing shortness of breath even when he was at rest. *Exhibits R-8, R-9.*

6. According to the results of the reassessment, TR needs some assistance in performing some instrumental activities of daily living (IADLs). He requires occasional help with preparing meals, negotiating stairs, and shopping. TR drives a car and requires only set-up assistance with transportation. TR manages his own medications and uses the phone without assistance. *Exhibits R-8, R-9; Testimony of Wakina McMichael.*

7. TR suffers from no cognitive impairments. He is capable of consistent, reasonable, and independent decision-making. He experiences no communications problems and is capable of both making himself understood and understanding others without difficulty. *Exhibit R-8.*

8. The target population for SOURCE includes physically disabled individuals who are functionally impaired, or have acquired a cognitive loss, who need assistance to perform ADLs or IADLs. Any member of such a population must meet eligibility requirements indicated in Part II-Chapter 700 of the SOURCE manual in a manner consistent with Georgia's application for a § 1915 (c) Home and Community Based Services Waiver as approved by the Centers for Medicare and Medicaid Services (CMS). An individual receiving SOURCE benefits must meet eligibility criteria based on the definition of Intermediate Nursing Home Level of Care. *Exhibits R-1, R-2, R-3, R-4; Testimony of Lorrie Stewart.*

9. A SOURCE review team reviewed the results of the April 16, 2013 assessment along with TR's care management progress notes and supplemental medical records. Ms. Washington also contacted the office of Dr. P A , TR's primary care physician. Ms. Washington spoke with Ms. J. K , who conveyed Dr. A 's concurrence with the results of the SOURCE assessment. Based on this information, the review team concluded that TR did not

¹ "interRAI" is an international research and development collaboration. <http://www.interrai.org>. It developed a form designed to be used by health or social care professionals. The form contains self-reliance items and domains relating to preventive health items, personal safety and accommodation.

² Set-up assistance entails placing articles or items necessary to complete a task within the individual's reach. It does not involve any physical assistance or supervision. *Exhibit R-8.*

meet the requisite Nursing Facility Level of Care and that he did not meet the 1915-c Waiver target population guidelines. On May 15, 2013, DCH notified TR in writing that his participation in the SOURCE program would be terminated because he did not meet the criteria for Intermediate Nursing Home Level of Care as indicated in Section 801.3 of the SOURCE manual and for the 1915-c Waiver target population. TR appealed DCH's determination to terminate his participation in the SOURCE program in a letter dated June 3, 2013. *Exhibits R-1, R-2, R-3, R-4, R-5, R-6, R-7, R-8, R-9, R-10, R-11, R-12; Testimony of Kathy Jackson.*

10. Ms. Wakina McMichael, a Certified Nurse Aide with RediNurse, testified at the hearing. Ms. McMichael provides TR with personal support services three days a week for approximately three hours a day. During her visits to TR's apartment, Ms. McMichael assists TR with his activities of daily living (ADLs) and instrumental activities of daily living (IADLs). This assistance involves preparing TR's meals, performing ordinary housework around his apartment, and assisting him with bathing and dressing. *Testimony of Wakina McMichael.*

11. Ms. McMichael testified that TR experiences dizziness if he attempts to bend over, and for this reason he is unable to bathe or dress his lower body without assistance. Ms. McMichael further testified that Petitioner is unable to stand for long periods of time and can prepare simple meals in the microwave only by sitting on a chair in the kitchen. According to Ms. McMichael, TR's condition has rendered him unable to perform ordinary housework and he depends on her to complete household chores such as dishwashing and laundry. When asked if TR was "able to negotiate stairs without personal assistance," Ms. McMichael indicated that TR was capable of going upstairs by holding onto both rails while she held his cane.

12. Ms. McMichael also indicated in her testimony that she assists TR with taking his medications. Although Ms. McMichael does not actually administer TR's medications, she testified that she must remind him to take them, since he is prone to forget. *Testimony of Wakina McMichael.*

13. Both Petitioner and Respondent submitted into evidence the Care Management Progress Notes taken by SOURCE Care Managers during their contacts with TR. These Notes, which were taken between May 2012 and August 2013, document that TR reported several falls to his Care Managers. None of these falls resulted in hospitalizations or injury to TR. *Exhibits R-12, P-1, P-2, P-4.*

14. TR did not testify at the hearing.

15. TR's representative contended that DCH had not conformed to the procedural requirements necessary to terminate TR's SOURCE benefits because DCH was required by its own rules to consult with TR's primary care physician. According to TR's representative, DCH did not meet this requirement by consulting with a member of Dr. Antoine's staff, but was required to speak directly with Dr. Antoine. *Exhibits P-4, P-6.*

16. TR's representative also argued that DCH failed to conform to the discharge planning and referral assistance provision of the SOURCE Manual. TR's representative submitted into evidence the SOURCE Case Management Form for Discharge Planning completed by Ms. Washington and Ms. Audrey Miller, another SOURCE Care Manager. The Form indicated that

DCH case managers contacted TR and referred him to DFCS after DCH determined that he should be discharged. TR was thereafter contacted by DCH on two occasions to conduct follow-ups. According to TR's representative, this was insufficient to meet the SOURCE Manual's requirement that DCH "review other resources to meet the member's needs." *Exhibits P-6, P-10.*

17. Finally, TR's representative argued that TR was owed more detailed notice of the reason for his termination than what DCH provided to him. *Exhibits P-6, P-9, P-11, P-12.*

III. Conclusions of Law

Overview of Medicaid Waiver Program

1. In 1965, the Medicaid program was created "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." Skandalis v. Rowe, 14 F.3d 173, 175 (2nd Cir. 1994), quoting Harris v. McRae, 448 U.S. 297, 301 (1980). See Social Security Act, 42 U.S.C. § 1396 *et seq.* (the "Act"). If a state elects to participate in the Medicaid program, it must obtain approval from the Secretary of the Department of Health and Human Services ("Secretary") of a plan specifying the programs and services it will offer using Medicaid funds. See 42 U.S.C. § 1396a. See also Susan J. v. Riley, 254 F.R.D. 439, 445 (M.D. Ala. 2008). Certain programs and services are mandatory under the Act, such as inpatient hospital services and laboratory and X-ray services, and other services may be funded through Medicaid "at the option of the State." 42 U.S.C. § 1396a(a)(10)(A)(i) and (ii); 42 U.S.C. § 1396d(a)(1), (3) & (4). See Skandalis, 14 F.3d at 175; Susan J., 254 F.R.D. at 446.

2. Home and community-based services ("HCBS")³ are optional services and may be reimbursed under a state plan if the state applies for and obtains a "waiver" from the Secretary to provide such services under section 1915(c) of the Act [42 U.S.C. § 1396n(c)]. See 42 U.S.C. § 1396a(a)(10)(A)(ii)(VI); 42 C.F.R. § 430.25; Susan J. v. Riley, 254 F.R.D. at 446. "The term 'waiver' comes from Section 1915(c) of the Social Security Act, enacted in 1981,⁴ which gave the Secretary . . . the power to waive certain requirements of the Medicaid Act." *Id.*; see 42 C.F.R. § 441.300 ("Section 1915(c) of the Act permits States to offer, under a waiver of statutory requirements, an array of home and community-based services that an individual needs to avoid institutionalization."). The statutory requirements that the Secretary may waive include uniform

³ HCBS may include the following services: case management services, homemaker services, home health aide services, personal care services, adult day health services, habilitation services, respite care services, day treatment for individuals with chronic mental illness, and other services that are cost effective and necessary to avoid institutionalization. 42 C.F.R. § 440.180.

⁴ "Before 1981, Medicaid provided assistance for long-term care only if the individual resided in an institution. That year, Congress attempted to change the 'institutional bias' of Medicaid by passing § 1915(c) of Title XIX of the Social Security Act, which created the [HCBS] Waiver Program for the treatment of individuals with mental retardation in the community. In 1986, Congress also extended the waiver program to provide community-based services for individuals with chronic mental illness. The term 'waiver' derives from the fact that the Secretary . . . can choose to waive certain requirements of Title XIX." Note, "Don't Tread on the ADA": + Olmstead v. L.C. Ex Rel. Zimring and the Future of Community Integration for Individuals with Mental Disabilities, 40 B.C. L. Rev. 1221, 1229 (1999)(footnotes omitted).

requirements relating to statewideness, comparability,⁵ and income and resource limits. See 42 U.S.C. § 1396n(c)(3).

3. In order to provide HCBS through a waiver program, states must “submit a proposal prepared in accordance with regulations promulgated by the Secretary.” Skandalis, 14 F.3d at 176. For example, the federal regulations require that a state’s application for a waiver include an assurance that services will be furnished only to recipients who, in the absence of such services, would require Medicaid-covered care in a hospital, nursing facility or an intermediate care facility for the mentally retarded. 42 C.F.R. § 441.301(b)(1)(iii). In addition, federal regulations require that each waiver application “be limited to one of the following target groups or any subgroup thereof that the State may define:”

- (i) Aged or disabled, or both.
- (ii) Mentally retarded or developmentally disabled, or both.
- (iii) Mentally ill.

42 C.F.R. § 441.301(b)(6); see also 50 Fed. Reg. 10013, Sec. III.H. (Mar. 13, 1985) (“States are required to submit individual waiver requests for each target group (or subgroup) to expedite the waiver review process and to avoid the need to deny a waiver request involving more than one of the three target groups when there are problems that relate to only one of those groups.”).

Georgia’s Waiver Program: SOURCE

4. Georgia provides funding for HCBS primarily through Medicaid waiver programs. See Note, *Deinstitutionalization: Georgia’s Progress in Developing and Implementing an “Effective Working Plan” as Required by Olmstead v. L.C. ex rel. Zimring*, 25 Ga. St. U. L. Rev. 699, 722 (Spring 2009). DCH designed SOURCE to provide enhanced case management for eligible members and, if necessary, fund various community services. According to DCH’s SOURCE Manual, “[t]he need for paid community services is not a prerequisite for membership in SOURCE. Case management alone provides sufficient support for some members to maintain residence in the community. . . .” (*Part II – Chapters 600-1400, Policies and Procedures for Service Options Using Resources in Community Environments (SOURCE)* [hereinafter *SOURCE Manual*], Sections 601, 800, 807).

5. In the past, the SOURCE program was part of the Georgia state plan for Medicaid. On April 1, 2008, DCH sought approval from the Centers for Medicare and Medicaid Services (“CMS”) to remove the SOURCE program from the state plan. On June 26, 2008, CMS approved DCH’s requested amendment to the state plan and removed SOURCE from the state plan effective April 1, 2008.

6. States have discretion in choosing what services will be offered through their Medicaid waiver programs and who the intended target group for the waiver services will be. See

⁵ “Comparability,” the requirement waived under the HCBS waiver at issue in this case, refers to the requirement under § 1902(a)(10)(B) of the Act that the medical assistance made available to any individual “shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual.” 42 U.S.C. § 1396a(a)(10)(B). See Susan J., 254 F.R.D. at 455.

generally Susan J. v. Riley, 616 F. Supp. 2d 1219, 1240 (M.D. Ala. 2009); Note, 40 B.C. L. Rev. at 1230 (“Under the HCBS Waiver Program, states have the flexibility to select the particular services that are most appropriate for their target population.”). The federal regulations describe the purpose of the Medicaid waiver program as follows:

Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to adapt their programs to the special needs of particular areas or groups of recipients. Waivers allow exceptions to State plan requirements and permit a State to implement innovative programs or activities on a time-limited basis, and subject to specific safeguards for the protection of recipients and the program.

42 C.F.R. § 430.25(b).

DCH Correctly Determined That Petitioner Does Not Meet the Required Level of Care

7. The minimal requirements for an individual to qualify for a nursing facility level of care specify that the applicant be:

1. diagnosed with a stable medical condition requiring intermittent skilled nursing services under the direction of a licensed physician; and
2. have a mental or functional impairment that would prevent self-execution of the required nursing care.

Part II, Policies and Procedures for Nursing Facility Services, p. VIII-3.

8. SOURCE providers have been given guidance in how to evaluate and reevaluate level of care in Appendix I of the SOURCE Manual. Per Appendix I, an individual must meet the requirements contained in Column A regarding Medical Status plus at least one item from Column B regarding Mental Status or Column C regarding Functional Status.

9. The Medical Status Column (Column A) is used to determine whether an individual has “a stable medical condition requiring intermittent skilled nursing services under the direction of a licensed physician.” The patient must have a condition that must be monitored and managed under the direction of a licensed physician. Additionally, care for the patient’s medical condition must require one of the following:

- Nutritional management, which may include therapeutic diets or maintenance of hydration status
- Maintenance and preventive skin care and treatment of skin conditions, such as cuts, abrasions or healing decubiti
- Catheter care such as catheter change and irrigation
- Therapy services such as oxygen therapy, physical therapy, speech therapy, [or] occupational therapy

- Restorative nursing services such as range of motion exercises and bowel and bladder training
- Monitoring of vital signs and laboratory studies or weights
- Management and administration of medications including injections

SOURCE Manual § 801.3, App'x I.

10. DCH does not dispute that TR suffers from stable conditions requiring intermittent skilled nursing services under the direction of a licensed physician. TR is under the care of a physician due to his congestive heart failure, morbid obesity, hypertension, diabetes mellitus, and asthma. His nutrition must be managed through a specialized, low-sodium diet. Additionally, TR requires therapy services (a CPAP machine) and his vital signs and weight must be monitored. Therefore, TR satisfies the requirements described in Column A of Appendix I. In order to meet the intermediate nursing home level of care and thus qualify for SOURCE, however, TR must meet one item from Column B or C (with the exception of Item #5 under Column C).

11. TR suffers from no cognitive disabilities that would meet any of the requirements listed under the Mental Status Column (Column B). Although Ms. McMichael provided testimony to the effect that TR has trouble remembering to take his medications, this amounts to occasional forgetfulness, which does not constitute a cognitive loss that would meet any criterion listed under Column B. *See SOURCE Manual, App'x I.*

12. To meet the intermediate nursing home level of care criteria based on a functional impairment (Column C), one of the following conditions must be met (with the exception of bullet 5):

- Transfer and locomotion performance of resident requires limited/extensive assistance by staff through help or one-person physical assist.
- Assistance with feeding. Continuous stand-by supervision, encouragement or cueing required and set-up help of meals.
- Requires direct assistance of another person to maintain continence.
- Documented communication deficits in making self-understood or understanding others. Deficit must be addressed in medical record with etiologic diagnosis addressed on MDS/care plan for continued placement.
- Direct stand-by supervision or cueing with one-person physical assistance from staff to complete dressing and personal hygiene. (If this is the only evaluation of care identified, another deficit in functional status is required).

SOURCE Manual § 801.3; *Id.* at Appendix I.

13. TR requires no assistance with his personal hygiene. However, the results of the SOURCE assessment indicated that he does require limited assistance in dressing his upper and lower body. Ms. McMichael also provided testimony confirming that TR is unable to dress or bathe his lower body on his own. Therefore, TR meets the requirement described above in bullet 5. However, the individual must require care additional to that described in bullet 5 in order to meet the level of care.

14. A functional impairment that inhibits an individual's performance in transfer and locomotion to the extent that he requires "limited or extensive assistance by staff through help or one-person physical assistance" is sufficient to satisfy the first item under Column C. However, TR requires only set-up assistance with transfer and locomotion; he does not require direct physical assistance from staff. TR is able to walk and move without physical assistance. Indeed, Ms. McMichael testified that TR is even able to negotiate stairs. Although TR has an unsteady gait and has difficulty in turning himself around, these conditions are corrected through the use of a cane, and therefore do not prevent the self-execution of his care. Furthermore, Ms. McMichael provides assistance to TR for only three hours a day, three days a week. TR is able to manage without her assistance for the majority of the week when she is absent. TR did not contend that he met any of the other criteria listed under Column C. Accordingly, DCH's determination that TR did not meet the minimal requirements to qualify for intermediate nursing home level of care for participation in SOURCE was supported by the evidence.

DCH Sufficiently Consulted with Petitioner's Primary Care Physician

15. Through the argument of his attorney, TR contended that DCH did not sufficiently review his diagnoses, medications, treatments with his primary care physician to "ensure concurrence with [his] health and functional status as documented on [the SOURCE assessment form]" as required in the SOURCE Manual. *See SOURCE Manual § 1406 15.B.*

16. The Care Management Progress Notes indicate that Ms. Washington "placed a call to Dr. P A 's office on 5/1/2013 and spoke to J. K who [she] completed [a] PCP concurrence with." According to Ms. Washington's notes, Ms. K conveyed the doctor's agreement with the data on the SOURCE assessment form and confirmed TR's diagnoses, medications, and treatments. This interaction between DCH and Dr. A 's office is reasonable to establish that DCH fulfilled the requirement set forth in the SOURCE Manual. There is no evidence to contradict DCH's communication with Dr. A 's office.

DCH Complied with the Discharge Planning and Referral Assistance Provision of the SOURCE MANUAL

17. The SOURCE Manual requires that the SOURCE review team and case manager "review other resources to meet the member's needs." *SOURCE Manual § 1406 15.B.* The evidence on record demonstrates that DCH accomplished this. The Case Management Form for Discharge Planning indicates that case managers contacted TR by telephone and provided him with information about alternative resources. Although TR's representative argued that DFCS was an inadequate alternative resource, this notation on the form describes merely the general topic of the case manager's conversation with the member, not the extent of the information provided. The Form also indicates that DCH followed up with TR on May 28, 2013 and June 13, 2013. This evidence is sufficient to demonstrate that DCH fulfilled the requirement described in the SOURCE Manual. *See id.*

DCH Provided Petitioner with Sufficient Notice

18. TR, through the argument of counsel, submitted at the hearing that DCH provided insufficient notice regarding the termination of his benefits. TR's counsel disputed the sufficiency of the notice in that the reason for the termination of TR's benefits was not included in adequate detail to satisfy the requirements of the SOURCE Manual, state law, and federal law.

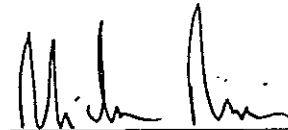
19. The written notice DCH sent to TR provides that, pursuant to 42 CFR 441.301(b)(I), (II) and 441.302(c)(2), it made the determination to terminate the services he received through SOURCE. DCH's notice informed TR that its decision was based on its conclusion that he did not meet the criteria for intermediate nursing home level of care. The notice also referred TR to sections of the SOURCE Manual that support DCH's decision. The notice further provided that, if TR disagreed with DCH's decision, he had the right to request a fair hearing. This notice is sufficient to satisfy the notice requirements delineated in the SOURCE Manual as well as those required by state and federal law.

20. Moreover, the adequacy of the notice provided to TR is evidenced by the fact that he has been active in the appeal process. He timely submitted a request for a hearing to DCH and appeared at the hearing, where he was provided with every opportunity to present his case and cross-examine DCH's witnesses.

IV. Decision

IT IS HEREBY ORDERED that DCH's termination of TR's participation in the SOURCE program per notice issued on May 15, 2013 is **AFFIRMED** on the basis that TR does not meet criteria for Intermediate Nursing Home Level of Care pursuant to section 801.3 of the SOURCE manual.

SO ORDERED, this 19th day of December 2013.



MICHAEL MALIHI
Administrative Law Judge