

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

██████████, :
Petitioner, :
 :
v. : Docket No:
 : OSAH-DCH-GAPP-██████████-Walker
 :
DEPARTMENT OF COMMUNITY :
HEALTH, :
Respondent. :

INITIAL DECISION

This matter comes before this Court pursuant to an appeal filed by BB ("Petitioner") in response to the decision of the Georgia Department of Community Health ("Department") to terminate his participation in the Georgia Pediatric Program ("GAPP"). An administrative hearing took place on December 16, 2014. For the reasons indicated below, the Department's decision is **AFFIRMED**.

I. FINDINGS OF FACT

1.

Petitioner is two years old. He was born prematurely at twenty-three weeks of gestation and spent the first months of his life in a Neonatal Intensive Care Unit. As a result of his premature birth, he has been diagnosed with a number of conditions including, Broncho-Pulmonary Dysplasia, Retinopathy, Hydrocele, Hypothyroidism, and Sleep Apnea. (Testimony of MB and TB; Exhibits R-5; P-2.)

2.

GAPP is a Medicaid waiver program that provides skilled nursing services to children who require the type of continuous skilled nursing services that usually are provided in an institutional setting. Skilled nursing services are services "so inherently complex that [they] 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.”¹ In Georgia, the Department administers the GAPP program. (Testimony of Sharon Collins; Exhibits R-1; R-2 at §§ 601, 701, 702.1, 902.)

3.

GAPP Medically Fragile Daycare (“GAPP-MFD”) serves children under five years old, and provides “specialized pediatric services to medically fragile members with a current Individualized Family Service Plan (IFSP) in a licensed day care facility.” Petitioner currently has an IFSP and attends a medically fragile daycare for fifty hours per week. (Testimony of TB; Testimony of Sharon Collins; Testimony of Karis Morneau; Exhibits R-1; R-2 at §§ 601, 701, 702.1, 902.)

4.

The Department reassesses a child’s eligibility for GAPP services every six months. If a child no longer has the need for skilled nursing services, the Department must discharge the child from the program. (Testimony of Sharon Collins; Exhibit R-2 at § 801.)

5.

Fortunately, over the past two years, Petitioner has made significant progress. However, at times, particularly when he is sleeping, he may require supplemental oxygen. A polysomnogram, or sleep study, performed on September 4, 2013, noted that Petitioner’s condition was “considerably improved” as compared to a prior exam performed on October 10, 2012. At this point, Petitioner has “Mild Obstructive Sleep Apnea” and, according to his physician, should be allowed to fall asleep without supplemental oxygen. An oxygen and pulse oximeter monitors his oxygen saturation rate. If Petitioner is “desatting” such that his saturation rate decreases below ninety three percent, he would need to receive titrated oxygen. (Testimony of TB; Testimony of Karis Morneau; Exhibits P-1; P-2.)

4.

The Department has contracted with the Georgia Medical Care Foundation (“GMCF”) to review applications for admission and continued stay in GAPP-MFD. A GAPP review team, which consists of physicians and nurses with experience in pediatric care, must comply with the Department’s policies in making its determination. The review team evaluated Petitioner’s physical condition by reviewing documentation submitted by his parents, a statement of medical necessity, a plan of care, and Petitioner’s nursing notes from the three previous months. Based

¹ 42 C.F.R. § 409.32(a).

on the submitted documentation, the team decided to issue an initial notice that it intended to terminate Petitioner's GAPP-MFD participation. (Testimony of Karis Morneau; Exhibits R-2 at § 801; R-4.)

5.

After Petitioner's parents submitted additional materials to GMCF, the review team issued a Final Determination Letter on May 20, 2013. The Final Determination Letter noted that while Petitioner did require a pulse oximeter, oxygen via a nasal canula, and oral/nebulizer medications, none of these treatments were so inherently complex that they required skilled nursing services.² (Testimony of Sharon Collins; Testimony of Karis Morneau; Exhibit R-3.)

6.

Petitioner's parents, MB and TB, appeal the Department's determination. In particular, they are worried that their son may "desat" such that he needs titrated oxygen. The [REDACTED] acknowledge that an individual can be trained to monitor the need for supplemental oxygen, but maintain that the performance of this assessment, and administration of any needed oxygen, are skilled nursing services. In opposition, the Department concludes that such services are not skilled nursing services warranting continued participation in the GAPP-MFD program. (Testimony of MB and TB; Testimony of Sharon Collins; Testimony of Karis Morneau.)

II. STANDARD OF REVIEW

² Although the Department has determined that Petitioner is no longer eligible for GAPP-MFD, in the event that Petitioner's condition worsened such that he again needed skilled nursing services, he could reapply for GAPP-MFD services. Petitioner also receives physical therapy, occupational therapy and speech therapy at the medically fragile daycare. Petitioner may continue to receive these services via other Department programs. (Testimony of Sharon Collins; Testimony of Karis Morneau.)

This matter concerns the Respondent's reduction of Petitioner's benefits; therefore, Respondent bears the burden of proof. Ga. Comp. R. & Regs. r. 616-1-2-.07. The standard of proof is a preponderance of evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21.

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 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, diagnostic and treatment services ("EPSDT") as needed "to correct or ameliorate defects and physical and mental illnesses." 42 U.S.C. § 1396d (r)(5).

3.

Providing the necessary services for those under the age of 21 is not optional for a state; the appropriate care must be provided "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).

4.

"The 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). Private skilled nursing is an enumerated category of treatment under the Medicaid Act. 42 U.S.C. § 1396d (a)(8).

5.

GAPP-MFD is a specific Medicaid program designed to serve eligible children under the age of 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 § 601.1 (Exhibit R-2).

6.

In this case, the issue presented by the parties is whether the monitoring of Petitioner’s oxygen saturation and the administration, if necessary, of supplemental oxygen is a skilled service so inherently complex that it can safely and effectively be performed only by, or under the supervision of, professional or technical personnel. 42 C.F.R. § 409.32.

7.

Under 42 C.F.R. § 409.33(b)(8), the “[i]nitial phases of a regimen involving administration of medical gases” would constitute skilled nursing services. However, either the administration of routine oral medications or “administration of medical gases after a regimen of therapy has been established” specifically are excluded as a skilled nursing services. 42 C.F.R. § 409.33(d)(1), (10). The testimony at the hearing indicated that all of the parties agree that a regimen of therapy has been established: Petitioner does not generally need supplemental oxygen; however, it is only if Petitioner’s oxygen saturation rate drops below ninety three percent that he should receive supplemental oxygen through a nasal canula.

IV. CONCLUSION

The Department proved, by a preponderance of the evidence, that at this time Petitioner does not require any nursing service that is so complex that it cannot be performed safely and effectively without skilled nursing services. In accordance with the foregoing Findings of Fact and Conclusions of Law, the Department’s decision to terminate the Petitioner’s participation in GAPP-MFD is **AFFIRMED**.

SO ORDERED THIS 16th day of January, 2013.

RONIT WALKER, ALJ