BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

[redacted],	)	
	)	
Petitioner,	)	Docket Number:
	)	OSAH-DCH-P-GAPP-[redacted]- Langston
v.	)	
	)	
DEPARTMENT OF COMMUNITY HEALTH,	)	
	)	
	)	
Respondent.	)	

INITIAL DECISION

I. INTRODUCTION

A hearing in this matter was held on November 13, 2013 to determine whether the medically fragile daycare program ("MFDC") benefits provided to the Petitioner, under the Georgia Pediatric Program ("GAPP") should be terminated. After careful consideration of the evidence and the arguments of the parties, the Department's decision to terminate Petitioner's MFDC benefits is hereby **REVERSED.**

II. FINDINGS OF FACT

1.

Petitioner is a three-and-a-half-year-old Medicaid recipient who is medically fragile and severely disabled. Petitioner's parents are her primary caregivers. Her disabilities stem from a primary diagnosis of holoprophencephaly. She has multiple secondary diagnoses including an almost complete lack of brain stem, feeding problems, failure to thrive, chromosome 13 deletion, radial abnormalities, chronic lung, deafness, respiratory distress, risk for airway obstruction, constipation related to history of anal atresia, inability to walk, stand or sit independently, no trunk control, history of skin breakdown, jerky movement of the body of unknown etiology, profound cognitive delays, incontinence of bladder and bowel function, septo-optic dysplasia, significant vision impairment, hypotinia, gastro-esophageal reflux disease, and obstructive sleep apnea.

2.

Functionally, due to these conditions, Petitioner is entirely dependent on others to attend to her basic needs, as she cannot move independently, can eat only by way of feeding tubes, is incontinent, and is confined to a wheelchair. She cannot speak or hear, and is legally blind. Her condition is permanent and will not improve, and barring access to the current level of care, she is guaranteed to worsen. However, Petitioner is likely to worsen over time due her diagnosis and "chronic aspiration," necessitating frequent suctioning.

3.

Petitioner's primary need for care stems from her chronic feeding and respiratory issues. Petitioner's fragile medical condition complicates her feeding and respiratory issues making the tasks associated with those issues complex.

4.

Petitioner's average day involves being picked up on a MFDC bus around 7:00 a.m. and arriving at the MFDC center around 8:00 a.m. A nursing assessment is completed at pick-up from Petitioner's home to ensure her safety. A complete head-to-toe assessment of Petitioner is completed upon arrival to the center to determine her appropriate care for the day. Petitioner is placed on a continuous saturation monitor and her oxygen levels are monitored continuously. Petitioner requires repositioning at least hourly in addition to positioning as needed for desaturations. Petitioner often requires Xopenex, Alubuterol or Pulmocort treatments to help open her airways, and frequently requires deep suctioning for mucous plugs. Occasionally, Petitioner requires additional oxygen if other measures are not effective to bring up her oxygen to safe levels. Petitioner receives medications administration at 9:00 a.m. and noon daily with additional Xopenex as needed throughout the day. Petitioner has G-tube feeds that run continuously. Petitioner receives daily G-tube care and often her feeds have to be adjusted based on poor toleration, increased residuals, vomiting, and/or coughing and gagging placing her at high risk for aspiration. Petitioner also requires therapy by skilled therapists several times a day and daily activities by nurses that have been instructed by therapists to help her reach her goals. Petitioner is also placed in therapy equipment throughout the day to promote her rehabilitation goals.

5.

Failure to properly manage Petitioner's aspirations can lead to pneumonia or even death.

6.

Skilled nursing services are necessary to properly manage Petitioner's breathing and feeding difficulties. Specifically, when Petitioner's oxygen levels fall below safe levels, critical thinking is required to determine which of the four breathing medications, in addition to changes of position, should be used and in what order. Being able to properly listen to how Petitioner's lungs sound through use of a stethoscope and to properly assess what is heard is key in assessing Petitioner's status. This is a skilled nursing task that can only be safely and effectively provided by skilled personnel.

7.

If Petitioner's oxygen levels are too low, a nursing assessment is conducted. The assessment may show that either 1) Petitioner has a tight airway with wheezing, 2) Petitioner has diminished breath sounds with fever or, 3) Petitioner is choking on a mucus plug. All three of these assessed situations call for different decision paths and choice of treatment. Each of these scenarios require a different intervention and given Petitioner's fragile medical condition, requires critical decision making by skilled personnel to select the proper intervention quickly enough so as not to jeopardize Petitioner's health.

8.

Despite provider training, Petitioner's caregivers continue to have confusion as to which respiratory medications to administer when the child is in acute respiratory distress. The caregivers do not yet understand the difference between brochodilators and preventatives.

9.

Petitioner's difficulties also extend to feeding issues. Petitioner receives 100% of her nutrition through her G-tube of 23 ml. per hour 23 hours a day for a total daily intake of 529 ml. per day. Petitioner also has an unusually high incidence when her "Mickey" Button becomes dislodged or bursts. These incidents happen multiple times a month. Petitioner has periods where she has trouble tolerating her feeds. Petitioner sometimes experiences coughing and congestion, and when such respiratory difficulties flare up, Petitioner has lots of problems tolerating her feeds. Petitioner is not able to digest all of the formula from the previous hours, which causes the formula to build up in her stomach. Fluids have the possibility of coming back up her esophagus and being breathed into her lungs.

10.

When Petitioner is having trouble tolerating her feeds, Petitioner begins gagging and coughing, which also puts her at risk for aspiration.

11.

When feeding trouble is recognized, the nurses conduct an assessment of Petitioner. As a result of such assessments, the nurses have to hold Petitioner's feeds by turning them off for an hour. The nurses then check Petitioner's feeding residuals, or whether Petitioner may need to be suctioned. If there is less than double the hourly amount of residual after the hour break, then feeding is re-started. If Petitioner has clinical signs of aspiration, the nurses would need to change Petitioner's position or suction her. To check for a residual, the nurses use a 2 oz. cath tip syringe, attach it to the extension and pull back for the residual.

12.

If after the position change and suctioning, Petitioner continues to cough and gag, and if there is too much residual, the nurses know that Petitioner is not tolerating the feeds and that initial intervention has not been successful. At this point, the care providers must determine how to get hydration to Petitioner and make the skilled decision to start Pedialyte for hydration until Petitioner can tolerate her formula again. After Pedialyte is administered, the nurses would typically try to advance Petitioner back to formula or half-strength formula depending on physician's orders. The nurses stay in communication with the physician with updates on progress and advance feeds as tolerated. If the provider did not hold the feed and/or suction Petitioner as needed, she could aspirate (breathe fluid down into her lungs) and possibly choke.

13.

While Petitioner's caregivers could understand some of the mechanics of the process, they would not be able to provide the skilled decision making required to provide management of these services safely and effectively.

14.

Petitioner's medical condition is fragile enough that she cannot be left unattended. Someone must be present with Petitioner at all times in order to control the secretions by either suctioning them or positioning her so she is not inhaling them since she is incapable of dislodging secretions on her own. Petitioner's feeding difficulties exacerbate and increase the risk of aspiration, necessitating someone to provide the care who can understand the interrelation between the feeding and breathing issues.

15.

To address Petitioner's continual need for total assistance, Petitioner receives very intense respiratory care, beginning with monitoring through the use of pulse oximetry to detect oxygenation levels. Pulse oximetry indicates when breathing treatments, positioning changes, and suctioning of these secretions is needed. The goal of the breathing treatments is to open Petitioner's airways and maintain good oxygen saturation. A skilled nurse is required to monitor Petitioner's respiratory care, as he or she must be aware of "the nuances of the problems" and to be present to administer the nebulizer, oxygen and positioning interventions while also assessing the impact on Petitioner's feeding issues.

16.

In addition to the skilled nursing hours provided by GAPP, Petitioner receives intense physical, occupational, and speech therapy at MFDC.

17.

The GAPP program was created to serve medically fragile children under the age of 21. The term medically fragile refers to the need for skilled nursing care, i.e., the level of care found in a hospital or skilled nursing home. To determine whether a recipient qualifies for the standard 50 hours of MFDC services, the Department looks to see whether appropriate level of care is met. In this case the standard at issue is skilled nursing facility level of care.

18.

The Final Determination Letter for Services from the Georgia Pediatric Program provided that Petitioner's termination was supported in part by the following:

- The child does not meet the nursing home's skilled level of care admission criteria (citation omitted).
- The nurses['] notes reviewed for the past 3 months document the stability of your child's condition.
- Your child's condition has remained stable with no exacerbations in disease process or hospitalizations since last pre-certification period.
- There is no evidence from the documentation submitted that the current hours are medically necessary to correct or ameliorate the child's medical condition (*see* 42 USCS § 1382(H)(b), O.C.G.A. § 49-4-169.1) and GAPP Manual § 702.2(A).
- G-tubes are not so inherently complex 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 ([*s*]*ee* 42 CFR § 409.31-409.34 and 42 CFR § 440.10).

- Your child requires pulse oximetry, oxygen PRN, and G-tube/nebulizer medications[,] all of which are not so inherently complex to require a professional licensed person on a daily basis.
- There is no documentation of recent hospitalizations or exacerbations in condition in the nurses['] notes, or assessment in the Appendix I submitted with the GAPP renewal packet.
- Skilled Nursing cannot be granted for projected potential problems . . .

(Exhibit R-15.)

19.

When a GAPP recipient becomes stable the recipient may be removed from the program as the goal is to look at a GAPP recipient's present needs and not at what might occur in the future. Since Petitioner has not been hospitalized recently, the Department believes Petitioner is stable. Furthermore, the assessment team examined the type of assistance that Petitioner primarily requires, i.e., assistance with her respiratory and feeding conditions, therapy services and daily skilled nursing assessment needs and determined these are not so inherently complex to require skilled nursing services. Furthermore, skilled nursing services are needed only to assess Petitioner and therapy services.

20.

The absence of preventative care in this case will lead to increased hospitalization. If skilled nursing care is not available, Petitioner should go to the emergency room if her Mickey Button bursts or is otherwise dislodged. Petitioner's the Mickey Button needed to be replaced due to bursting or dislodgement at least 9 times in the last 11 months.

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 *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).

2. A participating state must provide early periodic screening, diagnostic, and treatment services (EPSDT) to eligible children as needed "to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." 42 U.S.C. § 1396d(r)(5) (emphasis added).

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) (emphasis added); *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 or therapy 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 whether a member is entitled to receive MFDC benefits, the only question is whether the member meets the applicable level of care criteria. The Department has made the determination that once the criteria is met, a member is entitled to 50 hours of service a week which are deemed medically necessary.

4. In this case, the threshold issue is whether Petitioner meets the Skilled Nursing Level of Care. If the answer is "yes", then Petitioner is entitled to 50 hours of MFDC services. If the answer is "no", then the Court must address whether the services being provided to Petitioner are medically necessary to correct or ameliorate her condition under the EPSDT program and is thereby entitled to receive the nursing and therapy services under federal law. The Department bears the burden of proof on both issues. 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.

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). One such service is private duty nursing and others are skilled therapy services, both of which are provided to Petitioner through the MFDC service. 42 U.S.C. § 1396d(a).

6. State policy requires that the primary caregiver will eventually be trained and "become competent to assume some responsibility for the care of the child." *GAPP Manual* § 702.1. However, the Department's policy objectives do not override the State's obligations to administer the Medicaid program in a manner consistent with federal law. 42 U.S.C. § 1396c (state Medicaid plans must comply with federal statute or no payments will be made); O.C.G.A. § 49-4-18 (compliance with federal Social Security Act is intended); O.C.G.A. § 49-2-11(a) (nothing in Title 49, Social Services, "shall be construed to prevent the acceptance of more than 50 percent federal matching funds.") The State is required to provide medically necessary services for eligible children under the age of 21, regardless of

the State's articulated program goals. 42 U.S.C. § 1396d(r)(5); *Pittman*, 998 F.2d at 892. In addition, "the fact that a skilled service can be taught to the beneficiary or to the beneficiary's family does not negate the skilled aspect of the service when performed by a nurse." 42 CFR 409.44(b)(iii).

7. Insufficient evidence was presented by the Department pertaining to whether the criteria comprising SNLOC was met in this case.

8. The SNLOC is comprised of two Columns. Column A requires that "[t]he individual 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 nurses; physical therapists and speech pathologists or audiologists." In addition, Column A requires that one of several criteria be met in Section 2 of Column A. Finally, all of Column B must be satisfied.

9. Petitioner receives 100% of her caloric intake of 529 milliliters a day exclusively through her G-tube. Therefore, Section 2 of Column A(I)(2)(d) which requires that the member receive at least 25% of her daily caloric requirements, consisting of at least 501 milliliters of fluid per day, through enteral feeding is met.

10. The criteria in regard to Column B has been met as the services being received by Petitioner have been ordered by a physician to be provided by or under the supervision of skilled personnel on a daily basis.

11. The services being provided to Petitioner are so inherently complex, they cannot be safely or effectively performed by a non-skilled caregiver.

12. In the case under consideration the physical, occupational and speech therapy services being provided by the therapists at the MFDC can only be provided by skilled therapists and cannot be provided safely or effectively by unskilled caregivers. The Department's position that therapy services have nothing to do with whether the SNLOC criteria is met is directly contradicted by the plain wording of the criteria which specifically mentions physical, occupational and speech therapy services as qualifying as skilled care in terms of meeting the criteria. See GAPP Manual Appendix R-3. See also, 42 CFR 409.31 – 409.34.

13. In *Hunter v. Cook*, 2011 U.S. Dist. LEXIS 109775 (N.D. Ga. Sept. 27, 2011), the court gave much greater weight to the treating physician's testimony than to the opinion of the GMCF medical personnel, whose opinions were based solely upon paper records. *Id.* at *21, 26. Similarly, this Court gives greater weight to the testimony of Petitioner's treating physician, whose practice has known and worked with Petitioner since birth, and Ms. S[redacted] who provides now and has provided in the past nursing and therapy services to Petitioner personally and through her staff 50 hours a week for more than two years.

14. Petitioner is totally dependent upon others for even the minutest details of everyday care. Further, Petitioner is required to go to the emergency room each time her Mickey Button burst or was dislodged. The records show that Petitioner's Mickey Button needed to be

replaced due to bursting or dislodgement at least 9 times in the last 11 months. Therefore, the child is not medically stable.

15. Petitioner not only meets the SNLOC and that the Department failed to carry its burden, but that Petitioner also requires continual skilled care in order not to regress.

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Department's decision to reduce the hours of skilled nursing care provided to the Petitioner is hereby **REVERSED**. Petitioner is entitled to receive MFDC for a period of six months from the date of this Decision.

SO ORDERED, this the 30th day of December, 2013.

DAVID LANGSTON
Administrative Law Judge