BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

, **Petitioner,**	:	**Docket No.: OSAH-DCH-SOURCE .VOODARD**
	:	
v.	:	**Agency Reference No.**
	:	
DEPARTMENT OF COMMUNITY HEALTH,	:	
	:	
Respondent.	:	

FILED OSAH

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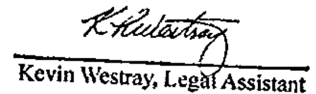


Kevin Westray, Legal Assistant

INITIAL DECISION

I. Introduction

The hearing in this matter was conducted on February 14, 2014 as a "telephone" hearing. The issue for determination is whether Petitioner meets the target group for SOURCE eligibility. Respondent concluded that Petitioner's primary health issues are caused by her mental illness, which makes her ineligible for SOURCE.

Petitioner and her fiancé, appeared and testified from Petitioner's residence in Augusta. Respondent was represented by Brevin Brown, Attorney at Law, Atlanta. Appearing as witnesses for Respondent were Lorrie Stewart, RN and SOURCE Program Analyst, Department of Community Services (DCH), Atlanta; and Emily Taylor, RN and SOURCE Review Nurse, Unihealth SOURCE, Augusta. Stephanie Dixon, RN and SOURCE Program Analyst, was present as an observer.

II. Overview of Medicaid Program

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 Skadalis v. Rowe, 14 F.3d at 175; Susan J. v. Riley, 254 F.R.D. at 446.

Home and community-based services ("HCBS")[1] 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,[2] 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 requirements relating to statewideness, comparability,[3] and income and resource limits. See 42 U.S.C. § 1396n(c)(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

1 HCBS 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.

2 "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).

3 "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.

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, 1085) ("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.").

III. Georgia's SOURCE Program

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). Among other waiver programs, Respondent has designed a program called SOURCE or "Service Options Using Resources in Community Environments," which provides enhanced case management for eligible members and, if necessary, funds various community services. According to Respondent'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. . . ." (SOURCE Manual §§ 601, 800, 807)

In the past, the SOURCE program was part of the Georgia state plan for Medicaid. On April 1, 2008, Respondent 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 Respondent's requested amendment to the state plan and removed SOURCE from the state plan effective April 1, 2008.

Georgia did not do away with the SOURCE program, however. Rather, Respondent added the SOURCE program to an existing §1915(c) HCBS Waiver entitled the "Elderly and Disabled Waiver" program. Specifically, on January 10, 2008, CMS approved Respondent's request to add enhanced case management services – or SOURCE – to the services offered under

Georgia's Elderly and Disabled Waiver.[4] Thereafter, on or about July 1, 2008, Respondent submitted an application to CMS to amend the Elderly and Disabled Waiver in order to increase the reimbursement rate for service providers by 3% ("Waiver Application"). In the Waiver Application, Respondent describes its Elderly and Disabled Waiver as follows:

> A. **Comparability.** The State requests a waiver of the requirements contained in § 1902(a)(10)(B) of the Act in order to provide the services specified in **Appendix C** that are not otherwise available under the approved Medicaid State plan to individuals who: (a) require the level(s) of care specified in Item 1.F and (b) meet the target group criteria specified in **Appendix B.**

Appendix C of the Waiver Application includes, among other covered services, enhanced case management (ECM) and alternative living services (ALS). In addition, the Waiver Application states that individuals must meet the same level of care for admission to a nursing facility in order to qualify for services under the Elderly and Disabled Waiver. Finally, and most importantly, in the Waiver Application, Respondent specifies the Elderly and Disabled Waiver's Target Group, pursuant to the following instruction from CMS:

> **Target Group(s).** Under the waiver of Section 1902 (a)(10)(B) of the Act, the State limits waiver services to a group or subgroups of individuals. . . . *In accordance with 42 C.F.R. § 441.301(b)(6), select one waiver target group, check each of the subgroups in the selected target group that may receive services under the waiver, and specify the minimum and maximum (if any) age of individuals served in each subgroup.*

Respondent, in completing the Waiver Application, selected as its target group "Aged or Disabled, or Both – General." Within the target group, Respondent checked two of three possible target sub-groups: "Aged" and "Disabled (Physical)." Respondent did not check the target sub-group identified as "Disabled (Other)," nor did it check the target group identified as "Mental Illness."

IV. Findings of Fact

1.

Petitioner is a 47 year-old female who suffers from a primary mental health diagnosis of schizophrenia, with a secondary mental health diagnosis of depression. The records made available to Respondent's SOURCE assessment nurse indicate that she has physical impairments of gastroesophageal reflux disease ("GERD"), asthma, hypertension, sleep apnea, muscle spasms, and obesity. Petitioner has been prescribed numerous prescription drugs, including Baclofen for

[4] This change was made effective October 1, 2007.

muscle spasms; Carvediol, Amlodipine Besylate, and Diovan for hypertension, and Lasix for related edema; Advair and Pro Air for asthma; a CPAP device for sleep apnea; Omeprazole for GERD; Citalopram for depression; and Ziprasidone for schizophrenia.

2.

Petitioner was initially approved for SOURCE in February 2005, and placed in care management. She resides at an apartment complex for disabled individuals, and receives home delivered meals and personal support aides funded through SOURCE.

3.

On August 26, 2013, Sharon Cooper, LPN with Unihealth SOURCE Augusta, conducted an annual review of Petitioner's continued eligibility for SOURCE benefits. [5] Ms. Cooper met with Petitioner, reviewed Petitioner's medical records, and observed Petitioner as she engaged in various activities of daily living. Ms. Cooper placed her observations and findings in a document titled "InterRAI Home Care." She noted that Petitioner suffers from asthma, hypertension, and sleep apnea, which are physical impairments that "Requires monitoring and overall management of a medical condition(s) under the direction of a licensed physician," "Monitoring of vital signs and laboratory studies or weights;" and "Nutritional management, which may include therapeutic diets or maintenance of hydration status." Ms. Cooper observed that Petitioner needed extensive assistance from others with meal preparation, and maximal assistance with ordinary housework.

4.

Ms. Cooper's observations and findings were forwarded for review by the SOURCE evaluation team, which consists of Petitioner's case manager, a supervising nurse, and a medical doctor. The team determined that Petitioner did not meet the intermediate nursing home level of care guidelines. The review nurse, Emily Taylor, RN, also concluded that Petitioner did not meet the SOURCE target group, as her inability to perform activities of daily was caused by schizophrenia, rather than a physical impairment.

5.

Respondent notified Petitioner in a document dated September 9, 2013 that she was no longer eligible for the SOURCE Program. Petitioner appealed, and this matter was forwarded to the Office of State Administrative Hearings to conduct an evidentiary hearing. Petitioner has continued to receive SOURCE benefits while this decision was pending.

6.

[5] The Augusta area was hit with a winter storm the week of this hearing. Ms. Cooper was unable to testify at this hearing due to communication issues caused by power outages in the CSRA. Emily Taylor was the nurse who reviewed Ms. Cooper's evaluation, and she testified in Ms. Cooper's behalf.

Petitioner testified that she has problems with joint stiffness, and pain in her legs and back. She recently has had problems walking, and has been under a physician's care for this condition. However, the records submitted to Respondent by the physician indicate that Petitioner can move more normally once she has undergone physical therapy. Petitioner also testified that she has recently had swelling in her stomach that has led to her physician performing tests. Petitioner testified that she has been told she needs a hysterectomy for this condition. This diagnosis was made only three days prior to the hearing, and there are no medical records available as of the date of entry of this Order. Petitioner related that she constantly suffers from acid reflux and a burning feeling in her stomach from GERD. She also has had a recent asthma attack, apparently brought on when she was unable to take a dosage from her inhaler.

Conclusions of Law

1.

The burden of proof is on the Respondent as it seeks to terminate Petitioner's participation in the SOURCE program. Ga. Comp. R. & Reg. r. 616-1-2-.07 (hereafter "OSAH Rule"). The standard of proof is by a preponderance of the evidence. OSAH Rule 21(4). The administrative law judge is required to "make an independent determination on the basis of the competent evidence presented at the hearing," and he "may make any disposition of the matter available to the Referring Agency." OSAH Rule 21(1). "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." OSAH Rule 21(3).

2.

Individuals eligible to participate in the SOURCE program are eligible based on meeting criteria for Intermediate Nursing Home Level of Care. (Part II, Policies and Procedures for Service Options Using Resources in Community Environment (SOURCE) § 701 (c)).

3.

The Nursing Home Level of Care can be defined as, if not for the in-home services provided through SOURCE, the individual would be placed in a nursing care facility. (42 C.F.R. § 441.301(b)(1)(iii) and SOURCE Manual § 701).

4.

SOURCE members must meet the Level of Care criteria for Intermediate Nursing Home Placement. The SOURCE R.N./L.P.N., through the use of the MDS-HC, Level of Care criteria (Appendix I), and professional judgment, determines the Level of Care for members during the assessment process. (SOURCE Manual § 801.2(a)).

5.

SOURCE services rendered to a member will be ordered by a physician and the Doctor/Medical Director's signature on the Level of Care confirms the Level of Care assessment. (SOURCE Manual § 801.2(b)).

6.

Providers may render SOURCE services only to members who: (1) meet the target group (individuals over age 65, or under 65 with a primary physical disability), (2) with a current Level of Care as reflected on current SOURCE Level of Care and Placement Instrument and completed MDS-HC assessment. (SOURCE Manual § 801.2(c); 42 C.F.R. § 441.301(b)(6)).

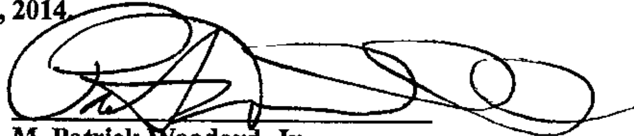
7.

Petitioner has several physical impairments, including GERD, hypertension, asthma, sleep apnea, obesity, and muscle spasms and joint pain, but these impairments do not cause her to require the level of care provided by a nursing home. Instead, it is Petitioner's schizophrenia which causes her to need assistance with meal preparation and housekeeping. As this is a mental illness or disorder, Petitioner cannot meet the target group for the SOURCE Program.

IV. Decision

IT IS HEREBY ORDERED that the decision of Respondent to terminate Petitioner's participation in the SOURCE program is **AFFIRMED.**

SO ORDERED, this 18th day of February, 2014.



M. Patrick Woodard, Jr.
Administrative Law Judge