

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

D.F. (MINOR),	:	
Petitioner,	:	Docket No.:
	:	OSAH-DCH-KATIE-1417446-33-Woodard
v.	:	
	:	Agency Reference No.: R13-920
DEPARTMENT OF COMMUNITY	:	
HEALTH,	:	
Respondent.	:	

INITIAL DECISION

I. SUMMARY OF PROCEEDINGS

Petitioner appealed the decision of Respondent, the Department of Community Health, to deny his application for coverage under the TEFRA/Katie Beckett Deeming Waiver (hereinafter “Katie Beckett”). The hearing on this matter was held via telephone conference on February 20, 2014. Petitioner’s mother, Mrs. C.F., participated in the hearing as her son’s personal representative. Ms. Deborah Lonon, Esq., participated as Respondent’s legal counsel. The following individuals also provided testimony at the hearing: Dophamia Williams, Katie Beckett Program Specialist, and Lauren Jones, RN, Katie Beckett Review Nurse. For the reasons indicated below, Respondent’s decision to deny Petitioner’s application for coverage under the Katie Beckett Deeming Waiver is hereby **AFFIRMED**.

II. FINDINGS OF FACT

The Katie Beckett Deeming Waiver

1.

Katie Beckett was established in 1982 under the Tax Equity and Fiscal Responsibility Act (TEFRA). The program, which is administered by Respondent, permits the state to ignore family income for certain disabled children for the purposes of determining Medicaid eligibility provided that certain conditions are met. It enables children under the age of 19, who would otherwise be ineligible to participate in Medicaid programs due to their parents’ income, to qualify for Medicaid participation based upon their own income. The child must qualify as a disabled individual under § 1614 of the Social Security Act and live at home, rather than in an institution. In addition, the child must require the level of care provided in a hospital, skilled nursing facility, or intermediate care facility for the mentally retarded (ICF/MR). The criteria

used to determine whether the child meets level of care are found in Title 42 of the Code of Federal Regulations. 42 C.F.R. § 409.31–.33; 42 C.F.R. 435.1010; 42 C.F.R. 440.10; DEP’T OF CMTY. HEALTH, PART II INFORMATION MANUAL TEFRA/KATIE BECKETT DEEMING WAIVER 6–7 (2013) [hereinafter KATIE BECKETT MANUAL].

The Katie Beckett Application Process

2.

Respondent has contracted with the Georgia Medical Care Foundation (GMCF) to review applications for continued participation in Katie Beckett. Testimony of Lauren Jones; Exhibit R-1.

3.

The GMCF Katie Beckett Review Team reviews information submitted with each application to determine whether the applicant requires a level of care provided in a hospital, skilled nursing facility, or intermediate care facility. Applicants submit a packet to the GMCF review team containing a DMA-6(A) form, a Level of Care statement, and a Psychological Assessment. Testimony of Lauren Jones; Exhibit R-1.

4.

Ms. Lauren Jones, a member of the GMCF review team, testified that, in making the determination of whether an applicant meets level of care criteria, the GMCF review team will review all information available to the team that is pertinent to the applicant’s condition. Although the team gives deference to the recommendations of the applicant’s physician, Ms. Jones specified that they exercise their professional judgment with regard to eligibility. If an applicant’s physician specifies that the applicant meets hospital level of care, for example, the Review Team would review that applicant’s condition to ascertain whether they met criteria for any pertinent level of care and not simply confine their review to hospital level of care criteria. Testimony of Lauren Jones; Exhibit R-1.

5.

If the Katie Beckett Review Team determines the applicant to be ineligible for Katie Beckett, it will issue an Initial Denial of Continued Coverage letter. This letter informs the applicant that they have been denied and delineates the reasons for their denial. The applicant then has thirty days from the date of the letter in which to obtain a review of GMCF’s decision. The applicant

may supplement the original application with additional information, which GMCF will then review in making its Final Determination. Exhibit R-1.

6.

If GMCF decides not to alter its original determination after reviewing the supplemented information packet, it will issue a Final Denial of Continued Coverage letter to the applicant. The applicant then has thirty days in which to request a hearing. Testimony of Dophamia Williams; Exhibit R-2.

Petitioner's Condition

7.

Petitioner is an eight-year-old male born on February 1, 2005. He has been diagnosed with mitochondrial disease,¹ failure to thrive, developmental delay, and attention deficit hyperactivity disorder (ADHD). Exhibits R-4, R-5, R-6, R-8, R-9

8.

The physical manifestations of Petitioner's diagnoses include weakened muscle tone and headaches caused by intracranial pressure. Petitioner underwent surgery to ameliorate this intracranial pressure, and he is currently under a neurologist's care. Petitioner's mitochondrial disease has also had a deleterious effect on his ability to swallow foods, and he had a G-tube inserted in 2011. He underwent a second surgery to change out his G-tube in September 2013. Petitioner is administered overnight feedings through the G-tube by an automated pump from 8:00 p.m. to 6:30 a.m. Petitioner can ingest food by mouth, but he does not seem to have the appetite to do so. He is also administered feedings through a bolus after he returns home from school. Exhibits R-5, R-6, R-8, R-9.

9.

Petitioner exhibits behavioral problems in addition to his physical difficulties, including a lack of focus, short attention span, and a lack of self-control. His behavioral problems and deficits in

¹ Mitochondrial disease is a condition caused by dysfunction of the mitochondria, the organelles responsible for generating energy for cells. When mitochondria fail, or do not function properly, less energy is generated for vital systems in the body and are compromised. As a result, the subject suffers deficiencies in physical functions, such as motor skills. UNITED MITOCHONDRIAL DISEASE FOUNDATION, http://www.umdf.org/site/c.8qKOJ0MvF7LUG/b.7934627/k.3711/What_is_Mitochondrial_Disease.htm (last visited March 11, 2014).

attention span have had a negative effect on his academic performance. He is currently under the care of a psychiatrist. Exhibit R-6; Testimony of C.F.

10.

Petitioner currently attends elementary school under an Individualized Education Plan (“IEP”) prepared in collaboration with the school and his parents. His primary care physician and specialist physicians can also have input in the development of the IEP. Petitioner currently attends special education classes, which provide an environment tailored to address the needs caused by his diagnoses. Petitioner’s medications are also administered at school, and a Special Education Nurse is available to respond to complications with the G-tube or other medical problems that may arise. Petitioner’s most recent IEP also provides for thirty minutes of Occupational Therapy (OT) administered once a month by a certified Occupational Therapist, sixty minutes a week of Speech Therapy (ST), and thirty minutes a week of social skills therapy, which is also administered by an Occupational Therapist. Exhibits R-5, R-6, and R-7; Testimony of C.F.

11.

Petitioner currently resides with both of his parents and three siblings. In addition to the professional therapy services that Petitioner receives through his IEP, he also receives music therapy once a week from Ms. E.H., a musical therapist licensed by the State of Georgia.² Exhibit R-5, P-2; Testimony of C.F.

Review of Petitioner’s Application

12.

Petitioner’s caregivers applied for Katie Beckett on or about May 1, 2013. Petitioner’s physician, Dr. P.G., MD, submitted a DMA-6(A) form, which included her recommendations for Petitioner’s pediatric care, to GMCF as part of the application packet. Dr. P.G. listed mitochondrial disorder, failure to thrive, developmental delay, and ADHD as Petitioner’s diagnoses and indicated on the form that Petitioner took prescription medications Clonidine, Metadate CD, and Sertraline. She recommended that Petitioner receive speech, physical, occupational, social, and music therapy. Where the form called for the physician to recommend

² At the conclusion of the hearing, the evidentiary record remained open so that Petitioner could submit documentation relating to music therapy and the credentials of Ms. E.H. As discussed *infra*, Petitioner submitted this documentation on February 26, 2014. For the purposes of this decision, this documentation is designated “Exhibit P-2.”

the Level of Care, Dr. P.G. checked the box for “Nursing Facility,” with an additional handwritten note for “Home Care.” Exhibit R-3; Testimony of Lauren Jones.

13.

On the Level of Care Statement submitted with Petitioner’s application, Dr. P.G. indicated that Petitioner required two Physical Therapy (PT) sessions, one OT session, and one ST session a week. She also recommended that he receive music therapy and social skills therapy. She listed “G-tube feeds – at school” under Petitioner’s current skilled needs. Dr. P.G. again indicated that Petitioner required Nursing facility level of care and included the handwritten notation “Home Care.” Exhibit R-4.

14.

Petitioner’s caregivers also submitted documentation of OT and PT evaluations of Petitioner performed at Children’s Healthcare of Atlanta. On the OT evaluation report, the administrator included the following conclusion: “Skilled occupational therapy is not recommended at this time due to patient demonstrating functional sensory processing, visual motor and fine motor skills.” On the physical therapy evaluation report, the administrator concluded: “skilled physical therapy is not recommended at this time due to patient demonstrating age appropriate functional gross motor skills and independence at home and in the community.” Testimony of Lauren Jones; Exhibits R-8, R-9.

15.

Petitioner’s Psychological Assessment that he has a full-scale IQ of 99, placing him on the “average range of intelligence.” Exhibit R-5; Testimony of Lauren Jones.

16.

The Review Team determined that the supporting documentation suggested that Petitioner received or required the Level of Care necessary for coverage under Katie Beckett. The Review Team noted that although Petitioner’s physician had recommended two units of ST and one unit each of OT and PT per week, the team also reviewed Petitioner’s IEP³ which indicated Petitioner received only ninety minutes of OT per year and sixty minutes of ST per week. The Review

³ Petitioner’s application packet included his then-current IEP, which described that Petitioner received 90 minutes of OT per year and sixty minutes of ST per week. Petitioner’s IEP was updated on December 16, 2013. His updated IEP provides for one session of OT per month, one session of social skills therapy per month, and two sessions of ST per week. The Review Team did not consider Petitioner’s newest IEP because it was generated after the final review of Petitioner’s Katie Beckett application. However, Ms. Jones testified that the increase in services documented in the newest IEP did not demonstrate that Petitioner met any Level of Care. *Exhibit R-6; Testimony of Lauren Jones.*

Team also considered the OT and PT evaluation reports from Children’s Healthcare of Atlanta, which expressly stated that OT and PT were not recommended for Petitioner’s care. The team did not consider music therapy or social skills therapy to be “skilled services,” and therefore discounted Dr. P.G.’s recommendation that Petitioner receive such services in its determination of whether Petitioner met the Level of Care.⁴ Testimony of Lauren Jones; Exhibits R-3, R-4, and R-5.

17.

Based upon the documentation submitted with Petitioner’s application, the GMCF Review Team concluded that Petitioner did not meet any Level of Care requisite for coverage under Katie Beckett and issued an Initial Denial of Admission letter to his caregivers.

18.

Upon receiving the Initial Denial letter, Petitioner’s caregivers sought supplementary documentation to support their contention that their son met Level of Care. Petitioner’s mother submitted a Medication Record from Petitioner’s school which documents instances in which Petitioner’s Metadate CD was administered at school via G-tube. Petitioner’s mother also included a personal letter in which she averred that her son met the Level of Care covered by Katie Beckett. Exhibits R-2 and R-7; Testimony of Lauren Jones; Testimony of C.F.

19.

After reviewing the supplementary materials, the Review Team concluded that the application was still lacking sufficient documentation to demonstrate that Petitioner required the skilled or rehabilitative services that would constitute a qualifying Level of Care. The Review Team found that administration of Petitioner’s medications at school did not “meet the level of complexity to meet level of care criteria.” Accordingly, Respondent issued a Final Denial of Admission letter to Petitioner’s caregivers on or about September 6, 2013. The Final Denial letter provided that Respondent’s decision to deny Petitioner’s Katie Beckett application was based upon the following:

- [Petitioner] does not require daily skilled/professional nursing services because his condition is not so inherently complex that care cannot be safely and effectively performed by unskilled healthcare personnel as evidence by:

⁴ It is unclear from the record whether Petitioner’s caregivers submitted documentation of Petitioner’s receipt of music therapy services in his application packet. Although Petitioner’s mother testified that she had included such documentation with her son’s application, no such documentation was submitted into evidence and Ms. Jones testified that she could not recall reviewing it.

- Per the DMA6 signed, 4/2/2013, at the age of eight, he carries the diagnoses of Mitochondrial Disease, Failure to Thrive, Developmental Delay, and ADHD.
- Per the Level of Care Statement the physician recommends the Nursing Facility level of care with Home Care written in. Speech therapy is ordered at two times per week. Physical therapy and Occupational therapy are ordered at one time per week each. Two hours of skilled nursing services at school are ordered. One hospitalization is reported to have occurred during the review year.
- Per the IEP he receives Occupational therapy 90 minutes per year, and Speech therapy sixty minutes weekly.
- Per the Physical therapy evaluation completed 4/9/2013 it is reported that therapy is not recommended at this time. The Occupational therapy evaluation completed 4/1/13 reports that therapy is not recommended at this time due to the patient's fine motor and visual motor skills being within functional limits and he is independent with functional daily living skills. No therapy notes submitted.
- Psychological Evaluation completed in the fall of 2011 reports a cognitive ability score of 97. Testing completed in 12/2012 reports a FSIQ of 99.
- Additional information received includes a Parent letter and the School Medication Record now with RN credentials added to signatures. [Petitioner's] mediation [sic] administration of Metadate CD at school does not meet the level of complexity to meet level of care criteria.
- Based on the above, he does not meet criteria for Hospital or Nursing Facility level of care at this time.
- The child's condition does not meet hospital inpatient-qualifying criteria which necessitates:
 - Nursing interventions every 4-8 hours
 - Post critical care or weaning monitoring
 - Procedures/interventions which require hospitalization/interventions or
 - IV medications which require hospitalization
- 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 CFR 409.31-409.34 as evidenced by documentation submitted
- Rehabilitative services are not required five days per week per documentation submitted which is a requirement of 42 CFR 409.31-409.34.
- Your child has a diagnosis of mental retardation, cerebral palsy, epilepsy, or a condition that is closely related to mental retardation, but health and rehabilitative services are not required 24 hours a day nor are they required to be ordinarily furnished on an inpatient basis which is a requirement of 42 CFR 440.150, 435.1010 and 483.440(a). Based on the documentation submitted, he does not meet criteria under the IC/MR level of care at this time.

Exhibit R-2; Testimony of Lauren Jones.

20.

After receiving Respondent's Final Denial letter, Petitioner's mother requested a hearing to dispute Respondent's determination that her son was ineligible for Katie Beckett. In her written

request, Petitioner's mother argued that her son required daily skilled nursing services comprised of: (1) daily administration of medication through a G-tube pursuant to his IEP, (2) two units of speech therapy per week, (3) social skills therapy, (4) a weekly music therapy session, (5) psychotherapy once a week, and (6) psychiatry twice a month. Petitioner's Request for Hearing.

21.

At the hearing on this matter, Petitioner's mother contended that her son required Katie Beckett coverage in order to obtain the level of services necessary to treat his condition. She asserted that her son met the Level of Care required for Katie Beckett eligibility as demonstrated by his receipt of skilled services, which, she argued, included music therapy and social skills therapy. She submitted letters from Dr. D.G., MD; Ms. K.W., Licensed Professional Counselor; and M.D., a Care Coordinator at Lookout Mountain CME, into evidence. Testimony of C.F.

22.

Dr. D.G. opined in his letter that Petitioner would "benefit greatly from the Katie Beckett waiver [which] would enable the family to have access to resources to help him with his optimal functioning[,] including in home therapy and other intensive services." Exhibit R-10.

23.

Mr. M.D. reported in his letter that Petitioner had been receiving "community wraparound services" from Lookout Mountain CME since October 2013. Mr. M.D. described Katie Beckett as "a great resource to further assist in the development of [Petitioner] and his ongoing service needs." Exhibit R-10.

24.

Ms. K.W. described Petitioner's recent behavioral problems in detail in her letter. She included her recommendation that Petitioner continue to receive family therapy and that he be "continuously medically managed by [a] psychiatrist." Exhibit P-1.

III. CONCLUSIONS OF LAW

1.

Because this case concerns the denial of Petitioner's application for coverage under Katie Beckett, Petitioner bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07. At the hearing, the administrative law judge required Respondent to present its evidence first, but this

did not shift the burden of proof from Petitioner. The standard of proof is a preponderance of evidence. Ga. Comp. R. & Regs. 616-1-2-.21.

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 et seq.; *Moore v. Reese*, 637 F.3d 1220, 1232 (11th Cir. 2011). Participation by a state 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).

3.

Respondent provides Medicaid benefits under the Katie Beckett program as described under Section 134 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). To be eligible for services under the TEFRA/Katie Beckett class of assistance, the child must:

- (1) Be eighteen years of age or younger
- (2) Live at home
- (3) Meet the federal criteria for childhood disability and
- (4) Require the level of care provided in a hospital, skilled nursing facility, or intermediate care facility

42 U.S.C. § 1396a(e)(3); 42 C.F.R. § 435.225.

Hospital Level of Care

4.

Hospital level of care is appropriate for individuals who continuously require the type of care ordinarily provided in an institution for the care and treatment of inpatients with disorders other than mental diseases. 42 C.F.R. § 440.10(i); KATIE BECKETT MANUAL 6. Petitioner’s needs, as described in the documentation submitted with his application, are not continuous; he does not require the intensity or frequency of care that he would receive in a hospital. Accordingly, Petitioner does not meet the criteria for hospital level of care for the purposes of Katie Beckett eligibility.

Skilled Nursing Facility Level of Care

5.

Skilled Nursing Facility Level of Care is appropriate for individuals who do not require hospital care, but who, on a regular basis, require licensed nursing services, rehabilitation services, or other health-related services ordinarily provided in an institution. KATIE BECKETT MANUAL 6. The individual must require services that are so inherently complex that they can be safely and effectively performed only by, or under the supervision of, technical or professional personnel . . .

AND

the service is one of the following or similar and is required seven days per week:

- Overall management and evaluation of a care plan for an individual who is totally dependent in all activities of daily living,
- Observation and assessment of an individual's changing condition because the documented instability of his or her medical condition is likely to result in complications, or because the documented instability of his or her mental condition is likely to result in suicidal or hostile behavior
- Intravenous or intramuscular injections or intravenous feeding
- Enteral feeding that comprises at least 26 per cent of daily calorie requirements and provides at least 501 milliliters of fluid per day
- Nasopharyngeal or tracheostomy aspiration
- Insertion and sterile irrigation or replacement of suprapubic catheters
- Application of dressings involving prescription medications and aseptic techniques
- Treatment of extensive decubitus ulcers or other widespread skin disorder
- Heat treatments as part of active treatment which requires observation by nurses
- Initial phases of a regimen involving administration of medical gases
- Rehabilitation nursing procedures, including the related teaching and adaptive aspects of nursing, that are part of active treatment

OR

The service is one of the following or similar and is required five days per week:

- Ongoing assessment of rehabilitation needs and potential; services concurrent with the management of a patient care plan,
- Therapeutic exercises and activities performed by PT or OT,
- Gait evaluation and training to restore function to a patient whose ability to walk has been impaired by neurological, muscular, or skeletal abnormality,
- Range of motion exercises which are part of active treatment of a specific condition which has resulted in a loss of, or restriction of mobility,

- Maintenance therapy when specialized knowledge and judgment is needed to design a program based on initial evaluation,
- Ultrasound, short-wave, and microwave therapy treatment,
- Hot pack, hydrocollator, infrared treatments, paraffin baths, and whirlpool treatment when the patient's condition is complicated by circulatory deficiency, areas of desensitization, open wounds, etc. and specialized knowledge and judgment is required,
- Services of a speech pathologist or audiologist when necessary for the restoration of function in speech or hearing

OR

The service is one of the following only if additional special medical complication requires that it be performed or supervised by technical or professional personnel:

- Administration of routine medications, eye drops, and ointments
- General maintenance care of colostomy or ileostomy
- Routine services to maintain satisfactory functioning of indwelling bladder catheters,
- Changes of dressings for non-infected postoperative or chronic conditions,
- Prophylactic and palliative skin care, including bathing and application of creams, or treatment of minor skin problems
- Routine care of incontinent individuals, including use of diapers and protective sheets
- General maintenance care (e.g. in connections with a plaster cast)
- Use of heat as a palliative and comfort measure (e.g. whirlpool and hydrocollator)
- Routine administration of medical gases after a regimen of therapy has been established
- Assistance in dressing, eating, and toileting,
- Periodic turning and positioning of patients,
- General supervision of exercises that were taught to the individual and can be safely performed by the individual including the actual carrying out of maintenance programs

AND

- The service needed has been ordered by a physician
- The service will be furnished either directly by, or under the supervision of, appropriately licensed personnel
- The beneficiary must require skilled nursing or skilled rehabilitation services, or both, on a daily basis.

KATIE BECKETT MANUAL 35-36.

6.

Although Petitioner receives enteral feedings, there is nothing in the record that suggests these feedings are “so inherently complex that they can be safely and effectively performed only by, or under the supervision of, technical or professional personnel.” Rather, the evidence establishes

that Petitioner's G-tube feedings are administered primarily at home, without the assistance or supervision of a medical professional. Although Petitioner's elementary school has a skilled nurse on hand to respond to complications with Petitioner's G-tube, the IEP provides that Petitioner "eats orally at school" and contains no indication that Petitioner's G-tube feedings are administered there.

7.

Administration of Petitioner's medication via G-tube does not constitute a "feeding" as that term appears under the criteria listed in the Katie Beckett Manual and the Code of Federal Regulations. Rather, that activity is more akin to the "routine administration of medications," which requires the additional element of a "special medical complication" that would "require the services of technical or professional personnel" in order to be considered a skilled service. Petitioner did not establish that such an element was present. Accordingly, Petitioner did not establish that his daily enteral feedings are sufficient to constitute a skilled service that would demonstrate that he meets Level of Care. See KATIE BECKETT MANUAL 35-36.

8.

As the GMCF Review Team noted during its consideration of Petitioner's application, none of the documentation supports the proposition that Petitioner requires OT, ST, or PT five times a week. Petitioner's most recent IEP provides for only two ST sessions per week, and sixty minutes of OT per month. Moreover, evaluations from Children's Healthcare of Atlanta concluded that Petitioner would not benefit from OT or PT because he was functioning within appropriate limits. Although professionals familiar with Petitioner's care were of the opinion that Petitioner required Katie Beckett coverage, they did not contend that Petitioner required the level of services that would demonstrate that Petitioner required any Level of Care.

9.

Petitioner's caregiver contended at the hearing of this matter that Petitioner's music therapy sessions should be counted among the skilled services under Skilled Nursing Facility Level of Care. Petitioner's caregiver established that music therapy is a service "furnished . . . directly by . . . appropriately licensed personnel" by submitting documentation that her son receives services from a music therapist duly licensed by the state. Moreover, the music therapy Petitioner receives is ordered by a physician, as is required by the section of the Georgia Code governing

the professional licensure of music therapists.⁵ Determination of whether Music Therapy is a skilled service for purposes of Nursing Facility Level of Care requires a more in-depth analysis of the definition of “skilled services” as provided in 42 C.F.R. 409.31-409.34, the section of the Code of Federal Regulations from which Respondent derives the criteria for Skilled Nursing Facility Level of Care.

10.

According to 42 C.F.R. 409.33(b), the following services are skilled nursing services:

- (1) Intravenous or intramuscular injections and intravenous feeding.
- (2) Enteral feeding that comprises at least 26 per cent of daily calorie requirements and provides at least 501 milliliters of fluid per day.
- (3) Nasopharyngeal and tracheostomy aspiration;
- (4) Insertion and sterile irrigation and replacement of suprapubic catheters;
- (5) Application of dressings involving prescription medications and aseptic techniques;
- (6) Treatment of extensive decubitus ulcers or other widespread skin disorder;
- (7) Heat treatments which have been specifically ordered by a physician as part of active treatment and which require observation by nurses to adequately evaluate the patient's progress;
- (8) Initial phases of a regimen involving administration of medical gases;
- (9) Rehabilitation nursing procedures, including the related teaching and adaptive aspects of nursing, that are part of active treatment, e.g., the institution and supervision of bowel and bladder training programs.

In reviewing the list of services that the Code of Federal Regulations includes among those that qualify as skilled nursing services, it is apparent that music therapy is not a skilled nursing service, since the list is comprised of very specific procedures with no “catch-all.” In other words, if the authors of the regulation meant to include music therapy as a skilled nursing service, they would have expressly included it among the enumerated services. Therefore, if

⁵ See O.C.G.A. § 43-25A-1(4) (2013):

Before providing music therapy services to a client for a medical, developmental, or mental health condition, the licensee shall collaborate, as applicable, with the client's physician, psychologist, or mental health professional to review the client's diagnosis, treatment needs, and treatment plan. During the provision of music therapy services to a client for a medical, developmental, or mental health condition, the licensee shall collaborate, as applicable, with the client's speech-language pathologist, occupational therapist, physical therapist, audiologist, or other medical or developmental professional to review the client's diagnosis, treatment needs, and treatment plan.

Petitioner's receipt of music therapy is to demonstrate that he meets Level of Care, music therapy must fall under the definition of a "skilled rehabilitation services."

11.

42 C.F.R. 409.32(c) includes the following services as "skilled rehabilitative services":

- (1) Ongoing assessment of rehabilitation needs and potential: Services concurrent with the management of a patient care plan, including tests and measurements of range of motion, strength, balance, coordination, endurance, functional ability, activities of daily living, perceptual deficits, speech and language or hearing disorders;
- (2) Therapeutic exercises or activities: Therapeutic exercises or activities which, because of the type of exercises employed or the condition of the patient, must be performed by or under the supervision of a qualified *physical therapist or occupational therapist* to ensure the safety of the patient and the effectiveness of the treatment;
- (3) Gait evaluation and training: Gait evaluation and training furnished to restore function in a patient whose ability to walk has been impaired by neurological, muscular, or skeletal abnormality;
- (4) Range of motion exercises: Range of motion exercises which are part of the active treatment of a specific disease state which has resulted in a loss of, or restriction of, mobility (as evidenced by a therapist's notes showing the degree of motion lost and the degree to be restored);
- (5) Maintenance therapy; Maintenance therapy, when the specialized knowledge and judgment of a qualified therapist is required to design and establish a maintenance program based on an initial evaluation and periodic reassessment of the patient's needs, and consistent with the patient's capacity and tolerance. For example, a patient with Parkinson's disease who has not been under a rehabilitation regimen may require the services of a qualified therapist to determine what type of exercises will contribute the most to the maintenance of his present level of functioning.
- (6) Ultrasound, short-wave, and microwave therapy treatment by a qualified physical therapist;
- (7) Hot pack, hydrocollator, infrared treatments, paraffin baths, and whirlpool; Hot pack hydrocollator, infrared treatments, paraffin baths, and whirlpool in particular cases where the patient's condition is complicated by circulatory deficiency, areas of desensitization, open wounds, fractures, or other complications, and the skills, knowledge, and judgment of a qualified physical therapist are required; and
- (8) Services of a speech pathologist or audiologist when necessary for the restoration of function in speech or hearing.

(Emphasis added by the administrative court).

Music therapy does not appear to fit the definition of any of the services listed in the Code. For example, therapeutic services are defined as those which are performed by an occupational therapist or physical therapist. The definition is not open, and therefore does not allow for

inclusion of additional types of therapy. Additionally, little to no evidence was presented at the hearing that would establish what, precisely, Petitioner's music therapy entailed. Therefore, it is impossible to determine whether Petitioner's music therapy would meet the definition of an "ongoing assessment of rehabilitation needs and potential" or maintenance therapy.

12.

Accordingly, Petitioner's caregiver did not establish that music therapy should count as a skilled rehabilitative service, the receipt of which could establish that the recipient meets Skilled Nursing Facility Level of Care.

ICF/MR Level of Care

13.

The intermediate care facility for the mentally retarded (ICF/MR) level of care is satisfied, in part, if:

- (1) The individual has mental retardation; or
- (2) The individual has a severe chronic disability attributable to Cerebral Palsy or epilepsy; or
- (3) The individual has a condition, other than mental illness, which is found to be closely related to mental retardation because it results in impairment of general intellectual functioning or adaptive behavior similar to mental retardation and requires similar treatment and services, and the condition is likely to continue indefinitely; and
- (4) The impairment results in substantial functional limitations in three or more of [a list of] life activities . . .

42 C.F.R. §§ 440.150, 435.1010. Petitioner is very clearly not appropriate for ICF/MR Level of Care. Petitioner does not have mental retardation; he has a Full Scale IQ of 99, which is within the normal range. Nor does Petitioner suffer from a severe chronic disability attributable to Cerebral Palsy or epilepsy, or a condition closely related to mental retardation. Moreover, Petitioner does not suffer an impairment that results in a substantial functional limitation of any activity of daily living.

14.

Considering the record in this matter, Petitioner's caregiver has not established that Petitioner met the requisite Level of Care to qualify for the Katie Beckett. Respondent was therefore correct in its determination that he was ineligible for participation.

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, Respondent's decision to deny Petitioner's application for Katie Beckett as provided in the Final Denial letter sent to Petitioner's caregivers on or about September 6, 2013 is **AFFIRMED**.

SO ORDERED, this the _____ day of March, 2014.

M. PATRICK WOODARD
Administrative Law Judge