



FILED
OSAH

OCT 27 2014

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

O [REDACTED] B [REDACTED],
Petitioner,

v.

GEORGIA DEPARTMENT OF
COMMUNITY HEALTH,
Respondent.

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Docket No.:
OSAH-DCH-SOURCE-[REDACTED]-121-Malihi

K. Westray
Kevin Westray, Legal Assistant

Agency Reference No.: R14-808

INITIAL DECISION

I. Introduction

Petitioner O [REDACTED] B [REDACTED], by and through her personal representative, appealed the Department of Community Health's ("DCH's") decision to terminate her participation in the Service Options Using Resources in Community Environments ("SOURCE") Program. The hearing on this matter was held before the undersigned Administrative Law Judge at the Office of State Administrative Hearings in Atlanta, Georgia on August 15, 2014. M [REDACTED] I [REDACTED], Petitioner's personal representative, participated in the hearing on Petitioner's behalf. Yvonne Hawks, Esq., represented DCH. For reasons indicated herein, DCH's action is **REVERSED**.

This record is sealed to protect medical records of Petitioner 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 Petitioner'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. Petitioner is thirty-four years old and a participant in the SOURCE Program. She currently resides in a Living Care Personal Care Home (hereinafter "Living Care"), a state-licensed facility where she is able to receive "twenty-four hour supervision, medically-related personal care, nursing supervision, and health-related support services" from qualified staff members. SOURCE provides financial support for Petitioner's stay at the personal care home. (Testimony of M [REDACTED] I [REDACTED]; Exhibits R-2, R-6).

2. Petitioner's diagnoses include seizure disorder, hypertension, non-insulin-dependent diabetes mellitus (NIDDM), hearing loss, bilateral progressive neuropathy, bipolar disorder, schizophrenia, and mental retardation. She currently takes gabapentin and topamax to alleviate her seizures, Metformin for diabetes, and Lorazepam, an anti-anxiety medication. Her primary care physician is Dr. F [REDACTED] O [REDACTED] (Exhibits R-5, R-6, R-10, R-11, R-12; Testimony of M [REDACTED] I [REDACTED]; Testimony of A [REDACTED] R [REDACTED]; Testimony of T [REDACTED] R [REDACTED]).

3. On March 28, 2014, A [REDACTED] R [REDACTED], RN, a SOURCE Assessment Nurse, visited Petitioner at Living Care to conduct a routine assessment of her eligibility for continued participation in the SOURCE program using the interRAI Minimum Data Set-Home Care (MDS-HC) Assessment Form and SOURCE Assessment Addendum.¹ As Petitioner was unable to effectively communicate, R [REDACTED] completed this Assessment with information obtained from staff members at Living Care. (Testimony of A [REDACTED] R [REDACTED]; Exhibit R-6 and R-7).

4. Petitioner requires assistance from staff members in order to perform most of her activities of daily living (ADLs). Although she has no deficits to mobility, she requires oversight and cuing from her caregivers in order to dress her upper body and requires limited assistance² in order to dress her lower body and maintain her personal hygiene. She also experiences occasional bladder incontinence and must be prompted to use the toilet. (Testimony of A [REDACTED] R [REDACTED]; Exhibit R-6, R-7, R-10, R-11, and R-12).

5. Petitioner is incapable of performing any instrumental activity of daily living (IADL). She depends entirely upon staff members at Living Care for meal preparation, ordinary housework, managing finances and medications, using the phone, using the stairs, shopping, and transportation. (Testimony of A [REDACTED] R [REDACTED]; Exhibit R-6, R-7, R-10, and R-11).

6. Petitioner's cognitive skills are severely impaired and she is entirely dependent on her caregivers for daily decision-making. She experiences problems with short-term, procedural, and situational memory. (Testimony of A [REDACTED] R [REDACTED]; Exhibits R-6, R-10, R-11, and R-12).

7. Petitioner has severe communication deficits and is incapable of either making herself understood or understanding others. During the Assessment, R [REDACTED] noted that Petitioner was "unable to express [her]self adequately even in simple, basic, written form. . . ." Petitioner's communication deficits are attributable, in large part, to her severe hearing loss. R [REDACTED] included the following notation on the Assessment form with regard to Petitioner's communication deficits: "[Petitioner] may try to make guttural[sic], hollow sounds, words. Muffled often garbled speech pattern . . . has great difficulty trying to express self even in written form . . . (deaf)."³ (Testimony of A [REDACTED] R [REDACTED]; Testimony of T [REDACTED] R [REDACTED]; Exhibits R-6, R-10, R-9, R-11, and R-12).

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. (Testimony of L [REDACTED] S [REDACTED]; Exhibits R-1, R-2, and R-3).

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 An individual who requires limited assistance in performing an ADL requires another individual to provide "guided maneuvering of limbs" in order to complete the task. (Exhibit R-6).

3 Exhibit R-6 (p. 2 of 17).

9. On or about April 22, 2014, a SOURCE Review Team with Georgia Medical Care Foundation (GMCF) reviewed the results of the March 28, 2014 Assessment, along with the SOURCE Assessment Addendum, and Petitioner's medical records. Using this information, the Review Team completed Appendix I, a rubric used to evaluate SOURCE eligibility. According to the instructions on Appendix I, in order "[t]o meet an intermediate nursing home level of care the individual must meet . . . [i]tem #1 in Column A [Medical Status] AND one other item (2-8) in Column A, PLUS at least one item from Column B [Mental Status] or C [Functional Status]." (Testimony of T [REDACTED] R [REDACTED]; Exhibits R-1, R-9).

10. Petitioner satisfied the requisite number of criteria under Column A on Appendix I. However, she did not meet any of the criteria under Column B because her cognitive deficits are attributable to developmental and psychiatric disease diagnoses—mental retardation and schizophrenia—which are not covered under SOURCE. For the same reason, the Review Team also concluded that Petitioner did not meet any of the criteria under Column C, Functional Status. Although Petitioner's communication deficits were of such a severe nature as to constitute a functional impairment, the Review Team concluded that they were not attributable to a physiological impairment, and were thus not covered under the program. Under item number four of Column C—which reads "documented communication deficits in making self understood or understanding others"—the Review Nurse described the etiology of Petitioner's communication deficits with the handwritten notation "schizo (deaf)."⁴ Accordingly, based on Appendix I, the Review Team made a determination that Petitioner did not meet intermediate nursing home level of care. (Testimony of T [REDACTED] R [REDACTED]; Exhibit R-9).

11. On or about April 23, 2014, DCH notified Petitioner that her enrollment in the SOURCE program would be terminated. M [REDACTED] L [REDACTED], President of the SOURCE Provider that contracts with Living Care, appealed DCH's determination on Petitioner's behalf on or about May 1, 2014 and the matter was referred to the Office of State Administrative Hearings for adjudication. (Testimony of M [REDACTED] L [REDACTED]; Exhibits R-4, R-13).

12. At the hearing on this matter, T [REDACTED] R [REDACTED], RN, a member of the team that conducted the above-described evaluation of Petitioner's continued eligibility for the SOURCE Program, testified that Petitioner did not meet the requisite level of care because she does not have a functional disability that is attributable to a physiological diagnosis. R [REDACTED] acknowledged that Petitioner had communication deficits caused by deafness, but testified that this was insufficient to meet level of care. (Testimony of T [REDACTED] R [REDACTED]).

13. At the close of the hearing on this matter, the evidentiary record remained open so that Petitioner's representative could obtain additional documentation of Petitioner's medical condition. On September 23, 2014, Petitioner's representative submitted records of an August 14, 2014 doctor's office visit by Petitioner and a letter from Dr. O [REDACTED] Petitioner's primary care physician, to the Office of State Administrative Hearings. In her letter, Dr. O [REDACTED] opined that "due to her deafness . . . [Petitioner] would have incredible difficulty communicating any inevitable need for assistance" Respondent did not alter its determination that Petitioner was ineligible for continued SOURCE Program participation after reviewing the additional

4 The Review Nurse who signed Petitioner's Appendix I, "M. T [REDACTED]" did not testify at the evidentiary hearing.

documentation submitted by Petitioner (Letter from Dr. F [REDACTED] O [REDACTED] filed September 23, 2014).

III. Conclusions of Law

1. This matter concerns the DCH's termination of Petitioner's benefits; therefore, DCH bears the burden of proof. 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.

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. §§ 1396-1396v. Each state is required to designate a single state agency to administer its Medicaid plan. In Georgia, that agency is DCH. 42 C.F.R. § 431.10(a); O.C.G.A. § 49-2-11(f).

3. The Department offers home- and community-based services (HCBS), including personal support services and alternative living services, to aged and physically disabled individuals through its SOURCE program. The SOURCE program is part of the Department's Elderly and Disabled Waiver, which is intended to furnish HCBS to Medicaid recipients who, in the absence of such services, would require Medicaid-covered care in a nursing facility. See 42 C.F.R. § 441.301(b)(1)(iii). Within the broad federal rules applicable to Medicaid, the Department is authorized to determine "eligible groups, types and range of services, payment levels for services, and administrative and operating procedures." 42 C.F.R. § 430.0. See also O.C.G.A. § 49-4-142(a) (the legislature authorized DCH to adopt and administer the state plan for Medicaid, including establishing "the amount, duration, scope and terms and conditions of eligibility for and receipt of such medical assistance...").

4. 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.

5. 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.

6. DCH does not dispute that Petitioner has stable conditions requiring intermittent skilled nursing services under the direction of a licensed physician. Petitioner 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, Petitioner must meet one item from Column B or C (with the exception of Item #5 under Column C).

7. In order to qualify under Column B, the participant must have a cognitive impairment unrelated to a psychiatric or developmental disability. *SOURCE Manual § 801.3*. Although Petitioner suffers from significant cognitive impairments, they are entirely attributable to mental retardation and schizophrenia, etiologies that are not covered under SOURCE.

8. To meet the intermediate nursing home level of care, the individual's medical condition must cause one of the functional impairments described under Column C of Appendix I (with the exception of bullet 5, which is insufficient, by itself, to show that the individual meets level of care):

- 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).

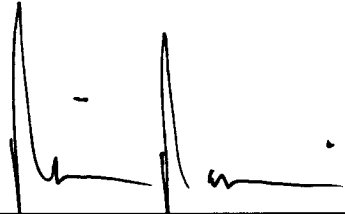
SOURCE Manual Section 801.3 and Appendix I.

9. In the present case, Petitioner's severe communication deficits were documented on the MDS-HC, in case notes, and in medical records. Therefore, unless Petitioner's communication deficits are attributable to an etiology that is not covered by SOURCE, she should meet the fourth item under Column C and remain on the SOURCE Program. Respondent bears the burden of demonstrating, by a preponderance of the evidence, that Petitioner's communication deficits are attributable to her psychiatric or developmental disease diagnoses. However, Petitioner's primary care physician, the SOURCE Assessment Nurse, and a member of the SOURCE Review Team, attribute Petitioner's communication deficits to her severe hearing loss, a physiological impairment. Indeed, very little in the evidentiary record cites schizophrenia or mental retardation as the cause of Petitioner's communication deficits. Accordingly, DCH's determination that Petitioner did not meet the intermediate nursing home level of care is unsupported by the evidence.

IV. Decision

IT IS HEREBY ORDERED that DCH's termination of Petitioner's participation in the SOURCE Program per notice issued on April 23, 2014 is **REVERSED**.

SO ORDERED, this the 27th day of October, 2014.



MICHAEL MALIHI, Judge