

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

██████████,

Petitioner,

v.

DEPARTMENT OF COMMUNITY
HEALTH,

Respondent.

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Docket No.:
OSAH-DCH-ICWP-██████████-Howells



FILED
OSAH

MAY 14 2015

INITIAL DECISION

I. INTRODUCTION

K. Westray

Kevin Westray, Legal Assistant

The hearing in this matter was held on April 20, 2015,¹ before the undersigned administrative law judge of the Office of State Administrative Hearings. Petitioner ██████████ requested the hearing to appeal Respondent's denial of her application for Independent Care Waiver Program ("ICWP") services. Ms. ██████████ was represented by C. Talley Wells, Esq. Respondent Department of Community Health ("DCH" or "Department") was represented at the hearing by James M. Knox, Esq.

For the reasons set forth below, the Department's denial is hereby **AFFIRMED**.

II. FINDINGS OF FACT

1.

██████████ is a 54 year-old woman who currently resides at the Lake City Nursing and Rehab Center in Morrow, Georgia. She has resided at the facility since August 27, 2001.

(Exs. R-3, R-8, R-9).

¹ The parties submitted written closing arguments on May 4, 2015 and May 5, 2015.

2.

Ms. [REDACTED] has the following diagnoses: brain injury,² dysarthria (difficulty articulating words), dysphagia (difficulty swallowing), vascular dementia, COPD, spastic hemiplegia, generalized muscle weakness, hypertension, and depression. (Exs. R-8, R-9; Testimony of Ometa Claypole, R.N.).

3.

Ms. [REDACTED] applied for ICWP services on November 24, 2014.³ The notice of denial, dated January 2, 2015, stated that Ms. [REDACTED] was denied because she requires maximum assistance at all times, she does not have a natural support system, and she did not have a Plan of Care within the cost limit of the waiver program. (Ex. R-14). Ms. [REDACTED] appealed the denial, and that appeal is the basis of this matter. (Ex. R-15).

4.

The ICWP is a Medicaid Home and Community-Based Services (“HCBS”) waiver program authorized in section 1915(c) of the Social Security Act. (Ex. R-2). Georgia’s application for a 1915(c) HCBS waiver (“Waiver Application”) for the ICWP was approved by the Centers for Medicare and Medicaid Services effective April 1, 2006, and was renewed for five years effective April 1, 2011. (Ex. R-2).

5.

The purpose of the ICWP is described in the Waiver Application as follows:

The [ICWP] offers services to individuals with significant physical disabilities and/or traumatic brain injury. To be considered for admission into the waiver, individuals must be between 21 and 64 years of age, meet nursing home and/or hospital level of care, and those whose care can be provided *safely* within the cost guidelines of the program. The program offers services that will assist a limited

² It is unclear whether Ms. [REDACTED]’s brain injury was caused by trauma or occurred as a result of a stroke. The Face Sheet from the nursing home reflects a diagnosis of “Brain Injury Nec.” However, a Care Plan from the nursing home contains a reference to a CVA with hemiplegia, as well as a history of a closed head injury. (Ex. R-9).

³ It appears that Ms. [REDACTED] may have applied previously for ICWP services, earlier in 2014, however, the outcome of that application is unclear. (Ex. R-15).

number of adult Medicaid members with severe physical disabilities to live in their own homes or in the community instead of an institutional setting. *The services offered through ICWP are designed to supplement the care provided to individuals by their family and friends in the community.*

(Ex. R-2 at § 2) (emphasis added). One of the goals listed in the Waiver Application is: “To provide quality services, consistent with the needs of the severely disabled and/or traumatic brain injured member, which are effective in improving/maintaining the member’s ability to live *safely* in the community as long as possible.” *Id.* (emphasis added).

6.

The Waiver Application requires that a service plan of care is developed for each participant and that it describes, in part, “the other services (regardless of funding source, including State plan services) and informal supports that compliment waiver services in meeting the needs of the participant.” (Ex. R-2 at § 6(A)). The Wavier Application further requires that the State assures and monitors the participants’ health and welfare. (Ex. R-2 at § 6(H)). Finally, the Waiver Application states that the “Participant Assessment Form” will be used to assess the applicant’s needs and develop the initial plan of care, and will include “information regarding the individual’s informal support system in order to fully utilize nonpaid assistance in developing the plan of care. (Ex. R-2 at Appx. B-2).

7.

The Department’s manual contains the criteria for eligibility in the ICWP. To be eligible, the applicant must:

- A) have been determined disabled [by the state or federal government and meet the financial and resource limits];
- B) [be] between twenty-one (21) and sixty-four (64) years old when services are started . . . ;
- C) have a severe physical impairment and/or traumatic brain injury that substantially limit one or more activities of daily living and require the assistance of another individual;

D) [be] cognitively alert and capable of directing [his/her] own services. (Does not include TBI members) . . . ;

E) [] not have a primary diagnosis of a mental disorder (i.e., mental retardation/mental illness);

F) [be] medically stable but . . . at risk of hospital or nursing facility placement due to inadequate community based support services;

G) [be] certified for a level of care appropriate for placement in a hospital or nursing facility;

H) have a Plan of Care within the cost limit of the waiver;⁴

I) [be] able to be safely placed in a home [or] community setting; [and]

J) [be] currently in an institution or at risk of being placed in an institutional setting.

(Ex. R-1 at § 701).

8.

The eligibility section of the manual further provides, as follows:

If the applicant requires extensive daily care, the presence of a natural support system must be presented at assessment. This support system can include family members, community assistance, paid support by the applicant, technological support, or other means to support the ICWP plan of care. The natural support system is used to develop a holistic plan of care that assures the safety of the applicant. Examples of extensive daily care include the need for 24-hour assistance; extensive transfer assistance without which the applicant will be unsafe and/or uncared for; and the need for continuous care of any kind.

(*Id.*)

9.

The Georgia Department of Community Health, Division of Medicaid is responsible for the overall administration of the Medicaid programs. (Exs. R-1, R-2; Testimony of Barbara

⁴ The cost for providing services under the ICWP must be cost-neutral. In other words, the cost for providing the services in the community cannot exceed the cost of providing those services in a nursing facility, as it pertains to this case. The average cost for nursing home care at the time of the Waiver Application was \$53,561.00. (Testimony of Barbara Means-Cheely; Ex. R-2 at Appx. J-2(c)(iii)). According to Ms. Means-Cheely, the \$53,561.00 amount is the cost limit for nursing home level of care under the ICWP. (*Id.*) Counsel for Petitioner argued that a calculation using factors contained in Appendix J-1 of the Waiver Application would result in an increase of \$5,998.28 for 2015 (i.e., year four of the waiver) and thus the cost limit is \$59,549.28 (i.e., \$53,561.00 + \$5,998.28).

Means-Cheely). The ICWP is one such program. (*Id.*) The Division of Medicaid has contracted with the Georgia Medical Care Foundation (“GMCF”) to perform the face-to-face assessments of applicants seeking services through the ICWP. (Ex. R-1; Testimony of Barbara Means-Cheely).

10.

Ometa Claypole, R.N. is employed with GMCF. She performed the face-to-face assessment of Ms. [REDACTED] on December 16, 2014. (Ex. R-8; Testimony of Ometa Claypole, R.N.)

11.

Ms. [REDACTED] requires maximum assistance with her activities of daily living. (Ex. R-8; Testimony of Ometa Claypole, R.N.). She can propel her wheelchair short distances. (Exs. R-10, R-13; Testimony of Ometa Claypole, R.N.). However, she cannot walk and requires the assistance of two people to transfer from her bed to her wheelchair or from her wheelchair to her bed. (Exs. R-3, R-8; Testimony of Ometa Claypole, R.N.). She is at risk for falls and has fallen because she has refused to use the assistive device to reach items. (Ex. R-8).

12.

At times, Ms. [REDACTED] becomes agitated and non-compliant. (Exs. R-8, R-9, R-13; Testimony of Ometa Claypole, R.N.). In the past, she has refused care and cursed at the nursing home staff. (Exs. R-8, R-13). Ms. [REDACTED] has both bowel and bladder incontinence. (Exs. R-8, R-9). As a result, she wears “pull-ups,” which she is unable to change on her own. (Testimony of Ometa Claypole, R.N.). Ms. [REDACTED] also smokes and because of tremors and spastic movements, she is unable to hold the cigarette and has dropped ashes on her clothing. (Ex. R-9). For those reasons, she is at risk for a smoking injury and the nursing home has required that she only smoke if she wears a smoking apron and allows a staff member to hold the cigarette. (*Id.*; Testimony of Ometa Claypole, R.N.). If Ms. [REDACTED] were to smoke without

any assistance there is a risk that she would accidentally start a fire.⁵ (Testimony of Ometa Claypole, R.N.).

13.

Due to her dysarthria, it is often difficult to understand what Ms. [REDACTED] is saying. (Ex. R-9, R-13; Testimony of Ometa Claypole, R.N.). In the nursing home, she has refused to use the communication board. (Ex. R-9). When given ample time to respond, she is able to make her needs known. (Ex. R-13). However, Ms. [REDACTED] cannot use a telephone. (Ex. R-8; Testimony of Ometa Claypole, R.N.).

14.

Ms. [REDACTED] does not have any family or friends who could provide informal support during the time when she would not have personal support services.⁶ Additionally, she has refused to consider alternative living services (i.e., a personal care home). She insists that she wants to live on her own. (Ex. R-8; Testimony of Ometa Claypole, R.N.).

15.

Because of Ms. [REDACTED]'s physical and mental deficits, Nurse Claypole concluded that she would require care twenty-four hours a day. (Ex. R-8; Testimony of Ometa Claypole, R.N.). Further, because she does not have any family or friends who could provide informal support, Nurse Claypole concluded that the ICWP could not provide services safely within the budget

⁵ Mr. [REDACTED]'s counsel asked her some questions about what she would do if she lived in her own apartment. When Ms. [REDACTED] was asked whether she would reach for items, such as her cigarettes when there was no aid present, Ms. [REDACTED] said that she would not because she would already have the cigarettes with her. (Testimony of Petitioner). This admission on the part of Ms. [REDACTED] coupled with her history of non-compliance, raises a significant concern that Ms. [REDACTED] will be at risk for a smoking related injury or that she could inadvertently start a fire.

⁶ Counsel for Ms. [REDACTED] argued that Ms. [REDACTED] could live in her own apartment with twelve hours of personal support services and an emergency response system (in essence a button to push for emergency services) to use during the other twelve hours of the day. However, Ms. [REDACTED]'s counsel presented no credible evidence that she could safely be left alone for twelve hours per day. In fact, the evidence presented supports a contrary conclusion. Aside from her risk for falls and smoking injuries, Nurse Claypole testified that if Ms. [REDACTED] were to soil her pull-ups and they were not changed for an extended period of time, she would be at risk for a breakdown of her skin integrity. (Testimony of Ometa Claypole, R.N.).

constraints.⁷ (*Id.*) Thus, she concluded that Ms. ██████ did not meet the eligibility criteria for the ICWP. (*Id.*)

III. CONCLUSIONS OF LAW

1.

This matter concerns an application for ICWP participation and services; therefore, Ms. ██████ bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07. The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21.

2.

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.* 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 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).

3.

Home and community-based services (“HCBS”)⁸ are services that a state may opt to offer and be reimbursed for 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 Social Security Act [42. U.S.C.

⁷ Nurse Claypole estimated the total cost of Ms. ██████'s care to be \$118,532.52 per year. (Exs. R-7, R-8). This amount includes \$3,000.00 for ten hours of case management services per month, \$113,967.60 for twenty-four hours per day, seven days per week of personal support services, and \$1,564.92 for medical supplies. (Ex. R-7).

⁸ 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.

§ 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 1981,⁹ 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, and income and resource limits. See 42 U.S.C. § 1396n(c)(3).

4.

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).

5.

Specifically pertinent to this case, the federal regulations require that the state’s application for a waiver include “[a] statement explaining whether the agency will refuse to offer home or community-based services to any beneficiary if the agency can reasonably expect that the cost of the services would exceed the cost of an equivalent level of care provided in” a

⁹ “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).

hospital, nursing facility or an intermediate care facility for the mentally retarded. 42 C.F.R. § 441.301(a)(3). Further, the regulation requires the state's application for a waiver include the use of a "Person-Centered Service Plan," which must "[r]eflect clinical and support needs as identified through an assessment of functional need." 42 C.F.R. § 441.301(c)(2)(iii). The Person-Centered Service Plan must also "[r]eflect the services and supports (paid and unpaid) that will assist the individual to achieve identified goals, and the providers of those services and supports, including natural supports." 42 C.F.R. § 441.301(c)(2)(v). The regulation defines "natural supports" as "unpaid supports that are provided voluntarily to the individual in lieu of 1915(c) HCBS waiver services and supports." *Id.* Additionally, the Person-Centered Service Plan must "[r]eflect risk factors and measures in place to minimize them, including individualized back-up plans and strategies when needed." 42 C.F.R. § 441.301(c)(2)(vi).

6.

Federal law provides that State plans for medical assistance, approved under 42 U.S.C. §§ 1396 *et seq.*, bind all political subdivisions administering a plan, which includes the ICWP. 42 U.S.C. § 1396a. In the case of the HCBS Waiver, "[o]nce approved, the Waiver [A]pplication becomes the controlling document." *See Susan J. v. Riley*, 616 F. Supp. 2d 1219, 1240 (M.D. Ala. 2009). If the Secretary finds "that in the administration of [the State] plan there is a failure to comply substantially with any . . . provision [in 42 U.S.C. § 1396a]," the Secretary may cease payments to the state for the non-compliant provisions. 42 U.S.C. § 1396c. In addition, under Georgia law, state laws relating to the provision of medical assistance must "be construed consistently with [the federal Social Security Act]," and the state plan must be administered "in a manner so as to receive the maximum amount of federal financial participation available in expenditures made under the state plan." O.C.G.A. § 49-4-157. Accordingly, Georgia law requires that DCH administer the ICWP in substantial compliance

with the terms of the approved Waiver Application, as failure to do so could jeopardize federal funding. *See* 42 U.S.C. § 1396c.

7.

At the hearing, counsel for Ms. ██████ appeared to argue that the Department's Manual included requirements (e.g., a natural support system) that were not included in the Waiver Application and therefore were not entitled to deference. Ms. ██████'s counsel also argued that Ms. ██████ could safely live on her own with only twelve hours of personal support services and an emergency response system provided through the ICWP, and that those services would be within the cost limit of the ICWP.¹⁰ Finally, in Petitioner's written closing argument, Ms. ██████'s counsel argued that in order to meet the informed choice requirement in the Department's Manual, it was required to determine the amount of services she could have received within the cost limit to ascertain whether she could safely live in the community. For the reasons that follow, the arguments advanced by Ms. ██████'s counsel are without merit.

8.

The very purpose of the ICWP as stated in the Waiver Application is to provide services to individuals who meet the age and level of care requirements and whose care can be provided safely within the cost guidelines of the program. Further, the Waiver Application specifically states that ICWP services are designed to supplement the care provided by the individual's family and friends. The Waiver Application also contains references to the individual's informal support system. Accordingly, the Manual's requirement of a natural support system for individuals who require extensive daily care is entirely consistent with the Waiver Application's terms and stated purpose, as well as the federal regulations. *See* 42 C.F.R. § 441.301(c)(2)(v). Similarly, the Manual's requirement that, in order to be eligible, an individual must have a plan

¹⁰ As noted above, the parties dispute the actual cost limit of the ICWP for individuals requiring nursing facility level of care. However, for the reasons that follow, it is unnecessary to resolve that dispute.

of care within the cost limit is also consistent with the terms of the Waiver Application and the federal regulations. *See* 42 C.F.R. § 441.301(a)(3).

9.

The evidence at the hearing established that Ms. [REDACTED] does not have a natural support system. Due to her mental and physical deficits, she requires care twenty-four hours a day.¹¹ Because she does not have a natural support system, all of her care would have to be provided through the ICWP. It would cost \$118,532.52 per year to provide such care to Ms. [REDACTED] in the community. This amount exceeds the cost limit for the ICWP.¹² For these reasons, the Department appropriately denied Ms. [REDACTED]'s application for ICWP services.

10.

Because the evidence indicated that Ms. [REDACTED] requires care twenty-four hours a day and the cost for that care would far exceed the cost limit of the ICWP under either party's calculation, there was no requirement for the Department to calculate the amount of services she could receive within the cost limit. Such an exercise ignores the patent safety concerns regarding Ms. [REDACTED]'s care and is inconsistent with the clinical and support needs identified for Ms. [REDACTED] through the assessment performed by Nurse Claypole. *See* 42 C.F.R. § 441.301(c)(2)(iii) (requiring the Person-Centered Service Plan to “[r]eflect the clinical and support needs as identified through an assessment of functional need”).


¹¹ Although Ms. [REDACTED]'s counsel argued that she could safely live on her own with only twelve hours of personal support services and an emergency response system, he presented no credible evidence to support that argument. In fact, there was convincing evidence to the contrary.

¹² As noted above, the Department presented evidence that the cost limit for the ICWP is \$53,561.00 for individuals requiring nursing facility level of care. Ms. [REDACTED]'s counsel argued that the cost limit for nursing facility level of care is \$59,549.28. The cost for the amount of care Ms. [REDACTED] requires far exceeds the limits advanced by both parties. Thus, the undersigned finds it unnecessary to resolve this dispute.

IV. DECISION

In accordance with the foregoing Findings of Facts and Conclusions of Law, the Department's decision to deny Petitioner Cheryl [REDACTED]'s application for services under the Independent Care Waiver Program is hereby **AFFIRMED**.

SO ORDERED, this 14th day of May, 2015.



STEPHANIE M. HOWELLS
Administrative Law Judge