



FILED
OSAH

AUG 25 2016

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

██████████,
Petitioner,

v.

**GEORGIA DEPARTMENT OF
COMMUNITY HEALTH,
Respondent.**

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Docket No.:
OSAH-DCH-SOURCE-██████████ Woodard

Agency Reference No.: ██████████

Kevin Westray
Kevin Westray, Legal Assistant

INITIAL DECISION

I. INTRODUCTION

This matter concerns the Petitioner’s appeal of 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 at the Office of State Administrative Hearings, in Atlanta, Georgia, before the undersigned Administrative Law Judge on June 9, 2016. C. Talley Wells, Esq., Atlanta Legal Aid Society, represented the Petitioner at the hearing and Yvonne Hawks, Esq., represented DCH. Following the hearing, the evidentiary record remained open to allow the parties to file briefs. The Petitioner filed her brief with the Office of State Administrative Hearings on July 5, 2016. DCH filed its brief on July 22, 2016, whereupon the evidentiary record closed. Having carefully reviewed the evidentiary record and the filings of both parties, the undersigned concludes that DCH erred in terminating the Petitioner’s SOURCE case. Therefore, for the reasons indicated below, DCH’s action is **REVERSED**.

II. FINDINGS OF FACT

The following facts are not in dispute:

1.

DCH assessed the Petitioner for admission into the SOURCE Program on December 2, 2015. The assessment was performed at the home of the Petitioner’s daughter. However, at the time of the assessment, the Petitioner was a resident of a nursing home. *Respondent’s Exhibit 6*.

2.

At the time of the assessment, the Petitioner was a recipient of Supplemental Security Income (SSI). Therefore, she was automatically eligible for Medicaid. *Respondent's Exhibits 7, 8.*

3.

Based on the results of the assessment, DCH determined that the Petitioner met the nursing facility level of care criteria. Accordingly, DCH approved the Petitioner for admission into the SOURCE Program on January 8, 2016. *Respondent's Exhibit 6.*

4.

On an unspecified date following the determination of SOURCE eligibility, the Petitioner left the nursing home and was admitted to a personal care home. Upon leaving the nursing home, and for an unspecified reason, the Petitioner's SSI coverage terminated. She was subsequently informed that she was no longer eligible for "full Medicaid." The Petitioner remained eligible for Medicaid under the "Qualified Medicare Beneficiary" (QMB) class of assistance. *Respondent's Exhibit 5.*

5.

Prior to commencing SOURCE services, DCH reviewed the Petitioner's Medicaid eligibility and discovered that the Petitioner's SSI had been terminated. DCH thereupon determined that the Petitioner was no longer eligible for SOURCE. *Respondent's Exhibits 5, 7.*

6.

In a letter dated April 22, 2016, DCH notified the Petitioner that it was terminating her SOURCE case due to her loss of SSI coverage. On May 10, 2016, Petitioner requested a hearing. *Respondent's Exhibits 4, 5.*

The Parties' Arguments:

7.

At the hearing in this matter, and in post-hearing briefs, the Petitioner, through counsel, averred that she remained eligible for SOURCE services according to Georgia's SOURCE Waiver Application. Specifically, the Petitioner argued that the Waiver Application extended eligibility to SSI recipients *and* individuals whose income did not exceed 300% of the SSI Federal Benefit Rate (FBR). *Petitioner's Trial Brief Requesting Reversal of SOURCE Denial filed July 5, 2016.*

8.

In its responsive brief, DCH acknowledged that “[t]he Medicaid eligibility requirement agreed to in the waiver and adopted by the SOURCE Manual states that participants must receive SSI Medicaid or . . . be 300% of the SSI FBR.” However, DCH asserted that the Petitioner had offered no evidence to show that she was eligible for SOURCE under either criterion. *Respondent’s Response to Petitioner’s Trial Brief filed July 22, 2016.*

III. CONCLUSIONS OF LAW

1.

This matter concerns DCH’s termination of the Petitioner’s SOURCE case. Therefore, DCH 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.

The Medicaid program was created in 1965 “for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons.” Miller v. Wladyslaw Estate, 547 F.3d 273, 277 (5th Cir. 2008) (quoting Harris v. McRae, 448 U.S. 397, 201 (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 (“the Secretary”) of a plan specifying the programs and services it will offer using Medicaid funds. See 42 U.S.C. § 1396a; see also Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 650 (2003). Certain programs 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), 1396d(a)(1), (3), (4); see Skandalis, 14 F.3d at 175; Susan J., 254 F.R.D. at 446.

3.

Home and community-based services (HCBS) 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., 254 F.R.D. at 446. “The term ‘waiver comes from Section 1915(c) of the Social Security Act, enacted in 1981, 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.”).

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, federal regulations require that a state’s application for a waiver include an assurance that services will be furnished only to beneficiaries who, in the absence of such services, would require Medicaid-covered care in a hospital, nursing facility, or intermediate care facility for the intellectually disabled. 42 C.F.R. § 441.301(b)(1)(iii). Additionally, federal regulations require that each waiver application “[b]e limited to one of the following target groups or any subgroup thereof that the state may define:”

- (i) Aged or disabled, or both.
- (ii) Individuals with Intellectual or Developmental Disabilities, or both.
- (iii) Mentally ill.

42 C.F.R. § 441.301(b)(6).

5.

DCH offers enhanced case management and HCBS to eligible Medicaid members under a waiver program entitled Service Options Using Resources in Community Environments, or “SOURCE.” In the past, the SOURCE Program was part of the Georgia Medicaid State Plan. However, with the approval of the Center for Medicare and Medicaid Services, DCH removed the SOURCE Program from the State Plan and added it to an existing § 1915(c) waiver entitled the “Elderly and Disabled Waiver.” DCH subsequently submitted an application to CMS to amend the Elderly and Disabled Waiver (“waiver application”). The current waiver application was approved by CMS on or about February 14, 2013 and is effective through September 30, 2017. Application for a § 1915(c) Home and Community-Based Services Waiver [hereinafter Waiver Application] available at https://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/waivers_faceted.html. “Once approved, the Waiver application becomes the controlling document.” Susan J., 616 F. Supp. 2d at 1240.

6.

In addition to level of care criteria, states are required to impose financial eligibility limits on HCBS waivers. See 42 U.S.C. § 1396a(a)(10)(A)(ii)(V), (VI); 42 C.F.R. § 441.303; see also 42 C.F.R. § 435.1005; Julie Stone, CONG. RESEARCH SERV., R41899, MEDICAID ELIGIBILITY FOR PERSONS AGE 65+ AND INDIVIDUALS WITH DISABILITIES: 2009 STATE PROFILES (2011) [hereinafter 2011 CRS REPORT]. At their option, states may limit participation to Supplemental Security Income (SSI) recipients, or establish a special income limit, which may be no greater than 300% of the SSI Federal Benefit Rate. Id.¹ This latter option is known as the “Special Income Rule” or “the 300% Rule.”² The 300% Rule “is intended for applicants with higher income and who require a level of care offered in an institution.” 2011 CRS REPORT.³

7.

DCH defined the scope of Georgia’s SOURCE program when it moved SOURCE into the Elderly and Disabled Waiver in October 2007. Pursuant to the waiver application, “Individuals served by [the Elderly and Disabled Waiver Program] are required to meet the same level of care for admission to a nursing home facility and be Medicaid eligible or potentially Medicaid eligible.” Waiver Application, p. 3 of 186. Under Appendix B, the section of the waiver application that specifies “applicable Medicaid eligibility . . . requirements,” the waiver application again provides that the waiver serves individuals who are “Medicaid eligible or potentially Medicaid eligible *after admission to the waiver.*” Id. at p. 29 of 186 (emphasis added). Under Section B-4 of Appendix B, DCH selected “SSI recipients” as an “Eligibility

¹ See also Allen J. LeBlanc et al., *Medicaid 1915(c) Home and Community-Based Services Waivers Across the States*, 22 HEALTH CARE FINANCING REV. 159, 160 (2000) (“States have the option of setting financial eligibility criteria for the 1915(c) waivers at the same level as those for institutional placement, up to 300 percent of Supplemental Security Income (SSI), although this varies at the States’ discretion.”); 77 Fed. Reg. 26,828, 26,839 (2012) (“The commenter believes this language demonstrated Congressional intent to allow States to make the CFC benefit available to individuals with incomes up to 300 percent of the Federal SSI benefit rate, *the same way that States may make nursing facility services, HCBS waiver services, and HCBS State plan benefit services available to them.*”) (emphasis added).

² See Brian Bruen et al., *State Usage of Medicaid Coverage Options for Aged, Blind, and Disabled People*, URB. INST., Winter 2000, at 7; see also Nancy L. Johnson & Katherine Ryan Sullivan, *Long-Term Care for the Elderly: Long-Term Care Financing: Federal Policy Implications, Actions, and Options*, 1 QUINNIPIAC HEALTH L.J. 139, 144 (1996/1997) (“States may also provide Medicaid to otherwise ineligible people who reside in nursing facilities or other institutions, or to people who are receiving alternative services at home or in the community. In these cases, states may establish a special income standard (known as the 300% rule) that extends Medicaid eligibility to these individuals, so long as their income does not exceed 300% of the basic SSI cash welfare payment. . . .”).

³ See Bruen et al., *supra* note 2, at 7 (“People eligible for institutional (e.g., nursing home) care, home- and community-based waiver services, or hospice care often become eligible for Medicaid at higher income levels than non-institutionalized people.”).

Group[] Served in the Waiver.” In the same section, DCH indicated that the State “furnishe[d] waiver services to individuals in the special home and community-based waiver group under 42 C.F.R. § 435.217.”⁴ DCH specified that it furnished waiver services only to special home and community-based waiver groups under 42 C.F.R. § 435.217 within “special income level[s] equal to . . . 300% of the Federal Benefit Rate (FBR).” *Id.* at 31 of 186.

8.

According to the plain language of the waiver application, eligibility under the SOURCE Program is not limited solely to SSI recipients. Rather, groups of individuals whose incomes are less than 300% of the SSI Federal Benefit Rate are also listed in the waiver application as an “Eligibility Group[] Served in the Waiver.” This clearly indicates that receipt of SSI Medicaid is not an essential prerequisite to SOURCE eligibility. Based on the language of the waiver application, it appears that Georgia is among the states that employ the 300% Rule in determining financial eligibility for waiver services.⁵ Thus, the Petitioner may be eligible for SOURCE if her income does not exceed 300% of the SSI Federal Benefit Rate. Currently, 300% of the SSI Federal Benefit Rate is \$2,199.00 (\$733.00 x 3). SOCIAL SECURITY ADMINISTRATION, *SSI Federal Payment Amounts for 2016*, <https://www.ssa.gov/oact/cola/SSI.html> (last visited Aug. 24, 2016).

⁴ Pursuant to this regulation:

The agency may provide Medicaid to any group or groups of individuals in the community who meet the following requirements:

- (a) The group would be eligible for Medicaid if institutionalized.
- (b) In the absence of home and community-based services under a waiver granted under part 441—
 - (1) Subpart G of this subchapter, the group would otherwise require the level of care furnished in a hospital, NF, or an ICF/IID; or
 - (2) Subpart H of this subchapter, the group would otherwise require the level of care furnished in an NF and are age 65 or older.
- (c) The group receives the waived services.

42 CFR 435.217.

⁵ According to a 2011 report to the United States Congress, individuals in Georgia may qualify for HCBS waiver services through “SSI-related and special income pathways.” 2011 CRS REPORT. Connecticut is also listed in that same report as qualifying individuals for HCBS waiver services through “special income pathways.” *Id.*; see also *Skandalis v. Rowe*, 14 F. 3.D 173, 175 (2d Cir. 1994) (“Connecticut limits eligibility for [its HCBS waiver program] to those individuals with income below 300% of the federal grant for [SSI]. . . .” Having reviewed Connecticut’s waiver application, the undersigned notes that Connecticut’s administering agency also selected the option to “furnish[] waiver services to individuals in the special home and community-based waiver group under 42 C.F.R. § 435.217 . . . [with] special income level[s] equal to . . . 300% of the Federal Benefit Rate (FBR).” MEDICAID.GOV, *Demonstrations & Waivers*, https://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/waivers_faceted.html (“CT HCBS for Elders”).


9.

The parties do not dispute that the Petitioner is currently eligible for Medicaid under the QMB class of assistance. Pursuant to the Economic Support Services Manual published by the Department of Human Services (hereinafter "the Medicaid Manual"), QMB provides a Medicare supplement to individuals or couples who have countable net income that is less than or equal to 100% of the Federal Poverty Level ("FPL"), plus \$20.00. The gross monthly income limits are \$1,010.00 for individuals and \$1,355.00 for couples. Medicaid Manual § 2143-1 and App'x. A1; see also 42 U.S.C. §§ 1396a(a)(10), 1396d(p). The QMB income limit is considerably lower than that prescribed by the waiver application. Therefore, the undersigned concludes that the Petitioner is qualified to participate in the SOURCE Program and that DCH's decision to terminate her SOURCE case was erroneous.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is the Initial Decision of the undersigned that DCH's decision to terminate Petitioner's enrollment in the SOURCE Program per notice dated April 22, 2016 is **REVERSED**.

SO ORDERED, this 25th day of August, 2016.


M. PATRICK WOODARD
Administrative Law Judge