


Devin Hamilton, Legal Assistant

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS

STATE OF GEORGIA

M [REDACTED] E [REDACTED],
Petitioner,

v.

DEPT. OF BEHAVIORAL HEALTH &
DEVELOPMENT DISABILITIES,
Respondent.

Docket No.: [REDACTED]
[REDACTED]-OSAH-DBHDD-NOWCOMP-106-Langston

Agency Reference No.: [REDACTED]

FINAL DECISION

I. INTRODUCTION

Petitioner receives services under the New Options Waiver/Comprehensive Supports Program (“NOW/COMP”) through the Department of Behavioral Health and Developmental Disabilities (“Department” or “Respondent”). The Department reduced Petitioner’s previously approved LPN skilled nursing service hours to 17 hours daily, and he appeals. An evidentiary hearing was conducted on July 14, 2023. After the hearing, the parties were allowed to submit proposed findings of fact and conclusions of law. For the reasons stated below, the Department’s reduction of daily skilled nursing hours is **AFFIRMED**.

II. FINDINGS OF FACT

1.

The Petitioner was born on October 17, 1992, and has always resided at home with his mother, father, and two sisters. He was thirty (30) years old at the time of this hearing.

2.

The Petitioner is a non-verbal, wheelchair and bed-bound spastic quadriplegic who is totally and permanently disabled. His diagnoses include developmental delay, intellectual disability, cerebral palsy, COPD, GERD, seizure disorder, insomnia, and scoliosis, among other conditions. Petitioner receives nourishment via feeding tube, is incontinent, and is dependent on

24-hour a day oxygen administered via tracheostomy. The Petitioner's condition, for which there is no cure, will deteriorate over time.

3.

Due to his numerous crippling conditions, the Petitioner requires close personal assistance, 1:1 care, with all activities of daily living ("ADLs") including, but not limited to, feeding/eating, bathing, dressing, personal hygiene, toileting, and transferring.

4.

To determine the amount of skilled nursing time needed by participants such as the Petitioner, the Department has a registered nurse ("RN") complete a general nursing assessment. This assessment evaluates the physician-ordered care for each participant and includes information regarding diagnoses, allergies, diet, ADLs and other day-to-day functioning, medications, any recent hospitalizations or other medical incidents, and other details involving daily direct care.

5.

In completing the nursing assessment, the RN conducts an interview with the participant's family. The RN also reviews collateral documentation, including notes from the home support coordinator and other Department officials; previous nursing assessments; and previous Health Risk Screening Tools ("HRSTs").

6.

The Department conducts Nursing Assessments for NOW/COMP participants when they first enter the program and annually thereafter. An assessment can also be conducted when a participant reports a "Level of Care" change, which is triggered by a physician's order addressing new treatments or a change to the frequency or invasiveness of existing procedures.

7.

Once the Nursing Assessment is complete, it is sent to a nurse "calculations team" with the Department that uses a standardized methodology—or "calculator"—to assign an amount of time to each skilled nursing task the participant requires. The calculator was developed by nursing experts who used evidence-based research to identify skilled nursing tasks that likely are needed for patients with complex medical needs in a community or home setting. The Department has been using this calculator for its NOW/COMP cases since 2017.

8.

For the purposes of the NOW/COMP calculator, skilled nursing services are indicated when the individual has a clinical diagnosis that requires ongoing complete assessment and intervention for the purpose of either the restoration or prevention of further deterioration of the individual's health. At minimum, those services must be performed by an RN or LPN, and they must be ordered by a physician or required by the participant's diagnosis.

9.

The calculator designates standardized amounts of time for each task, representing how long a nurse would need to perform the task within a 24-hour period. While the designated times are standardized, the team also accounts for modifying factors unique to each participant's complexities, including the frequency and specificity of how a particular task is administered. Additionally, if a treatment or medication is needed on an as-needed basis only, the participant is allotted the amount of time needed for one administration a day, regardless of whether the participant in fact needs it every day.

10.

Once time allotments are assigned to each skilled nursing task, the sum of these times is finalized as the daily amount of skilled nursing services the NOW/COMP participant is eligible to receive. The skilled nursing time is available as a "lump sum", meaning the family and support coordinator ultimately determine the scheduling of those hours. When a skilled nursing task is added, the time allotted for that task is added to the "lump sum" typically resulting in an increase of skilled nursing hours. On the other hand, when a skilled nursing task is no longer needed, the time allotted for that task is subtracted, resulting in a reduction of skilled nursing hours.

11.

On May 3, 2016, following a Nursing Assessment that detailed the extensive services (including tracheostomy care five times daily to include tracheal suctioning PRN) required to maintain Petitioner's health and safety at home, the Department awarded Petitioner twenty-three (23) hours of licensed practical nurse (LPN) care per day via an "exceptional rate approval."

12.

The Department conducted a Nursing Assessment for the Petitioner due to a level of care change on or around January 15, 2018. Based on that assessment, the Department's calculations team approved 1,300 minutes, or 22.5 hours of daily skilled nursing care from an LPN. The time allotments assigned by the calculator for the skilled nursing task for sterile dressing change 5x daily was 400 minutes.

13.

As the Department always round up the total number of hours, the Petitioner was approved to receive 23 hours of LPN care.

14.

On or around August 22, 2018, the Department completed a Nursing Assessment as a part of Petitioner's annual review for participation in the NOW/COMP program, (the "August 2018 Assessment"). The assessment was conducted in person. At that time, it was determined that Petitioner did not need sterile dressing changes for wound care. During the calculation, the 400 minutes allotted for sterile dressing changes was removed from the assessment and calculation. That resulted in a reduction of approved LPN care to 1000 minutes or 16.67 hours.¹

15.

The primary decrease is the time allotted for the sterile dressing changes 5 times daily.

16.

In August 2018, the Respondent attempted to reduce Petitioner's hours of LPN care to seventeen (17) hours per day by sending a *Notice of Adverse Action*. Petitioner appealed and requested a fair hearing. The Respondent declined to move forward with a fair hearing in 2018, 2019, 2020, 2021, and 2022 with Respondent eventually rescinding the 2018 *Notice of Adverse Action*, allowing the Petitioner to retain the twenty-three (23) hours of LPN care per day initially awarded on May 3, 2016.

17.

Each year from August 2018 on the Department again attempted to reduce the hours of LPN care to seventeen (17) hours per day by sending a *Notice of Adverse Action* in 2019, 2020,

¹ The Department has a PA extension in place until the hearing is resolved. The Petitioner has continued to receive 23 LPN hours and 5 RN hours from the date of the August 2018 Assessment.

2021, and 2022, and each year the Petitioner appealed and requested a fair hearing. Respondent declined to move forward on any of those *Notice of Adverse Actions* until the February 2023 *Notice of Adverse Action* that is the subject of this hearing. Petitioner has retained the 23 hours of LPN care over the five (5) years since the Respondent first attempted to reduce the Petitioner's LPN hours from 23 to 17 in the August 2018 Nursing Assessment.

18.

The Department conducted a Nursing Assessment for the Petitioner, due to a level of care change, on or around February 2, 2023.² Based on that assessment, the Department's calculations team continued³ to approve 1,000 minutes, or 16.67 hours of daily.

19.

The Petitioner was approved to receive 17 hours of LPN care.

20.

Despite being unable to communicate verbally, the Petitioner is described as happy in his home. Petitioner's representative believes that the reduction in skilled nursing services to seventeen (17) hours proposed by the Respondent would result in Petitioner's parents/legal guardians being unable to cover the six (6) skilled nursing hours per day, forcing Petitioner to be placed in a group home for those hours. The Petitioner has been denied access to group home care three (3) times this year due to his complex medical needs, specifically his oxygen needs. Thus Petitioner's parents believe that their only option would be to institutionalize Petitioner in a long-term care facility where the quality of medical care would be unknown.

III. CONCLUSIONS OF LAW

1. This matter concerns the reduction of skilled nursing hours under the NOW/COMP Waiver Program; therefore, Respondent 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). This proceeding is *de novo* in nature, and the evidence on the issues

² This hearing arises from the February 2023 Assessment. (See R-1, OSAH Form 1).

³ Since the August 2018 Assessment, the Department continued to approve 17 hours of LPN and 5 hours of RN care in 2019, 2020, 2021, 2022, and 2023.

shall not be limited to the evidence presented to or considered by the Department prior to its decision. Ga. Comp. R. & Regs. 616-1-2.21(3).

2. Title XIX of the Social Security Act allows states to create medical assistance plans partially funded by the federal government. (42 U.S.C. § 1396-1396v). The NOW/COMP Waiver Programs are two of several waiver programs offered under Georgia's State Plan pursuant to 42 U.S.C. § 1396n(d) and are included in Georgia's Home and Community-Based Waiver Programs for Elderly and Disabled Individuals.
3. A State Plan may provide for individuals who, but for the provision of home or community-based services, require the level of care provided in a hospital, nursing facility, or intermediate care facility for individuals with intellectual disabilities ("ICF/ID"). (42 U.S.C. § 1396a(a)(10)(A)(ii)(VI); 42 C.F.R. § 430.25(c)(2); 42 C.F.R. § 441.301(b)(1)(iii)(C); 42 C.F.R. § 441.302(c)(1)).
4. The NOW/COMP Waiver Programs are among the programs offered under Georgia's State Plan pursuant to 42 U.S.C. § 1396n(c) and (d). The programs are available only to those individuals who: (A) Are categorically eligible Medicaid recipients; and (B) Have a diagnosis of an intellectual disability and/or closely related condition; and (C) Are currently receiving the level of care provided in an ICF/ID which is reimbursable under the State Plan, and for whom home and community-based services are determined to be an appropriate alternative; or, (D) Are likely to require the level of care provided in an ICF/ID that would be reimbursable under the State Plan in the absence of home and community-based services that are determined to be an appropriate alternative. *PART II — CHAPTERS 600-1200, POLICIES AND PROCEDURES FOR COMPREHENSIVE SUPPORTS WAIVER*

PROGRAM (COMP) AND NEW OPTIONS WAIVER PROGRAM (NOW) GENERAL MANUAL (“NOW/COMP MANUAL”), § 701 (rev. July 13, 2023).

5. Under NOW/COMP, clinical nursing services are provided to individuals who “require ongoing complex assessment and intervention for the purpose of health restoration or prevention of further deterioration of the health of the individual.” *PART III — CHAPTERS 1300-3600, POLICIES AND PROCEDURES FOR COMPREHENSIVE SUPPORTS WAIVER PROGRAM (COMP)* (“COMP MANUAL”), § 2901 (rev. July 1, 2023).⁴
6. The Department approves a certain number of nursing hours based on an eligible member’s specific medical and/or treatment needs, as “confirmed by available medication information assessed and documented by a qualified professional who is knowledgeable about the individuals’ clinical needs.” *Id.* at § 2902.2(A). The Department requires a nursing assessment completed by a licensed RN; written orders from a licensed physician, physician assistant or nurse practitioner; an appropriately completed HRST; and documentation evidencing implementation of physicians’ orders. *Id.* § 2902.2(B). Once a member’s needs are identified, the approval of specific hours of skilled nursing support is determined by use of a standardized methodology that allocates time needed for skilled nursing tasks. *Id.* at § 2902.2(D). This methodology does not account for time spent on unskilled support needs, “social support needs,” or projected skilled needs. *Id.* at § 2902.2(D)(a)-(c). Rather, it considers the member’s current skilled nursing needs, “based solely on medical necessity, taking into consideration the overall medical condition of the individual, the equipment, and the level of and frequency of care required for the individual.” *Id.* at § 2902.2(D)(c).

⁴ The COMP Manual is used in conjunction with the NOW/COMP Manual. *See* COMP MANUAL, p. XXVIII-1.

7. In this matter, the Department met its initial burden in showing how it calculated and allotted skilled nursing service hours when deciding the Petitioner's reduction in LPN hours.
8. The Court next turns to the Petitioner, who bore the burden of proving the Department erred in its calculation. Based on the record before this Court, the Petitioner has not met this burden. Rather, a preponderance of the evidence demonstrates the Department properly calculated the Petitioner's nursing hours by utilizing its standardized methodology as set forth in its policy manual. The interpretation of a statute by an administrative agency, which has the duty of enforcing or administering it, is to be given great weight and deference. Hospital Authority of Gwinnett County v. State Health Agency, 211 Ga. App. 407, 408 (1993); Kelly v. Lloyd's of London, 255 Ga. 291, 293 (1985); Reheis v. L.E.A.F., Inc., 216 Ga. App. 699, 702 (1995); Georgia Real Estate Commission v. Peavy, 229 Ga. App. 201, 203 (1997); and Commissioner of Insurance v. Stryker, 218 Ga. App. 716, 718 (1995). Further, Statutes or regulations written in derogation of the common law are to be strictly construed. Greater Atlanta Home Builders Ass'n, Inc. v. City of McDonough, 322 Ga. App. 627, 627, 745 S.E.2d 830, 830 (2013).
8. Based on the record before this Court, Petitioner has not shown that Respondent failed to follow its methodology, or that the methodology is arbitrary or capricious. Petitioner also has not presented sufficient evidence to establish that more than 17 LPN hours daily is medically necessary to complete skilled services ordered by Petitioner's physician and/or that were identified through an assessment of Petitioner. Thus, Respondent's determination is upheld.⁵

⁵ Should the Petitioner's medical condition change and/or his physicians order new treatments, his family remains free to seek another "Level of Care" Nursing Assessment to seek an increase of hours.

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Department's decision to reduce Petitioner's hours of daily LPN services under the NOW/COMP program is hereby **AFFIRMED**. The Petitioner is eligible for 17 hours daily of LPN services, as determined by the Department.

SO ORDERED THIS 5th day of September, 2023.

David C. Langston

DAVID C LANGSTON
Administrative Law Judge

