

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

M [REDACTED] C [REDACTED],
Petitioner,

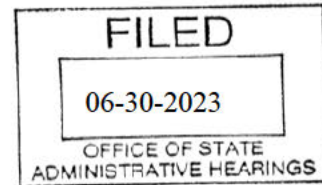
v.

DEPARTMENT OF COMMUNITY
HEALTH,
Respondent.

Docket No.: [REDACTED]
[REDACTED]-OSAH-DCH-SOURCE-22-Schroer

Agency Reference No.: [REDACTED]

INITIAL DECISION



I. INTRODUCTION

Petitioner M [REDACTED] C [REDACTED], through his mother and authorized representative, C [REDACTED] M [REDACTED], appealed the decision by the Department of Community Health (“DCH”) to deny his application for services under the Elderly and Disabled Waiver Program (“EDWP”). An evidentiary hearing was held before the undersigned administrative law judge on June 1, 2023 by two-way video conference. Ms. M [REDACTED] appeared at the hearing and represented Petitioner. DCH was represented by Cerille Nassau, Esq., an attorney for DCH, and Carolyn Porter, an EDWP provider specialist with DCH. For the reasons discussed below, DCH’s action is **REVERSED AND REMANDED**.

II. FINDINGS OF FACT

1.

Petitioner is thirty years old. He lives with his mother in Carrollton, Georgia. Petitioner has spastic cerebral palsy, as well as scoliosis, contractures, hydrocephalus, and other health conditions.¹ He is not able to stand or walk. In or around December 2022, Petitioner filed an

¹ According to his mother’s testimony, Petitioner was diagnosed with schizophrenia around the age of 18. There is no evidence in the record documenting this diagnosis, however, and DCH determined that the medical records

application for services under the Elderly and Disabled Waiver Program (“EDWP”). According to Ms. M [REDACTED], she applied for services after moving to Georgia in order to become a paid family caregiver for her son. (Testimony of C. M [REDACTED]; Ex. R-5.)

2.

The EDWP is a Section 1915(c) Home and Community-Based Services (“HCBS”) Waiver, which was renewed for five years by the Centers for Medicare and Medicaid Services (“CMS”) in or around November 2022. In order to be eligible for the EDWP, applicants must meet the same level of care for admission to a nursing facility. According to DCH’s waiver application, the EDWP is intended to allow individuals who have functional impairments due to age or physical disabilities to continue to live in their communities with appropriate supports. Under the approved waiver application, available EDWP services include adult day health care, alternative living services, emergency response service, home delivered meals, personal support services, and skilled nursing services. Georgia’s EDWP is limited to a maximum number of 45,373 participants in Year 1 and up to 63,743 participants in Year 5. (Testimony of C. Porter; Ex. R-2.)

3.

DCH evaluated Petitioner’s application under the criteria set forth in the Service Options Using Resources in Community Environments (SOURCE) Manual, a program that falls within Georgia's EDWP waiver.² Under the SOURCE Manual, applicants for the SOURCE Program must “be physically impaired, functionally impaired and in need of services to assist with the

provided during the application process were inconclusive regarding this diagnosis.

² The other program that falls under the EDWP is the Community Care Service Program or “CCSP.” According to DCH, the basic eligibility criteria are the same for both programs. (Ex. R-2.)

performance of activities of daily living (ADLs). Without waiver services, eligible SOURCE members would require placement in a nursing facility. While individuals participating in SOURCE under the Elderly and Disabled waiver, [sic] do not have specific exclusions related to age, the SOURCE waiver targets individuals who are elderly and physically disabled.” Under the SOURCE Manual, the eligibility criteria for applicants who are under 65 years old include the following prerequisites: a) applicant must be physically disabled; b) applicant must be receiving full Medicaid; c) applicant must meet Intermediate Nursing Home Level of Care; d) the cost of services must be less than cost at a nursing home; e) applicant must be a willing participant who chooses enrollment in SOURCE; f) applicant must reside in a designated service area; and g) applicant must be capable of residing safely in the community with assistance. (Ex. R-3, at Sec. 601; Sec. 701.)

4.

In addition to the EDWP, CMS has approved other waiver programs for Georgia, including the Independent Care Waiver Program (“ICWP”), the Georgia Pediatric Program (“GAPP”), and the New Options Waiver/Comprehensive Supports Waiver Program (known as “NOW/COMP”).³ Section 701 of the SOURCE Manual provides that SOURCE members, in some instances, may be allowed to participate in more than one waiver program, but participation in two waiver programs is precluded if it would result in duplication of services.

³ The NOW/COMP Manual was not tendered into evidence, although DCH’s witnesses testified about the general criteria and purpose of the NOW/COMP waiver program. The NOW/COMP Part II General Manual is available online at mmis.georgia.gov, and the Court has taken official notice of this manual for purposes of evaluating DCH’s decision to deny Petitioner’s EDWP application because he has a developmental disability and may be eligible for the NOW/COMP program. The NOW/COMP waiver program provides HCBS to individuals who are diagnosed with an intellectual disabilities or a “closely related condition.” Under Sections 701 and 702 of the NOW/COMP Part II Manual, cerebral palsy is specifically identified as a “related condition” to an intellectual disability, and individuals with severe forms of cerebral palsy are eligible to apply for NOW/COMP services. DCH has delegated oversight of the NOW/COMP Waiver to the Department of Behavioral Health & Developmental Disabilities (“DBHDD”).

The SOURCE Manual also states that individuals enrolled in NOW/COMP are excluded from simultaneous participation in SOURCE. However, “[i]n the instance where a member would need to choose, individuals have the option of transfer from one waiver to another, contingent upon eligibility and available funding.” (Testimony of C. Porter; Ex. R-3.)

5.

Neither the approved EDWP waiver application nor DCH’s SOURCE Manual limit SOURCE eligibility to a particular diagnosis or physical condition. Rather, the target population are individuals who are 65 and older and those under 64 with “physical disabilities.” Nevertheless, according to DCH, individuals with cerebral palsy, like Petitioner, must apply for services under the NOW/COMP waiver, which was designed for individuals with early-onset intellectual and developmental disabilities such as cerebral palsy. DCH’s witnesses testified that membership in the NOW/COMP program would provide Petitioner benefits that are not available under the SOURCE program; for example, Ms. Porter testified that eligibility for SOURCE must be reassessed annually, whereas NOW/COMP is considered a “lifetime waiver.”⁴ (Testimony of C. Porter; Ex. R-3.)

6.

In December 2022, after receiving Petitioner’s application for the EDWP, DCH arranged for Alliant Health Solutions, a medical management agency under contract with DCH, to conduct an assessment of Petitioner’s eligibility for SOURCE. Vicky Howard, a registered nurse at Alliant, reviewed the results of the assessment and completed a form referred to as an

⁴ Although there may be other differences in the two waiver programs that would make NOW/COMP a preferable program for someone with Petitioner’s unique needs, the parties did not identify any other services that are available under NOW/COMP but not SOURCE, nor is there any evidence in the record regarding the limits on the number of participants for NOW/COMP services, the wait list for the two programs, or any other characteristics of the NOW/COMP program that distinguishes it from SOURCE as it pertains to Petitioner.

Appendix I. Appendix I is a rubric used by DCH to determine whether an applicant meets the intermediate nursing home level of care.⁵ Ms. Howard determined that Petitioner met the prerequisites in Column A of Appendix I, related to Petitioner’s medical status. However, notwithstanding Petitioner’s uncontroverted need for assistance with most activities of daily living and instrumental activities of daily living, such as transfer, locomotion, toileting, and dressing, Ms. Howard determined that he did not meet the criteria of Column C, related to his functional status because his impairments were related to a “developmental disability.” According to Ms. Howard, cerebral palsy, Petitioner’s primary diagnosis, is a disorder caused by abnormal brain development that results in muscle weakness. Cerebral Palsy is typically present at birth and is considered a developmental disability by DCH. (Testimony of V. Howard, C. M. [REDACTED]; Exs. R-4, R-5.)

7.

On January 25, 2023, Alliant sent a notice of denial to Petitioner. The notice stated that “Etiologies/Diagnosis not covered in the EDWP/SOURCE Program level of care determination are those involving an intellectual or developmental disability where the ID/DD diagnosis is the probable cause of deficits in activities of daily living and/or instrumental activities of daily living.

⁵ Appendix I provides that in order to meet an intermediate nursing home level of care the individual must meet two criteria in Column A (Medical Status) and at least one item from Column B (Mental Status) or Column C (Functional Status). On the version of the form used to assess Petitioner’s level of care, Column C contains a sub-heading that provides that “[t]he Functional Status impairment must not be related to a developmental disability or mental illness.” (Ex. R-4.) Although the approved EDWP waiver application contains a specific provision excluding expenditures for “services for individuals with chronic mental illness,” the Court has not found, nor has DCH cited to a provision in the EDWP waiver that excludes services for individuals with “developmental disabilities.” (Ex. R-2.) The EDWP Manual does provide that “[s]pecial attention should be given to cases where psychiatric treatment is involved. A patient is not considered appropriate for intermediate care services when the primary diagnosis or the primary needs of the patient are psychiatric or related to a developmental disability rather than a medical need. This individual must also have medical care needs that meet the criteria for intermediate care facility placement. In some cases, a patient suffering from mental illness may need the type of services which constitute intermediate care because the mental condition is secondary to another more acute medical disorder.” The EDWP Manual also contains the Appendix I rubric, with a note under Column C describing “Functional Status impairment with etiologic diagnosis not related to a developmental disability or mental illness.” (Ex. R-3.)

Please discuss with your VISITING NURSE HEALTH SYSTEM, INC. Case Manager other WAIVER PROGRAM Services.” (Ex. R-1.)

8.

On or about February 21, 2023, Alliant sent a second notice of denial to Petitioner. The denial was based on the same reasoning as the initial notice; that is, Petitioner’s primary diagnosis of spastic cerebral palsy was a developmental disability and was not covered by EDWP. Ms. M [REDACTED] appealed this decision on behalf of Petitioner, arguing that Petitioner had received special education services while in school due to his “physical disability and not so much an intellectual one.” She stated that Petitioner had been in regular education classes, but required assistance because of his physical inability to walk, maintain continence, write, or type. According to the appeal request, Petitioner’s IQ was higher than the other participants in his school setting. Ms. M [REDACTED] stated that she was seeking waiver services for Petitioner because of his inability to physically care for himself, and she did not believe he would qualify for NOW/COMP. (Exs. R-5, R-6.)

9.

At the administrative hearing, Ms. M [REDACTED] testified that she did not apply for a particular waiver program, but was referred to EDWP/SOURCE by a service provider. She argued that Petitioner meets the eligibility requirements for SOURCE and should not be found ineligible because he might also meet the eligibility criteria for NOW/COMP.

III. CONCLUSIONS OF LAW

1.

This matter concerns Respondent's denial of Petitioner's application for Medicaid benefits. Therefore, Petitioner 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 v. Rowe, 14 F.3d 173, 175 (2d Cir. 1994); Susan J. v. Riley, 254 F.R.D. 439, 446 (M.D. Ala. 2008).

3.

Home and community-based services 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.”). “[O]nce a state opts to implement a waiver program and sets out eligibility requirements for that program, eligible individuals are entitled to those services and to the associated protections of the Medicaid Act.” Boulet v. Cellucci, 107 F. Supp. 2d 61, 76 (D. Mass. 2000).

4.

In Georgia, HCBS are available to individuals through a variety of waiver programs, including the SOURCE Program. Under federal regulations, HCBS offered under a waiver must “[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); see also 50 Fed. Reg. 10,019, Sec. III.H. (Mar. 13, 1985) (“States [are required] to submit individual waiver requests for each target group (or subgroup) to expedite the waiver review process and to avoid the need to deny a waiver request involving more than one of the three target groups when there are problems that relate to only one of those groups.”).

5.

As the evidence in the record proved, the EDWP is limited to individuals who are aged or physically disabled, and who would require the level of care provided in a nursing facility in the absence of HCBS. As Petitioner is not over 65, in order to prove eligibility for the SOURCE

program, he was required to prove that he is physically disabled. Having considered the evidence in the record, the Court concludes that Petitioner presented prima facie evidence that he has significant physical disabilities that severely affect his ability to perform basic activities of daily living.

6.

Nevertheless, the Court must decide whether Petitioner is ineligible for SOURCE despite his physical functional impairments because of his primary diagnosis of spastic cerebral palsy. That is, can an individual have a physical disability that is also a developmental disability? First, the Court has considered that the waiver application approved by CMS identifies only aged and physically disabled individuals as the EDWP target group. DCH did not include individuals with “developmental disabilities” within the EDWP target group, and under 42 C.F.R. § 441.301(b)(6), was not permitted to do so. In addition, the Court has considered that the SOURCE Manual contains language providing that functional impairments related to developmental disabilities do not meet the eligibility criteria for the SOURCE program.⁶ Finally, the Court has considered that the preponderance of evidence in the record proved that cerebral palsy is considered a “developmental disability,” which may manifest in both physical and intellectual deficits.

7.

On the other hand, the Court has considered that although Georgia’s EDWP waiver contains a provision that excludes expenditures for services related to chronic mental illness, it does not contain similar language excluding expenditures for services related to developmental disabilities. In addition, the SOURCE Manual contemplates instances when an applicant may be

⁶ To the extent the SOURCE Manual is inconsistent with the waiver document or otherwise narrows the eligibility criteria approved by CMS, the Court concludes that the terms of the CMS-approved waiver control. See Crittenden v. White, 346 Ga. App. 179, 184 (2018) (departmental manual not due the same deference as a statute, rule or regulation); see also Susan J., 254 F.R.D. at 451-453.

eligible for more than one waiver program and provides that “individuals have the option of transfer from one waiver to another, contingent upon eligibility and available funding.” Having weighed these provisions, the Court concludes that an applicant whose primary diagnosis is considered to be a developmental disability is not absolutely barred from the SOURCE program, and that DCH’s decision denying Petitioner eligibility in SOURCE solely because of his diagnosis for cerebral palsy is not consistent with the terms of the EDWP waiver. Consequently, the Court concludes that Petitioner’s application should be remanded to the agency to determine whether, as set forth in the SOURCE Manual, Petitioner has “medical care needs that meet the criteria for intermediate care facility placement.” On remand, Petitioner should be afforded an opportunity to present documentation to prove that his disabilities are primarily physical, as opposed to intellectual or mental health-related, and that he meets the following criteria for SOURCE:

- a) he is physically disabled;
- b) he is eligible for full Medicaid;
- c) he meets the Intermediate Nursing Home Level of Care;
- d) the cost of HCBS will be less than the cost of a nursing home;
- e) he willingly chooses enrollment in SOURCE;
- f) he resides in a designated service area; and
- g) he is capable of residing safely in the community with assistance.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, DCH’s decision to deny Petitioner’s application for enrollment in the SOURCE Program is hereby **REVERSED AND REMANDED**.

SO ORDERED, this 30th day of June, 2023.

Kimberly W. Schroer

Kimberly W. Schroer
Administrative Law Judge

