IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

JACKSON FLOURNOY, Petitioner,	:	
	:	Administrative Action No:
v.	:	OSAH-DCH-GAPP-1014474-8-Baxter
DEPARTMENT OF COMMUNITY HEALTH, Respondent.	:	

INITIAL DECISION

This matter comes before this Court pursuant to an appeal filed by Jackson Flournoy ("Petitioner") in response to the decision of the Georgia Department of Community Health ("Department") to reduce the number of skilled nursing hours provided to the Petitioner under the Georgia Pediatric Program ("GAPP"). A hearing was held on April 22, 2010. For the reasons indicated below, the Department's decision is **REVERSED**.

I. FINDINGS OF FACT

1.

Petitioner is a six-year-old ventilator dependent child who lives at home. His parents serve as his primary caregivers. His diagnoses include Pierre Robin Syndrome, Poland Syndrome with M bius variant, chronic respiratory failure, tracheostomy infection, Asthma, Epilepsy, pulmonary hypertension, Dacrystenosis, congenital Hypothyroidism, Scoliosis, Syndactly of fingers with fusion of bones, Eustachian tube dysfunction, history of tympanostomy tubes, Mobius syndrome, congenital Clubfoot, hearing loss, Gastro Esophageal Reflux and Dysphasia. (R. Ex. 8; Testimony of Felicia and Richard Flournoy.)

2.

Petitioner is wheelchair or bed dependent, requires a G-tube for feeding, is incontinent, and is dependent on a ventilator and tracheostomy tube twenty-four hours per day. Petitioner takes, at least, the following medications: Nystatin powder, Xeopene, Pulmicort, Synthroid, and Tobramycin. (R. Ex. 8.)

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3.

Petitioner receives physical, occupational, and speech therapies in the home. He requires regular suctioning, monitoring of his tracheostomy tube, pulse ox monitoring, respiratory treatments, wound care and ventilator care that occur at irregular intervals throughout each day, sometimes simultaneously. These therapies and treatments are orders by Petitioner's physicians and are in addition to Petitioner's other care needs such as grooming or custodial care. According to Petitioner's physicians, these therapies and treatments are medically necessary and should be provided or supervised by licensed healthcare professionals. (R. Ex. 8.)

4.

Petitioner's medical records indicate that he has had several infections that complicate his care and treatment. Additionally, as Petitioner has aged, he now pulls his tracheostomy tube out which creates an immediate medical emergency because he cannot breathe without the ventilator. Previous attempts to wean Petitioner off a full time ventilator have failed due to Petitioner's high frequency of infection. (R. Exs. 6, 8.)

5.

Dr. Luke Beno, M.D., and Dr. Daniel Torrez, M.D., Petitioner's treating physicians, both assert in testimony, affidavits, and letters of medical necessity that Petitioner is medically fragile and requires twenty-four hour per day care. Dr. Beno, Petitioner's primary care physician, stated that the Petitioner is so fragile that a medically fragile day care cannot provide sufficient care for Petitioner because of his need for one-on-one care. Dr. Torrez, Petitioner's pulmonologist, opines, "it is medically contraindicated to make unlicensed laypersons responsible for care which is always complicated and is often complex." (R. Exs. 3, 8; Deposition of Dr. Beno.)

6.

In September 2004, Petitioner was approved for 84 hours of skilled nursing care under the GAPP program. The Department implemented GAPP in 2002 as a part of its Medicaid plan to serve children under age 21 who are medically fragile and require continuous skilled nursing care or skilled nursing care in shifts. (R. Ex. 7, Part II Policies and Procedures for the Georgia Pediatric Program, Chapter 600 ("GAPP Manual"); R. Ex. 2.)

7.

Drs. Beno and Torrez have consistently opined that Petitioner must receive at least twelve hours per day of skilled nursing services. Dr. Beno asserted that twelve hours of skilled nursing

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care per day is an "absolute minimum and [Petitioner] would benefit from more care" and that "a reduction in the care provided to [Petitioner] will have medically adverse consequences and will place him in immediate jeopardy." Dr. Beno explained that due to Petitioner's complicated and extensive medical history, a highly skilled nurse might have difficulty providing necessary treatment until familiar with Petitioner's condition and therefore a skilled nurse with training and familiarity with the Petitioner is necessary to manage the nuances of Petitioner's care. Both Dr. Beno and Dr. Torrez ordered 84 hours per week of skilled nursing care because "failure to provide at least 84 hours of care each week for [Petitioner], as ordered, immediately places him in an untenable position." (R. Ex. 8.)

8.

Dr. Torrez reiterates Dr. Beno's opinion that 84 hours per week of skilled nursing care is "an absolute minimum" and that licensed healthcare professions should render Petitioner's therapies and treatments. Dr. Torrez further asserted, "Given the fact that [Petitioner's parents] are not trained health-care providers and that they are always on-duty, I believe requiring [Petitioner's] parents to provide more than 84 hours of care each week is medically unsound, is unwise and would be below the medical standard of care." (R. Ex. 8.)

9.

On August 6, 2009, the Department issued an initial determination that Petitioner's skilled nursing hours would be reduced from 84 hours per week to 80 hours per week for four weeks and then be reduced to 77 hours per week for five weeks. The Department's basis for the reduction was that Petitioner's condition was considered stable and that there was no evidence from the documentation submitted that the current hours were medically necessary to correct or ameliorate the Petitioner's medical condition. (R. Ex. 2.)

10.

On August 26, 2009, Petitioner submitted additional documentation to the Department for administrative review. After reviewing the supplementary medical information, the Department issued a Final Notification of Reduction in Services on September 24, 2009. (R. Exs. 3, 5.)

11.

The Final Notification indicated Petitioner's skilled nursing hours were being reduced because: (1) Skilled nursing hours may be reduced over time based on the medical need of the

member and the stability of the child's condition; (2) Petitioner's condition has remained stable with no exacerbations in disease process or hospitalizations since last pre-certification period; (3) There is no evidence from the documentation submitted that the current hours are medically necessary to correct or ameliorate the child's condition; and (4) other reasons which included:

> --The only hospitalization documented in the nurses note was an Emergency Room visit on 08/12/09 due to "thick yellow secretions and de-saturations on oxygen." Reported in nurses note, "child went to the hospital but was not admitted,"
> --Caregivers competent to perform skilled needs for the child based on the teaching checklist, and
> --Per nurses note dated 08/13/09 your child was started on an antibiotic for a potential upper respiratory infection. Oxygen saturation noted at 100% on 2 liters oxygen and he was on the vent. No fever reported in notes.

(R. Ex. 5.)

II. STANDARD OF REVIEW

This matter concerns the Respondent's reduction of Petitioner's benefits; therefore, Respondent bears the burden of proof. Ga. Comp. R. & Regs. r. 616-1-2-.07. The standard of proof is a preponderance of evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21.

III. CONCLUSIONS OF LAW

1.

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. In Georgia, the Department is the single state agency responsible for administering the state Medicaid plan. O.C.G.A. § 49-2-11(f); 42 C.F.R. § 431.10(a).

2.

A participating state is required to provide certain categories of care to eligible children, including early and periodic screening, diagnostic and treatment services ("EPSDT") as needed "to correct or ameliorate defects and physical and mental illnesses." 42 U.S.C. § 1396d (r)(5).

3.

Providing the necessary services for those under the age of 21 is not optional for a state;

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the appropriate care must be provided "whether or not such services are covered under the State plan." 42 U.S.C. § 1396d (r)(5). The Eleventh Circuit Court of Appeals has held that "[t]he language of subsection (r)(5) appears to mandate coverage for all medically necessary treatment for eligible recipients under age twenty-one." Pittman v. Secretary Fla. Dept. of Health & Rehabilitative Serv., 998 F.2d 887, 889 (11th Cir. 1993).

4.

"The federal Circuits that have analyzed the 1989 ESPDT [sic] amendment agree that... participating states must provide all services within the scope of § 1396d (a) which are necessary to correct or ameliorate defects, illnesses, and conditions in children discovered by the screening services." S.D. v. Hood, 391 F.3d 581, 593 (5th Cir. 2004). Private skilled nursing is an enumerated category of treatment under the Medicaid Act. 42 U.S.C. § 1396d (a)(8).

5.

GAPP is designed to serve eligible children under the age of 21 based on medical necessity determinations. A child enrolled as a member of GAPP is eligible to receive private duty nursing services.[1]

6.

The Department asserts that GAPP is designed as a teaching program and that skilled nursing services may be reduced when a member stabilizes. Despite the Department's admirable policy goal of being a teaching program, its policy objectives do not override the State's obligations to administer the Medicaid program in a way that is consistent with federal law. Providing medically necessary services for those under the age of 21 is not optional for a state regardless of its stated program goals. The Department must provide appropriate care "whether or not such services are covered under the State plan." 42 U.S.C. § 1396d (r)(5); Pittman, 998 F.2d at 892.

7.

This Court must decide whether the Department's decision to reduce Petitioner's skilled nursing hours compromises what is medically necessary to correct or ameliorate Petitioner's

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[1] Private duty nursing service is defined as "nursing services for recipients who require more individual and continuous care than is available for a visiting nurse or routinely provided by the nursing staff of the hospital or skilled nursing facility." 42 C.F.R. § 440.80. These services are provided by a registered nurse or nurse practitioner under the direction of the recipient's physician at either the recipient's home, a hospital or a skilled nursing facility. Id.

condition. In Moore v. Medows, a District Court balanced the interest of the State against the interest of private medical determinations of necessity and determined that "a private physician's word on medical necessity is not dispositive" however, the State is also not "the final arbiter of medical necessity." 674 F. Supp. 2d 1366, 1370 (N.D. Ga. 2009) (citations omitted). The District Court further clarified the State's role in medical necessity determinations by holding that "the state may review an order of a treating physician for 'fraud, abuse of the Medicaid system, and whether the service is within the reasonable standards of medical care.'" Id.

8.

In this case, Drs. Beno and Torrez prescribed 84 hours of skilled nursing care per week, which they both deemed "an absolute minimum" and medically necessary to ameliorate Petitioner's condition. The Department did not raise or present evidence of any fraud or abuse of the Medicaid system. Additionally, no evidence was presented contradicting the doctors' assertions or showing the doctors' recommendation of 84 hours per week was not based in fact. In their affidavits, testimony, and letters of medical necessity, Drs. Beno and Torrez explained the Petitioner's diagnosis and symptoms and described the required level of care to ameliorate these symptoms. They sufficiently accounted for their recommendation regarding the number of hours required to deliver the necessary level of care and consistently warned that a reduction in hours would result in an increased risk of morbidity and mortality for this medically fragile child.

9.

Dr. Beno and Dr. Torrez's assessments were based on years of treating the Petitioner and supported by the Petitioner's medical records. The Department failed to present medical evidence contradicting the doctors' recommendation for continued skilled nursing services at 84 hours per week and failed to show that the prescribed treatment was without any basis in fact or that there was fraud or abuse of the Medicaid system.

10.

Further, the Department argues that because Petitioner's parents were considered "competent" in his care, the Department may reduce the number of skilled nursing hours provided under GAPP. Petitioner's parents are not trained in skilled nursing services. They are not nurses or nurse practitioners who can provide skilled nursing care as established in 42 C.F.R. § 440.80. Therefore, their care and support does not qualify as skilled nursing services and cannot be used as a basis for reducing Petitioner's medically necessary treatment. The State has

no discretion to deny funding for medically necessary treatment. Pittman, 998 F.2d at 892. Accordingly, Petitioner is entitled to receive the medically necessary 84 hours per week of skilled nursing care regardless of his parents' ability to render medical support for his conditions.

IV. CONCLUSION

The Department has failed to refute Dr. Beno and Dr. Torrez's determinations that 84 hours per week of skilled nursing services are medically necessary to ameliorate Petitioner's condition and failed to show that these prescriptions were without any basis in fact or that there was fraud or abuse of the Medicaid system. Furthermore, the Department has failed to show any legal basis for the policy determinations that it cites as supplemental reasons for reducing the Petitioner's hours.

IT IS HEREBY ORERED THAT the Department's determination to reduce Petitioner's skilled nursing hours is contrary to medical necessity, and accordingly, the Department's decision to reduce Petitioner's hours is **REVERSED**.

SO ORDERED THIS 20th day of May, 2010.

AMANDA C. BAXTER
Administrative Law Judge

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