



BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

FILED
JAN 5 2016

L [REDACTED] W [REDACTED] (MINOR),
Petitioner,

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Docket No.:
OSAH-DCH-KATIE [REDACTED]

K. Woodard
Kevin Westray, Legal Assistant
-28-Woodard

v.

Agency Reference No.: [REDACTED]

DEPARTMENT OF COMMUNITY
HEALTH,
Respondent.

INITIAL DECISION

I. SUMMARY OF PROCEEDINGS

Petitioner L [REDACTED] W [REDACTED], through her mother and personal representative, appealed the decision of Respondent, the Department of Community Health, to deny her application for coverage under the TEFRA/Katie Beckett Deeming Waiver (hereinafter "Katie Beckett"). The hearing on this matter was held on November 24, 2015, at the Cherokee County Justice Center, Canton, Georgia. Petitioner's mother, Mrs. K [REDACTED] W [REDACTED], participated in the hearing as a witness and as her daughter's personal representative. Ms. Yvonne Hawks, Esq., participated as Respondent's legal counsel. Respondent's witnesses were Karis Morneau, RN, Georgia Medical Care Foundation (GMCF); and Sherri Collins, RN, PhD, Department of Community Health.

For the reasons indicated below, Respondent's decision to deny Petitioner's application for coverage under the Katie Beckett Deeming Waiver is hereby **AFFIRMED**. However, nothing in this Decision shall be construed as denying Petitioner's representative the right to reapply for the Katie Beckett Deeming Waiver and to submit documentation regarding Petitioner's need for and receipt of the sufficient type and frequency of skilled services, or for any category of Level of Care she might meet.

II. FINDINGS OF FACT

The Katie Beckett Deeming Waiver

1.

Katie Beckett was established in 1982 under the Tax Equity and Fiscal Responsibility Act (TEFRA). The program, which is administered by Respondent, permits the state to ignore family income for certain disabled children for the purposes of determining Medicaid eligibility provided that certain conditions are met. It enables children under the age of 19, who would otherwise be ineligible to participate in Medicaid programs due to their parents' income, to qualify for Medicaid participation based upon their own income. The child must qualify as a disabled individual under Section 1614 of the Social Security Act

and live at home, rather than in an institution. In addition, the child must require the level of care provided in a hospital, skilled nursing facility, or intermediate care facility for the intellectually disabled (ICF/IID; also previously known as ICF/MR).. The criteria used to determine whether the child meets level of care are found in Title 42 of the Code of Federal Regulations. 42 C.F.R. § 409.31–.33; 42 C.F.R. 435.1010; 42 C.F.R. 440.10; DEP'T OF CMTY. HEALTH, PART II INFORMATION MANUAL TEFRA/KATIE BECKETT DEEMING WAIVER 6–7 (2013) [hereinafter KATIE BECKETT MANUAL].

The Katie Beckett Application Process

2.

Respondent has contracted with the Georgia Medical Care Foundation (GMCF) to review applications for continued participation in Katie Beckett. Testimony of Lauren Jones; Exhibit R-1.

3.

The GMCF Katie Beckett Review Team reviews information submitted with each application to determine whether the applicant requires a level of care provided in a hospital, skilled nursing facility, or intermediate care facility. Applicants submit a packet to the GMCF review team containing a DMA-6(A) form, a Level of Care statement, and a Psychological Assessment. Testimony of Karis Moreau and Sherri Collins; Exhibit R-1.

4.

Ms. Karis Morneau, a member of the GMCF review team, testified that, in making the determination of whether an applicant meets level of care criteria, the GMCF review team will review all information available to the team that is pertinent to the applicant's condition. Although the team gives deference to the recommendations of the applicant's physician, Ms. Morneau testified that the team members exercise their professional judgment with regard to eligibility. If an applicant's physician specifies that the applicant meets hospital level of care, for example, the Review Team would review that applicant's condition to ascertain whether they met criteria for all three categories of level of care, and not simply confine their review to only the hospital level of care criteria. Testimony of Karis Morneau; Exhibit R-1

5.

If the Katie Beckett Review Team determines the applicant to be ineligible for Katie Beckett, it will issue an Initial Determination letter. This letter informs the applicant that they have been denied and delineates the reasons for their denial. The applicant then has thirty days from the date of the letter in which to obtain a review of GMCF's decision. The applicant may supplement the original application with additional information, which GMCF will then review in making its Final Determination. Exhibit R-11.

6.

If GMCF decides not to alter its original determination after reviewing the supplemented information packet, it will issue a Final Determination letter to the applicant. The applicant then has thirty days in which to request a hearing. Testimony of Sherri Collins; Exhibit R-12

Petitioner's Condition

7.

Petitioner I ■ W ■ is a 22 month-old girl with a primary diagnosis of Trisomy 21, more commonly known as Down Syndrome. According to Dr. Rezvan Habibian, PhD:

The most common manifestations of Down syndrome include mental retardation, cardiac anomalies (40%), relatively small stature, neonatal hypotonia and characteristic facies. Social development is more advanced than intellectual development. Infants with heart defects have a high mortality risk, but otherwise life expectancy is close to normal.

Exhibit R-9. L ■ exhibits Mixed Receptive/Expressive Language Deficit and Muscle Weakness, and Developmental Delay She also has been diagnosed with Ventricular Septal Defect by a cardiologist, Dr. Kahn, and will continue to be monitored for this condition. Otherwise, L ■ appears to be a happy and healthy little girl. Testimony of K ■ W ■ Eduardo Montana, Jr., MD, Children's Cardiovascular Medicine, P.C., Report, 10/7/2014. Exhibit R-9; Dr. Tim Lorenz, MD, Little Hickory Pediatrics, LLC, Report (Undated), Exhibit R-4; Evaluation Summary, 6/24/2014, Babies Can't Wait, North Georgia Health District, Exhibit R-8.

8.

I ■'s pediatrician has recommended that she receive physical therapy, 60 minutes per week; speech therapy, 60 minutes per week; and occupational therapy, 60 minutes per week. I ■'s mother testified that she is provided all three therapies every week, and that these are funded either privately or through United Healthcare insurance coverage. I ■'s physical therapist wrote that L ■ exhibits "global hypotonia, joint laxity, and decreased muscle strength throughout her trunk and extremities, characteristic of her diagnosis." L ■ also has "decreased core stability and postural control, impaired balance and coordination, and decreased endurance." Tara Wilson, DPT, Physical Therapy Progress Report, 11/23/2015. Exhibit P-1. According to her speech therapist, I ■ has very limited verbal skills, and only recently began to pronounce the words "book," "bubble", and "baby." Although L ■ has made progress with her speech therapist, "[s]he has not yet met age appropriate milestones in this area," as children her age "have an expressive vocabulary of at least 50 words, respond to 'yes/no' questions, reach or point to a wide variety of objects named, and respond to simple 'what' and 'where' questions. Cindy Baker, M.A., ED.S-CCC/SLP, Report, 11/19/2015. Exhibit P-1. I ■'s occupational therapist wrote that she has not met age-equivalent functioning in her fine motor skills, but "is beginning to hold and drink from a sippy

cup and is attempting to use a spoon to feed herself,” among other things. Linda Satterly, MS, OTR/L, Report, 11/18/2015. Exhibit P-1.

Review of Petitioner’s Application

9.

Petitioner’s caregivers applied for Katie Beckett on or about May 13, 2015. Petitioner’s physician, Dr. Timothy C. Lorenz, MD, submitted a DMA-6(A) form, which included his recommendations for Petitioner’s pediatric care, to GMCF as part of the application packet. Dr. Lorenz indicated that I [REDACTED] has Down Syndrome, Ventricular Septal Defect, and Developmental Delay-incoordination. He recommended that Petitioner receive speech, physical, and occupational therapy, one hour per week, and assessments from the various therapists were submitted with the Katie Beckett application for GMCF’s consideration. Where the form called for the physician to recommend the Level of Care, Dr. Lorenz checked the box for “ICF/MR,” which stands for Intermediate Care Facility / Mentally Retarded (Currently known as “ICF/IID”). Dr. Lorenz believed I [REDACTED]’s conditions could be managed through “Community Care” and/or “Home Health Services.” Exhibits R-3, 4, 5, 6, 7; Testimony of Sherri Collins and Karis Morneau.

10.

The Review Team determined that the DMA-6(A) and its supporting documentation did not support a finding that I [REDACTED] required the Level of Care necessary for coverage under Katie Beckett. The Review Team noted that I [REDACTED]’s physician had recommended only one hour per week of physical, occupational, and speech therapy, which was insufficient under the Respondent’s guidelines which require she receive at least five skilled therapies per week as ordered by a physician. A Final Determination letter was issued on August 26, 2015. I [REDACTED]’s mother filed a request for hearing, and the matter was referred to the Office of State Administrative Hearings for adjudication. Testimony of Karis Morneau; Exhibits R-12, 13.

11.

At the hearing on this matter, I [REDACTED]’s mother contended that I [REDACTED] required Katie Beckett coverage in order to obtain the level of services necessary to treat the conditions attendant to Down Syndrome. She asserted that I [REDACTED] met the Level of Care required for Katie Beckett eligibility as demonstrated by her need for physical, speech, and occupational therapies. Respondent’s witnesses countered that both at the time of the GMCF review of the initial application and the hearing, I [REDACTED] was not prescribed or receiving at least five skilled therapy sessions every week. I [REDACTED]’s mother stated that this might change in the future, but acknowledged that only three sessions per week, totaling three hours, of skilled therapies had been prescribed by Dr. Lorenz. Testimony of K [REDACTED] W [REDACTED]; testimony of Karis Morneau.

III. CONCLUSIONS OF LAW

1.

Because this case concerns the denial of Petitioner's application for coverage under Katie Beckett, Petitioner bears the burden of proof. Ga. Comp. R. & Regs. 616-1-2-.07. At the hearing, the administrative law judge required Respondent to present its evidence first, but this did not shift the burden of proof from Petitioner. The standard of proof is a preponderance of evidence. Ga. Comp. R. & Regs. 616-1-2-.21.

2.

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 et seq.; Moore v. Reese, 637 F.3d 1220, 1232 (11th Cir. 2011). Participation by a state is voluntary, "but once a state opts to participate it must comply with federal statutory and regulatory requirements." *Id.* All states have opted to participate and, thus, each must designate a single state agency to administer its Medicaid plan. *Id.*; 42 C.F.R. § 431.10(a), (b)(1). Georgia has designated the Department of Community Health as the "single state agency for the administration" of Medicaid. O.C.G.A. § 49-2-11(f).

3.

Respondent provides Medicaid benefits under the Katie Beckett program as described under Section 134 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). To be eligible for services under the TEFRA/Katie Beckett class of assistance, the child must:

- (1) Be eighteen years of age or younger
- (2) Live at home
- (3) Meet the federal criteria for childhood disability and
- (4) Require the level of care provided in a hospital, skilled nursing facility, or intermediate care facility

42 U.S.C. § 1396a(e)(3); 42 C.F.R. § 435.225.

Hospital Level of Care

4.

Hospital level of care is appropriate for individuals who continuously require the type of care ordinarily provided in an institution for the care and treatment of inpatients with disorders other than mental diseases. 42 C.F.R. § 440.10(i); KATIE BECKETT MANUAL 6. Petitioner's needs, as described in the documentation submitted with her application, are not continuous; she does not require the intensity or frequency of care that she would receive in a hospital. Accordingly, Petitioner does not meet the criteria for hospital level of care for the purposes of Katie Beckett eligibility.

Skilled Nursing Facility Level of Care

5.

Skilled Nursing Facility Level of Care is appropriate for individuals who do not require hospital care, but who, on a regular basis, require licensed nursing services, rehabilitation services, or other health-related services ordinarily provided in an institution. KATIE BECKETT MANUAL 6. The individual must require services that are so inherently complex that they can be safely and effectively performed only by, or under the supervision of, technical or professional personnel. . .

AND

the service is one of the following or similar and is required seven days per week:

- Overall management and evaluation of a care plan for an individual who is totally dependent in all activities of daily living,
- Observation and assessment of an individual's changing condition because the documented instability of his or her medical condition is likely to result in complications, or because the documented instability of his or her mental condition is likely to result in suicidal or hostile behavior
- Intravenous or intramuscular injections or intravenous feeding
- Enteral feeding that comprises at least 26 per cent of daily calorie requirements and provides at least 501 milliliters of fluid per day
- Nasopharyngeal or tracheostomy aspiration
- Insertion and sterile irrigation or replacement of suprapubic catheters
- Application of dressings involving prescription medications and aseptic techniques
- Treatment of extensive decubitus ulcers or other widespread skin disorder
- Heat treatments as part of active treatment which requires observation by nurses
- Initial phases of a regimen involving administration of medical gases
- Rehabilitation nursing procedures, including the related teaching and adaptive aspects of nursing, that are part of active treatment

OR

The service is one of the following or similar and is required five days per week:

- Ongoing assessment of rehabilitation needs and potential; services concurrent with the management of a patient care plan,
- ***Therapeutic exercises and activities performed by PT or OT,***
- Gait evaluation and training to restore function to a patient whose ability to walk has been impaired by neurological, muscular, or skeletal abnormality,
- ***Range of motion exercises which are part of active treatment of a specific condition which has resulted in a loss of, or restriction of mobility,***
- Maintenance therapy when specialized knowledge and judgment is needed to design a program based on initial evaluation,
- Ultrasound, short-wave, and microwave therapy treatment,
- Hot pack, hydrocollator, infrared treatments, paraffin baths, and whirlpool treatment when the patient's condition is complicated by circulatory deficiency, areas of desensitization, open wounds, etc. and specialized knowledge and judgment is required,

- ***Services of a speech pathologist or audiologist when necessary for the restoration of function in speech or hearing***

OR

The service is one of the following only if additional special medical complication requires that it be performed or supervised by technical or professional personnel:

- Administration of routine medications, eye drops, and ointments
- General maintenance care of colostomy or ileostomy
- Routine services to maintain satisfactory functioning of indwelling bladder catheters,
- Changes of dressings for non-infected postoperative or chronic conditions,
- Prophylactic and palliative skin care, including bathing and application of creams, or treatment of minor skin problems
- Routine care of incontinent individuals, including use of diapers and protective sheets
- General maintenance care (e.g. in connections with a plaster cast)
- Use of heat as a palliative and comfort measure (e.g. whirlpool and hydrocollator)
- Routine administration of medical gases after a regimen of therapy has been established
- Assistance in dressing, eating, and toileting,
- Periodic turning and positioning of patients,
- General supervision of exercises that were taught to the individual and can be safely performed by the individual including the actual carrying out of maintenance programs

AND

- The service needed has been ordered by a physician
- The service will be furnished either directly by, or under the supervision of, appropriately licensed personnel
- ***The beneficiary must require skilled nursing or skilled rehabilitation services, or both, on a daily basis.***

KATIE BECKETT MANUAL 35-36. (Emphasis added by the ALJ). Respondent's witnesses indicated that the term "daily basis" found in the last bullet, *supra*, would be met if skilled services were provided five days per week.

6.

I [REDACTED] has not been prescribed, nor does she require, any skilled services other than physical, speech, and occupational therapy. The sole question, then, is whether she receives these services with the required degree of frequency. The hearing record shows that I [REDACTED]'s treating physician has prescribed only one hourly session of physical, speech, and occupational therapy each week. Therefore, I [REDACTED] does not presently meet the Skilled Nursing Facility Level of Care.

ICF/IID Level of Care

7.

The intermediate care facility for individuals with intellectual disabilities (ICF/IID) level of care (formerly known as "ICF/MR, although occasionally still referred as such in the Federal Regulations) is satisfied, in part, if:

- (1) ***The individual has mental retardation; or***
- (2) The individual has a severe chronic disability attributable to Cerebral Palsy or epilepsy; or
- (3) The individual has a condition, other than mental illness, which is found to be closely related to mental retardation because it results in impairment of general intellectual functioning or adaptive behavior similar to mental retardation and requires similar treatment and services, and the condition is likely to continue indefinitely; and
- (4) ***The impairment results in substantial functional limitations in three or more of the following areas of major life activity:***
 - (1) *Self-care.*
 - (2) *Understanding and use of language.*
 - (3) *Learning.*
 - (4) *Mobility.*
 - (5) *Self-direction.*
 - (6) *Capacity for independent living.*

42 C.F.R. §§ 440.150, 435.1010. (Emphasis added by the ALJ).

8.

At first reading, it would appear that L ■■■ meets the ICF/IID Level of Care, as she clearly has an intellectual disability stemming from Down Syndrome, and she has severe functional limitations in the areas of understanding and use of language, learning, and mobility. However, persons who meet the ICF/IID Level of Care require 24 hour of continuous care and supervision, similar to that offered in a private or public hospital, due primarily to their intellectual disability, and not for another reason. I ■■■ is less than two years old. All children her age require the constant, continual, care and supervision described in 42 C.F.R. § 435.1010, which is highlighted in the previous paragraph. It is her age, and not her diagnosis of Down Syndrome, that is the primary reason she has the above-listed functional limitations in major life activities. Thus, L ■■■ does not meet the ICF/IID Level of Care criteria at the present time.

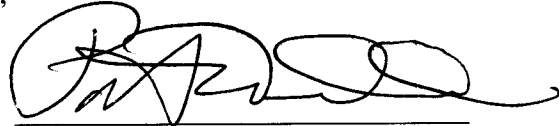
14.

Considering the record in this matter, Petitioner's caregiver has not established that Petitioner met the requisite Level of Care to qualify for the Katie Beckett. Respondent was therefore correct in its determination that she was ineligible for participation.

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, Respondent's decision to deny Petitioner's application for Katie Beckett as provided in the Final Denial letter sent to Petitioner's caregiver is **AFFIRMED**.

SO ORDERED, this the 5th day of January, 2016,

A handwritten signature in black ink, appearing to read 'M. Patrick Woodard', written over a horizontal line.

M. PATRICK WOODARD
Administrative Law Judge