

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA

M [REDACTED], by and through his :  
parents E [REDACTED] H [REDACTED] and B [REDACTED] :  
H [REDACTED], :

Petitioner,

v.

DEPARTMENT OF COMMUNITY  
HEALTH,

Respondent.

FILED  
OSAH  
FEB 08 2017  
ocket No.:  
OSAH-DCH-KATIE-[REDACTED]-28-Woodard  
Agency Reference No.: [REDACTED]

*Kevin Westray*  
Kevin Westray, Legal Assistant

INITIAL DECISION

I. SUMMARY OF PROCEEDINGS

Petitioner, by and through his parents, E [REDACTED] and B [REDACTED] H [REDACTED] appealed the decision of Respondent, the Department of Community Health, to deny his application for coverage under the TEFRA/Katie Beckett Deeming Waiver (hereinafter "Katie Beckett"). The hearing on this matter was held before the undersigned Administrative Law Judge on January 11, 2017 at the Office of State Administrative Hearings in Atlanta, Georgia. B [REDACTED] H [REDACTED], Esq., represented Petitioner at the hearing and Brevin Brown, Esq., represented Respondent. Dophamia Williams, Medicaid Policy Consultant; Karis Morneau, RN, Katie Beckett Review Nurse; and Lanise Shortell, RN; and E [REDACTED] H [REDACTED] also provided testimony.

For the reasons indicated below, Respondent's decision to deny Petitioner's application for coverage under the Katie Beckett Deeming Waiver is hereby **REVERSED**.

II. FINDINGS OF FACT

1.

Katie Beckett was established in 1982 as a Medicaid waiver program under the Tax Equity and Fiscal Responsibility Act ("TEFRA"). The waiver, which is administered by Respondent, permits the state to ignore family income for certain disabled children for the purposes of determining Medicaid eligibility. It allows 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 waiver was designed to allow

children to leave a hospital or skilled nursing care facility and still be potentially eligible for Medicaid coverage while receiving services at home or through a community-based program.

2.

In order to qualify for Katie Beckett, the child must meet the definition of a disabled individual under § 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 individuals with intellectual disabilities (ICF/ID). The criteria used to determine whether the child meets the requisite institutional level of care are based on definitions and guidelines provided in Title 42 of the Code of Federal Regulations. 42 C.F.R. §§ 409.31-.33, 435.1010, 440.10; DEP'T OF CMTY. HEALTH, PART II INFORMATION MANUAL TEFRA/KATIE BECKETT DEEMING WAIVER [hereinafter KATIE BECKETT MANUAL].

3.

Petitioner was born on February 15, 2016. At birth, his diagnoses included Trisomy 13, intrauterine growth restriction, alobar holoprosencephaly, midline facial cleft, bilateral polydactyly of upper and lower extremities, a ventricular septal defect, malpositioning of feet, and hypospadias. These diagnoses were fatal; Petitioner was not expected to survive more than a few weeks after his birth. *Exhibits P-3, R-5.*

4.

Petitioner's diagnoses caused severe physiological deficits, and he required significant medical care at the hospital immediately following birth. Due to his complete inability to ingest food orally, he was fed 100% of his diet through a orogastric (O.G.) tube. He also had breathing difficulties, which necessitated administration of "blow-by" oxygen. *Exhibits P-3, R-5; Testimony of E [REDACTED] H [REDACTED] Testimony of Lanise Shortell.*

5.

Petitioner could have remained at Northside Hospital, but his parents wanted to bring him home when his treating physicians determined it was possible. On February 17, 2016, Petitioner was discharged from the hospital into his parents' primary care. Pursuant to the plan of care developed by his physicians, Petitioner's parents were provided with hospice care, which was administered by Hospice Atlanta. According to Petitioner's care plan, the focus of his care "was on comfort and palliation[,] rather than cure." *Exhibits R-5, P-3; Testimony of E [REDACTED] H [REDACTED] Testimony of Lanise Shortell.*

6.

After Petitioner was discharged from Northside, Lanise Shortell, R.N., a nurse employed by Hospice Atlanta, visited his home to educate his parents on how to properly care for him. Specifically, Ms. Shortell instructed Petitioner's parents on how to implement the O.G. tube, administer bolus feedings, administer medications, use a suction machine, administer blow-by oxygen, and monitor Petitioner for distress or discomfort. After receiving instruction from Ms. Shortell, E█████ H█████ was able to independently administer these services, though she never became proficient in them and continued to communicate daily with Hospice Atlanta for assistance. The skilled nurses of Hospice Atlanta were on-call twenty-four hours per day, seven days per week, to respond to calls from Petitioner's parents, and Petitioner's parents regularly communicated with Ms. Shortell by telephone. Ms. Shortell visited Petitioner's home on four dates in the span of approximately two weeks: February 17, February 19, February 25, and March 1, 2017. *Exhibit P-3; Testimony of E█████ H█████ Testimony of Lanise Shortell.*

7.

Petitioner passed away at his home on March 1, 2017. *Exhibit P-5; Testimony of E█████ H█████ Testimony of Lanise Shortell.*

8.

Petitioner's parents applied for Katie Beckett for Petitioner by submitting an application packet to DFCS's Katie Beckett unit, which in turn transmitted the packet to the Georgia Medical Care Foundation (GMCF), a private organization retained by Respondent to render level of care determinations. This application packet included a "Physician's Recommendation for Pediatric Care" form (also called a "DMA-6(A)") and a Level of Care Statement completed by Petitioner's pediatrician, Dr. Madelaine Murad, M.D. The packet also included a letter from Dr. Murad and a discharge summary generated by Northside Hospital. *Exhibits R-3, R-4, and R-5.*

9.

On the DMA-6(A), Dr. Murad indicated that Petitioner required nursing facility level of care. She listed administration of oxygen as needed and G-tube feedings among Petitioner's skilled needs on the Level of Care Statement. *Exhibits R-4 and R-5.*

10.

At GMCF, a Katie Beckett review team, including Karis Morneau, RN, processed Petitioner's Katie Beckett application. Based upon its review of the documentation included in Petitioner's

renewal packet, the GMCF team concluded that Petitioner did not require the level of care provided in a hospital, skilled nursing facility, or ICF/ID, and was thus was ineligible for Katie Beckett. Specifically, the team noted from the documentation submitted with Petitioner's application that his physicians did not order, and Petitioner did not receive, the amount of services required to meet skilled nursing facility level of care. The review team did not consider the services provided by Petitioner's parents while Petitioner was under hospice care to be performed "under the supervision" of licensed personnel. The team further noted that Petitioner's application packet did not include nurse's notes evidencing that licensed personnel provided daily skilled nursing services to Petitioner.<sup>1</sup> Therefore, the team concluded that Petitioner was not provided skilled services "on a daily basis" such as would demonstrate skilled nursing level of care. *Exhibits R-1, R-2; Testimony of Karis Morneau.*

11.

At the hearing, Petitioner's parents contended that the services provided by Hospice Atlanta, or that the parents administered at the direction of Hospice Atlanta—namely, administration of oxygen, OG-tube implementation and feedings, management and evaluation of Petitioner's care plan, and observation/assessment of Petitioner's changing condition—demonstrated that Petitioner required skilled nursing level of care. Petitioner's parents contended that they were being punished financially because they made the decision to bring their child home. If he had remained at Northside Hospital until his death, they argue, the State would be responsible for significantly higher medical bills. The total of unpaid medical expenses incurred by Petitioner's parents for his home care was approximately \$4,300.00. *Testimony of E [REDACTED] H [REDACTED]*

12.

According to Lanise Shortell, Petitioner was "severely medically fragile" and required highly complex services. Specifically, she testified that he required overall management and evaluation of his care plan, which was done on a daily basis; OG tube feedings, which were also performed on a daily basis; observation and assessment of his condition; and administration of oxygen. Ms. Shortell testified that Petitioner required that oxygen be administered more frequently than on an as-needed basis, and opined that his need for oxygen was something close to "continuous." *Testimony of Lanise Shortell.*

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<sup>1</sup> Ms. Morneau testified that nurses are required to document the provision of skilled nursing services in nurse's notes pursuant to the standard of care. *Testimony of Karis Morneau.*

13.

E█████ H█████ also provided testimony regarding the complexity of Petitioner's care, and asserted that she would not have been able to provide the services described in Petitioner's care plan, including administering of oxygen and OG-tube feedings, without the assistance of skilled personnel such as Ms. Shortell. Ms. H█████ continuously encountered difficulties with performing the services Petitioner required, and it was fortunate that Ms. Shortell and other staff with Hospice Atlanta were always available by telephone to instruct her, and to provide over-the-phone supervision. *Testimony of E█████ H█████*

### 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. 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 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 [SNF], or intermediate care facility for the intellectually disabled [ICF-ID].

42 U.S.C. § 1396a(e)(3); 42 C.F.R. § 435.225. In the instant case, there is no question that Petitioner met the age, residency, and disability requirements for Katie Beckett. The only issue for adjudication, therefore, is whether he required the level of care for a hospital, SNF, or ICF-ID.

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 9. Petitioner did not require the intensity or frequency of care that he would receive in a hospital. Accordingly, Petitioner did not meet the criteria for hospital 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 a skilled nursing facility. KATIE BECKETT MANUAL 33. The individual must require services that are so inherently complex that they can be safely and effectively performed directly by, *or under the supervision of*, technical or professional personnel. 42 C.F.R. §§ 409.31(a)(3), 409.32. The individual must require one or more of the skilled nursing and/or skilled rehabilitation services described in 42 C.F.R. § 409.33 and the Katie Beckett Manual “on a daily basis.” 42 C.F.R. §§ 409.31, .33, .34; KATIE BECKETT MANUAL 33–35. To meet the “daily basis” requirement, the skilled nursing services “must be needed and provided 7 days a week[.]” 42 C.F.R. § 409.34(a)(1). Skilled rehabilitation services “must be needed and provided at least 5 days a week.” 42 C.F.R. § 409.34(a)(2).

6.

The credible evidence shows that Petitioner received the following skilled services:

- Overall management and evaluation of [a] care plan;
- Observation and assessment of [Petitioner’s] changing condition;
- Enteral feeding that comprises at least 26 per cent of daily calorie requirements and provides at least 501 milliliters of fluid per day; and
- Initial phases of a regimen involving administration of medical gases.

42 C.F.R. § 409.33.<sup>2</sup>

7.

Overall management and evaluation of a care plan may qualify as a skilled nursing or rehabilitation service

when, because of the patient's physical or mental condition, those activities require the *involvement of technical or professional personnel* in order to meet the patient's needs, promote recovery, and ensure medical safety. Those activities include the management of a plan involving a variety of personal care services only when, in light of the patient's condition, the aggregate of those services requires the involvement of technical or professional personnel.

(Emphasis added by the ALJ) 42 C.F.R. § 409.33(a)(1)(i). The evidence on record shows that management and evaluation of Petitioner's care plan required the involvement of technical or professional personnel at least five days per week. In fact, the technical and professional personnel at Hospice Atlanta were involved in his care, both in person and via telephone, every day following Petitioner's discharge.

8.

Observation and assessment of a patient's condition constitutes a skilled nursing or rehabilitation service

when the skills of a technical or professional person are required to identify and evaluate the patient's need for modification of treatment or for additional medical procedures until his or her condition is stabilized.

42 C.F.R. § 409.33(a)(2)(i). Based on the evidence presented at the hearing, the undersigned concludes that the skills of a technical or professional person were required to identify and evaluate Petitioner's need for modification of treatment or for additional medical procedures. Although Ms. H [REDACTED] was initially trained on how to visually assess Petitioner's condition, she is not a health care professional, and was dependent on skilled professionals such as Ms. Shortell to evaluate Petitioner's need for modification of treatment or additional medical procedures. The evidence on record warrants the conclusion that this service was administered under the supervision of licensed personnel at least five days per week.

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<sup>2</sup> The parties do not dispute that these services were "ordered by a physician." See 42 C.F.R. § 409.31(a)(1); KATIE BECKETT MANUAL 34

9.

It is undisputed that Petitioner received enteral feedings and administration of gases. Further, Petitioner received 100% of his daily nutritional intake via enteral feedings. The undersigned also concludes, based on Ms. Shortell's testimony, that Petitioner was administered oxygen, a medical gas, more than on an as-needed basis. Although Petitioner's enteral feedings and need for oxygen were typically fulfilled by Ms. H■■■■, Ms. Shortell provided not only the initial training and guidance, but also daily support either in person or via telephone.

10.

Respondent's position is that because much of the contact between Petitioner's parents and Hospice Atlanta was via telephone, such contacts do not meet the definition of "supervision." The term "supervision" is not defined in the pertinent regulations. However, in the context of nursing and/or rehabilitation services, the advent of advanced electronic communication devices now enable health care professionals to quickly and effectively access their patients and caregivers, whereas in the past such access would necessarily be in person. Where the well-being of the patient may be at stake, "supervision" may be construed as either direct, in-person supervision, or supervision provided by telephone or other electronic device. *See* 42 C.F.R. 409.32(a) ("To be considered a skilled service, the service must be so inherently complex that it can be *safely and effectively* performed only by, or under the supervision of, professional or technical personnel.") (emphasis added); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2296 (2002) (defining "supervise" as "coordinate, direct, and inspect continuously and at first hand the accomplishment of") (*quoted in Hutton v. Commonwealth*, 701 S.E.2d 750 (Va. Ct. App. 2016)); RANDOM HOUSE DICTIONARY 2013 ("supervise" means "to oversee (a process, work, workers, etc.) during execution of performance; superintend; have the oversight and direction of.") (*quoted in Commonwealth v. Lynn*, No. CP-51-CR-0003530-2011, 2013 Phila. Ct. Com. Pl. LEXIS 615 \* (Pa. C.P. 2013)). None of the cited cases *require* that supervision be performed in-person. Ms. Shortell and the other staff at Hospice Atlanta certainly provided direct supervision of the care provided by Petitioner's parents on a daily basis, both in-person and electronically. The services were therefore "furnished either directly by, or under the supervision of" technical or professional personnel on a daily basis. 42 C.F.R. § 409.31.



11.

Based on the foregoing, the undersigned concludes that Petitioner met the institutional level of care prerequisite for Katie Beckett. Accordingly,

**IV. DECISION**

**IT IS HEREBY ORDERED** that Respondent's decision to deny Petitioner's application for Katie Beckett is **REVERSED**. As the evidence proves that Petitioner met all other eligibility criteria for the waiver, the application for Medicaid is **GRANTED**.

**SO ORDERED**, this 8<sup>th</sup> day of February, 2017.

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

**M. PATRICK WOODARD**  
Administrative Law Judge