

**OHIO DEPARTMENT OF JOB AND FAMILY SERVICES
BUREAU OF STATE HEARINGS**

In the matter of:

<u>Appeal:</u>	<u>Program:</u>	<u>Disposition:</u>
1255430	MED	SUSTAINED
No Compliance Required		
Decision Date:	02/02/2006	
Request Date:	11/03/2005	
Hearing Officer:	ELIZABETH FOSTER	

State Hearing Decision

ISSUE SECTION:

1. By notice mailed on 10-19-05, CareStar proposed to decrease daily living services aide hours from 16 hours per day to 12 hours per day. The Appellant receives Medicaid under the Ohio Home Care Waiver Medicaid program through the Coshocton County Department of Job and Family Services (Agency). After consideration of the testimony and evidence provided at the state hearing in conjunction with the applicable policy, the Hearing Officer found that CareStar's proposal was not fully supported at the state hearing. Thus, the Hearing Officer recommends that Appeal Number 1255430 (MED) be sustained.

PROCEDURAL MATTERS:

1. The Appellant's written request for state hearing was received by the Ohio Department of Job and Family Services (ODJFS), Bureau of State Hearings on 11-3-05.
2. The state hearing was scheduled to be hearing on the following dates: 12-14-05, 1-18-06. The Appellant requested and received postponements. The state hearing was rescheduled and heard on 1-23-06.
3. All witnesses were sworn in by the Hearing Officer.
4. CareStar prepared and presented an appeal summary which was received by the Hearing Officer on 12-7-05. The Appellant presented documentation to the Hearing Officer at the time of the state hearing. All documentation received by the Hearing Officer was reviewed and entered into the hearing record in its entirety.

STATE HEARING DECISION CONTINUATION

5. The Appellant represented himself at the state hearing. The Appellant's attorney did contact CareStar and provided a release of information form (Exhibit I) to CareStar. CareStar released its appeal summary to the Appellant's attorney in response. The Appellant testified at the state hearing that this person was no longer his attorney. The Appellant was assisted at the state hearing by five of his independent caregivers. The Agency was represented by Annette Luce. CareStar was represented by Carol Schott and Libby Brinkman. The Ohio Attorney General's office was represented by Attorney Rachel Relle. ODJFS was represented by Sara Sherman.

FINDINGS OF FACT:

1. The Appellant is a 41-year old man who receives Medicaid under the Ohio Home Care Waiver program through the Agency.

2. The Appellant's current all services plan calls for 16 hours per day of daily living services (DLS) to be performed by the Appellant's contracted independent providers. The plan also provides an emergency response system in the Appellant's home. The call button is located in the living room only.

3. The Appellant has following diagnoses: cerebral palsy, scoliosis. (Exhibit B-3)

4. The Appellant takes two prescription medications.

5. The Appellant needs hands on assistance with all of his activities of daily living (ADLs) and instrumental activities of daily living (IADLs) except for telephoning. The Appellant is able to use the telephone with the assistance of adaptive devices. The Appellant is independent in the area of telephoning.

6. The Appellant uses an electric wheelchair for mobility.

7. The Appellant lives alone. The Appellant's sister is his authorized representative and signs documents for the Appellant or uses a signature stamp with the Appellant's consent.

STATE HEARING DECISION CONTINUATION

8. On 9-16-05, CareStar completed an annual assessment at the Appellant's home. (Exhibit B) Present for the assessment were the CareStar employee, the Appellant, the Appellant's sister, and four of the Appellant's independent DLS providers. The Appellant gave written consent (Exhibit K) for CareStar to continue to contact his physician for medical information as needed.

9. By notice mailed on 10-19-05, (Exhibit 1) CareStar proposed to decrease the Appellant's DLS hours from 16 hours per day to 12 hours per day. CareStar proposed no other changes for this case.

10. The Appellant receives fair hearing benefits due to an appeal received within the prior notice period.

11. CareStar faxed a request to the Appellant's doctor (Exhibits G and H) to determine whether the doctor was in agreement with the proposed reduction in DLS hours for the Appellant. The Appellant's doctor replied, "I would agree with this plan." And, "Agree with reduction in nursing care." (Exhibits G and H-1)

12. The Hearing Officer could not determine with certainty if there was a duplication of daytime DLS services during the overnight hours or if non-DLS services were being provided during the overnight hours. Two of the log sheets refer to "conversation" with the Appellant. (Exhibits C-9 and C-11) One of the log sheets refers to "check[ing] on the [Appellant]." (Exhibit C-8)

13. The Appellant receives 70 hours every two weeks of personal care assistance through the Ohio Rehabilitation Services Commission. (Exhibit F) Of these hours, 25 hours per two-week period are provided for personal finances assistance. (Exhibit F-1)

14. The Appellant works outside the home with the assistance of his personal care hours through the Ohio Rehabilitation Services Commission.

15. The Appellant does not have access to the emergency response system in his bedroom.

CONCLUSIONS OF POLICY:

STATE HEARING DECISION CONTINUATION

Policy

1. Ohio Admin. Code § 5101:6-7-01(C)(1) (2003) provides that the Hearing Officer's findings of fact "shall be based exclusively on the evidence introduced at the hearing, or after the hearing and subject to examination and rebuttal by both parties." The Agency has the burden of proof in the state hearings process.

2. Ohio Admin. Code § 5101:3-1-01(A) (2002) defines "medically necessary services" to include "the lowest cost alternative that effectively addresses and treats" the consumer's medical needs.

3. Ohio Admin. Code § 5101:3-12-03(C) (2000) describes the Ohio Home Care waiver benefit package for "consumers whose functional abilities and/or medical condition meet the criteria for an institutional level of care and have chosen home care in lieu of institutionalization."

Subsection (C)(1) states that the following are covered services in this program:

"(a) Intermittent or continuous nursing services as described in paragraph (A) of rule 5101:3-12-06 of the Administrative Code;

(b) Intermittent or continuous daily living services as described in paragraph (B) of rule 5101:3-12-06 of the Administrative Code;

(c) Skilled therapy services as described in paragraph (C) of rule 5101:3-12-06 of the Administrative Code; and

(d) ODJFS-administered HCBS waiver services as described in rule 5101:3-12-07 of the Administrative Code."

4. Ohio Admin. Code § 5101:3-12-06(B) (2000) defines "daily living services" as "services which assist consumers in carrying out activities of daily living and instrumental activities of daily living that they would typically self-perform if functional ability were present." "A 'daily living visit' shall be defined as a face-to-face encounter for the purpose of providing daily living services." Subsection (B)(4) provides that reimbursable daily living visits are limited to intermittent or continuous care visits to provide the following services:

(a) Personal care services that are needed to facilitate treatment or to prevent deterioration of the consumer's health unless the skills of a licensed nurse are required due to the consumer's condition.

STATE HEARING DECISION CONTINUATION

- (b) Assistance with activities that are directly supportive of skilled therapy services, but do not require the skills of a therapist or therapy assistant to be safely and effectively performed.
- (c) Routine care of prosthetic and orthotic devices.
- (d) Performance of general household activities that are essential to the consumer's health and safety.
- (e) Short term relief for the primary caregivers of consumers enrolled on the ODJFS-administered waiver benefit.
- (f) Other services that are traditionally nursing services that may be delegated by nurses, in accordance with Chapter 4723 of the Revised Code.

Analysis

The sole issue for the state hearing was whether CareStar's proposal to decrease DLS hours for this Appellant from 16 hours per day to 12 hours per day was correct. I found that this proposal was not fully supported at the state hearing. CareStar argued that the DLS hours currently are being used for non-DLS purposes such as conversation, companionship or supervision of the Appellant, especially during the overnight hours. Ohio Admin. Code § 5101:3-12-06(B) as cited defines reimbursable daily living services. This definition clearly does not include companionship or supervision of the Appellant or his medical conditions. In order to support the argument, however, CareStar would have had to provide me with a series of DLS log sheets so that I could determine exactly what DLS are provided during the overnight hours and whether these are duplications of services provided in the daytime hours. A review of the log sheets (Exhibit C) in the hearing record does not fully support this argument by a preponderance of the evidence, which is the standard for state hearings. There were only two log sheets which reflect overnight hours. On the other hand, the independent providers who testified at the state hearing did testify that they do provide supervision during the overnight hours to determine if the Appellant awakens and needs to use the bathroom or has an emergency situation, for example. Without the provision of other DLS services during this time, I found that this would not constitute reimbursable daily living services but that this situation calls for further evaluation on the part of CareStar.

The overall purpose of the Ohio Home Care waiver program is to provide services to the Appellant which do allow him to remain in his home in lieu of institutionalization. One of the

STATE HEARING DECISION CONTINUATION

services, in addition to DLS, which was discussed at the state hearing, was the emergency response system. Much to my surprise, one of the Appellant's independent providers was not even aware that there was such a system installed in the Appellant's home. Further, the testimony at the hearing was that the Appellant was not functionally able to use the system as it is presently installed. CareStar is charged with evaluating and determining whether the Appellant has all of the services in place that meet his medical and functional needs. It appeared to me that Appellant should have an emergency response system located in his home where he is able to access and use it, especially during the overnight hours. The Appellant testified that he is able to use his liberator/communication device and his mobile telephone in case of an emergency when he is in his motorized wheelchair, but does not have that capability when he is in bed. Again, I found that the present situation calls for further evaluation on the part of CareStar.

As an aside, one of the Appellant's independent providers objected to CareStar's contact via fax with the Appellant's physician arguing that CareStar accessed protected health information. I found that this argument had no merit. The Appellant, via his sister as authorized representative, clearly signed the "ASP Physician Letter" (Exhibit K) giving CareStar access to the Appellant's medical records. The Appellant argued that the physician which CareStar contacted was not in the best position to evaluate the Appellant's functional abilities or needs. This argument would have merit had the Appellant provided an alternative physician for CareStar to contact. However, a review of the signature page of the all services plan (Exhibit J) showed that the Appellant acknowledged that Dr. Meyer was the physician to contact and was the contact person for medical information for the development of the plan. I found that CareStar fulfilled its duty to contact the Appellant's physician about the proposal to decrease DLS hours, however, CareStar should have done so before proposing to decrease the hours on 10-19-05, instead of afterwards on 12-1-05.

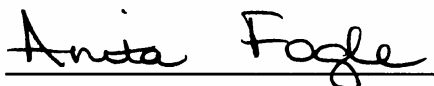
HEARING OFFICER'S RECOMMENDATIONS:

Based on the record before me, I find that Appeal Number 1255430 (MED) should be sustained. The proposal to decrease the Appellant's DLS hours as noted on the 10-19-05 adverse action notice was not found to be supported by the preponderance of the evidence at the state hearing. CareStar should void this proposal. As the Appellant continues to receive fair hearing benefits with no decrease in DLS hours, there is no order of compliance to CareStar.

STATE HEARING DECISION CONTINUATION

FINAL ADMINISTRATIVE DECISION AND ORDER:

I find that the Hearing Officer's recommendations are supported by policy and the evidence and I adopt the recommendations. The Medicaid appeal is sustained. As the Appellant continues to receive fair hearing benefits with no decrease in DLS hours, there is no order of compliance to CareStar or to the Coshocton County Department of Job and Family Services.



Anita Fogle, CHO
Hearing Authority

February 2, 2006

Notice to Appellant

This is the state hearing decision in your case. All papers and materials introduced at the hearing or otherwise filed make up the hearing record. The hearing record will be maintained by the Ohio Department of Job and Family Services. If you believe this state hearing decision is wrong, you may request an administrative appeal by writing to: Ohio Department of Job and Family Services, Bureau of State Hearings, P.O. Box 182825, Columbus, Ohio 43218-2825 or FAX (614) 728-9574. Your request should state why you think the hearing decision is wrong. You can complete the appeal request form included with this decision. Your written request or appeal form must be received by the Bureau of State Hearings within 15 calendar days from the date this decision is issued. (If the 15th day falls on a weekend or holiday, this deadline is extended to the next work day.) During the 15-day administrative appeal period, you or your representative may request a free copy of the hearing record and recording of the hearing by calling the Bureau of State Hearings at 1-866-635-3748 (select option 1 from main menu). If you want information on free legal services but don't know the number of your local legal aid office, you can call the Ohio State Legal Services Association, toll free, at 1-800-589-5888, for the local number.

Aviso a la Apelante

Esta es la decisión estatal administrativa de su caso. Todos los documentos y materiales presentados como prueba en la vista o de otra manera radicados componen el récord administrativo. El récord administrativo será mantenido por el Ohio Department of Job and Family Services.

Si usted cree que esta decisión estatal administrativa es errónea, usted puede solicitar una apelación administrativa escribiendo al: Ohio Department of Job and Family Services, Bureau of State Hearings, P.O. Box 182825, Columbus, Ohio 43218-2825 o facsímil (614) 728-9574. Su solicitud debe indicar por qué usted piensa que la decisión administrativa es errónea. Usted puede completar la solicitud de apelación incluida con esta decisión. Su solicitud escrita o formulario de apelación tiene que ser recibido por el Bureau of State Hearings dentro de los 15 días calendario desde la fecha en que esta decisión es expedida. (Si el 15to. día recae sobre un fin de semana o un día feriado, esta fecha límite es extendida al próximo día laborable). Durante el período de 15 días de apelación administrativa, usted o su representante pueden solicitar una copia gratuita del récord administrativo y de la grabación de la vista llamando al Bureau of State Hearings al 1-866-635-3748 (seleccione la opción 1 del menú principal).

Si usted quiere información sobre servicios legales gratuitos pero no sabe el número de su oficina local de servicios legales, usted puede llamar al Ohio State Legal Services Association, gratuitamente, al 1-800-589-5888, para el número local.

STATE HEARING DECISION CONTINUATION

STATE HEARING DECISION CONTINUATION

Appendix

Agency Exhibits:

- A. CareStar appeal summary (2 pages inclusive)
- B. PEAT dated 9-16-05 (34 pages inclusive)
- C. DLS log sheets dated 9-15-05, 9-26-05, 9-30-05 - 10-5-05, 9-10-05 – 9-16-05, 9-17-05- 9-18-05, 9-24-05 – 9-28-05, 9-24-05, 9-23-05, 9-24-05, 9-25-05 (11 pages inclusive)
- D. “Medicaid Bulletin, Colorado Title XIX” dated March 2000, “Norms for Home Health & HCBS personal care/home management” (8 pages inclusive)
- E. CareStar daily DLS time estimation dated 10-10-05 (1 page inclusive)
- F. Statement of Ohio Rehabilitation Services Commission dated 10-6-05 (3 pages inclusive)
- G. CareStar fax and response from Appellant’s doctor dated 12-1-05 (1 page inclusive)
- H. CareStar fax and response from Appellant’s doctor dated 12-1-05 (2 pages inclusive)
- I. Authorization for the Release or Use of Protected Health Information (PHI)” dated 10-31-05 and cover page from Appellant’s attorney from the Ohio Legal Rights Service dated 11-3-05 (2 pages inclusive)
- J. Signature page from Appellant’s all service plan signed and dated 9-16-05 (1 page inclusive)
- K. CareStar form “ASP Physician Letter” signed by Appellant’s authorized representative /sister on 9-16-05 (1 page inclusive)

Appellant Exhibits:

- 1. State hearing request (2 pages inclusive)
- 2. E-mail from CareStar employee to Appellant dated 10-19-05 (1 page inclusive)
- 3. E-mail from CareStar supervisor to Appellant dated 10-31-05 (1 page inclusive)