

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

TRISTON WEBB, a minor,	:	
through his mother	:	
ANGELA ANDREW-WEBB,	:	C.A. No. 03A-03-003
	:	
Appellant,	:	
	:	
v.	:	
	:	
VINCENT MECONI, in his official	:	
capacity as Secretary of the Delaware	:	
Department of Health and Social	:	
Services,	:	
	:	
Appellee.	:	

Submitted: November 6, 2003

Decided: February 19, 2004

ORDER

Upon Appeal of the Decision of the Department  
of Health and Social Services. Affirmed.

Diana S. Erickson, Esquire, Community Legal Aid Society, Inc., Dover, Delaware,  
attorneys for Appellant Triston Webb.,

A. Ann Woolfolk, Esquire, Deputy Attorney General, Wilmington, Delaware,  
attorneys for Appellee.

WITHAM, J.

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February 19, 2004

### ***Introduction***

Before this Court is Triston Webb's (hereinafter "Triston") appeal of a decision of the Delaware Department of Health and Social Services (hereinafter "DHSS") reducing the number of private duty nursing hours for his care from thirty hours per week to twenty hours per week. DHSS has answered the appeal. Based upon the parties' briefs and the transcript of the fair hearing, this Court concludes that the decision of the hearing officer was supported by substantial evidence, thus, the decision of the DHSS is *affirmed*.

### ***Background***

Triston is an eight year old boy who suffers from a number of complex medical problems, including cerebral palsy, severe developmental delay, seizures, and gastrointestinal problems. He currently attends school at the satellite branch of Kent County Community School in East Dover Elementary School. The school bus picks him up at his home at 7:30 a.m. and he returns home at approximately 3:30 p.m. each day. His mother, Angela Andrew-Webb (hereinafter "Ms. Andrew-Webb"), is a registered nurse working as a private duty in-home nurse for Christiana Care approximately 40 to 57 hours each week. She usually returns home from work at 6:45 p.m., although her work schedule can vary depending upon her patients' needs. In addition, she works for the State of Delaware one weekend each month caring for a medically fragile child in her home. Also residing in the home is Ms. Andrew-Webb's fiancé who cares for Triston between the time Ms. Andrew-Webb leaves for work and the school bus arrives to take him to school. Care is also

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provided by Ms. Andrew-Webb's mother when she is available. However, her mother and fiancé work, therefore they are unable to take care of Triston when he returns home from school.

Triston receives Medicaid benefits administered by First State Health Plan, a managed care program which contracts with and acts on behalf of the Division. Triston is a third-party beneficiary to the contract between DHSS and First State Health. On August 7, 2002, and on August 16, 2002, First State Health Plan issued notices terminating Triston's 30 hours of private duty nursing care in his home and denying Triston private duty nursing care at school. The notices based the denial of nursing care for 30 hours per week on First State Health Plan's and the Medical Director's decision that the services do not meet the definition of medical necessity as defined as

the essential need for medical care or services, which will . . . be primarily directed to treat the diagnosed medical condition or the effects of the condition of the beneficiary, in all settings for normal activities of daily living, but will not be solely for the convenience of the beneficiary, the beneficiary's family, or the beneficiary's provider.<sup>1</sup>

The letter went on to state that First State Health Plan would not pay for private duty nursing because it had not been demonstrated that a nurse is required to care for Triston in his mother's absence at work. Triston appealed these determinations, and a state fair hearing was held on October 24, 2002. Prior to the fair hearing,

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<sup>1</sup> Letter to Parents of Triston Webb from First State Health Plan dated August 7, 2002.

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Triston received a Fair Hearing Summary submitted by First State Health Plan which provided that private duty nursing had been denied to Triston because it appeared to be solely for the benefit of Ms. Andrew-Webb, rather than primarily directed to treat his medical condition. After the hearing, the DHSS hearing officer concluded that there was a sufficient basis for denying private duty nursing services in the school.<sup>2</sup> In addition, the hearing officer found that First State Health Plan failed to provide a reasonable basis for denying private duty nursing services to Triston while his mother is working and ordered First State Health Plan to provide flexible private duty nursing services for up to 20 hours per week, not the 30 hours he had been receiving. The hearing officer found that the nursing care was required for the treatment Triston's medical conditions, but the hours over 20 per week were solely for the benefit of his mother, rather than to treat his medical condition. Triston then filed this appeal.

Triston's present appeal relates to the decision rendered after the state fair hearing, contending that the decision of the hearing officer reducing the number of hours was not supported by substantial evidence on the record and the number of hours of care was not an issue before the hearing officer. DHSS has answered the appeal, arguing that the determination of the number of hours of care was a proper issue before the hearing officer and that his decision was supported by evidence on the record.

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<sup>2</sup> Appellant has not appealed this decision.

*Discussion*

Title 31, section 520 of the Delaware Code provides that recipients of public assistance benefits may appeal an administrative hearing decision if the decision causes them financial harm. The appeal is on the record and “the Court shall decide all relevant questions and all other matters involved, and shall sustain any factual findings of the administrative hearing decision that are supported by substantial evidence on the record as a whole.”<sup>3</sup> The Delaware Supreme Court has stated, “Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>4</sup>

Triston contends that the hearing officer’s decision was not based upon evidence presented at this hearing, but rather relied upon a previous hearing in which the hearing officer concluded that Triston was entitled to only 20 hours of nursing care.<sup>5</sup> In addition Triston argues that the hearing officer failed to consider the variance in Ms. Andrew-Webb’s work schedule and Triston’s school schedule, thus ignoring the fact that Ms. Andrew-Webb’s work schedule is dictated by the needs of her patients and Triston’s school has holidays. Therefore, it is asserted that 30 hours of private duty nursing per week is required to provide Triston with care

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<sup>3</sup>31 Del. C. § 520 (2003).

<sup>4</sup> *Anderson v. General Motors Corp.*, 748 A.2d 406 (Del. 2000), 2000 Del. LEXIS 82, \*6.

<sup>5</sup> In his decision, the hearing officer states, “It is unknown to this hearing officer how 30 hours of nursing care was ever authorized as a prior hearing decision by this hearing officer only authorize 20 hours per week.” Decision of DHSS referencing Medicaid ID# 000899204-01, dated February 24, 2003.

while his mother is working.

The hearing officer's conclusion that 20 hours of private duty nursing was required per week appears to have been based solely upon testimony presented at the hearing. Ms. Andrew-Webb testified that she works 40 to 57 hours per week and one weekend per month. Although her schedule might vary, she testified that normally Triston arrives home from school at 3:30 p.m. and she arrives home from work at 6:45 p.m. The private duty nurse stays until 7:00 p.m. to go over reports with Ms. Andrew-Webb. In the mornings before the bus picks up Triston, Ms. Andrew-Webb gets him up and ready to go to school. Her fiancé then cares for Triston until the private duty nurse arrives to get him off to school at 7:00 a.m. When Ms. Andrew-Webb cares for the foster child one weekend each month, she does so in her home. Testimony was also presented that Ms. Andrew-Webb's fiancé and her mother were generally unable to care for Triston after school due to work commitments. Therefore, the hearing officer concluded that nursing services would be required for the hours Ms. Andrew-Webb was working outside of the house and Triston was home from school, totaling no more than 20 hours per week. This allows for 3.5 hours of care each day after school plus another one-half hour each morning before school. This equates exactly with the testimony given by Ms. Andrew-Webb regarding her normal schedule. Sufficient evidence was presented establishing Ms. Andrew-Webb's average work week.<sup>6</sup> Based upon this, the

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<sup>6</sup> Copies of her work schedule were submitted as exhibits in addition to her testimony.

hearing officer reached the decision to reduce the number of hours of nursing care from 30 to 20 per week. This decision appears to be supported by substantial evidence presented at the fair hearing.

Finally, Triston argues that the hearing officer exceeded his scope of authority in reducing the number of hours from 30 to 20 because Triston and his mother did not receive sufficient notice that this was an issue to be considered in the hearing. Title 42, section 431.205 of the Code of Federal Regulations provides that in a case like Triston's the State must provide a hearing which satisfies the due process standards established in *Goldberg v. Kelly*.<sup>7</sup> The United States Supreme Court held in *Goldberg* that a fair hearing was required before a state could discontinue public assistance.<sup>8</sup> The recipient of the benefits must receive timely and adequate notice of the hearing which also details the reasons for termination.<sup>9</sup> The recipient must have an opportunity to defend by confronting adverse witnesses and by presenting his or her own evidence.<sup>10</sup> Only if the hearing satisfies these requirements is due process satisfied.

In this case, Triston received two notices mailed on August 7, 2002, and August 16, 2002, informing him that private duty nursing was being discontinued

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<sup>7</sup> 397 U.S. 254 (1970).

<sup>8</sup> *Id.* at 264.

<sup>9</sup> *Id.* at 267-68.

<sup>10</sup> *Id.*

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because First State Health Plan determined that there was no medical necessity requiring the care. In addition, the Fair Hearing Summary submitted by First State Health Plan prior to the hearing indicated that the nursing services were being discontinued because they appeared to be for the benefit of the care giver, Ms. Andrew-Webb, rather than out of medical necessity. The definition of what First State Health Plan considered medically necessary states that nursing care provided only for the convenience of the care giver is not included within the definition. This was clearly set forth in the August 2002 letters. Therefore, it was within the bounds of the hearing officer to consider not only whether the care was necessary based upon medical standards, but also based upon whether the care was provided for Ms. Andrew-Webb's convenience. Triston and Ms. Andrew-Webb received sufficient notice that this would be an issue presented at the fair hearing.

The hearing officer heard testimony regarding Ms. Andrew-Webb's work schedule and the help provided by her mother and fiancé. Additionally, he heard testimony regarding Triston's school schedule and Ms. Andrew-Webb's work schedule. Based upon this information, he concluded that 20 hours per week was sufficient. This figure comports with the testimony given by Ms. Andrew-Webb at the hearing. The number of hours of nursing care permitted was an issue properly before the hearing officer, and, as stated previously, this decision was based upon substantial evidence presented at the hearing.

### ***Conclusion***

Based upon the transcript of the hearing, the written findings of the hearing



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officer, and the briefs prepared by the parties, the decision by the Department of Health and Social Services reducing the number of private duty nursing hours for Triston Webb from 30 hours per week to 20 hours per week is *affirmed*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File