

STATE OF FLORIDA  
DEPARTMENT OF CHILDREN AND FAMILIES  
OFFICE OF APPEAL HEARINGS

FILED

AUG 31 2009

OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-03162

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION  
CIRCUIT: 06 Pasco  
UNIT: AHCA

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on June 24, 2009, at 11:18 a.m. The petitioner was present. The petitioner was represented by \_\_\_\_\_, licensed practical nurse with \_\_\_\_\_ and his mother, \_\_\_\_\_. The respondent was represented by Stephanie Lang, registered nurse specialist, and Patricia Cobb, registered nurse specialist. Present by telephone as witnesses for the respondent from Keystone Peer Review Organization (KePRO) were Rakesh Mittal, M.D., physician reviewer, and Theresa Ashy, review operations supervisor.

**ISSUE**

The petitioner is appealing the notices of April 21, 2009 and May 4, 2009 for the respondent's action to deny 1,648 hours of private duty nursing for the

period of April 18, 2009 through October 14, 2009. The respondent has the burden of proof.

### **FINDINGS OF FACT**

1. The petitioner is a two year old Medicaid eligible individual. The petitioner care is medically complex. The petitioner weighs 50 pounds. The petitioner resides with his mother and twin sibling. The mother is trained in the petitioner's care and is the petitioner's primary caregiver. The mother works part time 11:00 a.m. to 4:00 p.m. The mother has a medical problem with herniated disks and is under physician's care. The petitioner's twin sibling has a blood disorder.

2. For the period of October 20, 2009 to April 17, 2009, the petitioner was receiving 16 hours a day of private duty nursing. From March 4, 2009 to April 17, 2009, the hours were modified to 24 hours a day due to the petitioner's hospitalization in February 2009. For the period of April 18, 2009 through October 14, 2009, the nursing agency requested 4,320 hours of private duty nursing for the petitioner. This request would be 24 hours a day, seven days a week of private duty nursing.

3. Prior authorization for private duty nursing is reviewed every 180 days. KePRO is the contract provider for the respondent for the prior authorization decisions for private duty nursing. The request for private duty nursing is reviewed by a nurse reviewer and a physician consultant.

4. The initial nurse reviewer screened the petitioner's request for private duty nursing using the Internal Focus Finding. The Internal Focus Finding

provides information to KePRO of case identifiers and additional information regarding the petitioner. This information is generated to the computer for review by KePRO from the information entered by the petitioner's home health agency via computer. The request was then referred to the board certified physician consultant.

5. The initial physician consultant determination was based solely on the information received from the nursing agency. The physician consultant denied the request for 4,320 hours of private duty nursing due to a lack of information. He stated: "...the mother could provide at least 2 hrs of care in the evenings (9pm to 11pm nightly) when the toddlers are asleep." A PDN/PC Recipient Denial Letter was sent to the petitioner on April 21, 2009.

6. The nursing agency requested a reconsideration. The nursing agency reported information not reported on the initial request.

7. The reconsideration was reviewed by a second physician consultant. The second physician consultant suggested "...a denial of five (5) hours between 5pm and 10pm and 3 hours between 6am and 9am as well as a denial of 12 hours on Saturday and Sunday between 6am to 6pm and APPROVAL of the REST of the hours to accommodate mothers need for coverage for work and preparation of work week on Sunday...". The respondent sent a PDN/PC Recipient Reconsideration - Denial Overturned notice on May 4, 2009. The notice informed the petitioner that for the requested 4,320 hours of private duty nursing for the period of April 18, 2009 through October 14, 2009, 2,672 hours were approved and 1,648 hours were denied.

8. The petitioner's nurse is the petitioner's night nurse. In addition to the petitioner's medical problem he has severe edema. She provides his treatments, exercise, activities of daily living, care, feeding and monitoring. The petitioner's nurse opined that the petitioner is fragile and needs exceptional care due to his problem with thermal regulation, reflux, ketogenic diet, allergic reactions, seizure disorder, sleep disorder and the effect of his sleeping disorder on bi-pap and bolus feeding. The petitioner's sleep disorder can cause the petitioner to be awake for days or sleep for two to three days at a time. The petitioner was awake for eight days and cried constantly for six days. The bi-pap can be used when the petitioner is asleep and cannot be used when the petitioner is awake for days. The bi-pap cannot be used when bolus feeding. The petitioner feeding schedule is every four hours. The feeding is for a half hour then the petitioner rests for a half hour. The petitioner is on a ketogenic diet and is not supposed to have any sugar. Problem is the petitioner's medications contain some sugar. Any drop in the petitioner's ketone level results in a seizure. The petitioner has constant allergic reaction to antibiotics. The petitioner was hospitalized February 12 through February 19, for pneumonia, March 24 through March 27 for his diet, a week in April for pneumonia, the beginning of May for pneumonia, May 29 through June 1 for pneumonia and July 16 through July 19, 2009 for pneumonia. The mother is unable to lift the petitioner due to his weight of 50 pounds. She opined that the petitioner's mother is not able to care for the petitioner.

9. The petitioner submitted letters from the petitioner's five physicians and a Home Health Certification and Plan of Treatment for June 17 through

August 15, 2009. The five physicians opined that the petitioner is in need of 24 hours nursing care and constant monitoring. Home Health Certification and Plan of Treatment indicated the petitioner's 60 day summary. The Plan indicated: "...mom continues to learn and provide patient care. Much reinforcement and teaching has been required this cert period due to frequent and rapid changes in patient status..." The petitioner's treating physician ordered 24 hours nursing care in the Plan.

10. The review physician opined that the nursing agency must train the mother. He concurred with the denial for private duty nursing for the hours between 5:00 pm and 10:00 pm and between 6:00 am and 9:00 am Mondays through Fridays and between 6:00 am to 6:00 pm Saturdays and Sundays.

#### **CONCLUSIONS OF LAW**

By agreement between the Agency for Health Care Administration and the Department of Families and Children, the Agency for Health Care Administration has conveyed jurisdiction to the Office of Appeal Hearings to conduct this hearing pursuant to Chapter 120.80 F.S. The Florida Medicaid Program is authorized by Chapter 409, Florida Statutes, and Chapter 59G, Florida Administrative Code. The Program is administered by the Agency for Health Care Administration.

1. As to the issue as to whether or not medical necessity was demonstrated for 24 hour private duty nursing.

Florida Administrative Code 59.G-1.010, "Definitions", states for medical necessity:

(166) "Medically necessary" or "medical necessity" means that the medical or allied care, goods, or services furnished or ordered must:

(a) Meet the following conditions:

1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; statewide; and
5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

(b) "Medically necessary" or "medical necessity" for inpatient hospital services requires that those services furnished in a hospital on an inpatient basis could not, consistent with the provisions of appropriate medical care, be effectively furnished more economically on an outpatient basis or in an inpatient facility of a different type.

(c) The fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service.

For the period of October 20, 2009 to April 17, 2009, the petitioner was authorized to receive 16 hours a day of private duty nursing. From March 4, 2009 to April 17, 2009, the hours were modified to 24 hours a day due to the petitioner's hospitalization. For the period of April 18, 2009 through October 14, 2009, the nursing agency requested 4,320 hours of private duty nursing for the petitioner. This request would be 24 hours a day, seven days a week of private duty nursing. The petitioner is medically complex. The petitioner medical needs

include constant monitoring and numerous other medical procedures. The evidence clearly supports that this petitioner requires 24 hour nursing care.

Simply because medical necessity is found for the petitioner to require 24 hour private duty nursing does not mandate the granting of this benefit. The analysis must continue to determine if there are other parties that may be responsible for providing this benefit.

II. As to the issue as to whether or not private duty nursing hours can be reduced pursuant to parental responsibility.

The Home Health Services Coverage and Limitation Handbook under Licensed Nurse and Home Health Aide Visit Services, on pages 2-14 and 2-15

"Skilled Nursing Services", states:

The following are examples of services that require the direct care skills of a licensed nurse:

- Administration of intravenous medication;
- Administration of intramuscular injections, hypodermoclysis, and subcutaneous injections only when not able to be self administered appropriately.
- Insertion, replacement and sterile irrigation of catheters;
- Colostomy and ileostomy care; excluding care performed by recipients;
- Treatment of decubitus ulcers when:  
deep or wide without necrotic center;  
deep or wide with layers of necrotic tissue; or  
infected and draining;
- Treatment of widespread infected or draining skin disorders;
- Administration of prescribed heat treatment that requires observation by licensed nursing personnel to adequately evaluate the individual's progress;
- Restorative nursing procedures, including related teaching and adaptive aspects of nursing, which are a part of active treatment and require the presence of licensed nurses at the time of performance;

- Nasopharyngeal, tracheotomy aspiration, ventilator care; Levin tube and gastrostomy feedings, excluding feedings performed by the recipient, family or caregiver; and
- Complex wound care requiring packing, irrigation, and application of an agent prescribed by the physician.

The Home Health Services Coverage and Limitation Handbook under Licensed Nurse and Home Health Aide Visit Services, on page 2-15 "Home Health Aide Services", states:

Home health aide services help maintain a recipient's health or facilitate treatment of the recipient's illness or injury. The following are examples of home health aide services reimbursed by Medicaid:

- Assisting with the change of a colostomy bag;
- Assisting with transfer or ambulation;
- Reinforcing a dressing;
- Assisting the individual with prescribed range of motion exercises that have been taught by the RN;
- Assisting with an ice cap or collar;
- Conducting urine test for sugar, acetone or albumin;
- Measuring and preparing special diets;
- Providing oral hygiene;
- Bathing and skin care; and
- Assisting with self-administered medication.

Home health aides must not perform any services that require the direct care skills of a licensed nurse.

The Home Health Services Coverage and Limitation Handbook has been promulgated into rule in the Florida Administrative Code at 59G-4.130 (2). The Home Health Services Coverage and Limitation Handbook under Private Duty Nursing, on page 2-15 "Parental Responsibility", states:

Private duty nursing services are authorized to *supplement* care provided by parents and caregivers. Parents and caregivers must participate in providing care to the fullest extent possible... (emphasis added)



The basis for the reduction by the respondent was essentially that while medical necessity was demonstrated for skilled nursing services 24 hours daily, the hours should be reduced to allow for the mother to provide care to the fullest extent possible. The respondent determined that the reduction should be a denial of hours from 5:00 p.m. to 10:00 p.m. Mondays through Fridays, and 6:00 a.m. to 6:00 p.m. on Saturdays and Sundays.

The evidence demonstrates that the petitioner is in need of services. The issue then rests on whether the mother can provide the services during the time period that the respondent has determined that they should. We must look at the mother's availability, the mother's medical condition, the impact of other responsibilities in the household and the skill of the mother.

The mother works part-time and has medical issues. The petitioner has a twin sibling living in the home. The sibling has a blood disorder and there was no evidence indicating the sibling required any specific or specialized medical care. The hearing officer concludes that the mother is in the home a sufficient number of hours to care for her other child, their home and for the petitioner.

What remains to be reviewed is the mother's skill in providing care to the petitioner. From March 4, 2009 to April 17, 2009, the petitioner's private duty nursing hours were modified to 24 hours a day due to the petitioner's hospitalization in February 2009. The petitioner was hospitalized March 24 through March 27 for his diet. He was hospitalized a week in April, the beginning of May, May 29 through June 1 and July 16 through July 19, 2009 for

pneumonia. The petitioner has had numerous health incidents that required several hospitalization and additional care in the last six months.

The Home Health Certification and Plan of Treatment indicated that much reinforcement and teaching had been required due to frequent and rapid changes in patient status. The nurse that sees the petitioner regularly does not believe that the petitioner's mother cannot provide independent care for him given his current medical condition. The petitioner's mother is not sufficiently trained to meet the petitioner's frequent and rapid changes.

The hearing officer concludes that at this time based on the petitioner's need for additional care and the mother's need for additional training, the respondent's action to deny 1,648 hours of private duty nursing for the period of April 18, 2009 through October 14, 2009 is not consistent with rule and policy. The respondent's action is not upheld.

### **DECISION**

This appeal is granted.

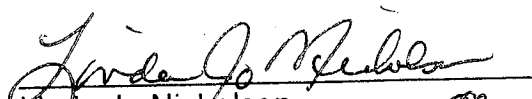
### **NOTICE OF RIGHT TO APPEAL**

This decision is final and binding on the part of the agency. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, FL 32308-5403. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The agency has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

FINAL ORDER (Cont.)  
09F-03162  
PAGE - 11

DONE and ORDERED this 3/8<sup>th</sup> day of August, 2009,

in Tallahassee, Florida.

  
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