

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

FILED

OCT 21 2009

OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-03165

PETITIONER,

Vs.

AGENCY FOR HEALTH  
CARE ADMINISTRATION  
CIRCUIT: 07 Volusia  
UNIT: AHCA

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened telephonically before the undersigned hearing officer on September 3, 2009, at 4:03 p.m. The petitioner was not present. The petitioner was represented by his mother, \_\_\_\_\_ Testifying on behalf of the petitioner were the licensed practical nurses (LPNs) who provide his care, \_\_\_\_\_ and \_\_\_\_\_. The respondent was represented by Cynthia Barge, Area Four Registered Nurse (RN) Specialist with the Agency for Health Care Administration (AHCA). Testifying on behalf of the respondent was Dr. Robert Buzzeo, medical reviewer, Keystone Peer Review Organization (KePRO) and Theresa Ashe, RN reviewer with KePRO.

The record was held open for 14 days to allow both parties to submit additional evidence. Evidence was received from petitioner and entered into evidence as Petitioner's Composite Exhibit 1. No evidence was received from the respondent.

### ISSUE

The petitioner is appealing a decrease in the number of hours of private duty nursing (PDN) for the period of April 15, 2009 through October 11, 2009. The respondent held the burden of proof.

### FINDINGS OF FACT

1. The petitioner is a five year old male with complex medical needs. The petitioner needs assistance with all the activities of daily living; he is incontinent, ventilator dependent, speech impaired, requires gastrointestinal (G-tube) feeding and unable to use a wheelchair.
2. Prior to the action under appeal, the petitioner was receiving PDN services through Medicaid twenty-four hours per day five days per week (the days that the petitioner's mother worked; her work schedule varies from week to week) and twenty-two hours per day the other two days per week (the days the petitioner's mother does not work). The petitioner has been receiving PDN services for over two years. In early April 2009, the family switched to a new home health care agency; the new agency requested that the petitioner's private duty nursing hours be increased to twenty-four hours per day seven days per week for the period of April 13, 2009 through October 11, 2009; the total hours for the six month period equals 4320.
3. On April 23, 2009, the respondent denied all of the requested hours. The letter states in part: "Denied Hours 4320...Total Approved Hours 0". The petitioner requested reconsideration. On May 5, 2009, the respondent issued a letter which partially overturned the previous denial. The reconsideration letter states in part,

"Denied Hours 2628...Total Approved Hours 1692". The petitioner requested a hearing on May 11, 2009.

4. KePRO is the Peer Review Organization (PRO) contracted by AHCA to perform medical review for the private duty nursing and personal care assistance under the Prior Authorization Program for Medicaid recipients in the State of Florida. The KePRO reviewing physician, Dr. Buzzeo, board certified pediatrician, explained that PDN services are intended to supplement the care provided by the family. The decision to approve or deny PDN hours is based on a number of factors including the petitioner's medical needs, the number of family members or caregivers, their work and/or school schedules and medical impairments. In the instant case, KePRO determined that the petitioner's medical needs require a caregiver be present at all times. The petitioner lives with his mother who is single, there are no siblings, the petitioner's mother works 11:00 am to 8:00 pm five days per week; the days vary from week to week. The petitioner's mother has no known medical impairments. After reconsideration, KePRO approved PDN hours during the mother's working hours (allowing for travel time); 9:00 am – 9 pm, five days per week (1692 total hours for the six month certification period). During the hearing, Dr. Buzzeo acknowledged that the policies which govern this program also allow eight hours per night for the caregiver to sleep and on the record revised the approved PDN hours to include 11:00 pm to 7:00 am, seven days per week (in addition to the previously approved hours of 9:00 am – 9:00 pm five days per week). KePRO denied PDN services for the hours of 8:00 am – 11:00 pm on the two days per week that the petitioner's mother does not work.

5. The petitioner's mother argued that the respondent's decision was based on erroneous information about the household circumstances. The records did not reflect that the petitioner attends school Monday – Friday from 7:00 am – 3:00 pm and requires a nurse during those hours. The mother's work schedule (including travel time) is actually 9:00 am – 11:00 pm four days per week. English is the mother's second language; she believes this limits her ability to provide adequate care. The LPNs who care for the petitioner asserted that his mother does the best that she can, but her care does not match the level of care that they provide. The petitioner's mother explained that she injured her neck and shoulder while working at Kmart in February 2009 and has a 10 pound lifting restriction. She believes this further limits her ability to care for the petitioner. Both the petitioner's mother and the LPNs admitted that on multiple occasions the petitioner's mother has taken care of him when nursing staff were late or could not work as scheduled. The petitioner's mother argued that she does what is necessary to take care of her son; she lifts him despite the pain in her neck and shoulder and despite the fact she feels the nurses provide better care.

6. After hearing the testimony of the petitioner's mother and the LPNs, the respondent re-emphasized that PDN services are intended to supplement the family's care and that 24/7 PDN services totally replaces family care. The respondent took into consideration the mother's updated work schedule as well as the petitioner's school schedule and offered to increase PDN hours to twenty-four hours per day on the days that the petitioner is in school and the mother is working; eight hours per day (11:00 pm to 7:00 am) on the days that the mother is not working and the petitioner is not in school. In addition, the respondent offered four hours of PDN services per week (of the

family's choosing) for the petitioner's mother to run errands and perform chores. The petitioner's mother was offered the opportunity to provide medical verification of her lifting restrictions which the respondent would review and decide if home health aide services could be provided to assist her with the lifting, bathing and general moving requirements of the petitioner. The record was held open for seven days for the petitioner's mother to provide verification of her lifting restrictions and seven days for the respondent to submit a written decision. In addition, while the record was open, the petitioner's mother requested that she be allowed to provide a letter from the petitioner's treating physician regarding his need for PDN services. The request was granted. On September 10, 2009, the undersigned hearing officer received a letter from the petitioner's mother which explained that she was mistaken; she actually injured her neck and shoulder in February 2008, not February 2009. No medical verification was provided to substantiate her assertion of lifting restrictions. Regarding the opinion of the petitioner's treating physician, a letter from Community Medical Center states in part:

is a patient of Community Medical Center, who has a diagnosis of Jeunne's Syndrome. It would be recommend [sic] that he has 18 to 24 hours of nursing assistance daily..." The evidence was entered as Petitioner's Composite Exhibit 1. No evidence was received from the respondent.

#### **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.

Fla. Stat. ch. 409.9132(d) states in part:

Medical necessity or medically necessary means any goods or services necessary to palliate the effects of a terminal condition, or to prevent, diagnose, correct, cure, alleviate, or preclude deterioration of a condition that threatens life, causes pain or suffering, or results in illness or infirmity, which goods or services are provided in accordance with generally accepted standards of medical practice. For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity. Determinations of medical necessity must be made by a licensed physician employed by or under contract with the agency and must be based upon information available at the time the goods or services are provided.

The above legal authority explains that Medicaid reimburses for services determined to be medically necessary. It explains further that determinations of medical necessity must be made by a licensed physician employed by or under contract with the agency and the determinations are based upon information submitted to the reviewer. KePRO is the agency's contracted provider to determine medical necessity as defined in rule. Dr. Buzzeo is a licensed physician employed under this contract with the agency to determine medical necessity.

Fla. Stat. ch. 409.905, states in relevant part:

Mandatory Medicaid services.--The agency may make payments for the following services, which are required of the state by Title XIX of the Social Security Act, furnished by Medicaid providers to recipients who are determined to be eligible on the dates on which the services were provided. Any service under this section shall be provided only when medically necessary and in accordance with state and federal law... (2) EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT SERVICES.--The agency shall pay for early and periodic screening and diagnosis of a recipient under age 21 to ascertain physical and mental problems and conditions and provide treatment to correct or ameliorate these problems and conditions. These services include all services

determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations... (4) HOME HEALTH CARE SERVICES.--The agency shall pay for nursing and home health aide services, supplies, appliances, and durable medical equipment, necessary to assist a recipient living at home... (b) The agency shall implement a comprehensive utilization management program that requires prior authorization of all private duty nursing services, an individualized treatment plan that includes information about medication and treatment orders, treatment goals, methods of care to be used, and plans for care coordination by nurses and other health professionals. The utilization management program shall also include a process for periodically reviewing the ongoing use of private duty nursing services. The assessment of need shall be based on a child's condition, family support and care supplements, a family's ability to provide care, and a family's and child's schedule regarding work, school, sleep, and care for other family dependents. When implemented, the private duty nursing utilization management program shall replace the current authorization program used by the Agency for Health Care Administration and the Children's Medical Services program of the Department of Health. The agency may competitively bid on a contract to select a qualified organization to provide utilization management of private duty nursing services. The agency is authorized to seek federal waivers to implement this initiative.

(c) The agency may not pay for home health services unless the services are medically necessary...

The above authority explains that under State Plan Medicaid, the agency shall pay for early and periodic screening, diagnosis and treatment services for a recipient under 21. The agency will provide treatment to correct or ameliorate the child's problems and conditions. These services include private duty nursing. The statute also sets forth that the agency will implement a prior authorization program for all private duty nursing services to include completing an assessment based on the child's condition, family support and care supplements, a family's ability to provide care and a family's and child's schedule regarding work, school, sleep and care for other family

dependents. The agency may not pay for home health services unless the service is medically necessary.

Fla. Admin. Code 59G-1.010 Definitions, defines medically necessary as applied in Medicaid prior authorization decisions and states in part:

(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.

(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.

The Florida Medicaid Home Health Services Coverage and Limitations

Handbook, July 2008, defines the guidelines for private duty nursing services as follows at page 2-17:

Private Duty Nursing Definition. Private duty nursing services are medically necessary skilled nursing services that may be provided in a child's home or other authorized settings to support the care required by the child's complex medical condition...



Private Duty Nursing Requirements. Private duty nursing services must be: ordered by the attending physician; documented as medically necessary; provided by a registered nurse or a licensed practical nurse; consistent with the physician approved plan of care; and authorized by the Medicaid service authorization nurse...

Parental Responsibility. 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. Training can be offered to parents and caregivers to enable them to provide care they can safely render. Medicaid does not reimburse private duty nursing services provided solely for the convenience of the child, the parents or the caregiver...

The above legal authorities make it clear that the Medicaid services must not be in excess of the patient's needs, must be reflective of the level of service that can be safely furnished, and are intended to supplement the care of recipient's family or caretaker.

The fact that the petitioner requires nursing care is not disputed. The fact the PDN services are intended to supplement family care and not to replace family care is also not disputed. The treating physician recommends that the petitioner has 18 to 24 hours of nursing assistance daily. However, the above Florida Administrative Code explains that 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 Medicaid covered service. The petitioner's treating physician does not make medical necessity determinations, as defined in rule, for the Medicaid agency. His statement was weighed accordingly. Continuing with the analysis, the undersigned considered that the petitioner has been receiving PDN care for over two years. As of the date of the hearing, he was receiving at least twenty-two hours of PDN every day of the week. The undersigned concludes

that this was sufficient time to train the petitioner's mother so that she can provide his care when a nurse is not in the home. The petitioner's mother acknowledged that on the occasions when nurses have not arrived at the home as scheduled, she has taken care of the petitioner's needs without incident. Her assertions of lifting restrictions due to a neck and shoulder injury were not substantiated by medical evidence and therefore, the undersigned could not find that she has any medical limitations which prevent her from being able to take care of the petitioner. Her concerns about providing adequate care for the petitioner because English is her second language were taken into consideration, however, the fact that she does take care of the petitioner when nursing staff are not available proves that she is capable of providing the care the petitioner needs. During the hearing, after hearing the actual situation of the petitioner, KePRO increased the PDN coverage to 24 hours per day for the days the petitioner is in school and the mother is working, eight hours per day when the mother is not at work and the petitioner is not in school and four hours per week for the mother to run errands. These hours were in addition to the hours already approved for the mother's work hours. Although this does not provide 24 hours per day for every day of the week, as the petitioner's mother was seeking, the undersigned concludes that this number of hours does cover the medically necessary hours (as defined in the above authorities) for the petitioner, leaving the days per week that the mother does not work and is not sleeping and when the petitioner is not in school, as hours not medically necessary for Medicaid to cover.

**DECISION**

The appeal is granted in part and denied in part. The petitioner's request for PDN services twenty-four hours per day, seven days per week is denied. The appeal is granted in part; the respondent is hereby ordered to provide PDN services twenty-four hours per day on the days that the petitioner is in school and the mother is working; eight hours per day (11:00 pm to 7:00 am) on the days the mother is not working and the petitioner is not in school, plus four hours (of the family's choosing) of PDN services per week for the petitioner's mother to run errands and perform chores.

**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.

DONE and ORDERED this 21<sup>st</sup> day of October, 2009,

in Tallahassee, Florida.

  
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Leslie Green  
Hearing Officer  
Building 5, Room 255  
1317 Winewood Boulevard  
Tallahassee, FL 32399-0700  
850-488-1429

FINAL ORDER (Cont.)

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