

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

FILED

SEP 25 2009

OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-03333

PETITIONER,

Vs.

AGENCY FOR HEALTH  
CARE ADMINISTRATION  
CIRCUIT: 05 Hernando  
UNIT: AHCA

RESPONDENT.  
\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened by telephone before the undersigned-hearing officer on August 19, 2009, at 1:05 p.m. The petitioner was not present. Present representing the petitioner was his father. The respondent was represented by Tommie Ellis, program administrator 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), Melanie Clyatt, RN reviewer with KePRO and Joan Dohn, RN with AHCA.

The record was held open for 14 days to allow the petitioner's father the opportunity to respond to additional evidence submitted during the hearing by the respondent. As of the date of this order, a response has not been received from the petitioner's father.

### ISSUE

The petitioner is appealing the respondent's action of May 11, 2009, to decrease the number of hours of private duty nursing for the period of April 13, 2009 through October 9, 2009. The respondent has the burden of proof.

### FINDINGS OF FACT

1. Prior to the action under appeal, the petitioner was receiving private duty nursing services through Medicaid at 24 hours per day, seven days per week. The petitioner requested the continuation of private duty nursing services at the same level for the period of April 13, 2009 through October 9, 2009.

2. The petitioner is seven years old. He has a twin who receives private duty nursing services 24 hours per day, seven days per week. Both children have the same disabilities. One nurse cares for both the petitioner and his twin who share a bedroom. The petitioner also has a ten year old and a five year old sibling who live at home and requires no special medical care. These children are in school out of the home and return around 4:45 p.m. on school days. The children live with their father who is a single parent.

3. Keystone Peer Review Organization (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.

4. A prior authorization review was completed by KePRO. On May 1, 2009, KePRO denied the petitioner's request for all of the hours of private duty nursing services requested. A reconsideration was requested. A reconsideration review was completed by

KePRO. Upon reconsideration, KePRO approved private duty nursing services for all hours except from 1:00 p.m. to 5:00 p.m. on Saturdays and Sundays. Private duty nursing was denied during these hours because the petitioner did not work on Saturdays and Sundays and because the grandmother assisted with the care of the petitioner's ten year old and five year old siblings. On May 11, 2009, KePRO denied the private duty nursing services from 1:00 p.m. to 5:00 p.m. on Saturdays and Sundays as it was determined that these hours were not medically necessary. A total of 4120 hours were approved and 200 hours were denied. KePRO considered the father's schedule (off of work on Saturdays and Sundays) and determined that these hours were the most likely time that the father would not have to go into work or be outside of the home and would be available to provide the care. There was no detailed schedule provided for Saturdays and Sundays. KePRO also considered that the father is a single parent. KePRO learned after its decision that the grandmother was no longer there to provide care. There was no discussion of how the other two children were taken care of.

5. There is no dispute that the skilled nursing services are medically necessary.

6. At the time of the action under appeal, the petitioner's father was working from 7:00 a.m. to 4:00 p.m. Monday through Friday and got home between 5:00 p.m. and 5:30 p.m. At times, he also worked on Saturdays. However, during the end of July 2009 and subsequent to the reduction, the father started working every Saturday from 7:00 a.m. to 4:00 p.m. and in turn, has another day off during the week. The second day off during the week changes; some weeks he is off Sundays and Mondays, some weeks he is off Sundays and Tuesdays, etc. His constant day off is Sunday. He gets home between 5:00 p.m. and 5:30 p.m. The grandmother assisted with the care of the children.

However, she no longer is able to care for the children as she no longer lives near the petitioner's home. The father cannot care for the petitioner on Saturdays between 1:00 p.m. and 5:00 p.m. because of the change in his work schedule. The home health agency did not report his change in work schedule and therefore, KePRO was not aware of such. The father does provide care at other times during the week as there are times when the home health agency does not send a nurse.

7. At the hearing, KePRO explained that the procedure to be followed in this situation would be for the provider (home health care agency) to submit a modification request through the internet to KePRO. Medically necessary private duty nursing services are always authorized while the caregiver is working. KePRO's procedure involves applying the standard of parental responsibility to the best times and days for the caregiver based on the information supplied. It is recognized that there are situations when home health agencies in general do not provide nurses. However, this is due to a shortage in nurses, which is not under the control of AHCA or KePRO as the hours for the nursing services have been approved.

8. The petitioner's father explained his position as being confused by the decision for one twin, while the agency did not change the 24 hour for 7 days per week private duty nursing for the other twin who has the same disabilities. There is one nurse providing the service for both children. Because one child has full-time nursing and the other child does not and the service is provided by the same nurse, the father argues this is inconsistent and he does not know why or how he is to apply his parental responsibility of care to only one twin while the nurse provides care for the other one without separating the two.

9. KePRO's position is that siblings do not always come up for review together; this was an oversight as typically the reduction would be applied consistently to both children in the same situation. It was not intended for Medicaid to cover full-time nursing services around the clock; the intention is to assist families with the medically necessary nursing services and provide some of the nursing services. It is common practice throughout the industry for one nurse to provide care for two patients; an example is ICU units in hospitals where one nurse provides care for two patients.

### **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 controlling authority explains that Medicaid reimburses for services determined to be medically necessary. It also explains that 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.

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 above legal definition of medically necessary, as applied in Medicaid prior authorization decisions by the agency physician, requires that the service reimbursed by Medicaid must not be in excess of the patient's needs, must 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 as well as the restriction that the service

must be furnished in a manner not primarily intended for the convenience of the recipient's caretaker.

The Florida Medicaid Home Health Services Coverage and Limitations Handbook 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 authorities require that private duty nursing services must be documented as medically necessary to be reimbursed by Medicaid. 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.

In this case, the family living together consists of the father, seven year old twins that have medically necessary private duty nursing services provided by Medicaid, a five year old and a ten year old who require no medical care and who attend school outside of the home. At issue is the reduction of private duty nursing services for one of the twins.

The father raises the question on appeal of how it could have been determined that he had parental responsibility for some hours for one twin and not the other with the same disabilities. The twins share a bedroom and have the same nurse. He is uncertain of the agency's expectation that he will provide care for the petitioner during the specified hours but the nurse will be providing care for his twin, while in the same room. He is available on Sundays to provide care but not Saturdays as he is now required to work on Saturdays.

Administrative fair hearings are de novo in nature, meaning that new and relevant evidence not previously considered by the agency may be considered by the hearing officer. There has been a change in the father's work schedule subsequent to the agency's decision and was unknown to the agency until the hearing. The change involves the father now working on Saturdays which in turn, causes him to have a week day off rather than working Monday through Friday, as previously reported to KePRO. Based on the above authorities, the undersigned concludes that the agency was correct in its determination that the father can provide care on Sundays from 1:00 to 5:00 p.m. resulting in private duty nursing services not being medically necessary for this timeframe. However, the undersigned concludes that the decision that private duty nursing services are not medically necessary on Saturdays was not correct. The reduction of 100 hours (rather than the 200 hours) is affirmed for the certification period of April 13, 2009 through October 3, 2009.

This decision does not address the private duty nursing services for the petitioner's twin as no adverse action has been taken at this time. However, the undersigned does recognize the father's argument that this seems to be an inconsistent decision, if in fact,



both children require the same level of nursing services. Therefore, the agency may want to address this concern by reviewing the twins' private duty nursing services together and issue written notification of any changes, also taking into consideration the father's new work schedule.

**DECISION**

The appeal is partially granted in that the reduction of private duty nursing services for Saturdays is denied. The reduction of private duty nursing services for Sundays is affirmed.

**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 25<sup>th</sup> day of September, 2009,

in Tallahassee, Florida.



Morris Zamboca  
Hearing Officer  
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850-488-1429

FINAL ORDER (Cont.)

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