

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

FILED

FEB 05 2010

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-06228

PETITIONER,

Vs.

CASE NO.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 09 Orange
UNIT: AHCA

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned hearing officer convened an administrative hearing in the above-referenced matter on December 17, 2009, at 3:58 p.m., in Orlando, Florida. The petitioner did not appear. petitioner's mother and representative, appeared on his behalf. Lissette Knott, human services program specialist with the Agency for Health Care Administration (AHCA), appeared and represented the respondent-Agency. Melanie Clyatt, registered nurse operations review supervisor with KePRO, and Dr. Rakesh Mittal, board certified pediatrician physician reviewer with KePRO, appeared telephonically as witnesses for the respondent.

ISSUE

At issue is the respondent's action of September 28, 2009, reducing the petitioner's number of skilled nursing service hours from twenty-two hours per day, Monday through Friday, to ten hours per day, and from twenty hours per day

Saturday and Sunday, to twelve hours per day based on level of medical necessity and social situation. The respondent bears the burden of proof in this appeal.

FINDINGS OF FACT

1. The petitioner is a medically complex eleven-year old child. His diagnoses include: chronic respiratory disease, end stage renal disease, bronchopulmonary dysplasia, and seizure disorder. He has a tracheostomy, a cardiac monitoring device, a GT pump, continuous suctioning, apnea monitoring, continuous oxygen therapy, nebulizer treatments, and is fed by a G-tube. He is non-ambulatory.
2. The petitioner resides with his mother and a fifteen-year old cousin. His mother is disabled and does not work outside the home. His mother is diabetic, has high blood pressure, and is subject to lifting restrictions (nothing over five pounds, due to back and neck pain). She participates in providing some of the petitioner's care. The child's father has no participation in his care.
3. The petitioner's mother requested continuation of his nursing services in the amount of twenty-two hours per day, Monday through Friday, and twenty hours per day, Saturday and Sunday. This request was taken by the petitioner's home health agency and sent to the respondent. The respondent forwarded the request to its prior service authorization review agent, KePRO. A physician at KePRO reviewed the petitioner's case file and found that based on the petitioner's level of medical necessity and

social situation, a reduction in service was proper. The physician also determined that a substitution of services with that of a home health aide in place of a skilled nurse for some hours of care would adequately meet the petitioner's needs. The physician approved the petitioner to receive nine hours per day of skilled nursing service (preferably for sleep coverage for his mother) and a home health aide would provide eleven hours, Monday through Friday. His mother would provide the four remaining hours of daily care. For Saturday and Sunday coverage, the petitioner would be approved to receive twelve hours each day per day of skilled nursing, four hours per day of care by his mother, and eight hours per day of home health aide service.

4. The respondent issued a notice dated September 23, 2009, informing of this decision. The petitioner's mother requested a reconsideration of this decision.
5. KePRO had a second physician review the petitioner's file. This physician upheld the initial physician's review and denial. The respondent issued a second notice to the petitioner, dated September 28, 2009, informing of the decision.
6. The petitioner appeals.
7. At the hearing, the petitioner informed that she is able to provide four hours per day of her son's care. She stated that her son's medical conditions require a skilled nurse for at least twenty hours per day, seven

day per week. She provided four doctors' statements which indicated a need for care.

8. The respondent's physician witness stated that because the petitioner's mother is in the home and she is available and capable of providing care, her son's medical needs can best be met with skilled nursing coverage while she sleeps and a home health aide can supplement the other hours of care that she herself or the nurse does not provide. The respondent offered to approve continuation of her son's current level of service for the next 60 days (through February 2010) and then implement the reduction with the addition of two hours of skilled nursing per day. Ultimately, the new reduction would result in skilled nursing in the amount of eleven hours per day, seven days per week, nine hours of home health aide service per day, seven days per week, and mother's care of four hours per day, seven day per week (11 - PDN, 9 - HHA, 4 - Parent).
9. The petitioner refused the offer and stated she would accept nothing less than twenty-hours per day, seven days per week.

CONCLUSIONS OF LAW

Fla. Admin. 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.

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...

The basis for the reduction by the respondent was essentially that while there is a demonstrated need for skilled nursing services 24 hours daily, the hours should be reduced to allow for the parent to provide care to the fullest extent possible. The hearing officer considered all evidence submitted at the hearing and reviewed all conditions for medical necessity as set forth in the rules of the Program.

The petitioner's care is medically complex. The evidence demonstrates that the petitioner is in need of services. It is undisputed that nursing services are required. The evidence clearly supports that this

petitioner requires 24 hour care. For the Medicaid Program to authorize and pay for private duty nursing service to meet this need, the required nursing care must meet the rule definition of medical necessity. The analysis must continue to determine if there are other parties that may be responsible for providing this benefit. The handbook sets forth that private duty nursing services are authorized to *supplement* care provided by parents and parents must participate in providing care to the fullest extent possible. The issue then rests on whether the parents can provide the services during the time period that the respondent has determined that they should. We must look at the skill of the parent and the impact of other responsibilities in the household.

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 evidence demonstrates that the petitioner is in need of services. The handbook sets forth that parents and caregivers must participate in providing care to the fullest extent possible. The mother is trained in the petitioner's care. The evidence demonstrated that the mother is subject to a lifting restriction and is capable of providing four hours of care to the petitioner per day. Lifting and

repositioning are not skilled nursing services and these are services that could be performed by a home health aide. The services of a home health aide would be a less costly service. It is the opinion of the respondent's physician expert that the petitioner needs coverage of eleven hours per day of skilled nursing, preferably during night hours so that his mother can have sleep time coverage. The expert physician also stated that the child's mother can provide the petitioner's required care for four hours per day and the other hours of care can be supplemented by a home health aide since mother is in the home full-time. On this basis, services of a skilled nurse for the 24 hours a day, seven days a week would not meet the criteria for medical necessity.

The rule sets forth that the service 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; statewide. The service of a home health aide for monitoring and lifting would be a less costly service and still meet the petitioner's required level of care, in addition to the number of skilled nursing hours and mother's hours of care. The request for skilled nursing hours in the amount of twenty hours per day, seven days per week does not meet the definition of medical necessity.

The petitioner's mother argued that she and her niece have doctor's appointments to attend to and that would leave no one to care for her son because a home health aide is not capable of performing the duties of a skilled nurse. The respondent countered that she may request "modification" hours to have a skilled nurse present during those times for coverage for these

appointments. The mother also argued that she was concerned about any emergency situation arising with herself or niece that would require her to leave the home and that a home health aide would not be capable to care for her son. The respondent countered that emergency care is not covered and that an emergency could occur any time of day or night, even during her time of caring for her son. If the child experienced an emergency while in the care of the home health aide, the aide would call 911 just as the petitioner's mother would do in such an event.

The respondent agreed to approve continuation of services at the current level through February 2010. The hearing officer adopts that agreement. However, for the remainder of the certification period, the hearing officer concludes that action to reduce skilled nursing service to eleven hours per day, seven day per week, and add home health aide service of nine hours per day, seven days per week meets the criteria for medical necessity and is correct.

DECISION

The appeal is partially granted and partially denied. The respondent's action is reversed as to the reduction effective with the beginning of the petitioner's certification period through February 2010. The respondent will continue current level of skilled nursing, twenty-two hours per day, Monday through Friday, and twenty hours per day Saturday and Sunday. The respondent's action is affirmed as to the reduction effective March 2010. The respondent may implement the reduction in skilled nursing to eleven hours per

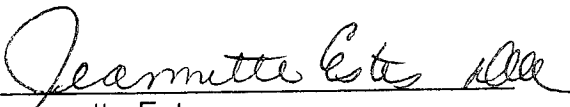
day, seven days per week, and approve home health aide service nine hours per day, seven days per week.

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 5th day of February 2010,

in Tallahassee, Florida.


Jeannette Estes
Hearing Officer
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