

FILED

FEB 03 2010

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

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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-06833

PETITIONER,  
Vs.  
AGENCY FOR HEALTH CARE  
ADMINISTRATION (AHCA)  
CIRCUIT: 06 Pinellas

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened telephonically before the undersigned at 10:44 a.m. on January 6, 2010. The petitioner was not present but was represented by his mother, Patricia Cobb, RN specialist with AHCA represented the respondent. Additional testimony for the respondent was from Bonnie Wallington, RN supervisor with KePRO, and Rakesh Mittal, MD pediatrician and physician reviewer with KePRO.

**ISSUE**

At issue was whether reduction in Private Duty Nursing (PDN) hours was correct. The respondent bears the burden of proof.

**FINDINGS OF FACT**

1. The petitioner is a five-year-old child with medically complex needs. He needs full time care to the level of nursing services around the clock. Using

review data from KePRO (the peer review organization), the respondent had previously authorized twenty-four hours daily PDN.

2. Between July 28 and September 23, 2009, KePRO conducted a new review.

3. Following that new review, on September 24, 2009, the respondent informed the petitioner that PDN was to be reduced by 2 hours every day. The reduction notice said that 360 hours were denied and 3960 hours were approved.

4. That notice was challenged.

5. The petitioner has two siblings, ages 7 and 10. Their activities include gymnastics and baseball as well as school. The mother is a single parent, working two full-time jobs. Job hours are Monday through Saturday, 9:30 a.m. to 3:00 p.m. and 6:30 p.m. to 3:00 a.m. She needs to sleep, take care of all household chores, attend to activities for the other children, including taking them to and from school and preparing meals. She uses the time from 4:00 p.m. to 6:00 p.m. to cook for her children, eat, and help them with homework. Her customary sleep is from about 3:00 a.m. to 6:00 a.m., plus as much as possible on Sundays, to "catch up." No other adult lives in the home.

6. The KePRO review conclusions during September 2009 said:

Approve all hours except for 4PM-6PM Daily and Sunday hours except for sleep for this 5-year-old male born with hypoplastic left heart. He also has severe immune system issues. History of seizure disorder, hypertension, Dysphagia, GT, chronic sinusitis, GERD, malposition of heart, History of anoxia and stroke, unsteady gait...

However hours will need to be reduced to 22 hours/day/7 days/week, which is within the guidelines ... The DENIAL of two (2) hours/day can be designated for any time period during the day.

7. KePRO's case synopsis notes during late July 2009, relaying information of the provider, said that, "MD orders for 24 hours 7 days a week for PDN." Those notes also showed the petitioner:

has undergone three major open-heart surgeries... frequent bradycardic episodes into the 30s and needs a Pacemaker. He saw cardiology and has to wait until he is more stable before undergoing another surgery... constipation... neurological problems requiring PT/OT/ST. Has a Gtube and receives pediasure 100ml plus 90ml of water five times a day via pump. Can have po stage 3 baby food. Two bolus at night and 3 during the day.

8. The notes showed that his mother said his "Natural Pacemaker in his heart is not working. If he becomes bradycardic, needs manual stimulation. Is too compromised at this time for the pacer to be replaced."

9. During the hearing, the respondent offered to lessen the PDN reduction plan and offered reduction of ten hours weekly rather than fourteen hours weekly. KePRO staff said that the mother could select whatever ten hours weekly she wanted to provide. The petitioner's mother did not accept that plan.

### **CONCLUSIONS OF LAW**

By agreement between the Agency for Health Care Administration (AHCA) and the Department of Children and Families, AHCA has conveyed jurisdiction to the Office of Appeal Hearing to conduct this hearing pursuant to Florida Statute, Chapter 120.80.

Florida Statute 409.905 addresses mandatory Medicaid services under the State Medicaid Plan and informs:

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...

(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. ...

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

AHCA has a prior authorization system for all private duty nursing services. This includes 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. AHCA does not pay for home health services unless the service is medically necessary. Florida Statute 409.913 addresses "Oversight of the integrity of the Medicaid program," with (1)(d) describing "medical necessity or medically necessary" standards and saying in relevant part. "...For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity..."

At issue is whether reduction of PDN hours is justified. As the respondent offered to lessen the plan of reduction, reducing not by 14 hours but rather by 10 hours weekly, that is also noted. Consistent with statute, Florida Administrative Code 59G-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. ...

(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 Limitation Handbook is adopted by rule under the Florida Administrative Code at 59G-4.130

(2). The Florida Medicaid Home Health Services Coverage and Limitation Handbook, addresses Private Duty Nursing, Parental Responsibility, and on page 2-17 states:

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. (emphasis added)

The Florida Medicaid Home Health Services Coverage and Limitations Handbook, July 2008, discusses the authorization process for private duty nursing services as follows at page 2-19:

Private duty nursing services are authorized by the Medicaid peer review organization if the services are determined to be medically necessary.

Private duty nursing services will be decreased over time as parents and caregivers are taught skills to care for their child and are capable of safely providing that care or as the child's condition improves.

The basis for reduction in this case was that while there is a demonstrated need for nursing services 24 hours daily, the hours should be reduced to allow the parent to provide care to the fullest extent possible. It is further noted that the only parent in the home is responsible for two other young children and is working two full time jobs. Sleep is a critical element in a parent's ability to care for her children. The petitioner's care is medically complex and that is undisputed. The evidence shows that he requires 24 hour nursing care and this is undisputed.

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 continues to determine if there are other parties that may be responsible for providing this benefit. The Florida Medicaid handbook set forth under rule, says 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 parent can provide the services during the time the respondent has determined she can. If this were true, then the service would not meet the medically necessary definition for private duty nursing services under Medicaid.

To make that determination, the undersigned looked at the skill and availability of the parent, along with her other obligations. The Florida Medicaid Home Health Services Coverage and Limitation Handbook, under Licensed Nurse and Home Health Aide 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 procedure, 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 feeding, 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 rule says that the request must reflect the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available. It is proper to assess the hours that the parent would be available to provide safe care to the petitioner. In this situation, the undersigned cannot agree that this parent should be available for ten hours weekly to provide care for the petitioner. This parent is already over-committed, sleep-deprived and has no apparent source of relief. It is not likely she could safely provide care for the petitioner while she is also tending to dinner chores, homemaking, and children's homework chores. It is concluded that reduction of either 14 or 10 hours weekly PDN service has not been justified.

#### **DECISION**

The appeal is granted and the respondent's action is not upheld.

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

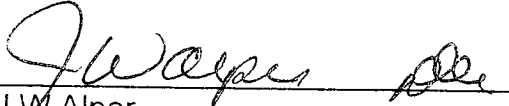
This decision is final and binding on the part of the agency. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Agency for Health Care Administration, 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



FINAL ORDER (Cont.)  
09F-06833  
PAGE - 9

this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this 3<sup>rd</sup> day of February 2010, in Tallahassee, Florida.

  
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Copies Furnished To: