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

APPEAL NO. 09F-07465

PETITIONER,

Vs.

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

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, an administrative hearing was convened by telephone before the undersigned-hearing officer on December 29, 2009, at 11:35 a.m. The petitioner was not present. Present representing the petitioner was his grandmother. The respondent was represented by Marilynn Schlott, field office manager with the Agency For Health Care Administration (AHCA). Testifying on behalf of the respondent were Dr. Rakesh Mittal, medical reviewer, Keystone Peer Review Organization (KePRO), and Melanie Clyatt, review operations supervisor with KePRO. Kelly Loveall, RN with AHCA was present as an observer.

ISSUE

The petitioner is appealing the respondent's action of October 19, 2009, to decrease the number of hours of private duty nursing for the period of October 10, 2009 through April 7, 2010.

The respondent had the burden of proof.

FINDINGS OF FACT

1. The petitioner was receiving private duty nursing services of 24 hours per day seven days per week.

2. The petitioner is 12 years old and lives with his grandmother. He has been diagnosed with cerebral palsy, developmental delay, chronic upper respiratory deficiency, chronic respiratory disease, esophageal reflux, reoccurring decubitus ulcer, apnea, intestinal stenosis in 12 areas with pain and failure to thrive. The petitioner has a tracheostomy, GT and a fundoplication. He is bed and chair bound and needs two persons to be transferred from bed to chair. He is incontinent of bowel and bladder, is non-verbal and is not able to make his needs known. The petitioner requires constant supervision and cannot be left at home alone.

3. The petitioner attends school daily. Due to his medical condition, the school administration has refused to allow him to attend unless he is accompanied by a private duty nurse as the school is not staffed to meet his medical needs. The petitioner and the nurse are picked up at his home by the school transport at approximately 8:30 a.m. and are returned home by school transport by approximately 4:15 p.m.

4. The grandmother is the sole caregiver for the petitioner. She is 60 years old and is not able to transfer the petitioner without assistance. The grandmother has been diagnosed with high blood pressure, heart disease and mitral valve prolapse. The grandmother does not work as she cares for the petitioner. While at home the grandmother can provide the care that the petitioner requires with the assistance of a home health aide whenever the private duty nurse in not in the home. She believes that

she would not be able to care for the petitioner if he should require emergency services. Therefore, she believes that the petitioner needs 24 hour nursing services seven days per week.

5. Keystone Peer Review Organization (KePRO) is the Peer Review Organization (PRO) contracted by the Agency for Health Care Administration to perform medical review for the private duty nursing and personal care Prior Authorization Program for Medicaid recipients in the State of Florida.

6. A prior authorization review was completed by KePRO. On October 8, 2009, KePRO approved nursing services nightly from 11:00 p.m. to 7:00 a.m. and approved a home health aide from 7:00 a.m. to 11:00 p.m. KePRO denied all other hours of nursing services.

7. The petitioner requested a reconsideration because she disagrees with the decrease in the number of hours of nursing services. On October 19, 2009, a reconsideration review was completed by (KePRO). On reconsideration KePRO approved 20 hours per day of nursing services seven days per week and denied fours hours of nursing services per day in which a home health aide could be substituted to assist the grandmother with the petitioner's care. KePRO agreed to approve a home health aide for four hours per day during the time when the nurse was not in the home to assist the grandmother. KePRO believed that the four hours can be applied during the day and the four hours do not need to be specified for any particular time period. The four hours per day of nursing services were denied because the petitioner's grandmother would be at home during the four hours when the nurse was not there and

she could care for the petitioner during those four hours with the assistance of a home health aide.

CONCLUSIONS OF LAW

The Office of Appeal Hearings has subject matter jurisdiction in this proceeding, pursuant to Sections 120.569, 120.57(1), 120.80(7) and 409.285 Florida Statutes.

Fla. Admin. R 65-2.060, states in part:

> (1) The burden of proof, except where otherwise required by statutes, is on the party asserting the affirmative of an issue. The burden is upon the Department when the Department takes action which would reduce or terminate the benefits or payments being received by the recipient. The burden is upon the petitioner if an application for benefits or payments is denied. The party having the burden shall establish his/her position, by a preponderance of evidence, to the satisfaction of the hearing officer.

Because the Agency moves to reduce private duty nursing care hours, the Agency has the burden of proof.

The hearings are de novo hearings, in that, either party may present new or additional evidence not previously considered by the Department in making its decision. Fla. Admin. R 65-2.060, states in part:

> (3) The Hearing Officer must determine whether the department's decision on eligibility or procedural compliance was correct at the time the decision was made. The hearings are de novo hearings, in that, either party may present new or additional evidence not previously considered by the department in making its decision.

Consequently, the undersigned took into consideration all the evidence presented to him at the hearing, not solely what was made available to the Agency when it made its decision.

Florida Statutes 409.913 governs the oversight of the integrity of the Florida Medicaid Program. Section (1)(d) sets forth the "medical necessity or medically necessary" standards, and states in pertinent part as follows:

> .... 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** .... See §409.913(d), Florida Statutes (emphasis added).

Based on these authorities, the hearing officer concludes the Agency makes the final decision of medical necessity.

The hearing officer has been delegated the final decision making authority for the Agency in making this decision. In making the decision, he will evaluate the testimony of the expert witnesses, taking into consideration the facts in the records upon which the experts relied in reaching there opinion. (See sections 90.702, 90.703 90.704, 90.705, Florida Statutes.) The hearing officer will credit additional weight to the treating physician's testimony regarding the petitioner's condition and treatment needs when there is a conflict of opinion on these matters. The hearing officer will equally consider the treating physician's opinion and the reviewing physician's opinion on the ultimate issue of medical necessity as that is a matter of applying the legal definition of the medical necessity as used by the Medicaid Program to the petitioner's condition and needs.

Florida's Administrative Code at 59G-1.010, Definitions, 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.

Coverage for Medicaid children's services is controlled by the federal program requirements for Early Prevention, Screening, Diagnosis, and Treatment (EPSDT). Children under age 21 who are Medicaid beneficiaries are entitled to EPSDT services. The relevant provision of the federal definition of medical necessity, 42 U.S.C. § 1396d (r)(5), states in pertinent part as follows:

> Early and periodic screening, diagnostic, and treatment services. The term "early and periodic screening, diagnostic, and treatment services" means the following items and services: ... (5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services and covered under the State plan.

Private-duty nursing care services are described at 42 U.S.C. §1396d(a)(8). The requirements under federal law are that the private-duty nursing services be "necessary treatment to correct or ameliorate physical and mental conditions ... "

It is important to note that the Agency has accepted its responsibility to cover private-duty nursing services and the dispute in this case in not whether the Agency covers such services but rather the amount of services (in hours) the petitioner requires. There are no arbitrary limits on the amount of hours rather an individual determination is made based on the petitioner's individual needs. There has been no authority submitted which would suggest the state has set utilization limits on the amount of private-duty nursing services a child may receive.

The state of Florida has implemented the federal definition "necessary ... treatment and other measures described in subsection (a) of 1396d to correct or ameliorate physical and mental conditions" through, statute and rule including handbooks referenced in rule. These authorities evaluate and determine the necessary treatment to correct or ameliorate physical and mental conditions through the use of the term "medical necessary".

Florida Statute section 409.905 (4)(b)specifically requires "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."

The state of Florida has made it clear that when the family can provide care as envisioned under the statute, Medicaid will not pay for care as an alternative to the family providing the care. Any care the family can provide under the statute, even when such care may elsewhere be described as skilled nursing care, is not considered necessary health care or treatment to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services.

The Agency reduced services based on its belief that the grandmother was capable of providing care to petitioner for four hours per day. This decision was made by the Agency's expert Dr. Mittal. The petitioner did not provide any rebuttal medical evidence.

The 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. 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 petitioner's grandmother does not work and is at home with the petitioner. The evidence presented did not establish that the care required by the petitioner was so complex that the grandmother, with the assistance of a home health aide, could not

care for him during the four hours per day when the private duty nurse was not available. Based on the evidence presented, it is determined that the respondent met its burden of proof in the reduction of the hours of private duty nursing services. Therefore, it is concluded that the respondent correctly denied private duty nursing services of four hours per day seven days per week.

DECISION

The appeal is denied. The respondent's action 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 25th day of January, 2010, in Tallahassee, Florida.

Morris Zamboca

Morris Zamboca
Hearing Officer
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