

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

FILED

APR 02 2010

OFFICE OF APPEAL HEARINGS  
DEPT OF CHILDREN & FAMILIES

APPEAL NO. 09F-07671

PETITIONER,  
Vs.

RESPONDENT.

**FINAL ORDER**

Pursuant to notice, an administrative hearing was telephonically convened before the undersigned at 9:05 a.m. on January 21, 2010. The petitioner was represented by his mother, \_\_\_\_\_ with attorney \_\_\_\_\_. The respondent was represented by Bill Porter, attorney, with testimony available from Patricia Cobb, AHCA RN specialist; Bonnie Wallington, Keystone Peer Review Organization (KePRO) RN review supervisor; and Rakesh Mittal, MD board certified pediatrician and pediatric emergency room physician reviewer with KePRO. The hearing record remained open an extra period to permit submissions of legal memoranda if desired. Such was not required or received.

**ISSUE**

At issue was whether or not reduction in Private Duty Nursing (PDN) hours was correct. The respondent bears the burden of proof.

### FINDINGS OF FACT

1. The petitioner is an eleven year old boy and receives Medicaid. He has many health challenges and complex medical care needs.
2. He lives at home with his mother, and undisputedly requires constant care and attention at a skilled level. There are no other adults or siblings at home and his mother works full time as a pediatric service advanced registered nurse practitioner (ARNP) outside of the home.
3. The petitioner's health challenges include cerebral palsy, agitation, infections, pain, seizure disorder, self abuse with attempts to strike/bite others, incontinence, blindness, developmental delay, inability to verbalize, and weighing about 55 pounds, he is nonambulatory with use of wheelchair. He receives intermittent oxygen therapy, nasopharyngeal suctioning, nebulizer treatments, oxygen saturation monitoring, and uses a G-tube for nutrition. He requires many medications and special eye care as well as special skin care. Some medications are administered with foods, and others are injected or provided in ointment. During the 60 day period just before recent review, he did not receive inpatient hospital or emergency room care, but he was seen by his doctor.
4. In addition to working outside the home, and having limited time available, his mother has significant mobility issues and weight-lifting restrictions. Her problem is so profound that she is unable to lift more than five pounds, and she uses a medically implanted dorsal stimulator to deal with her pain. She cannot restrain or reposition the petitioner. This is undisputed and confirmed in the KePRO records. There was no evidence or testimony from the petitioner's

mother regarding her inability to provide skilled nursing care. There was no evidence submitted or assertion that the mother was not capable for providing skilled care for the petitioner. Furthermore, during the time that the petitioner is without PDN, there were no reports of problems beyond being able to lift the petitioner.

5. The mother's work schedule is approximately 8:00 a.m. to 5:00 or 6:00 p.m. weekdays, and 8:00 a.m. to 1:00 p.m. several times a month on the weekend. Work travel takes about an hour.

6. Eligibility for PDN is evaluated every six months, for six month certification periods. KePRO conducts the review for AHCA and KePRO electronically receives review data from care providers. KePRO review does not customarily include interviews with families or physicians.

7. During prior certification, 22 hours PDN daily (3962 hours), from 7 a.m. to 5 a.m. were authorized. The petitioner's mother currently provides care during the remaining two hours a day. At the new certification, to be effective October 12, 2009 to April 9, 2010, the same hours were requested but were not fully approved. Notice of reduction was issued on October 29, 2009, saying 206 hours were denied. The respondent approved 20 hours, Sunday through Wednesday and 22 hours Thursday through Saturday (although the 2 extra hours on Thursday and Friday could be used on different days.) The notice was challenged.

8. Notice and review documents were in Respondent's Exhibit 2, with policy submitted in Respondent's Exhibit 1. The respondent approved 3754 PDN

hours but denied 206 hours saying, “2 hrs 4 days per week ...” were not authorized. The notice did not reflect that a home health aide would be substituted for the denied PDN hours, but page 15 of Respondent's Exhibit 2 stated “deny RN service as during these hrs HHA (home health aide) could help mom with adl’s while mom provides the medical care... Deny those RN hrs for now and approve HHA for those hrs when requested...”.

9. The attending doctor, on October 13, 2009, described the petitioner’s need for skilled nursing on the Home Health Certification and Plan of Care Form HCFA-466 (Petitioner's Exhibit 2, section 21) “RN/LPN 16-22 hours/day, 6-7 days/week/not to exceed Medicaid authorization x 60 days....”

10. The petitioner receives Early Prevention, Screening, Diagnosis, and Treatment (EPSDT) services as a child receiving Medicaid.

### 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 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...

(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...

(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 ...

Eligibility for EPSDT is authorized when a child receives Medicaid. PDN services may be available to children receiving Medicaid. The petitioner argued that with Medicaid eligible children, the respondent did not have discretion to provide services once a physician orders a service. The petitioner, quoting from Anna C. Moore v. Rhonda Medows (--- F.Supp.2d ----, 2009 WL 4884029, 2009)

The District Court held that "[t]he state must provide for the amount of skilled nursing care which the Plaintiff's treating physician deems necessary to correct or ameliorate her condition." Moore v. Medows, 563 F.Supp.2d 1354, 1357 (N.D.Ga.2008). While it is true that, after the 1989 amendments to the Medicaid Act, the state must fund any medically necessary treatment that Anna C. Moore requires, , it does not follow that the state is wholly excluded from the process of determining what treatment is necessary. Instead, both the state and Moore's physician have roles in determining what medical measures are necessary to "correct or ameliorate" Moore's medical conditions. ("(d) The agency may

place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.”); see 42 U.S.C. § 1396d(r)(5). A private physician's word on medical necessity is not dispositive. [quoting Moore v. Medows, 563 F.Supp.2d 1354, 1357 (N.D.Ga.2008), rev'd, 324 Fed.Appx. 773 (11 Cir.2009 ) at 4.] [cites omitted]

The petitioner believes that the respondent must follow the physician's orders and does not have discretion in ordering services. The respondent disagrees.

If the respondent had refused to provide any PDN services, it would have to be resolved as to whether the respondent has the discretion to ignore or disregard a physician's order. In this case, the petitioner's treating physician completed a plan of care and submitted it to the respondent. That Plan of Care ordered 16 to 22 hours of PDN, 6 to 7 days a week, not to exceed Medicaid authorization. A Plan of Care as defined in the Home Health Services Coverage and Limitations Handbook at 2-6 is:

A plan of care (POC) is an individualized written program for a recipient that is developed by health care professionals including the attending physician. The POC is designed to meet the medical, health and rehabilitative needs of the recipient. The POC must identify the medical need for home health care, appropriate nursing interventions, and expected health outcomes.

The Plan of Care for the petitioner was signed by the treating physician. The physician ordered 16 to 22 hours of PDN and the respondent approved 20 hours. The respondent's actions are within the parameters of the physician's order. The approval of PDN hours 20 hours, four days a week with 22 hours the remaining days, does follow the physician's order. The reduction in services does not conflict with Moore v. Medow.

PDN evaluation requires assessment based on 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. KePRO makes the assessment based upon information it receives electronically from providers. AHCA does not pay for home health services unless, following KePRO review, such is determined medically necessary. Florida Statute 409.913 also 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 for the new certification period. Consistent with statute, Florida Administrative Code 59G-1.010 "Definitions" informs:

(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...

In this situation, the attending physician's home health certification and plan of care described medical necessity for nursing service as 16-22 hours daily for 6-7 days a week. It is undisputed that the petitioner meets the criteria for medical necessity for PDN care.

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 PDN, parental responsibility, stating:

**Parental Responsibility.**

Private duty nursing services are authorized to *supplement* (emphasis added) 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. Medicaid does not reimburse private duty nursing for respite care. Examples are parent or caregiver recreation, socialization, and volunteer activities.

...

**Limitations**

...

**Authorization Process**

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.

Customary review was conducted by KePRO.



The basis for reduction in this case was that the parent would be expected to provide supervision to the fullest extent possible. The petitioner's care is medically complex. He needs continuous skilled care along with personal attention, and that is undisputed. The petitioner has not required emergency room care or hospitalization during the past few months. While his medical condition is complex and he sees the physician regularly, his situation may be described as somewhat stabilized. His mother can provide skilled care, but she has limited ability to provide lifting or positioning care. She has serious limitation in physical care-giving and this was evident throughout the review process. The respondent noted at hearing and in the evidence, that a home health aide (HHA) could be substituted for the PDN hours that were denied.

For the Medicaid Program to authorize and pay for PDN service, all review standards must be met. In the review, it is necessary to assess other sources of care. The Florida Medicaid Handbook, set forth under rule, says that private duty nursing services are authorized to *supplement* care provided by parents but parents must participate in providing care to the fullest extent possible. It is then important to assess whether parents can provide the services during the time and in the manner the respondent has determined the parent shall provide care. To make that evaluation, the undersigned considered skill levels, availability, and extensive limitations of the parent. This parent is a single parent who has both significant care giving skills and limitations.

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 licenses 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 Handbook continues, and page 2-15 addresses "Home Health Aide Services" stating:

Home health aide services help maintain a recipient's health or facility 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 rules say that the request must reflect the level of service for which no equally effective and more conservative or less costly treatment is available. In this situation, it is proper to assess the hours that the parent would be available to provide assistance and care to the petitioner. It is recognized she cannot provide significant lifting or positioning of the petitioner on her own. She cannot care for her son without significant hands-on assistance. However, with an HHA in the home to replace PDN for 206 hours in the new certification period, it should be possible for her to manage, supervise, and assist in his skilled care. The AHCA plan would continue to have skilled nursing PDN available for 22 hours three days a week and 20 hours four days a week, with the suggested HHA for the other 2 hours. The AHCA decision notice did not reflect that all 206 non-approved PDN hours would be replaced with HHA, but KePRO indicated that the HHA would be approved.

The change planned by AHCA is reasonable with the option of 206 hours PDN hours replaced by HHA. The mother's limitations were evident throughout the review and it would not be proper to describe her as singlehandedly able to provide an additional two hours daily safe care with her limitations. However

there was no evidence that showed that she was not able to provide the skilled nursing care with assistance of an HHA. Based on evidence and guidelines, the 206 hours PDN reduction is justified as set forth in notice. Request for HHA replacement hours is strongly encouraged.

### **DECISION**

The appeal is denied and the respondent's action is upheld. However, the parties are urged to address HHA replacement hours.

### **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.

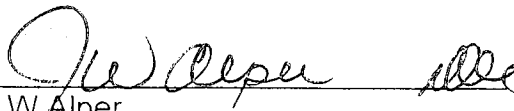
FINAL ORDER (Cont.)

09F-07671

PAGE - 13

DONE and ORDERED this 2<sup>nd</sup> day of April, 2010,

in Tallahassee, Florida.



J W Alper

Hearing Officer

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Copies Furnished To: