

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

FILED
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OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-07774

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE
ADMINISTRATION (AHCA)
CIRCUIT: 18 Seminole

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned at 2:00 p.m. on January 5, 2010, in Orlando, Florida. The petitioner was not present, but was represented by her parents,

with assistance of the Agency for Persons with Disabilities waiver support coordinator. The respondent was represented by Lisette Knott, human service program specialist, with testimony from KePRO staff, Robert Anthony Buzzeo, MD, pediatrician - physician reviewer and Melanie Clyatt, RN review operation supervisor.

ISSUE

At issue was whether reduction in private duty nursing (PDN) hours from 4320 hours to 4012 hours was correct following a 60-day training period for the parents. The respondent bears the burden of proof.

FINDINGS OF FACT

1. The petitioner's date of birth is 2. She has profoundly serious health challenges. Her care is medically complex and justifies need for skilled caregiver at all times. This is undisputed.

2. Her medical problems include cerebral palsy, hypotonic quadriplegia, cerebral degeneration, seizure disorder, scoliosis, subluxed hip, chronic respiratory failure, continuous ventilator and tracheostomy dependence, incontinence, contractures, and nonambulatory - nonverbal status. She requires constant skilled services for medication administration, tube feedings, all personal and safety care, aspiration prevention, seizure and tracheostomy care. Additional services include intermittent oxygen therapy and monitoring, suctioning, nebulizer, ABI vest.

2. She was receiving 24-hour daily PDN service under the AHCA Medicaid program. Certification period is approximately 6 months, and full number of hours for a certification period is 4320.

3. KePRO conducts peer reviews for AHCA. KePRO staff does not examine the petitioner or conduct family interviews. KePRO relies on information from the health care providers. Following a KePRO certification review in the fall of 2009, the family was informed of plan to begin a gradual decrease in PDN service. The plan was to continue 24 hours daily PDN for 60 days, during which time parental training would occur. That would be followed by a decrease of 308 hours, which would mean the parents would provide care for 2 hours a day during the week and 4 hours daily on Saturday and Sunday. (Respondent's

Exhibit 1 included materials from the review process.) Details of the hours could be modified a bit depending on parental work schedules, but the AHCA intent is PDN reduction of 18 hours weekly.

4. The respondent issued notice of the planned reduction on October 29, 2009. The notice approved 4012 hours of PDN and denied 308 hours for certification period 09/28/09 – 03/26/10. The family challenged that notice.

5. The family was concerned about ability to provide adequate care without continuous nursing staff in the home. Some concerns and the home health certification as well as plan of care were included in Petitioner's Exhibit 1. The medical order on the October 19, 2009 plan of care said "SKILLED NURSING FREQUENCY/DURATION: RN/LPN 18-24 hours/day 5-7 days week for 60 days." Additionally, the orders said, "Patient/PCG (primary caregiver) will assume all care when nursing not present." The orders set forth need to "educate patient/PCG on all care and related equipment...emergency contact numbers and hotline information..." Family work information was shown as "(father) works lengthy hours and has one and half hour commute to work each way. His schedule is very unpredictable. Mom is primary PCG when she is not working and as her health allows." November 2009 doctors' letters noted recent infections and recommended 24 hour nursing care at home. Need for constant and skilled care is undisputed.

6. The petitioner's mother works six days a week, and her busiest day is Saturday, when she typically works from 10:00 a.m. to 6:00 p.m. Other days she works from 11:00 a.m. to 5:00 p.m. or 9:00 a.m. to 12:30 p.m. and then 4:30 p.m.

to 9:00 p.m. The petitioner lives with both parents and a toddler brother. The brother has “mild medical issues” and receives some therapy and exercises, according to the home health care agency.

7. The mother has received more training than the father has and currently she has the greater skill capability. The parents are involved in providing safety at home and the mother always attends to the petitioner when the petitioner is hospitalized. In the two-month period just before the review, the petitioner was not hospitalized, or treated in an emergency room, but she had been to the doctor’s office. The parents do not feel comfortable in providing the additional 18 hours weekly skilled care needs of the petitioner.

8. During the hearing, the respondent noted that following the training period, the 18 hour per week reduction could be arranged around the substantial scheduling needs of the parents. The respondent also explained that there is a way to request modifications, and changes can be approved due to new circumstances. However, the respondent did not withdraw from its overall intent to reduce hours by 18 per week, after a 60-day parental training period.

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 ...

Consistent with law, AHCA has a prior authorization system for all PDN 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 such is 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 308 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...

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 and flex hours, with pages 2-

17 and 19, 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

...

Flex Hours or Banking of Hours

Medicaid does not allow "banking of hours" or "flex hours". Only the number of hours that are medically necessary may be approved. Home health service providers must request only the number hours that are expected to be used and must indicate the times of day and days per week that the hours are needed. If a recipient requires additional hours due to unforeseen circumstances or change in medical or social circumstances, the home health service providers should submit a modification request to the PRO for the additional hours needed.

...

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.

The basis for reduction in this case was that the parents would be expected to provide care to the fullest extent possible. The petitioner's care is medically complex. She needs continuous skilled care, and that is undisputed. 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 as to 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 the parents can provide the services during the time the respondent has determined they can.

To make that evaluation, the undersigned considered skill levels and schedules of the parents. Each parent works a full time job and is intellectually capable, but neither parent is a professional nurse and each appeared uncomfortable with such responsibilities. There is another young child in the home. 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 rules say 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. The medical orders and plan of care provided by the petitioner have been carefully studied. Those medical orders are completely consistent with the AHCA plan to reduce PDN. The parents are trainable and training is available from the professionals. Within their scheduling limits, the parents should be available and present to care for the petitioner for 18 hours per week after training. The medical orders in Petitioner's Exhibit 1 expressly provide that PDN by an RN or LPN be available "18-24 hours/day 5-7 days week for 60 days."

The change planned by AHCA is reasonable. Once a 60-day parental training occurs, the 22 hours (weekdays) and 20 hours (weekends) daily is well within the medical orders in the plan of care. There could be some adjustment made to that weekday/weekend proviso if the mother's heavy workday is a weekend day, but in general, the plan makes sense. The reduction by 18 hours weekly, following a 60-day training period is justified. The respondent's Notice dated October 29, 2009 is appropriate.

DECISION

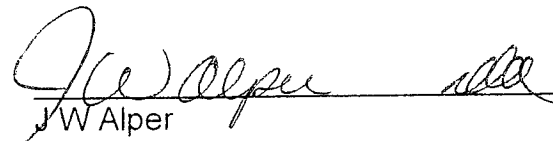
The appeal is denied and the respondent's action is affirmed.

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 11th day of February 2010, in Tallahassee, Florida.


J.W. Alper
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

Copies Furnished To: