

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

FILED
FEB 16 2010
OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-08285

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION (AHCA)
CIRCUIT: 04 Duval
UNIT: AHCA

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened telephonically before the undersigned hearing officer on February 5, 2010, at 3:15 p.m. The petitioner was not present; he was represented by his mother, _____ The respondent was represented by Cynthia Barge, Area Four Registered Nurse (RN) Specialist with the Agency for Health Care Administration (AHCA). Testifying on behalf of the respondent were Dr. David Childers, medical director with Ped-I-Care, Linda Garcia, RN with Ped-I-Care, Valerie Beasley, RN supervisor with Children's Medical Services (CMS), Gwen Patterson, director of clinical services with Maximus, Sherry Buchman with CMS and Jennifer Barry, compliance and quality director with Ped-I-Care.

ISSUE

The petitioner is appealing termination of Private Duty Nursing (PDN) services.

The respondent holds the burden of proof.

FINDINGS OF FACT

1. The petitioner is a two year old male with complex medical needs. His medical history includes: premature birth (23 weeks gestation), dysphagia, g-tube feeding, laparotomy with excision of perforated bowel secondary to necrotizing enter colitis, ileostomy (closed). The petitioner is severally developmentally delayed; he is non-ambulatory, non-verbal, needs assistance with all the activities of daily living. The petitioner is a Medicaid recipient receiving services through Children's Medical Services (CMS). Ped-I-Care is contracted with the agency to make pediatric determinations of medical necessity. Maximus is a home healthcare agency that provides medical services to Medicaid recipients.

2. In October 2009, the petitioner was hospitalized due to a severe respiratory infection. Prior to his hospitalization, the petitioner attended medical daycare in a Prescribed Pediatric Extended Care (PPEC) facility. A tracheotomy was placed in the petitioner's throat during his hospitalization to aide his breathing. While the tracheotomy was in place, it was determined that the petitioner should not attend PPEC; the treating physician prescribed home PDN services for the petitioner to protect him from airway blockage. Ped-I-Care approved PDN services for the petitioner 18 hours per day, 7 days per week for a 60 day certification period.

3. In early December 2009, the respondent notified the petitioner that the PDN services were being terminated effective January 6, 2010. The family notified the

respondent that the petitioner's tracheotomy was still open and requested the PDN services be continued at a minimum until the tracheotomy was closed; PDN services were extended through January 21, 2009 (the date the petitioner's tracheotomy was closed). The petitioner's mother requested a hearing on December 4, 2009. The PDN services have been continued pending the hearing decision.

4. Dr. Childers explained that Ped-I-Care is tasked by AHCA to provide the most cost effective medically appropriate level of care. Each case is reviewed individually. In the instant case, PDN services were approved for the express purpose of preventing blockage of the petitioner's airway while the tracheotomy was in place. In the doctor's opinion, none of the petitioner's other presenting symptoms, including the presence of a g-tube for feeding, requires the services of a registered nurse.

5. The petitioner's mother does not object to him attending PPEC during the day, however, she would like to continue to receive PDN services during the night. She explained that the petitioner has had numerous intestinal surgeries; as a result he must be fed almost exclusively by g-tube; the average g-tube feeding time is three hours. During the night, the petitioner vomits frequently without waking up; his mother believes he requires constant monitoring to prevent aspiration.

6. The household includes the petitioner, his mother, grandmother, grandfather and two minor siblings. The petitioner's mother is the only household member who can take care of him. She works 40 hours per week; schedule varies. She attends community college part time and plans to obtain an undergraduate degree. She has been diagnosed with some health issues which do not impact her ability to care for the petitioner. The grandfather (age 67) works out of town during the week and therefore is

not home to take care of the petitioner. The grandmother (age 65) has been determined disabled by Social Security; she suffers from fibromyalgia, carpal tunnel syndrome and "frozen shoulders". She is unable to assist with the petitioner's care and sometimes requires care for herself; when needed, her care is provided by the petitioner's mother. The siblings are ages 2 (the petitioner's twin sister) and 6. The petitioner's mother explained that after work and school during the day, she is exhausted at night and requires sleep. She would not be able to sleep if the nurse was not in the home due to her aspiration concerns. She would like to receive 8 to 10 hours of PDN services per night, seven days per week.

7. In response to the mother's concerns regarding aspiration, Dr Childers opined that the petitioner's developmental level is comparable to that of an average infant; he is capable of clearing his airway of formula or liquids by coughing which is a reflex not impacted by the petitioner's developmental delays. He acknowledged that most parents with infants or infant like children are prone to suffer from sleep deprivation until they develop schedules (as required to care for the child) to compensate for sleep loss. The respondent also suggested changing the petitioner's feeding schedule so that he is fed more during the day hours to reduce incidents of night time vomiting.

CONCLUSIONS OF LAW

The Florida Medicaid Program is administered by the Agency for Health Care Administration. By agreement, the Agency for Health Care Administration has conveyed jurisdiction to the Department of Children and Families, Office of Appeal Hearings to conduct this hearing pursuant to Chapter 120.80 F.S.

The Florida Medicaid Program is authorized by Chapter 409, Florida Statutes, and Chapter 59G, Florida Administrative Code.

Fla. Stat. ch. 409.9132(d) in relevant part states:

Medical necessity or medically necessary means any goods or services necessary to palliate the effects of a terminal condition, or to prevent, diagnose, correct, cure, alleviate, or preclude deterioration of a condition that threatens life, causes pain or suffering, or results in illness or infirmity, which goods or services are provided in accordance with generally accepted standards of medical practice. 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 and must be based upon information available at the time the goods or services are provided.

The cited authority explains that Medicaid reimburses for services determined to be medically necessary; determinations of medical necessity must be made by a licensed physician employed by or under contract with the agency. Dr. Childers is a licensed physician reviewer with Ped-I-Care who determines medical necessity for the agency.

Fla. Stat. ch. 409.905, states in relevant part:

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, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and

immunizations... (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. When implemented, the private duty nursing utilization management program shall replace the current authorization program used by the Agency for Health Care Administration and the Children's Medical Services program of the Department of Health. The agency may competitively bid on a contract to select a qualified organization to provide utilization management of private duty nursing services. The agency is authorized to seek federal waivers to implement this initiative.

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

The legal authority cited above sets forth mandatory Medicaid services as well as the requirements of eligibility for those services. Eligibility criteria includes 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. The agency may not pay for home health services unless the services are medically necessary.

Fla. Admin. Code 59G-1.010 Definitions, defines medically necessary as applied in Medicaid prior authorization decisions and 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.

The Florida Medicaid Home Health Services Coverage and Limitations

Handbook, July 2008, define the guidelines for PDN services as follows at pages 2-17

thru 2-18:

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 cited authorities explain that Medicaid services must not be in excess of the patient's needs, must be reflective of the level of service that can be safely furnished, and are intended to supplement the care of recipient's family or caretaker.

The petitioner was approved for PDN services in October 2009 for the specific purpose of preventing blockage of his airway as a result of a recent tracheotomy; the tracheotomy is now closed. The petitioner's mother would like PDN services to continue at night due to fear of aspiration because the petitioner vomits frequently when fed at night. It is the reviewing physician's expert opinion that the petitioner is capable of clearing his airway by coughing which is a reflex not impacted by his developmental delays. Absent any contradictory medical evidence, the undersigned must conclude that that PDN services are not medically necessary for the asserted reason of fear of aspiration. The petitioner's mother would also like to continue to receive PDN services as it is convenient for her work and school schedules. The controlling legal authorities make it clear the PDN services can not be provided for the convenience of the recipient or the recipient's family. Prior to the tracheotomy, the petitioner attended PPEC during the day and was cared for by his mother during the night. His household circumstances are unchanged; the work and school schedules as well as medical impairments of all the household members are the same as they were prior to the petitioner's tracheotomy. The petitioner is no longer in danger of airway blockage due to the tracheotomy; the condition which necessitated PDN services no longer exists. Absent substantial evidence that continued PDN services are medically necessary, the undersigned must conclude that the respondent's termination was correct.

DECISION

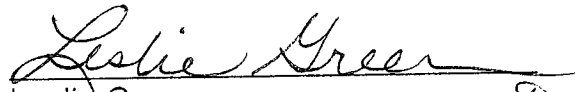
The appeal is denied.

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 26th day of February, 2010,

in Tallahassee, Florida.


_____ *LG*

Leslie Green
Hearing Officer
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Copies Furnished To: