

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

**FILED**  
APR 17 2014  
OFFICE OF APPEAL HEARINGS  
DEPT OF CHILDREN & FAMILIES

APPEAL NO. 13F-12121

PETITIONER,

vs.

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

RESPONDENT.

**FINAL ORDER**

Pursuant to notice, a hearing in the above-styled matter convened before  
Hearing Officer Patricia C. Antonucci on February 12, 2014 at approximately 3:00 p.m.  
All parties and witnesses appeared via teleconference.

**APPEARANCES**

For the Petitioner: [REDACTED] Petitioner's mother

For the Respondent: Diane Van Cleef, RN Specialist, Medicaid Program Office  
Area 3, Agency for Healthcare Administration (AHCA)

**STATEMENT OF THE ISSUE**

At issue is whether AHCA was correct to deny Petitioner's request for an  
additional four units/one hour per week of Occupational Therapy (OT) for the  
certification period beginning September 15, 2013 and ending in May 13, 2014.  
Petitioner seeks a total of one hour of OT, three times for per week. The proposed  
denial of the extra weekly session authorizes OT for one hour, twice weekly.

**PRELIMINARY STATEMENT**

The minor Petitioner was not present, but was represented by her mother, [REDACTED]. Ms. [REDACTED] presented one additional witness: [REDACTED] MS OT, the Petitioner's occupational therapist. Diane Van Cleef, AHCA Area 3 RN Specialist, on behalf of the Respondent, presented one witness: Rakesh Mittal, M.D., Physician Reviewer with AHCA's contracted review agency, eQHealth Solutions.

Respondent's Exhibits 1 through 6, inclusive, and Petitioner's Exhibit 1 were accepted into evidence. Respondent's exhibits included a Memorandum of Law regarding Medicaid's interpretation of Early and Periodic Screening, Diagnosis, and Treatment (EPSDT). Administrative Notice was taken of: Fla. Admin. Code R. 59G-4.320, Fla. Stat. § 409.905(2), and the Florida Medicaid Therapy Services Coverage and Limitations Handbook (August 2013).

The record was held open to allow Petitioner the opportunity to provide supplementary documentation for Respondent's review. Via correspondence dated February 25 and 28, 2014, Respondent notified the Office of Appeal Hearings that no additional information had been received, and that eQHealth Solutions did not wish to change its recommendation. This correspondence has been moved into evidence as follows:

- Respondent's Exhibit 8: February 25, 2014 e-mail from Ms. Van Cleef, stating that no supplemental documentation was received (one page)
- Respondent's Exhibit 9: February 28, 2014 e-mail from Ms. Van Cleef, inclusive of a response from Dr. Mittal at eQHealth Solutions (four pages)

**FINDINGS OF FACT**

1. The Petitioner is a 4-year old male, born [REDACTED]

2. At all time relevant to this matter, Petitioner has been eligible to receive and has been receiving Medicaid services.

3. Petitioner is diagnosed with sensory processing and cognitive issues, which impact his ability to perform self-care. He is developmentally delayed and while Autism is suspected, it has not been affirmatively diagnosed. Petitioner's mother reports that she's known he had problems since he was 3-months old, but has encountered difficulty in obtaining proper referrals to diagnostic specialists. Petitioner has a history of eye surgery (July 2011), removal of adenoids (January 2013), and placement of ear tubes (September 2013). He exhibits excessive eye blinking, blank stares, and loss of balance. He has trouble with pain recognition and difficulty sleeping. More recently, the Petitioner has started to increase self-injurious behavior, including banging his head while screaming and covering his ears.

4. Petitioner began receiving OT following an OT evaluation in May of 2011. On November 18, 2013, Petitioner's provider agency, OT 4 Kids, Inc., submitted a request on behalf of the Petitioner, for OT services of four units, three times per week (total of 312 units). Included with the request for services was Petitioner's OT Evaluation and Plan of Care, 6-month Progress Report (POC), signed November 15, 2013. Per the POC, "[Petitioner] has made significant progress in all areas of development in the past 6 months, however, he continues to be significantly delayed in many areas. [He] continues to exhibit sensory processing deficits and developmental delays that contribute to poor frustration tolerance, decreased awareness of pain and safety as well as delays with social/emotional development and self-care skills."

5. A prior service authorization request is submitted by a provider along with information and documentation required to make a determination of medical necessity. The request is reviewed by a peer review organization (PRO), in this case, eQHealth Solutions, Inc., who is contracted by AHCA.
6. Petitioner's service request was submitted to the PRO for an increase in OT from two hours per week to three hours per week (four units, three times a week) during the certification period of November 15, 2013 to May 13, 2014.
7. Once the PRO receives a service request, it conducts a first-level, clinical review, and/or secondary review by a Florida-licensed physician, who makes a determination regarding medical necessity of the service and the frequency of service requested.
10. On November 19, 2013, a first-level reviewer examined Petitioner's ST request, noting, "Overall severity of deficits documented does not support the request. The severity status indicates 4 units 2X week sufficient to address fine motor, sensory processing and cognitive deficits. Guidelines recommend 4 units 2X week."
11. Also on November 19, 2013, the physician reviewer noted:

PR APPROVAL RATIONALE: The patient is a 3 year old with mild sensory processing, cognitive, and self care delays who may benefit from continued OT.

CLINICAL RATIONALE FOR DECISION: The patient is a 3 year old with mild sensory processing, cognitive, and self care delays who may benefit from continued OT; however, the request to increase services is excessive based on the mild severity of delay and the goals met.
12. Via letter dated November 21, 2013, the PRO notified Petitioner's physician and provider of its intent to deny the request for ST services. Said letter stated, in pertinent part:

PR Principal Reason – Denial: Submitted information does not support the medical necessity for requested frequency and/or duration. Therapy services are approved for partial length of service requested, based on the documentation provided.

Clinical Rationale for Decision: The patient is a 3 year old with mild sensory processing, cognitive, and self care delays who may benefit from continued OT; however, the request to increase services is excessive based on the mild severity of delay and the goals met. Based on the patient's deficits and needs, 4 units 2 times a week are approved. The additional requested units are not approved as they have been deemed excessive.

13. On November 21, 2013, a notice was also sent to the Petitioner. Petitioner's notice did not include information regarding the principal denial reason or the clinical rationale, stating only:

The reason for the denial is that the services are not medically necessary as defined in 59G-1.010 (166), Florida Administrative Code (F.A.C.), specifically the services must be:

Individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient's needs.

14. Petitioner did not request reconsideration from the PRO, but on December 20, 2013, Petitioner's representative requested a hearing to challenge AHCA's partial denial of OT services.

15. Petitioner's POC, signed November 15, 2013, reflects Petitioner's medical history, developmental history, and areas of primary concern. Petitioner has difficulty with many activities of daily living, is still in diapers (working on toilet training), and continues to have tantrums, which involve banging his head on the floor. He walks on his toes, but has shown improvement in fine motor coordination, gross motor

coordination, praxis, oral motor control, communication, auditory processing, pre-writing/writing, and letter and number formation. Despite progress, in the area of gross motor skills, Petitioner exhibits symptoms of decreased body scheme/awareness, which "continues to be an area of delay." With regard to oral motor control, he is hypersensitive to teeth-brushing, and in terms of auditory processing, he "continues to demonstrate auditory hypersensitivity to certain sound frequencies (i.e. vacuum)."

16. Goals outlined in the POC include continuation of 10 out of 14 previously implemented goals (short and long term components considered separately), including acceptance of tactile/deep pressure program, therapeutic listening program, use of suspended equipment and positioning for postural control, increased attention and functional play skills, reduction of controlled/rigid behaviors, and improved transition between activities. Discontinued/met is Petitioner's short & long term goals of improved functional communication, and his short-term goals regarding reduction of control/rigidity and improved transitions. New goals, as of November 15, 2013, include improved motor planning and gross motor coordination (measured by tricycle riding), improved body awareness and independence with self-care (measured by independent toileting), improved self-regulation (measured by sleeping through the night 4-6 nights per week, and improved self-regulation/emotional control (measured by decrease in self-injurious behaviors).

17. In the 'Summary/Comment,' portion of his POC, Petitioner's OT notes:

[Petitioner] has made significant progress in all areas of development in the past 6 months, however, he continues to be significantly delayed in many areas. [He] continues to exhibit sensory processing deficits and developmental delays that contribute to poor frustration tolerance, decreased awareness of pain and safety

as well as delays with social/emotional development and self-care skills. It is strongly recommended that [he] continue to receive occupational therapy services 3 hours per week to address areas of need so that he will continue to progress towards developmental milestones.

18. At hearing, it was clarified that Petitioner was approved to receive OT twice per week for the prior certification period, despite requesting continuation of his previously authorized (prior to May 2013) three sessions per week. Petitioner did not appeal this determination because he was ill and was not sure he would be able to attend all three weekly sessions, even if they were approved. The Petitioner missed most if not all OT sessions from May through June of 2013 due to recurrent respiratory illness, ear infections, seizure-like symptoms, and strep throat.

19. Petitioner's OT, [REDACTED] MS, has been a licensed Occupational Therapist since 2007, and has been with her current provider agency for approximately five years. She specializes in pediatric sensory deficits and has worked with the Petitioner since May of 2011. It is her opinion, based upon direct contact and work with Petitioner that he regressed during the period of May – June 2013, exhibiting increased tantrums and head-banging behavior. When Petitioner resumed OT in August of 2013, he had accumulated sufficient unused (but authorized) hours to attend OT three times per week, and improved with this frequency of treatment. He showed improvement from August to November 2013. After utilizing all surplus hours, Petitioner returned to twice weekly OT in December of 2013, and again regressed, showing increased tantrums at home, at school, and in therapy. Petitioner also began kicking at his mother when she places him into the car. Petitioner's school has on several occasions requested that his mother pick him up and take him home, fearing that he was a danger

to himself and other students. He also exhibits increased fixation of specific activities, coupled with refusal to participate in others. Ms. [REDACTED] suspects that following placement of ear tubes in October of 2013, Petitioner has been exhibiting symptoms of vestibular issues. She has observed his discomfort whenever his feet are off the ground, or his head is lowered beneath his body. Vestibular issues have not been confirmed via diagnosis; however Ms. [REDACTED] is treating the symptoms, regardless of their cause. It is her opinion that Petitioner requires increased auditory therapy, which he is no longer tolerating through a home program. She feels that he needs increased intensity of integration OT to ensure frequent and consistent intervention, noting that it will take much longer for Petitioner to progress with self-regulation if he attends OT only twice per week. Ms. [REDACTED] is greatly concerned about Petitioner's increased head-banging and continuation of the seizure-like activity, and is worried that he will hurt himself or others if these actions are not regulated. She recommends increasing to three weekly sessions of OT until Petitioner regains abilities, and fading, thereafter.

20. Dr. Mittal has been a physician for 25 years, and is Board Certified in general pediatrics and in pediatric emergency medicine. At hearing, Dr. Mittal clarified that the PRO conducted a paper review of Petitioner's file, examining only documents submitted by his provider. The PRO did not speak to Petitioner's caregivers or examine the Petitioner, in person, but reviewed the request for medical necessity, considering the requirements for medical necessity under Early and Periodic Screening, Diagnosis, and Treatment and other relevant authority. It is his opinion that because Petitioner has shown improvement in all targeted areas, without any documented decrease in abilities, two weekly sessions of OT is sufficient.



21. Respondent does not contend that any of the goals, intervention, or tasks implemented by Petitioner's providing OT are outside the scope of OT services.

Respondent only contends that the frequency of service requested is excessive.

22. On February 27, 2014, prior to closure of the record, Dr. Mittal submitted a response to the Office of Appeal Hearings (forwarded to Petitioner), noting in part:

I have reviewed the letter from Ms Van Cleef of AHCA whereby I have been informed that the provider has not submitted any additional info since the [fair hearing]. Based on this I would uphold the initial decision of eQHS and would not approve any additional hrs.

#### **CONCLUSIONS OF LAW**

23. By agreement between AHCA and the Department of Children and Families, the Office of Appeal Hearings has jurisdiction to conduct this hearing pursuant to Florida Statutes Chapter 120.

24. Legal authority governing the Florida Medicaid Program is found in Fla. Stat., Chapter 409, and in Chapter 59G of the Florida Administrative Code. Respondent, AHCA, administers the Medicaid Program.

25. The Florida Medicaid Therapy Services Coverage and Limitations Handbook, August 2013 (The Handbook) has been incorporated, by reference, into Fla. Admin. Code 59G-4.320(2).

26. This is a Final Order, pursuant to § 120.569 and § 120.57, Fla. Stat.

27. This hearing was held as a *de novo* proceeding, in accordance with Fla. Admin. Code R. 65-2.056.

28. The burden of proof in the instant case is assigned to the Petitioner. The standard of proof in an administrative hearing is preponderance of the evidence. (See Fla. Admin. Code R. 65-2.060(1).)

29. Fla. Stat. § 409.905 addresses mandatory Medicaid services under the State Medicaid Plan:

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 all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems and conditions, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

30. Consistent with the law, as AHCA's PRO agent, eQHealth performs service authorization reviews under the Prior Authorization Program for Medicaid recipients in the state of Florida. Once the PRO receives a OT service request, its medical personnel conduct file reviews to determine the medical necessity of requested services, pursuant to the authorization requirements and limitations of the Florida Medicaid Program, and the review process described, above. As noted in the Handbook, the PRO may call a recipients primary care physician or conduct phone on in-person interviews with the recipient to obtain more information.

31. Florida Administrative Code Rule 59G-1.010(166) defines medical necessity, as follows:

'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.

32. As the Petitioner is under 21, a broader definition of medically necessary applies to include the Early and Periodic Screening, Diagnosis, and Treatment Services (EPSDT) requirements. The undersigned must, therefore, consider both EPSDT and Medical Necessity requirements (both cited, above) when developing a decision.

33. EPSDT augments the Medical Necessity definition contained in the Florida Administrative Code via the additional requirement that all services determined by the agency to be medically necessary for the *treatment, correction, or amelioration* of problems be addressed by the appropriate services.

34. United States Court of Appeals for the Eleventh Circuit clarified the states' obligation for the provision of EPSDT services to Medicaid-eligible children in Moore v.

Reese, 637 F.3d 1220, 1255 (11th Cir. 2011). The Court provided the following guiding principles in its opinion, (which involved a dispute over private duty nursing):

- (1) [A state] is required to provide private duty nursing services to [a child Medicaid recipient] who meets the EPSDT eligibility requirements, when such services are medically necessary to correct or ameliorate [his or her] illness and condition.
- (2) A state Medicaid plan must include "reasonable standards ... for determining eligibility for and the extent of medical assistance" ... and such standards must be "consistent with the objectives of" the Medicaid Act, specifically its EPSDT program.
- (3) A state may adopt a definition of medical necessity that places limits on a physician's discretion. A state may also limit required Medicaid services based upon its judgment of degree of medical necessity so long as such limitations do not discriminate on the basis of the kind of medical condition. Furthermore, "a state may establish standards for individual physicians to use in determining what services are appropriate in a particular case" and a treating physician is "required to operate within such reasonable limitations as the state may impose."
- (4) The treating physician assumes "the primary responsibility of determining what treatment should be made available to his patients." Both the treating physician and the state have roles to play, however, and "[a] private physician's word on medical necessity is not dispositive."
- (5) A state may establish the amount, duration, and scope of private duty nursing services provided under the required EPSDT benefit. The state is not required to provide medically unnecessary, albeit desirable, EPSDT services. However, a state's provision of a required EPSDT benefit, such as private duty nursing services, "must be sufficient in amount, duration, and scope to reasonably achieve its purpose."
- (6) A state "may place appropriate limits on a service based on such criteria as medical necessity." In so doing, a state "can review the medical necessity of treatment prescribed by a doctor on a case-by-case basis" and may present its own evidence of medical necessity in disputes between the state and Medicaid patients (citations omitted).

35. In the instant case, the parties agree that therapy services are requested to treat and ameliorate the language disorder and resultant deficits which Petitioner's speech/language disorder present. The fact that OT is in keeping with Fla. Admin. Code R. 59G-1.010(166)(1) is not in dispute.

36. In terms of being specific and individualized, per Fla. Admin. Code R. 59G-1.010(166)(2), Petitioner's POC is based upon his therapist's evaluation, via standardized tests and professional observation and treatment of the Petitioner, such that said POC is "an individualized and specific written program...designed to meet the medical, health and rehabilitative needs of the recipient." (See page 2-11 of the Handbook). Petitioner's POC address his individualized needs by setting specific goals and incorporating a multitude of exercises to accomplish said goals.

37. Fla. Admin. Code R. 59G-1.010(166)(2) also bears the requirement that any provided service not be in excess of the patient's needs. The Handbook describes the services covered under the Florida Medicaid Home Health Services Program, including occupational therapy. Although Respondent suggests that provision of OT three times per week is excessive, Respondent does not contend that any of the modalities utilized in Petitioner's POC are outside the proper scope of OT services. As such, exhaustive review of Handbook and legal definitions regarding practice and procedure is not required. In terms of service frequency, the number of POC goals that Petitioner has yet to meet, in combination with the need to restore skills lost during his two month absence from services, suggest that more than two weekly sessions of OT is needed. This is particularly true given that Petitioner is exhibiting self-injurious behavior which has resulted in his removal from school, and which poses a real risk of harm, and is in keeping with page 1-3 of the Handbook, which notes:

Occupational therapy services include evaluation and treatment to prevent or correct physical and emotional deficits, minimize the disabling effect of these deficits, maintain a level of function, acquire a skill set or restore a skill set (emphasis added).

38. Similarly, with regard to Fla. Admin. Code R. 59G-1.010(166)(3)'s requirement that a service be consistent with generally accepted professional medical standards as determined by the Medicaid program, no evidence was presented to indicate that it is medically inappropriate to provide OT in the manner indicated within Petitioner's POC, and Respondent makes no such contention.

39. Finally, there is little to no evidence to indicate that occupational therapy is furnished primarily for the convenience of the Petitioner, his family, or his provider (Fla. Admin. Code R. 59G-1.010(166)(5)).

40. In reviewing Petitioner's needs, great deference is given to the direct observation, evaluation, and assessment of his OT – a skilled professional with particular expertise, who works with the Petitioner on a regular basis. Indeed, page 2-9 of the Handbook notes:

Evaluations determine the recipient's level of function and competencies through therapeutic observation and standardized testing measures appropriate to the language, speech, or physical limitations and specific to the therapeutic services required.  
(emphasis added).

41. After examining all testimony and evidence, it is determined that Petitioner requires OT to address the effects of his deficits, well as the underlying causes. These needs and the intensive therapeutic plan for addressing same substantiate approval of OT at four units of service, three times per week, at this time. Though Petitioner has shown some progress during the prior certification period, he is still not performing at optimum level, has areas of regression, and is a potential threat to himself and/or

others. Reducing Petitioner's OT, now, would seem counterproductive to remediating his disorder.

42. When jointly considering the requirements of both ESPDT and Medical Necessity, along with a review of the totality of the evidence and legal authority, the undersigned concludes that Petitioner has met his burden of proof to show that three weekly sessions of OT are appropriate.

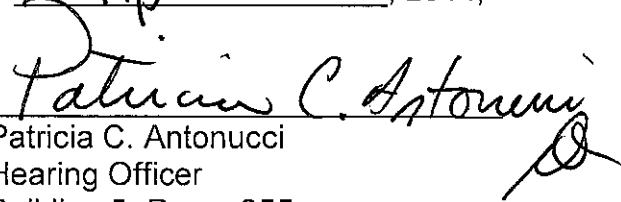
### DECISION

Petitioner's appeal is GRANTED. The Respondent is directed to provide Petitioner with four units of occupational therapy, three times a week, through the remainder of the certification period.

### 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 17<sup>th</sup> day of April, 2014,  
in Tallahassee, Florida.

  
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Copies Furnished To:

[REDACTED] Petitioner  
Marilyn Schlott, Area 3, AHCA Field Office Manager