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

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DEPT. OF CHILDREN & FAMILIES



APPEAL NO. 14F-09426

PETITIONER,

Vs.

CASE NO.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 17 Broward
UNIT: IDL

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned hearing officer convened an administrative hearing in this matter telephonically on December 18, 2014, at 10:40 a.m.

APPEARANCES

For the Petitioner:

Petitioner's mother

For the Respondent:

Sharon Garrison, R.N.
Registered Nurse Specialist/Fair Hearing Coordinator

STATEMENT OF ISSUE

The issue is whether the decision of the Agency for Health Care Administration to deny the petitioner's request for additional Personal Care Assistant ("PCA") services is correct.

PRELIMINARY STATEMENT

[REDACTED] the petitioner's mother, appeared on behalf of the petitioner, [REDACTED] ("petitioner"), who was not present. Ms. [REDACTED] may sometimes hereinafter be referred to as the petitioner's "representative".

Sharon Garrison, R.N., Registered Nurse Specialist/Fair Hearing Coordinator for the Agency for Health Care Administration, appeared on behalf of the Agency for Health Care Administration. Ellyn Theophilopoulos, M.D., Physician Reviewer with eQHealth Solutions, appeared as a witness for the Agency for Health Care Administration. The Agency for Health Care Administration may sometimes hereinafter be referred to as "AHCA" or the "Agency".

During the hearing, the respondent introduced Exhibits "1" through "6", inclusive, all of which were accepted into evidence and marked accordingly. The petitioner did not introduce any exhibits.

During the course of identifying the issue in this matter, it was determined that the Agency denied all of the requested Personal Care Assistant services requested by the petitioner, including the five hours per day, Monday through Friday, the petitioner was receiving during the prior certification period. Dr. Theophilopoulos, speaking on behalf of the Agency, explained that eQHealth Solutions does not normally reduce services from a prior certification period unless there has been a significant change in circumstances. Dr. Theophilopoulos explained the Agency would likely not be able to meet its burden to justify a reduction of services and reinstated the petitioner's Personal Care Assistant services in the amount of five hours per day, Monday through Friday. The petitioner's representative agreed with the Agency's stipulation to reinstate the

petitioner's services on Monday through Friday. Therefore, the only issue remaining in this appeal is the Agency's denial of the additional service hours requested for Saturday.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The petitioner is an 18-year-old male diagnosed with autism, seizure disorder, and obsessive-compulsive disorder.
2. Petitioner was eligible to receive Medicaid services at all times relevant to this proceeding.
3. Petitioner is approved to receive Personal Care Assistant services through the Medicaid State Plan. The Medicaid State Plan is administered by the Agency for Health Care Administration.
4. The petitioner is on a regular diet, ambulatory, and continent. He is home-bound and is home-schooled.
5. The petitioner has behavioral problems resulting from his autism disorder.
6. The petitioner's Personal Care Services Plan of Care signed September 2, 2014 lists the services to be performed by a Personal Care Assistant as follows: bathing and grooming; toileting and elimination; oral hygiene; oral feedings and fluid intake; and other. Although the document calls for an explanation if "Other" is checked, none was provided in this case; the Plan of Care does not specify to what the "other" refers.
7. The Plan of Care lists the petitioner's functional limitations as follows: speech difficulty; and other: Autism/OCD/Seizures.

8. The petitioner's Physician Visit Documentation Form dated September 2, 2014 explains as follows: "[Petitioner] needs constant monitoring as he has no sense of danger to himself and others around the home or outside.... He also has OCD, Seizure Disorder, Thyroid issues that all needs to be watched at all times which needs a full 7 days a week."

9. Eating, bathing, dressing, oral care, skin care, toileting and elimination, incontinent care, and range of motion and positioning are considered to be activities of daily living ("ADLs").

10. Personal Care Assistant services may be approved by the Agency for Health Care Administration for the purpose of assisting a patient with activities of daily living, if a parent or caregiver is not available to provide the service.

11. Personal Care Assistant services may not be approved by the Agency for Health Care Administration for the purposes of providing monitoring and supervision.

12. The petitioner lives in the family home with both of his parents, a 16-year-old sibling, and an 8-year-old sibling.

13. The information provided to eQHealth Solutions along with the request for services indicated that the petitioner's mother was his sole caregiver. The information was inaccurate; both of the petitioner's parents reside in the family home.

14. The petitioner is home-schooled. He has two teachers – one for Math and one for English. Petitioner receives educational instruction on Tuesdays, Wednesdays, Thursdays, and sometimes on Fridays. The first teacher arrives at the petitioner's home at 9:30 a.m. and the second teacher arrives as the first is leaving. One of the petitioner's parents is required to be at home while an instructor is present.

15. Petitioner's father is employed as a contractor in the property maintenance field. He works in excess of 40 hours per week but has a variable work schedule. The petitioner's representative explained at the hearing that he normally leaves home at 7:00 a.m. every day of the week but that his work hours vary daily – she explained he can return home as late as midnight or afterwards and sometimes does not come home at all depending on the urgency of the work that needs to be completed. The petitioner's father is always on-call.

16. The petitioner's mother works from approximately 3:00 p.m. to 9:30 p.m., Monday through Friday. She works at the office of the petitioner's father, assisting him with billing and other matters. The office is located outside of the family home.

17. The petitioner's mother recently obtained a professional license, which allows her to sell cremation services. She works part-time on the weekends for the Neptune Society. The petitioner's mother explained at the hearing that this is a sales position with no set hours.

18. The petitioner's parents do not have any physical limitations that limit their ability to assist with the care of the petitioner.

19. Petitioner was previously approved to receive Personal Care Assistant services five hours per day, Monday through Friday.

20. On September 23, 2014, Americare Home Health, the petitioner's home health agency, submitted a request to eQHealth Solutions for Personal Care Assistant services to be provided five hours per day, seven days per week, for the certification period September 2, 2014 through February 28, 2015.

21. eQHealth Solutions is the Quality Improvement Organization contracted

by the Agency for Health Care Administration to review requests by Medicaid recipients in the State of Florida for Private Duty Nursing and Personal Care Services.

22. eQHealth Solutions is charged with the responsibility of determining if a requested service is medically necessary under the terms of the Florida Medicaid Program. eQHealth Solutions has the authority to act as a witness for AHCA.

23. The Home Health Services Program includes various types of assistance. Examples include: Registered Nurse Services, Licensed Practical Nurse Services, and Personal Care Services. Personal Care Assistant services and Home Health Aide services are types of Personal Care Services.

24. A request for Personal Care Services is submitted directly to eQHealth Solutions by a petitioner's home health agency. Once eQHealth Solutions receives the information, it completes a prior authorization review – it reviews the written request to determine if the number of hours requested are medically necessary.

25. The petitioner's request was reviewed by an eQHealth Solutions Physician Reviewer on September 26, 2014. The Physician Reviewer denied all of the requested services explaining that the services requested were not medically necessary. The Physician Reviewer provided the following principal reasons for the denial:

The service is denied because it is for the convenience of the recipient, recipient's caregiver or the provider.
The service is denied because the care can be provided by the parent or caregiver.
Submitted information does not support the medical necessity for requested services.

26. The Physician Reviewer provided the following clinical rationale for the decision:

The patient is an 18 year old male with autism and seizures. The patient does not have a gastrostomy tube or a tracheostomy. The patient is on a regular diet. The patient is not on any medications. The patient is ambulatory, continent and requires assistance with activities of daily living. The patient is homeschooled. The mother is the sole caregiver and does not have any physical limitations. The mother does not work. There are two other siblings in the house. The clinical information provided does not support the medical necessity for any personal care services. The mother is available to assist with activities of daily living. The request for services is not approved.

27. At the petitioner's request, a Reconsideration Review was completed by a different Physician Reviewer on October 7, 2014. The second Physician Reviewer upheld the decision of the first Reviewer and explained the following, in part:

The information submitted for reconsideration provided no evidence to support the reversal of the previous decision. The original decision is upheld.

28. The petitioner's Personal Care Assistant normally provides services to the petitioner while the petitioner's mother is at work in the afternoons.

CONCLUSIONS OF LAW

29. By agreement between the Agency for Health Care Administration and the Department of Children and Families, AHCA has conveyed jurisdiction to the Office of Appeal Hearings to conduct this hearing pursuant to Fla. Stat. § 120.80.

30. The Florida Medicaid Program is authorized by Chapter 409, Fla. Stat., and Chapter 59G, Florida Administrative Code. The Program is administered by AHCA.

31. The Florida Medicaid Home Health Services Coverage and Limitations Handbook March 2013 ("Handbook") is promulgated into rule by Fla. Admin. Code R. 59G-4.130(2). The Handbook describes the Home Health Services Program, which consists of various services including: Registered Nurse services; Licensed Practical

Nurse services; and Personal Care Services. All services provided under this Program, including Personal Care Assistant services, must be determined to be medically necessary in order to be approved under Florida Medicaid.

32. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code R. 65-2.056.

33. The petitioner in the instant matter is requesting additional Personal Care Assistant services. Therefore, in accordance with Fla. Admin. Code R. 65-2.060 (1), the burden of proof is assigned to the petitioner.

34. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," (Black's Law Dictionary at 1201, 7th Ed.).

35. Section 409.905, Fla. Stat. 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...

(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 ...

36. Although the terms medically necessary and medical necessity are often used interchangeably and may be used in a variety of contexts, their definition for Florida Medicaid purposes is contained in the Florida Administrative Code. Fla. Admin. Code R. 59G-1.010 states:

(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.

37. Since petitioner is under 21, a broader definition of medically necessary applies to include the Early and Periodic Screening, Diagnosis, and Treatment Services (EPDST) requirements. Section 409.905, Fla. Stat., Mandatory Medicaid Services defines Medicaid services for children to include:

(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.

38. Section 409.913, Fla. Stat. 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

“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....

Section (1)(d) goes on the further state:

...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.

39. Section (1)(d) highlights that the Agency makes the final decision regarding whether or not a requested service is medically necessary; however, the hearing officer is the final decision making authority for the Agency. See § 120.80, Fla. Stat.

40. For Personal Care Assistant services to be approved, the services must not only be medically necessary but must also meet any further requirements set forth in the Handbook.

41. Page 1-2 of the Handbook states "Personal care services provide medically necessary assistance with activities of daily living (ADL) and age appropriate instrumental activities of daily living (IADL) that enable the recipient to accomplish tasks that they would normally be able to do for themselves if they did not have a medical condition or disability."

42. Page 1-2 of the Medicaid Handbook provides a list of personal care (ADL) services. These services include:

- Eating (oral feedings and fluid intake);
- Bathing;
- Dressing;
- Toileting;
- Transferring; and
- Maintaining continence (examples include taking care of a catheter or colostomy bag or changing a disposable incontinence product when the recipient is unable to control his bowel or bladder functions).

43. Personal Care Services are confined by the limitations specified in the Handbook. An individual's service needs relating to behavioral or supervisory issues do not supersede Handbook provisions.

44. The hearing officer acknowledges the petitioner may need to be monitored or supervised due to his autism and seizure disorders. However, monitoring and supervision may be provided by any responsible adult; a medically trained professional is not necessary.

45. The Handbook, on Page 1-3, defines babysitting as: "The act of providing custodial care, daycare, afterschool care, supervision, or similar childcare unrelated to the services that are documented to be medically necessary for the recipient."

46. The Handbook, on Pages 2-11 and 2-12, lists babysitting, day care or after school care, as examples of services that are not reimbursable under the Medicaid home health services program.

47. Eating, bathing, dressing, oral care, skin care, incontinent care, and assistance with toileting may be summarized as activities of daily living. These services may be approved and provided by a Home Health Aide if it is determined they are medically necessary and a primary caregiver is unavailable to provide the care." (See Fla. Admin. Code R. 59G1.010 (111), *Definition of "Home Health Aide (HHA)"*).

48. Appendix L of the Handbook discusses "Medicaid Review Criteria for Personal Care Services" and sets forth each of the allowable personal care tasks and general time allowance for each task.

49. The definition of medical necessity set forth in Fla. Admin. Code R. 59G-1.010 (166)(a) explains goods or services furnished or ordered must:

(5) Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

This information is echoed on Page 2-18 of the Handbook.

50. The Handbook, also on Page 2-18, discusses the requirement of parental responsibility. It explains

...parents or legal guardians must provide assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs) for their child, to the fullest extent possible. If parents or legal guardians need training to safely perform these ADL and IADL tasks, the home health services provider must provide training and document the methods used to train the parent or legal guardian in the medical record. If the parents or legal guardians are willing and capable of providing more than ADL and IADL care, private duty nursing can be authorized to supplement the care provided by those parents or legal guardians.

Medicaid can reimburse services rendered to a recipient whose parent or legal guardian is not available or able to provide ADL or IADL care. Supporting documentation must accompany the prior authorization request in order to substantiate a parent or legal guardian's inability to participate in the care of the recipient (i.e., work or school schedules and medical documentation....

51. The above paragraphs highlight that the Home Health Services Program is a supplemental program. It is designed to supplement the care provided by the parents or caregivers and is not intended to assume the care of the patient under any circumstances. Parents and caregivers must participate in providing care to the fullest extent possible.

52. Page 2-20 of the Handbook discusses banking of hours and flex hours. It explains as follows:

Medicaid does not allow "banking of hours" or "flex hours." Only the number of hours that are medically necessary can be approved. Home health service providers must request only the number of hours that are expected to be used and must indicate the times of day and days per week the hours are needed.

53. Since the mother's work schedule on Saturdays is completely variable and cannot be pinpointed with any amount of accuracy, the hours request for Saturdays fall within the definition of flex hours. The Handbook clearly states that flex hours may not be approved.

54. Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, it is determined that the Agency for Health Care Administration correctly denied the petitioner's request for Personal Care Assistant services on Saturdays. Therefore, the petitioner has not met his burden of proof in this matter.

55. In rendering this decision, the undersigned hearing officer reviewed all conditions of "medical necessity" and Personal Care Assistant duties set forth in the Florida Administrative Code and the rules governing the Florida Medicaid program.

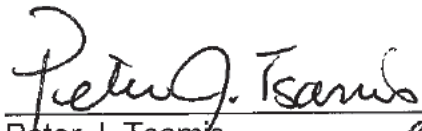
DECISION

The petitioner's appeal is hereby DENIED. The Agency is hereby directed to continue providing the petitioner Personal Care Assistant services five hours per day, Monday through Friday, as stipulated at the hearing.

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 petitioner is responsible for any financial obligations incurred as the agency has no funds to assist in this review.

DONE and ORDERED this 28th day of January, 2015,
in Tallahassee, Florida.


Peter J. Tsamis
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