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

[redacted]

APPEAL NO. 14F-09522

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 19 St. Lucie
UNIT: AHCA

RESPONDENT.
_____/

## FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on December 18, 2014 at 11:36 a.m.

## APPEARANCES

For the Petitioner: [redacted]
Petitioner's mother

For the Respondent: Carol King, R.N.
Fair Hearing Coordinator
Agency for Health Care Administration

## STATEMENT OF ISSUE

At issue is whether respondent's action approving three hours per day; three days per week of personal care services (PCS) was correct. Seven hours of PCS services; Monday through Friday; and four hours on Saturday and Sunday were requested.

## PRELIMINARY STATEMENT

The petitioner was not present but represented by her mother. Petitioner's exhibit "1" was entered into evidence.

Ms. King appeared both as a witness and representative for the respondent. Also present as a witness was Darlene Calhoun, M.D., Physician Consultant with eQ Health Solutions. Respondent's exhibit "1" was entered into evidence.

Administrative notice was taken of the following:

- Florida Statute: § 409.905; § 409.9131; § 409.971; § 409.972; and § 409.973.
- Florida Administrative Code: R.59G-4.130 and R. 59G-1.010.
- TheFlorida Medicaid Home Health Services Coverage and Limitations Handbook.
- Respondent's memorandum dated August 5, 2014 and entitled: "Medical Necessity as a Limitation on Medicaid Services, Including EPSDT".

## 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 female with a birth date of [redacted] At all times relevant to this proceeding, she was eligible to receive Medicaid services.

2. Petitioner has not transitioned to the Statewide Managed Care Program. Her services are provided through the Medicaid State Plan.

3. The certification period at issue is September 30, 2014 through November 29, 2014. Respondent was not funding PCS for the petitioner at the onset of the certification period.

4. Petitioner resides with her mother and stepfather. The mother is petitioner's primary caregiver.

5. The mother has no documented disability.

6. Petitioner's mother is employed as a nurse. Her schedule for each workday is 6:45 a.m. to 7:30 p.m. Work days rotate on a weekly basis as follows:

- Tuesday; Wednesday; and Saturday
- Sunday; Wednesday; Thursday

7. Petitioner's diagnoses include:

- Cerebral palsy
- Developmental delay
- Spastic quadriplegia
- Seizure disorder

8 At an unspecified date in 2014, petitioner became eligible to receive services through the Medicaid Waiver operated by the Agency for Persons with Disabilities (APD). Petitioner receives approximately 20 hours per week of respite services through this program[1].

9. Petitioner attends school. Her schedule, including transportation, is approximately 6:00 a.m. to 2:30 p.m. each school day.

10. On petitioner's behalf, All Care Health and Human Services, Inc. (All Care) submitted the request for PCS.

11. eQHealth Solutions, Inc. is the Peer Review Organization (PRO) contracted by the respondent to perform prior authorization reviews for home health services. PCS is a home health service.

[1] Information regarding a stepfather in the household and receipt of APD services was not known by the respondent until the time of hearing.

12. All Care submitted the service request through an internet based system. The submission included, in part, information about the petitioner's medical conditions; her functional limitations; and other pertinent information related to the household.

13. Part of All Care's submission included a Plan of Care (POC). The document addresses petitioner's medical conditions and type of assistance required. The POC was signed by the petitioner's physician.

14. The POC noted the following functional limitations:

- Limited use of arms, hands, or feet
- Requires assistance to ambulate
- Bowel/bladder incontinence
- Speech difficulty
- Fall risk

15. The POC also identifies assistance is required with activities of daily living (ADLs). Such activities includes: bathing; oral hygiene; feeding; toileting; and dressing. The POC also noted the petitioner uses a power wheelchair.

16. A physician's order was also submitted by All Care. The order called for PCS at the frequency of seven hours per day; five days per week and four hours each Saturday and Sunday.

17. A physician reviewer at eQHealth Solutions thereafter reviewed all information submitted by All Care. The reviewer is board certified in pediatrics.

18. The physician reviewer determined PCS were medically necessary but not at the requested frequency. The physician reviewer determined three hours per day; three days per week was appropriate.

19. On November 14, 2014 notices were issued by eQ to the petitioner; her physician; and All Care. In the notice to the physician and All Care, the physician reviewer wrote, in part:

> 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 frequency and/or duration.
> ...
>
> Personal care services are only to assist with activities of daily living. Constant supervision and monitoring are not covered benefits.

20. The above notice stated should the parent, provider, or physician disagree with the decision, reconsideration could be requested within 5 business days. Additional information could be provided with the request.

21. Reconsideration was timely requested.

22. A second physician reviewer thereafter reviewed all submitted information. On November 3, 2014 a notice was issued which stated, in part: "The information submitted for reconsideration provided no evidence to support the reversal of the previous decision. The original decision is upheld."

23. On November 7, 2014 petitioner timely requested a Fair Hearing.

24. Petitioner's mother estimates it takes approximately 30 minutes for bathing and another 30 minutes for dressing.

25. When petitioner's food is cut into small pieces she can feed herself.

26. Petitioner attempts to let someone know when she needs to use the bathroom. Toileting accidents, however, do occur.

27. Petitioner's mother asserts additional hours are needed to facilitate her work schedule and keep her daughter safe. The additional PCS hours would allow the mother to expand the number of hours worked each week.

## CONCLUSIONS OF LAW

28. 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 Hearings to conduct this hearing pursuant to § 120.80, Fla. Stat.

29 This hearing was held as a *de novo* proceeding pursuant to Fla. Admin. Code R. 65-2.056.

30. Respondent's action represents neither a termination nor reduction of existing personal care. In accordance with Fla. Admin. Code R. 65-2.060(a), the burden of proof is assigned to the petitioner.

31. 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.).

32. 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 ...

33. The definition of medically necessary is found in Fla. Admin. Code R. 59G-1.010 which 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.

34. As the petitioner is under 21, the requirements associated with Early and Periodic Screening, Diagnosis and Treatment (EPSDT) are applicable. 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, ...

35. In regard to EPSDT requirements, The State Medicaid Manual, published by the Centers for Medicare and Medicaid Services states, in part:

> OBRA 89 amended §§1902(a)(43) and 1905(a)(4)(B) and created §1905(r) of the Social Security Act (the Act) which set forth the basic requirements for the program. Under the EPSDT benefit, you[2] must provide for screening, vision, hearing and dental services at intervals which meet reasonable standards of medical and dental practice established after consultation with recognized medical and dental organizations involved in child health care. You must also provide for medically necessary screening, vision, hearing and dental services regardless of whether such services coincide with your established periodicity schedules for these services. Additionally, the Act requires that any service which you are permitted to cover under Medicaid that is necessary to treat or ameliorate a defect, physical and mental illness, or a condition identified by a screen, must be provided to EPSDT participants regardless of whether the service or item is otherwise included in your Medicaid plan. Additionally, the Act requires that any service which you are permitted to cover under Medicaid that is necessary to treat or ameliorate a defect, physical and mental illness, or a condition identified by a screen, must be provided to EPSDT participants regardless of whether the service or item is otherwise included in your Medicaid plan.

36. The State Medicaid Manual continues by stating, in part:

> 5110. Basic Requirements...
> ...Services under EPSDT must be sufficient in amount, duration, or scope to reasonably achieve their purpose. The amount, duration, or scope of

[2] "You" in this context of the manual refers to the state Medicaid agency.

> EPSDT services to recipients may not be denied arbitrarily or reduced solely because of the diagnosis, type of illness, or condition. **Appropriate limits may be placed on EPSDT services based on medical necessity**[Emphasis Added].

37. The October 2014 Florida Medicaid Home Health Services Coverage and Limitations Handbook (Handbook) has been promulgated into rule by Fla. Admin. Code R. 59G-4.130(2). The Handbook describes services covered under the Florida Medicaid Home Health Services Program. PCS is an included service for individuals under the age of 21. The issue before the undersigned, therefore, focuses upon the amount of PCS which is medically necessary.

38. 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."

39. Page 1-2 also provides the types of ADLs for which a PCS provider can assist:

- 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).

40. Page 2-12 of the Handbook also addresses excluded services which are not reimbursed by Medicaid. This list includes, in part:

- Respite care
- Baby-sitting
- Day care or after school care

- Escort services
- Companion sitting or leisure activities

41. The Handbook, on page 1-3, provides the following definition of babysitting: "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.

42. The undersigned acknowledges the petitioner is a young woman and the term "babysitting" may not be appropriate. Regardless, the requested hours appear to be both for PCS and supervision. Supervision, however, does not require the expertise of a PCS provider. Supervision can be provided by a responsible adult. Petitioner has appropriately accessed this service need through APD.

43. The estimates of petitioner's mother establish ADLs can most likely be performed within the context of three hours on those days she works.

44. Appendix L of the Handbook discusses "Review Criteria for Personal Care Services" and sets forth each of the allowable personal care tasks and general time allowance for each task. The time estimates for each session of bathing; dressing; eating; and toileting are also generally within a three hour timeframe.

45. In regard to parental responsibility, the undersigned takes note of page 2-25 of the Handbook:

> Personal care services can be authorized to supplement care provided by parents and legal guardians. Parents and legal guardians must participate in providing care to the fullest extent possible. Where needed, the home health service provider must offer training to enable parents and legal guardians to provide care they can safely render without jeopardizing the health or safety of the recipient. The home health services provider must document the methods used to train a parent or legal guardian in the medical record.

46. The above paragraph establishes the Home Health Services Program is designed to supplement the care provided by the parents.

47. Page 2-2 of the Handbook states: "Home health services are not considered emergency services." This is interpreted to mean the role of PCS is to provide a specific block of services related to ADLs and does not include supervision should an emergency (seizure, choking, etc.) arise.

48. Page 2-26 of the Handbook states, in part: "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." Should a change occur in the household dynamics which require additional PCS, such can be addressed through the modification process. This would include a change in the mother's work schedule.

49. It is noted that the petitioner's physician ordered a service frequency greater than approved by eQ Health Solutions. Fla. Admin. Code. R. 59G-1.010(166)(c), however, states a prescription does not automatically mean the requirements of medical necessity have been satisfied. The physicians from eQHealth Solutions not only considered the various conditions of medical necessity but also considered all applicable rules and regulations, including those found in respondent's Handbook.

50. The undersigned has reviewed EPSDT and medical necessity requirements and applied such to the totality of the evidence. The petitioner has not established, by the greater weight of the evidence, that the requested PCS hours are medically necessary.

51. The undersigned finds credible respondent's position that PCS is medically necessary at the frequency of three hours per day; three days per week.

52. Petitioner's request for seven PCS hours per day; five days per week and four hours each Saturday and Sunday is in conflict with the following conditions of medical necessity:

> 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;
>
> 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...

## DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the petitioner's appeal is DENIED and the Agency'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 petitioner is responsible for any financial obligations incurred as the agency has no funds to assist in this review.

DONE and ORDERED this 5th day of February, 2015,

in Tallahassee, Florida.

Frank Houston
Hearing Officer
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