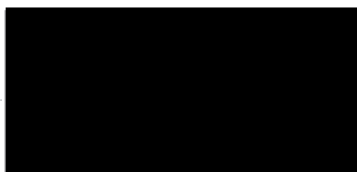


**FILED**

**FEB 13 2015**

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

OFFICE OF APPEAL HEARINGS  
DEPT OF CHILDREN & FAMILIES



APPEAL NO. 14F-09540

PETITIONER,

Vs.

CASE NO.

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

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened in this matter before the undersigned hearing officer on December 22, 2014, at 2:10 p.m. The hearing was convened in Fort Lauderdale, Florida.

**APPEARANCES**

For the Petitioner:

  
Petitioner's Mother

For the Respondent:

Sharon Garrison, R.N.  
Registered Nurse Specialist/Fair Hearing Coordinator  
Agency for Health Care Administration

**STATEMENT OF ISSUE**

At issue is the denial of the Agency for Health Care Administration (sometimes hereinafter referred to as "AHCA" or the "Agency") of the petitioner's request for an additional two hours per day of Home Health Aide services Monday through Saturday. Home Health Aide services may also be called Personal Care Assistant services.

**PRELIMINARY STATEMENT**

██████████ the petitioner's mother, appeared on behalf of the petitioner, ██████████ ("petitioner"), who was also present. ██████████ D.P.T., appeared as a witness for the petitioner. Ms. ██████████ may sometimes hereinafter be referred to as the petitioner's "representative".

The Agency for Health Care Administration (sometimes hereinafter referred to as the "respondent", "Agency" or "AHCA") was represented by Sharon Garrison, R.N., Registered Nurse Specialist and Fair Hearing Coordinator with the Agency for Health Care Administration. Carol King, R.N., Registered Nurse Specialist and Fair Hearing Coordinator with the Agency, was present solely for the purpose of observation. Ken Hamblin, Statewide Fair Hearing Coordinator with the Agency, was present to facilitate the hearing. The following individuals from Children's Medical Services appeared as witnesses on behalf of the Agency: Cheryl Wallin, R.N., Nursing Director; Catherine Starkey, Appeals and Grievances Coordinator; Stephanie Bankston, R.N., Clinical Resource Manager; and Joselyn Mateo, M.D., Medical Director. Alexander Fabano, Children's Medical Services Contract Manager for the South Florida Community Care Network ("SFCCN"), also appeared as a witness on behalf of the Agency.

The respondent introduced Exhibits "1" through "6", inclusive, at the hearing, all of which were accepted into evidence and marked accordingly. The petitioner did not introduce any exhibits at the hearing; however, the hearing record was left open until the close of business on December 29, 2014 to allow the petitioner an opportunity to provide a legible copy of a letter from the petitioner's physician. Once received, the letter was accepted into evidence and marked as petitioner's Exhibit "1".

The petitioner was previously receiving Personal Care Assistant services six hours per day, Monday through Saturday. Children's Medical Services sent a letter to the petitioner proposing a reduction in the petitioner's Personal Care Assistant services to four hours per day, six days per week. In response to the proposed reduction of services, the petitioner's representative sent a letter appealing the reduction and requesting an increase in the petitioner's Home Health Aide services to eight hours per day, six days per week.

The Agency's witness stipulated an approval of Home Health Aide services six hours per day, six days per week, at the time of hearing. Therefore, the only matter remaining to be addressed is the petitioner's request for an increase of services from six to eight hours per day.

#### **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. Petitioner is a 13-year-old female diagnosed with Pineal Blasoma. The petitioner was diagnosed with brain cancer in October 2011 and regressed physically after receiving six weeks of radiation and six months of chemotherapy. The petitioner was able to walk and attend school prior to her cancer treatment but could not do so afterwards.
2. The petitioner is non-verbal, legally blind and incontinent. The petitioner requires total assistance with all activities of daily living ("ADL").
3. The petitioner needs to be re-positioned every 60 to 90 minutes. She has various items of durable medical equipment used for positioning, including a positioning

chair, stroller chair, bed, and stander. Each of the items has multiple settings available for different positions. Frequent re-positioning is necessary for the prevention or minimizing of scoliosis.

4. The petitioner receives physical therapy three times per week.

5. The petitioner receives Medicaid State Plan benefits through Children's Medical Services. She has been enrolled with Children's Medical Services for 7 years.

6. Children's Medical Services is a provider service network in Broward County. CMS accepts patients with multiple significant medical conditions who require the care of multiple specialists. CMS allows these multiple professionals to collaborate on the care of a patient and develop a plan of care.

7. The petitioner lives in the family home with her mother, a 9-year-old sibling and a 10-year-old sibling. There are no other adults living in the home. The petitioner's siblings do not have special needs.

8. Petitioner was previously approved to receive Home Health Aide services, six hours per day, six days per week.

9. In a letter dated September 26, 2014, Children's Medical Services advised the petitioner of its intent to reduce the petitioner's Home Health Aide services to four hours per day, six days per week.

10. In response to the letter proposing a reduction in services, the petitioner's representative sent a letter appealing the decision to Children's Medical Services and requesting an increase in Home Health Aide services to eight hours per day, six days per week.

11. The petitioner's mother works as a real estate agent. She also works as a customer service representative taking calls from her home. The Parent or Legal Guardian Statement of Work Scheduled signed by the petitioner's mother and dated October 18, 2014 indicates that she works between 50 and 60 hours per week and that the hours worked vary per day. The form indicates the petitioner's mother can work anytime from 8:00 a.m. to 10:00 p.m., Monday through Saturday and from 2:00 p.m. to 9:00 p.m. on Sunday. The petitioner's mother confirmed at the hearing that her work schedule is variable.

12. The petitioner's physical therapist who was present at the hearing has been working with the petitioner for almost her entire life. He explained the petitioner regressed physically after being treated for cancer. The physical therapist testified that the petitioner is fully dependent for all activities of daily living; that the petitioner has no bed mobility and needs to be re-positioned every 60 to 90 minutes. He explained that frequent re-positioning is necessary to avoid muscle contractures and minimize the risk of scoliosis.

#### **CONCLUSIONS OF LAW**

13. 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.

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

15. The Florida Medicaid Home Health Services Coverage and Limitations Handbook revised October 2014 ("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.

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

17. The petitioner is requesting an increase in her previously approved Home Health Aide services. Therefore, in accordance with Fla. Admin. Code R. 65-2.060 (1), the burden of proof is assigned to the petitioner.

18. 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, 7<sup>th</sup> Ed.).

19. 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 ...

20. 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.

21. 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.

22. 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.

23. 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.



24. 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:

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.

25. The Handbook, on Page 2-2, explains that:

Medicaid reimburses home health services provided to an eligible Medicaid recipient when it is medically necessary to provide those services in the recipient's place of residence or other authorized setting.

Medicaid does not reimburse for home health services when the service duplicates another provider's service under the Medicaid program or other state or local program or if a comparable home and community-based service is provided to the recipient at the same time on the same day.

26. The Handbook, on Page 2-18, states:

Home health aide services help maintain a recipient's health or facilitate treatment of the recipient's illness or injury. The following are examples of home health aide services reimbursed by Medicaid:

- Assisting with the change of a colostomy bag
- Assisting with transfer
- Reinforcing a dressing
- Assisting the individual with prescribed range of motion exercises that have been taught by the RN
- Measuring and preparing prescribed special diets
- Providing oral hygiene
- Bathing and skin care
- Assisting with self-administered medications

Home health aides must not perform any services that require the direct care skills of a licensed nurse.

27. In addressing parental responsibility on Page 2-19, the Handbook states

There are times during the day when skilled interventions are not required for a recipient receiving private duty nursing services. In these cases,

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).

Medicaid does not reimburse private duty nursing for respite care. Examples are parent or legal guardian recreation, socialization, and volunteer activities, or periodic relief to attend to personal matters unrelated to the medically necessary care of the recipient.

28. Page 2-21 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. 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 QIO for the additional hours needed.

29. The mother's work schedule as a real estate agent is variable and cannot be pinpointed with any amount of accuracy. No one can predict when the mother will receive a call to show a property. Therefore, these hours fall within the definition of flex hours. The Handbook clearly states that flex hours may not be approved.

30. The petitioner's mother and physical therapist provided thought-provoking testimony at the hearing regarding the many challenges encountered by the petitioner. The mother's concern for the petitioner is evident in both her testimony and her request for an appeal. However, the hours worked by the petitioner's mother are variable. As such, the additional services requested by the petitioner fall within the definition of flex hours and cannot be approved.

31. Pursuant to the above, the petitioner has not met her burden of proof with regard to an increase in the amount of her Home Health Aide services to eight hours per day, six days per week.

32. In rendering this decision, the undersigned hearing officer considered all of the testimony and documentary evidence submitted at the hearing and reviewed all conditions of "medical necessity" and Home Health Aide duties set forth in the Florida Administrative Code and the rules governing the Florida Medicaid program.

### **DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, petitioner's appeal for additional Home Health Aide services is hereby DENIED. The respondent is directed to continue providing Home Health Aide services six hours per day, six days per week, as stipulated at the hearing.

### **NOTICE OF RIGHT TO APPEAL**

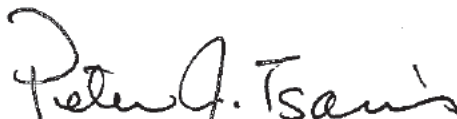
This decision is final and binding on the part of the agency. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Agency for Health Care Administration, 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


FINAL ORDER (Cont.)  
14F-09540  
PAGE - 12

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 13<sup>th</sup> day of February, 2015,

in Tallahassee, Florida.



Peter J. Tsamis  
Hearing Officer   
Building 5, Room 255  
1317 Winewood Boulevard  
Tallahassee, FL 32399-0700  
Office: 850-488-1429  
Fax: 850-487-0662  
Email: Appeal\_Hearings@dcf.state.fl.us

Copies Furnished To:

 Petitioner  
Sharon Garrison, Field Office Area 10 Medicaid