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

FILED
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OFFICE OF APPEAL HEARINGS
DEPT OF CHILDREN & FAMILIES

[redacted]

APPEAL NO. 14F-10941

PETITIONER,

Vs.

CASE NO.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 12 Manatee
UNIT: AHCA

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on February 24, 2015, at approximately 9:59 a.m. in Bradenton, Florida.

APPEARANCES

On behalf of Petitioner: [redacted], Petitioner's Mother

On behalf of Respondent: David Beaven, Medical Healthcare Program Analyst, Agency for Healthcare Administration ("Agency").

STATEMENT OF ISSUE

Whether the Agency was correct in denying Petitioner's request for personal care services (PCS) hours.

PRELIMINARY STATEMENT

Petitioner was present at the hearing. He was represented by his mother, [redacted] Petitioner's waiver support coordinator, [redacted] appeared as a witness

for Petitioner. Rakesh Mittal, Physician Consultant with eQ Health Solutions, appeared as a witness for the Agency.

Petitioner requested four hours of PCS Monday through Friday and six hours on Saturday and Sunday. The Agency, through eQ Health Solutions, denied the request. Petitioner is no longer contesting the weekend hours. On the record, the Agency agreed to approve two hours of PCS each day from Monday through Friday. This order will only address the remaining request for the additional two hours that were denied.

Petitioner submitted one composite exhibit, marked and entered as Petitioner's Composite Exhibit 1. Respondent admitted one composite exhibit, marked and entered as Respondent's Composite Exhibit 1.

FINDINGS OF FACT

1. Based on the oral and documentary evidence presented at the fair hearing and on the entire record of this proceeding, the following Findings of Fact are made:

2. Petitioner is an 8-year-old male with autism. He is nonverbal, ambulatory, and can be aggressive with his mother and sister. He requires constant supervision and assistance with activities of daily living (ADLs).

3. eQHealth Solutions, Inc. is the Peer Review Organization (PRO) contracted by the respondent to review personal care services provided to Medicaid recipient in the State of Florida.

4. eQHealth Solutions personnel had no direct contact with the petitioner or his family. The decision made by each physician at eQHealth was solely based on the information submitted by the providers.

5. Petitioner's mother does not work. His father works Monday through Saturday until 6 p.m. and some weekends, but he is not home until about 7 p.m. Petitioner is in school Monday through Friday from 8:30 a.m. to 2:30 p.m., with an hour of travel each way. Therefore, Petitioner is home with his mother and six-year-old sister from roughly 3:30 p.m. through about 7:00 p.m. when his father arrives home. This is approximately three and half hours that Petitioner's mother is the sole caregiver in the evenings.

6. Petitioner requested the PCS hours because Petitioner needs assistance with feeding, toileting, grooming, and supervision. Petitioner's mother is unable to care for Petitioner's six-year-old sister because all of her time is devoted to Petitioner. He is destructive, aggressive, and elopes. Petitioner's sister does not have any developmental or medical needs.

7. Petitioner's mother is stressed and seeing a doctor for depression and carpal tunnel syndrome. There is no medical documentation indicating Petitioner's mother has any physical limitations making her unable to care for Petitioner.

8. By notice dated December 3, 3014, the Agency denied all of the requested hours because the hours were deemed in excess of Petitioner's needs. The care can be provided by the parent or caregiver. The decision was upheld on redetermination on December 17, 2014. Petitioner requested a Medicaid fair hearing on December 9, 2014.

9. Petitioner is also a client of the Agency for Persons with Disabilities ("APD") through his enrollment in the Developmental Disabilities Waiver. APD's behavior analysts conducted a crisis assessment and recommended that Petitioner receive 12 hours of behavior services and 12 hours of respite services. The Medicaid state plan

would be responsible for paying for the behavior services and personal care assistance, not APD. However, Petitioner wants to use the respite funding to pay for a private behavior provider because there is no Medicaid behavior provider in the area. Petitioner has asserted since he is using the funds in this manner, there are no funds available for respite. Petitioner is seeking personal care services to supplement the alleged loss of respite.

CONCLUSIONS OF LAW

9. 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 Chapter 120.80, Florida Statutes.

10. This is a final order pursuant to Sections 120.569 and 120.57, Florida Statutes.

11. This hearing was held as a de novo proceeding pursuant to Florida Administrative Code Rule 65-2.056.

12. In accordance with Florida Administrative Code Rule 65-2.060(1), the burden of proof was assigned to the Petitioner. The standard of proof needed to be met for an administrative hearing is by a preponderance of the evidence, as provided by Florida Administrative Code Rule 65-2.060(1).

13. Florida Administrative Code, 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.

14. Since the Petitioner is under twenty-one years-old, a broader definition of medical necessity applies to include the Early and Periodic Screening, Diagnosis, and Treatment Services (EPDST) requirements. Section 409.905, Florida Statutes, Mandatory Medicaid services, provides that Medicaid services for children 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.

15. Under the above statute, the Agency offers personal care services as an EPSDT service to Medicaid-eligible recipients less than twenty-one years of age.

16. The 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 my present its own evidence of medical necessity in disputes between the state and Medicaid patients. (see (citations omitted)).

17. Consistent with these requirements, the state is obligated to provide services to recipients under twenty-one years of age, but only to the extent such services are medically necessary. The definition of medical necessity for services provided under the EPSDT benefit is established by the state. The state is authorized to establish the amount, duration, and scope of such services.

18. The Florida Medicaid Home Health Services Coverage and Limitations Handbook- October 2014 ("Medicaid Handbook") has been incorporated by reference into Florida Administrative Code Rule 59G-4.130(2).

19. Page 1-2 of the Medicaid Handbook states in pertinent part:

> 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.
>
> ADLs 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).

20. The criteria that must be met in order to receive personal care services through Medicaid are listed on page 2-23 of the Medicaid Handbook.

> Medicaid reimburses personal care services for recipients under the age of 21 who meet all of the following criteria:
> • Have a medical condition or disability that substantially limits their ability to perform their ADLs or IADLs
> • Have a physician's order for personal care services
> • Require more individual and continuous care than can be provided through a home health aide visit
> • Do not have a parent or legal guardian able to provide ADL or IADL care.

21. The Medicaid Handbook also contemplates parental participation in a child's care. At page 2-25, it states:

> Parents and legal guardians must participate in providing care to the fullest extent possible....

Medicaid can reimburse personal care services rendered to a recipient whose parent or legal guardian is not able to provide ADL or IADL care.

22. Petitioner's mother is home whenever Petitioner is. She could assist with his after school ADLs, such as bathing and brushing teeth. There was no justification for additional ADL assistance after school that mother could not assist with. She has no documented physical limitations that prevent her from assisting Petitioner with his ADLs. Petitioner does not meet the fourth criteria set forth above because his mother is available. All criteria must be met in order to receive personal care services through Medicaid.

23. The Agency approved two hours of personal care services at the time of the hearing. Personal care services are for ADL assistance only. Appendix L of the Medicaid Handbook, titled "Medicaid Review Criteria for Personal Care Services", contains a list of tasks and a general time allowance for each in order to assess a recipient's needs and necessary hours.

24. Based on the general time allowances set forth at page L-4 of the Medicaid Handbook, two hours is sufficient to assist Petitioner with his after school ADLs. The provider could assist Petitioner with changing his clothes (15 minutes), brushing his teeth and washing his face (15 minutes), toileting (15 to 30 minutes), and eating (30 minutes).

25. All ADLs should be completed within the two hours approved each day after school. Therefore, the remaining requested two hours would be for supervision, or availability just in case of a toileting or some other need. The definition of medical necessity considers actual medical need for a service, not potential need. Additionally,

as set forth above, a parent is available to provide care during the entire after school period and thus additional personal care service hours cannot be approved.

26. Babysitting is specifically excluded as a Medicaid home health service on page 2-11 of the Handbook. Babysitting is defined on page 1-3 of the Handbook 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.

27. The documentation Petitioner's provider sent to eQ Health indicates a need for assistance with ADLs, supervision, and a need for behavioral services. However, his mother is home and available to provide assistance with his ADLs. Medicaid does not provide general supervision to a recipient so that the family could have a respite. Respite services are provided with the waiver program and Petitioner is receiving such. If Petitioner needs additional respite services, the Agency for Persons with Disabilities is best suited to address this need.

28. Petitioner is seeking personal care service hours to assist with behaviorial needs. Personal care service hours are not intended to assist with behavioral needs; they are for ADL assistance only.

29. Based on the evidence presented, in conjunction with the above-cited rules, the hearing officer concludes that Respondent's decision to deny personal care hours for the period of December 1, 2014 through May 31, 2015 was correct.

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 23rd day of March, 2014,

in Tallahassee, Florida.

Danielle Murray
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Copies Furnished To [redacted] Petitioner
Lorraine Campanaro, Area 6, AHCA Field Office Manager