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

[redacted]

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 09 Osceola
UNIT: AHCA

RESPONDENT.
_____/

APPEAL NO. 14F-02631

CASE NO.

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on May 12, 2014 at 10:06 a.m.

APPEARANCES

For the Petitioner: [redacted] Petitioner's Father

For the Respondent: Doretha Rouse, Registered Nurse Specialist

STATEMENT OF ISSUE

At issue is the Respondent's action in denying Personal Care Services for the current certification period of February 1, 2014 through July 31, 2014.

PRELIMINARY STATEMENT

The Agency contracts with a Quality Improvement Organization ("QIO"), eQHealth Solutions, to perform medical utilization reviews for private duty nursing and personal care services through a prior authorization process for medicaid beneficiaries.

Through this contractual agreement, eQHealth Solutions is authorized to make determinations of medical necessity on behalf of the Agency and act as a witness in all related fair hearing proceedings.

A prior service authorization request is submitted by a provider along with information and documentation required to make a determination of medical necessity. Initial requests for private duty nursing and personal care services will be authorized for up to 60 days (two-month period) to allow for reassessment of the recipient's condition. Thereafter, a medical necessity review is conducted every 180 days (six-month period). If necessary, a request for modification may be submitted by the provider.

Witness for the Respondent was Darlene Calhoun, M.D., Physician Consultant with eQHealth Solutions.

Respondent's exhibit 1 and Petitioner's exhibit 1 were admitted into evidence.

FINDINGS OF FACT

Based upon the oral and documentary evidence presented at the final hearing and on the entire proceeding, the following Findings of Fact are made:

1. Petitioner is an eighteen year old male with a medical history remarkable for spina bifida. He is non-ambulatory, has a catheter, and is incontinent of bowel and bladder. He can dress his upper body but not his lower body. He requires full assistance with all activities of daily living (ADLs). Petitioner resides with both parents and a sibling.

2. Petitioner is currently receiving services under the Developmental Disabilities Waiver program administered by the Agency for Persons with Disabilities.

That program provides Petitioner with approximately 60 hours of respite care each month. Currently, Petitioner receives respite from about 12:00 p.m. through 2:00 p.m. on school days.

3. Petitioner attends school from 7:00 a.m. to 12:00 p.m., Monday through Friday. His father provides transportation to and from school.

4. None of the work schedules that the mother provided to the Agency are accurate. The schedules indicate that she works from home caring for Petitioner, and she is employed by Petitioner's father to do so. The schedules list the hours that she cares for Petitioner, and the activities she performs. The schedule is not an accurate reflection of the mother's employment, because she works outside of the home.

5. Based on testimony, the mother works from 7:00 a.m. to 4:00 p.m., Monday through Friday. The father works from 7:00 p.m. to 3:30 a.m., Monday through Friday. Based on these schedules, there is no period of time where Petitioner is without at least one adult to assist him with his needs. Both parents are available between 3:30 a.m. and 7:00 a.m., and from 4:00 p.m. through 7:00 p.m. during weekdays and all day on weekends.

6. There was no testimony that Petitioner requires any overnight assistance.

7. Petitioner weighs approximately 130 pounds and his parents (particularly his mother) have difficulty lifting him for transfers. There is no durable medical equipment in the home, such as a hoyer lift, to assist the caregivers with transfers.

8. Petitioner's father testified that PCS is needed because the parents struggle to lift Petitioner and because father needs time to sleep when Petitioner is home. Petitioner's parents have provided the care and Petitioner's health is stable.

There have been no recent medical changes in Petitioner's condition. Neither parent has any current medical or physical limitations on their ability to provide care, but the mother did have a hernia surgery in 2010.

9. By notice dated January 27, 2014, a QIO physician consultant with eQHealth Solutions informed Petitioner and his providers of a denial of the requested hours for the certification period spanning from February 1, 2014 through July 31, 2014. The principal reason for this decision is the clinical information provided does not support the medical necessity of the requested services. The caregivers are available to provide assistance. eQHealth Solutions did not complete a reconsideration because it deemed the reconsideration request untimely, and the instant appeal followed.

CONCLUSIONS OF LAW

10. The Department of Children and Families Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Florida Statutes § 120.80. The Office of Appeal Hearings provided the parties with adequate notice of the administrative hearing.

11. Florida Medicaid State Plan is authorized by Chapter 409, Florida Statutes, and Chapter 59G, Florida Administrative Code. The program is administered by the Agency for Health Care Administration.

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

13. The burden of proof was assigned to the Petitioner in accordance with Rule 65-2.060(1), Florida Administrative Code. This request is considered an initial application for services, because additional services are being requested.

14. The standard of proof needed to be met for an administrative hearing is by a preponderance of the evidence, as provided by Rule 65-2.060(1), Florida Administrative Code.

15. 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.

16. 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. Fla. Stat. § 409.905, 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.

17. 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.

18. 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)).

19. 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 and the state is authorized to establish the amount, duration, and scope of such services.

20. The Florida Medicaid Home Health Services Coverage and Limitations Handbook- March 2013 ("Medicaid Handbook") has been incorporated by reference into Florida Administrative Code Rule 59G-4.130(2).

21. 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).

22. PCS are intended to provide medically necessary assistance with ADLs such as eating, grooming, and continence care. The evidence shows Petitioner requires assistance with ADLs and this assistance is necessary. However, Petitioner's parents are available to provide this care and have been providing it. Petitioner does not require an additional outside provider to protect life, prevent significant illness, prevent significant disability, or alleviate severe pain, because his parents and respite services are available to provide the care. An additional outside provider is in excess of Petitioner's needs at the present time.

23. Granting the request because the father wants more sleep would be inappropriate for two reasons. First, based on the above authorities, a service cannot be provided primarily for the caregiver's convenience. Second, the facts indicate the father does have time to sleep. The evidence shows that father is home but not the sole caregiver from 3:30 a.m. through 2 p.m. (10.5 hours) and again from 4:00 p.m. through 7 p.m. (3 hours). During these hours, the mother is home, the child is at school, or a respite provider is available. Petitioner needs assistance with ADLs but does not require supervision, and ADLs do not require caregiver intervention at all times. Father may be woken up to assist with tasks, but otherwise there is ample time that he is not the sole caregiver and could sleep.

24. The Agency suggested that Petitioner consult with his physician and waiver support coordinator to determine whether an assistive device such as a hoyer lift would be appropriate to help his parents with lifting and transferring him.

25. After careful review of the evidence submitted and the relevant laws set forth above, the undersigned concludes the Agency's action was proper and the Petitioner's burden was not met.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is hereby 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 30th day of June, 2014, in Tallahassee, Florida.

Danielle Murray

Danielle Murray
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: [redacted] Petitioner
Judy Jacobs, Area 7, AHCA Field Office