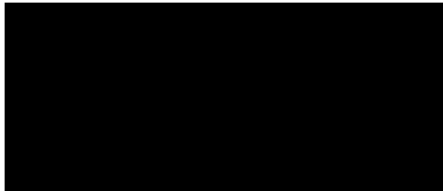


STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

FILED

JUL 07 2014

OFFICE OF APPEAL HEARINGS
DEPT OF CHILDREN & FAMILIES



APPEAL NO. 14F-02632

PETITIONER,

Vs.

CASE NO.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 13 Hillsborough
UNIT: AHCA

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on May 6, 2014, at 1:00 p.m., and reconvened on May 20, 2014 at 10:00 a.m.

APPEARANCES

For the Petitioner:



Mother

For the Respondent:

David Beaven
Agency for Health Care Administration

STATEMENT OF ISSUE

At issue is the Respondent's action denying Personal Care Services (PCS) for the current certification period, and her request to increase those services from the number approved for the preceding certification period.

PRELIMINARY STATEMENT

The Agency for Health Care Administration (agency or respondent) 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.

Petitioner was represented by her mother, [REDACTED] who also testified on her behalf. The respondent was represented by David Beaven, Fair Hearing Coordinator, Medicaid Field Office, Area Six. Darlene Calhoun, M.D., Physician Consultant with eQHealth Solutions, testified on behalf of the respondent.

Respondent's exhibits 1-11 were admitted into evidence. The matter was reconvened so that petitioner could provide corrected medical records, which were received as respondent's exhibit 11. Petitioner submitted no exhibits into evidence.

Administrative notice was taken of 409.905 and 913, Florida Statutes and Chapters 1 and 2 of the Medicaid Home Health Services Qualifications, Enrollment and Requirements Handbook.

FINDINGS OF FACT

Based upon the testimony of the witnesses and documentary evidence presented at the final hearing, the following Findings of Fact are made:

1. Petitioner is a six year-old female with a medical history remarkable for a complex genetic syndrome that includes deletion of chromosome 7 and duplication of chromosome 22, resulting in developmental delay, microcephaly, failure to thrive, asthma, obstructive sleep apnea, GERD and allergy to milk. She has had several surgeries because of low level spinal cord lymphoma and intestinal mal-rotation. She is non-ambulatory, blind and incontinent. She must be fed through a g-tube.
2. Petitioner resides with her mother and five year-old brother, who is autistic and requires therapy from 4:00 p.m. until 5:00 p.m., Monday through Friday. The brother attends school from 7:45 a.m. to 2:00 p.m., Monday through Friday. The mother does not work. Respondent's evidence showed that petitioner's mother had no health restrictions. She stated, however, that she has had problems with her back and spine since she was sixteen years old and needs to seek medical attention.
3. Petitioner receives continues feedings through her g-tube from 9:00 a.m. until 3:00 p.m. and from 9:00 p.m. until 7:00 p.m.
4. Petitioner received six hours of PSC services Monday through Friday during the previous certification period. The mother, through the provider, Esperanza Home Health Services, Inc., requested an additional two hours a day of PSC. The request

included a physician's order for a home health aid 8 hours a day. Petitioner's mother stated that she needed the extra hours because she needs to take her son to therapy because of his autism. She is otherwise able to provide care for petitioner.

5. On March 18, 2014, eQ Health Solutions (eQ) sent petitioner a Notice of Outcome – Denial of Private Duty Nursing/Personal Care Services. In that notice, eQ not only denied petitioner's request for additional hours, but also eliminated the hours she was already receiving.

6. The physician's rationale for denying the requested hours and eliminating the previously-approved hours was:

The patient is a 7 year old developmental delay, microcephaly and failure to thrive. The patient has a gastrostomy tube through which the patient receives continuous feeds. The patient lives with her mother and a sibling who has autism. The patient is non-ambulatory and incontinent. The mother does not work and has no limitations. The clinical information provided does not support the medical necessity of the requested PCS services. The mother is available to provide ADLs. If the mother requires assistance with a skill need, SN can be requested. The requested service is deemed excessive.

7. Petitioner requested a reconsideration of the determination on March 31, 2014, which was untimely.

8. Petitioner provided a prescription from her doctor stating that Home Health Aid was medically necessary for 8 hours a day.

9. Petitioner receives no other services and requires assistance with all of her Activities of Daily Living (ADLs), which are provided by her mother. The mother stated that the Home Health Aide assists with cleaning the g-tube. No other evidence was presented regarding assistance provided by the Home Health Aide.

10. Petitioner's Plan of Care, dated February 19, 2014, shows functional limitations and a need for assistance with all ADLs.

11. Respondent's position is that the requested PCS services are not medically necessary and that petitioner can apply for skilled nursing services (SN) if needed.

12. Petitioner's position is that the hours are necessary so that the mother can attend to the needs of the sibling, such as transporting him to therapy.

CONCLUSIONS OF LAW

13. 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.

14. 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.

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

16. The burden of proof was assigned to the respondent with respect to the elimination of the original PSC hours which were eliminated in accordance with Rule 65-2060(1), Florida Administrative Code.

17. 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.

18. 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.

19. 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.

20. 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.

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

22. 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.

23. 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).

24. 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).

25. Personal care services are limited by the exclusions and limitations specified in the Medicaid Handbook. Page 2-11 of the Medicaid Handbook provides a list of services excluded by Medicaid State Plan for home health services. This list includes baby-sitting.

26. Activities related to supervision are termed "baby-sitting" in the Medicaid Handbook and are noted as service exclusion. Page 1-3 of the Handbook 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."

27. The fact that a physician prescribes PCS services does not in itself make these services medically necessary. Rules and regulations associated with the Home Health Services program must also be adhered to.

28. PCS are intended to provide medically necessary assistance with ADLs that support a recipient's medical care needs. The evidence shows that petitioner needs assistance with all of her ADLs, but that petitioner's mother is providing that care.

29. Supervision can be provided by any competent adult and does not require the skills of a paraprofessional, such as a home health aide. The controlling authorities make clear that Medicaid services cannot be in excess of the patient's needs. The Petitioner's needs appear age-appropriate; therefore PCS do not appear medically necessary.

30. The petitioner may certainly seek skilled nursing services if she believes that is warranted.

31. After careful review of the evidence submitted and the relevant laws set forth above, the undersigned concludes the respondent's action was proper and the respondent met the burden of proof. Having determined that the respondent acted appropriately in eliminating petitioner's PSC hours, it is not necessary to address the issue of whether or not an *increase* in PSC hours is warranted.

DECISION

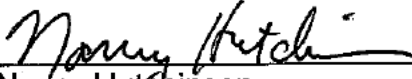
Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is hereby denied and the Agency's action is affirmed.


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 7th day of July, 2014,

in Tallahassee, Florida.



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