

FILED

JUN 23 2014

**OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES**

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



APPEAL NO. 14F-03965

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 15 Palm Beach
UNIT: AHCA

RESPONDENT.

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on June 12, 2014 at 8:37 a.m.

APPEARANCES

For the Petitioner:



Petitioner's mother

For the Respondent:

Ken Hamblin, Fair Hearing Coordinator
Agency for Health Care Administration

STATEMENT OF ISSUE

At issue is whether respondent's action in terminating petitioner's private duty nursing (PDN) for the certification period April 25, 2014 through October 21, 2014 was correct.

PRELIMINARY STATEMENT

The petitioner was not present but represented by her mother, [REDACTED]

Petitioner entered no exhibits into evidence.

Mr. Hamblin appeared both as a representative and witness for the respondent. Present for the respondent from eQHealth Solutions, Inc. was Ellyn Theophilopoulos, M.D. Respondent's exhibits "1" through "8" were accepted into evidence. Respondent's documentary evidence included information submitted by petitioner's provider; pertinent sections of Florida Statute and Florida Administrative Code; portions of the Home Health Services Coverage and Limitation Handbook; and Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) information.

FINDINGS OF FACT

1. Petitioner is a four year old female with a birth date of [REDACTED] She resides with her mother; a 13 year old sibling; and the mother's fiancé.
2. The petitioner is eligible to receive Medicaid services at all times relevant to this proceeding.
3. The petitioner is diagnosed with diabetes insipidus; developmental delay; and pulmonary insufficiency. Petitioner has only light perception in her left eye and is near sighted in the other eye.
4. Petitioner has not experienced any issues related to diabetes insipidus for at least the last year.
5. Petitioner requires occasional nebulizer treatments.
6. Petitioner does not receive any intravenous medication or intramuscular injections.

7. Petitioner does not have a catheter; colostomy; or tracheotomy.
8. Petitioner does not require the use of a ventilator.
9. Petitioner does not require gastrostomy feedings.
10. Petitioner does not have any complex wounds; infections; or ulcers.
11. Petitioner receives occupational and speech therapy on a weekly basis in the family home.
12. Petitioner receives once per week service from the Lighthouse for the Blind. This service is received in the family home.
13. Petitioner has been attending a pre-school Monday through Friday 8:30 a.m. to 1:30 p.m. In the fall, she will begin kindergarten.
14. Petitioner does not attend a Prescribed Pediatric Extended Care (PPEC) facility.
15. Petitioner's primary caregiver is her mother. The mother administers all medications.
16. The mother is employed 40 hours per week. Her work schedule is 8:30 a.m. to 6:30 p.m., Monday through Friday. Occasional Saturday work is required. Saturday hours are 8:30 a.m. to 3:30 p.m. When working on a Saturday, additional time off is given during the week.
17. Petitioner's mother has a thyroid problem and the sibling is diagnosed with attention-deficit/ hyperactivity disorder (ADHD).

18. The petitioner's nursing provider, [REDACTED] (hereafter referred to as "provider"), requested a continuation of the following licensed practical nursing (LPN) hours each week:

- Sunday: 4 hours
- Monday – Friday: 12 hours per day
- Saturday: 9 hours

19. Petitioner did not utilize LPN hours on Sunday in the prior certification period.

20. eQHealth Solutions, Inc. is the Quality Improvement Organization (QIO) contracted by the respondent to perform prior authorization reviews for PDN services. The provider 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.

21. A Plan of Care (POC), signed by the petitioner's physician, was submitted for review by the provider. The document outlines the type of assistance to be provided by a LPN. The POC contained the following relevant information:

- Safety measures consist of aspiration precautions and skin integrity
- Functional limitations are age appropriate
- Is verbal and can make needs known
- Consumes at least 75% of her meals
- No longer receiving nutritional supplements
- Ambulates independently
- No recent hospitalizations

22. Petitioner's physician also wrote, in part:

Provide personal care as needed to include bathing, dressing, diapering, skin and oral care. Report alteration in skin integrity unresolved by interventions as prescribed by MD.

Skilled nursing care currently required due to patient's inability to independently adhere to MD orders or perform ADL's [activities of daily living].

23. Also submitted for review was a physician's order calling for RN/LPN services at the frequency requested by the provider.

24. A physician at eQHealth Solutions, who is board certified in pediatrics, reviewed the information submitted on petitioner's behalf and determined PDN service would not be approved for the certification period at issue.

25. A Notice of Outcome was thereafter sent to the petitioner's mother; her physician; and the provider. The notice to the physician and provider stated, in part:

The service is denied because the plan of care provided is not individualized or consistent with the symptoms or, confirmed diagnosis.

Clinical Rational for Decision: The patient is a 4 year old with diabetes insipidus, developmental delay, failure to thrive and a history of prematurity. The patient is ambulatory and on a regular diet. The patient requires assistance with ADLs. It appears that the patient has been receiving skilled nursing for her diabetes insipidus has not had any issues related to this in the past year. The skilled nursing notes show that the skilled nurse is providing assistance with ADLs only. The patient attends preschool for 2 hours per day ... The clinical information provided does not support the medical necessity of the requested services. The patient may qualify for PCS [personal care services] but clearly there are no skilled services being provided in the home currently. The requested skilled nursing services are not approved.

26. The above notice stated should the parent, provider, or petitioner's physician disagree with the decision, reconsideration could be requested within 5 business days.

27. Reconsideration was not requested.

28. Petitioner thereafter timely requested a fair hearing. Respondent administratively approved the following LPN hours pending the outcome of this proceeding:

- Sunday: 4 hours
- Monday – Friday: 12 hours per day
- Saturday: 9 hours

29. Petitioner's mother states her daughter does not speak clearly; is not fully "potty trained"; uses her hands to eat; and is underweight. Due to her visual impairment, petitioner will have an aide when she starts school in the fall. As the mother must work and therapies are provided in the home, assistance is needed.

30. Respondent argues no evidence was presented that skilled nursing interventions have occurred in the last year. The duties being performed by the LPN are related to ADL and supervision. Respondent acknowledges the petitioner requires assistance with ADLs. The required assistance, however, is age appropriate and can be provided by any responsible adult.

31. Respondent suggests petitioner consider applying for PPEC or personal care services. Respondent advised the provider could assist with a request for personal care services.

32. Respondent considered the requirements of Early and Periodic Screening, Diagnosis, and Treatment Services (EPSDT) and determined PDN services are not medically necessary.

CONCLUSIONS OF LAW

33. 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.

34. This is a final order pursuant to Fla. Stat. § 120.569 and § 120.57.
35. This hearing was held as a de novo proceeding pursuant to Fla. Admin. Code R. 65-2.056.
36. In accordance with Fla. Admin. Code R. 65-2.060(1), the burden of proof was assigned to the respondent.
37. The standard of proof in an administrative hearing is by a preponderance of the evidence (See Fla. Admin. Code R. 65-2.060(1).) The preponderance of the evidence standard requires proof by "the greater weight of the evidence," (Black's Law Dictionary at 1201, 7th Ed.).
38. The Florida Medicaid program is authorized by Fla. Stat. Chapter 409 and Fla. Admin. Code Chapter 59G. The Medicaid program is administered by the respondent. 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; and a determination of the medical necessity for private duty nursing instead of other more cost-effective in-home services.

(c) The agency may not pay for home health services unless the services are medically necessary ...

39. The definition of medically necessary is found in the 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.

40. As the petitioner is under 21, a broader definition of medically necessary applies

to include the EPSDT 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.

41. 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)).

42. Consistent with these requirements, the respondent must provide services to Medicaid recipients under 21 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.

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

44. Private duty nursing services are available to recipients under the age of 21 who have complex medical problems and require more extensive and continual care than can be provided through a home health visit. See 2-18, Medicaid Handbook.

45. Regarding skilled nursing services, Page 2-16 of the Medicaid Handbook provides examples of nursing services reimbursed by Medicaid. These services include, in part:

- Administration of intravenous medication
- Administration of intramuscular injections...
- Insertion, replacement, and sterile irrigation of catheters
- Colostomy and ileostomy care ...
- Treatment of decubitus ulcers ...
- Treatment of widespread infected or draining skin disorders
- Administration of prescribed heat treatment...
- Restorative nursing procedures ...
- Nasopharyngeal, tracheotomy aspiration, ventilator care
- Levin tube and gastrostomy feedings ...
- Complex wound care ...

46. The Findings of Fact establish the petitioner does not require any of the above medical interventions.

47. In regard to parental responsibility, Page 2-18 states in relevant part:

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 ...

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

Medicaid does not reimburse private duty nursing for respite care ...

48. The Medicaid Handbook on page 2-11 through 2-12 provides examples of services not reimbursable as a home health services. The list includes baby-sitting.

49. Petitioner's age; visual impairment; and developmental delay warrant supervision and assistance with ADLs. No authority, however, has been provided which establishes such activities must be conducted by a skilled nurse.

50. The need to have an adult in the household so that home based therapies can be received is understood. However, such supervisory activities are not part of the Medicaid home health service program.

51. Respondent's position regarding personal care services is noted. 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 ...

52. Neither evidence nor testimony establishes the LPN is providing any skilled nursing services as outlined in the Medicaid Handbook. As such, many of the services provided by the LPN would fall within the definition of personal care or are supervisory in nature. It is noted the POC specifically identifies personal care duties be performed by the skilled nurse.

53. After reviewing ESPDT and medical necessity requirement and applying both to the totality of the evidence, the undersigned finds that the respondent's action is correct.

54. Petitioner's request for PDN services 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...

55. Petitioner, if desired, can submit a request for personal care services. Should the service not be approved or approved at a frequency less than requested, hearing rights could be exercised.

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 22 day of June, 2014,

in Tallahassee, Florida.



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