

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

**FILED**

MAY 27 2014

OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN & FAMILIES



PETITIONER,

APPEAL NO. 14F-00881  
14F-01220

Vs.

CASE NO.

AGENCY FOR HEALTH  
CARE ADMINISTRATION  
CIRCUIT: 18 Brevard  
UNIT: AHCA

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on April 9, 2014, at approximately 10:09 a.m. in Cocoa, Florida.

**APPEARANCES**

On behalf of Petitioner: [REDACTED] Esq., Petitioner's Father/Attorney

On behalf of Respondent: Willis Melvin, Esq., Attorney for the Agency for Healthcare Administration (AHCA).

**STATEMENT OF ISSUES**

Whether the Agency was correct in denying petitioner's request for personal care service (PCS) hours and denying the request for additional occupational therapy (OT) hours.

Petitioner's father, as an attorney, is also requesting reimbursement of his attorneys' fees and costs from the Agency for representing the Petitioner in this case. He put his motion for attorneys' fees on the record at the hearing.

### PRELIMINARY STATEMENT

The Petitioner was present at the hearing. He was represented by his father, [REDACTED]. His mother, [REDACTED] was present but did not provide testimony. [REDACTED] the owner of Petitioner's school, [REDACTED] appeared by phone as a witness. Doretha Rouse, R.N., Registered Nurse Specialist, appeared in person for the Agency. Ellyn Theophilopolos, M.D., J.D., physician-consultant with eQHealth Solutions, Inc., appeared by phone as a witness.

The Respondent denied Petitioner's request for PCS hours for certification period November 14, 2013 through January 12, 2014. Petitioner's request for OT was partially denied for the January 24, 2014 through July 22, 2014 certification period. eQHealth Solutions completed a reconsideration and upheld the original determinations on each issue.

During the hearing, Dr. Theophilopolos agreed to modify the partial denial and approve the OT request for 4 units, 3 times per week (12 units per week) for the certification period of January 24, 2014 through July 22, 2014. The approval is effective as of the hearing date. Petitioner was satisfied with this outcome and did not provide testimony on the OT issue as it was resolved. Dr. Theophilopolos testified that a modification or hearing determination is not binding on later certification periods and

determinations for future services. As Petitioner was satisfied with the outcome of the OT appeal, this appeal is dismissed as moot.

Respondent entered three (3) exhibits into the record, two of which are composites. Petitioner entered two (2) exhibits into the record.

### **FINDINGS OF FACT**

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:

1. Petitioner is a 10 year old male diagnosed with cerebral palsy, cortical visual impairment, and gastroesophageal reflux disease (GERD). He requires constant supervision and assistance with activities of daily living (ADLs).
2. Petitioner requires tube feedings four times per day that take approximately one hour each to complete. Two of these feedings take place overnight, at approximately 10:30 p.m. and at 2:30 a.m.
3. eQHealth Solutions, Inc. is the Peer Review Organization (PRO) contracted by the Agency to review personal care services, private duty nursing services, and occupational therapy services provided to Medicaid recipients 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 currently receives 12 hours of private duty nursing (PDN) hours every day, which are used overnight.

6. Petitioner's mother made a request for 12 personal care service (PCS) hours daily in addition to the 12 hours daily of PDN which Petitioner currently receives. If the PCS hours are approved, Petitioner plans to use the PCS hours during the day and continue to use the previously-approved PDN hours for overnight care.

7. By notice dated August 15, 2013, the Agency denied Petitioner's request for PCS as not medically necessary. Upon reconsideration, the Agency upheld the original decision.

8. PCS is provided by paraprofessional unskilled aides. An aide can assist with ADLs such as grooming, toileting, and repositioning. The aide cannot give medication or tube feedings. PDN is provided by a skilled nurse who can provide assistance with ADLs as well as nursing care services such as tube feedings and administering medication.

9. Petitioner attends a school for special needs children for approximately 6.5 hours per day, Monday through Friday. Each classroom has a teacher and two teacher aides who assist children with the learning process but not with their medical needs. Depending on their medical needs, some children have their own private aides who assist in the classroom with medical care and feedings. In Petitioner's class, there are 10 students. Of those 10 students, 7 have full-time aides and 2 have part-time aides. Petitioner does not currently have an aide during school hours. The Agency was aware that Petitioner's school did not provide medical aides at the time of its decision.

10. During both day and night, Petitioner requires medication, tube feeds, and he must be lifted or repositioned to alleviate gas pains due to his GERD during feedings. Petitioner's father testified that Petitioner must be lifted and/or burped to

alleviate his pains, which he argues is different from mere repositioning. The physician reviewer referred to lifting and repositioning interchangeably and stated that it "might be necessary" to alleviate pain. Frequent repositioning is not typically provided at night by nurses.

11. Petitioner's father also testified that the lifting at night requires extra time because the child is unable to self-soothe. He testified that frequently, the caregiver may end up holding the child over an hour until he is calmed.

12. The Agency argues that Petitioner's needs may be met by the 12 PDN hours he already receives daily. The Agency suggested that the Petitioner use the PDN hours during the day because he does not qualify for nighttime services based on his medical needs.

13. The physician reviewer noted that nighttime nursing hours are approved for children with overnight medical needs requiring continuous interventions. As examples, she explained overnight nursing care might be approved for children with ventilators, tracheostomies, continuous nighttime feeds, or serious and frequent seizures requiring diastat or a vagal nerve stimulator. The Petitioner does not have such medical needs.

14. The physician reviewer indicated that eQHealth Solutions reviewed a 30-day nursing log and although he has some seizure activity, Petitioner does not require nursing interventions at night. The Agency did not specifically approve the PDN hours for overnight care, and does not believe Petitioner requires overnight care. The Agency believes that Petitioner's care needs are currently being met and the request for 12 PCS hours daily (for a total of 24 hours daily services) is excessive.

15. Petitioner argued that 6 hours of PCS would be sufficient if 12 hours is deemed inappropriate.

16. Petitioner's mother does not work. She is currently caring for Petitioner during the day since PCS was not approved. The father testified that she has a shoulder injury and cannot lift Petitioner, and the care she provides to Petitioner now is injuring her shoulder further. There was no medical documentation submitted regarding the shoulder injury and the mother's actual limitations. The mother did not offer any testimony of her limitations.

17. Petitioner's parents are divorced. His father lives across the state and cares for Petitioner during the weekend approximately every 3 weeks, but recently it has been less frequent due to the parties' medical conditions. Petitioner's mother is the main caregiver.

18. Petitioner's father argued that nursing care at night is necessary to alleviate severe pain and prevent decline due to a "failure to thrive" diagnosis. In support of this argument, he pointed out that the GERD causes severe pain after feedings, requiring the caregiver to lift and hold him to relieve it. Also, the Petitioner's thrashing at night can cause reflux and thus more pain, including the possibility that Petitioner can fall out of bed or cut himself on the bed apparatus. The thrashing also causes him to burn calories, thus reducing his weight.

**CONCLUSIONS OF LAW**

19. 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 Fla. Stat.

20. This is a final order pursuant to Fla. Stat. § 120.569 and § 120.57.

21. This hearing was held as a de novo proceeding pursuant to Fla. Admin. Code R. 65-2.056.

22. 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).

23. 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.

24. 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. Florida Statutes § 409.905, Mandatory Medicaid services, provide 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.

25. 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.

26. 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)).

27. Consistent with these requirements, the state is obligated to provide services to recipients less than 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.

28. 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).

29. Personal Care Services are available to recipients under the age of 21 that meet all the required criteria and medical necessity. See 2-23, Medicaid Handbook.

The review criteria for Personal Care Services are provided at Appendix L of the Medicaid Handbook.

30. 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).

31. There are guidelines in the Medicaid Handbook at page L-4 that reviewers use regarding the time allotted to particular ADL tasks. For positioning, Medicaid suggests 15 minutes for the task to move the recipient into and out of a bed, chair, or wheelchair. *Id.* This can be done every 2 hours, when medically indicated. *Id.*

32. The requested PCS hours must be medically necessary. The Agency argues that the PCS hours are not medically necessary because they are in excess of the Petitioner's needs. This is because the Petitioner is already receiving 12 hours of PDN services and care from his mother. Effectively, Petitioner is mainly requesting 24 hours of care because his mother is unable to lift him when he is in pain or needs feeding, grooming, or to be moved into a different mobility device. There was no direct competent evidence or verification of mother's shoulder injury and limitations provided during the hearing.

33. Petitioner's father also suggested 6 PCS hours would be acceptable if 12 hours could not be approved. Based on the guidelines for PCS, and the testimony regarding Petitioner's needs at night, Petitioner's request is excessive.

34. It is clear that Petitioner has a complex medical condition and requires assistance. The issue is that he already receives PDN services, which would duplicate the requested PCS care. In order to keep the services from overlapping, Petitioner's father explained that PCS service would be used during the day and the PDN would be at night.

35. The issue then becomes whether the 12 hours of PDN services are medically necessary at night, or if they can be used during the day as the Agency suggests.

36. The first prong of "medically necessary" is that the service must "[b]e necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain." Petitioner argues that PDN is necessary to prevent significant illness and alleviate severe pain. The first part of the argument, regarding significant illness, is that Petitioner will burn calories as he thrashes in bed and will lose weight. Additionally, he could fall out of bed during his thrashing and hurt himself or cut himself on the bed apparatus. There is no evidence that Petitioner falls out of bed regularly or that he requires nursing intervention to stop his thrashing. This behavior is something any competent adult can supervise, and does not require a skilled nurse or paraprofessional.

37. The next part of Petitioner's argument is that the PDN is necessary to alleviate severe pain. This pain is caused by Petitioner's GERD and reflux. According

to testimony, Petitioner's gas pains cause him to scream and thrash. The thrashing will cause reflux, which in turn causes additional pain. To relieve the pain, the caregiver must lift and hold Petitioner until he calms, which can take over an hour. Therefore, Petitioner reasons that a provider at night can alleviate the severe pain by lifting and holding Petitioner because his mother is injured and cannot do so.

38. This argument fails for two reasons. First, his pain is not constant, and testimony was that he needed the care "if he had pain." The only testimony on the frequency was from the Petitioner's father, who admittedly is not the primary caregiver and only cared for him on infrequent weekends. He felt that it was a constant need because the child cannot self-soothe and the caregiver may not get any sleep at night. PDN and PCS cannot be approved for supervision purposes or "what if" scenarios, especially if the caregivers are available, albeit sleeping. Second, a skilled nurse (PDN) is not required to reposition and console a child. Any competent adult can perform this task. PDN cannot be approved when a lesser service would be appropriate and when the caregivers are available. "Parents... must participate in providing care to the fullest extent possible." Medicaid Handbook at 2-24. No direct competent evidence or verification of Petitioner's mother's shoulder injury or her limitations was provided.

39. There is no evidence that the child requires medical interventions (which must be provided by a skilled nurse) on a regular basis at night. Petitioner's caregiver is competent and able to give his medications and feedings at night. It is concluded that the service requested is for supervision purposes, in case Petitioner has pain or thrashes about in bed to trigger reflux.

40. Petitioner did not show by a preponderance of the evidence that additional PCS hours are necessary and that his needs cannot be met by using PDN during the day. There is no indication that a skilled caregiver is medically necessary at night or that there is a need for continuous skilled care or assistance at night.

41. Based on the evidence presented, in conjunction with the above cited rules, the hearing officer concludes that the Agency's decision to deny Petitioner's request for personal care services for the period of November 14, 2013 through January 12, 2014, was correct.

### **DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner's appeal relating to PCS is denied and the Agency's action is affirmed. Petitioner's appeal related to OT is dismissed as moot.

### **ATTORNEY'S FEES**

The petitioner indicates that he will be seeking an award of attorney's fees, pursuant to §120.595(1), Fla. Stat. In French v. Dep't of Children and Families, 920 So.2d 671 (Fla. 5th DCA 2006), the Fifth District Court of Appeals addressed the issue of attorney's fees for Medicaid Fair Hearings conducted by a Department of Children and Families hearing officer and determined that only an Administrative Law Judge at the Division of Administrative Hearings (DOAH) may order fees under §120.595(1), Fla. Stat. Therefore, this request is denied as non-jurisdictional. However, the petitioner's request puts respondent on notice that he intends to seek such an award

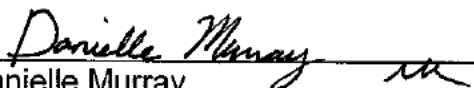
and at the close of this proceeding the Petitioner may wish to file the request for fees with DOAH.


**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 2<sup>th</sup> day of May, 2014,

in Tallahassee, Florida.

  
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