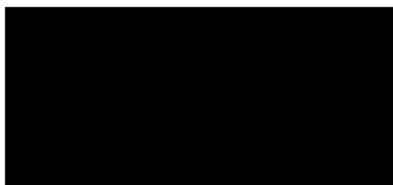


FILED

MAY 26 2015

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

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



APPEAL NO. 15F-00800

PETITIONER,

Vs.

CASE NO.

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

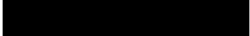
RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on April 30, 2015, at approximately 9:47 a.m. in Bradenton, Florida.

APPEARANCES

On behalf of Petitioner:  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 partially denying Petitioner's request for personal care services (PCS) hours for the certification period of January 1, 2015 through June 30, 2015. The burden of proof on this issue is with Petitioner.

PRELIMINARY STATEMENT

Petitioner was not present at the hearing. Petitioner's waiver support coordinator, [REDACTED] appeared as a witness for Petitioner. Dr. Ellyn Theophilopoulos, Physician Consultant with eQ Health Solutions, appeared as a witness for the Agency.

Petitioner requested four hours of PCS Monday through Friday. The Agency, through eQ Health Solutions, granted two hours on Monday through Thursday. It denied the remaining two hours requested Monday through Thursday, and denied the four hours requested on Friday. On the record, the Agency agreed to approve two hours of PCS on Friday. This order will only address the remaining request for the additional two hours that were denied for Monday through Friday.

Petitioner submitted three exhibits, marked and entered as Petitioner's Exhibits 1 through 3. Respondent admitted seven exhibits, marked and entered as Respondent's Exhibits 1 through 7. The hearing officer took administrative notice of the Home Health Services Coverage and Limitations Handbook (October 2014) and the cases contained in the Agency's EPSDT Memorandum (August 2, 2013).

The record was left open until May 6, 2015 to allow eQ Health the opportunity to consider the updated support plan which it did not have prior to hearing. There was no response, so the undersigned assumes no change in eQ's position based on the new information. The record closed on May 6, 2015.

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 11-year-old male with autism. He is ambulatory and independent in most activities but requires prompting and supervision to ensure a task is performed safely and correctly. He cannot follow multi-step directions. He elopes and has some behavior issues which result in aggression and self-injury. He requires constant supervision and assistance with some activities of daily living (ADLs). Specifically, he needs assistance with hygiene and feeding. Although he can independently feed, he will gorge himself on food and may choke, requiring supervision. Beyond the ADL assistance, Petitioner needs someone to do enriching activities with him to ensure he is not engaging in undesirable activities or behaviors.

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 Petitioner or his family. The decision made by each physician at eQHealth was solely based on the information submitted by the providers.

5. Petitioner is in school Monday through Friday from 8:30 a.m. to approximately 3:30 p.m., or 2:30 p.m. if he is having therapy that day. Petitioner's father works out of town and is unavailable Monday through Thursday. He is only available after about 5:00 p.m. on Fridays. Petitioner's mother works from home approximately 3 hours each day after Petitioner is home from school. Her schedule is 3:00 p.m. to 6:00 p.m. on Monday and Friday, 4:00 p.m. to 7:00 p.m. on Tuesday and Thursday, and 5:00 p.m. to 7:00 p.m. on Wednesdays. This is approximately three hours each evening on weekdays that Petitioner's parents are unavailable to care for Petitioner.

6. Petitioner requested the PCS hours because he needs assistance with feeding, toileting, grooming, and supervision. The PCS would also be used for transportation home after school if permitted. Petitioner's mother is unable to care for Petitioner while she is working at night, and the father is mostly unavailable.

7. There is no medical documentation indicating Petitioner's mother has any physical limitations making her unable to care for Petitioner.

8. By notice dated January 13, 2015, the Agency denied some of the requested hours because the hours were deemed not medically necessary. It stated specifically "[t]he already approved services should be sufficient to assist the patient with ADLs while the parents are working. The additional services appear to be for supervision which is not a covered service." There was no reconsideration done on this case. Petitioner requested a Medicaid fair hearing on January 23, 2015.

PRINCIPLES OF LAW AND ANALYSIS

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 (EPSDT) 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 working when Petitioner is home after school. However, she is available later in the evenings and on some days, before she begins work. She could assist after work with his late evening ADLs, such as bathing and brushing teeth. There was no justification for additional ADL assistance beyond the care needed after school for meal assistance and hygiene. All criteria must be met in order to receive personal care services through Medicaid.

23. The Agency approved two hours of personal care services. 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). eQ Health acknowledged that some of these tasks may take longer depending on the individual Petitioner. There was no evidence presented that indicated Petitioner needed additional time to complete tasks.

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. Supervision to prevent elopement and provide enriching activities can be provided by any competent adult.

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, and testimony at hearing, indicates a need for some assistance with ADLs, supervision, and a possible need for behavioral services. Medicaid does not provide general supervision to a recipient, only assistance with ADLs. Personal care service hours are not intended to assist with supervision or behavioral needs; they are for ADL assistance only.

28. Based on the evidence presented, in conjunction with the above-cited rules, the hearing officer concludes that Respondent's decision to deny two personal care hours Monday through Friday for the period of January 1, 2015 through June 30, 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 21~~st~~ day of May, 2015,

in Tallahassee, Florida.


Danielle Murray
Hearing Officer
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Copies Furnished To: [REDACTED] Petitioner
Don Fuller, Area 6, AHCA Field Office Manager