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

[redacted]

PETITIONER,

APPEAL NO. 15F-00826

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 06 Pasco
UNIT: AHCA

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, Hearing Officer Patricia Antonucci convened an administrative hearing in the above-captioned matter on March 17, 2015 at approximately 11:30 a.m. All parties and witnesses appeared via teleconference. The minor petitioner was not present in on the conference line, but had representation in attendance throughout the proceeding.

APPEARANCES

For the Petitioner: [redacted] Petitioner's father
[redacted] Petitioner's stepmother

For the Respondent: Stephanie Lang, Registered Nurse Specialist
Agency for Health Care Administration

STATEMENT OF ISSUE

At issue is a decision by Respondent, the Agency for Health Care Administration (AHCA or 'the Agency') to deny Petitioner's request for institutional services under the

Statewide Inpatient Psychiatric Program ("SIPP"). Petitioner bears the burden of proving, by a preponderance of the evidence, that said denial was improper.

PRELIMINARY STATEMENT

[redacted], the Petitioner's father and stepmother/designated representatives, appeared on Petitioner's behalf. Stephanie Lang, AHCA Registered Nurse Specialist, represented the Respondent. AHCA presented the following witnesses from Petitioner's managed care health plan, Amerigroup Community Care (Amerigroup): Tracey Smithey, M.D., Behavioral Health Medical Director; Susan Bramer, Director of Behavioral Health; and Tracy Parks, Manager of Clinical Quality/ Grievances and Appeals. Respondent's Exhibits 1 through 5, inclusive, were entered into evidence. Administrative Notice was taken of pertinent legal authority.

After proceeding to hearing and securing testimony from both sides, the record was held open so that Respondent could submit additional documentation referenced at hearing, which was not previously filed or provided to Petitioner. Petitioner was assigned a deadline by which to submit a written response to the supplemental information. Respondent's documentation was timely received. Copies of 42 C.F.R. § 441.152, Fla. Admin. Code R. 65E-10.018, and Fla. Stat. § 394.492 and § 394.67 were Administratively Noticed. Respondent's additional supplements were entered as follows:

- Respondent's Exhibit 6: Medicaid printouts reflecting that there is no currently promulgated SIPP Handbook (pages 56-57);

- Respondent's Composite Exhibit 7: Amerigroup's January 9, 2015 notifications to Petitioner and Petitioner's providers that denial was upheld upon Amerigroup's review (pages 273-289)

Petitioner's 3-page e-mail response, dated March 25, 2015, was entered as Petitioner's Exhibit 1.

FINDINGS OF FACT

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

1. The Petitioner is a 16-year-old male, born [redacted] He has a history of behavioral problems, both at home and at school. He is diagnosed with Oppositional Defiance Disorder, depression, and a mood disorder (NOS). He also exhibits learning disabilities and attention deficit hyperactivity disorder (ADHD). His family medical history includes bipolar and manic depressive disorders.

2. Petitioner currently lives with his father, stepmother, and four younger siblings: one biological brother and three stepbrothers. He has an older sister who is a member of the military and does not reside in the family home. As a young child, Petitioner observed discord between his mother and father, until his mother left the household. His mother suffers from mental illness and alcoholism, and Petitioner may have witnessed past domestic violence between her and her boyfriend. Petitioner's father has sole custody, and reports that although the biological mother maintains contact with her other children, she is less involved with Petitioner, himself.

3. The Petitioner attends school under an individualized education plan (IEP), due to short-term memory deficits and language delays. He has difficulty focusing on tasks, and although he is afforded additional time to complete assignments, he still has trouble handing work in on time. Petitioner's IEP includes language therapy, a behavior intervention plan, a "dropout prevent program," and optional tutoring. He is

involved in ROTC and plans to enlist in the military upon graduation from high school. He has a low grade point average (currently failing several classes) and frequently fails to submit his assignments. He also has a school disciplinary history, the most recent of which is an out of school suspension related to an incident on or about January 22, 2014, when he skipped class to meet up with an ex-girlfriend, and allegedly made contact with/kissed her against her will.

4. Approximately two and half years ago, Petitioner began receiving outpatient counseling services. Within these sessions, Petitioner has reported difficulty sleeping and frustration with his family, stating he feels that his father and stepmother show preferential treatment to his siblings, while being very strict with him. The Petitioner is noted to constantly seek his father's approval, and to suffer from underlying issues of abandonment and low self-esteem. Progress notes reflect that in joint counseling sessions with Petitioner and his father, both individuals were at times frustrated and angry. Several notes reference the father's desire to place Petitioner in a Runaway Alternatives Project (RAP) house or crisis unit due to Petitioner's disrespectful attitude, poor academic performance, and behavioral issues. These notes also indicate parental reluctance to attempt alternative measures.

5. Also through counseling, Petitioner has indicated an understanding of the need to take responsibility for his actions, but a lack of ability to do so when engaged in an argument. Nonetheless, through July of 2014, Progress Notes frequently reflect "substantial progress in being able to maintain his behavior and make positive choices."

6. Petitioner's father and stepmother are very concerned about Petitioner's well-being, and the safety of his younger siblings. The report that he is defiant, lies, and

steals from the family. He has attempted to run away on two occasions. Since January 2014, Petitioner has been involuntarily committed to a crisis unit and/or RAP house on five occasions: January 23rd, May 20th, September 17th, September 23rd, and November 12th. These commitments, under Florida's Baker Act, were for verbal threats, threats of suicide, and physically aggressive behaviors, including one incident where Petitioner punched a hole in a wall, and another where he kicked at his father.

7. The Petitioner is prescribed Prozac and Concentra, and takes Lithium to control behavior. He receives weekly therapeutic behavioral on-site (TBOS) services – both family and individual sessions, on alternating weeks. He also receives case management at school and at home, as well as medication management. Through these services, Petitioner's family is directly involved in counseling and/or case management approximately three times per month. His father and stepmother feel that he is not making sufficient progress with these services, and seek SIPP placement to fortify Petitioner's skills, assist him to cope with his behavioral and emotional issues, and ensure 24-hour monitoring.

8. On September 23, 2014, Dr. Rosemary Odocha of BayCare Behavioral Health (Baycare) authored a letter in which she recommended SIPP, stating, in pertinent part:

> [Petitioner] has not responded effectively to the lesser restrictive therapeutic interventions and would benefit from placement in a more restrictive environment. The purpose of residential placement and the expected length of treatment had been reviewed with both the client and the parent/guardian.

9. On or about November 19, 2014, Petitioner's parents submitted an application for to the Child Specific Staffing Team (CSST). Based upon this application,

the CSST met on or about December 18, 2014. Notes from this meeting reflect an approval of SIPP placement; however, no member of the team testified at hearing to explain the review process.

10. On December 22, 2014, Baycare submitted to Amerigroup a 'Behavioral Health Inpatient Initial Review Form,' requesting SIPP authorization.

11. Via letter dated December 24, 2014, Petitioner and Baycare were notified of Amerigroup's decision to deny the request. This notice stated, in part:

> **The service(s) is not approved on 12/23/2014 because:**
> ...
> Admissions to residential treatment are very serious and should happen when an adolescent is so ill that she/he can only be helped with such an admission. In other cases of even significant illness, treatment outside of the hospital helps people get better and stay better. Your adolescent's provider told us why he/she thought your adolescent needed to be admitted. The information suggested that your adolescent could have been helped outside the hospital in a setting such as an intensive outpatient program. Specifically, the information that your provider gave us did not include a serious danger to self or others or other serious problems that could not be treated as successfully in a lower level of care without getting worse.

12. Upon receipt of this notice, Petitioner's parents requested that Amerigroup reconsider the SIPP denial. This internal appeal was denied/SIPP denial upheld by Amerigroup's Medical Director on January 9, 2015. Petitioner requested an administrative hearing to challenge this determination.

13. At hearing, Petitioner's father and stepmother testified that the Petitioner's current routine is going to school and therapy, coming home, taking a 3-hour nap, waking up for a while, and then returning to bed. They are concerned with this pattern, as they want to see Petitioner develop life skills and succeed.

14. Dr. Smithey, who is board certified in psychiatry and has practiced in the area of child psychiatry since 1990, testified on behalf of Amerigroup. Dr. Smithey reviewed Petitioner's case file, and does not agree that SIPP placement is an appropriate course of treatment at this time. She noted that SIPP placement, i.e., commitment in a locked facility, is to be reserved for children who are severely disturbed and so dangerous to themselves or others than they cannot be safely maintained in a community/family setting. It is Dr. Smithey's medical opinion that because Petitioner is maintained on Lithium, and does not exhibit hallucinations, self-injurious behavior, or suicidal actions, he does not require the intense level of treatment that SIPP provides. While he has been involuntarily committed because of a perceived danger to self or others, this threat is not considered ongoing/continuous. Petitioner exhibits defiance, opposition, and academic problems, but Dr. Smithey does not regard this as a major mental illness.

15. While Dr. Smithey noted that Petitioner is currently receiving TBOS and case management, she and Ms. Bramer (Amerigroup Director of Behavioral Services) recommended that Petitioner and his family participate in an interdisciplinary staffing to discuss Petitioner's case and implement an array of "tight wraparound" services, such as more intensive/frequent counseling. Until these community-based options are exhausted, Amerigroup does not believe SIPP placement is appropriate.

CONCLUSIONS OF LAW

16. By agreement between AHCA and the Department of Children and Families, the Office of Appeal Hearings has jurisdiction to conduct this hearing pursuant to Florida Statutes, Chapter 120.

17. Legal authority governing the Florida Medicaid Program is found in Florida Statutes, Chapter 409, and in Chapter 59G of the Florida Administrative Code. Respondent, AHCA, administers the Medicaid Program.

18. Via Fla. Stat. § 409.965, Petitioner receives coverage of Medicaid services through a contracted managed care plan, Amerigroup.

19. This is a Final Order, pursuant to § 120.569 and § 120.57, Fla. Stat.

20. This hearing was held as a *de novo* proceeding, in accordance with Fla. Admin. Code R. 65-2.056.

21. The burden of proof in the instant case belongs to Petitioner, who seeks SIPP placement. The standard of proof is preponderance of the evidence. (See Fla. Admin. Code R. 65-2.060(1).)

22. Section 409.905, Florida Statutes, 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....
>
> (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 all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems and conditions, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

23. Consistent with the law, AHCA's contracted HMO, Amerigroup, performs service authorization reviews for its members. Once Amerigroup receives a service request, its medical personnel conduct file reviews to determine the medical necessity of requested services, pursuant to the authorization requirements and limitations of the Florida Medicaid Program.

24. As of the date of this Final Order, there is no Medicaid SIPP Handbook currently promulgated by rule. As such, the undersigned must review Amerigroup's determinations in conjunction with provisions of medical necessity and pertinent legal authority.

25. Fla. Admin. Code R. 65A-1.702 defines SIPP as:

> (16) Statewide Inpatient Psychiatric Program (SIPP) waiver. This program provides inpatient mental health treatment and comprehensive case management planning to enable discharge to less restrictive settings in the community for children under the age of 18 who are placed in an inpatient psychiatric program. Those who are Medically Needy and those who are Medicare recipients are excluded from this program. Services must be received from a designated provider selected by AHCA. This program provides an exception to provisions that residents of an institution for mental disease (IMD) are not eligible for Medicaid.

26. 42 CFR § 441.152 (Inpatient Psychiatric Services for Individuals Under Age 21 in Psychiatric Facilities or Programs) states:

> Certification of need for services.
> (a) A team specified in Sec. 441.154 must certify that--
> (1) Ambulatory care resources available in the community do not meet the treatment needs of the recipient;
> (2) Proper treatment of the recipient's psychiatric condition requires services on an inpatient basis under the direction of a physician; and
> (3) The services can reasonably be expected to improve the recipient's condition or prevent further regression so that the services will no longer be needed.
> (b) The certification specified in this section and in Sec. 441.153

satisfies the utilization control requirement for physician certification in Sec.Sec. 456.60, 456.160, and 456.360 of this subchapter.

27. In addition, residential placement also requires that a recipient to meet certain criteria. These criteria are set forth in Fla. Admin. Code R. 65E-10.018, as follows:

(1) To be eligible to be admitted to a program encompassed by these rules, a child must:
(a) Be under the age of 18;
(b) Be currently assessed within 90 days prior to placement by a psychologist or a psychiatrist licensed to practice in the State of Florida, with experience or training in children's disorders; who attests, in writing, that:
1. The child has an emotional disturbance as defined in Section 394.492(5), F.S., or a serious emotional disturbance as defined in Section 394.492(6), F.A.C.;
2. The emotional disturbance or serious emotional disturbance requires treatment in a residential treatment setting;
3. A less restrictive setting than residential treatment is not available or clinically recommended;
4. The treatment provided in the residential treatment setting is reasonably likely to resolve the child's presenting problems as identified by the psychiatrist or psychologist;
5. The nature, purpose, and expected length of treatment have been explained to the child and the child's parent or guardian.
(c) Have been reviewed at a minimum by the child and family specific team and been presented with all available options for treatment.
(2) General revenue funds designated as children's mental health funding shall not be used to maintain children over the age of 18 in programs encompassed by these rules or to place a child for whom no appropriate services are available in Florida in an out of state residential treatment program which is not an approved Medicaid provider in the state where the child is being placed.
(3) Placement of children and youth in therapeutic out of home settings with general revenue funds is dependent on the availability of funds.

28. The applicable definitions of "emotional disturbance" referenced in the above Rule are found in Fla. Stat. § 394.492(5 and 6):

(5) "Child or adolescent who has an emotional disturbance" means a person under 18 years of age who is diagnosed with a mental, emotional,

or behavioral disorder of sufficient duration to meet one of the diagnostic categories specified in the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association, but who does not exhibit behaviors that substantially interfere with or limit his or her role or ability to function in the family, school, or community. The emotional disturbance must not be considered to be a temporary response to a stressful situation. The term does not include a child or adolescent who meets the criteria for involuntary placement under s. 394.467(1).
(6) "Child or adolescent who has a serious emotional disturbance or mental illness" means a person under 18 years of age who:
(a) Is diagnosed as having a mental, emotional, or behavioral disorder that meets one of the diagnostic categories specified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association; and
(b) Exhibits behaviors that substantially interfere with or limit his or her role or ability to function in the family, school, or community, which behaviors are not considered to be a temporary response to a stressful situation.

29. Fla. Admin. Code R. 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.

30. As the Petitioner is under 21, a broader definition of medically necessary applies to include the Early and Periodic Screening, Diagnosis, and Treatment Services (EPSDT) requirements. The undersigned must, therefore, consider both EPSDT and standard Medical Necessity requirements (both cited, above) when developing a decision.

31. EPSDT augments the Medical Necessity definition contained in the Florida Administrative Code via the additional requirement that all services determined by the agency to be medically necessary for the *treatment, correction, or amelioration* of problems be addressed by the appropriate services.

32. 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 (citations omitted).

33. In terms of being specific and individualized, in keeping with Fla. Admin. Code R. 59G-1.010(166)(2), Petitioner's request for SIPP meets portions of the criteria set forth in Fla. Admin. Code R. 65E-10.018. However, both 65E-10.018 and 59G-1.010(166)(2) also bear the requirement that SIPP (or any service) not be in excess of the patient's needs.

34. Respondent notes that SIPP is excessive because Petitioner's behaviors escalate to the point of constituting harm to self or others only on a temporary basis. (*See* Fla. Stat. § 394.492(6)(b)). On these occasions, Petitioner is committed to a crisis unit for stabilization, and then realized back into the community. Along with these temporary, emergency placements, Petitioner is maintained through Lithium, other psychotropic medications, and his IEP.

35. Respondent acknowledges that Petitioner may need increased/more frequent services that are currently provided; however, due to the significant restrictions inherent in SIPP, Respondent is hesitant to commit Petitioner to this institutionalized placement until all community-based and less restrictive options are attempted.

36. Although Petitioner's physician and the CSST recommended SIPP placement, neither the physician nor anyone from the team testified at hearing to explain their review process. There is no evidence to suggest that, for example, increased counseling (frequency and/or intensity) was considered and ruled out. Absent exhaustion of such less-restrictive measures, the undersigned cannot conclude that SIPP is appropriate, particularly for an adolescent who seems to exhibit mainly defiance, academic issues, and situational outbursts.

37. When jointly considering the requirements of both ESPDT and medical necessity, along with a review of the totality of the evidence and legal authority, the undersigned concludes that Petitioner not met his burden to show that SIPP placement was improperly denied.

38. It is evident that Petitioner's parents are genuinely concerned for his health and safety. As such, they are strongly encouraged to work with Amerigroup to develop a comprehensive array of services to meet, but not exceed, Petitioner's needs.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner's appeal is hereby DENIED.

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 9th day of June, 2015,

in Tallahassee, Florida.

Patricia C. Antonucci

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