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

FILED
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OFFICE OF APPEAL HEARINGS
DEPT OF CHILDREN & FAMILIES

[redacted]

APPEAL NO. 15F-01140

PETITIONER,

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 05 MARION
UNIT: AHCA

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, hearing convened on March 19, 2015 before Hearing Officer Patricia C. Antonucci of the Department of Children and Families. All parties and witnesses appeared via teleconference.

APPEARANCES

For the Petitioner: [redacted] Petitioner's mother

For the Respondent: Alice Reshard, Program Administrator
Agency for Health Care Administration

STATEMENT OF ISSUE

At issue is a decision by Respondent, the Agency for Health Care Administration (AHCA), to terminate Petitioner's Prescribed Pediatric Extended Care (PPEC) via a 30-day fade/transition. Respondent bears the burden of proving, by a preponderance of the evidence, that this termination is proper.

PRELIMINARY STATEMENT

At hearing, the minor Petitioner was not present, but was represented by his mother, [redacted] Respondent was represented by Alice Reshard, Program Administrator with AHCA. Respondent presented one additional witnesses: Darlene Calhoun, M.D., Physician Reviewer with eQHealth Solutions.

Respondent's Exhibits 1 through 12, inclusive, were admitted into evidence. Administrative Notice was taken of Fla. Stat. § 400.913 (1&2), Fla. Admin. Code R. 59G-4.260, Fla. Admin. Code R. 59G-1.010(164-166), and pertinent pages of the September 2013 Florida Medicaid Prescribed Pediatric Extended Care Services Coverage and Limitations Handbook (PPEC Handbook).

FINDINGS OF FACT

1. The Petitioner is a 1-year old male, born [redacted] He lives in the family home with his single, working mother.

2. Petitioner is and has been eligible to receive Medicaid services at all times relevant to these proceedings.

3. The Petitioner was born at 37 weeks gestation with a tracheoesophageal fistula, which has not been surgically repaired. He has since been diagnosed with chronic obstructive asthma, esophageal reflux, and failure to thrive. Petitioner also has diagnoses of plagiocephaly (positional skull flattening) secondary to torticollis (shortening of neck muscles).

4. The Petitioner experiences frequent respiratory infections, for which he visits the emergency room. He uses a nebulizer when an infection is present, but does not use one for maintenance. Petitioner's mother is able to assist in nebulizer use, when

needed. He also takes Tylenol and Benadryl. He is able to ambulate and can feed himself using a spoon.

5. Petitioner is under the 5th percentile in weight (most recently 18 pounds) and height for his age, but is noted to be growing steadily "along his own curve." He visits his pediatrician monthly, and was recently prescribed PediaSure (3 times/day) in addition to nutritional formula. He cannot tolerate milk. He has been referred to several specialists, including a pediatric gastroenterologist for reflux, and an otolaryngologist for chronic ear infections and potential placement of ear tubes. His pediatrician has also recommended that he undergo genetic screening to test for Down Syndrome. As of the date of hearing, no test results or additional diagnoses were available from these referrals.

6. Per Petitioner's mother, the Petitioner initially began attending PPEC in order to obtain physical therapy for torticollis. He has been attending PPEC since the age of 6 months; however, Petitioner's mother has only met with the physical therapist once, and does not know whether Petitioner has a plan of care. She has noticed improvement since Petitioner began attending, and feels that he did well and progressed within the program.

7. On or about December 29, 2014, Petitioner's PPEC provider submitted a request on behalf of the Petitioner, to continue his previously authorized PPEC services (5 days per week, 8 hours per day) into her new certification period, spanning January 7, 2015 through July 5, 2015.

8. This prior service authorization request was submitted to AHCA's peer review organization (PRO), along with information and documentation required to make a

determination of medical necessity. The PRO contracted by AHCA to review PPEC requests is eQHealth Solutions, Inc. (eQHealth).

9. On January 2, 2015, the PRO reviewed Petitioner's request for services and all supporting documentation. By letter dated January 5, 2015, the PRO notified Petitioner's provider of its decision to approve services only until October 21, 2014, stating, in pertinent part:

> PR Principal Reason – Denial: Requested services are denied because the clinical information does not support the medical necessity.
>
> Clinical Rationale for Decision: The patient is a 1 year old with a history of failure to thrive, asthma, tracheoesophageal fistula and gastroesophageal reflux disease. The patient has received no nebulizer treatments while attending PPEC in the past 2 months. The patient is below the 5% for weight. The patient is on Alimentum and table foods....[he] has had emergency room visits for upper respiratory infections [and] receives physical therapy while attending PPEC. The clinical information provided does not appear to support skilling nursing services; however, 30 days will be approved to provide the caregiver [time] to transition out of PPEC.... [the patient] does not meet the medical complexity requirement of PPEC services.

10. In response to this notice, on or about January 9, 2015, Petitioner's provider requested reconsideration of the PRO's determination. Along with the reconsideration request, the provider submitted notes from a doctor's visit on January 8, 2015, during which Petitioner was seen for an earache and prescribed antibiotics.

11. Via letter dated January 12, 2015, the PRO notified Petitioner, in pertinent part:

> The reason for the denial is that the services are not medically necessary as defined in 59G-1.010(166), Florida Administrative Code (F.A.C.), specifically the services must 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.
>
> If you do not agree with this decision, your or your authorized representative may ask for a fair hearing... If this action is a termination, reduction, or suspension of your services, your services may continue until the fair hearing decision if you submit the request for a fair hearing within 10 calendar days of the date of this notice or prior to the end of your current certification period 2/7/2015, whichever is later.

12. On January 26, 2015, Petitioner requested a hearing to challenge the PROs determination. Petitioner's services did not continue pending the outcome of this appeal. However, at hearing, Respondent noted that because Petitioner had requested hearing within the timeframe noted on the denial letter, he was entitled to have services reinstated, pending the outcome of his appeal. Petitioner opted to accept reinstatement.

13. At hearing, Dr. Calhoun explained that she reviewed Petitioner's request for services in conjunction with his Plan of Care and PPEC Assessment and Daily Progress Notes.

14. Petitioner's Plan of Care reflects that he is totally dependent on others for ADL care, due to his functional limitations. While he requires precautions/monitoring, the only interventions (aside from a physical therapy evaluation) indicated on the Plan are the administration of a nebulizer and use of ambu-bag, in case of emergency. The "Current Medical Condition" portion of Petitioner's Plan states that he is monitored for feeding intolerance, reflux and potential for aspiration. The PPEC Assessment notes that Petitioner needs "PPEC services for administering his medication and reinforcement towards his care."

15. In the time since Petitioner last attended PPEC (approximately one month prior to hearing), his mother has been bringing him with her to work. She states that he has good days and bad days, but that he was doing better while attending the PPEC program.

16. It is Dr. Calhoun's opinion that at this time, Petitioner does not require that skilled nursing interventions be provided on a regular basis. While Dr. Calhoun would encourage Petitioner to be evaluated for physical therapy, as a distinct service, she feels that there is no current requirement for nursing services via PPEC.

PRINCIPLES OF LAW AND ANALYSIS

17. 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.

18. Respondent, the Agency for Healthcare Administration, administers the Medicaid Program. Legal authority governing the Florida Medicaid Program is found in Fla. Stat., Chapter 409, and in Chapter 59G of the Florida Administrative Code.

19. The September 2013 Florida Medicaid Prescribed Pediatric Extended Care Services Coverage and Limitations Handbook (PPEC Handbook) has been promulgated into rule by Fla. Admin. Code R. 59G-4.260.

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

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

22. The burden of proof in the instant case is assigned to the Respondent, who seeks to terminate a previously authorized service. The standard of proof in an

administrative hearing is preponderance of the evidence. (See Fla. Admin. Code R. 65-2.060(1).)

23. Fla. Stat. § 409.905 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.

24. Page 1-1 of the PPEC Handbook notes that, "[t]he purpose of the Florida Medicaid Prescribed Pediatric Extended Care (PPEC) Services Program is to enable recipients under the age of 21 years with medically complex conditions to receive medical and therapeutic care at a non-residential pediatric center." Page 1-2 adds that "PPEC services are not emergency services," (emphasis added).

25. On page 2-1 – 2-2, the PPEC Handbook lists the requirements for PPEC services.

> To receive reimbursement for PPEC services, a recipient must meet all of the following criteria:
> - Be Medicaid eligible.
> - Diagnosed with a medically-complex or medically fragile condition as defined in Rule 59G-1.010, F.A.C.
> - Be under the age of 21 years.

> • Be medically stable and not present significant risk to other children or personnel at the center.
> • Require short, long-term, or intermittent continuous therapeutic interventions or skilled nursing care due to a medically-complex condition.

26. Fla. Admin. Code R. 59G-1.010 defined "medically complex" and "medically fragile" as follows:

> (164) "Medically complex" means that a person has chronic debilitating diseases or conditions of one or more physiological or organ systems that generally make the person dependent upon 24-hour-per-day medical, nursing, or health supervision or intervention.
> (165) "Medically fragile" means an individual who is medically complex and whose medical condition is of such a nature that he is technologically dependent, requiring medical apparatus or procedures to sustain life, e.g., requires total parenteral nutrition (TPN), is ventilator dependant, or is dependent on a heightened level of medical supervision to sustain life, and without such services is likely to expire without warning. (emphasis added)

27. Consistent with the law, AHCA's agent, eQHealth, performs service authorization reviews under the Prior Authorization Program for Medicaid recipients in the state of Florida. Once eQHealth receives a PPEC 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.

28. 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.

29. As the petitioner is under the age of 21, a broader definition of medically necessary applies, to include the Early and Periodic Screening, Diagnosis, and Treatment Services (EPSDT) requirements. Both EPSDT and Medical Necessity requirements (both cited, above) have been considered in the development of this Order.

30. 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.

31. 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).

32. In the instant case, PPEC is requested to treat and ameliorate the supervisory and monitoring needs which Petitioner's health conditions require. As such, in a general sense, PPEC is in keeping with Fla. Admin. Code R. 59G-1.010(166)(1). Because PPEC is a recognized Medicaid service, it is consistent with generally accepted medical standards, per Fla. Admin. Code R. 59G-1.010(166)(3).

33. More specifically, however, Fla. Admin. Code R. 59G-1.010(166) also requires that any authorized service not be in excess of a patient's needs, be furnished in a

manner not intended for convenience, and be a service for which no equally effective and less-costly treatment is available. In order for PPEC to fulfill these criteria, the Petitioner must fulfill the requirements for PPEC, as provided in the PPEC Handbook.

34. There is little evidence to suggest that the Petitioner is dependent upon 24-hour per day medical or nursing care, or that he is dependent upon life-sustaining medical equipment, such that he would properly be deemed 'Medically Fragile.' His need for supervision, occasional medication administration, and general monitoring and precautions do not constitute a need for "intermittent continuous therapeutic interventions or skilled nursing care." As such, his needs do not support the authorization of PPEC, which cannot be authorized as a sitting service, particularly when there is no skilled therapy or intervention provided at the PPEC site. In essence, this would constitute approval of PPEC as an emergency service, in direct violation of the PPEC Handbook (page 1-2).

35. The Petitioner may require continued or more focused physical therapy, so that he is better able to manage the torticollis, decrease any resultant pain, and eventually, aid in his own ADL care. While it is understandable that Petitioner's mother is concerned for her son's well-being, PPEC cannot be authorized to assist a child who *does* have health concerns, but is not "medically complex." As therapy services are authorized and billed separately from PPEC, it is appropriate to request them as a distinct service.

36. 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 AHCA has met its burden of proof, and shown that denial of PPEC services is appropriate in the instant case.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner's appeal is 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 12th day of May, 2015,

in Tallahassee, Florida.

Patricia C. Antonucci
Hearing Officer
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