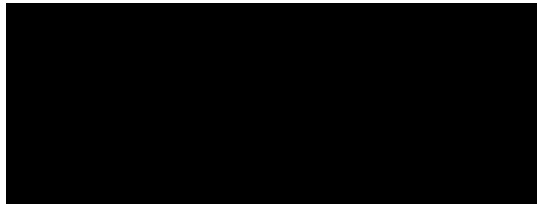


FILED

Jan 14, 2016

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

Office of Appeal Hearings
Dept. of Children and Families



APPEAL NO. 15F-08071

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 09 Orange
UNIT: AHCA

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-styled matter on December 3, 2015, at approximately 2:09 p.m. in Orlando, Florida.

APPEARANCES

For Petitioner:



Petitioner's mother

For Respondent:

Doretha Rouse
Registered Nurse Specialist
Agency for Health Care Administration

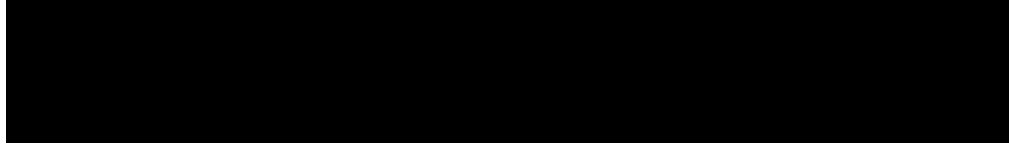
STATEMENT OF ISSUE

At issue is whether or not Respondent's denial of Petitioner's request for a Rifton Activity Chair ("Rifton") is correct. The burden of proof is assigned to Petitioner.

PRELIMINARY STATEMENT

Petitioner's mother represented him at the hearing. Respondent presented the following witnesses by telephone:

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-
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Petitioner moved Exhibits 1 and 2 into evidence at the hearing. Respondent's Exhibits 1 through 8 were entered into evidence at the hearing. The undersigned took administrative notice of the Florida Medicaid Durable Medical Equipment and Medical Supply Services Coverage and Limitations Handbook, July 2010.

FINDINGS OF FACT

Based upon 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. Petitioner is a 9-year-old male. At all times relevant to this proceeding, Petitioner was eligible to receive Medicaid services.
2. Petitioner is enrolled with Children's Medical Services ("Ped-I-Care") as his Managed Medical Assistance (MMA) plan.
3. Petitioner's primary diagnosis is Wolf-Hirshhorn Syndrome, which causes global developmental delay. Petitioner requires total assistance with all of his activities of daily living (ADLs).
4. Petitioner has a custom wheelchair, a Zippee TS ("Zippee"). It is designed to provide custom head, trunk, and pelvic support. It has a tilting function that is supposed to allow correct head alignment for safe feeding. It was provided to him when he lived in New York.

5. Ms. Gaines said if Petitioner's Zippee is not meeting his needs he can have it evaluated by a technician and modified as necessary. Petitioner's mother said it was evaluated and the technician told her that the Zippee and the Rifton tilt at different angles and the tilt angle is very minimal compared to the Rifton system. She said the Zippee gives him good trunk support and the headrest supports his head, but the headrests on the Zippee and Rifton are not the same.

6. The Zippee allows more movement of his head, making it more difficult to feed him. Ms. Gaines said the headrest can be changed or modified and that the angle that the Zippee tilts the seat-to-back angle can be modified. Ms. Gaines also testified the vendor that submitted the price quote for the Rifton is very experienced in making the adjustments and Ped-I-Care has not received anything regarding a need for customized adjustments. [REDACTED] said there is some missing information and that it would make sense for the Rifton vendor to communicate with Ped-I-Care's consultant because they don't understand why the Zippee is not meeting Petitioner's needs since it is customized for him.

7. Petitioner also has a Leckey positioning chair that was provided to him approximately seven (7) years ago when he lived in New York. Petitioner has outgrown the chair. Petitioner seeks to replace the Leckey with the Rifton. The Rifton has similar functionality to the Leckey as far as feeding is concerned. Petitioner's mother still continues to feed him in the Leckey because she is afraid he might aspirate if fed in the Zippee because he has a high risk for aspiration. She says he is steadier in the Leckey because of the tilt angle and she has more control

with feeding him in it. Petitioner eats three (3) to five (5) times per day, including both meals and snacks.

8. Petitioner was hospitalized two (2) years ago for almost three (3) months and was on a ventilator with pneumonia due to complications from a surgery. His mother testified his lungs are very weak.

9. Petitioner's mother said they use the Zippee primarily for transportation and the Leckey primarily for feeding. Respondent's position is that the Rifton would be duplicative of the functions of the Zippee and the Zippee should have the ability for safe feeding. Ms. Gaines testified the Zippee can be used for both transportation and positioning.

10. The Zippee requires tools to adjust its height and its seat-to-back angle. The Rifton does not require tools. The Rifton is not customized and is easy to adjust because it is designed for settings such as schools, where multiple children will use the same chair at different times. Ms. Gaines said the Rifton's height can be adjusted to drop almost all the way to the floor, but the Zippee cannot.

11. Ms. Gaines testified that as Petitioner grows the Zippee would need adjustment, which would require tools, but that it should be infrequent. Regarding the seat-to-back angle, she said it should not be adjusted frequently because Petitioner should not stay in the chair for extended periods of time. She said the seat-to-back angle can be adjusted on the Rifton without tools, but that it is still limited.

12. The Rifton can lean forward 15 degrees, which would allow Petitioner to wash his hands or reach something that requires leaning forward. The Zippee cannot lean forward. Ms. Gaines said Petitioner is documented to have extremely limited head

and trunk control, so leaning him forward could put him at increased risk of injury.

She also said Petitioner is documented to have poor control of his hands and is unable to reach and manipulate objects, so it does not appear that he would be able to independently turn the water on and wash his hands at this time. She does not see any benefit to Petitioner from being able to lean forward.

13. Petitioner lives in a two-story home with his mother, brother, sister, and maternal grandparents. Petitioner's mother is unable to move the Zippee upstairs because it weighs around 85 pounds and is too heavy for her. His mother carries him upstairs at night to his bedroom.

CONCLUSIONS OF LAW

14. By agreement between AHCA and the Department of Children and Families, the Office of Appeal Hearings has jurisdiction to conduct this hearing pursuant to § 120.80, Fla. Stat.

15. This hearing was held as a *de novo* proceeding, in accordance with Florida Administrative Code Rule 65-2.056.

16. This is a Final Order, pursuant to Sections 120.569 and 120.57, Fla. Stat.

17. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," (Black's Law Dictionary at 1201, 7th Ed.).

18. Legal authority governing the Florida Medicaid Program is found in Fla. Stat. Chapter 409, and in Chapter 59G of the Florida Administrative Code. Respondent, AHCA, is the single state agency that administers the Medicaid Program.

19. The July 2010 Florida Medicaid Durable Medical Equipment and Medical Supply Services Coverage and Limitations Handbook ("DME Handbook") is promulgated into law by Chapter 59G of the Florida Administrative Code.

20. Page 2-5 of the DME Handbook states the service criteria for DME as follows:

All DME, medical supplies, and orthotics and prosthetic devices must be:

- Medically necessary, and
- Functionally appropriate for the individual recipient, and
- Adequate for the intended medical purpose, and
- For conventional use, and
- For the exclusive use of the recipient.

DME items requested or supplied must not duplicate or perform the same function as other DME equipment or medical supplies currently in the recipient's possession. (emphasis added).

21. The definition of "medically necessary" is found in Fla. Admin. Code R. 59G-1.010, which states, in part:

(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.

22. Since Petitioner is under 21 years of age, a broader definition of medical necessity applies to include the Early and Periodic Screening, Diagnosis, and Treatment Services (EPDST) requirements. § 409.905, Fla. Stat., Mandatory Medicaid services, provides that Medicaid services for children include:

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.

23. Under the above statute, the Agency must provide durable medical equipment that would correct or ameliorate Petitioner's condition.

24. 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)) (emphasis added).

25. Consistent with these requirements, the state is obligated to provide services to 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 and the state is authorized to establish the amount, duration, and scope of such services.

26. In the instant matter, Petitioner has not met his burden of proof to show he requires the Rifton. The Zippee appears to be able to perform all of the medically necessary functions for Petitioner and the Rifton would be duplicative. Adjustments to the Zippee seems to be the appropriate solution. The fact that the adjustments require tools on the Zippee and do not on the Rifton is a matter of convenience, not necessity.

27. The undersigned notes Petitioner’s mother is genuinely concerned for her son’s safety. ██████████ emphasized that the ultimate goal is to ensure Petitioner’s safety, only there isn’t enough information as to why the Zippee cannot allow for safe feeding. The Zippee is designed to provide for safe feeding. Petitioner was using the Leckey for

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feeding when he was hospitalized, so there is no guarantee the Rifton would be any safer for feeding than the Zippee.

28. Petitioner's mother is encouraged to work with the provider and Ped-I-Care to determine what adjustments to the Zippee are needed. In the event adjustments cannot provide for safe feeding, it may be appropriate for a new custom wheelchair or a Rifton to be provided at that time.

DECISION

Based upon the foregoing, 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.

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DONE and ORDERED this 14 day of January, 2016,

in Tallahassee, Florida.



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