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

APPEAL NO. 14F-03411

PETITIONER,

Vs.

CASE NO.

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

RESPONDENT.
_______________________________/

FINAL ORDER

Pursuant to notice, a telephonic hearing in this matter convened on May 29, 2014 at approximately 1:11 p.m.

APPEARANCES

For the Petitioner: ██████ Petitioner's mother

For the Respondent: Patricia Brooks, Medicaid Program Office
Area 8, Agency for Healthcare Administration (AHCA)

STATEMENT OF THE ISSUE

At issue is whether AHCA was correct to deny petitioner's request for an additional four units/one hour per week of Occupational Therapy (OT) for the certification period beginning January 22, 2014 and ending on July 27, 2014. Petitioner seeks eight (8) units of OT per week, for a total of two hours of OT per week. The respondent has approved four (4) units, for a total of one (1) hour per week of OT.

PRELIMINARY STATEMENT

The minor Petitioner was not present, but was represented by his mother, [redacted] No other witnesses appeared on behalf of petitioner. Patricia Brooks, AHCA Area 8 Program Director, represented the respondent. Rakesh Mittal, M.D., Physician Reviewer with AHCA's contracted review agency, eQHealth Solutions appeared on behalf of respondent.

Respondent's Exhibits 1 through 7 were marked and accepted into evidence. Respondent's exhibits included a Memorandum of Law regarding Medicaid's interpretation of Early and Periodic Screening, Diagnosis, and Treatment (EPSDT). Administrative Notice was taken of: Fla. Admin. Code R. 59G-4.320, Fla. Stat. § 409.905(2), and excerpts from the Florida Medicaid Therapy Services Coverage and Limitations Handbook (August 2013).

Petitioner's exhibits1 through 3 were marked and accepted into evidence. The record was held open to allow petitioner the opportunity to provide supplementary evidence. Petitioner did not present any that supplementary evidence.

FINDINGS OF FACT

1. The Petitioner is a [redacted]

2. At all times relevant to this matter, Petitioner has been eligible to receive and has been receiving Medicaid services.

3. Petitioner has been diagnosed with speech delay, pervasive developmental delay and was recently diagnosed with Autism Spectrum Disorder (ASD).

4. Petitioner began receiving Speech Therapy (ST) and OT following an evaluation. On January 27, 2014, Petitioner's provider agency, Sensory Solutions, LLC, submitted a

request on behalf of the Petitioner, for OT services of four units, two times per week. Included with the request for services were Petitioner's OT Evaluation and Plan of Care.

5. A prior service authorization request is submitted by a provider along with information and documentation required to make a determination of medical necessity. The request is reviewed by a peer review organization (PRO), in this case, eQHealth Solutions, Inc., who is contracted by AHCA.

6. Petitioner's service request was submitted to the PRO for an increase in OT from one hour per week to two hours per week during the certification period of January 22, 2014 through July 27, 2014.

7. Once the PRO receives a service request, it conducts a first-level, clinical review, and/or secondary review by a Florida-licensed physician, who makes a determination regarding medical necessity of the service and the frequency of service requested.

8. On January 28, 2014, a first-level reviewer examined Petitioner's OT request, noting,

> There is insufficient documentation of deficits, impairments and goals to support the requested intensity of services. Based on the deficits and goals that have been documented, National Guidelines suggest 4 units 1 times/week for 26 weeks. If the recipient's condition changes such that an increase of services is warranted during the certification period, the provider may submit a modification request.

9. Also on January 27, 2014, the physician reviewer noted:

> PR APPROVAL RATIONALE: Approve appropriate units to provide therapy to a patient with developmental delay.
> CLINICAL RATIONALE FOR DECISION: 2 yo with pervasive developmental delay. Therapy is needed to improve vestibular processing and tolerating "messy play' and to decrease proprioceptive seeking behaviors.

10. On January 29, 2014, the PRO notified Petitioner's physician and provider of its intent to deny the requested increase in OT services.

11. Petitioner's Occupational Therapy Evaluation and Plan of Care indicates that:

> [Petitioner] is a bright 2-year-old boy who has recently been diagnosed with autism (level III, 4/10/14. He demonstrates moderate sensory processing difficulties, including tactile and oral defensiveness and verbal and proprioceptive under-registration. He demonstrates age-appropriate fine and gross motor skills. While [petitioner] demonstrates difficulty with transitions, in general he appears to be a very happy, curious boy with well-supported social-emotional developments. Weekly skilled occupational therapy is recommended to address sensory processing, transitions, feeding and behavior...

12. The Plan of Care indicated that petitioner's "therapy prognosis is excellent secondary to strong family involvement and client factors.

13. An update to petitioner's Plan of Care, dated April 11, 2014, indicates that he "has made excellent progress." The long-term goals in the Plan of Care were that [petitioner'] will improve his sensory processing in order to increase participation in

14. Petitioner did not make a timely request for reconsideration of the decision because the ASD diagnosis had not yet been received, but did make a timely request for a fair hearing. Petitioner has requested specific treatment for the ASD, which is pending and not the subject of this hearing.

15. Petitioner's mother expressed her belief that additional OT hours were needed because of petitioner's recent diagnosis of ASD. He has many areas of difficulty, but his sensory processing and tactile senses are most affected. She indicated that he has made great improvement, but does not yet have the quality of life+ the parents are looking for. With the current one hour of OT per week, he has made some gains and has seen excellent progress.

16. Dr. Mittal has been a physician for 25 years, and is Board Certified in general pediatrics and in pediatric emergency medicine. At hearing, Dr. Mittal stated that the PRO conducted a paper review of Petitioner's file, examining only documents submitted by his provider. The PRO did not speak to Petitioner's caregivers or examine the Petitioner, in person, but reviewed the request for medical necessity, considering the requirements for medical necessity under Early and Periodic Screening, Diagnosis, and Treatment and other relevant authority.

17. It is his opinion that petitioner's new diagnosis is not important at this time. What is important are the deficits. Petitioner's social behavior is normal, his eating is normal and his motor skills are normal. He believes that 4 units once a week, followed reinforcement at home is fine. Dr. Mittal stated that at petitioner's age his attention span is limited to less than 5 minutes as a time and he cannot yet participate in intensive therapy. He suggested that perhaps petitioner receive 2 units (30 minutes) twice a week.

CONCLUSIONS OF LAW

18. 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.

19. 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, administers the Medicaid Program.

20. The Florida Medicaid Therapy Services Coverage and Limitations Handbook, August 2013 (The Handbook) has been incorporated, by reference, into Fla. Admin. Code 59G-4.320(2).

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

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

23. The burden of proof in the instant case is assigned to the Petitioner. The standard of proof in an administrative hearing is preponderance of the evidence. (See Fla. Admin. Code R. 65-2.060(1).)

24. 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.

25. As AHCA's PRO agent, eQHealth performs service authorization reviews under the Prior Authorization Program for Medicaid recipients in the state of Florida. Once the PRO receives a OT 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, and the review process described, above.

26. 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:
> 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.

27. 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. Both EPSDT and Medical Necessity requirements (both cited, above)l must be considered.

28. 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.

29. 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).

30. The parties agree that OT services are necessary to treat and ameliorate the language disorder which Petitioner's speech/language disorder present. The fact that OT is in keeping with Fla. Admin. Code R. 59G-1.010(166)(1) is not in dispute.

31. In terms of being specific and individualized, per Fla. Admin. Code R. 59G-1.010(166)(2), petitioner's POC is based upon his therapist's evaluation, using standardized tests and professional observation and treatment of the petitioner and is "an individualized and specific written program...designed to meet the medical, health and rehabilitative needs of the recipient." (See page 2-11 of the Handbook).

32. Fla. Admin. Code R. 59G-1.010(166)(2) requirements that any provided service not be in excess of the patient's needs. The Handbook describes the services covered under the Florida Medicaid Home Health Services Program, including occupational therapy. Occupational therapy services include evaluation and treatment to prevent or correct physical and emotional deficits, minimize the disabling effect of these deficits, maintain a level of function, acquire a skill set or restore a skill set.

33. Fla. Admin. Code R. 59G-1.010(166)(3) does require that a service be consistent with generally accepted professional medical standards as determined by the Medicaid program.

34. Dr. Mittal's testimony was clear that, given petitioner's current condition and age (and attention span), coupled with the participation of the parents at home, the recommended 4 units a week are sufficient to meet petitioner's needs.

35. After examining all testimony and evidence, it is determined that petitioner requires OT to address the effects of his deficits, well as the underlying causes. These needs and the intensive therapeutic plan for addressing same substantiate approval of OT at four units of service, one time per week, at this time. Petitioner has shown progress during the prior certification period and is doing well

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 petitioner has not met his burden of proof to show that one weekly session of OT is not appropriate.

DECISION

Petitioner's appeal to increase his hours of OT 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 30th day of July, 2014,

in Tallahassee, Florida.

Nancy Hutchinson
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal_Hearings@dcf.state.fl.us

Copies Furnished To: [redacted] Petitioner
Dietra Cole, Area 8, AHCA Field Office Manager