FILED
JUL 22 2014
OFFICE OF APPEAL HEARINGS
DEPT OF CHILDREN & FAMILIES

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

APPEAL NO. 14F-03964

PETITIONER,

Vs.

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

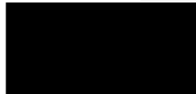
RESPONDENT.

______________________________/

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on June 26, 2014 at 1:30 p.m.

APPEARANCES

For the Petitioner:  Mother

For the Respondent: Doretha Rouse, Registered Nurse Specialist

STATEMENT OF ISSUE

At issue is the Respondent's action in partially denying Personal Care Services for the current certification period.

PRELIMINARY STATEMENT

The Agency contracts with a Quality Improvement Organization ("QIO"), eQHealth Solutions, to perform medical utilization reviews for private duty nursing and personal care services through a prior authorization process for medicaid beneficiaries.

Through this contractual agreement, eQHealth Solutions is authorized to make determinations of medical necessity on behalf of the Agency and act as a witness in all related fair hearing proceedings.

A prior service authorization request is submitted by a provider along with information and documentation required to make a determination of medical necessity. Initial requests for private duty nursing and personal care services will be authorized for up to 60 days (two-month period) to allow for reassessment of the recipient's condition. Thereafter, a medical necessity review is conducted every 180 days (six-month period). If necessary, a request for modification may be submitted by the provider.

Witness for the Petitioner was [redacted] his sister-in-law and personal care support/respite provider. Witness for the Respondent was Rakesh Mittal, M.D., Physician Consultant with eQHealth Solutions.

Respondent's exhibits 1-13 were entered into evidence. Petitioner's composite exhibit 1 was entered into evidence.

FINDINGS OF FACT

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

1. Petitioner is a [redacted] with a medical history remarkable for autism, developmental delay, and aggressive behavior. He is ambulatory, on a regular diet, and is incontinent of bowel and bladder.

2. Petitioner resides with his parents in the family home. The mother has no limitations in caring for the Petitioner. Petitioner attends school from 8:00 a.m. to 3:30 p.m. on school days.

3. The mother works a variable schedule from 6:00 p.m. to 6:30 a.m. on Tuesday, Wednesday, and Saturday. The father allegedly works from 7:00 a.m. to 3:30 p.m. Monday through Friday. However, no work schedule form was submitted for the father.

4. On March 21, 2014 [redacted] submitted a request for Personal Care Services ("PCS") for eight hours per day seven days per week. A physician's order for the services was also submitted.

5. By notice dated April 28, 2014, a QIO physician consultant with eQHealth Solutions informed Petitioner and [redacted] of a partial denial of the requested hours for the certification period spanning from April 1, 2014 to September 30, 2014. Two hours of PCS were approved on Tuesday, Wednesday, and Saturday. The principal reason for this decision is the clinical information provided does not support the medical necessity of the requested services. The physician consultant further reasoned the additional hours are excessive and appear to be for supervision and behavior redirection which are not covered services.

6. During a reconsideration review completed on May 3, 2014, a second QIO physician upheld the original decision.

7. Plan of Care ("POC"), dated March 19, 2014, lists no functional limitations.

8. Physician Visit Form, dated March 19, 2014, indicates Petitioner needs services because he is a danger to self and others and is sometimes aggressive. He also needs to be taken for doctor's visits and needs medication administration.

9. Petitioner's mother asserts he is more like a three year old. She is his provider for personal care services. However, since losing services she has had to find a second job. She asserts Petitioner vomits and uses the bathroom on himself.

10. Petitioner was approved for behavioral services last week through Medicaid State Plan. In addition, Petitioner receives approximately 19 hours per week in respite services through the Agency for Persons with Disabilities.

11. Respondent argued home health services are not intended for supervision and safety. Services cannot be authorized for vomiting which is episodic in nature. Likewise, services cannot be authorized for social and family issues and behavioral issues as a home health aide is not an expert in these fields. Respondent argued the mother works from home and is only working three days per week. In view of this, she should be able to provide care for Petitioner.

CONCLUSIONS OF LAW

12. The Department of Children and Families Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Florida Statutes § 120.80. The Office of Appeal Hearings provided the parties with adequate notice of the administrative hearing.

13. Florida Medicaid State Plan is authorized by Chapter 409, Florida Statutes, and Chapter 59G, Florida Administrative Code. The program is administered by the Agency for Health Care Administration.

14. This hearing was held as a de novo proceeding pursuant to Rule 65-2.056, Florida Administrative Code.

15. The burden of proof was assigned to the Petitioner in accordance with Rule 65-2.060(1), Florida Administrative Code. This request is considered an initial application for services.

16. The standard of proof needed to be met for an administrative hearing is by a preponderance of the evidence, as provided by Rule 65-2.060(1), Florida Administrative Code.

17. 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.

18. 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 (EPDST) requirements. Fla. Stat. § 409.905, 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.

19. 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.

20. 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)).

21. 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 and the state is authorized to establish the amount, duration, and scope of such services.

22. The Florida Medicaid Home Health Services Coverage and Limitations Handbook- March 2013 ("Medicaid Handbook") has been incorporated by reference into Florida Administrative Code Rule 59G-4.130(2).

23. 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).

24. Personal care services are limited by the exclusions and limitations specified in the Medicaid Handbook. Page 2-11 of the Medicaid Handbook provides a list of

services excluded by Medicaid State Plan for home health services. This list includes the following:

- Baby-sitting

25. Activities related to supervision are termed “baby-sitting” in the Medicaid Handbook and are noted as a service exclusion. Page 1-3 of the Handbook defines babysitting 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.”

26. Regarding safety concerns, page 2-1 of the Medicaid Handbook indicates home health services are not to be “considered emergency services.”

27. Page 2-24 of the Medicaid Handbook places an emphasis on parental responsibility. The Medicaid Handbook states “parents and legal guardians must participate in providing care to the fullest extent possible.” The controlling authority make clear that medicaid services cannot be furnished in a manner primarily intended for the convenience of the caregiver.

28. The fact that a physician prescribes PCS services does not in itself make these services medically necessary. Rules and regulations associated with the Home Health Services program must also be adhered to.

29. PCS are intended to provide medically necessary assistance with ADLs that support a recipient's medical care needs. The evidence shows Petitioner is ambulatory, on a regular diet, and is incontinent of bowel and bladder. The evidence further shows that Petitioner requires a great deal of supervision.

30. Supervision can be provided by any competent adult and does not require the skills of a paraprofessional, such as a home health aide. The controlling authorities make clear that Medicaid services cannot be in excess of the patient's needs.

31. After taken into account the mother's work schedule, the Petitioner's ADL needs, the behavioral services being received, and the additional respite hours, the presently authorized hours appear to be sufficient and medically necessary. The evidence suggests Petitioner's ADLs can be completed with the PCS hours allotted.

32. After careful review of the evidence submitted and the relevant laws set forth above, the undersigned concludes the Agency's action was proper and the Petitioner's burden was not met.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is hereby 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 23rd day of July, 2014, in Tallahassee, Florida.

La Toya Jackson

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Copies Furnished To: [redacted] Petitioner
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