

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

FILED

AUG 20 2009

OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-02664

PETITIONER,

Vs.

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

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on July 8, 2009, at 8:54 a.m. The petitioner was not present. The petitioner was represented by \_\_\_\_\_, Esq. and \_\_\_\_\_, Esq. Witnesses for the petitioner were the petitioner's mother, \_\_\_\_\_; the petitioner's nurse \_\_\_\_\_, licensed practical nurse with \_\_\_\_\_, and \_\_\_\_\_, director clinical services for \_\_\_\_\_. The respondent was represented by Bevin Brown, Esq., assistant general counsel Agency for Health Care Administration. Witness for the respondent from the Agency Health Care Administration was Stephanie Lang, registered nurse specialist. Present by telephone as witnesses for the respondent from Keystone Peer Review Organization (KePRO) were Rakesh Mittal, M.D., physician reviewer, and Melanie Clyatt, registered nurse review operations supervisor. Observing were Andrea Bacon, worker with the Medicaid

Resource Unit, and \_\_\_\_\_, Esq., legal director for the Advocacy Center for Persons with Disabilities, Incorporated.

A motion was made by the petitioner for the record to be left open for the submission of a Proposed Final Order. The motion was granted and the record was left open for ten days. The petitioner's Proposed Final Order was due no later than July 20, 2009. The hearing officer received the Petitioner's Proposed Final Order on July 17, 2009. The record was closed on July 20, 2009.

### **ISSUE**

The petitioner is appealing the notices of March 16, 2009 and April 9, 2009 for the respondent's action to deny 516 hours of private duty nursing for the period of March 4, 2009 through August 30, 2009. The respondent has the burden of proof.

### **FINDINGS OF FACT**

1. The petitioner is a three year old Medicaid eligible individual. The petitioner care is medically complex. The petitioner resides with his mother, father and four siblings. One of the siblings is receiving private duty nursing services, provided by the same home health agency. The petitioner's other siblings ages are eight years old, six years old, two years old and 6 months old. The mother is employed and goes to school. The mother is trained in the petitioner's care and is the petitioner's primary caregiver. The father is employed.

2. The nursing agency requested 4,320 hours of private duty nursing for the petitioner for the period of March 16, 2009 and April 9, 2009. This request would be twenty four hours a day, seven days a week.

3. Prior authorization for private duty nursing is reviewed every 180 days. KePRO is the contract provider for the respondent for the prior authorization decisions for private duty nursing. The request for private duty nursing is reviewed by a nurse reviewer and a physician consultant.

4. The petitioner's home health agency submitted information pertaining to the petitioner to KePRO through an internet program. This information is generated for review by KePRO from the information entered by the petitioner's home health agency. This exchange of computer information is referred to as I-Exchange. The information provided by the home health agency is converted into a document called the Internal Focus Finding.

5. The initial nurse reviewer screened the petitioner's request for private duty nursing using the Internal Focus Finding. The nurse reviewer requested additional information regarding the mother and father's schedules. The provider responded:

Mother's schedule

Sunday	Church if possible
Monday	8am-5pm - School, sometimes has to stay until 7pm
Tuesday	8am-5pm - School, sometimes has to stay until 7pm
Wednesday	11am-8pm - School
Thursday	11am-8pm - School
Friday	9am-5pm - School
Saturday	9am-5pm - Salon

Father's schedule

Sunday	9am-10pm - Church, then to buyer appt/open houses
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Monday	8am-10pm – take son to school, then work
Tuesday	8am-10pm – take son to school, then work
Wednesday	8am-10pm – take son to school, then work
Thursday	8am-10pm – take son to school, then work
Friday	8am-10pm – take son to school, then work
Saturday	9am-6pm –work on the road and 6pm to 10pm to possibly 12am at home

The nurse reviewer reviewed the additional information received. The request was then referred to the board certified physician consultant.

6. The initial physician consultant determination was based on the information received from the nursing agency. The initial physician consultant noted that the petitioner was a three year old with developmental delay, poorly controlled seizures, GERD, G-tube, aspiration risk and parents work complex schedules. The initial physician consultant recommended an approval for skilled nursing for hours requested except that the mother should provide independent care 9:00 p.m. to 11:00 p.m. Mondays through Fridays and 1:00 p.m. to 11:00 p.m. on Sundays. On Saturdays, the respondent approved 24 hour nursing care. A PDN/PC Recipient Denial Letter was sent to the petitioner on March 16, 2009.

7. The home health agency requested reconsideration. The nursing agency indicated that the mother attends church on Sunday and uses the day to complete errands, cleaning the house and shopping due to the tight schedule with school and work. The mother's school schedule is Mondays, Tuesdays and Fridays form 8:00 a.m. to 5:00 p.m. The mother may work in a salon until 7:00 and sometimes does not get home until 9:00 p.m. This was a different schedule than the schedule previously given by the provider.

8. The reconsideration was reviewed by a second physician consultant. The second physician consultant upheld the previous denial of 516 hours. The respondent sent a PDN/PC Recipient Reconsideration - Denial Upheld notice on April 9, 2009. The notice informed the petitioner that for the requested 4,320 hours of private duty nursing for the period of March 4, 2009 through August 30, 2009, 3,804 hours were approved and 516 hours were denied. The hours that were denied were 9:00 p.m. to 11:00 p.m. Mondays through Fridays and 1:00 p.m. to 11:00 p.m. on Sundays.

9. The review physician attested as follows. The intent of the service of private duty nursing is to supplement care. The family is to provide the maximum number of hours of nursing care. There is no coverage for flex hours, respite care or recreation activity. KePRO did consider the parents' work schedule and that the petitioner has four siblings one of whom is receiving private duty nursing services. The review physician opined based on the mother's school/work schedule she was available to provide care for the petitioner from 9:00 p.m. to 11:00 p.m. Mondays through Fridays and as she goes to church and does not work on Sunday she was available to provide care 1:00 p.m. to 9:00 p.m.

10. The petitioner's nurse attested as follows. The petitioner is her only patient. She works four shifts to 10:00 p.m. for 32 hours a week. Her biggest concern for the petitioner is for aspiration. Her first priority is keeping the petitioner's G-tube vented and repositioning the petitioner. The petitioner is repositioned up to twenty times an hour. The petitioner flips over on to his back frequently. The petitioner will aspirate or vomit if he is on his back. The

petitioner gags frequently. She keeps records of the petitioner's seizures, monitors his oxygen, monitors the petitioner two pumps (food and water), monitors heart rate issues and provides suctioning as needed. The petitioner uses a nebulizer on as need basis. She opined that a non-trained medical professional would not be able to recognize when the petitioner was going into distress. She stated that the parents are trained and are capable.

11. The petitioner's mother attested as follows. The petitioner flips over on to his back frequently. The petitioner will aspirate or vomit if he is on his back. The petitioner feeding pump must be constantly adjusting. The petitioner cannot have any food in his stomach. The petitioner gags frequently. His seizure medication causes increased secretion. The petitioner's seizures and oxygen must be monitored. The petitioner has been hospitalized several times due to reduction of oxygen and seizures. What prevents her from providing care to the petitioner is that she cannot tell the petitioner's breathing sounds to diagnose if he is having a problem, the time demands with her other children, the constant adjusting of the petitioner tubes, the time demands of shopping, laundry and meal preparation and lack of medical training. As she had two disabled children, there is extra laundry as both are changed frequently.

12. The director of clinical services for the home health agency attested as follows. There is a limitation in the field on the questionnaire for the provider to submit information. The provider was unable to put in all diagnoses for the petitioner, all treatments for the petitioner, all medications for the petitioner, the parents' work schedules and the nurses' schedules. The petitioner's seven

pages of treatments had to be reduced to one sentence. The petitioner has seven to eight pages of medications that had to be reduced to half a page. The provider cannot get a copy of the completed questionnaire. She opined that the petitioner's care is much more complex than reflected in the I-Exchange or the Internal Focus Finding.

### **CONCLUSIONS OF LAW**

By agreement between the Agency for Health Care Administration and the Department of Families and Children, the Agency for Health Care Administration has conveyed jurisdiction to the Office of Appeal Hearings to conduct this hearing pursuant to Chapter 120.80 F.S. The Florida Medicaid Program is authorized by Chapter 409, Florida Statutes, and Chapter 59G, Florida Administrative Code. The Program is administered by the Agency for Health Care Administration.

1. As to the issue as to whether or not medical necessity was demonstrated for 24 hour private duty nursing.

Florida Administrative Code 59.G-1.010, "Definitions", states for medical necessity:

(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.

(b) "Medically necessary" or "medical necessity" for inpatient hospital services requires that those services furnished in a hospital on an inpatient basis could not, consistent with the provisions of appropriate medical care, be effectively furnished more economically on an outpatient basis or in an inpatient facility of a different type.

(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.

The Home Health Services Coverage and Limitation Handbook under Licensed Nurse and Home Health Aide Visit Services, on pages 2-14 and 2-15 "Skilled Nursing Services", states:

The following are examples of services that require the direct care skills of a licensed nurse:

- Administration of intravenous medication;
- Administration of intramuscular injections, hypodermoclysis, and subcutaneous injections only when not able to be self administered appropriately.
- Insertion, replacement and sterile irrigation of catheters;
- Colostomy and ileostomy care; excluding care performed by recipients;
- Treatment of decubitus ulcers when:  
deep or wide without necrotic center;  
deep or wide with layers of necrotic tissue; or  
infected and draining;
- Treatment of widespread infected or draining skin disorders;
- Administration of prescribed heat treatment that requires observation by licensed nursing personnel to adequately evaluate the individual's progress;
- Restorative nursing procedures, including related teaching and adaptive aspects of nursing, which are a part of active treatment and require the presence of licensed nurses at the time of performance;



- Nasopharyngeal, tracheotomy aspiration, ventilator care; Levin tube and gastrostomy feedings, excluding feedings performed by the recipient, family or caregiver; and
- Complex wound care requiring packing, irrigation, and application of an agent prescribed by the physician.

The Home Health Services Coverage and Limitation Handbook under Licensed Nurse and Home Health Aide Visit Services, on page 2-15 "Home Health Aide Services", states:

Home health aide services help maintain a recipient's health or facilitate treatment of the recipient's illness or injury. The following are examples of home health aide services reimbursed by Medicaid:

- Assisting with the change of a colostomy bag;
- Assisting with transfer or ambulation;
- Reinforcing a dressing;
- Assisting the individual with prescribed range of motion exercises that have been taught by the RN;
- Assisting with an ice cap or collar;
- Conducting urine test for sugar, acetone or albumin;
- Measuring and preparing special diets;
- Providing oral hygiene;
- Bathing and skin care; and
- Assisting with self-administered medication.

Home health aides must not perform any services that require the direct care skills of a licensed nurse.

The petitioner is medically complex. It is undisputed that nursing services are required. The petitioner medical needs include constant monitoring, positioning, venting and numerous other medical procedures. The evidence clearly supports that this petitioner requires 24 hour nursing care.

Simply because medical necessity is found for the petitioner to require 24 hour PDN does not mandate the granting of this benefit. The

analysis must continue to determine if there are other parties that may be responsible for providing this benefit.

II. As to the issue as to whether or not private duty nursing hours can be reduced pursuant to parental responsibility.

The Home Health Services Coverage and Limitation Handbook has been promulgated into rule in the Florida Administrative Code at 59G-4.130 (2). The Home Health Services Coverage and Limitation Handbook under Private Duty Nursing, on page 2-15 "Parental Responsibility", states:

Private duty nursing services are authorized to *supplement* care provided by parents and caregivers. Parents and caregivers must participate in providing care to the fullest extent possible...  
(emphasis added)

The basis for the reduction by the respondent was essentially that while medical necessity was demonstrated for skilled nursing services 24 hours daily, the hours should be reduced to allow for the parents to provide care to the fullest extent possible. The respondent determined that the reduction should be from 9:00 p.m. to 11:00 p.m. Mondays through Fridays, and 1:00 p.m. to 11:00 p.m. on Sundays. Counsel for the respondent argued that parents need to participate to the fullest extent possible. Counsel for the petitioner argued that private duty nursing for the petitioner was medically necessary for twenty four hours a day, seven days a week and that not all elements were addressed by KePRO. The director of clinical services from Maxim opined that not all information was considered by KePRO.

The hearing officer considered all evidence submitted at the hearing and reviewed all conditions as set forth the rules of the Program. The evidence demonstrates that the petitioner is in need of services. The issue then rests on whether the parents can provide the services during the time period that the respondent has determined that they should. We must look at the skill of the parents and the impact of other responsibilities in the household.

The services provided by the current skilled nurse for the petitioner include G-tube venting, repositioning, monitoring for aspiration, monitor for gagging, keep records of the petitioner's seizures, monitor oxygen, monitors the two pumps (food and water), monitors heart rate issues and provides suctioning as needed. The petitioner uses a nebulizer on as need basis. The mother is trained to provide all of this services and it is uncontested that she is capable of caring for the petitioner. Since the mother can safely provide care to the petitioner, we must then determine if there are other barriers to providing this care.

There are four other children in the home. The evidence clearly demonstrated that the petitioner requires constant care. Because of that, the mother will not be able to care for the other children at the same time. It is imperative that the father be in the home while the mother is caring for the petitioner. The father is working and unable to provide care for the petitioner for the hours of 9:00 p.m. to 10:00 p.m. Mondays through Fridays and 1:00 p.m. to 10:00 p.m. on Sundays. Both parents are in the home from 10:00 p.m. to 11:00 p.m. Mondays through Sundays. This time would allow the mother to provide care for the petitioner while the father attends to the petitioner's siblings. This

would give the mother until 10:00 p.m. at night on Sundays to attend church and complete shopping, laundry and meal preparation.

The evidence demonstrated that the petitioner's mother is very involved in the petitioner's care and is capable for caring for the petitioner. The hearing officer concludes that the mother could provide care from 10:00 p.m. to 11:00 p.m. Mondays through Friday and Sundays.

### **DECISION**

This appeal is denied, in part.

For the certification period of March 4, 2009 through August 30, 2009, private duty nursing is granted for the additional hours of 9:00 p.m. to 10:00 p.m. Mondays through Fridays and 1:00 p.m. to 10:00 p.m. on Sundays.


For the certification period of March 4, 2009 through August 30, 2009, private duty nursing is denied for the hours of 10:00 p.m. to 11:00 p.m. Mondays through Fridays and Sundays.

### **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 agency has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

FINAL ORDER (Cont.)  
09F-02664  
PAGE - 13

DONE and ORDERED this 20<sup>th</sup> day of August, 2009,  
in Tallahassee, Florida.

  
Linda Jo Nicholson  
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Copies Furnished To