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

PETITIONER,

Vs. APPEAL NO. 09F-02990

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 07 St. Johns
UNIT: AHCA

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on July 1, 2009, at 11:20 a.m., in St. Augustine, Florida. The petitioner was present and represented himself. The petitioner's personal care and companion care provider, ... was present as a witness. Also present as a witness for the petitioner was , community support coordinator with ... The respondent was represented by Michelle Manor, program administrator with the Agency for Health Care Administration. Present as a witness for the respondent was Kermy Hurte, Medicaid waiver specialist with the Brain and Spinal Cord Injury Program. Present telephonically as a witness for the respondent was Kristen Russell, Department of Health, Brain and Spinal Cord Injury program administrator.

ISSUE

At issue is the respondent's April 15, 2009 action reducing the petitioner's companion care hours received under the Brain and Spinal Cord Injury Medicaid Waiver Program (BSCIP). The respondent held the burden of proof.

FINDINGS OF FACT

1. The petitioner is a 51 year old male with a spinal cord injury. The petitioner is a quadriplegic; he has no use of his arms or legs and requires assistance with all the activities of daily living. The petitioner lives alone in his own home.

2. The petitioner has been receiving personal care (skilled nursing care such as bowel and bladder care) and companion care (services such as house cleaning, cooking, running errands) through the BSCIP since at least 2001. This program provides Home and Community Based Services (HCBS) to allow individuals who would otherwise require nursing home care or other institutional care to receive services in their own homes or in home-like settings.

3. Prior to the action under appeal, the petitioner was receiving four hours per day personal care per day, five days per week and four hours per day companion care, seven days per week. Effective April 15, 2009, the companion care hours were reduced to two hours per day, seven days per week. There was no change in the personal care hours. The BSCIP staff sent the petitioner written notification of the service reduction on April 20, 2009 (five days after the change was implemented).

4. The respondent explained that in early December 2008, BSCIP staff were informed that the program was planning to reduce services due to funding limitations. Program staff were instructed to consult with the recipients and the home health care

agencies in an effort to reduce services without adversely affecting the recipients' health or safety. The BSCIP waiver specialist visited the petitioner's home on April 1, 2009 to discuss possible service reductions. The BSCIP waiver specialist asserted that the petitioner agreed to the reduction in companion care hours during this meeting. The petitioner stipulated that the meeting did occur, but he does not recall the substance of the conversation. The petitioner explained that his medication sometimes causes confusion and he did not understand that his companion care hours were being reduced until April 15, 2009, when the reduction was actually implemented.

5. The petitioner argued that he needs four hours daily of companion care in part due to anxiety about being alone and the lack of ability to attend to his own needs. The petitioner's care provider explained that prior to the reduction, the companion care hours were performed from 7:00 pm to 11:00 pm. They are now performed from 7:00 pm to 9:00 pm. During this time, she cleans the house, does laundry, errands and cooks. It is the petitioner's nature to think of additional things he needs close to the end of her shift. It was easier to make sure the petitioner's needs were met in four hours, but she has been able to adjust her schedule and is now able to meet the petitioner's companion care needs in two hours. The petitioner's companion care provider acknowledged that the reduction in hours has not adversely affected the petitioner's health or safety. The BSCIP waiver specialist suggested the care provider and the petitioner make lists of things to accomplish each day so the petitioner does not become anxious towards the end of the care provider's shift. The petitioner and the care provider agreed that this was a good idea.

6. The petitioner's community support coordinator questioned why the reduction in companion care hours (effective April 15, 2009) occurred prior to the issuance of the written notice (notice was dated April 20, 2009) of adverse action. The BSCIP waiver specialist explained that he believed a verbal agreement existed between the petitioner and himself and therefore, he considered the written notice a formality. The petitioner did not incur any out of pocket expenses for companion services as a result of the respondent's untimely notice.

CONCLUSIONS OF LAW

Fla. Statutes Title XXIX Chap. 408.301 in part states:

> 408.301 Legislative findings.--The Legislature has found that access to quality, affordable, health care for all Floridians is an important goal for the state. The Legislature recognizes that there are Floridians with special health care and social needs which require particular attention. The people served by the Department of Children and Family Services, the Agency for Persons with Disabilities, the Department of Health, and the Department of Elderly Affairs are examples of citizens with special needs. The Legislature further recognizes that the Medicaid program is an intricate part of the service delivery system for the special needs citizens. However, the Agency for Health Care Administration is not a service provider and does not develop or direct programs for the special needs citizens. Therefore, it is the intent of the Legislature that the Agency for Health Care Administration work closely with the Department of Children and Family Services, the Agency for Persons with Disabilities, the Department of Health, and the Department of Elderly Affairs in developing plans for assuring access to all Floridians in order to assure that the needs of special citizens are met.

Fla. Statutes Title XXIX Chap. 408.302 states in part:

> (1) The Agency for Health Care Administration shall enter into an interagency agreement with the Department of Children and Family Services, the Agency for Persons with Disabilities, the Department of Health, and the Department of Elderly Affairs to assure coordination and cooperation in serving special needs citizens. The agreement shall include the requirement that the secretaries or directors of the Department of Children and Family Services, the Agency for Persons

with Disabilities, the Department of Health, and the Department of Elderly Affairs approve, prior to adoption, any rule developed by the Agency for Health Care Administration where such rule has a direct impact on the mission of the respective state agencies, their programs, or their budgets.

Fla. Admin. Code 59G-13.080 entitled "Home and Community-Based Services Waivers" establishes:

(1) Purpose. Under authority of Section 2176 of Public Law 97-35, Florida obtained waivers of federal Medicaid requirements to enable the provision of specified home and community-based (HCB) services to persons at risk of institutionalization. Through the administration of several different federal waivers, Medicaid reimburses enrolled providers for services that eligible recipients may need to avoid institutionalization. Waiver program participants must meet institutional level of care requirements. The HCB waiver services are designed to allow the recipients to remain at home or in a home-like setting. To meet federal requirements, Medicaid must demonstrate each waiver's cost-effectiveness.

(2) Definitions. General Medicaid definitions applicable to this program are located in Rule 59G-1.010, F.A.C. Additional descriptions of services available under this program are provided in subsection (3) of this rule. The following definitions apply:

(a) "Agency" means the Agency for Health Care Administration, the Florida state agency responsible for the administration of Medicaid waivers for home and community-based (HCB) services.

(b) "Department" means the Florida Department of Elderly Affairs (DOEA).

(3) Home and Community-Based (HCB) Waiver Services are those Medicaid services approved by the Centers for Medicare and Medicaid under the authority of Section 1915(c) of the Social Security Act. The definitions of the following services are provided in the respective HCB services waiver, as are specific provider qualifications. Since several similar services with different names may be provided in more than one waiver, this section lists them as a cluster. A general description of each service cluster is provided. Individuals eligible for the respective HCB services waiver programs may need and receive the following services:

(a) Adaptive and Assistive Equipment, and Adaptive Equipment, include selected self-help items that are necessary for recipient safety and

that assist recipients to increase their functional ability to perform activities of daily living.

(b) Adult Day Health Care and Day Health Care are services provided in an ambulatory care setting. They are directed toward meeting the supervisory, social, and health restoration and maintenance needs of adult recipients who, due to their functional impairments, are not capable of living independently.

(c) Caregiver Training and Support are services that encourage the provision of care for the recipient in the home or home-like settings from caregivers such as relatives, friends, and neighbors. Activities include workshops or in-home training conducted by professionals to increase the caregivers' knowledge of care giving skills and understanding of the aging or disease process and to provide emotional support through caregivers' support groups.

(d) Case Aide services are adjunctive to case management and provided by paraprofessionals under the direction of case managers. These services include: assistance with implementing plans of care, assistance with obtaining access to appointments for care plan and other services, supervision of provider activities, and assisting with linkages of providers with recipients via additional telephone contacts and visits. They will not develop care plans or conduct assessments or reassessments.

(e) Case Management, Waiver Case Management, and Support Coordination are services that assist Medicaid eligible individuals in gaining access to needed medical, social, educational and other services, regardless of funding source.

(f) Chore Services and Housekeeping/Chore Services are provided to maintain the home in a clean, sanitary and safe environment. Chore services will be provided only in cases where neither the recipient, nor anyone else in the household, is capable of performing or financially providing for them, and where no other relative, caretaker, landlord, community volunteer/agency, or third party payor is capable of or responsible for their provision.

(g) Companion Services include those activities necessary to assist the recipient in performing household or personal tasks and providing social stimulation to relieve the negative effects of loneliness and isolation.

Florida Administrative Code 59G-13.130, Traumatic Brain and Spinal Cord Injury Waiver Services, states:

> (1) This rule applies to all traumatic brain and spinal cord injury waiver services providers enrolled in the Medicaid program.
> (2) All traumatic brain and spinal cord injury waiver services providers enrolled in the Medicaid program must be in compliance with the Florida Medicaid Traumatic Brain and Spinal Cord Injury Waiver Services Coverage and Limitations Handbook, April 2006, incorporated by reference, and the Florida Medicaid Provider Reimbursement Handbook, Non-Institutional 081, which is incorporated by reference in Rule 59G-13.001, F.A.C. Both handbooks are available from the Medicaid fiscal agent.

The Florida Medicaid Summary of Services Handbook Traumatic Brain and Spinal Cord Injury Waiver Services, 2008 – 2009 states in part:

> Brain and Spinal Cord Injury Program Medicaid Waiver Program
>
> The Traumatic Brain Injury/Spinal Cord Injury Waiver Program allows individuals with a traumatic brain injury or spinal cord injury to live in their homes or in community based settings rather than living in a nursing facility...Waiver services include: adaptive health and wellness, assistive technologies, attendant care, behavioral programming, companion services, community support coordination, consumable medical supplies, environmental accessibility adaptations, life skills training, personal adjustment counseling, personal care and rehabilitation engineering evaluation.
>
> To be eligible for waiver services an individual must meet the following criteria:
>
> Must have one of the following conditions:
>
> Traumatic Brain Injury (TBI)...
> Spinal Cord Injury (SCI)...
> Must be considered medically stable...

The legal authorities cited above set forth the policies and procedures which govern the Brain and Spinal Cord Injury Program.

Fla. Admin. Code 65-2.060 in parts states:

> The burden of proof, except where otherwise required by statutes, is on the party asserting the affirmative of an issue. The burden is upon the Department when the Department takes action which would reduce or terminate the benefits or payments being received by the recipient. The burden is upon the petitioner if an application for benefits or payments is denied. The party having the burden shall establish his/her position, by a preponderance of evidence, to the satisfaction of the hearing officer.

The Code of Federal Regulations appearing in 42 C.F.R. § 431.206 states in part:

> Informing applicants and recipients.
>
> (a) The agency must issue and publicize its hearing procedures.
> (b) The agency must, at the time specified in paragraph (c) of this section, inform every applicant or recipient in writing--
> (1) Of his right to a hearing;
> (2) Of the method by which he may obtain a hearing; and
> (3) That he may represent himself or use legal counsel, a relative, a friend, or other spokesman.
> (c) The agency must provide the information required in paragraph
> (b) of this section--(1) At the time that the individual applies for Medicaid;
>
> (2) At the time of any action affecting his or her claim;

The Code of Federal Regulations appearing in 42 C.F.R. § 431.211 states in part:

> The State or local agency must mail a notice at least 10 days before the date.

The legal authorities cited above make it clear that recipients should be notified in writing at least 10 days prior to the effective date of any adverse action.

The respondent reduced the petitioner's companion care hours from four hours, seven days per week to two hours, seven days per week; the respondent believes two

hours is sufficient time to perform the companion care services required by the petitioner. The legal authorities cited above make it clear that the respondent holds the burden of proof. The petitioner's companion care provider acknowledged that the reduction in hours has not adversely affected the petitioner's health or safety; she is able to accomplish the required tasks in the allotted two hours.

The Findings of Fact shows that the respondent did not provide the petitioner 10 days written notice prior to implementing the reduction in companion care hours; the written notice was issued five days after the services were reduced. The above controlling federal authority requires that a written 10 day advance written notice be issued prior to a service being reduced. This allows the recipient to request a hearing and request that benefits be reinstated pending the outcome of the final order, before the reduction is effective. The written notice also helps assure that the recipient understands the proposed action and effective date; the petitioner did not have the benefit of this advance notice. However, the Findings of Fact show that the petitioner did not incur any out of pocket expenses for companion services as a result of the respondent's error and therefore, there is no corrective action the undersigned can order regarding this matter.

The testimony revealed that the necessary companion care can be provided within the reduced number of hours. After carefully reviewing the testimony, evidence and controlling legal authorities, the undersigned finds that the respondent met its burden of proof; the respondent's action reducing the companion care hours is affirmed.

DECISION

The appeal is denied.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the respondent. 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 First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. 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 Department has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE AND ORDERED this 27th day of July, 2009,

in Tallahassee, Florida.

Leslie Green

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Copies Furnished To: