

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

FILED  
AUG 11 2009  
OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN & FAMILIES

PETITIONER,

APPEAL NO. 09F-03108

Vs.

AGENCY FOR HEALTH CARE  
ADMINISTRATION (AHCA)  
CIRCUIT: 09 Osceola

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned in Kissimmee, Florida, at 2:33 p.m. on July 17, 2009. The petitioner was not present, but was represented by his mother, Lisette Knott, human service program specialist, represented the respondent. Robert Anthony Buzzeo, M.D., physician reviewer with KePRO and Theresa Ashey, R.N., operation supervisor with KePRO, presented testimony.

**ISSUE**

At issue was whether reduction in Private Duty Nursing (PDN) hours funded by AHCA was correct. The respondent bears the burden of proof.

**FINDINGS OF FACT**

1. The petitioner had been receiving PDN at a level of approximately 20 hours daily, under Medicaid. He is a profoundly incapacitated 96-pound

teenager, living with his family. He suffered cardio respiratory arrest at the end of 2008 and that made his condition more severe.

2. At the KePRO eligibility review, continuation of 20 hours PDN daily was requested. A total of 3600 hours was requested for the period of April 11, through October 7, 2009. Approval of 2289 hours was authorized and 1311 hours were denied. Notice of reduction, including reconsideration determination, was issued in April 2009.

3. The petitioner's mother appealed. She is the primary caregiver.

4. During prehearing conferences with another KePRO doctor and at hearing, more information became known about the family scheduling and needs. KePRO agreed that 2289 hours authorization was too low. KePRO staff agreed to rescind the 2289 hours PDN authorization. The KePRO doctor explained the plan would basically rescind the 11:00 a.m. to 3:00 p.m. PDN denial as related to the petitioner's sister's school days. This would achieve more than 2289, but less than 3600 PDN hours for the new period, and KePRO would need more schedule information. KePRO staff did not agree to renew the level of 3600 or 20 hours per day, however.

5. The respondent did not issue notice to the petitioner advising of the more favorable plan. The respondent did not issue notice rescinding the 2289-hour authorization.

6. The petitioner remained unsatisfied with the option presented to her by KePRO staff at the hearing. The petitioner wants the 3600 hours of PDN coverage to continue.

CONCLUSIONS OF LAW

By agreement between the Agency for Health Care Administration (AHCA) and the Department of Children and Families, AHCA has conveyed jurisdiction to the Office of Appeal Hearing to conduct this hearing pursuant to Florida Statute, Chapter 120.80.

Florida Administrative Code **65-2.049** addresses agency procedures when a hearing is requested. In relevant part, it informs:

...  
(2) Upon receipt of the Request for Hearing, a supervisory review is mandated. The supervisory review or interview may satisfy the appellant regarding his/her case so that a request for hearing is withdrawn. Should an error be discovered during this process, immediate action shall be taken to rectify it, and the appellant shall be so advised.

In this case, prehearing supervisory review occurred, including conferences with KePRO professionals. A more favorable agency action was anticipated, but the petitioner did not withdraw the appeal. Moreover, the plan for a more favorable action had not been issued officially.

Florida Administrative Code **65-2.056 Basis of Hearings** informs:

The Hearing shall include consideration of:

(1) Any Agency action, or failure to act with reasonable promptness, on a claim of Financial Assistance, Social Services, Medical Assistance, or Food Stamp Program Benefits, which includes delay in reaching a decision on eligibility or in making a payment, refusal to consider a request for or undue delay in making an adjustment in payment, and discontinuance, termination or reduction of such assistance.

(2) Agency's decision regarding eligibility for Financial Assistance, Social Services, Medical Assistance or Food Stamp Program Benefits in both initial and subsequent determination, the amount of Financial or Medical Assistance or a change in payments.

(3) The Hearing Officer must determine whether the department's decision on eligibility or procedural compliance was correct at the time the decision was made. The hearings are de novo hearings, in that, either party may present new or additional evidence not previously considered by the department in making its decision.

In the case at hand, the only official action taken by the respondent was the reduction from 3600 hours to 2289 hours of PDN. It may have been based on information available to KePRO at the time, but that information was apparently deficient. Another less harsh action based upon more complete and accurate information may be forthcoming and was discussed at the hearing. However, such action had not occurred prior to the hearing, and it was not anticipated to reauthorize the 3600 hours. The petitioner did not agree with an amount less than the 3600 hours and has not had opportunity to review any other notice of planned action. There was no agreement reached between the parties.

Florida Administrative Code **65-2.060 Evidence** (1), informs:

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 respondent had the burden of proof because the PDN hours were reduced. The undersigned has jurisdiction regarding official agency decisions, which were previously made and then appealed. In the case at hand, the respondent has already determined that the reduction to 2289 hours was too great. At one point, the information available to KePRO may have indicated

justification for such. However, at the hearing, KePRO staff declared that 2289 hours would not provide sufficient coverage given the facts of the case. Based upon evidence and rules, it is concluded that the plan to reduce to 2289 PDN hours is not appropriate. The notice under challenge has not been justified.

**DECISION**

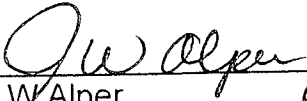

The appeal is granted and the respondent's action is not upheld.

**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.

DONE and ORDERED this 17<sup>th</sup> day of August, 2009, in

Tallahassee, Florida.

  
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J W Alper  
Hearing Officer   
Building 5, Room 255  
1317 Winewood Boulevard  
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850-488-1429

Copies Furnished To: