

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

FILED

AUG 31 2009

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

PETITIONER,
Vs.
AGENCY FOR HEALTH CARE
ADMINISTRATION (AHCA)
CIRCUIT: 18 Seminole
RESPONDENT.

APPEAL NO. 09F-03779

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned at 3:45 p.m. on July 9, 2009 in Orlando, Florida. The petitioner was not present, but was represented by her mother and father,

assisted by _____, waiver support coordinator. Lisette Knott, human service program specialist, represented the respondent. Telephone testimony of KePRO staff was available from Rakesh Mittel, MD pediatrician-physician reviewer, and Melanie Clyatt, RN review operation supervisor.

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 was receiving 24 hours daily private duty nursing service. This service was authorized through Agency for Health Care (AHCA) contracted with KePRO, under Medicaid.

2. The respondent conducted review in May 2009 and then a reconsideration.

3. The respondent issued notices on May 13, 2009 and on June 4, 2009 for the six-month period of April 1 thru September 27, 2009 approving 3392 hours of PDN and denying 928 hours of PDN for the same period.

4. The family appealed the reduction.

5. The respondent did not have accurate information from the nursing service agency during the review process. KePRO received more information about family schedule and capability on June 16, 2009. By that date, the hearing had already been requested. KePRO did not complete an additional review.

6. The family also submitted more information on July 2, 2009 to the hearing section in preparation for hearing. All information received in the hearing section was shared with AHCA on that same date.

7. KePRO staff at hearing acknowledged that the new and more accurate information would justify a determination that reduction was incorrect. KePRO acknowledged that a different amount of hours should be authorized and the current amount authorized does not reflect the need pursuant to the new information provided before the hearing. However, they did not have a recommendation of a new amount. KePRO acknowledged that they would still recommend a reduction in the hours but not the 928 hours originally denied.

8. The petitioner's family does not want any reduction in PDN hours.

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 Hearings 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, a more favorable agency action was anticipated, following additional information received by the reviewing agency before the hearing. However, the plan for a more favorable authorization action was not issued officially and the petitioner did not withdraw the appeal.

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 24 hours PDN to approval of 3392 and denial of 928 hours in a six month period. That reduction may have been based on information available to KePRO at the time, but that information was deficient. The respondent did acknowledge based upon the information provided at the hearing the number of hours that they would authorize has changed. They agreed that that the approval of 3392 hours was not correct. They were unable to give a specific number of hours that they were willing to authorize at the moment. What is clear is the respondent could no longer stand by prior authorized amount of PDN hours.

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. At one point, the information available to KePRO may have indicated justification for hours that were

authorized. However, at the hearing, KePRO staff declared that 3392 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 is not appropriate. The reduction of PDN hours under challenge has not been justified.

DECISION

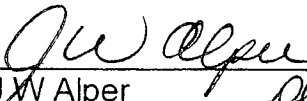
The appeal is granted and the respondent's action is not upheld.

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 31st day of August, 2009, in

Tallahassee, Florida.



JW Alper
Hearing Officer
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Tallahassee, FL 32399-0700
850-488-1429

Copies Furnished To: