

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

FILED

AUG 28 2009

OFFICE OF APPEAL HEARING  
DEPT. OF CHILDREN & FAMILI

APPEAL NO. 09F-04251

PETITIONER,

Vs.

AGENCY FOR HEALTH  
CARE ADMINISTRATION  
CIRCUIT: 14 Bay  
UNIT: AHCA

RESPONDENT.  
\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer by telephone on August 14, 2009, at 3:00 p.m., All parties participated by telephone. The petitioner was not present. He was represented by his mother, . . . . . The respondent was represented by Gina Nolan, Registered Nurse Specialist (RNS) with Agency for Health Care Administration (AHCA). Testifying on behalf of the respondent was Nita French, RNS with AHCA; Melanie Clyatt, RN reviewer operations supervisor with KePRO and Dr. Robert A Buzzeo, physician reviewer with KePRO.

**ISSUE**

The petitioner is appealing AHCA's action of June 18, 2009 to deny 156 hours Private Duty Nursing (PDN) from a request of 1,436 hours to 1,280 hours for the months of June 17, 2009 thorough December 13, 2009 based on the contention that the

intensity or level of medical care requested was not medically necessary. The Agency bears the burden of proof.

### **FINDINGS OF FACT**

1. The petitioner (date of birth \_\_\_\_\_), is a Medicaid recipient. A request for 1,436 hours of PDN was submitted by the provider, \_\_\_\_\_ Northwest Florida, for the period of June 17, 2009 through December 13, 2009.
2. The provider requested PDN services as follows: Monday through Friday (6:30 a.m. to 4:30 p.m.) and 6 hours on Sunday (8 a.m.- 2 p.m.) This totaled 1,436 hours.
3. The provider's request for PDN indicated that the child's parents were in the home. The father is a contractor working from 7 a.m. to 3:30 p.m. and the mother is a teacher at an academy for special students working from 7:30 a.m. to 3:30 p.m.
4. Requests for PDN are reviewed with a contract provider who completes prior authorization for the requested service. That contract provider is KePRO. The request for services is submitted by the home health care provider, in this case, Interim Health Care Services, Inc. All communication is sent between KePRO and the provider until a decision is reached. KePRO reviews the written request for services to determine if the number of hours requested are medically necessary. If additional information is needed, KePRO contacts the provider. Once services, as in this case, were rejected or modified, a notice is sent to the recipient's family.

5. KePRO received the request for 1,436 hours of PDN submitted by the provider, [REDACTED], KePRO Registered Nurse Reviewer (RNR) completed a screening of the Plan of Care submitted on June 17, 2009.

6. At AHCA's direction, the RNR used modified InterQual Criteria and a Pediatric Home Care Guide for Private Duty Nursing (PDN) Hourly Utilization to review the request for PDN services. Using that documentation, a Utilization Form was developed. The Utilization Form assigns point values to physical conditions of the petitioner and level of care that is anticipated. KePRO concluded that based on the points the petitioner was scored, a physician's review was required.

7. The case was then referred to a Board Certified Pediatric Specialty Physician Consultant. A Board Certified Pediatrician reviewed the case and made the following determination: "19 y/o male patient, residing at his parents house. He is a quadriplegic that needs constant monitoring for seizures, personal care for bowel incontinence. Request hours and dates-----: 6/17-12/03 1436hr 10 hours Mon-Fri (6:30A-4:30P) while parents are at work and 6 hours on Sunday (8A-2P that his parents can get ready, travel and attend church then travel home. Recommendation. Sunday hours are respite hours. Deny Sunday hours. Approve remaining hours."

8. The petitioner's diagnosis as submitted to KePRO is Quadriplegia, bowel incontinence, fitting suprapubic catheter, seizures. The determination of the physician consultant was sent to [REDACTED] on June 18, 2009. Based on

the documentation, the pediatric consultant denied 156 hours and approved 1,280 hours of the 1,436 requested hours of PDN.

9. A reconsideration was requested on June 23, 2009 and a second KePRO Physician consultant, board certified in Pediatrics, who had not issued the initial denial determined "Provider responds to our denial decision for Sunday hours with the following comment; 'parents are requesting that the hours for Sunday be reconsidered from 8AM-2PM as the caregivers not only attend church on some Sundays but also see to her elderly mother that resides in a nursing home to make sure her needs are being met.' Unfortunately this too would be considered 'respite care' and is an exclusion as stated in the Home Health Services coverage and Limitations Handbook. DENIAL UPHOLD." A Recipient and Provider Recon letter was issued on June 29, 2009 upholding the original denial of PDN on Sunday.

10. The program is operated with the understanding that private duty nursing services are authorized by the Medicaid peer review organization (KePRO) if the services are determined to be medically necessary. Private duty nursing services are authorized to supplement care provided by parents and caregivers. Medicaid does not reimburse private duty nursing services provided solely for the convenience of the child, the parents or the caregiver. In addition, Medicaid does not reimburse private duty nursing for respite care. Examples of respite care are parent or caregiver recreation, socialization, and volunteer activities.

11. The petitioner believes that going to church on Sundays is not respite in nature. She considers it educational in that she is engaged in Bible studies. In addition, her mother is a resident in an assisted living facility. She goes to the facility on Sundays to review the plan of care for her mother. She considers her mother a dependent. The petitioner did acknowledge that a review of her mother's care could be achieved by telephone call.

#### **CONCLUSIONS OF LAW**

By agreement between the Agency for Health Care Administration and the Department of Children and Families, 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.

Florida Statutes § 409.919 Rules (2006) states:

The agency shall adopt any rules necessary to comply with or administer ss. 409.901-409.920 and all rules necessary to comply with federal requirements. In addition, the Department of Children and Family Services shall adopt and accept transfer of any rules necessary to carry out its responsibilities for receiving and processing Medicaid applications and determining Medicaid eligibility, and for assuring compliance with and administering ss. 409.901-409.906, as they relate to these responsibilities, and any other provisions related to responsibility for the determination of Medicaid eligibility.

Florida Statute 409.905 addresses Mandatory Medicaid services with section (4) informing that Home Health Care Services can be covered. Under subsection (b) the following information is relevant:

The agency shall implement a comprehensive utilization management program that requires prior authorization of all private duty nursing services...The utilization management program shall also include a process for periodically reviewing the ongoing use of private duty nursing services. The assessment of need shall be based on a child's condition, family support and care supplements, a family's ability to provide care, and a family's and child's schedule regarding work, school, sleep and care for other family dependents...

It is concluded that the agency needed to review need for nursing service.

Florida Statute 409.913 addresses Oversight of the integrity of the Medicaid program, with (1)(d) describing "medical necessity or medically necessary" standards and says in relevant part: "...For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity..." Consistent with statute, Fla. Admin. 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 Limitations Handbook , Chapter 2,

p.2-2, states in part:

In order to be reimbursed, home health services must also be:

- Ordered by and remain under the direction of the attending physician...licenses under Chapter 461, 458 or 459 F.S. or licensed in the state in which the attending physician practices;
- Consistent with the individualized written physician-approved plan of care
- Provided by qualified staff; and
- Consistent with accepted standards of medical and nursing practice.

The Home Health Services Coverage and Limitations Handbook defines private duty nursing and parental responsibility (at page 2-17):

Private duty nursing services are medically necessary skilled nursing services that may be provided in a child's home or other authorized settings to support the care required by the child's complex medical condition.

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...Medicaid does not reimburse private duty nursing services provided solely for the convenience of the child, the parents or the caregiver.

Medicaid does not reimburse private duty nursing for respite care. Examples are parent or caregiver recreation, socialization, and volunteer activities.

The Home Health Services Coverage and Limitations Handbook provides that for private duty nursing, prior authorization must be received (at page 2-19):

**Prior Authorization:** All private duty nursing services must be prior authorized by a Medicaid service authorization nurse prior to the delivery of services.

Home Health Services Coverage and Limitations Handbook (October 2003),

Appendix B states:

Service authorization is the approval process required prior to providing certain services to recipients under 21 years of age. Medicaid will not reimburse for these services without service authorization when it is required.

**Services Requiring Service Authorization**

The following home health services require service authorization for reimbursement:

- Private duty nursing; and
- Personal care.

As a result of the reduction in PDN services paid for by Medicaid, the petitioner, through his representative, appeals this action, asserting that the Sunday hours amounting to 156 hours of PDN services is necessary so that the caregivers can attend church and visit an elderly mother who is in an assisted living facility.

AHCA presented evidence from the pediatric physician consultant of the number of hours deemed medically necessary. This is a medical expert who routinely determines medical necessity for Medicaid services. The petitioner's argument that going to church and visiting her mother to meet with nursing staff is not respite is not



persuasive. The petitioner's statement that her mother's care is being provided by the nursing staff at the assisted living facility does not support her contention that the mother is dependent on her to provide for her care. Further the petitioner agreed that meetings regarding her mother's care can be held by telephone. Even so, one parent could visit the mother while the other is home to provide care for the son. The petitioner considers Sunday Bible School and attendance at church services educational and not "socialization". The respondent argued that Sunday services and Bible study are voluntary activities and PDN is not provided by Medicaid in these situations. The petitioner's argument is not persuasive as the undersigned concludes that Bible study can be obtained through other means or attended by one parent at the time, leaving the other parent available to provide care to their son. The undersigned concludes that both of these activities are voluntary on the parents' part.

According to the above authorities, Medicaid does not reimburse PDN services provided solely for the convenience of the child, the parents or the caregiver and does not reimburse PDN for parents to engage in voluntary activities. The above controlling authorities also explain that the parents must participate in providing care to the fullest extent possible. After careful consideration, it is determined that the action to reduce the PDN hours from 1,436 to 1,280 and to deny 156 hours on Sundays for the period at issue is in accordance with the above authorities.

#### **DECISION**

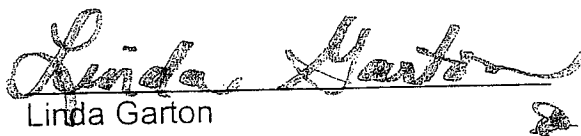
The appeal is denied. The respondent's action is affirmed.

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

DONE and ORDERED this 28<sup>th</sup> day of August, 2009,

in Tallahassee, Florida.



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