

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

FILED

OCT 29 2009

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-04303

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 12 DeSoto
UNIT: AHCA

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on September 4, 2009, at 3:27 p.m., in Arcadia, Florida. The petitioner was not present. She was represented by her father _____, and _____ nurse coordinator with Children Medical Service. The respondent was represented by Pat Brooks, program operation administrator, and Karen Smith, registered nurse specialist. Witnesses for the respondent from Keystone Peer Review Organization (KePRO) were Robert Buzzeo, M.D., physician reviewer, and Melanie Clyatt, registered nurse review operations supervisor.

The hearing officer left the record open until September 14, 2009 for the petitioner to submit any additional evidence. The hearing officer left the record for ten days for any respondent from the respondent. The hearing officer received additional evidence from the petitioner on September 8, 2009 and

September 18, 2009 that was entered into record as Petitioner Exhibits 1 and 2.

As there were no indications that the evidence submitted by the petitioner was sent to the respondent, the hearing officer forwarded the evidence to the respondent. Any response from the respondent was due no later than September 28, 2009. As of September 28, 2009, there was no response from the respondent. The record was closed on September 24, 2009.

ISSUE

The petitioner is appealing the respondent's action to deny 254 hours of private duty nursing for the period of June 2, 2009 through November 28, 2009. The respondent has the burden of proof.

FINDINGS OF FACT

1. The petitioner care is medically complex. The petitioner is 14 years old. The petitioner's disabilities are progressive neurodegenerative disorder (thought to be Alpert Syndrome) cerebral palsy, mixed development disorder, chronic seizure disorder, asthma, chronic respiratory disease with desaturations mostly related to repositioning, gastroesophageal reflux, severe scoliosis, hypoatremia, hypothyroidism and chronic otitis. The petitioner is unable to attend school. The petitioner resides with her father. The petitioner's father is the petitioner's primary caregiver. The father works long hours as an irrigation specialist in the tomato fields. The petitioner's mother died in 2000 from cancer and the petitioner's only sibling died in November 2007 from the same diseases as the petitioner has. The father has no family to assist in the petitioner's care. The father requested assistance with filing his request for hearing and requested

the hearing be held in person as he has difficulty with written communication skills.

2. 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.

3. The nursing agency requested 4,320 hours of private duty nursing for the petitioner for the period of June 2, 2009 through November 28, 2009. This request would be 24 hours a day of private duty nursing. The petitioner's home health agency submitted the information pertaining to the petitioner to KePRO through an internet program. This information is generated to the computer for review by KePRO from the information entered by the petitioner's home health agency via computer. 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.

4. The nursing agency submitted information of the petitioner's diagnoses, services provided, family situation and synopsis of care. No hospitalization or emergency room visits was noted for in the 60 days preceding the petitioner's June 2, 2009 request. The petitioner requires continuous pulse oximeter, frequent suctioning, nebulizer, oxygen, vest treatment four times a day, medication, CPT daily, passive range of motion and GT feeding from 10 p.m. to 11:00 a.m. The petitioner has intermittent seizure activity and frequent agitation. Recent increase in agitation and sleeplessness required medication. The

petitioner requires repositioning every two hours. An example of the father's reported work schedule was 7:00 a.m. to 7:00 p.m. Monday through Friday, 6:00 a.m. to 3:00 p.m. on Saturdays and 6:00 a.m. to 12:00 p.m. on Sundays. If the temperature gets close to freezing he works through the night. Because of the nature of the job, he is on call twenty-four hours a days, seven days a week. No health issue with the father was originally noted by the nursing agency.

5. The initial nurse reviewer screened the petitioner's request for private duty nursing using the Internal Focus Finding. The Internal Focus Finding provides information to KePRO of case identifiers and additional information regarding the petitioner. This information is generated to the computer for review by KePRO from the information entered by the petitioner's home health agency via computer.

6. The initial physician consultant determination was based on the information received from the nursing agency. The initial physician consultant opined that the father could provide more independent care as the father is home by 7:00 p.m. Mondays through Fridays, 3:00 p.m. on Saturdays and 12:00 p.m. on Sundays. The initial physician consultant denied the private duty nursing hours of 7:00 p.m. to 9:00 p.m. Mondays through Fridays, 5:00 p.m. to 9:00 p.m. on Saturdays and 3:00 p.m. to 9:00 p.m. on Sundays. A PDN/PC Recipient Denial Letter was sent to the petitioner on June 4, 2009. The notice informed the petitioner that for the requested 4,320 hours of private duty nursing for the period of June 2, 2009 through November 28, 2009, 3,808 hours were approved and 512 hours were denied.

7. The nursing agency requested a reconsideration. The nursing agency notified KePRO that the petitioner's father was being treated for two toe amputation due to his diabetes. The father is on crutches and was unable to turn the petitioner. The father is not allowed to stand without crutches and must keep his foot elevated. The father has multiple appointments for skin grafting.

8. The reconsideration was reviewed by a second physician consultant. The second physician consultant opined that the father at the time was physically disabled and modified the denial. The second physician consultant approved twenty-four hours a day, seven days a week for the first 90 days of the certification period of June 2, 2009 through November 28, 2009. He denied the private duty nursing hours of 7:00 p.m. to 9:00 p.m. Mondays through Fridays, 5:00 p.m. to 9:00 p.m. on Saturdays and 3:00 p.m. to 9:00 p.m. on Sundays for the second 90 days of the certification period of the private duty nursing hours of 7:00 p.m. to 9:00 p.m. Mondays through Fridays, 5:00 p.m. to 9:00 p.m. on Saturdays and 3:00 p.m. to 9:00 p.m. on Sundays. The respondent sent a PDN/PC Recipient Reconsideration - Denial Upheld notice on June 24, 2009. The notice informed the petitioner that of the requested 4,320 hours of private duty nursing for the period of June 2, 2009 through November 28, 2009, 4,066 hours were approved and 254 hours were denied.

9. The father attested as follows. His foot is not healed. He is trying to keep his job. If he does not work, he does not get paid. If he does not earn the money, he will be unable to pay for electricity to run the machines for the petitioner's care. Desoto County is very difficult to keep staffed with nurse. The

father must miss work and not get paid every time there is no nurse available.

This requires him to work extra hours when he can. His work really depends on the weather. He is leaving home in the morning between 6:00 a.m. and 7:00 p.m. and gets home some time between 6:30 and 7:00 p.m.

10. The petitioner's father presented a letter dated September 18, 2009 from his physician. The petitioner went to the emergency room with a gangrenous foot. He required two surgical procedures to control the infection. The father has had two toes amputated as well as the bulk of the sole of his foot removed. The wound was left open to heal from the inside out. The physician opined that the father will require five month of dressing and further debridement. The father had to return to work as his FMLA (family medical leave) expired. The increased weight bearing on his foot reopened a part of the foot that had previously healed. The father needs to be off his feet as much as possible.

11. The petitioner's nurse opined that the petitioner is in substantial need for skilled nursing for the care the petitioner needs and due to his health the father is unable to provide the care the petitioner needs. The father has diabetic neuropathy with two toes amputated that has not healed. The father has open sores and is on his feet more than he should be. The petitioner's nurse opined that the petitioner's father needs more training due to his difficulty with reading and writing to handle the petitioner's complex care. At a minimum, the training is necessary to insure that the petitioner is receiving the correct medication and the father to be able to understand written instructions.

12. The petitioner has been hospitalized. The history and physical report from the petitioner's August 13, 2009 hospitalization and the discharge summary from the petitioner's August 31, 2009 hospitalization were submitted as additional evidence. After a visit to the emergency room, the father and nursing were told to notify EMS if the petitioner's heart rate was less than 60. The petitioner was hospitalized on August 13, 2009 as her heart rate was 51. The impression for the hospitalization on August 13, 2009 was admitted secondary to bradycardia, recent history of intermittent oxygen requirement secondary to desaturations, hypoatremia with mild hyperkalemia and hypothermia. The petitioner was to have a surgical procedure on August 31, 2009. The surgical procedure was cancelled and the petitioner was admitted to the pediatric intensive care unit for ongoing evaluation and care. The petitioner developed an oxygen requirement that her doctor felt was secondary to an intermittent obstruction.

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.

Although the term medically necessary may be used in a variety of context, at issue is whether or not medical necessity as defined in Medicaid rules

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 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 handbook on page 2-19 states:

Private duty nursing services will be decreased over time as parents and caregivers are taught skills to care for their child and are capable of safely providing that care or as the child's condition improves.

The basis for the reduction by the respondent was essentially that while there is a demonstrated need for skilled nursing services 24 hours daily, the hours should be reduced to allow for the father to provide care to the fullest extent possible. The hearing officer considered all evidence submitted at the hearing and reviewed all conditions for medical necessity as set forth the rules of the Program.

The petitioner's care is medically complex. The evidence demonstrates that the petitioner is in need of services. It is undisputed that nursing services are required. The evidence clearly supports that this petitioner requires 24 hour nursing care. For the Medicaid Program to authorize and pay for private duty nursing service to meet this need, the required nursing care must meet the rule definition of medical necessity. The rule sets forth that the request must 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. The analysis must continue to determine if there are other parties that may be responsible for providing this benefit.

The handbook sets forth the private duty nursing services are authorized to *supplement* care provided by parents and parents must participate in providing care to the fullest extent possible. As such it must

be determined as to whether or not the father can provide the services during the time period that the respondent has determined that they should.

The hearing officer considered the father's work hours, recent amputation, open sores, inability to bear weight on his feet and his need for more training due to his difficulty with reading and writing. Additionally the hearing officer considered that the petitioner's health is not improving and the petitioner has been in the hospital twice in August 2009. The hearing officer concludes that the father is currently not capable of safely providing the petitioner's care due to his health issues. The hearing officer concludes that the father needs additional training to care for petitioner.

If the father is not capable of providing the petitioner's skilled nursing care the last consideration is whether or not there is any other less costly alternative. The petitioner and her father have no other family member that can assist with the petitioner's care. No evidence was present for a less costly alternative to provide the skilled nursing care the petitioner requires. Based on the above cited authorities, the hearing officer reverses the respondent's action to deny 254 hours of private duty nursing and grants twenty-four hours seven day a week private duty nursing for the period of June 2, 2009 through November 28, 2009.

DECISION

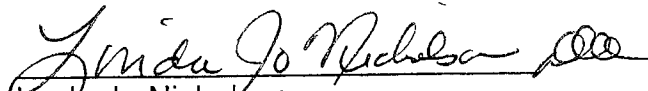
This appeal is granted for the period of June 2, 2009 through November 28, 2009.

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 29th day of October, 2009,

in Tallahassee, Florida.


Linda Jo Nicholson
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

Copies Furnished To