

FILED

OCT 15 2009

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

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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-04709

PETITIONER,

Vs.

CASE NO. 7901819448

AGENCY FOR HEALTH CARE ADMINISTRATION  
CIRCUIT: 13 Hillsborough  
UNIT: AHCA

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

**FINAL ORDER**

Per notice, a hearing was held before the undersigned hearing officer on August 25, 2009, at 1:34 p.m. The minor petitioner was not present. The petitioner was represented by his mother \_\_\_\_\_ also testified. The petitioner's father, \_\_\_\_\_, appeared as a witness. \_\_\_\_\_, registered nurse and director of nursing with \_\_\_\_\_, also appeared as a witness for the petitioner. The respondent was represented by David Beaven, program analyst with the Agency for Health Care Administration. \_\_\_\_\_ also testified.

Two persons with Keystone Peer Review Organization (KePRO) appeared as witnesses for the respondent by telephone: Teresa Ashe, review operations supervisor, and Dr. Robert Buzzeo, physician reviewer.

### ISSUE

At issue is the respondent action of July 24, 2009 to reduce a listed 56 hours of private duty nursing (PDN) for the certification period of July 1, 2009 through December 27, 2009. Specifically, the respondent has terminated prior approved PDN hours from 8 a.m. to 4 p.m. only on the Thursdays when the petitioner is not in school. During the Thursdays when the petitioner is in school, the respondent continues to approve PDN hours from 8 a.m. to 4 p.m. The issue does not include whether or not the nursing provider should or should not be paid for past nursing hours provided in July 2009, as discussed at the hearing. The respondent has the burden of proof.

### FINDINGS OF FACT

1. The petitioner is six years old and receives private duty nursing services by the respondent through Medicaid. The petitioner lives with his mother (40), his father (48), and two other siblings, ages 17 and 12. As of the hearing date, the 17 year-old was in a treatment facility in North Carolina. Another unrelated 22 year-old female temporarily lives in the home.
2. The petitioner's diagnoses, as reported and recognized by KePRO, include Down's Syndrome, obstructive sleep apnea, laryngeal spasm, GERD, and allergies. The respondent approved PDN services based on the need for medication administration, teaching, aspiration precautions, toilet training, and monitoring for respiratory distress. The petitioner is ambulatory but has bowel/bladder incontinence and needs assistance with

all activities of daily living. The petitioner also has food allergies, and has to be fed.

3. The petitioner previously received approved PDN services through Children's Medical Services (CMS). The respondent AHCA reviewed and determined the need for requested PDN services for the certification period of July 1, 2009 through December 27, 2009. KePRO is the contracted provider that reviews information supplied by the nursing provider via the internet to determine approved hours of PDN. Two separate physician consultants with KePRO review the information provided. On July 24, 2009, after several earlier reviews, KePRO approved a reduced amount of 2429 hours PDN for the listed certification period, but denied 56 hours.
4. The petitioner's mother and father are his personal caregivers. Neither of the parents are medical professionals. Even though the parents have some health issues, they are capable of providing needed care to the petitioner when nursing services are not provided.
5. The petitioner's mother is self-employed cleaning houses. As of the hearing date, the mother worked Mondays, Tuesdays, and Fridays. She was in the process of re-grouping with other clients to see if she would also work on Wednesdays and Thursdays.
6. The petitioner attends regular school but is accompanied by a nurse while in school. The respondent has approved PDN hours on the weekdays the petitioner attends school from 8:00 a.m. to 4:00 p.m. Further, the

respondent approved night time PDN hours from 10:00 p.m. to 7:00 a.m. during weekdays, 11:00 p.m. to 6:00 a.m. on Saturdays, and 10:00 p.m. to 7:00 a.m. on Sundays. His parental caregivers provide needed care at other hours.

7. The respondent has not approved PDN hours on the Thursdays when the petitioner is not in school due to holidays or other reasons. The petitioner's father is not presently employed, but is actively seeking employment. KePRO asserts that the petitioner's father is available to provide care for the petitioner on these Thursdays. The petitioner's father has provided needed care when nurses were not available. However, he believes he is exhausted and unable to focus on the needs of his other children when providing care to the petitioner.
8. The parental caregivers wrote a letter labeled Petitioner Exhibit 2, dated June 10, 2008. This letter advises of the parent's belief that their 12 year-old sibling, ..., has an auditory-processing disorder. ... receives occupational and physical therapies and attends a charter school for children with learning difficulties. There is no medical evidence to establish the level of care needed to provide for ... special needs.
9. The petitioner disputes the termination of approved PDN hours on the Thursdays when the petitioner is not in school. The petitioner requested appeal on this overall reduction of approved PDN hours on July 24, 2009.

**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 respondent Agency for Health Care Administration.

The Florida Administrative Code 59.G-1.010, "Definitions", sets forth the criteria for medically necessary goods and services under the Florida Medicaid Program. Section (166) sets forth the following:

(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.

There is no dispute that the petitioner requires continuous PDN hours to meet the medical necessity criteria described above. The

question at issue is whether or not the elimination of approved PDN hours on the Thursdays while the petitioner is not in school is a safe determination as in paragraph 4 above, and, whether this determination is consistent but not in excess of the petitioner's needs as in paragraph 2 above. The evidence shows that the petitioner's father is able to provide needed care to the petitioner and is presently available to provide such care on Thursdays when the petitioner is not in school.

The Home Health Services Coverage and Limitation Handbook have 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 (PDN), 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)

Since the petitioner's father is able and currently available to provide care to the petitioner, it must then be determined if there are other barriers to providing this care. The 17 year-old child is not presently in the home due to his residential treatment in New York. Therefore, any care needed for this sibling is not a barrier to provide care for the petitioner.

The father also complained of a lack of focus to provide care for the 12 year-old, when care is provided to the petitioner. The 12 year old child, has an auditory processing disorder. There is no medical evidence to confirm the level of severity of this diagnosis. Further, there is insufficient

evidence to show what level of caregiver assistance is needed for \_\_\_\_\_ that would detract from the care needed by the petitioner on the specified Thursdays.

The evidence demonstrates that both of the petitioner's parents and caregivers are very involved in the petitioner's care. Both parents are capable to provide this care even though the provision of such care is stressful and tiring. The language of the above cited authority requires that parents must provide needed care "to the fullest extent possible." Since the petitioner's father is not presently employed, the hearing officer concludes that he could provide care on the Thursdays when the petitioner is not in school. If he were to obtain employment and not be available on these Thursdays, he is advised to then contact the home health agency that is providing services as soon as possible.

#### **DECISION**

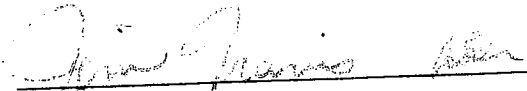
This appeal is denied and the respondent's action affirmed.

#### **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.

FINAL ORDER (Cont.)  
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DONE and ORDERED this 15<sup>th</sup> day of October, 2009,  
in Tallahassee, Florida.



Jim Travis  
Hearing Officer  
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Copies Furnished To