

FILED

NOV 16 2009

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

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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-05406

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION  
CIRCUIT: 11 Dade  
UNIT: AHCA

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned-hearing officer on October 13, 2009, at 9:20 a.m., in Miami, Florida. The petitioner was not present but was represented by her mother, Monica Otalora, human services analyst, Agency for Health Care Administration (AHCA), represented the respondent. Witnesses for the respondent from Keystone Peer Review Organization (KePRO) were Dr. Rakesh Mittel, consulting physician, and Bonnie Wallington, registered nurse, KePRO. \_\_\_\_\_ interpreted for the petitioner. This hearing was originally scheduled for September 23, 2009, but was continued at the request of the respondent. The record was held open for 14 days to allow the petitioner the opportunity to provide additional information. No additional information was provided during the timeframe allotted.

### ISSUE

At issue is the respondent's action of August 7, 2009, to deny the petitioner 765 hours of private duty nursing (PDN) services for the certification period July 21, 2009 through January 16, 2010. The respondent had the burden of proof.

### FINDINGS OF FACT

1. The petitioner was 17 month old at the time of the review and a Medicaid beneficiary in the state of Florida. The petitioner's diagnosis as reported to the agency includes extreme prematurity, respiratory distress, ventilator dependent, respiratory failure, chronic lung disease, congenital heart failure, anemia of prematurity, grade 4 intra ventricular hemorrhage, tracheitis, gastrostomy, tracheostomy, pulmonary hypertension and oxygen dependent.

2. Prior to the action under appeal, the petitioner was receiving private duty nursing services through Medicaid at 24 hours per day, seven days per week. On July 20, 2009, the PDN provider requested the continuation of private duty nursing services at the same level for the period of July 21, 2009 through January 16, 2010. The initial information received by KePro from the provider states in part, "Mother is a single parent, no other siblings in the home. Mother work schedule is Mon-Sat 8am 7pm. Mother suffers from hypertension, and insulin dependent diabetic."

3. KePRO is the Peer Review Organization contracted by AHCA to perform medical review for the private nursing and personal care prior authorization program for Medicaid beneficiaries in the state of Florida.

4. An initial screening of the request was completed by a registered nurse reviewer. At this level of review, the amount of hours being requested was not approved by the nurse reviewer. The request was referred to a Board Certified Pediatric Specialty Physician Consultant for review.

5. The physician consultant reviewed the information submitted and determined, "Mother off on Sundays. Should participate in the care. Recommend mother cover 8P-11P Mon-Sat. Deny 8A-11P on Sun. Approve remaining hours."

6. On July 21, 2008, the initial denial letter was sent to the petitioner.

7. On July 30, 2009, the provider then submitted a reconsideration request and provided additional information stating, "Patient is a sensitive case and do requires constant skilled nurses for her well being...To prevent frequent hospitalization as per physician's request it is medically necessary for patient to receive 24 hours PDN nursing service..."

8. A different board certified physician consultant reviewed the entire case, including the petitioner's medical condition as reported and social needs.

9. The reviewing physician reasoned that by now the mother should be well trained in the care of her daughter; however, the initial decision was modified to represent a denial from 8:00 p.m. to 11:00 p.m. each evening from Monday

through Saturday, and a denial from 8:00 a.m. to 12:00 noon and 4:00 p.m. to 11 p.m. on Sunday.

10. During the hearing, the petitioner's mother explained that the nursing agency did not provide the correct information to KePro. The petitioner's mother asserted that she is not working because she is disabled. She was declared disabled by the Social Security Administration on May 16, 2005. She claims that she does not have vision in one eye and is losing sight in the other one. She also claims to be pregnant.

11. Included in the evidence is a copy of a Notice of Decision from the Social Security Administration dated March 20, 2009, indicating that the petitioner was found disabled on May 16, 2005, because of diabetes mellitus, vision loss, depression and headaches so severe that she is unable to perform any work existing in significant numbers in the national economy.

12. Also included in the evidence is a letter from the petitioner's mother treating physician, Dr. Victor Gonzalez-Quintero, indicating that she is under his care and that her estimated due date is November 11, 2009.

13. Dr. Mittel explained that since the SSA letter is three years old, he would need a current letter from her treating physician detailing her medical condition before making a final decision on this case. Dr. Mittel instructed the petitioner's mother to provide this letter to the nursing provider.

### 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 Florida Statute, Chapter 120.80.

Fla. Admin. Code 59G-1.010 *definitions* states in part:

(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;
5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

The Home Health Services Coverage and Limitations Handbook (July 2007), page 2-17 states in part:

#### *Private Duty Nursing Definition*

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.

#### *Parental Responsibility*

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. Training can be offered to parents and caregivers to enable them to provide care they can safely render. Medicaid does not reimburse private duty nursing services provided solely for the convenience of the child, the parents or the caregiver.

Fla. Admin. Code 65-2.056, **Basis for Hearings**, states in part:

(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 KePro denied the petitioner 765 hours of PDN services for the certification period July 21, 2009 through January 16, 2010 based on information received from the nursing provider.

The petitioner's mother argues that the nursing provider gave incorrect information to KePro, specifically that she was working. The findings show that the petitioner's mother was found disabled by the SSA. The findings also show that she is pregnant, with a due date of November 11, 2009. KePro medical consultant stated at the hearing that would need current information from her treating physician to make a final decision on the case.

Administrative fair hearings are de novo in nature, meaning that new and relevant evidence not previously considered by the agency may be considered by the hearing officer. Given that incorrect information was provided to KePro and that the new information provided during the hearing was not sufficient to make a determination of medical necessity for the services, the case is being

remanded to the respondent for further consideration of the new medical and social information.

**DECISION**

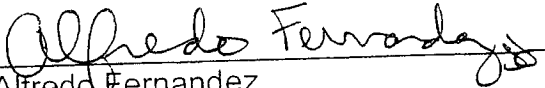
The appeal is partially granted as stated in the Conclusions of Law.

**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 16<sup>th</sup> day of November, 2009,

in Tallahassee, Florida.

  
Alfredo Fernandez  
Hearing Officer  
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850-488-1429

Copies Furnished