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

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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-05908

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 09 Osceola
UNIT: AHCA

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing convened telephonically with the undersigned hearing officer on December 21, 2009, at 11:40 a.m. The petitioner is a child and was not present. Her mother, _____ represented her.

_____ cousin, translated. Lizette Knott, human services program specialist, Area 7 Agency for Health Care Administration (AHCA), represented the respondent. Witnesses for the respondent from KePRO included Dr. Rakesh Mittal, MD, physician reviewer, and Bobbie Wallington, nurse reviewer supervisor.

ISSUE

At issue is the action taken by the Agency to deny a request for 208 hours of private duty nursing benefits for the certification period of August 26, 2009 to February 21, 2010. This is a reduction from the amount he previously received. The respondent has the burden of proof in this matter.

FINDINGS OF FACT

1. The petitioner is 15 years old. Prior to the proposed action under appeal and while the appeal is pending, the petitioner has been receiving 16 hours per day of private duty nursing under State Plan Medicaid.
2. The petitioner lives with his mother, his primary caregiver (PCG) and single parent, and his 14 year old sister. His sister is deaf and mute with behavioral problems. The petitioner has three older siblings that do not live in the home. His mother does not work.
3. Requests for private duty nursing under Medicaid are reviewed with a contract provider who completes prior authorization and determines medical necessity for the requested services. The contract provider is KePRO. The request for services is submitted by the home health care provider through an Internet exchange process. Pediatric Services of America (PSA) is the petitioner's home health care provider. All communication is done between the home health care provider and KePRO. There is no direct contact with the patient (the petitioner), his family, or any of his doctors. If additional information is needed, KePRO would contact the home health care provider. Dr. Mittal explained that they look at the medical needs of the petitioner and family situations. He further explained that the intent and purpose of private duty nursing is not to take over the care of the patient, but it is to supplement the care provided by the parent or family.
4. On August 25, 2009, PSA submitted a request for 2880 hours of private duty nursing for the period of August 26, 2009 –February 21, 2010. The hours requested were for 16 hours per day, seven days per week, from 7am to 11pm. With the

information submitted by PSA, 2672 hours were approved and 208 hours were denied. The approved hours were from 7 am to 7 pm. and from 7 pm. to 11 pm until 12/31/2009, then from 7am to 7 pm from January 1, 2010- February 21, 2010. The denied hours were from 7 pm to 11 pm from January 1, 2010 through February 21, 2010 (Respondent's Exhibit 2). The petitioner's mother had surgery and additional hours were approved to give her time to recover.

5. On August 31, 2009, a physician consultant (PC1), board certified in pediatrics, made the following decision; "8/26-9/8:DENY. 15YO with anoxic brain injury, seizures, trach and vent dependent, G-tube. Single mom is PCG and does not work, has another child 14YO who attends special needs school. Mom apparently with limitations secondary to health issues, but unable to provide documentation of this or specific date of pending surgery. Request is for SN for 7A-11P daily for cert period. Would deny as does not comply with FL Medicaid PDN handbook." A denial letter was issued on September 1, 2009 citing the requested hours did not meet the definition of medical necessity because the information regarding the recipient's medical status and the information concerning his mother's medical issues was limited.

6. On September 2, 2009, the home health care agency provided medical documentation to KePRO and again asked for 16 hours per day of private duty nursing. PSA cited that the petitioner weighs 128 pounds, that the petitioner's mother provides his care during the hours of 11 pm. to 7 am, that she needs her rest because of her medical issues, and that his sister requires constant supervision because of her behavioral issues.

7. On September 7, 2009, the request for reconsideration was conducted by a second physician consultant (PC2), board certified in pediatrics, who stated in part: "Request is for SN for 7A-11P daily for cert period. *** PCG should be capable of providing care from 7pm to 11pm daily. I would DENY the hours from 7pm to 11pm and APPROVE the rest." A letter was sent on September 8, 2009 with that decision.

8. On September 8, 2009, PSA notified KePRO that there was no change in the medical status or in the caregiver dynamics, and asked for authorization of 12 hours a days for an additional 166 days. On September 9, 2009, the nurse reviewer wrote "Hours approved per AHCA matrix: 8 sleep hours per day, 2 hours sibling care per day, and 4 hours weekly for household errands."

9. On September 29, 2009, PSA asked for a modification because the petitioner's mother was scheduled for surgery on September 30, 2009. They asked for 24 hours of private duty nursing (52 additional hours) from September 20, 2009 through October 3, 2009, which would cover from 11 pm to 7 am.

10. On September 30, 2009, the modification request was approved by a third physician consultant (PC3), board certified in pediatrics.

11. On October 2, 2009, the home health care provider wrote that since a fair hearing was requested, all of the 16 hours per day, seven days a week should be approved for the entire certification period, plus the additional 52 that were approved to provide care to the petitioner while his mother recovered from surgery.

12. On October 6, 2009, a fourth physician consultant (PC4), board certified in pediatrics made the following decision: "I suggest APPROVE 7am to 7pm and 7pm to 11pm until December 31, 2009, then I would DENY 7pm to 11pm after 12/31/2009. We

have already approved 24/7 coverage from 9/30-10/3-that should still remain approved. I am considering mother medical problems prior to surgery and allowing a recovery of 2 months after surgery..." A letter was sent on October 6, 2009 with this information.

13. The petitioner's mother filed an appeal because she is not happy with KePRO's decision. She wants to keep 16 hours a day of private duty nursing. Her older children do not live with her, and her 14 year old child is not trained to take care of him nor is it her responsibility to take care of him. The petitioner's mother cited medical issues of depression and diabetes. She explained that a 12 hour shift from 7 pm to 7 am is too long of a period of time. She explained that her depression medication makes her sleepy and that she is already awake from 11 pm to 7 am. During the day she has household chores to do and things for her son. She needs time to rest and sleep. She also has to help the nurses as her son is getting heavier. He is going to have to have surgery and then she will need more help. She has a set routine. She has to frequently go to her daughter's school because of behavior problems or illness. She sleeps from 7 am to 12 or 1 pm, when the petitioner has no appointments, then she may go to the pharmacy, grocery store, home to talk to the nurse, cook for her daughter and herself, help with her daughter's homework, clean, and rest a little before the nurse leaves. She expressed concern about care when the petitioner, her daughter, or herself, has medical appointments.

14. After hearing testimony from the petitioner's mother, the respondent offered to give her an additional four hours of private duty nursing a week that could be used at her discretion. It was suggested that the petitioner's mother chose to provide care at night, but she could split the private duty nursing hours the petitioner receives into more

than one shift, giving her time to rest while her daughter was in school and then again before she resumed her night shift hours. The respondent explained that only an additional four hours per day of private duty nursing was denied. If the hours she receives PDN services now is not suiting her needs, she needs to take that concern up with her home health care provider. KePRO recommended that the petitioner's mother, through her home health care agency, request additional hours as soon as she makes a doctor's appointment for the petitioner, herself, or her daughter. The petitioner does not believe that PSA will get the information submitted to KePRO for approval timely since they did not provide requested information timely during this recertification period. She is seeking the 16 hours per day of private duty nursing that she was receiving. She already provides eight hours a day of care and believes she will be too tired to provide the additional four hours.

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.

Federal Regulations at 42 C.F.R. § 440.230, Sufficiency of amount, duration, and scope, informs:

(d) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

Florida Statute 409.905 addresses *Mandatory* Medicaid services under the State Medicaid Plan and informs:

Mandatory Medicaid services.--The agency may make payments for the following services, which are required of the state by Title XIX of the Social Security Act, furnished by Medicaid providers to recipients who are determined to be eligible on the dates on which the services were provided. Any service under this section shall be provided only when medically necessary and in accordance with state and federal law...

(4) HOME HEALTH CARE SERVICES.--The agency shall pay for nursing and home health aide services, supplies, appliances, and durable medical equipment, necessary to assist a recipient living at home...

(b) The agency shall implement a comprehensive utilization management program that requires prior authorization of all private duty nursing services, an individualized treatment plan that includes information about medication and treatment orders, treatment goals, methods of care to be used, and plans for care coordination by nurses and other health professionals. 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. When implemented, the private duty nursing utilization management program shall replace the current authorization program used by the Agency for Health Care Administration and the Children's Medical Services program of the Department of Health. The agency may competitively bid on a contract to select a qualified organization to provide utilization management of private duty nursing services. The agency is authorized to seek federal waivers to implement this initiative...

(c) The agency may not pay for home health services unless the services are medically necessary and...

The above statute indicates that for a recipient under age 21 under the State Medicaid Plan, the agency will implement a prior authorization program for all private duty nursing services to include completing an assessment based on the 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. The agency may not pay for home health services unless the service is medically necessary.

The Florida Medicaid Home Health Services Coverage and Limitation Handbook has been promulgated into rule in the Florida Administrative Code at 59G-4.130 (2).

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..."

Although the term medically necessary may be used in a variety of contexts, at issue is whether or not medical necessity as defined in Medicaid rules was demonstrated for 2880 hours of private duty nursing to be paid for by Medicaid. Consistent with statute and Fla. Admin. Code 59G-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. ...

(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 Florida Medicaid Home Health Services Coverage and Limitation Handbook, under Private Duty Nursing, on page 2-15 Parental Responsibility, states:

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. (emphasis added)

The Florida Medicaid Home Health Services Coverage and Limitations Handbook, July 2008, discusses the authorization process for private duty nursing services as follows at page 2-19:

Private duty nursing services are authorized by the Medicaid peer review organization if the services are determined to be medically necessary. 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.

It is undisputed that nursing services are required. 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 handbook sets forth that private duty nursing services are authorized to *supplement* care provided by parents and that parents must participate in providing care to the fullest extent possible. The basis for the reduction of private duty nursing by the respondent was essentially that while there is a demonstrated need for nursing services, the hours should be reduced for the parent to provide care to the fullest extent possible. Further, as parents are taught skills necessary to provide for the care of their child, private duty nursing

services are reduced over time. The issue then rests on whether the parent can provide the services during the time period that the respondent has determined that she should.

The hearing officer considered all of the testimony and evidence submitted at the hearing, and reviewed all conditions for medical necessity as set forth in the rules of the Program. The evidence clearly supports that the petitioner requires care and supervision. His mother is fully trained and able to provide his care. She does not work outside of the home and also has a 14 year old child with special needs that attends school. The decrease at issue requires the mother to provide four additional hours of care per day for the period of January 1, 2010 through February 21, 2010. The Agency added four hours per week of private duty nursing during the hearing. The petitioner's mother expressed concern about covering a 12 hour shift. The agency explained that she can work with the home health agency to have split shifts which would allow her time to rest while her daughter is in school and then to rest again before she assumes care for her son. After a thorough review of the facts, evidence and the controlling authorities, the undersigned concludes that the agency met its burden of proof to show that the reduction is within the rules of the Medicaid Program.

DECISION

The appeal is denied. The agency'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 14th day of January, 2010,

in Tallahassee, Florida.



Margaret Poplin
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Copies Furnished To