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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-06938

PETITIONER,

Vs.

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 December 18, 2009, at 2:54 p.m. All parties appeared by phone. The petitioner was not present, but was represented by his grandmother and caregiver,

who also testified. David Beaven, Medicaid health care program analyst with the Agency For Health Care Administration (AHCA), represented the respondent and testified. Two persons with Kepro appeared as witnesses for the respondent: Melanie Clyatt, registered nurse and review operations supervisor, and Dr. Rakesh Mittal, physician reviewer.

The hearing record was held open for an additional ten-day period to allow for the submission of medical evidence. On December 18, 2009, two physician letters were received from the respondent. The first letter is dated October 28, 2009 from Dr. . The second letter is dated October 14, 2009

from Dr. These two letters are labeled the Respondent composite Exhibit 2. The petitioner submitted these same two letters as evidence. These two letters are also labeled the Petitioner's composite Exhibit 1. The petitioner also submitted another letter dated December 28, 2009 Dr. This letter advises of the caregiver's diagnosis and physical restrictions. This letter is labeled Petitioner's Exhibit 2.

ISSUE

At issue is the respondent's decision of October 12, 2009 to reduce the amount of private duty nursing (PDN) hours paid by Medicaid. The respondent previously approved 24 hours PDN daily, 7 days weekly for a total of 4320 quarter hours. The respondent's action is to reduce the total amount of PDN hours to 3246 quarter hours for various times during the week. The respondent has the burden of proof.

FINDINGS OF FACT

1. The petitioner is 13 years old and lives with his grandmother and grandfather. His grandmother is his legal guardian and caregiver. The petitioner's grandfather is disabled and does not provide care to the petitioner. There are no parents in the home and no siblings.
2. The petitioner's diagnoses include static encephalopathy, cerebral palsy, seizure disorder, blindness, spastic quadriplegia and severe developmental delay due to shaken baby syndrome. Services performed by private duty nursing include medication administration, teaching, g-tube feedings and care, aspiration precautions, seizure

precautions, and trach care. The petitioner requires suction about 10 times per day. Seizures are not fully controlled by medication. The petitioner's condition requires constant nursing care.

3. The current certification period for PDN hours is September 5, 2009 to March 3, 2010. The petitioner received approved 24/7 PDN hours in the past certification period. The respondent continues to administratively approve 24/7 PDN care until the outcome of this hearing decision.
4. On September 22, 2009, the contracted KePRO reviewer sent notice to reduce total PDN hours to 3014 quarter hours for the current certification period. Upon request for reconsideration on October 12, 2009, KePRO decreased the amount of reduced hours to approve 3246 quarter hours of PDN.
5. Upon reconsideration on October 12, 2009, KePRO reduced approved PDN hours to the following times: 11:00 p.m. to 9:00 a.m. seven days weekly, 9:00 a.m. to 9:00 p.m. on Mondays and Tuesdays, 1:00 p.m. to 11:00 p.m. on Wednesdays and Thursdays, and 9:00 a.m. to 7:00 p.m. on Sundays. The respondent denied all PDN hours except the 10 sleep time hours on Fridays and Saturdays. The respondent then agreed to provide home health aide (HHA) hours on Fridays and Saturdays from 8:00 a.m. to 8:00 p.m. The petitioner seeks continued 24/7 PDN hours.

6. The caregiver works at the Tampa Airport for somewhat variable and changeable hours. On Sundays, she works from 8:00 a.m. to 5:00 p.m. On Mondays and Tuesdays, she works 10:00 a.m. to 6:30 p.m. On Thursdays, she works from 2:00 p.m. to 10:30 p.m. The petitioner is off work on Fridays and Saturdays.
7. KePRO understood from the nursing provider that the petitioner works from 2:00 p.m. to 10:30 p.m. on Wednesdays. The petitioner now works from 10:00 a.m. to 6:30 p.m. on Wednesdays, per testimony at the hearing.
8. The petitioner's grandmother and caregiver can provide most of the petitioner's care needs, with certain physical limitations, when she is available to provide care. The caregiver is restricted from bending, pushing or pulling, lifting over 20 pounds, stooping or squatting, and sitting or standing for prolonged periods of time. KePRO agreed to provide a HHA to assist with physical care needs for the petitioner when the caregiver is off work on Fridays and Saturdays.
9. On Fridays, the caregiver runs any needed errands, buys groceries, pays bills, performs chores, and schedules any routine doctor appointments, per testimony. After hearing this testimony, KePRO agreed to approve an additional 8 hours PDN and 4 hours of HHA on Fridays. The respondent advised the caregiver to inform her nursing provider if she requires additional hours for any scheduled medical procedures. The nursing provider would then be required to request

any additional PDN hours from the respondent to be reviewed by the contracted reviewer, KePRO. KePRO generally approves additional PDN hours for this reason.

10. The petitioner's caregiver expressed concerns that a HHA cannot administer medication or provide suction when needed. The caregiver has recently requested a change in nursing provider. The same amount of approved PDN hours is approved when a nursing provider changes. The new nursing provider may request to change approved nursing hours if circumstances change.

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.

1. As to the issue on whether or not medical necessity 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 petitioner's grandmother is generally capable to provide needed care to the petitioner, with certain physical restrictions. The language of the cited "Home Health Services Coverage and Limitations Handbook," on page 2-15, shows that parents and caregivers must participate in care "to the fullest extent possible," to provide care as in the following excerpt:

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.

It is undisputed that nursing services are required due to the petitioner's medical needs. The evidence supports that the petitioner

requires 24 hour daily nursing care. However, simply because medical necessity is found for the petitioner to require 24 hour PDN does not mandate the granting of this benefit. The analysis must continue to determine if there are other parties that may be responsible for providing this benefit.

2. As to whether or not private duty nursing hours can be reduced pursuant to parental and caregiver responsibility.

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 basis for the reduction by the respondent was essentially that while medical necessity was demonstrated for skilled nursing services 24 hours daily, the hours should be reduced to allow for the caregiver to provide care to the fullest extent possible. The respondent determined that the reduction in PDN hours should occur when the caregiver is not working.

The respondent has appropriately considered the petitioner's work schedule to determine the caregiver's availability to provide care to the petitioner. However, the caregiver's scheduled work hours have changed on Wednesdays. Since the petitioner continues to work the approximate same number of hours on

Wednesdays, the approved amount of 10 PDN hours on Wednesdays should remain sufficient. The time of these 10 approved PDN hours on Wednesdays should be adjusted to accommodate the caregiver's changed work schedule.

Further, the respondent approved an additional 8 hours PDN and 4 hours HHA on Fridays on the date of hearing. These additional hours should permit the caregiver sufficient time to perform various errands and shopping, and schedule any routine doctor visits. The 4 HHA hours approved on Fridays, and 12 HHA hours approved on Saturdays should assist the caregiver with the more physically demanding care needs that the caregiver can not perform. The petitioner's grand-mother, as a trained caregiver, could then administer medication and provide suctioning that can not be performed by a HHA.

In sum, the evidence shows that the petitioner's medical needs do require constant care. The petitioner's grandmother is capable to provide most of this care when she is available. The amount of approved HHA hours are sufficient to assist with any physically demanding care needs that the petitioner's grandmother can not physically perform. The continuing seven-day weekly approval of 10 PDN hours at night permits the caregiver to have sufficient sleep time. The additional 8 hours PDN and 4 hours HHA should permit the caregiver sufficient time for shopping, errands, and routine doctor visits on Fridays. Thus, the respondent is concluded to be correct to reduce the amount of approved PDN hours to the amounts described in these Findings of Fact and Conclusions of Law.

DECISION

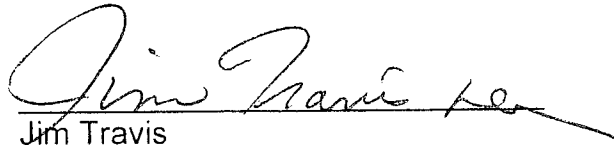
This appeal is denied and the respondent's action affirmed.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the Department. 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 First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. 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 Department has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this 5th day of February 2010,

in Tallahassee, Florida.



Jim Travis
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

Copies Furnished To