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

APPEAL NO. 09F-07732

PETITIONER,

Vs.

AGENCY FOR HEALTH
CARE ADMINISTRATION
CIRCUIT: 01 Escambia
UNIT: AHCA

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on February 17, 2010, at 8:15 a.m., in Pensacola, Florida. The petitioner was not present. He was represented by ' , Esq. Testifying on behalf of the petitioner was his mother, and his father, Also testifying on behalf of the petitioner was administrator, ' The respondent was represented by William Porter, Esq. Testifying on behalf of the respondent was Cindy Henline, medical health care program analyst, Agency for Health Care Administration (AHCA) and Marshall Wallace, senior human services program specialist, AHCA. Also testifying on behalf of the respondent by telephone was Dr. Robert Buzzeo, physician reviewer, Keystone Peer Review Organization (KePRO).

The hearing was originally scheduled to be held on January 16, 2010 but was continued at the request of the petitioner.

PRELIMINARY STATEMEMENT

The hearing record was held open for an additional 21 days or until close of business on March 10, 2010 to allow both parties to submit proposed orders. These were submitted within the time frame allotted. Subsequent to the receipt of the proposed orders and prior to closing the record, the undersigned received a Motion to Strike Post Fair Hearing Argument from AHCA's Counsel & Alternatively Allow Rebuttal Argument from Petitioner's Counsel as the respondent submitted supplemental argument rather than a proposed order. Alternatively petitioner offered a response to the supplemental argument submitted by AHCA and would like it accepted if the AHCA supplemental argument is accepted. The record was held open only for proposed orders; therefore, the petitioner's motion is hereby granted. Both the respondent's "Proposed Findings of Fact and Argument" and petitioner's Rebuttal Argument are stricken from the record.

ISSUE

The petitioner is appealing the Agency's action to reduce Private Duty Nursing (PDN) services from a request of 2,670 hours to 1,864 hours, and denying 806 hours for the period of September 27, 2009 through March 25, 2010. The respondent bears the burden of proof.

FINDINGS OF FACT

1. The petitioner (Date of Birth) is four years of age and receives private duty nursing and personal care services through the state of Florida Medicaid Program.
2. The petitioner has been diagnosed with anoxic brain injury due to cardio-respiratory arrest from birth, developmental delay and cortical blindness. His needs include medical administration, treatments, dressings, suctioning, gastrostomy (G-tube) feeding, ventilator, tracheotomy care, aspiration precautions, seizure precautions, and oxygen therapy. He is in a persistent vegetative state and is severely spastic, is quadriparetic/quadriplegic, essentially because he has no voluntary purposeful movement.
3. The petitioner lives with his parents and a sibling, aged two years-old. The petitioner's mother (aged 26) is his primary caregiver (PCG). The petitioner's mother has no physical or mental limitations. The father (aged 28) is employed as a small engine repair mechanic with Sears from Monday through Friday, 7 a.m. to 5 p.m. and is on call Saturdays.
4. The agency has contracted KePRO South to perform medical utilization reviews for Private Duty Nursing and the Personal Care Prior Authorization Program for Medicaid beneficiaries. This prior authorization review determines medical necessity of the hours requested, under the terms of the Florida Medicaid Program.

5. The request for service is submitted by the provider, along with all information/documentation required in order for KePRO to make a determination of medical necessity for the level of service being requested. This service is reviewed every 180 days (six months) and a request for modification can be requested by the petitioner before the review.
6. The petitioner had been receiving private duty nursing (PDN) of 2,670 hours for the previous certification. The hours provided was from 10 p.m. to 4 p.m. Monday, Tuesday, Thursday and Friday (18 hours daily), 10 p.m. to 6 a.m. Wednesday and Sunday (8 hours daily) and 8 a.m. to 4 p.m. and again from 10 p.m. to 6 a.m. on Saturday (16 hours). The parents provide 64 hours per week care for the petitioner. The petitioner continues to receive the same level of services pending the outcome of the appeal.
7. A request for 2,670 hours of PDN, (5-7 days/week, 8-18 hours/day) was submitted by the provider, Medical Services of Northwest Florida, for the period of September 27, 2009 through March 25, 2010. The summary provided by the provider indicated the petitioner "is totally dependant on other individuals for his survival. He cannot blink, swallow, move, he is incontinent, and has no protective reactions. He requires 24 hour care to meet his needs including g-tube care, administration of feedings, administration of medications, eye care, Passive ROM, ventilator care, trach care, suctioning,

CPT, turning, bathing, changing, dressing, skin care, oral care, and bowel/bladder care."

8. A board certified pediatric specialty physician consultant reviewed the case and made the following determination:

> DENY 2670 hours LPN 09/27/09-03-25-10 Sunday (8) 12a-6a & 10p-12a Mon(18) 12a-4p & 10p-12a tues(18) 12a-4p & 10p-12a sat (16) 12a-6a & 8a-4p & 10p-12a. The parents could provide further care, especially as the mother is home. Would only APPROVE 10p-6a nightly – if the mother is able to provide care all day Wednesday it is unclear why she is not able to do so on all other days of the week."
> Pediatrician Information regarding this recipient's medical status and / or PCG availability to provide care was limited and did not support the skilled services requested for this certification period. 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...

PDN-Recipient and Provider Initial Denial Letter dated October 20, 2009 was issued approving 1,440 and denying 1,230 hours.

9. An appeal and request for reconsideration was requested by the provider on October 20, 2009.

10. A second KePRO physician consultant, board certified in pediatrics, who had not issued the initial denial made the following decision:

> "Reconsideration review. Provider does not answer our questions to how mother is capable of providing care all day Wednesday and not during the other days when 18 hours of care is being requested.**I would therefore suggest to rescind the previous denial and MODIFY the DENIAL to represent APPROVAL of hours as requested to be applied to the first 30 days of the cert period followed by a denial of 4 hours on Monday, Tuesday, Thursday, Friday and Saturday for the next 30 days, and an additional 4 hours

> for each of the same days, except Saturday for the following 30 days, followed by a DENIAL of an additional 2 hours for each of the same days, M-T Thu-F for the remainder of the cert period and approval of the rest of the hours requested. This will provide time for this PCG to apply these denied hours to anytime during the days slated and provide independent care as she is capable of demonstrating on Wednesday. "

11. PDN-Recipient and Provider Recon Letters (Overturn) were issued on November 4, 2009 modifying the original denial of PDN hours.

12. According to petitioner's testimony, is a high school dropout and has a learning disability. He asserts that he is untrained in providing for the independent care of the petitioner and believes that he is "untrainable". He is the sole employed individual in the household working from 7 a.m. to 5 p.m. five to six days per week. opined that, even with training in the care of the petitioner, he would be unable to adequately and competently provide the level of care that the petitioner needs due to his learning disability, difficulty in grasping medical concepts and making independent decisions in an emergency situation. He asserts he lacks the knowledge and training necessary to provide the level of medical care that requires. He can help with bathing and repositioning the petitioner and can follow instructions for monitoring the machines; however, he does not feel capable of making independent decisions regarding how much or how frequently the petitioner needs to be suctioned or to have oxygen adjusted unless he is told what he is to do.

13. assists his wife, the petitioner's primary caregiver, with shopping, cleaning and child care on occasions. His wife is primarily responsible for these functions as well.

14. described a typical Monday as follows: She and her youngest child arise at about 7 a.m., prepare and eat breakfast, dress, brush teeth, and perform other activities of daily living (ADL). She goes to the gym for about 30 minutes three times a week after taking her youngest child to a sitter. She will run other errands, shopping, etc. pick up her toddler, and return home at 11:00 a.m. After preparing lunch for the toddler, she tries to get him down for a nap. She is present in the petitioner's room when the therapist comes about two times a week. At about 1:30 p.m. her youngest child wakes up. She will spend this time playing with him for about 2 hours. Between 4 p.m. to 6 p.m. she is the sole caregiver for the petitioner until her husband gets home. The husband will feed the youngest child and put him down at about 8 p.m. The parents go to bed at 10:15 p.m. or 10:30 p.m.

15. On Sunday and Wednesday, the mother is responsible for providing 16 hours of care for the petitioner from 6 a.m. to 10 p.m. Neither the petitioner nor the provider presented an explanation as to how she was able to provide for 16 hours of his care on these days and not the other days. On Thursday and Friday the petitioner's mother is responsible for providing 6 hours of care from 4 p.m. to 10 p.m. and Saturday she provides care from 6 a.m. to 8 a.m. and

4:00 p.m. to 10 p.m. The PCG currently provides care 64 hours weekly. She is concerned that the complexity and amount of care the petitioner requires will lead to fatigue. As a result, she fears that the level of care will deteriorate and that she would be unable to adequately and competently provide the intense level of care that [redacted] needs and provide for the care of her two-year old child, in addition to other household responsibilities. In addition, she fears that her marriage will suffer if she is unable to spend some time with her husband.

16. The petitioner requires 24 hour trained monitoring to meet his medical needs including monitoring and adjustment to his ventilator, tracheal tube, suctioning, gastric tube placement and cleansing, liquid feeding through the gastric tube, body turning, positioning, comfort needs, diaper changing, bathing, dressing, skin and oral care, bowel and bladder incontinence care. His heart rate, respiration rate, oxygen saturation levels, body temperature, skin color, urine output, drainage, administration and titration of medications, suctioning and breathing treatments are activities required by the petitioner's caretakers.

17. The provider, Medical Services of Northwest Florida, testified regarding current staffing for the petitioner. There are six nurses providing for his care who can provide 40 hours of care per week. The home health care agency uses a combination of multiple LPNs to provide the contracted hours of

weekly care not currently provided by the petitioner's PCG. Due to the complexity of the petitioner's care and the diligence a caregiver must provide, staffing standards are determined on a "case by case" basis. Caregivers must be trained on ventilator and tube feeding techniques and must be near the petitioner at all times.

18. The petitioner has been hospitalized in excess of 20 times since birth. He was last hospitalized for pneumonia in December 2009.

19. The petitioner provided a deposition from PH. D. a board certified rehabilitation counselor, Life Care Planner and Case Manager and a licensed mental health counselor. His role as a life care planner and case manager is to develop an intensive plan for making certain that all arrangements necessary for durable and replenishable medical goods are accomplished and that parents fully understand the nature of the care and treatment that has to be provided. He works with a treatment team and utilizes every resource in making a determination as to what the individual's needs are. In this instance, Dr. is acting as a consultant and has completed an analysis based on the consultation he has done. He is not a treating provider for the petitioner. Dr. has reviewed the petitioner's medical records from September 2007. He has also conducted in-person evaluations with the petitioner and his family, done developmental assessments on the petitioner, reviewed his medical records and completed a

documentation of recommendations to draw from the assessment tool what is needed to go into a life care plan. He is familiar with the family, the mother, the petitioner and his records.

20. Dr. review of the petitioner's medical records from the treating physicians reveals that the petitioner requires such equipment as a nebulizer set, oropharyngeal suction catheter, tubing,tracheostomy tubing, breather circuits, enteral feeding supplies, volume ventilator stationary/portable, humidifies air power source compressor and tracheostomy tube collar to administer his care.

21. A telephone conference was conducted between Dr. and the PCG to discuss the petitioner's current level of functioning and to outline the petitioner's daily care needs. The daily schedule provided describes daily activities.

6:00 a.m. the petitioner is given chest physiotherapy (removal of excess secretions from the lungs by patting the chest to vibrate the lungs),range of motion therapy to prevent contractures, application of lacrilube to both eyes, administration of medication through the G-tube, IV antibiotics administered through his mediport, repositioning and g-tube feeding. Oral and tracheal suctioning are done numerous times daily based on his need for such. This may require tracheal suctioning 3 or 4 times a daily Nebulizer treatment. This will increase during periods of illness to as much as every 3 to 4 minutes.
6:30 a.m. to 7 a.m. Nebulizer treatment is complete, trach is suctioned, and G-tube feeding is completed.
7:30 a.m. G-tube is flushed with water.
8:00 a.m. chest physiotherapy and range of motion therapy. Dressings changes around trach and G-tube, O2 sensor relocated on body, oral hygiene, diaper change as needed, hands splinted and placed in a sitting position in a chair.

10:00 a.m. placed back in bed, administer medications via G-tube, flush G-Tube, monitor temperature, suctioning.
11:00a.m. G-tube feeding
12:00 noon. Feeding is complete- disconnect from feeding pump
12:30 p.m. G-tube is flushed
1:00 p.m. AFO's are put on and he is placed in his stander.
2:00 p.m. petitioner removed from stander, chest physiotherapy and range of motion administered. Nebulizer treatment, tracheal suctions, medication administered.
3:00 p.m. IV disconnected- repositioned on tummy for a hour and then repositioned.
5:00 p.m. G-tube feeding
5:30 p.m. administered medication as needed
6:00 p.m. Administer medication, range of motion and chest physiotherapy.
7:00 p.m.-7:30 p.m. Bathe (sponge bathe, change dressings, reposition O2 probe, chest physiotherapy and range of motion, oral care
8:00 p.m. put to bed
10:00 p.m. range of motion therapy, chest physiotherapy- nebulizer treatment and tracheal suctioning, g-tube feeding.
The overnight nurse takes over care for the petitioner from 10:00p.m. to 6:00 a.m.

22. Dr. deposition testimony attested that the majority of items under the home health regulations would be defined as skilled nursing services. "The mother can provide those services and has done so during the hours that she is the main caregiver. Services such as G-tube care, ventilator care, deep suctioning, the administration of IV antibiotics, and administration of nebulizer treatments are skilled nursing services and are not generally consistent with provisions by certified nurse assistants". The petitioner requires oversight 24 hours a day, seven days a week and remains at risk for significant healthcare problems even with the provision of the balance of skilled nursing care and family care that he is receiving. Dr. opines that "the amount of care currently provided is pushing the maximum for this

family because the PCG is responsible for the care of a young toddler and for her home". He opines that because the petitioner's needs are intensive, "it is difficult for the mother to accomplish the 64 hours she currently provides for the petitioner. She has accomplished it, managed it, but it has been very difficult". He opines that there is "the possibility that the cumulative effect of the provision of care will lead to increased stress and caregiver burnout". The proposed action to add additional responsibility to the PCG will lead to burnout creating a risk factor for the mother not to provide the highest quality and level of care and support for the petitioner. There is a risk that the PCG will miss something. "Generally an LPN will take on eight to twelve hour shifts. There is a risk of fatigue factor which creates problems with staff efficiency if they run longer shifts or go into 60, 70, or 80 hour weeks".

23. Dr. opined that the proposal to increase the amount of care the PCG is responsible to provide is unrealistic. "Based on the care required by the petitioner, there would be no way to guarantee that the mother would ever get a full night's sleep". Further, his opinion is that the petitioner would be at significant risk medically and the caregiver would be pushed to the point of burnout. "It is too many hours, results in a significant lack of sleep, and no way to guarantee that the PCG can handle the frequency with which she is going to have to get up during the night to deal with medically intensive

issues". Finally, he opines that there would be a mental health and a physical health risk on the PCG and the biggest risk on the petitioner.

24. The petitioner's treating physician, Dr. I , provided a letter dated October 30, 2009 stating in part: " is neurologically devastated secondary to cardiopulmonary arrest/intracranial hemorrhage in the neonatal period... has significant nursing needs, and in my clinical judgment needs all of his daytime nursing retained."

25. Dr. Buzzeo, the respondent's expert, testified that he is a board-certified pediatrician, licensed to practice medicine in the state of Florida. Dr. Buzzeo explained that KePRO reduced the services based on the information provided to KePRO through the I-exchange internet program from the Home Health Agency. Dr. Buzzeo's review was limited to the petitioner's medical records. He has never met the petitioner or his parents nor spoken with any of her health care providers.

26. Dr. Buzzeo explained why KePRO did not approve petitioner's request for PDN hours at previous level. The assessment of need is based on a child's condition, family support and care supplements, the family's ability to provide care and a family's and child's schedule regarding work, school, sleep and care for other family dependents. In addition, PDN services are authorized as a supplement to the care provided by the parents and caregivers.

27. The KePRO reduced petitioner's PDN services gradually to allow the PCG to apply denied hours to anytime during the days stated and provide independent care as she is capable of demonstrating on Wednesday (16 hours). The PDN request was modified so that skilled nursing be approved for the first 30 days of the certification period (September 27, 2009 –October 26, 2009) as requested; 18 hours per day Monday, Tuesday, Thursday and Friday; 8 hours per day Wednesday and Sunday; and, 16 hours on Saturday. The next 30 days period (October 27, 2009 through November 25, 2009) would be reduced to 14 hours per day Monday, Tuesday, Thursday and Friday, 8 hours per day Wednesday and Sunday and a reduction to 12 hours per day on Saturday. The next 30 day period (November 26, 2009-December 25, 2009) would be reduced to10 hours per day Monday, Tuesday, Thursday and Friday, 8 hours per day Wednesday and Sunday, and 12 hours per day Saturday. For the remaining 90 days of the certification period (February 26, 2009-March 25, 2010) the hours would be 8 hours per day Monday through Friday and Sunday and 12 hours per day on Saturday.

28. Dr. Buzzeo acknowledged that he is not a "life care planner". He disagrees with Dr. opinion regarding the care that the petitioner requires (that it be no more than the staffing formula for a skilled provider). Testimony presented by the petitioner would not impact the decision to reduce PDN in this case. The parent has demonstrated the ability to care for the petitioner

for 16 hours on Sunday and Wednesday. The father is available on Sundays and is able to assist with the care of the home, shopping and the toddler. Further, the father is available from the time he gets home from work, approximately 6 p.m. to 10 p.m. to complete household chores, child care activities for the toddler and assist the PCG with bathing and monitoring activities of the petitioner.

29. Ms. Henline, the medical health care program analyst for AHCA provided testimony regarding the requirements for a recipient to receive PDN, as well as the Agency's policies and procedures for PDN services. Ms. Henline presented and reviewed the pertinent provisions of the Home Health Handbook. Specifically, Ms. Henline explained that PDN 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.

30. Further, Medicaid does not reimburse private duty nursing services provided solely for the convenience of the child, the parents or the caregiver. In addition, Medicaid does not reimburse private duty nursing for respite care. Examples are parent or caregiver recreation, socialization, and volunteer activities.

CONCLUSIONS OF LAW

The Office of Appeal Hearings has subject matter jurisdiction in this proceeding, pursuant to Sections 120.569, 120.57(1), 120.80(7) and 409.285 Florida Statutes.

Fla. Admin. Code 65-2.060, states in part:

> (1) The burden of proof, except where otherwise required by statutes, is on the party asserting the affirmative of an issue. The burden is upon the Department when the Department takes action which would reduce or terminate the benefits or payments being received by the recipient. The burden is upon the petitioner if an application for benefits or payments is denied. The party having the burden shall establish his/her position, by a preponderance of evidence, to the satisfaction of the hearing officer.

Because the Agency moves to reduce private duty nursing care hours, the Agency has the burden of proof.

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. Fla. Admin. Code 65-2.060, 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.

Consequently, the undersigned took into consideration all the evidence presented at the hearing, not solely what was made available to the Agency when it made its decision.

Pursuant to section 409.902, Florida Statutes, the "Agency for Health Care Administration is designated as the single state agency authorized to make payments for medical assistance and related services under Title XIX of the Social Security Act."

Florida Statutes 409.913 governs the oversight of the integrity of the Florida Medicaid Program. Section (1)(d) sets forth the "medical necessity or medically necessary" standards, and states in pertinent part as follows:

> .... For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity. Determinations of medical necessity must be made by a licensed physician employed by or under contract with the agency .... See §409.913(d), Florida Statutes (emphasis added).

The petitioner argued the opinion of the treating physician, Dr. Hensley, that the services the petitioner receives should not be reduced and the opinion of Dr. Deutsch, a certified life care planner should be given considerable and substantial weight. The undersigned considered the treating physician's written opinion however, there was no indication that the mother was not able to provide the medical care needed by the petitioner.

The law is clear that "[t]he 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." See Rule 59G-1.010(166), Florida Administrative Code; see also, Home Health Services Coverage and Limitations Handbook, (July 2008) page 2-2. Although Dr. Hensley recommends that the petitioner in the instant case retain the number of

hours of PDN services, that does not, in itself, make such services medically necessary or a covered service.

In Moore v. Medows, the United States Court of Appeals for the Eleventh Circuit determined that "[w]hile it is true that, after the 1989 amendments to the Medicaid Act, the state must fund any medically necessary treatment that [the Medicaid recipient] requires, ... it does not follow that the state is wholly excluded from the process of determining what treatment is necessary. Instead, both the state and Moore's physician have roles in determining what medical measures are necessary to "correct or ameliorate" Moore's medical conditions .... **The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures .... A private physician's word on medical necessity is not dispositive."** See Moore v. Medows, 324 Fed. Appx. 773, 774. (IIth Cir.) (emphasis added).

Based on these authorities, the hearing officer concludes the Agency makes the final decision of medical necessity. The administrative hearing is a part of the Agency's decision making process. The court has stated: "The APA envisions a process where the agency will take a second look at its action. Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily." (*McDonald v. Department of Banking & Finance, 346 So.2d 569* (Fla. 1st DCA 1977)).

Also In *Couch Construction Company, Inc. v. Department of Transportation*, 361 So.2d 172 (Fla. 1st DCA 1978), the court stated in part: "As we said in McDonald, APA hearing requirements are designed to give affected parties an opportunity to change the agency's mind. That being so, the agency's final order must defend its decision on the basis of what it knows at the time the order is entered."

The hearing officer has been delegated the final decision making authority for the Agency in making this decision. In making the decision, she will evaluate the testimony of the expert witnesses, taking into consideration the facts in the records upon which the experts relied in reaching their opinion. (See sections 90.702, 90.703 90.704, 90.705, Florida Statutes.)

Coverage for Medicaid children's services is controlled by the federal program requirements for Early Prevention, Screening, Diagnosis, and Treatment (EPSDT). Children under age 21 who are Medicaid beneficiaries are entitled to EPSDT services. The relevant provision of the federal definition of medical necessity, 42 U.S.C. § 1396d (r)(5), states in pertinent part as follows:

> Early and periodic screening, diagnostic, and treatment services. The term "early and periodic screening, diagnostic, and treatment services" means the following items and services: ... (5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services and covered under the State plan.

Private-duty nursing care services are described at 42 U.S.C. §1396d(a)(8). The requirements under federal law are that the private-duty nursing services be "necessary treatment to correct or ameliorate physical and mental conditions ... "

It is important to note that the Agency has accepted its responsibility to cover private duty nursing services and the dispute in this case in not whether the Agency covers such services or medical necessity, but rather the amount of services (in hours) the petitioner requires. There are no arbitrary limits on the amount of hours, rather an individual determination is made based on the petitioner's individual needs. There has been no authority submitted which would suggest the state has set utilization limits on the amount of private duty nursing services a child may receive.

The state of Florida has implemented the federal definition "necessary ... treatment and other measures described in subsection (a) of 1396d to correct or ameliorate physical and mental conditions" through, statute and rule including handbooks referenced in rule. These authorities evaluate and determine the necessary treatment to correct or ameliorate physical and mental conditions through the use of the term "medical necessary."

Florida's definition of medically necessary is provided at rule 59G·1.010(166), FAC" which reads as follows:

> (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.

Florida Statute section 409.905 Mandatory Medicaid services, states:

(4) HOME HEALTH CARE SERVICES
(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.

The evidence submitted at the hearing shows the petitioner required 24 hour nursing care. For that care to be paid for under the Medicaid Program it must be necessary treatment or medically necessary as defined in the legal authorities.

Florida Statute section 409.905 (4)(b)specifically requires "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."

The state of Florida has made it clear that when the parents can provide care as envisioned under the statute, Medicaid will not pay for care as an alternative to the parents providing the care. Any care the parents can provide under the statute, even when such care may elsewhere be described as skilled nursing care, is not considered necessary health care or treatment to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services.

The Agency reduced services based on its belief that the parents were capable of providing care to petitioner as demonstrated on Wednesday from 6:00 a.m. to 11:00 p.m. This decision was made by the Agency's expert Dr. Buzzeo. The record shows that he was not provided information that explained why the mother was able to provide the level of care on Wednesday and not the other days of the week. The father works five to six days per week. He is able to assist the mother with household duties and child care for the younger sibling, leaving the mother the opportunity to provide for the petitioner's care.

There was no dispute as to whether the mother had the ability to be trained to meet the high level of care the petitioner required. In petitioner's consultant's ( ) opinion the number of hours of intense level of care provided by the

petitioner's mother should not exceed the hours provided by LPN's or trained skilled nurses as there is a risk of caregiver burnout that could contribute to the deterioration of care provided to the petitioner. This could present a safety issue for the child.

Dr. Buzzeo's opinion was based solely on the record present and he had no contact with the petitioner or her mother. In reviewing KePRO physician's (Dr. Buzzeo) opinion, the mother has already demonstrated the ability to provide at least 16 hours of care on Wednesday.

The Home Health Services coverage and limitations handbook (July 2008) p2-10 states in part:

> Medicaid does not reimburse for the following services under the home health services program:
> ...Respite care; ...

The above authority explains that private duty nursing services are not provided for respite care. The petitioner's testimony indicated the mother goes to a gym three times a week for exercise. The undersigned concludes that this activity would be considered respite in that the petitioner's mother could complete this activity at home.

The issue as to whether or not private duty nursing hours can be reduced pursuant to parental responsibility is based on the following: the Florida Medicaid Home Health Services Coverage and Limitation Handbook, which has been promulgated into rule in the Florida Administrative Code at 59G-4.130(2). The Florida Medicaid 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 parents to provide care to the fullest extent possible. The respondent determined that the reduction should be gradually reduced over time during the certification period. Counsel for the respondent argued that parents need to participate to the fullest extent possible. Counsel for the petitioner argued that private duty nursing for the petitioner was medically necessary for the hours requested and that any further reduction in hours would potentially create caregiver burnout leading to possible endangerment of the child's life.

The hearing officer considered all evidence submitted at the hearing and reviewed all conditions as set forth in the Program rules. The evidence demonstrates that the petitioner is in need of services. The issue then rests on whether the parents can provide the services during the time period determined by the respondent. We must look at the skill of the parents and the impact of other responsibilities in the household.

The services provided by the current skilled nurse for the petitioner include G-tube care, ventilator care, deep suctioning, the administration of IV antibiotics, administration of nebulizer, repositioning and monitoring for oxygen saturations. The mother is trained to provide all of these services and it is uncontested that she is

capable of caring for the petitioner. Since the mother has demonstrated that she can safely provide care to the petitioner, we must then determine if there are other barriers to providing this care.

There is one other child in the home. The father is working and unable to provide care for the petitioner based on his learning disability and his absence from the home during work hours. He is home Mondays through Fridays and at times on Saturdays from 6:00 p.m. until at least 6:00 a.m. and all day Sundays. The mother does not work and is in the home all day, seven days a week. The father can attend to the petitioner's sibling during the time he is at home and is capable of contributing to the household maintenance and shopping to relieve his wife of these activities.

While the petitioner's expert offered his opinion that the parents could not take on any more hours of care for their son, there was no evidence that the care provided required constant intervention. The hours added by the reduction in the Medicaid covered PDN do not appear to be unreasonable as the parents currently provide 16 hours per day on some days. The evidence demonstrated that the petitioner's mother is very involved in the petitioner's care and is capable of caring for the petitioner. The hearing officer concludes that the petitioner's parents are capable of caring for the petitioner. The proposed reduction in hours of PDN still provide sufficient time for the parents to take care of other necessary activities needed to run the household, etc. The respondent's action to gradually reduce the hours of PDN as proposed is within program rules.

DECISION

The appeal is denied. The respondent'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 1st day of April, 2010,

in Tallahassee, Florida.

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

Copies Furnished