

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

FILED

FEB 16 2010

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

PETITIONER, APPEAL NO. 09F-08069
Vs.
AGENCY FOR HEALTH CARE
ADMINISTRATION (AHCA)
CIRCUIT: 06 Pinellas
RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was telephonically convened before the undersigned at 2:20 p.m. on January 6, 2010. Her mother, _____, represented the petitioner. Stephanie Lang, RN specialist represented the respondent. AHCA testimony was available from KePRO (Keystone Peer Review Organization) staff members, Bonnie Wallington RN nurse review supervisor, and Robert Anthony Buzzeo, MD pediatrician and physician reviewer. The hearing record was left open to receive Medicaid Waiver and more work information from the petitioner's mother with response permitted from AHCA. The information was received and labeled as Petitioner's Exhibits 2 and 3, respectively. AHCA did not wish to respond (shown in correspondence of January 25, 2010) and response was not required.

ISSUE

At issue was whether denial of 480 hours of Private Duty Nursing (PDN) was correct. As this was a reduction, the respondent bears the burden of proof.

FINDINGS OF FACT

1) The petitioner has profound medical challenges and receives PDN under Medicaid. It is undisputed that she needs skilled care around the clock. Her mother knows how and is capable of providing such care.

2) She is ten years old. Health problems include seizure disorder, cerebral palsy, swallowing disorder, incontinence, contractures, microcephaly, urinary tract infections, pain, poor vision, and developmental delay. Treatments include use of wheelchair, G-tube feedings and pump, reflux precautions, suctioning, nebulizer, chest physiotherapy and other skilled services. She requires assistance with all areas of daily living.

3) She lives with her mother and two siblings, ages 8 and 13. The siblings are active in sports and attend school with honor roll recognition. The mother is a paramedic who works for [redacted] responding to 911 calls. She works full time, generally four days a week, usually at 12 hour shifts beginning at 6:30 a.m. and the schedule involves "rotating weekends...position requires additional shifts from time to time as needed..." (Petitioner's Exhibit 3 from the employer). The mother does not control her own schedule and it is unpredictable. She may get notice of need to work just the day before she has to work. Her work schedule is not flexible but it is fluctuating. If the mother is not sufficiently accommodating to the employer, the mother is concerned she will not earn enough money to meet the economic needs of the family.

4) KePRO is the review agent for AHCA. Until the recent recertification period, KePRO and AHCA approved PDN at 22 hours daily, from 7am to 8pm

and then from 10pm to 7am. KePRO does not interview family or physicians but relies on information submitted by providers for review purposes.

5) At recertification for period of October 20, 2009 – April 17, 2010 the provider requested continuation of 3960 hours. The request was not approved. Instead, 3480 hours PDN were approved and 480 hours were denied. The review findings said:

Approved Hours: 3480 SN hours

22 hours 4 days/wk days mom works

14 hours 3 days/wk days mom not work ...

22 hrs 7 days/wk x 30 days, then 18 hrs 3 days/w30 days, then 14 hrs 3 days/wk for remained of cert

Denied Hours: 480 SN hours

4 SN hours 3 days/wk after 30 days, x 30 days, then 8 hrs 3 days/week for remainder of cert.

6) The respondent issued reduction notice on November 16, 2009 and it was appealed.

7) The petitioner has applied for Medicaid Waiver with the Agency for Persons with Disabilities. She is on the wait list (Petitioner's Exhibit 2). There may be at least 900 others ahead of her.

8) The petitioner's father does not live in the home. Evidence did not establish that he is capable of providing skilled care for her. The mother believed he could provide the petitioner's care for about an hour on each weekend day, if she had to work, and he would not need to medicate or attend to her hygiene.

CONCLUSIONS OF LAW

By agreement between the Agency for Health Care Administration (AHCA) and the Department of Children and Families, AHCA has conveyed jurisdiction to

the Office of Appeal Hearing to conduct this hearing pursuant to Florida Statute, Chapter 120.80.

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. ...

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

Consistent with law, AHCA uses a prior authorization system for all PDN services. This includes 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. AHCA does not pay for home health services unless such is medically necessary. Florida Statute 409.913 also addresses "Oversight of the

integrity of the Medicaid program,” with (1)(d) describing “medical necessity or medically necessary” standards and saying in relevant part. “...For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity...”

At issue is whether reduction of PDN hours is justified for the new certification period. Consistent with statute, Florida Administrative Code 59G-1.010 “Definitions” informs:

(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 is adopted by rule under the Florida Administrative Code at 59G-4.130

(2). The Florida Medicaid Home Health Services Coverage and Limitation

Handbook, addresses PDN, parental responsibility and flex hours, with pages 2-17 and 19, stating:

Parental Responsibility.

Private duty nursing services are authorized to *supplement* (emphasis added) 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. Medicaid does not reimburse private duty nursing for respite care. Examples are parent or caregiver recreation, socialization, and volunteer activities.

...

Limitations

...

Flex Hours or Banking of Hours

Medicaid does not allow "banking of hours" or "flex hours". Only the number of hours that are medically necessary may be approved. Home health service providers must request only the number hours that are expected to be used and must indicate the times of day and days per week that the hours are needed. If a recipient requires additional hours due to unforeseen circumstances or change in medical or social circumstances, the home health service providers should submit a modification request to the PRO for the additional hours needed.

...

Authorization Process

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.

The petitioner's care is medically complex. She needs continuous skilled care, and that is undisputed. Her mother is capable of providing care and that is undisputed. For the Medicaid Program to authorize and pay for PDN service, all review standards must be met. It is necessary to assess other sources of care.

The Florida Medicaid Handbook, set forth under rule, says that private duty nursing services are authorized to *supplement* care provided by parents but parents must participate in providing care to the fullest extent possible. It is then important to assess whether parents can provide the services during the time and in the manner the respondent has determined they can. The primary concern in this case is the mother's availability, not her capability. She is a single parent who works long hours at fluctuating schedule and she cares for her other children. She understands her daughter's care and can provide skilled services when she is home and not tending to other children or other family needs. On days when she works 12 hours, and has 22 hours of PDN, it is evident she would have 10 hours to sleep, address hygiene, basic family chores, other children, travel to and from work, and eat. She also would be providing skilled care for the petitioner from 8:00 p.m. to 10:00 p.m.

The Florida Medicaid Home Health Services Coverage and Limitation Handbook, under Licensed Nurse and Home Health Aide Services, on pages 2-14 and 2-15 "Skilled Nursing Services" states:

The following are examples of services that require the direct care skills of a licensed nurse:

- Administration of intravenous medication;
- Administration of intramuscular injections, hypodermoclysis, and subcutaneous injections only when not able to be self administered appropriately.
- Insertion, replacement and sterile irrigation of catheters;
- Colostomy and ileostomy care; excluding care performed by recipients;
- Treatment of decubitus ulcers when:
Deep or wide without necrotic center;
Deep or wide with layers of necrotic tissue; or
Infected and draining;

- Treatment of widespread infected or draining skin disorders;
- Administration of prescribed heat treatment that requires observation by licensed nursing personnel to adequately evaluate the individual's progress;
- Restorative nursing procedure, including related teaching and adaptive aspects of nursing, which are a part of active treatment and require the presence of licensed nurses at the time of performance;
- Nasopharyngeal, tracheotomy aspiration, ventilator care; Levin tube and gastrostomy feeding, excluding feedings performed by the recipient, family or caregiver; and
- Complex wound care requiring packing, irrigation, and application of an agent prescribed by the physician.

The rules say that the request must reflect the level of service for which no equally effective and more conservative or less costly treatment is available. The general argument of the respondent is reasonable in view of the mother's work schedule with 3 days off. However, the work schedule as presented did not establish predictability or pattern, and evidence did not establish that the other parent could safely provide skilled care during the mother's work time. The mother suggested another reasonable alternative. She wanted the 22 hours daily level to continue as before, with the downward modification of 1 hour each weekend day, when the father could assist. In other words, she recommended 22 hours PDN for Monday through Friday, and 21 hours PDN for Saturday and Sunday.

In this situation, it is proper to assess the hours that the parent(s) would be available to provide skilled assistance and care to the petitioner. It is apparent that the obstacle to the mother providing greater number of care hours is that her work schedule is unpredictable, not flexible, and she is required to be available at short notice. If the mother's work schedule develops a more

predictable pattern, and/or if she is given greater notice of need to work, then it is likely that greater PDN reduction would be warranted. However, such a work routine was not evident.

Based on available evidence, the following PDN plan is determined appropriate. PDN at 22 hours daily is correct during the week and 21 hours daily is correct on the weekend. Some reduction has been justified, but not to the level shown in notice of November 16, 2009.

DECISION

The appeal is granted and the respondent's action is not upheld.

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.

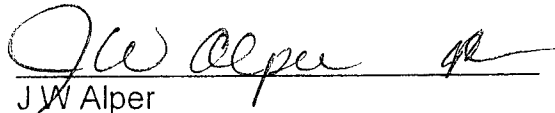
FINAL ORDER (Cont.)

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DONE and ORDERED this 16th day of February 2010, in

Tallahassee, Florida.



J.W. Alper

Hearing Officer

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Copies Furnished To: