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APR 26 2010

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

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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-08159

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION  
CIRCUIT: 20 Lee  
UNIT: AHCA

RESPONDENT.

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**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on March 16, 2010, at 8:30 a.m., in Ft. Myers, Florida. The petitioner was present at the beginning of the hearing. The petitioner was represented by \_\_\_\_\_ Esq. Present on behalf of the petitioner were the petitioner's parents, \_\_\_\_\_ the petitioner's treating physician, \_\_\_\_\_ M.D.; waiver support coordinator, \_\_\_\_\_ and the petitioner's certified nursing assistant (CNA), \_\_\_\_\_. The respondent was represented by Willis Melvin, Esq. Present on behalf of the respondent was Pat Brooks, Agency for Health Care Administration (ACHA) program operation administrator. Witnesses for the respondent from Keystone Peer Review Organization (KePRO) were Robert Buzzeo, M.D., physician reviewer, and Tina Herron, registered nurse reviewer.

David Nam, Esq. with ACHA was observing. Roberta Bishop was present as court reporter.

An Order to Submit Memorandum of Law was sent to both parties on April 8, 2010. Memorandum of Law was received from both parties on April 20, 2010.

### **ISSUE**

The petitioner is appealing the notices of November 13, 2009 and January 15, 2010 for the respondent's action to deny 600 hours of personal care assistance for the period of November 3, 2009 through May 1, 2010. The petitioner was receiving four hours, seven days a week prior to the denial. As this action is a termination of the hours previously being received, the respondent has the burden of proof.

### **FINDINGS OF FACT**

1. The petitioner is a nine year old Medicaid eligible child. On behalf of the petitioner, the nursing agency requested 720 hours of personal care assistance for the period of November 3, 2009 through May 1, 2010. This equated to two hours of personal care assistance (PCA) twice a day, for a total of four hours daily (7:00 a.m. to 9:00 a.m. and 6:30 p.m. to 8:30 p.m.)
2. The petitioner's diagnoses are Autism Spectrum Disorder, anxiety disorder, constipation, ADHD and obsessive compulsive disorder. The petitioner is non-communicative.

3. The petitioner is currently attending school that is specifically for children with autism. He attends school 9:00 a.m.-3:00 p.m., Monday through Wednesday; 9:00 a.m.-12:00 p.m., on Thursday; and 9:00 a.m. to 3:00 p.m. on Fridays (when the school is open). The school is a year-round school. He is involved in an in-home program with a behavioral specialist after school from 3:00 p.m. to 6:00 p.m. Monday through Thursday.
4. The petitioner is unable to independently perform his activities of daily living. Bathing requires constant prompts and attendance. If left alone, the petitioner will only play with the water or not get in the bath. He will not bath without prompting.
5. Without prompting, the petitioner would not brush his teeth or he would put other items in his mouth. He can be very resistant to brushing teeth. He will use aggressive tactics to avoid brushing his teeth. In order to get this task accomplished, he needs to be assisted and prompted. The petitioner's mother stated that lack of oral hygiene for the petitioner caused DCF to visit the petitioner's home but noted that there was no intervention by the Department.
6. The petitioner has food issues and the mother has tried a variety of diets. She continually monitors his diet. Special attention must be paid to meal preparation.
7. The petitioner cannot eat a meal without prompts and assistance. If he is left alone he will throw food and dishes, spit it out and not eat. At

- times, he will "pile" food which results in him choking. He must be instructed on swallowing.
8. The petitioner will not use the toilet without prompting. He must be directed to go to the bathroom and he must be told to eliminate and how. If left alone, he will play with the feces or not use the toilet.
  9. The petitioner is unable to clothe himself without prompting.
  10. The petitioner resides with his parents, and three siblings, ages 8, 4 and 11 weeks old. The mother is the primary caregiver of the children. The mother does have help from a friend in the afternoon for the petitioner's siblings. The father works outside of the home. His hours are 9:00 a.m. to 6:00 p.m. The father is providing the petitioner's personal care in the mornings. The father drives the petitioner to school on days that the petitioner attends school.
  11. The petitioner has escaped during the night and been brought home by the police. His room is now equipped with bars on the windows and locks on the door. The petitioner wears a Sheriff's GPS ankle bracelet device due to his history of wandering.
  12. The petitioner will pinch and bite his siblings and mother. The family now takes measures to make sure that the children are not in close proximity to the petitioner. When the petitioner's mother was pregnant, the petitioner would push on her stomach and over-power her. It was at that time, the petitioner's father took over the petitioner's care. The mother spends less than one hour a day one-on-one with the

petitioner. The petitioner requires constant one-on-one monitoring to provide a safe environment.

13. Currently, the PCA provides two hours of care in the evening. Those activities are bathing, feeding, dressing, dental hygiene, and getting him ready for bed. Currently, the PCA is providing morning care occasionally in the morning on days that the petitioner does not have school. The activities are bathing, feeding, dressing, dental hygiene, and getting him ready for the day. She works with him five to eight hours a day. She attested that the petitioner's morning and evening routines are about two hours each time if the petitioner is cooperative.
14. The nursing agency requested 720 hours of personal care assistance for the petitioner for the period of November 3, 2009 through May 1, 2010<sup>1</sup>. Prior authorization for home health services are reviewed every 180 days. KePRO is the contract provider for the respondent for the prior authorization decisions.
15. The petitioner's home health agency provides information to KePRO by computer. This process of exchange of information is referred to as the I-exchange. The information from the I-exchange is entered into the Internal Focus Finding. The Internal Focus Finding provides information to a nurse reviewer and physician consultant of case identifiers, information and additional information regarding the

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<sup>1</sup> It should be noted that the denial letter and reconsideration letter both refer to home health aide (HHA) hours but all parties agree that the requested hours were for PCA.

petitioner. The case was reviewed by a nurse reviewer. The request was then referred to the board certified physician consultant.

16. The initial physician consultant's decision was based on the information received from the home health agency. The physician consultant determined that the petitioner did not meet medical necessity. Of the 720 hours of personal care requested, 120 hours was approved as a transitional period for one month and 600 hours was denied. A PDN/PC Recipient Denial Letter was sent to the petitioner on November 3, 2009.
17. The home health agency requested reconsideration. The reconsideration was reviewed by a second physician consultant with KePRO. The second physician consultant indicated the notes from the home health agency only mention behavioral issues with the petitioner and no medical issues for the petitioner or his parents. He denied the requested services citing home health services cannot be provided for behavioral issues and the limited information regarding the petitioner and his parents' availability to provide care did not support the services requested. The respondent sent a PDN/PC Recipient Reconsideration - Denial Upheld notice on January 15, 2010.
18. The basis for the denial was that the petitioner did not qualify for the requested service. The petitioner's allergies and medications were considered. The respondent asserted that autism does not meet the criteria for services set forth in the handbook without other medical

impairments or motor deficits. Without any other motor deficits, there is no need for a home health aide.

19. The petitioner's treating physician asserted that autism is not a mental health issue or psychiatric issue. Autism is a neurodevelopment disorder. The physician has been treating the petitioner since July 2009. He has seen the petitioner in the office and in the petitioner's home. The petitioner needs attention in all activities of daily living due to safety issues. The physician believes PCA is needed for two hours in the morning and two hours at night to address the petitioner's needs for teeth brushing, bathing, toileting, and feeding.

20. The petitioner is on the Medicaid Developmental Disabilities Services Waiver. Effective March 1, 2010, the Developmental Disabilities Services Waiver no longer provides personal care assistance to recipients under the age of 21. These services are now available under the state plan to all Medicaid recipients' not just individuals receiving under a Medicaid waiver.

21. The waiver support coordinator opined that four hours of personal care service is warranted for the petitioner. The petitioner needs personal care services two hours in the morning and two hours at night due to other children in the home and health and safety concerns regarding the petitioner.

### 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.

The petitioner has been receiving PCA services through the Medicaid Developmental Disabilities (DD) Waiver Program. PCA is no longer covered under the DD Waiver Program but is a Medicaid State Plan service. The Medicaid Home Health Services (HHS) Coverage and Limitations Handbook has been adopted by rule and any includes the requirements for state plan Medicaid PCA services. Under the DD waiver, PCA could be used for a variety of reasons that addressed the needs of the specifically defined populations. The HHS handbook has different definitions of who is eligible for services and the type of services that can be paid by Medicaid. This transition from waiver to state plan has impacted PCA benefits in particular.

Since the petitioner's PCA is now a service under state plan HHS, the respondent reviewed the request for services using the rules and policies associated with this program. After a review of the petitioner's request for services, the respondent first reduced then terminated PCA. The following reasons were cited as the reasons for the denial:



- A. The petitioner's needs are not medically complex thus he is not eligible for services under the State Plan Medicaid
- B. The needs of the petitioner were behavioral interventions and those are not covered services within the State Plan Medicaid.
- C. The respondent contended that these types of services are available with Community Behavioral Health Services.
- D. The requested services are not medically necessary.
- E. The parents are to provide the requested services to the fullest extent possible, with supports from other sources that address autistic children.

The undersigned will address each of these denial reasons.

**A. The recipient must have a medically complex condition to receive  
PCA services.**

The respondent asserts that to receive this benefit, the petitioner must have a medically complex condition. The petitioner asserts that this is not a requirement for PCA. The HHS handbook defines PCA as "services ... to provide medically necessary assistance with activities of daily living that support a recipient's medical care need." (Home Health Services Coverage and Limitations Handbook at 2-22) The limitations on this service are "Medicaid reimburses personal care services for recipients under the age of 21 who: Have complex medical problems; and (r)equire more individual and continuous care than can be provided through a home health aide visit." (at 2-22) Medically complex is defined in Fla. Admin. Code 59G-1.010(164) as meaning "a person

has chronic debilitating diseases or conditions of one or more physiological or organ systems that generally make the person dependent upon 24-hour-per-day medical, nursing, or health supervision or intervention.” The petitioner’s conditions must be reviewed to determine if he meets this definition.

The petitioner has a diagnosis of Autism Spectrum Disorder. That medical diagnosis is a chronic condition. Autism is a neurological disorder impacting the petitioner’s neurological system. That has made him dependent on 24-hour-per-day health supervision or intervention. The petitioner is not capable of living on his own, completing his activities of daily living, communicating, or functioning without supervision or intervention. Therefore, it is concluded that this petitioner has a medically complex condition.

The petitioner’s condition meets the definition of a medically complex condition. The petitioner is requesting PCA to perform services for his daily living activities in the amount of two hours in the morning and two hours in the evening. Those services include bathing, eating, and dental hygiene. In accordance with the State Plan Medicaid, this is the type of services a PCA performs (Home Health Services Coverage and Limitations Handbook at 2-15).

**B. The needs of the petitioner were behavioral interventions and those are not covered services within the State Plan Medicaid.**

The respondent asserted that the services requested, due to the petitioner’s diagnosis, were mental health services. This was countered with the petitioner’s physician’s testimony that autism is not a mental health diagnosis but a neurological disorder. The Home Health Services Coverage and Limitations

Handbook at 2-10 lists the following as services that are excluded for home services: "Medicaid does not reimburse for the following services under the home health services program: ... Mental health and psychiatric services (these services are covered under the Medicaid Community Behavioral Health Program)..." The petitioner is not seeking mental health services, but is seeking PCA to assist with his activities of daily living (ADL's). Therefore, it is concluded that the petitioner is not seeking mental health services.

**C. The services requested are available through Community Behavioral Health Services.**

The respondent asserted that the services that were requested by the petitioner were not PCA services but behavioral services. The petitioner asserts that the services requested are personal care services. The respondent suggested that the petitioner seek assistance through Community Behavioral Health Services. The Community Behavioral Health Services Handbook (CBHS) at 1-2 state in part:

Community behavioral health services include mental health and substance abuse services provided to individuals with mental health, substance abuse and mental health and substance abuse co-occurring disorders for the maximum reduction of the recipient's disability and restoration to the best possible functional level. Services are limited to those which are medically necessary, are recommended by a treating practitioner and included in an individualized treatment plan.

However, the CBHS Handbook at 2-1-4 notes the following exclusions:

**Service Exclusions**

Medicaid does not pay for community behavioral health services for treatment of autism, pervasive developmental delay, non-emotional or non-behavioral based developmental disability, or mental retardation.

Therefore, since the petitioner's diagnosis is Autism Spectrum Disorder, this service is not available to meet the petitioner's needs.

**D. Is the petitioner's request for personal care services medically necessary?**

The respondent argued the requested services were not medically necessary. The basis for the conclusion was the definition of medically necessary. To be eligible for Medicaid State Plan services, the requested service must be medically necessary. Florida Administrative Code 59G-1.010, "Definitions", defines 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 respondent concluded that the requested services did not meet this definition and therefore, the request was denied.

The petitioner believes the use of this definition is too restrictive. The definition of services under the Early and Periodic Screening, Diagnosis, and Treatment Services (EPDST) is a broader definition and using this definition, Medicaid should cover the requested services. Fla. Stat. 409.905 Mandatory Medicaid services define Medicaid services for children:

(2) EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT SERVICES.--The agency shall pay for early and periodic screening and diagnosis of a recipient under age 21 to ascertain physical and mental problems and conditions and provide treatment to correct or ameliorate these problems and conditions. These services include all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

There are two considerations in determining whether an individual may receive payment for a service through Medicaid. The first consideration is whether the service would be an approved service under the state plan or whether it is an excluded service that would not be paid for regardless of the individual's need. PCA is an approved service through Medicaid state plan. Although there was some argument at the hearing that would suggest a person with Autism Spectrum Disorder would not qualify for the PCA services under the state plan or the EPSDT requirements, the above authorities' show there is no exclusion for individuals with this diagnosis. As there is not exclusion of this

service for the petitioner, the second consideration is whether the petitioner's medical care needs meet the medically necessity criteria.

There are five conditions that must be met for a service to be medically necessary. The first condition appears in paragraph (166)(a)(1) "Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;"

For the PCA service, it was argued that any service that was ordered by the treating physician that ameliorates the petitioner's condition must be a covered service. Ameliorate is defined by Black's Law Dictionary as ameliorate "vb. 1. To make better... 2. To become better..."<sup>2</sup> The petitioner's treating physician which ordered PCA stated that without the service, the petitioner's condition would decline. The petitioner avowed the physician's statement must be given great weight. The respondent stated that regardless of the physician's statement, the request for service does not meet the medical necessity requirement. The fact that a service was ordered by a physician does not in and of itself meet this requirement.

Paragraph (166)(1)(a)1., "Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;" should be interpreted in conjunction with "To correct or ameliorate defects and physical and mental illnesses" for EPSDT participants in a way that is not more restrictive than the EPSDT definition. In C.F. v Children and Families 934 So.2d 5, the court stated:

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<sup>2</sup> <http://dictionary.reference.com/browse/ameliorate>

The state definition of medical necessity is a narrower view that does not encompass the assistance a caretaker would need in taking care of a disabled child. The federal definition, on the other hand, encompasses a more expansive view, allowing for services that sustain or support, as opposed to actually treating the disability.

It is not disputed that the petitioner cannot perform activities of daily living, such as brushing teeth, bathing, toileting and eating on his own. He needs assistance with these activities. The hearing officer has given weight to the testimony of the treating physician that there is a need for assistance for the petitioner with his activities of daily living. The physician's testimony, along with the mother, support coordinator and personal care assistant, clearly establishes that without assistance, the petitioner would not perform ADL's. The hearing officer concludes that the petitioner's need for PCA meets the requirements of condition one of the state's definition of medically necessary. Conditions two through four were not argued at the hearing.

**E. The parents are to provide the requested services to the fullest extent possible, with supports from other sources that address autistic children.**

As the need for the PCA service meets the requirements of both EPSDT and paragraph (166)(a)(1) of the definition of medically necessary, we must then proceed to the consideration of who should provide this service. The fifth condition of medically necessary is paragraph (166)(a)(5) states "Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider..."

The petitioner has argued that a definition of medical necessity that included parental availability as a decisional factor is more restrictive than the definition of services under EPSDT. Petitioner cited to C.F. v. Department of Children and Families, 954 So.2 1,5(Fla App. 3 Dist. 2005)

The state definition of medical necessity is a narrower view that does not encompass the assistance a caretaker would need in taking care of a disabled child. The federal definition, on the other hand, encompasses a more expansive view, allowing for services that sustain or support, as opposed to actually treating the disability.

The concept that EPSDT definition is more expansive than the State definition of medically necessary was also upheld in Cook v. AHCA, 967 So.2d 1002 at 1004. In this case, the minor was receiving PCA services. The respondent reduced the services from 9.173 to 6 hours. The reduction was upheld by a hearing officer and the decision was appealed to the District Court of Appeals. The petitioner argued that the services should remain the same using the definitions found in EPSDT:

Appellant argues that this definition is more restrictive than the federal definition because it does not include providing the services necessary to sustain or support a disabled child's care, but only covers those services necessary to treat or correct a child's disability. While the Agency agrees that a more restrictive definition is impermissible when applied to EPSDT, a mandatory Medicaid service, it argues that a more restrictive definition may apply to optional Medicaid services, such as Appellant's waiver services. See § 409.906, Fla. Stat. (2005). We find the Agency's argument is without merit. (Cook v. AHCA, 967 So.2d 1002 at 1004)

However, the court upheld the reduction of PCA hours stating:

Here, the hearing officer denied 3.173 hours of personal care assistance, finding these hours to be unnecessary, because Appellant was asleep during some of this time, and duplicative. We find that the hearing officer did not apply an impermissible definition of medical necessity in denying



these hours, but instead relied on established facts to justify the reduction in personal care hours.

The facts must be evaluated to determine if the reduction of PCA is justified.

Therefore, once there is a finding that PCA services are necessary (in this case that has been done) the question comes down to whether the respondent can reduce the amount of services that should be paid by Medicaid. In this case, the petitioner's doctor has asserted that the petitioner would benefit from four hours of PCA and the respondent has asserted that the parents can provide the four hours of PCA.

Do the parents have a responsibility to provide any or all of this care or is it Medicaid's responsibility to provide the care through the HHC program? To answer that, we must look at the level of services requested to be provide by Medicaid.

The services provided by a PCA are not from a licensed, skilled professional. These are services that are routinely done in most households: bathing, dressing, feeding, etc. It is an expectation that parent(s) or caretakers routinely provide these services to their children. In the cases of children with disabilities, additional assistance might be necessary to assist the caretaker or parent(s) in doing these routine tasks. Therefore, it necessary to review what services are needed beyond what is routinely done and what should be expected from the caretaker in providing these routine tasks. This concept is addressed in CF v. Department of Children and Families, (id at 5) with the court's statement that, "The state definition of medical necessity is a narrower view that does not

encompass the assistance a caretaker would need in taking care of a disabled child." The Agency does look not at caring for the child but what assistance the caretaker needs to care for the child.

In this instant case, it has already been established that the petitioner requires PCA. The father is currently providing morning care to the petitioner. Specifically, he is bathing, feeding and getting the petitioner to school. This demonstrates that the father is capable of providing the petitioner's care for the two hours requested in the morning. The home health agency is currently providing evening care (PCA) to the petitioner. Again, bathing, eating, dressing and getting into bed. This is the busiest time for the household. It is undisputed that the petitioner requires one-on-one attention to complete these tasks. During the evening the caretakers have additional responsibilities and cannot provide one-on-one care. The petitioner's needs are a direct result of the petitioner's medical diagnosis.

Based on the above cited authorities, the respondent's action to deny 600 hours of personal care assistance for the period of November 3, 2009 through May 1, 2010 is not within the rules of the Program. The request for Medicaid payment for two hours in the morning of PCA is denied as that assistance can be provided by the father. However, Medicaid payment for PCA services shall be provided for two hours in the evening.

**DECISION**

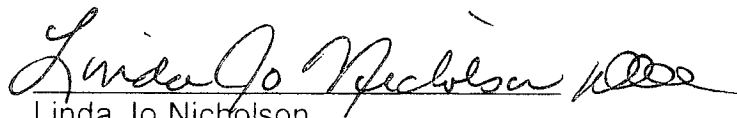
This appeal is granted, in part in that the Agency's action to terminate all PCA benefits was not supported by the evidence. The petitioner is eligible for two hours of PCA services in the evenings.

**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 26<sup>th</sup> day of April 2010,

in Tallahassee, Florida.



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