

FILED

NOV 20 2015

**OFFICE OF APPEAL HEARINGS
DEPT OF CHILDREN & FAMILIES**

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



APPEAL NO. 15F-07090

PETITIONER,

Vs.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 10 Polk
UNIT: AHCA

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing on October 19, 2015 at approximately 10:00 a.m.

APPEARANCES

For Petitioner:



Petitioner's Mother

For Respondent:

Stephanie Lang
Registered Nurse Specialist
Agency for Health Care Administration

STATEMENT OF ISSUE

At issue is Respondent's termination of Petitioner's Prescribed Pediatric Extended Care Services ("PPEC"). The burden of proof is assigned to Respondent.

PRELIMINARY STATEMENT

Dr. Rakesh Mittal, Physician Reviewer with eQHealth Solutions ("eQHealth") appeared as a witness for Respondent. Petitioner's mother gave oral testimony, but did not move any exhibits into evidence. Respondent moved Exhibits 1 through 8 into evidence.

Administrative notice was taken of the following:

- Section 409.905, Florida Statutes.
- Florida Administrative Code Rules 59G-1.001, 59G-1.010, and 59G-4.260.
- The Florida Medicaid Prescribed Pediatric Extended Care Services Coverage and Limitations Handbook, September 2013.

FINDINGS OF FACT

1. Petitioner is a 23-month-old female. At all times relevant to this proceeding, Petitioner was eligible to receive Medicaid services.
2. Petitioner's health conditions include:
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
3. Petitioner had been receiving PPEC services prior to this request. Petitioner is continuing to receive PPEC services, pending the outcome of this appeal.
4. Petitioner's Physician Plan of Care for PPEC Services indicates she eats a normal, age-appropriate diet, "has made progress over the last 180 days, as evidenced by her ability to pull up and cruise around furniture," and that discharge from PPEC should be considered once she no longer requires skilled nursing care (Respondent's Exhibit 4).

5. Petitioner receives speech therapy, occupational therapy, and physical therapy as part of her PPEC services. Dr. Mittal noted that only the PPEC services were under review at hearing, not the other therapies. Those services can be provided on an outpatient basis.

6. PPEC is for children who need special medical care, such as skilled-nursing care, throughout the day, that ordinary day care cannot provide. Ordinary day care cannot administer medications.

7. Petitioner's mother said some of her medications need to be taken twice per day. Other medications are provided to Petitioner on an as-needed basis, such as Pulmicort and Albuterol, because of her fragile respiratory system. Petitioner's mother sends extra medications to the PPEC provider to be administered as needed. If Petitioner was in ordinary day care, her mother would have to leave work to administer the medications. Petitioner's mother works between eight (8) to ten (10) hours per day.

8. Because Petitioner was born prematurely, she is more prone to illness than other children. Petitioner's mother has had to miss work a significant amount of time in order to take care of her when she is ill. She also stated when one twin gets sick, the other also catches it. Petitioner and her sister have had hand, foot, and mouth disease twice this year, and also had vomiting and diarrhea. Petitioner can attend the PPEC center when she has a fever or other illness, as long as she is not contagious, because someone can provide her medication. An ordinary day care would not allow her to come when she is sick.

9. Dr. Mittal said the various illnesses, such as fever or gastroenteritis, cannot be foreseen, and that PPEC is not appropriate for temporary illnesses. PPEC is for someone who needs care every day for a chronic illness. Temporary illnesses can be dealt with when they occur, but PPEC cannot be provided every day, just in case something might happen. Petitioner's mother stated she does have chronic lung disease, but that it is treated on an as-needed basis.

10. Petitioner's PPEC provider submitted a request for 12 hours per day, five (5) days per week of PPEC services, for a period of 180 days.

11. On August 10, 2015, eQHealth issued a Notice of Outcome – Partial Denial Prescribed Pediatric Extended Care Services. One month of PPEC services were approved in order for Petitioner to transition into ordinary day care, but the rest of the request was denied. The Clinical Rationale for the Decision was as follows:

The patient is a 1 year old with a history of twin birth and prematurity. The patient has a history of a grad IV IVH. The clinical information provided does not support the medical necessity of the requested services; however, 1 month will be approved to provide the caregiver time to transition the patient out of PPEC. The clinical information provided does not support the medical necessity of the additional services. The patient appears to no longer require skilled nursing services and does not meet the medical complexity requirement of PPEC services. The additional services are deemed excessive. 1 hour per day from 8.6.15 thru 9.4.15, Monday through Friday are approved. (Respondent's Composite Exhibit 8).

12. Petitioner timely requested a hearing on August 17, 2015.

CONCLUSIONS OF LAW

13. By agreement between the Agency for Health Care Administration ("AHCA" or "Agency") and the Department of Children and Families, the Office of Appeal Hearings has jurisdiction over this matter pursuant to § 120.80, Fla. Stat.

14. This hearing was held as a *de novo* proceeding, in accordance with Florida Administrative Code Rule 65-2.056.

15. This is a Final Order, pursuant to §§ 120.569 and 120.57, Fla. Stat.

16. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by “the greater weight of the evidence,” (Black’s Law Dictionary at 1201, 7th Ed.).

17. Legal authority governing the Florida Medicaid Program is found in Chapter 409 of the Florida Statutes, and in Chapter 59G of the Florida Administrative Code. Respondent, AHCA, is the single state agency that administers the Medicaid Program.

18. The Florida Medicaid Prescribed Pediatric Extended Care Services Coverage and Limitations Handbook, September 2013 (“PPEC Handbook”) is promulgated into law by Florida Administrative Code Rule 59G-4.260.

19. Page 2-1 of the PPEC Handbook lists the requirements for receiving PPEC services. Page 2-1 states:

To receive reimbursement for PPEC services, a recipient must meet all of the following criteria:

- Be Medicaid eligible
- Diagnosed with a medically-complex or medically fragile condition as defined in Rule 59G-1.010, F.A.C.
- Be under the age of 21 years
- Be medically stable and not present significant risk to other children or personnel at the center
- Require short, long-term, or intermittent continuous therapeutic interventions or skilled nursing care due to a medically complex condition.

20. Fla. Admin Code R.59G-1.010 defines “medically complex” and “medically fragile” as follows:

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(164) "Medically complex" means that 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.

(165) "Medically fragile" means an individual who is medically complex and whose medical condition is of such a nature that he is technologically dependent, requiring medical apparatus or procedures to sustain life, e.g., requires total parenteral nutrition (TPN), is ventilator dependant, or is dependent on a heightened level of medical supervision to sustain life, and without such services is likely to expire without warning.

21. Section 409.905, Florida Statutes, "Mandatory Medicaid services," states, in pertinent part: "Any service provided under this section shall be provided only when medically necessary and in accordance with state and federal law...."

22. The definition of medically necessary is found in Fla. Admin. Code R.59G-1.010, which states:

(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.

23. Since the Petitioner is under 21 years of age, a broader definition of medical necessity applies to include the Early and Periodic Screening, Diagnosis, and Treatment Services (EPDST) requirements. § 409.905, Fla. Stat., Mandatory Medicaid services, provides that Medicaid services for children include:

(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.

24. The United States Court of Appeals for the Eleventh Circuit clarified the states' obligation for the provision of EPSDT services to Medicaid-eligible children in *Moore v. Reese*, 637 F.3d 1220, 1255 (11th Cir. 2011). The Court provided the following guiding principles in its opinion, which involved a dispute over private duty nursing:

[A state] is required to provide private duty nursing services to [a child Medicaid recipient] who meets the EPSDT eligibility requirements, when such services are medically necessary to correct or ameliorate [his or her] illness and condition.

(2) A state Medicaid plan must include "reasonable standards ... for determining eligibility for and the extent of medical assistance" ... and such standards must be "consistent with the objectives of" the Medicaid Act, specifically its EPSDT program.

(3) A state may adopt a definition of medical necessity that places limits on a physician's discretion. A state may also limit required Medicaid services based upon its judgment of degree of medical necessity so long as such limitations do not discriminate on the basis of the kind of medical condition. Furthermore, "a state may establish standards for individual physicians to use in determining what services are appropriate in a particular case" and a treating physician is "required to operate within such reasonable limitations as the state may impose."

(4) The treating physician assumes "the primary responsibility of determining what treatment should be made available to his patients." Both

the treating physician and the state have roles to play, however, and “[a] private physician’s word on medical necessity is not dispositive.”

(5) A state may establish the amount, duration, and scope of private duty nursing services provided under the required EPSDT benefit. **The state is not required to provide medically unnecessary, albeit desirable, EPSDT services.** However, a state’s provision of a required EPSDT benefit, such as private duty nursing services, “must be sufficient in amount, duration, and scope to reasonably achieve its purpose.”

(6) A state “may place appropriate limits on a service based on such criteria as medical necessity.” In so doing, a state “can review the medical necessity of treatment prescribed by a doctor on a case-by-case basis” and may present its own evidence of medical necessity in disputes between the state and Medicaid patients. (see (citations omitted)) (emphasis added).

25. Consistent with these requirements, the state is obligated to provide services to recipients under 21 years of age, but only to the extent such services are medically necessary. The definition of medical necessity for services provided under the EPSDT benefit is established by the state and the state is authorized to establish the amount, duration, and scope of such services.

26. In the instant matter, the testimony and documentary evidence fails to establish the medical necessity of PPEC services for Petitioner. While it is true Petitioner has chronic lung disease, her mother’s testimony indicates that treatment is only given on an as-needed basis. Petitioner does not require skilled nursing care throughout the entire day, every day.

27. Petitioner is more susceptible to illness than an ordinary child of her age. However, while it is certainly an inconvenience for her mother to have to leave work in order to attend to her medical needs, her situation is no different than that of any other parent of a small child. Small children in ordinary day care sometimes get sick and their parents have to find an alternative method of care. The only difference here is that Petitioner is likely to be ill more frequently than the other children.

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28. Petitioner's level of illness does not reach the level of "medically complex" or "medically fragile," as defined in the Florida Administrative Code. PPEC services are only provided when the recipient's condition is severe.

29. The undersigned has reviewed EPSDT and medical necessity requirements and concludes Respondent has met its burden of proof, by the greater weight of the evidence, in terminating Petitioner's PPEC services.

30. Dr. Mittal made it clear that Petitioner's needs for speech therapy, occupational therapy, and physical therapy are not at issue in this appeal. Petitioner's mother is encouraged to work with the Agency to address any needs for services that can be provided on an outpatient basis.

DECISION

Based upon the foregoing, Petitioner's appeal is DENIED and the Agency's action is AFFIRMED.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the agency. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, FL 32308-5403. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The petitioner is responsible for any financial obligations incurred as the agency has no funds to assist in this review.

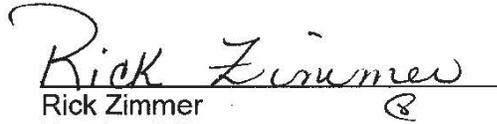
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DONE and ORDERED this 20 day of November, 2015,

in Tallahassee, Florida.



Rick Zimmer

Hearing Officer

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