



STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION
OFFICE OF FAIR HEARINGS

FILED

Apr 10, 2023, 9:23 am

OFFICE OF FAIR HEARINGS

[REDACTED],

PETITIONER,

AHCA Case No.: 22-FH2345

Plan ID No.: [REDACTED]

vs.

SUNSHINE STATE HEALTH PLAN, INC.,

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on March 8, 2023, at 1:01 p.m. Eastern Standard Time ("EST").

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Christian Pacheco
Senior Director for Quality Improvement
Sunshine State Health Plan, Inc.

STATEMENT OF ISSUE

The issue is whether Respondent proved by a preponderance of the evidence that Respondent's decision to terminate Petitioner's private duty nursing services was correct.

PRELIMINARY STATEMENT

All parties appeared telephonically. Petitioner's Authorized Representative and [REDACTED],

[REDACTED] (" [REDACTED] "), appeared on behalf of the Petitioner.

Christian Pacheco, Senior Director for Quality Improvement for Sunshine State Health Plan, Inc. (“Sunshine”) appeared on behalf of Respondent. The following attended as witnesses for Respondent: Dr. Thidatorn Tanpattana (“Dr. Tanpattana”), Pediatric Medical Director for Sunshine; Lan Nguyen, Case Manager for Sunshine; Michelle Collins, Supervisor of Case Management for Sunshine; and Sabrina Ledgister, Senior Manager of Case Management for Sunshine.

Suzanne Chillari, Medical/Health Care Program Analyst for the Agency for Health Care Administration (“Agency” or “AHCA”) and Dr. Mia Phung, Pediatric Medical Director for Sunshine, attended as observers.

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred and thirty-nine (239)-page evidence packet. The two hundred and thirty-nine (239)-page evidence packets appear in the Office of Fair Hearings’ document management system as file titles “MFH Packet [Petitioner Surname] Part 1.pdf” and “MFH Packet [Petitioner Surname] Part 2.pdf”. Absent an objection from the Petitioner, the undersigned admitted the two hundred and thirty-nine (239)-page evidence packet into evidence as Respondent’s Composite Exhibit 1 (“RCE 1”).

FINDINGS OF FACT

1. Petitioner is an enrolled member of Sunshine. *See* page 2 of RCE 1. Sunshine is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida.

2. Petitioner is [REDACTED] ([REDACTED] [REDACTED]) old. *Id.* at 14. Petitioner is diagnosed with [REDACTED] [REDACTED]. *Id.* at 58. Petitioner is [REDACTED] [REDACTED]. *Id.*

3. Petitioner requested continuation of [REDACTED] private duty nursing service (10 hours per day, 5 days per week). *Id.* at 6. In the Notice of Adverse Benefit Determination (“NABD”), dated November 30, 2022, Respondent approved one (1) month of service, but denied the remainder of the request. The NABD explained as follows:

We determined that your requested services are not medically necessary because the services do not meet the reason(s) checked below: (*See Rule 59G-1.010*)

...

- Must be individualized, specific, consistent with symptoms or diagnosis of illness or injury and not be in excess of the patient’s needs.

...

The facts that we used to make our decision are:

Sunshine Health Policy on Review of Private Duty Nursing Requests, FL.UM.26. These services have also been reviewed under EPSDT (Early and Periodic Screening, Diagnostic and Treatment).

Rationale: The request for continuation of private duty nursing (nursing care provided by a nurse in the home) S9124 10 hours per 5 days a week is partially approved. Approval is granted for one month. After this approval period, private duty nursing will be denied for lack of medical necessity (need). This review was closely reviewed by the medical director (someone who has expert knowledge in the subject matter). Your child is [REDACTED] old and diagnosed with [REDACTED]

[REDACTED]

Your child i

Your chil

[REDACTED]. Your child attends school. There is insufficient (not enough)

documentation (notes) to support the skilled nursing (nursing care provided by a nurse) hours requested. There is no documentation of the details of the skilled nursing services required that need this level of coverage. Your child’s assistance with daily living needs is under a home health aide (a trained and certified health care worker to assist a person in the home with daily activities) not skilled nursing.

Reconsideration (change of decision) of this request can be done when updated complete clinical information is submitted for review.

However, we have approved home health services, billing code S9124 for 10 hours per 5 days a week for 1 month period using authorization number OP3259427458 from November 29, 2022 to December 29, 2022 with Family First Homecare of Pensacola[.]

...

Pages 5 – 7 of RCE 1.

4. Petitioner requested reconsideration of the Respondent’s decision. In a Notice of Plan Appeal Resolution (“NPAR”), dated December 21, 2022. *Id.* at 33 – 35. The NPAR explained the basis of the decision as follows:

The reason for our decision was : Your request for S9124 NURSING CARE IN THE HOME/PRIVATE DUTY NURSING (PDN) was recently partially denied due to lack of medical necessity. That partial denial occurred because there was not enough supportive information to justify the medical need for the requested PDN services. Because you appealed that decision, your request was re-evaluated by a second Medical director. Based upon this secondary review, the previous denial is upheld. There is not enough information submitted to justify the medical necessity for the requested PDN services of 10 hours/day Monday through Friday. Your child is

old and diagnosed with is attends school without PDN accompaniment.

There is insufficient documentation to support the skilled nursing hours requested. There is no documentation of the details of the skilled nursing services performed daily that require this level of coverage. There is no reason that most of in-home care and assistance with activities of daily living could not be provided by a home health aide (HHA), instead of skilled nursing. This has been discussed with the prescribing physician, who agrees that a combination of PDN and HHA services is appropriate. This request will be reconsidered if new clinical information is provided that justifies 10 hours of PDN services per day. In the interim, please refer any questions regarding this decision to Sunshine Health Case Manager. FL.UM.26, Review of Private Duty Nursing Requests, the Sunshine Health Member Handbook, Services covered by Sunshine Health, Florida Medicaid, Private Duty Nursing Services Coverage Policy, and/or Florida Medicaid Home Health Visits Service Coverage Policy were referenced in making this decision. This decision was made with regards to Early and Periodic Screening, Diagnostic and Treatment Services (EPSDT). This decision was made by a Medical Director who is Board Certified Physician in Pediatrics.

...

Pages 33 – 34 of RCE 1.

5. On December 21, 2022, Petitioner requested a Fair Hearing to challenge the termination of private duty nursing services. On February 13, 2023, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for March 8, 2023, at 1:00 p.m. EST.

6. Dr. Tanpattana is a Medical Director of Sunshine. Dr. Tanpattana testified to the following:

- a. Petitioner is [REDACTED]
[REDACTED]
- b. Petitioner attends school, in person, and is not accompanied by a nurse.
- c. Petitioner [REDACTED].
- d. It is Dr. Tanpattana's opinion that a home health aide is able to assist with "supervision, redirection, and opening up packages" for the Petitioner, and a two (2) hours of skilled nursing services, five (5) days a week would be enough to assist with the [REDACTED] and any other nursing care he may need.
- e. Petitioner does not have any [REDACTED].
- f. Petitioner is approved for two (2) hours of skilled nursing services and four (4) hours of home health aide services, five (5) days per week.

7. [REDACTED] testified to the following:

- a. Petitioner is [REDACTED]
- b. Petitioner is [REDACTED]
- c. [REDACTED] works 90 minutes away from the home.

d. [REDACTED] leaves for work at 2:30 p.m. each day.

e. The nurses help with the [REDACTED]
[REDACTED]

CONCLUSIONS OF LAW

8. The Agency's Office of Fair Hearings has jurisdiction over the subject matter of this proceeding and the parties pursuant to section 409.285(2) of the Florida Statutes (2019). This order is the final administrative decision of AHCA under Fla. Stat. § 409.285(2)(a).

9. This hearing was held as a *de novo* proceeding pursuant to Fla. Admin. Code R. 59G-1.100(17)(b).

10. Because Respondent terminated an existing service, Fla. Admin Code R. 59G-1.100(17)(g) assigns the burden of proof to Respondent. 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.)

11. The Florida Medicaid Private Duty Nursing Services Coverage Policy (November 2016) ("Coverage Policy") establishes the provision and coverage of private duty nursing services under Florida Medicaid. The Coverage Policy states as follows:

1.1 Description

Florida Medicaid private duty nursing (PDN) services provide medically necessary skilled nursing to recipients whose medical condition, illness, or injury requires the care to be delivered in their home or in the community.

...

1.3 Definitions

The following definitions are applicable to this policy. For additional definitions that are applicable to all sections of Rule Division 59G, F.A.C., please refer to the Florida Medicaid definitions policy.

...

1.3.6 Medically Necessary/Medical Necessity

As defined in Rule 59G-1.010, F.A.C.

...

2.2 Who Can Receive

Florida Medicaid recipients under the age of 21 years requiring medically necessary PDN services. Some services may be subject to additional coverage criteria as specified in section 4.0.

...

4.0 Coverage Information

4.1 General Criteria

Florida Medicaid covers services that meet all of the following:

- Are determined medically necessary
- Do not duplicate another service
- Meet the criteria as specified in this policy

4.2 Specific Criteria

Florida Medicaid reimburses for up to 24 hours of PDN services per day, per recipients, when the recipient meets all of the following criteria:

- Is under the care of a physician and has a physician's order for PDN services
- Requires more extensive and continual care than can be provided through a home health visit
- Requires services that can be safely provided in their home or the community

For recipients requiring less than two hours of PDN services per day, please refer to the Florida Medicaid home health visits services coverage policy.

4.2.1 Private Duty Nursing Provided by Parent or Legal Guardian

Florida Medicaid may reimburse an enrolled home health agency provider for up to 40 hours per week, per recipient, for PDN services rendered by a parent or legal guardian who has a valid RN or LPN license in the state of Florida, and who is employed by the home health agency.

The initial assessment and all subsequent plan of care (POC) recertification assessments, must be completed by an RN who is employed by the home health agency provider and who is not a relative or member of the recipient's household. Any other authorized service hours must be provided by a non-relative RN or LPN.

4.2.2 Services Provided by Independent RNs and LPNs

Florida Medicaid reimburses for PDN services rendered by an independent RN or LPN in accordance with 42 CFR 440.70 (b)(1), when there is no home health agency provider available in the area to furnish the care. A physician must direct and monitor the services provided by an independent RN or LPN, and must be available to consult on the recipient's medical condition.

...

5.0 Exclusion

5.1 General Non-Covered Criteria

Services related to this policy are not covered when any of the following apply:

- The service does not meet the medical necessity criteria listed in section 1.0
- The recipient does not meet the eligibility requirements listed in section 2.0
- The service unnecessarily duplicates another provider's service

12. Rule 59G-4.290 defines skilled nursing as follows:

(3) Skilled Services Criteria.

- a) To be classified as requiring skilled nursing or skilled rehabilitative services in the community or in a nursing facility, the recipient must require the type of medical, nursing or rehabilitative services specified in this subsection.
- b) Skilled Nursing. To be classified as skilled nursing service, the service must meet all of the following conditions:
 1. Ordered by and remain under the supervision of a physician;
 2. Sufficiently medically complex to require supervision, assessment, planning, or intervention by a registered nurse.
 3. Required to be performed by, or under the direct supervision of, a registered nurse or other health care professionals for safe and effect performance;
 4. Required on a daily basis;
 5. Reasonable and necessary to the treatment of a specified documented illness or injury; and,
 6. Consistent with the nature and severity of the individual's condition or the disease state or stage.
- c) Examples of services that qualify as skilled nursing services:
 1. Intravenous medication or fluids.
 2. Intramuscular or subcutaneous injection and hypodermoclysis when:
 - a. Administered by licensed nursing personnel at least 5 times weekly, excluding daily insulin administration; and,
 - b. Observation is necessary to assess the recipient's response to treatment or to identify adverse reactions.
 3. Management and monitoring medication regime on a daily basis:
 - a. For drugs whose dosage requirements may rapidly change;
 - b. For drugs prone to cause adverse reactions, severe side effects or unfavorable reactions; and,

- c. For residents with unstable reactions.
- 4. Levin tube and gastrostomy feedings; excluding feedings performed by residents, family members, or friends.
- 5. Administration of medical gases, aerosolized medication or oxygen which is started, monitored and regulated by professional staff.
- 6. Naso-pharyngeal and tracheotomy aspiration, excluding tracheotomy care in self-care residents.
- 7. Insertion, replacement, and sterile irrigation of catheters when:
 - a. Medically necessary or required for reasons other than to maintain satisfactory catheter functioning and dryness;
 - b. The medical need is documented by the physician;
 - c. Continuous irrigation, frequent insertion, special care or observation is required because of bleeding, infection, obstruction, or heavy sediment formations; and,
 - d. Care of a recently inserted supra-pubic catheter, inserted within 2-4 weeks, is required.
- 8. Colostomy and ileostomy care:
 - a. When medically necessary and required during early postoperative period;
 - b. During the period of initial self-care training, or
 - c. when complications are present and documented in the medical record.
- 9. Treatment of decubitus ulcers when:
 - a. Deep or wide without necrotic center;
 - b. Deep or wide with layers of necrotic tissue, or
 - c. Infected and draining.
- 10. Treatment of widespread infected or draining skin disorders.
- 11. Application of dressings involving prescription medication and aseptic techniques when documented as required on a daily basis. Excludes simple dressings involving non-infected cases, simple skin breaks, and healed postoperative incisions.
- 12. Heat treatments prescribed by a physician as daily treatment for a specific condition.
- 13. Rehabilitation nursing procedures required on a daily basis as necessary to restore functioning, including teaching and adaptive aspects of nursing.

13. States must provide Early and Periodic Screening, Diagnostic, and Treatment (“EPSDT”) services to Medicaid-eligible children under age 21 when requested under the Medicaid state

plan. See 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(a)(4). According to 42 U.S.C. § 1396d(r)(5),

EPSDT services mean, in relevant part, the following items and services:

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 illness and conditions discovered by the screen services, whether or not such services are covered under the state plan.

14. Petitioner is under age [REDACTED] and therefore eligible for EPSDT services. However, a state may place medical necessity limitations on EPSDT services. See 42 C.F.R. §§ 440.230(a), (b), (d).

15. Fla. Stat. § 409.905(2) limits EPSDT services with a medical necessity standard:

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 all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems and conditions, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

16. The Florida Medicaid Definitions Policy, incorporated by reference in Fla. Admin. Code R. 59G-1.010, defines “Medically Necessary” or “Medical Necessity” as follows:

The medical or allied care, goods, or services furnished or ordered must meet the following conditions:

- Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate pain
- 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
- Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational
- 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
- Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient’s caretaker, or the provider

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.

17. Petitioner previously was authorized to receive ten (10) hours of private duty nursing services, five (5) days per week. *See* ¶ 3. In the NABD, dated November 30, 2022, Respondent effectively terminated the service. Respondent explained that continuing services at the previous level was not medically necessary – specifically that it did not meet the requirement that services must be “individualized, specific, consistent with symptoms or diagnosis of illness or injury and not be in excess of the patient’s needs.” *Id.* Later, Respondent approved two (2) hours of private duty nursing services, five (5) days per week, along with four (4) hours of home health aide services, five (5) days per week. *See* ¶ 6.

18. Private duty nursing services provide medically necessary skilled nursing services to recipients who require care to be delivered in the home. *See* ¶ 11. As provided by the EPSDT requirements, the recipient must meet the medical necessity criteria as outlined in Fla. Admin. Code R. 59G-1.010. As provided in the Definitions Policy, a component of medical necessity is that such services must be “[i]ndividualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient’s needs”. *See* ¶ 16. As shown by the record, Petitioner is diagnosed with [REDACTED]

See ¶ 2. Petitioner is [REDACTED].

Id. Petitioner is currently approved to receive two (2) hours of skilled nursing services and four (4) hours of home health aide services, for five (5) days each week. At the Fair Hearing, Dr. Tanpattana provided credible testimony that the approved services are sufficient to care for the


Petitioner. See ¶ 6. Dr. Tanpattana explained that the two (2) hours of private duty nursing can assist Petitioner with the [REDACTED], and any other skilled nursing needs, and that four (4) hours of home health aide can provide for any of Petitioner's non-skilled nursing needs. *Id.* Accordingly, Respondent demonstrated that ten (10) hours of private duty nursing services, five (5) days per week, are in excess of Petitioner's needs.

19. Upon consideration of the testimony provided, evidence submitted, and applicable polices, the undersigned concludes that Respondent proved by a preponderance of the evidence that continuing private duty nursing services at the previous level was not medically necessary for Petitioner. Looking at all the evidence relevant to the particular needs of Petitioner, Respondent has demonstrated that ten (10) hours of private duty nursing services, five (5) days a week, are not necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, Respondent proved by a preponderance of the evidence that Respondent's reduction of private duty nursing services was correct.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

Respondent's denial is **AFFIRMED**. Petitioner's appeal based on Respondent's denial is **DENIED**.

DONE and ORDERED this 10th day of April 2023, in Tallahassee, Leon County, Florida.

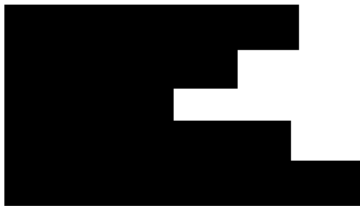

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JOSEPH MABRY, Hearing Officer
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NOTICE OF A RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

Copies Furnished To:



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