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Jun 18, 2024, 11:31 am
OFFICE OF FAIR HEARINGS

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

[redacted],

PETITIONER,

vs.

CHILDREN'S MEDICAL SERVICES,

RESPONDENT.
_____/

AHCA Case No.: 24-FH0635
Plan ID No.: [redacted]

FINAL ORDER

Pursuant to notice, the undersigned Hearing Officer convened a telephonic Fair Hearing on the instant case on May 7, 2024, at 9:59 a.m. Eastern Standard Time ("EST").

APPEARANCES

For the Petitioner: [redacted]
Petitioner's Authorized Representative

For the Respondent: Nicole Vega
Regulatory Research Coordinator
Children's Medical Services

STATEMENT OF ISSUE

The issue is whether Petitioner proved by a preponderance of the evidence that Respondent's denial of Durable Medical Equipment ("DME"), namely a child's safety bed was incorrect.

PRELIMINARY STATEMENT

All parties appeared for the Fair Hearing telephonically. [redacted] ("[redacted]") the Petitioner's [redacted] and Authorized Representative appeared for the Fair Hearing and testified on behalf of the Petitioner.

Nicole Vega ("Ms. Vega"), Regulatory Research Coordinator, Clinical Appeals Coordinator for Children's Medical Services ("CMS" or "Respondent") appeared at the Fair Hearing as a representative for Respondent. Dr. Mai Fung M.D. ("Dr. Fung"), Medical Director for CMS appeared as a witness for the Respondent. The following personnel of CMS attended the Fair Hearing for observation purposes only; Samira Jean-Louis, Occupation Therapist; Kathy Warman, Supervisor for Case Management; Nicholas Crosby, Therapy Advisor and Tamara McDonald, Program Specialist 2.

Doris Rivera, Medical/Healthcare Program Analyst for the Agency for Health Care Administration ("Agency" or "AHCA") appeared for the Fair Hearing as an observer. Aldrea White Futtrel, Compliance Officer and Samar Sultan, Esq., both from the Florida Department of Hearing appeared at the Fair Hearing as observers.

Prior to the Fair Hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred and fifty-seven (257)-page evidence package that was admitted into evidence without objection, is identified as "Respondent's Composite Exhibit 1", and is maintained in the Office of Fair Hearings' document management system as "MFH packet [Petitioner].pdf". The Petitioner did not submit any exhibits into evidence.

FINDINGS OF FACT

1. The Petitioner is an enrolled member of CMS. *See* Respondent's Composite Exhibit 1, page 1. CMS is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in the state of Florida.

2. As of the date of the Fair Hearing, Petitioner is a [redacted] and has been diagnosed with [redacted] *See* Respondent's Composite Exhibit 1, pages 16-18.

3. On November 22, 2023, the Petitioner was evaluated by Physical Therapist [redacted], who concluded the Petitioner is a candidate for a "medical bed". *See* Respondent's Composite Exhibit 1, pages 14-21. [redacted] evaluation states the Petitioner shares a bedroom with [redacted], and [redacted] *Id.* The Equipment Evaluation Report prepared by [redacted] states the following has been tried to address the Petitioner's sleepless wanderings and failed:

a. [redacted]

See Respondent's Composite Exhibit 1, page 18. The Evaluation Report further reflects that the Petitioner did a trial of a hospital style bed with side-rails, but that trial was unsuccessful because the Petitioner was able to climb over the side rails and the increased height of the bed created a great for injury due to its height. *Id.* The evaluation report specifically states that the Petitioner is not at risk for institutionalization without the enclosed safety bed yet recommends the Cubby Safety Bed for the Petitioner. *See* Respondent's Composite Exhibit 1, pages 17 and 20.

4. On December 7, 2023, the Petitioner submitted a request for an enclosed Cubby Safety Bed Plus. *See* Respondent's Composite Exhibit 1, page 5. On January 3, 2024, CMS issued a

Notice of Adverse Benefit Determination ("NABD") denying Petitioner's request for the requested Cubby Safety Bed Plus based on medical necessity. Respondent's Composite Exhibit 1, pages 5-10. The NABD explained the denial of Petitioner's requested Cubby Safety Bed Plus as follows, in pertinent part:

> We made our decision because:
> *(Check all boxes that apply)*
>
> __**X**__ 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 needed to protect life, prevent significant illness or disability, or alleviate severe pain.
> __**X**__ Must be individualized, specific, consistent with symptoms or diagnosis of illness or injury and not be in excess of the patient's needs.
> ____ Must meet accepted medical standards and not be experimental or investigational.
> ____ Must be able to be 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.
> ____ Must be furnished in a manner not primarily intended for convenience of the recipient, caretaker, or provider.
> *(The convenience factor is not applied to the determination of the medically necessary level of private duty nursing (PDN) for children under the age of 21.)*
>
> ____ The requested **service is not a covered benefit**.
>
> ____ **Other authority** .
> . . .
> The facts that we used to make our decision are:
>
> Enclosed Beds, based on Centene Clinical Policy on Durable Medical Equipment and Orthotics and Prosthetics, CP.MP.107. Florida Medicaid Durable Medical Equipment and Medical Supply Coverage and Limitations Handbook, Agency for Health Care Administration. These services have also been reviewed under EPSDT (Early and Periodic Screening, Diagnostic and Treatment).
>
> Rationale: Request for Cubby Bed Plus is denied. It is denied for lack of medical need. The clinical notes sent does not address less intensive choices. This includes removal of all safety hazards in room. This includes furniture anchors. This

> includes child protection devices such as child locks on doors and windows. This is to decrease risk of child leaving home without supervision. No notes why the child medical needs could not be met. Confinement is not medically needed for a child's roaming behavior at night. This should not be used as a discipline measure or as a restraint during times of high agitation or aggression.

Id.

5. On January 31, 2024, the Petitioner requested a plan appeal. *See* Respondent's Composite Exhibit 1, page 43. On February 13, 2024, CMS issued a Notice of Plan Appeal Resolution ("NPAR") upholding the denial of Petitioner's request for a Cubby Plus Safety Bed. *See* Respondent's Composite Exhibit 1, pages 43-46. The NPAR states the following explanation, in pertinent part:

> The facts that we used to make our decision are: The previous denial to authorize equipment (Cubby Basic Safety Bed and accessories) is upheld due to lack of medical necessity. There is not enough clinical information noting that less intensive alternatives to improve patient safety have been tried and ruled out. This includes: removal of all safety hazards, mattress on floor, bed alarms, video/audio monitors, child protection devices such as child locks on doors, windows, cabinets, furniture anchors, gates at steps and doors, physician directed medication to address behaviors and sleep, environmental modifications to encourage calming behaviors and sleep, or established routines addressing sensory needs and/or behavior modification to assist with improved naptime or night time behaviors and sleep. The notes do not explain why these measures could not meet the member's medical needs. The notes do not explain how the requested enclosed safety bed will correct or reduce the member's nighttime behaviors. It is unknown if the requested enclosed bed will exacerbate the member's nighttime behaviors. Confinement is not medically necessary for a child's roaming behavior at night, and should not be used as a discipline measure or as a restraint during times of high agitation or aggression. There is no indication that the member would require institutionalization without this equipment. The reasons for this decision are based on a set of standards. This included Criteria: CP.MP.107 Durable Medical Equipment and Orthotics and Prosthetics Guidelines, FLORIDA MEDICAID DURABLE MEDICAL EQUIPMENT AND MEDICAL SUPPLY SERVICES COVERAGE AND LIMITATIONS HANDBOOK. This decision was made with regards to EPSDT.

Id.

6. On February 22, 2024, the Petitioner requested a Fair Hearing regarding the denial of the Cubby Safety Bed Plus. On March 28, 2024, the undersigned Hearing Officer issued a notice to all parties of record scheduling the Fair Hearing to be conducted by telephone on May 7, 2024, at 10:00 a.m. EST.

7. The Centene Corporation Clinical Policy for Durable Medical Equipment and Orthotics and Prosthetics Guidelines (Reference Number CP.MP.107, June 2022) states as follows with respect to children's enclosed safety beds:

> ENCLOSED BEDS - Requests will be reviewed by a medical director and/or therapy advisor to determine medical necessity, based on all of the following:
>
> A. Standard bed or standard hospital bed must be unable to meet the positioning needs due to disability;
>
> B. Less intensive alternatives to improve the member's/enrollee's safety have been tried and ruled out (To include documentation of why they could not meet medical needs). Considerations include, but are not limited to:
>
> 1. Bed rails;
> 2. Mattress placed on the floor;
> 3. Removal of all safety hazards;
> 4. Bed alarms;
> 5. Video/audio monitors;
> 6. Child protection devices such as locks on doors, windows, cabinets, furniture anchors, gates at steps and doors;
> 7. Physician-directed medication to address seizures, behaviors and sleep;
> 8. Environmental modification to encourage calming behaviors and sleep;
> 9. Established routines addressing sensory needs and/or behavior modification to assist with improved naptime or night time behaviors and sleep;
>
> C. Medical diagnosis to include, but not limited to:
>
> 1. Cerebral palsy;
> 2. Developmental delay;
> 3. Genetic or neurological disorder that would cause vertigo, disorientation, or uncontrolled movement of the body or extremities;

4. Uncontrolled seizure disorder;
5. Severe behavior disorder;

D. Healthcare provider evaluation (typically from an occupational or physical therapist) to include:
1. Specific information on functional status;
2. Documentation of home evaluation;
3. Documentation of education provided to caregivers on proper use of a bed enclosure, noting: they are to be used for medical support, improved safety transitioning in and out of the bed, and improved safety while sleeping;

E. Name of and invoice for the bed or enclosure being requested.

Note: Enclosed beds should not be used as a discipline measure or as a restraint during times of high agitation or aggression. To limit sensory deprivation, enclosed beds should be used at night for sleeping and only for short rests or naps during the day.

See Respondent's Composite Exhibit 1, pages 79-80.

8. The Petitioner's [redacted] and Authorized Representative testified that [redacted] is a single [redacted] and [redacted] testified [redacted] has been diagnosed with [redacted] testified that the Florida Department of Children and Families has requirements [redacted] and that the Petitioner's physician

has declined to prescribe prescription [redacted] due to the Petitioner's age and [redacted] diagnosis. [redacted] stated the Petitioner does not have a "safe sleeping environment" and believes that a Cubby Safety Bed would work to solve the problems [redacted] is experiencing. Finally, [redacted] testified that if the attempt to secure a Cubby Safety Bed is unsuccessful, it may result in a failed adoption of [redacted].

9. Dr. Fung testified for the Respondent that there is no documentation in this matter that provides the Petitioner could be institutionalized without a child's safety bed, that other less intrusive alternatives to an enclosed safety bed have been exhausted, such as removing hazardous furniture in the Petitioner's bedroom, using furniture anchors, and consulting another physician that could prescribe [redacted]. Finally, Dr. Fung testified that the use of an enclosed child's safety bed is an extreme measure that should only be used as a last resort after everything else has failed, that the improper use of a safety bed could result in serious complications for the Petitioner and that there is no guarantee the use of a safety bed will address the problems being experienced by the Petitioner.

10. On October 31, 2023, [redacted] executed a Physician's Order for "a Specialty Bed" based upon a diagnosis of "[redacted]. *See* Respondent's Composite Exhibit 1, page 25.

CONCLUSIONS OF LAW

11. 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).

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

13. The burden of proof in this proceeding is governed by Fla. Admin. Code R. 59G-1.100(17)(g), which provides as follows:

> The burden of proof is on the party asserting the affirmative of an issue, except as otherwise required by statute. The burden of proof is on the Agency or plan, whichever is applicable, when the issue presented is the suspension, reduction, or termination of a previously authorized service. The burden of proof is on the recipient or enrollee when the issue presented is the denial or a limited authorization of a service. The party with the burden of proof shall establish its position to the satisfaction of the Hearing Officer by a preponderance of the evidence.

14. Because Petitioner is requesting a new service, Fla. Admin. Code R. 59G-1.100(17)(g) assigns the burden of proof to Petitioner. 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.).

15. 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).

16. 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.

17. A state may place medical necessity limitations on EPSDT services. *See* 42 C.F.R. §§ 440.230(a), (b), (d).

18. Section 409.905(2), Florida Statutes, 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.

19. Petitioner's requests for DME are governed by the Florida Medicaid Durable Medical Equipment and Medical Supply Services Coverage and Limitations Handbook (July 2010) ("DME Handbook"), which is incorporated by reference in Fla. Admin. Code R. 59G-4.070. The DME Handbook provides the following, in pertinent part:

> **Purpose**
> The purpose of the DME and Medical Supply Services Program is to promote, maintain, or restore health and minimize the effects of illness, disability, or a disabling condition.
>
> **Durable Medical Equipment (DME)**
> Durable medical equipment (DME) is defined as medically-necessary equipment that can withstand repeated use, serves a medical purpose, and is appropriate for use in the recipient's home as determined by the Agency for Health Care Administration (AHCA).
> . . .
> **Service Criteria**
> All DME, medical supplies, and orthotics and prosthetic devices must be:
> - **Medically necessary**, and
> - Functionally appropriate for the individual recipient, and
> - Adequate for the intended medical purpose, and
> - For conventional use, and
> - For the exclusive use of the recipient.
>
> DME items requested or supplied must not duplicate or perform the same function as other DME equipment or medical supplies currently in the recipient's possession
> . . .
> **Medical Necessity**

Medicaid reimburses for services that do not duplicate another provider's service and are determined to be medically necessary. Per 59G-1.010, F.A.C., to be medically necessary, services must meet the following conditions:

- Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe 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; and
- 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.

. . .

Safety Enclosure Frame and Canopy Coverage and Billing

Medicaid may reimburse for a safety enclosure frame and canopy for recipients under 21 years of age when prescribed by the treating physician or the treating physician's ARNP or physician assistant as medically necessary for the recipient's self-protection.

The frame and canopy do not need prior authorization, but must be billed with a hospital bed procedure code listed on the DME and Medical Supply Services Provider Schedules.

Note: See the DME and Medical Supply Services Provider Fee Schedules for the appropriate HCPCS procedure code and scheduled fee.

Safety Enclosure Frame and Canopy Documentation Requirements

The following safety enclosure frame and canopy documentation, with the authorized prescriber's signature, must be included in the recipient record:

- A medical statement that the recipient is confined to bed and will be in the enclosed bed for at least 18 hours a day; and
- Proof of medical necessity for continued care in the home; and
- **Supporting medical documentation that states the recipient would be institutionalized without the enclosed bed; and**

- Supporting information that the enclosed bed will provide effective treatment or prevent self-harm or self-injury when the recipient bites or chews.

DME Handbook pages 1-1, 1-2, 2-5, 2-9 and 2-53. (Emphasis added.)

20. The Florida Medicaid Definitions Policy (August 2017), incorporated by reference in Fla. Admin. Code R. 59G-1.010, provides definitions of commonly used terms that are applicable to all sections of Rule Division 59G, Florida Administrative Code (F.A.C.), unless specifically stated otherwise in a service-specific coverage policy or rule. The Florida Medicaid Definitions Policy 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.**

(Emphasis added).

21. The Petitioner requested DME and more specifically a Cubby Safety Bed Plus. *See* supra ¶ 4. In the NABD and in the NPAR, Respondent denied Petitioner's request for a Cubby Safety

Bed Plus as not medically necessary, in excess of the Petitioner's medical needs, and that required supporting documentation, analysis, and opinions were not presented by the Petitioner. *See* supra ¶ 4 and 5. This medical necessity requirement is referenced in the Florida Medicaid DME Handbook, the EPSDT guidelines, the Respondent's Durable Medical Equipment Policy, CP.MP.107 for Enclosed Beds, and the Florida Medicaid Definitions Policy. *See* supra ¶ ¶ 7, 17, 18, 19 and 20.

22. As Petitioner bears the burden of proof, Petitioner must show that Respondent's decision was incorrect. *See* supra ¶ ¶ 13 and 14. Thus, Petitioner must demonstrate by a preponderance of the evidence that a childs safety bed is "…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". *See* supra ¶ ¶ 18, 19 and 20. The Respondent's Medical Director, Dr. Fung provided credible testimony as to the information submitted to CMS that although a safety bed may be medically necessary for the Petitioner, there is insufficient documentary support to approve a safety bed. *See* supra ¶ 9. In addition, there is no evidence that the Petitioner would be institutionalized if the Cubby Safety Bed Plus is not approved, and the Petitioner did not demonstrate that all less intrusive methods to address the Petitioner's sleep issues have been tried and failed, including the use of [redacted].

23. In this case, [redacted], Physical Therapist recommended a child's safety bed, and [redacted] submitted a Physicians Order recommending a "Specialty Bed". *See* supra ¶¶ 3 and 9. However, section 2.83 of the Definitions Policy mandates 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." *See* supra ¶ 20. Therefore,

the evaluation report from [redacted] and the Physician Order from [redacted] do not, *in themselves* , make the requested Cubby Safety Bed Plus medically necessary.

24. In this case, Petitioner did not establish that by a preponderance of the evidence that a childs safety bed was 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. The undersigned Hearing Officer finds that Petitioner did not establish that a Cubby Safety Bed Plus meets the Respondent's criteria or the Florida Medicaid program's criteria, and the requested DME is medically necessary. In addition, there is no evidence presented in this case that the Petitioner is a candidate for institutionalization if a Cubby Safety Bed Plus is not approved. *See* supra ¶ 19.

25. Based on the totality of the circumstances, evidence, testimony and the applicable Florida policies, the Petitioner has not established that a Cubby Safety Bed Plus is medically necessary under Florida Medicaid and Respondent's Clinical Guidelines. Looking at all the evidence relevant to the particular needs of Petitioner, Petitioner has not demonstrated that the requested DME is necessary to correct or ameliorate a defect or a physical and mental illness or condition. Therefore, the undersigned Hearing Officer concludes that Petitioner did not prove by a preponderance of the evidence that Respondent's decision to deny the requested Cubby Safety Bed Plus was incorrect.

IT IS THEREFORE ORDERED AND ADJUDGED:

Respondent's denial of the requested Cubby Safety Bed Plus is hereby **AFFIRMED**. Petitioner's appeal based on Respondent's denial is hereby **DENIED**.

DONE and ORDERED this 18th day of June 2024, in Tallahassee, Leon County, Florida.

ALAN J. LEIFER, Hearing Officer
Agency for Health Care Administration
Office of Fair Hearings
2727 Mahan Drive, Mail Stop # 11
Tallahassee, FL 32308-5407

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:

[redacted]

Children's Medical Services
CMSPlanContract@flhealth.gov

AHCA Medicaid Hearing Unit
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