



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

FILED

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OFFICE OF FAIR HEARINGS

[REDACTED]

PETITIONER,

AHCA Case No.: 24-FH1028

Plan ID No.: [REDACTED]

vs.

CHILDREN'S MEDICAL SERVICES,

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on June 24, 2024, 10:05 a.m. Eastern Standard Time ("EST").

APPEARANCES

For the Petitioner:

[REDACTED]

Petitioner's Authorized Representative

For the Respondent:

Chantal Pierre
Clinical Appeals Coordinator
Counsel for Respondent

STATEMENT OF ISSUE

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

PRELIMINARY STATEMENT

All parties appeared telephonically. [REDACTED] (" [REDACTED] "), Petitioner's Authorized Representative and [REDACTED], appeared for the Fair Hearing on behalf of Petitioner. The following

individuals appeared as witnesses for Petitioner: [REDACTED] (“[REDACTED]”), Nurse Practitioner at [REDACTED]; [REDACTED] (“[REDACTED]”), Registered Nurse (“RN”) and Petitioner’s caregiver; and [REDACTED] (“[REDACTED]”), Petitioner’s [REDACTED]. [REDACTED] (“[REDACTED]”), Director of Nursing at [REDACTED], appeared as a witness for Petitioner but did not testify.

Chantal Pierre, Clinical Appeals Coordinator for Children's Medical Services (“CMS”), appeared for Fair Hearing as representative for Respondent. The following individuals appeared for Fair Hearing as witnesses for Respondent: Andrew Metinko, M.D. (“Dr. Metinko”), Medical Director for CMS; Thidaporn Tanpattana, M.D. (“Dr. Tanpattana”), Medical Director for CMS; Nazareth Lopez, Case Manager for CMS; and Kathy Powell, Supervisor for Case Management for CMS.

The following individuals appeared for Fair Hearing as observers: Elyssa Luke, Counsel for CMS at Florida Department of Health; Aldria White-Futrell, Compliance Officer for CMS; and Lee Ann Williams, Medical Health Care Program Analyst for the Agency for Health Care Administration (“Agency” or “AHCA”).

Prior to the hearing, Petitioner sent to the Office of Fair Hearings and Respondent an eighty-nine (89)-page evidence packet, a forty-six (46)-page packet, a fifty-three (53)-page packet, a twenty-three (23)-page packet, a three (3)-page packet, a forty-nine (49)-page packet, a three (3)-page document, an eight (8)-page packet, and a four (4)-page packet. The eighty-nine (89)-page evidence packet appears in the Office of Fair Hearings document management system as the file title “24-FH1028 Evidence Part 1.pdf.” The forty-six (46)-page packet appears in the Office of Fair Hearings document management system as the file title “24-FH1028 Evidence Part

2.pdf.” The fifty-three (53)-page packet appears in the Office of Fair Hearings document management system as the file title “24-FH1028 Evidence Part 3.pdf.” The twenty-three (23)-page packet appears in the Office of Fair Hearings document management system as the file title “24-FH1028 Evidence Part 4.pdf.” The three (3)-page packet appears in the Office of Fair Hearings document management system as the file title “24-FH1028 Evidence Part 5.pdf.” The forty-nine (49)-page packet appears in the Office of Fair Hearings document management system as the file title “24-FH1028 Additional Evidence(2).pdf.” The three (3)-page document appears in the Office of Fair Hearings document management system as the file title “24-FH1028 Additional Document.pdf.” The eight (8)-page packet appears in the Office of Fair Hearings document management system as the file title “24-FH1028 Additional Document(2).pdf¹.” The four (4)-page packet appears in the Office of Fair Hearings document management system as the file title “24-FH1028 Supporting Document.pdf².” Absent an objection from the Respondent, the undersigned admitted the eighty-nine (89)-page evidence packet into evidence as Petitioner’s Composite Exhibit 1 (“PCE 1”); the forty-six (46)-page evidence packet into evidence as Petitioner’s Composite Exhibit 2 (“PCE 2”); the fifty-three (53)-page evidence packet into evidence as Petitioner’s Composite Exhibit 3 (“PCE 3”); the twenty-three (23)-page evidence packet into evidence as Petitioner’s Composite Exhibit 4 (“PCE 4”); the three (3)-page evidence packet into evidence as Petitioner’s Composite Exhibit 5 (“PCE 5”); the forty-nine (49)-page packet into evidence as Petitioner’s Composite Exhibit 6 (“PCE 6”); the three (3)-page document into evidence as Petitioner’s Composite Exhibit 7 (“PCE 7”); the eight (8)-page evidence packet into

¹ This file was received on June 21, 2024.

² This file was received on June 21, 2024.

evidence as Petitioner’s Composite Exhibit 8 (“PCE 8”); and the four (4)-page evidence packet into evidence as Petitioner’s Composite Exhibit 9 (“PCE 9”).

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a one hundred and forty (140)-page evidence packet. The one hundred and forty (140)-page packet appears in the Office of Fair Hearings document management system as the file title “MFH packet [Petitioner].pdf.” Absent an objection from the Petitioner, the undersigned admitted the one hundred and forty (140)-page evidence packet into evidence as Respondent’s Composite Exhibit 1 (“RCE 1”).

FINDINGS OF FACT

1. Petitioner is an enrolled member of Children’s Medical Services (“CMS”) Managed Medical Assistance (“MMA”) program. See RCE 1 at page 2. CMS is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida. *Id.*

2. Petitioner is [REDACTED]. *Id.* at 60, 65. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] See PCE 1 at 7, 14-16, 26. [REDACTED]
[REDACTED]
[REDACTED]. *Id.*

3. Petitioner is prescribed the following medications: [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *Id.* at 27. Petitioner receives occupational therapy (“OT”), physical therapy (“PT”), and applied behavior analysis (“ABA”) therapy. *Id.* at 8.

4. Petitioner requested recertification of home health services (private duty nursing) for twelve (12) hours per day, seven (7) days per week. *See* RCE 1 at 52. In a Notice of Adverse Determination (“NABD”), dated March 1, 2024, Respondent reduced Petitioner’s services. *Id.* at

4-8. The NABD explained the basis of the reduction as follows:

- ✓ We determined that the 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:

The facts that we used to make our decision are: Sunshine Health Policy on Review of Private Duty Nursing Requests, FL.UM.26.00. The review of these services was also considered under (EPSDT) Early and Periodic Screening, Diagnostic and Treatment.

Rationale: The request for private duty nursing services (these are licensed nurses who provide care in the home) for your child is partially approved and partially denied. We are approving services for an initial 30- day period. Services beyond the first 30 days are denied at this time. There are missing notes of the medical need for the nurse and the hours medically needed for the nurse. This is required by Florida Medicaid.

Id. at 4-5.

5. On March 27, 2024, Petitioner requested a plan appeal for the reduction of home health services. *Id.* at 50-51, 89. In a Notice of Plan Appeal Resolution (“NPAR”) dated March 29, 2024,

Respondent reduced private duty nursing services to nine (9) hours per day on weekdays. *Id.* at

89-91. The NPAR explained as follows:

The request has been reviewed. The review was completed by a licensed doctor. The doctor was not a part of the first review or the findings from that review.

The Medical Director involved is a Board Certified MD with a specialty in Pediatrics.

On 03/28/2024, after consideration of the information you provided to Children's Medical Services Health Plan in support of your plan appeal, Children's Medical Services Health Plan hereby partially denying your plan appeal. As a result, [Petitioner] will not receive all services, effective 03/28/2024.

The facts that we used to make our decision are: the previous decision to partially approve and partially deny private duty nursing services (12 hours per day, 7 days per week) for your child is partially approved/overtaken and partially denied/upheld. The notes that we received stated that your child needs a nurse to attend school with [REDACTED] to [REDACTED]. We are approving 9 hours per day, on weekday, based on medical necessity. The request to authorize additional hours is upheld. Please discuss other options with your child's care manager and/or primary care pediatrician. Criteria: Review of Private Duty Nursing Requests, POLICY ID: FL.UM.26.00. This decision was made with regards to EPSDT. The reasons for this decision are based on a set of standards. This included Review of Private Duty Nursing Requests, POLICY ID: FL.UM.26.00. This decision was made with regards to EPSDT.

Id. at 89-90.

6. On March 29, 2024, Petitioner requested a Fair Hearing to challenge the reduction of the private duty nursing services. On April 22, 2024, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions ("Scheduling Order"), setting the hearing for May 17, 2024, at 10:00 a.m. EST. At Petitioner's request, the undersigned issued an Order Granting Continuance and a second Scheduling Order, setting the hearing for June 24, 2024, at 10:00 a.m. EST.

7. Petitioner’s Board Certified Behavior Analyst (“BCBA”), Diana Puentes (“Ms. Puentes”), wrote a letter dated March 29, 2024, regarding Petitioner’s maladaptive behaviors. The letter states as follows:

We have recently sent a request to Medicaid requesting the authorization of ABA services for [Petitioner] to work on communication, social, and behavioral goals aimed to promote independence and a high quality of life. The therapeutic hours will take place after school hours. Interviews with [redacted] parents provided detailed information of the [redacted] behaviors that frequently take place during [redacted]. This detailed information was confirmed during the direct assessment at the center and at school. It was observed that [Petitioner] exhibited challenging behaviors during [redacted]. Some of the behaviors displayed by [Petitioner] were:

1. [redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

These behaviors have an average duration of one hour long and they occur during the five daily [redacted] sessions. When [Petitioner] refuses to be [redacted] [redacted] A nurse possesses the necessary medical training and expertise to administer feedings through a gastric tube safely and accurately, minimizing the risk of complications to the client. This will allow for a more effective and productive learning environment for [Petitioner]. One of the vital goals of ABA services for [Petitioner] is to work on building cooperation through the feedings through the collaborative approach between the nurse and the behavioral therapist. This will ensure an effective implementation of the strategies and support in overcoming these challenges in a gradual manner. The end goal is to train the nurse on the different strategies to decrease challenging behaviors successfully and effectively during [redacted], as well as gradually fading us from these [redacted] sessions.

See PCE 5 at page 3.

8. Petitioner's pediatric advanced registered nurse practitioner at [REDACTED], [REDACTED] [REDACTED] (" [REDACTED]"), wrote a reconsideration letter dated April 17, 2024, co-signed by [REDACTED] [REDACTED] M.D. (" [REDACTED]"), regarding Petitioner's health status. The letter states as follows:

[PETITIONER] is an established patient of this practice. [Petitioner] has been diagnosed with [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[Petitioner] is in need of home health nursing 12 hours per day for 7 days per week to assist parents with [REDACTED] [REDACTED] [REDACTED] [REDACTED].

Due to [Petitioner]'s [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

I am concerned due to the significant decrease of home nursing hours and the patient's digression without it that the patient will not be able to reach [REDACTED] maximum potential without the assistance of home nursing. At this time, I ask that you reconsider your denial of extended home nursing care as to not cause detriment to the patient.

See PCE 1 at pages 2-3[sic].

[REDACTED]

From [REDACTED], there was a lapse in nursing coverage for [Petitioner]. During that time, the family was made to take on the entire burden of caring for [REDACTED]. In spite of the fact that [Petitioner] has family that is overseeing [REDACTED] care, it is to my understanding that they had to rely heavily on [REDACTED]

[REDACTED] When I then came back to work with [Petitioner] on [REDACTED], I experienced a much harder struggle with [REDACTED]

[Petitioner] has also made great strides in [REDACTED] development to [REDACTED]

[REDACTED] Patient assessments also have to be interpreted and communicated to the patient's parents, doctors, and specialists to be referred to seek additional treatment as needed.

See PCE 1 at page 31-32.

10. Petitioner's pediatric gastroenterologist and [REDACTED] [REDACTED], M.D., ("[REDACTED]"), wrote a reconsideration letter dated May 16, 2024, regarding Petitioner's health status. The letter states as follows:

[Petitioner] is a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See PCE 7 at page 2.

11. Petitioner’s former pediatric speech language pathologist and [REDACTED] therapist, [REDACTED], M.S., CCC-SLP (“[REDACTED]”), wrote a letter of Petitioner’s progress during [REDACTED] tenure.

The letter states as follows:

As a pediatric speech language pathologist/[REDACTED] therapist, (I will refer to myself as “clinician” throughout this letter), I began working with [Petitioner] in [REDACTED] home on [REDACTED] for 30 minute sessions two times per week through the [REDACTED] Early Steps program. At that time, [Petitioner] received all [REDACTED]

[REDACTED]

The goal of treatment sessions was to increase [Petitioner]'s [REDACTED].
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

At the end of [REDACTED], [Petitioner] passed a [REDACTED].
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

In the beginning of [REDACTED], [Petitioner] was approved for an increase in speech/[REDACTED] therapy to 3 times per week for 30-minute sessions. At the end of [REDACTED], [REDACTED].
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See PCE 6 at pages 35-36[sic].

12. Dr. Tanpattana is a Medical Director for CMS. Dr. Metinko testified to the following at Fair Hearing:

- a. CMS Medical Directors recommended the reduction of private duty nursing services in accordance with the Review of Private Duty Nursing Requests and EPSDT. *See* RCE 1 at 99-137 and ¶¶ 18, 23 and 24.
- b. Petitioner was mostly [REDACTED]
[REDACTED]
- c. [REDACTED]
- d. The medication administration record (“MAR”) for [REDACTED] showed there were only [REDACTED].
- e. According to the [REDACTED] skilled nursing notes, Petitioner has tolerated [REDACTED]. *See* RCE 1 at 10-49.
- f. Private duty nursing services were partially approved for Petitioner’s nurse to attend school with [REDACTED]. *See* ¶ 5.
- g. Parents should participate in [REDACTED]. *See* ¶ 18.

13. Dr. Metinko is a Medical Director for CMS. Dr. Metinko testified to the following at Fair Hearing:

- a. CMS Medical Directors agreed that documentation lacked adequate demonstration of enough skilled nursing tasks performed to continue twelve (12) hours per day, seven (7) days per week. *See* ¶ 4-5.
- b. Dr. Metinko argued that the reduction of services included a safety net coverage for delays with a parent returning home.

- c. [REDACTED]
[REDACTED]
[REDACTED].
- d. Dr. Metinko opined that Petitioner's major skilled nursing task is delivery of [REDACTED].
- e. Other tasks included in the Plan of Care such as [REDACTED]
[REDACTED].
- f. Parents are expected to provide assistance with Petitioner's care such as [REDACTED].
- g. Dr. Metinko argued that parents should be able to assist with [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

14. [REDACTED] is Petitioner's case manager. [REDACTED] testified to the following at Fair Hearing:

- a. [REDACTED] conducted a home visit in [REDACTED] at Petitioner's former home in [REDACTED] with only [REDACTED] present.
- b. [REDACTED] conducted a subsequent visit in [REDACTED] with Petitioner's [REDACTED] and [REDACTED] present after Petitioner's move to [REDACTED].
- c. During the home visit in [REDACTED], [REDACTED] witnessed Petitioner's [REDACTED]
[REDACTED].

- d. Prior to the Fair Hearing, [REDACTED] had not mentioned [REDACTED] physical or medical limitations, but [REDACTED] was aware of Petitioner's [REDACTED]'s medical conditions.
- e. [REDACTED] did not receive any medical limitation forms from either parent.

15. [REDACTED] is Petitioner's pediatric advanced registered nurse practitioner. [REDACTED]

testified to the following at Fair Hearing:

- a. Petitioner has been [REDACTED]'s patient since [REDACTED].
- b. Petitioner's primary concerns are [REDACTED].
Petitioner has [REDACTED]
[REDACTED]
- c. [REDACTED]. See
PCE 9 at 3-7.
[REDACTED]
[REDACTED]
[REDACTED].
- e. [REDACTED]
[REDACTED]
[REDACTED].
- f. [REDACTED] recommends Petitioner to continue on twelve (12) hours per day, seven (7) days per week of private duty nursing to avoid regression of [REDACTED] health.
- g. [REDACTED]
[REDACTED]
[REDACTED]

h. [REDACTED] argued that the [REDACTED] lapse in service coverage contributed to the regression described in the letter by [REDACTED]. See ¶ 9.

i. A parent should be able to perform a [REDACTED]
[REDACTED].

16. [REDACTED] is Petitioner's nurse caregiver. [REDACTED] testified to the following at Fair Hearing:

a. [REDACTED] provides about sixty (60) hours per week of care to Petitioner.

b. [REDACTED] follows the gastroenterologist's instructions for [REDACTED]
[REDACTED]. See ¶ 10.

c. [REDACTED]
[REDACTED] See PCE 7 at 2-3.

d. [REDACTED]
[REDACTED]
[REDACTED].

e. During the schoolyear Petitioner's school schedule is from 8:30 a.m. to 2:30 p.m. and ABA therapy afterschool between 2:30 p.m. and 5 p.m. Petitioner receives OT every Wednesday from 3-3:30 p.m. or 3:30-4 p.m. and PT every Thursday from 3-4 p.m.

f. [REDACTED] works around the family's schedule and any other factors with weekday schedules busier due to Petitioner's multiple therapies and weekend schedules less busy when both parents are home.

g. [REDACTED] has shown and explained [REDACTED] techniques to Petitioner's parents.

- h. Petitioner lives at home with [REDACTED].
- i. [REDACTED] has observed Petitioner's [REDACTED] typically returns home around 6 p.m. and rests in bed but is available to assist whereas Petitioner's [REDACTED] suffers from [REDACTED].
- j. [REDACTED] explained that [REDACTED] does not [REDACTED] with Petitioner's activities of daily living unless Petitioner is not cooperating and the parents must step in. Requesting help is not common because Petitioner's [REDACTED] is usually not home and [REDACTED] is usually at home busy with other things, or the tasks are basic and not skilled nursing tasks.
- k. Most times Petitioner's [REDACTED] is home at the same time [REDACTED] is present.
- l. [REDACTED]
[REDACTED].

17. [REDACTED] is Petitioner's [REDACTED]. [REDACTED] testified at Fair Hearing that [REDACTED] is [REDACTED] full-time employee since [REDACTED] as an [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

18. The CMS Health Review of Private Duty Nursing Requests (June 2015) ("FL.UM.26.00") provides as follows in regards private duty nursing services:

PURPOSE:

To establish clinical criteria on which to review requests for private duty nursing services to provide medically necessary, age-appropriate nursing care to eligible members with medical needs beyond a skilled care nursing visit. The services will

assist in maintaining the member in their home and community environment, in a safe manner.

...

DEFINITION:

Medically Complex: A member is medically complex if he/she has chronic debilitating diseases or conditions of one or more physiological or organ systems that make the person dependent upon 24-hour per day medical, nursing or health supervision or intervention.

Private Duty Nursing Services: are services that are medically necessary skilled nursing services that can be provided to members under the age of 21 in their home or other authorized settings to support the care required by their complex medical problems and require more extensive and continual care than can be provided through a home health nurse visit. Private duty nursing is furnished for the purposes of performing skilled interventions or monitoring the effects of prescribed treatment.

...

PROCEDURE:

Review Process

To assist in determining the medical necessity of private duty nursing, the clinical criteria established in this policy will be applied. A request for medical necessity review is consistent with CMS Health medical policies:

- FL.UM.02.01 - Medical Necessity Review and Continuity of Care
- FL.UM.02.00 - Use of Clinical Criteria
- Any decision to deny, reduce, suspend or terminate services must be made by a CMS Health Medical Director as outlined in the policy Use of Clinical Criteria FL.UM.02.00. Determinations and provider notifications will be made according to the expediency of the case as described in FL.UM.05.00 Timeliness of UM Decisions and Notifications.

Specific Clinical Information/Criteria

- I. Services and supplies for medically fragile children include home health and private duty nursing services directly related to their care. It is the policy of CMS Health Plan that services for medically fragile children are **medically necessary** when all of the following apply:
 - A. Member is enrolled in a Florida Medicaid CMS Health Plan
 - B. Member is under the age of 21 years old
 - C. Member is enrolled in complex case management OR is deemed as medically fragile/medically complex.
 - D. There is a signed plan of care and order for the requested services.

...

Limitations and Exclusions:

...

- Private duty nursing is not covered for respite care. Examples are parent or legal guardian recreation, socialization, and volunteer activities or periodic relief to attend to personal matters unrelated to the medical necessary care of the member.
 - Private duty nursing can be covered outside the member's residence if the services are unavailable through other public or private resources, including schools (with documentation of such) and the services are medically necessary while the member is outside his/her home.
- ...
- Private duty nursing services are not covered in the following locations:
 - Hospitals
 - Nursing facilities
 - Intermediate care facilities for individuals with intellectual disabilities
 - Physician offices
 - Clinics
 - Prescribed pediatric extended care centers
 - There are times during the day when skilled interventions are not required for a member receiving private duty nursing services. In these cases, parents or legal guardians must provide assistance with activities of daily living (ADL) and instrumental activities of daily living (IADL) for the member, to the fullest extent possible. If parents or legal guardians need training to safely perform these ADL and IADL tasks, the home health provider must provide training and document the methods used to train the parent or legal guardian in the member's medical record. If the parents or legal guardians are willing and capable of providing more ADL and IADL care, private duty nursing can be authorized to supplement the care provided by those parents or legal guardians.
 - Private duty nursing services can be approved for a member whose parent or legal guardian is not available or able to provide ADL or IADL care. Documentation must be provided with a request for private duty nursing services in order to substantiate a parent or legal guardian's inability to participate in the care of the member (i.e., work or school schedules and medical documentation). If a parent or legal guardian is unable to provide a work schedule, a statement attesting to the work schedule must be presented to CMS Health when making the request.
 - For MMA, CMS, SMI and Child Welfare members, a home health agency can allow payment for up to 40 hours per week of private duty nursing services provided by a parent or legal guardian if that parent or legal guardian has a valid license as a RN or LPN in the state of Florida and is employed by a contracted home health agency. Parents or legal guardians must participate in providing ADL and IADL care to the fullest extent possible and are expected to continue to provide non-reimbursed care as the primary parent or legal guardian.

...

- Approval is not provided for additional private duty nursing hours for the member so that the member's parent or legal guardian who is providing private duty nursing for the member can also work outside the home or for respite. The parent or legal guardian is not eligible to participate in this program if the required care cannot be provided because of a medical condition or disability of the parent or legal guardian.
- The absence of an available care giver does not make the requested services skilled care, and therefore is not criteria used for determining medical necessity of private duty nursing.
- Services that can be provided safely and effectively by a non-clinically trained person are not considered skilled when a non-skilled caregiver is not available.
- Services that involve payment of family members or nonprofessional caregivers for services performed for the member are not considered as medically necessary for authorization of private duty nursing services.

See RCE 1 at 93-96.

CONCLUSIONS OF LAW

19. 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), Florida Statutes (2022). This order is the final administrative decision of AHCA under section 409.285(2)(a).

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

21. Because Respondent reduced a previously approved service, Fla. Admin. Code R. 59G-1.100(17)(g) assigns the burden of proof to the 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.)

22. The Florida Medicaid Private Duty Nursing Services Coverage Policy (November 2016) ("PDN Policy"), incorporated by reference in Fla. Admin. Code R. 59G-4.261, governs private duty

nursing services available under Florida Medicaid. The PDN Policy provides the following, in pertinent part:

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.

Note: Subparagraph (a)(5) of the medical necessity definition shall not be applied when determining the medical necessity of private duty nursing services. All other medical necessity criteria apply and must be met in order to receive reimbursement from Florida Medicaid

...

3.0 Eligible Provider

3.1 General Criteria

Providers must meet the qualification specified in this policy in order to be reimbursed for Florida Medicaid private duty nursing services.

3.2 Who Can Provide

Services must be rendered by providers meeting one of the following:

- Home health agencies licensed in accordance with section 408.810 F.S., and Rule Chapter 59A-8, F.A.C.
- Licensed practical nurses (LPN) licensed in accordance with Chapter 464, F.A.
- Registered nurses (RN) licensed in accordance with Chapter 464, F.S.

4.0 Coverage Information

4.1 General Criteria

Florida Medicaid reimburses for 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 recipient, 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

...

4.3 Early and Periodic Screening, Diagnostic, and Treatment

As required by federal law, Florida Medicaid provides services to eligible recipients under the age of 21 years, if such services are medically necessary to correct or ameliorate a defect, a condition, or a physical or mental illness. Included are diagnostic services, treatment, equipment, supplies, and other measures described in section 1905(a) of the SSA, codified in Title 42 of the United States Code 1396d(a). As such, services for recipients under the age of 21 years exceeding the coverage described within this policy or the associated fee schedule may be approved, if medically necessary. For more information, please refer to Florida Medicaid’s General Policies on authorization requirements.

...

5.0 Exclusion

5.1 General Non-Covered Criteria

Services related to this policy are not reimbursed 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

5.2 Specific Non-Covered Criteria

Florida Medicaid does not reimburse for the following:

- A skill level other than what is prescribed in the physician order and approved POC
- Babysitting
- Certification of the POC by a physician
- Nursing assessments related to the POC
- Professional development training or supervision of home health staff or other home health personnel
- Respite care to facilitate the parent or legal guardian attending to personal matters
- Services funded under section 110 of the Rehabilitation Act of 1973 or under the provisions of the Individuals with Disabilities Educational Act

- Services furnished by relatives as defined in section 429.02(18), F.S., household members, or any person with custodial or legal responsibility for the recipient. (except as described in section 4.2.1)
- Services provided in any of the following locations:
 - Hospitals
 - Intermediate care facilities for individuals with intellectual disabilities
 - Nursing facilities
 - Prescribed pediatric extended care centers
 - Residential facilities or assisted living facilities when the services duplicate those provided by the facility
- Services rendered prior to the development and approval of the POC
- Travel time to or from the recipient’s place of residence

7.0 Authorization

7.2 Specific Criteria

Providers must obtain authorization from the Medicaid contracted Quality Improvement Organization (QIO) at least every 180 days, or more frequently if there is a change in the recipient’s condition requiring an increase or decrease in authorized services.

...

7.2.3 Intensified Review

The QIO’s physician peer reviewer will review the authorization request if the multidisciplinary team cannot reach consensus on the amount of PDN service hours to include in the service plan.

The QIO’s physician peer reviewer will review all of the available information collected as a part of the multidisciplinary team process, and attempt to contact the recipient’s physician to discuss the case.

PDN Policy at page 1-5.

23. 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.

24. Petitioner is under age 21, and therefore EPSDT applies to this request for services. However, a state may place medical necessity limitations on EPSDT services. See 42 C.F.R. §§ 440.230(a), (b), (d). 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.

25. The Florida Medicaid Definitions Policy (August 2017) (“Definitions Policy”), incorporated by reference in Fla. Admin. Code R. 59G-1.010, defines “Medically Necessary” or “Medical Necessity” as follows:

2.83 Medically Necessary or Medical Necessity

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.

Definitions Policy at page 7.

Private Duty Nursing Services

26. In the instant case, Petitioner requested recertification of private duty nursing services for twelve (12) hours per day, seven (7) days per week. *See* ¶ 4. In the NABD, dated March 1, 2024, Respondent reduced Petitioner’s services beyond an initial 30-day period. *See* ¶ 4. In the NPAR dated March 29, 2024, Respondent reduced the private duty nursing services to nine (9) hours per day on weekdays. *See* ¶ 5. Respondent cited the lack of medical necessity as the basis for their decision, specifically that the services must be “individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness under treatment, and not in excess of the patient’s needs.” *See* ¶ 4-5. Respondent has the burden of proof to show by a preponderance of evidence that the Respondent’s determination was correct. *See* ¶ 21.

27. The PDN Policy states that Florida Medicaid reimburses for services that meet all of the following: (1) are determined medically necessary; (2) do not duplicate another service; and (3) meet the criteria specified in the policy. *See* ¶ 22. The Definitions Policy requires that the services must “[b]e 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* ¶ 25.

28. As demonstrated in the record, Petitioner has multiple medical conditions including

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See* ¶ 2, 8. [REDACTED]

[REDACTED] *See* ¶ 3, 12, 16. Petitioner is ordered multiple medications

[REDACTED]

[REDACTED]. See ¶ 3, 8-10. At Fair Hearing, a CMS Medical Director, Dr. Tanpattana, explained that the recommended reduction of private duty nursing services was in accordance with the Review of Private Duty Nursing Requests and EPSDT. See ¶ 4-5, 12. Multiple CMS Medical Directors conducted a medical necessity review for Petitioner's private duty nursing services and agreed that there was not enough skilled nursing tasks performed to justify twelve (12) hours per day, seven (7) days per week of private duty nursing services. See ¶ 4-5, 12-13. Another CMS Medical Director, Dr. Metinko, explained at Fair Hearing that Petitioner's major skilled nursing task is delivery of [REDACTED]. See ¶ 13.

The evidence introduced by Petitioner suggest that Petitioner's [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] but currently

receives ABA therapy, OT and PT each week. See ¶ 3, 8, 11.

29. Dr. Metinko and Dr. Tanpattana argued that the reduction of services included a safety net coverage for delays with a parent returning home as well as the nurse attending school with Petitioner to provide [REDACTED] feedings. See ¶ 12-13. Petitioner has not presented evidence of unmet skilled nursing needs that cannot be addressed within the reduced number of private duty nursing service hours. See ¶ 7-10, 15-17. Petitioner introduced various recommendations from

team of medical specialists, including testimony by , that Petitioner has not reached

See ¶ 2, 8, 15. 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. See ¶ 25. Basic monitoring is not among the criteria for the purpose of requiring private duty nursing services under Florida Medicaid. See ¶ 18, 22. The record does not indicate on any reported difficulty regarding getting Petitioner’s vitals. See ¶ 8-9. Petitioner appears to have the appropriate services in place (i.e. school, ABA therapy, PT, and OT) to address some of the developmental and behavioral challenges faces. See ¶ 3, 7, 16. Petitioner appears to have reaped a better benefit with alternative services, such as speech and therapy,

. See ¶ 11.

30. Dr. Metinko further argued that Petitioner’s Plan of Care included tasks such as which do not fall under skilled nursing tasks. See ¶ 13. Regarding private duty nursing services, Respondent’s FL.UM.26.00 maintains that “parents or legal guardians must provide assistance with activities of daily living (ADL) and instrumental activities of daily living (IADL) for the member, to the fullest extent possible.” See ¶ 18. Petitioner has not presented sufficient evidence to demonstrate the parents’ lack of availability to provide some assistance with ADLs and IADLs or gaps in care for these needs. See ¶ 2, 16. The evidence presented by Petitioner suggest that Petitioner’s and are

limited in assisting with Petitioner's home care needs due to Petitioner's [REDACTED]. See ¶ 8, 16-17. However, these circumstances were not substantiated by supporting documentation including any medical limitation forms for both parents. See ¶ 14. These circumstances also do not demonstrate that Petitioner's parents are unavailable or unwilling to assist with Petitioner's needs. See ¶ 18. According to [REDACTED]'s testimony, [REDACTED] does not commonly [REDACTED] with Petitioner's ADLs because some tasks are basic and not skilled nursing tasks. See ¶ 16. Furthermore, [REDACTED] testified that Petitioner is never left alone and at least one parent is always at home before and after [REDACTED]'s work shift. See ¶ 16. The record demonstrates Petitioner's needs with ADLs and IADLs can be met with a lower level of care and with the assistance provided by Petitioner's parents. See ¶ 2-3, 12-13. The record reflects that the reduction of private duty nursing services should be sufficient to meet Petitioner's specific skilled nursing needs. See ¶ 2-5, 12-13, 18, 22. Based on all aforementioned facts, Respondent proved by a preponderance of the evidence that the continuation of private duty nursing services at twelve (12) hours per day, seven (7) days per week are "in excess of [Petitioner]'s needs." See ¶ 12-13, 18, 22-25.


31. Upon consideration of the testimony provided, evidence submitted, and applicable policies, the undersigned finds that Respondent proved by a preponderance of the evidence that the recertification of the previously approved level of home health (private duty nursing) services does not meet the medical necessity criteria. Looking at all the evidence relevant to the particular needs of this Petitioner, the Respondent demonstrated that the recertification of the previously approved home health (private duty nursing) services is not necessary to correct or ameliorate a

defect or a physical and mental illness or condition. Accordingly, the undersigned finds that Respondent proved by a preponderance of the evidence that Respondent's decision to reduce Petitioner's home health (private duty nursing) services was correct.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

Respondent's reduction of home health services (private duty nursing) is **AFFIRMED**. Petitioner's appeal based on Respondent's reduction of home health services (private duty nursing) is **DENIED**.

DONE AND ORDERED this 5th day of September, 2024 in Tallahassee, Leon County, Florida.


Kimberly Roche
24-FH1028
2024.09.05
08:39:17 -04'00'

KIMBERLY ROCHE, 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.

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