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

FILED

Oct 01, 2024, 3:41 pm

OFFICE OF FAIR HEARINGS

[redacted],

PETITIONER,

vs.

CHILDREN'S MEDICAL SERVICES,

RESPONDENT.

_____/

AHCA Case No.: 24-FH1992
Plan ID No.: [redacted]

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic Fair Hearing on the instant case on July 22, 2024, at 9:59 a.m. Eastern Standard Time ("EST").

APPEARANCES

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

For the Respondent: Chantal Pierre
Clinical Appeals Coordinator
Children's Medical Services Health Plan

STATEMENT OF ISSUE

The Petitioner in this matter requested a continuation of in-home private duty skilled nursing for one hundred and sixty-eight (168) hours per week, consisting of 24 hours per day, 7 days per week, throughout the Petitioner's Authorization Period. Children's Medical Services Health Plan ("Respondent" or "CMS") approved one hundred and sixty-eight hours per week for thirty (30) days, then reduced the Petitioner's in-home private duty skilled nursing services to one hundred and fourteen (114) hours per week, consisting of eighteen (18) hours per day on Monday's through Friday, and twelve (12) hours per days on Saturdays and Sundays. The issue in this matter

is whether the Respondent proved by a preponderance of the evidence that Respondent's decision to reduce the Petitioner's in-home private duty skilled nursing hours by fifty-four (54) hours per week was correct.

PRELIMINARY STATEMENT

All parties appeared telephonically. The Petitioner's [redacted] ("[redacted]") appeared as the Petitioner's Designated Authorized Representative and testified on behalf of the Petitioner. In addition, the Petitioner's [redacted] also testified at the Fair Hearing.

Chantal Pierre, Clinical Appeals Coordinator ("Ms. Pierre") appeared on behalf of the Respondent. Andrew Metinko, M.D. ("Dr. Metinko"), a Medical Director for the Respondent testified on behalf of the Respondent. Dr. Mansura Solari, M.D., attended the Fair Hearing on behalf of CMS for observation purposes only. Joanna White, Compliance Officer and Elisa Luke, Esq., both with the Florida Department of Health attended the Fair Hearing for observation purposes only. Lastly, Marielisa Amador, Medical Healthcare Program Analyst with the Florida Agency for Healthcare Administration attended the Fair Hearing for observation purposes.

Prior to the hearing, the Petitioner sent to the Office of Fair Hearings and Respondent a fifty-six (56) page evidence package that was admitted into evidence without objection, is identified herein as "Petitioner's Composite Exhibit 1" and appears in the Office of Fair Hearings document management system as file title "24-FH1992 Evidence.pdf".

Prior to the hearing, Respondent sent to the Office of Fair Hearings and Petitioner a two hundred and sixteen (216) page evidence package that was admitted into evidence without objection, is identified herein as "Respondent's Composite Exhibit 1" and appears in the Office of Fair Hearings document management system as file title "MFH Packet [Petitioner].pdf".

FINDINGS OF FACT

1. Petitioner is an enrolled member of CMS since January 10, 2022. *See* Respondent's Composite Exhibit 1, page 2. CMS is a managed care organization contracted by the Agency to provide services to eligible Medicaid recipients in Florida.

2. The Petitioner is a [redacted] *See* Petitioner's Composite Exhibit 1, pages 5-6. The Petitioner has a [redacted] *Testimony of Dr. Metinko.* Lastly, [redacted]. *See* Respondent's Composite Exhibit 1, page 160.

3. On May 20, 2024, the Petitioner requested a continuation of in-home private duty skilled nursing for one hundred and sixty-eight (168) hours per week, consisting of twenty-four (24) hours per day, seven (7) days per week of in-home private duty skilled nursing. *See* Respondent's Composite Exhibit 1, page 4. In a Notice of Adverse Benefit Determination ("NABD"), dated May 27, 2024, the Respondent approved thirty (30) days of the requested one hundred and sixty-eight hours per week of in-home private duty skilled nursing consisting twenty-four (24) hours per day, seven (7) days

per week followed by a fifty-four (54) hour per week reduction of the in-home private duty nursing totaling one hundred and fourteen (114) hours per week, consisting of eighteen (18) hours day on Monday through Friday, and twelve (12) hours per day on Saturday and Sunday. *See* Respondent's Composite Exhibit 1, pages 4-9. The NABD explained the basis of the denial 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 needed to protect your child's life, prevent significant illness or disability to your child, or to alleviate your child's severe pain.
>
> ☒ Must be individualized, specific, consistent with symptoms or diagnosis of illness or injury and not be in excess of your child'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:
>
> 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 Sunshine Health Member Handbook, Services covered by Sunshine Health, page 21; Florida Medicaid Private Duty Nursing Services Coverage Policy; and/or Florida Medicaid Home Health Visits Service Coverage Policy. This decision was made with regards to Early and Periodic Screening, Diagnostic and Treatment Services (EPSDT).
>
> Rationale: The request for ongoing private duty nursing services of 24 hours per day, 7 days per week has been reviewed. Private duty nursing services are medical care given in the home by a trained and licensed nurse. More services are approved for 30 days ([redacted]) to allow time for change. After that time, private duty nursing services are approved for 18 hours per day Monday through Friday, and for 12 hours on Saturday and Sunday, for the rest of the authorization period ([redacted]). Hours were increased at

> first due to the parent's limits from [redacted]. However, there are no medical notes that support continuing the current volume of coverage hours. Your child does not have a tracheostomy. A tracheostomy is a cut made in the throat to relieve any blockage causing breathing problems. [redacted] does not depend on a ventilator to breathe. A ventilator is a machine to help a person breathe. [redacted] does not have a noted extra oxygen need. The notes we have show that [redacted] There is no current plan of care signed by [redacted] doctor that proves a 24 hour per day private duty nursing need. A plan of care is a program of treatment or care. The request will be reviewed again if complete medical notes and a signed doctor's plan of care are sent which prove the medical need for this level of private duty nursing service hours.
>
> . . .

Id.

4. The Petitioner requested a plan appeal on [redacted], and received a Notice of Plan Appeal Resolution ("NPAR"), dated June 10, 2024, that affirmed the previous thirty (30) days of the requested one hundred and sixty-eight hours per week of in-home private duty nursing consisting twenty-four (24) hours per day, seven (7) days per week of in-home private duty nursing, followed by a fifty-four (54) hour per week reduction of the in-home private duty skilled nursing for a total of one hundred and fourteen (114) hours per week, consisting of eighteen (18) hours day on Monday through Friday, and twelve (12) hours per day on Saturday and Sunday. *See* Respondent's Composite Exhibit 1, page 122. The NPAR explained the basis of the decision as follows:

> The facts that we used to make our decision are: the previous decision regarding private duty nursing services is upheld. The clinical information that we received does not indicate that your child needs advanced respiratory support. Your child does not need multiple medications administered in the veins. Your child does not need continuous feeds through a feeding tube 24 hours per day. The clinical notes do not support the need for continuous skilled nursing 24 hours per day, 7 days per week. 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.
>
> . . .

See Respondent's Composite Exhibit 1, pages 122-125.

5. On June 17, 2024, the Petitioner requested a Fair Hearing to challenge the fifty-four (54)

hour per week reduction of in-home private duty nursing. On June 25, 2024, the undersigned issued an Order Scheduling Fair Hearing by Telephone and Prehearing Instructions, setting the hearing for July 22, 2024, at 10:00 a.m. EST.

6. The Sunshine Policy and Procedure FL.UM.26.00, entitled Review of Private Duty Nursing Requests, effective June 2015, is applicable for members under the age of 21 requiring in-home private duty nursing and states in-part as follows:

> **POLICY STATEMENT:**
> Sunshine Health's Private Duty Nursing Criteria clinical policy supports the management of the Managed Medical Assistance (MMA), Children's Medical Services (CMS), Serious Mental Illness (SMI) and Child Welfare (CW) benefit for private duty nursing as described in the Florida Agency for Health Care Administration (AHCA) Service-Specific Policies entitled, Private Duty Nursing Services Coverage Policy and Home Health Visit Services Coverage Policy.
>
> **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.
>
> **DEFINITIONS:**
> **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.
> **Private Duty Nursing Benefit:**
> Private duty nursing (PDN) services provide skilled nursing services for members who are under the age of 21. The services must be provided in the member's home or other authorized setting to support the care required by the child's medically complex condition(s).

PDN is considered for members:

- Who have complex medical problems
- Require more extensive and continual care than can be provided through a home health nurse visit

POLICY:

Sunshine Health's Private Duty Nursing Criteria clinical policy supports the management of the Managed Medical Assistance (MMA), Children's Medical Services (CMS), Serious Mental Illness (SMI) and Child Welfare (CW) benefit for private duty nursing as described in the Florida Agency for Health Care Administration (AHCA) Service-Specific Policies entitled, Private Duty Nursing Services Coverage Policy and Home Health Visit Services Coverage Policy.

. . .

Limitations and Exclusions:

- Members, who may benefit from private duty nursing, include those eligible members who are under the age of 21, only.
- Banking or flex hours of approved private duty nursing hours is not allowed. Only the number of hours that are approved as medically necessary can be approved. The total number of hours per week, hours per day, and days per week approved must be followed. Any variations would need to be requested and approved in advance by Sunshine Health.
- 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 can be considered for the medically complex member at school if both of the following are met:
    - The member's primary care physician provides documentation that he/she considers going to school a viable option given the member's medical status, and
    - The school system is not currently providing the intensity of nursing care required by the child, and private duty nursing services would enable the member to attend school (with documentation of such).
        - 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 Sunshine 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.
- If a child is receiving private duty nursing services that are performed by a primary parent or legal guardian, the servicing agency must submit the "Sunshine Health Request for Authorization for Private Duty Nursing by a Parent or Legal Guardian" form with the request for authorization to Sunshine Health Plan. If a parent or guardian requests to provide PDN services after the start date of the authorization, the form may be submitted by the agency for Sunshine Health signature prior to the authorization end date. The Sunshine Health Request for Authorization for Private Duty Nursing by a Parent or Legal Guardian" form does not replace the need for medical necessity review of services.
- The Sunshine Health prior authorization nurse receives the submitted forms, reviews for completion, signs the form and faxes a copy of the signed form to the requesting agency. The signed form is electronically attached to the member's record in TruCare.
- Additionally, the Sunshine Health prior authorization nurse will contact the

members assigned care manager (CM) to communicate outcome of approval by calling the assigned CM and following up with an email.

- 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.
- Long Term Care members may receive nursing care of both a supportive and healthy related nature, specific to the needs of a medically stable, physically handicapped member age 21 and older who requires more individual and continuous care than an intermittent nursing visit. The scope and nature of these services do not otherwise differ from private duty nursing services. This service is providing under attendant nursing care authorizations.

(Emphasis added.) *See* Respondent's Composite Exhibit 1, pages 165-170.

7. The Petitioner's [redacted] testified that the Petitioner requires [redacted] and that prescribed pediatric extended care outside the home will not work for the Petitioner as the nurses can't give the Petitioner the attention [redacted] requires because of multiple patients, and will not be able get to the Petitioner quick enough if [redacted] is in crisis. The Petitioner's [redacted] acknowledged that the Petitioner does not have a tracheostomy tube to assist breathing but testified that the reduction of in-home private duty skilled nursing would likely require the Petitioner to get a tracheostomy tube. In addition, the Petitioner's [redacted] testified [redacted] cannot provide the intensive care the Petitioner

requires in-part because [redacted] has to divide [redacted] time and attention between [redacted] in addition to the Petitioner.

8. The Petitioner's [redacted] testified [redacted] helps to care for the Petitioner but as the principal wage earner for the family, [redacted] job requires [redacted] to frequently travel nationally for extended period with little notice, especially during the fall season. In addition, [redacted] is frequently on-call for remote national technical support coast-to-coast and frequently handles matters on Pacific Standard Time, requiring [redacted] to work very late nights and very early mornings. It is for these reasons that [redacted] is unable to provide the Respondent with an accurate work schedule. Testimony from both [redacted] and [redacted] reflects [redacted] provides assistance for all [redacted] children with activities of daily living (ADL) and instrumental activities of daily living (IADL) to the fullest extent possible.

9. Dr. Metinko testified for the Respondent and stated that the Petitioner is considered a "medically complex" case and because the Petitioner is currently obtaining twenty-four (24) hour care, seven (7) days per week, [redacted] case is reviewed by the Respondent's internal care team weekly. Dr. Metinko conceded the Petitioner does in fact require in-home skilled private duty nursing, particularly at night, but testified the Respondent concluded that around-the-clock nursing was not medically necessary, and reduced the Petitioner's skilled nursing by fifty-four (54) hours per week.[1] Dr. Metinko testified the Petitioner began receiving in-home skilled nursing services in March of 2023, for a total of fifty-six (56) hours per week, or an average of eight (8) hours per day. In August 2023, the Respondent increased the in-home private duty skilled nursing services to twenty-four (24) hours per day, in large part due to [redacted]. It is the position of the Respondent that the remaining hours of in-home private duty skilled

[1] The Petitioner has been receiving a continuation of twenty-four (24) hour, seven (7) days per week of in-home skilled nursing benefits during the pendency of this case.

nursing after the fifty-four (54) hour reduction medially sufficient, that since there is no longer a newborn in the household, now is an appropriate time to reduce the in-home skilled nursing hours per week, and finally that the number of hours per week exceeds what the Petitioner was receiving before [redacted]. Dr. Metinko did state [redacted] participated in a peer-to-peer meeting with one of the Petitioner's physicians, but that discussion did not reveal any information that would justify remaining at twenty-four (24) hour a day in-home private duty skilled nursing. Lastly, Dr. Metinko testified that this matter can be reviewed at any time to add more hours if it appears the reduced hours are insufficient.

10. Three of the Petitioner's physicians, a Physicians Assistant, and a Registered Nurse that provide medical services to the Petitioner have all submitted letters into evidence that recommend the continuation of the in-home private duty nursing at the current level of twenty-four (24) hours per day, seven (7) days per week, including the following:

A. [redacted], M.D. submitted a [redacted], letter stating in-part "… please reconsider you decision to decrease [the Petitioner's] hours and keep [redacted] at 24/7 nursing care." *See* Petitioner's Composite Exhibit 1, pages 36 and 37.

B. [redacted], M.D., submitted a [redacted], letter stating in-part "[T]he [Petitioner] and [redacted] family should be continued to be provided with 24/7 in-home private duty skilled nursing care in the effort to prevent hospitalization and ensure [redacted] has proper care at home." *See* Petitioner's Composite Exhibit 1, page 40.

C. The Record contains a [redacted], progress note [redacted], M.D., stating as follows:

> I am concerned that insurance is discussion a decrease in [the Petitioner's] nursing care. [redacted]

> [redacted] I would advocate for [redacted] to keep 24-hour nursing care.

See Petitioner's Composite Exhibit , pages 44 and 45.

D. [redacted], PA, submitted an undated letter wherein [redacted] states in-part that "I strongly recommend [the Petitioner] continues to receive 24 hour nursing services to ensure [redacted] safety and optimize [redacted] health outcomes." *See* Petitioner's Composite Exhibit 1, pages 46 and 47.

E. [redacted], RN, submitted a letter describing the Petitioner's nursing care and requesting in-part to "… please reconsider decreasing [the Petitioner's] 24/7 care." *See* Petitioner's Composite Exhibit 1, pages 51-53.

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 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 the Respondent is reducing the Petitioner's current services, Fla. Admin. Code R. 59G-

1.100(17)(g) assigns the burden of proof to the Respondent to demonstrate that the decision to reduce the services by the Respondent was correct. 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.)

1. The Florida Medicaid Private Duty Nursing Services Coverage Policy (November 2016) ("PDN Policy") establishes the provision and coverage of private duty nursing services under Florida Medicaid. The PDN policy provides 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 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 community

. . .

4.3 Early and Periodic Screening, Diagnosis, 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 sectioned 1905(a) of the Social Security Act, 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 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

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 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.

> Florida Medicaid may reimburse for some services listed in the section through a different service benefit.

See Respondent's Composite Exhibit 1, pages 192-200.
15.

16. 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.

17. Petitioner is under age 21, and therefore EPSDT applies to [redacted] 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.

18. The Florida Medicaid Definitions Policy (August 2017) ("Definitions Policy"), incorporated by reference in Fla. Admin. Code R. 59G-1.010, provides the applicable definitions for Florida Statewide Medicaid Managed Care policy. The Definitions Policy provides the following definitions applicable to the instant case:

2.2 Activities of Daily Living (ADLs)
ADLs include:

- Bathing
- Dressing
- Eating (oral feedings and fluid intake)
- Maintaining continence (examples include taking care of a catheter or colostomy bag or changing a disposable incontinence product when the recipient is unable to control bowel or bladder functions)
- Toileting
- Transferring

2.64 Instrumental Activities of Daily Living (IADLs)
When necessary for the recipient to function independently, including:

- Grocery shopping
- Laundry
- Light housework
- Meal preparation
- Money Management
- Personal hygiene
- Transportation
- Using the telephone to take care of essential tasks (examples include paying bills and setting up medical appointments)

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.

See Definition Policy, pages 1-7.

19. In the NABD, dated April 1, 2024, the Respondent approved thirty (30) days of home health aide services and denied five (5) months (150 days) of home health aide services. *See* ¶ 4. The Respondent explained in the NABD that medical necessity for sixty (60) hours per week for six (6) months was not reflected in the file. *Id.*

20. The Respondent's May 27, 2024, NABD denying the Petitioner's request for a home health aide for fifty (50) hours per week and stated in-part as follows:

> The request for ongoing private duty nursing services of 24 hours per day, 7 days per week has been reviewed. Private duty nursing services are medical care given in the home by a trained and licensed nurse. More services are approved for 30 days ([redacted]) to allow time for change. After that time, private duty nursing services are approved for 18 hours per day Monday through Friday, and for 12 hours on Saturday and Sunday, for the rest of the authorization period ([redacted]). Hours were increased at first due to the parent's limits from [redacted]. However, there are no medical notes that support continuing the current volume of coverage hours. Your child does not have a tracheostomy. A tracheostomy is a cut made in the throat to relieve any blockage causing breathing problems. [redacted] does not depend on a ventilator to breathe. A ventilator is a machine to help a person breathe. [redacted] does not have a noted extra oxygen need. The notes we have show that [redacted] There is no current plan of care signed by [redacted] doctor that proves a 24 hour per day private duty nursing need. A plan of care is a program of treatment or care. The request will be reviewed again if complete medical notes and a signed doctor's plan of care are sent which prove the medical need for this level of private duty nursing service hours.
> . . .

See ¶ 3. In addition, the Respondent's June 10, 2024, NPAR upheld the denial and stated in-part as follows:

> The facts that we used to make our decision are: the previous decision regarding private duty nursing services is upheld. The clinical information that we received does not indicate that your child needs advanced respiratory support. Your child

> does not need multiple medications administered in the veins. Your child does not need continuous feeds through a feeding tube 24 hours per day. The clinical notes do not support the need for continuous skilled nursing 24 hours per day, 7 days per week. 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.
>
> . . .

See ¶ 4.

21. As the Respondent bears the burden of proof, the Respondent must show that the requested services are medically necessary and that the decision of the Respondent to deny the requested services was correct. As provided in the PDN Policy, 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. *See* ¶ 15.

22. As shown by the record, the Petitioner [redacted] and is diagnosed with very serious health conditions. *See* ¶ 2. The Respondent testified that there is no question the Petitioner requires in-home private duty skilled nursing services but not at the level and hours that were previously approved. *See* ¶ 9. The evidence demonstrates the Petitioner began receiving in-home private duty nursing in March 2023, for forty (40) hours per week, which was then increased to one hundred and sixty-eight (168) hours per week immediately after [redacted], the Respondent is reducing the hours to 114 hours, weekly, which is still at a level above what was originally provided. *See* ¶ 9. Dr. Metinko acknowledged that the Petitioner requires the skilled nursing services overnight but during the daytime hours, the Petitioner's parents are in the position to provide care for [redacted] to the "fullest extent" possible. Finally, if the Petitioner's health, welfare, or safety is in-fact jeopardized by the reduction of in-home private duty skilled nursing, a

new request for increased hours that is supported by the evidence can be requested at any time by the family. *See* ¶ 4. As such, the record shows that 168 hours of nursing services are "in excess" of the Petitioner's needs. Therefore, the Respondent demonstrated that continuing services at the prior level was not medically necessary.

23. Upon consideration of the testimony provided, evidence submitted, and applicable polices, the undersigned concludes that Respondent has proved by a preponderance of the evidence that the requested one hundred and sixty-eight (168) hours (twenty-four hours per day, seven (7) days per week) are not medically necessary. Looking at all the evidence relevant to the particular needs of Petitioner, the Respondent has t demonstrated that the previously approved 168 per week of nursing services are no longer necessary to correct or ameliorate a defect or a physical and mental illness or condition. Accordingly, the Respondent has proved by a preponderance of the evidence that the reduction of fifty-four (54) hours per week was correct.

IT IS HEREBY ORDERED AND ADJUDGED THAT:

The Respondent's reduction of fifty-eight (58) hours per week of in-home skilled nursing services is **AFFIRMED**. Petitioner's appeal based on Respondent's reduction of in-home private duty skilled nursing is **DENIED**.

DONE and ORDERED this 1st day of October, 2024, in Tallahassee, Leon County, Florida.

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

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]

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CMSPlanContract@flhealth.gov

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