

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████,)
)
Petitioner,)
)
vs.) Case No. 07-2361APD
)
AGENCY FOR PERSONS WITH)
DISABILITIES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On October 15, 2007, a hearing was held in ██████, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes (2007). The case was considered by June C. McKinney, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Walter James Harvey, Esquire
Gray Robinson
1221 Brickell Avenue, Suite 1650
Miami, Florida 33131

For Respondent: David Glantz, Esquire
Office of the Attorney General
110 Southeast 6th Street, Tenth Floor
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether Petitioner's Licensed Practical Nursing (L.P.N), Physical Therapy and Occupational Therapy services under the

Developmental Services Home and Community-Based Waiver program should be reduced because they exceed medical necessity?

PRELIMINARY STATEMENT

Maximus is an agency with which the Agency for Persons with Disabilities (APD) contracts to provide annual reviews of services and goods requested by participants in the Medicaid Waiver program. By letter dated May 7, 2007, Maximus notified [REDACTED] that certain nursing, physical therapy and occupational services [REDACTED] was receiving would be reduced as not medically necessary. [REDACTED] disputed the determination that the services requested were no longer necessary and requested a hearing.

On May 29, 2007, the case was referred to the Division of Administrative Hearings and assigned to the undersigned. The case was noticed for hearing on July 10, 2007. The case was continued two times and was heard on October 15, 2007.

At hearing, Petitioner presented the testimony of Lenora Besley, L.P.N.; Caroline Icart, L.P.N.; Kathleen Frahm, Occupational Therapist; Maria Teresa Veronica Miranda-Alder, Physical Therapist; Harold Townsend, Waiver Support Coordinator; Haydee Gonzalez, L.P.N.; Debrah Kahn, Waiver Support Coordinator (by deposition); Jay Franklin, M.D. (by deposition); and [REDACTED] Petitioner's mother. Petitioner's Exhibits numbered 1 through 3 were admitted into evidence. Respondent presented the testimony of Chun Hee Youn, prior service authorization reviewer

for APD and Respondent's Composite Exhibit numbered 1 through 85 was admitted into evidence.

The proceeding was recorded and transcribed. After an extension of time was provided, the parties were given until December 10, 2007, to file proposed recommended orders. Both the Petitioner and Respondent filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, [REDACTED] is a [REDACTED]-year-old female with developmental disabilities who receives services from the APD's Medicaid Waiver Program (Med Waiver Program).

2. [REDACTED]'s primary disabilities are mental retardation, seizure disorder, and cerebral palsy. [REDACTED] also suffers from respiratory problems. [REDACTED] is not mobile, cannot see or hear, and takes all [REDACTED] nutrition, hydration, and medication through a gastrointestinal tube (G-tube). [REDACTED] cannot do anything for herself other than breathe. [REDACTED] needs assistance with all of [REDACTED] daily living.

3. [REDACTED] suffers from seizures that are frequent, sporadic, uncontrolled, unpredictable, and occur at any hour of the day. [REDACTED] can have as many as four or five seizures during a nurse's shift or none at all. The seizures vary in length from five seconds to minutes. [REDACTED] turns catatonic with some seizures.

4. After some lengthy seizure episodes, immediate medications such as Ativan and Diastat must be administered to [REDACTED] by an L.P.N. Ativan is given to [REDACTED] for seizures greater than two minutes and Diastat is given to [REDACTED] for seizure episodes greater than five minutes. L.P.N.'s also provide the medical care that prevents [REDACTED] from hurting [REDACTED] or biting [REDACTED] tongue during seizures.

5. [REDACTED] resides at home with [REDACTED] mother, [REDACTED] [REDACTED]. [REDACTED] is the owner and sole proprietor of a childcare facility. [REDACTED] works an average of 12 hours a day and travels extensively with [REDACTED] job.

6. [REDACTED] has received occupational therapy twice a week, physical therapy twice a week, and private duty L.P.N. nursing services 24 hours per day for over five years. [REDACTED]'s medical condition has not changed.

7. [REDACTED] receives 24-hour nursing care from L.P.N.'s that work shifts. The L.P.N.'s monitor [REDACTED] for seizure activity, care for [REDACTED] when [REDACTED] has a seizure, administer [REDACTED]'s medicines, check [REDACTED]'s vital signs, monitor [REDACTED]'s oxygen saturation levels, provide aerosol treatments, and clean the G-tube and check it for placement. The L.P.N.'s are not licensed to perform physical or occupational therapy.

8. Ms. Miranda-Alder, who has a Bachelor of Science degree in physical therapy and has been a licensed physical therapist

in Florida since 1991, has been providing physical therapy to [REDACTED] on and off for ten years. [REDACTED]'s physical therapy treatment plan consists of two hours a week. The therapy includes techniques unique to [REDACTED] that center around joint mobility, joint compression, vestibular and sensory stimulation, and myofascial stretching, range of motion exercises, weightbearing, stretching and cardiopulmonary therapy. The treatment is different from day to day based on how Ms. Miranda-Alder assesses [REDACTED]'s responses for a particular session.

9. Ms. Miranda-Alder can not teach a non-licensed caregiver how to perform the unique physical therapy techniques for [REDACTED]. A four-year degree is required to become a physical therapist and the state of Florida requires licensure in the area to perform such therapy. Application of an incorrect movement or pressure to [REDACTED]'s body parts by a non-licensed caregiver could cause joint dislocation or trigger a seizure.

10. Ms. Frahm is an Occupational Therapist licensed in Florida. She has been an occupational therapist for 12 years and has participated in [REDACTED]'s therapeutic treatments since June 2007. Ms. Frahm provides [REDACTED] sensory integrated occupational therapy techniques two hours a week. She works with [REDACTED]'s posture, balance, interaction with objects and with people in [REDACTED] environment. The focus of [REDACTED] treatment is fine motor skills, hand skills, and the ability to grasp. Ms.

Frahm's treatment of [REDACTED] varies from session to session based on [REDACTED]'s alertness level. The goal of [REDACTED] treatment is to improve [REDACTED] motor control condition. Ms. Frahm must constantly assess [REDACTED]'s performance while engaging in the active exercises to make adjustments necessary to [REDACTED] treatment

11. Occupational therapy requires specialized expertise and is based on knowledge of the neurological system. The State of Florida requires licensure to conduct such therapy. A bachelor's degree in occupational therapy or an equivalent certification is required to obtain licensure. There is a serious risk in delegating occupational therapy to a non-licensed caregiver because incorrectly applying any techniques to [REDACTED] can trigger a seizure.

12. A non-licensed individual can not perform occupational therapy. Ms. Frahm can not train caregivers to perform the same individualized sort of techniques that [REDACTED] conducts during occupational therapy because an unlicensed person will not have the background to perform the therapy properly and effectively. One can assist with rote repetitive activities that don't require the clinical assessment of an occupational therapist, but occupational therapy services provided by a trained occupational therapist are necessary for [REDACTED] to progress and develop new functional skills.

13. [REDACTED]'s physical therapy focuses on gross functions but the occupational therapy focuses on fine motor control.

14. Maximus is a contracting agency that performs prior service authorization reviews for APD. The prior service reviews are intended to determine whether requested goods or services for a client are within the guidelines in the Med Waiver Program, as established in the Developmental Disabilities/Waiver Service Limitations Handbook (Waiver Handbook). The Waiver Handbook has been promulgated as a rule by the Agency. Fla. Admin. Code R. 59G-13.080(12).

15. On or about January 2, 2007, Petitioner's request for continued services at the current level of 24-hour L.P.N. nursing services, two hours a week physical therapy, and two hours a week occupational therapy was submitted to Maximus for Prior Service Authorization (PSA) review and was assigned PSA number 58211.

16. Respondent performed a PSA review of the documents submitted and terminated the services due to lack of information and documentation to demonstrate medical necessity.

17. Petitioner requested reconsideration on April 6, 2007, and Ms. Youn conducted the Prior Service Authorization Reconsideration Review by reviewing all the documentation submitted by Petitioner in both her initial request for services and the information submitted with the request for

reconsideration. [REDACTED] request included a prescription, plan of care, and nursing progress notes.

18. Maximus reduced [REDACTED]'s services upon reconsideration by letter dated May 7, 2007. Ms. Choun made her determination on the reconsideration to reduce the service hours to 12 hours of private duty L.P.N. nursing care, and one hour a week for physical and occupational therapy as all that was medically necessary.

19. The Reconsideration Determination of Prior Authorization Review read in pertinent part:

* * *

The documents submitted indicates [sic] that Ms. Machado requires Occupational Therapy to prevent future deformities of both upper extremities with range of motion, increase sensory stimulation, and evaluate [sic] [REDACTED] needs for adaptive equipment for positioning, range of motion, and feeding. [REDACTED] does not attend a day program due to frequent and uncontrolled seizures. [REDACTED] receives 24 hour per day nursing services and the nurses can be trained to carry out the prescribed treatment daily and the therapist should be able to oversee the ongoing therapy on a less intense schedule. Approval is recommended for 312 quarter hours (two hours per week for the first 26 weeks, and one hour per week for the following 26 weeks) of Occupational Therapy. It is suggested that twice weekly visits be used in the first six months to train the nursing staff and family and then once weekly visits the following six months, to reinforce teaching and evaluate [REDACTED] for any changes.

* * *

The documents submitted indicates [sic] that [REDACTED] requires Physical Therapy to strengthen upper

extremities, neck and trunk to improve sitting balance and provide vestibular stimulation. [REDACTED] receives 24 hour per day nursing services and the nurses can be trained to provide this therapy to [REDACTED]. Approval is recommended for 312 quarter hours (two hours per week for first 26 weeks, and one hour per week for the following 26 weeks) of Physical Therapy. It is suggested that twice weekly visits be used in the first six months to train the nursing staff and family and then once weekly visits the following six months, to reinforce teaching and evaluate [REDACTED] for any changes.

* * *

. . . Based on the information submitted, it appears that [REDACTED]'s medical condition is stable and the requested amount of Private Duty Nursing for [REDACTED] chronic medical conditions is in excess of [REDACTED] needs. It appears that at least a portion of the duties can be provided by a trained caregiver (certified nursing assistant) including monitoring of signs and symptoms of illness, feeding, assisting [REDACTED] personal hygiene, and re-positioning. Therefore, Private Duty Nursing LPN is approved with changed [sic] in the amount of 17,520 quarter hour (12 hours per day for 365 days). This represents a final determination of reduction of the service [sic] requested.

20. [REDACTED] challenged the reconsideration determination on PSA Number [REDACTED] and requested a hearing. No dispute exists that the request for hearing was timely filed.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.¹ See J.M. v. Florida Agency for Persons With Disabilities, 938 So. Sd 535 (Fla. 1st DCA 2006).

22. This is a de novo proceeding for the purpose of formulating agency action, and not to determine whether the agency's decision was correct at the time that it made the decision. The issue to be decided is whether the currently received services of 24-hour L.P.N. nursing care, two hours a week physical therapy and occupational therapy are medically necessary. The findings of fact have been made "based exclusively on the evidence of record and on matters officially recognized." § 120.57 (1) (j) and (k), Fla. Stat.

23. Title 42, Section 440.180, Code of Federal Regulations defines home or community-based services as "services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this chapter." The Federal Social Security Act allows states to offer an array of home and community-based services to developmentally disabled individuals in order to avoid the need for these individuals to reside in an institution. 42 C.F.R. § 441.300. Florida's plan for providing

services to the developmentally disabled is found in Chapter 393, Florida Statutes, and in Florida Administrative Code Rule Chapter 59G-13.

24. Florida Administrative Code Rule 59G-13.080 implements and describes Florida's Medicaid Waiver Program, including the Med Waiver Program. Florida Administrative Code Rule 59G-13.080(6) incorporates by reference the Waiver Handbook.

25. Because the goal of the Med Waiver Program is to avoid institutionalization of developmentally disabled individuals insofar as possible, waiver participants must meet institutional level-of-care requirements, and the waiver services provided must be necessary to allow recipients to remain at home or in a home-like setting. See Fla. Admin. Code R. 59G-13.080(1).

26. The Waiver Handbook, at pages 1-5 through 1-6 and 2-4, further provides that "waiver services shall only be provided when the [requested] service or item is medically necessary." The Waiver Handbook adopts the following definition of "medically necessary" or "medical necessity," which is found in Florida Administrative Code Rule 59G-1.010:

(166) "Medically necessary" or "medical necessity" means that the medical or allied care, goods, or services furnished or ordered must:

(a) Meet the following conditions:

1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;

2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available statewide; and
5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider.

Fla. Admin. Code R. 59G-1.010(166).

27. As the party seeking to reduce the services to Petitioner, Respondent has the burden of proving its position by the preponderance of the evidence. See Wiggins v. Fla. Dept. of Children and Families, 919 So. 2d 619 (Fla. 1st DCA 2006) and Fla. Admin. Code R. 65-2.060(1). A preponderance of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. V. Perry, 5 So. 2d 862 (Fla. 1942).

28. The Waiver Handbook at pages 2-62 describes physical therapy available under the Med Waiver Program as follows:

Physical therapy is a service prescribed by a physician that is necessary to produce specific functional outcomes in ambulation, muscle control, and postural development, and to prevent or reduce further physical disability. The service may also include a physical therapy assessment, which does not

require a physician's prescription. In addition, this service may include training and monitoring direct care staff and caregivers to ensure they are carrying out therapy goals correctly.

29. The Waiver Handbook page 1-26 sets out the requirements for physical therapy providers in pertinent part as follows:

Providers of physical therapy and assessment services shall be licensed as physical therapists and physical therapist assistants
. . . .

* * *

Physical therapists and physical therapy assistants shall be licensed by the Department of Health in accordance with Chapter 486, F.S., and may perform services within the scope of their license.

30. Page 2-56 of the Waiver Handbook, in relevant part, defines occupational therapy under the Med Waiver Program as follows:

Occupational therapy services are services prescribed by a physician that are necessary to produce specific functional outcomes in self-help, adaptive, and sensory motor skill areas, and assist the recipient to control and maneuver within the environment. The services may also include an occupational therapy assessment, which does not require a physician's prescription. In addition, this service may include training direct care staff and caregivers and monitoring those individuals to ensure they are carrying out therapy goals correctly.

31. The Waiver Handbook, page 1-24, sets out the requirements for occupational therapy providers in pertinent part as follows:

Providers of occupational therapy and assessment services shall be licensed as occupational therapists, occupational therapy aides, or occupational therapy assistants, in accordance with Chapter 468, F.S.

* * *

Assessments can only be provided by the occupational therapist.

* * *

Occupational therapists, occupational therapy aides, and occupational assistants shall be licensed by the Department of Health, in accordance with Chapter 468, F.S., and may provide services within the scope of their licenses.

32. Ms. Youn asserted at hearing that her recommendation that all three services be cut in half is based upon her desk review of documents and her conclusion that many of the nursing services needed by [REDACTED] could be done by the caregiver, a Personal Care Assistant, or Certified Nursing Assistant. Additionally, Ms. Youn further contended that the nursing staff and family could be trained to perform the physical therapy and occupational therapy services one hour a week.

33. In this case, the Respondent has not met its burden to demonstrate that Petitioner's L.P.N. nursing services should be

reduced to 12 hours. The greater weight of the evidence indicated it is medically necessary to have an L.P.N. present to provide medical care to █████ during and after a seizure episode. Since █████'s seizures are unpredictable and could happen at any time during the day or night, private duty L.P.N. nursing care is medically necessary around the clock 24 hours to handle the seizure episodes whenever they occur in order to protect █████'s life with the proper medical care and medication.

34. Additionally, Respondent also failed to demonstrate that both the physical therapy and occupational therapy should be reduced to once a week. Although a physical therapist and an occupational therapist may provide training to caregivers for rote activities, the actual physical therapy and occupational therapy services themselves cannot be performed by █████'s nurse, caregivers, or family who are not licensed to provide such therapy services.

35. Petitioner requested 24-hour private duty L.P.N. nursing care, and two hours a week physical therapy and occupational therapy. The amount requested was supported by the record.

36. Taken as a whole, the evidence presented indicates that █████'s condition continues to need support. There exists no basis for reducing private duty L.P.N. nursing, physical therapy, or occupational services in half. The requested 24-

hour L.P.N nursing care and twice-a-week occupational and physical therapy for the whole cost plan year is medically necessary in order to allow [REDACTED] to remain at home.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That a final order be entered which awards [REDACTED]'s request for 24-hour L.P.N nursing care and twice-a-week occupational and physical therapy.

DONE AND ENTERED this 9th day of January, 2008, in Tallahassee, Leon County, Florida.

S

JUNE C. MCKINNEY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of January, 2008.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2007 codification.

COPIES FURNISHED:

Debra F. Scott, Acting Agency Clerk
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0700

M. Catherine Lannon, Esquire
Office of the Attorney General
Administrative Law Section
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

David Glantz, Esquire
Office of the Attorney General
110 Southeast 6th Street, Tenth Floor
Fort Lauderdale, Florida 33301

Walter James Harvey, Esquire
Gray Robinson
1221 Brickell Avenue, Suite 1650
Miami, Florida 33131

Jane E. Johnson, Executive Director
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0700

John Newton, General Counsel
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
Tallahassee, Florida 32399-0700

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.