

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

██████████, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. ██████████  
 )  
AGENCY FOR PERSONS WITH )  
DISABILITIES, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on ██████████, by video teleconference, with the parties appearing in ██████████, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Marcia McFarlane, Support Coordinator  
Advocates for Opportunity, Inc.  
1333 South University Drive, Suite 206  
Plantation, Florida 33324

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

STATEMENT OF THE ISSUE

Whether the Petitioner's request for durable medical equipment through the Developmental Disabilities Home and

Community-Based Services Medicaid Waiver Program ("Medicaid Waiver Program") should be granted or denied for the reason set forth in the Notice of Intent to Deny, Reduce or Terminate Services dated February 12, 2009.

PRELIMINARY STATEMENT

In Notice of Intent to Deny, Reduce or Terminate Services dated February 12, 2009, the Agency for Persons with Disabilities ("APD"), through APS Healthcare, a contractor performing Prior Service Authorization ("PSA") reviews of requests for services under the Medicaid Waiver Program, advised the Petitioner, [REDACTED], that [REDACTED] request for durable medical equipment, specifically a semi-electric hospital bed and a low air loss mattress, had been denied pursuant to a Prior Services Authorization Review. The reason for the denial given in the February 12, 2009, notice was that the request did not "comply with Developmental (Disabilities Home and Community-Based Services Medicaid Waiver or Family and Supported Living Waiver) service limitations/exclusions or requirements."

A Determination of Prior Service Authorization Review Form #3a ("Form #3a) was enclosed with the February 12, 2009, notice, which indicated that the requested durable medical equipment had been denied. The explanation of the reason for the decision to deny the request was set forth in a Determination of Prior Service Authorization Review Form #3b,

Rationale and Recommendations for Approvals with Changes, Denials, or Terminations ("Form #3b) and was included with the February 12, 2009, notice.

██████████'s Medicaid Waiver Support Coordinator ("Support Coordinator"), did not request reconsideration of the recommended denial, and ██████ filed a request for an administrative hearing with the APD on ██████████. This request was transmitted to the Division of Administrative Hearings for assignment of an administrative law judge. Pursuant to notice, the final hearing was held on ██████████. At the hearing, the APD presented the testimony of Gary Reavis, and Respondent's Exhibits 1 through 4 were offered and received into evidence. ██████████ mother, testified on behalf of ██████., and Petitioner's Exhibit 1 was offered and received into evidence.

No transcript of the proceedings was filed with the Division of Administrative Hearings. The Respondent timely filed proposed findings of fact and conclusions of law, but ██████. did not file a post-hearing submittal. The Respondent's proposed findings of fact and conclusions of law have been considered in the preparation of this Recommended Order.



4. [REDACTED] has a surgically-implanted gastrostomy tube through which [REDACTED] receives nutrition. [REDACTED] head must be elevated at a 45 degree angle to avoid [REDACTED] aspirating [REDACTED] food.
5. Approximately six, but not more than eight, years ago, [REDACTED]. was provided a hospital bed and air mattress through the Medicaid Durable Medical Equipment and Medical Supplies Program state plan services ("Medicaid State Plan"). The hospital bed is broken and cannot be elevated, so that [REDACTED]. runs the risk of aspirating and possibly contracting pneumonia. In addition, the air mattress [REDACTED]. is currently using does not re-inflate, and [REDACTED] runs the risk that his skin will break down and ulcerate.
6. The company that made the hospital bed and mattress no longer manufactures or repairs the bed, and Ms. [REDACTED] and [REDACTED] contacted several other companies that manufacture hospital beds to determine if any other company could repair [REDACTED]. 's hospital bed. None of the companies contacted will repair beds made by other manufacturers. [REDACTED] have, therefore, found it impossible to repair [REDACTED] 's bed.
7. [REDACTED] made a request to the Medicaid State Plan for a replacement semi-electric hospital bed and an air mattress. This request was denied because the bed is less than eight years old and, under the rules of the Medicaid State Plan, cannot be replaced until it is more than eight years old.

8. ██████████ submitted a request to the Medicaid Waiver Program for a replacement hospital bed and air mattress. ██████ sent ██████ request to the APD, together with prescriptions for the bed and mattress, the denial notice from the Medicaid State Plan, and all other required documentation.

9. APS Healthcare recommended to the APD that it deny the request on the grounds that durable medical equipment cannot be provided under the Medicaid Waiver Program if it is available through the Medicaid State Plan.<sup>2</sup>

#### CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes. See J. M. v. Florida Agency for Persons With Disabilities, 938 So. 2d 535 (Fla. 1st DCA 2006).

11. This is a de novo proceeding for the purpose of formulating agency action, and the findings of fact "shall be based exclusively on the evidence of record and on matters officially recognized." § 120.57(1)(j) and (k), Florida Statutes; see Hamilton County Bd. of County Comm'rs v. State Dep't of Environmental Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981); McDonald v. Department of Banking & Finance, 346 So. 2d 569 (Fla. 1st DCA 1977).

12. 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.

13. Florida Administrative Code Rule 59G-13.080 implements and describes Florida's Medicaid Waiver Program. Florida Administrative Code Rule 59G-13.080(6) incorporates by reference the Developmental Disabilities Waiver Services Coverage and Limitation Handbook (July 2007) ("Developmental Disabilities Handbook") which establishes guidelines for the Medicaid Waiver Program. See also Fla. Admin. Code R. 59G-13.083.

14. Because the goal of the Medicaid 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).

15. [REDACTED] has challenged the APD's intended decision to deny his request for durable medical equipment that the APD has not previously provided, which is a request to the APD for a new service. [REDACTED] therefore, has the burden of proving by a preponderance of the evidence that the request should be granted. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health & Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

16. The Developmental Disabilities Handbook describes durable medical equipment and supplies at page 2-33 as follows:

Durable medical equipment includes specified, prescriptive equipment required by the recipient. Durable medical equipment generally meets all of the following requirements: a) can withstand repeated use; b) is primarily and customarily used to serve a medical purpose; c) is generally not useful to a recipient in the absence of a disability; and d) is appropriate for use in the home. . . .

The semi-electric hospital bed and low air loss mattress are durable medical equipment, as defined above.

17. The Limitations segment of the section on Durable medical equipment and supplies includes a list of items that can

be provided under the Medicaid Waiver Program. It also contains the following limitation:

Durable medical equipment and supplies cannot duplicate DME and supplies provided through the Medicaid Durable Medical Equipment (DME) and Medical Supplies Program state plan services. Refer to the Florida Medicaid Durable Medical Equipment and Medical Supplies Services Coverage and Limitations Handbook for additional information on Medicaid state plan coverage. Supplies not available under the Medicaid DME and Medical Supplies Program state plan services or that are available in insufficient quantity to meet the needs of the recipient may be purchased by the waiver.

Developmental Disabilities Handbook at pages 2-33 through 2-38.

The Limitations segment goes on to list the equipment that the Medicaid Waiver Program will cover, and hospital beds and mattresses are not included on that list.

18. Although the Developmental Disabilities Handbook provides on page 2-38 that the APD can provide items not included in the list as exceptions, it also provides that "[i]tems specifically excluded in this handbook will not be approved through exception." Items provided by the Florida Medicaid State Plan are specifically excluded and cannot, therefore, be provided by the APD through the Medicaid Waiver Program.

19. The Florida Medicaid Durable Medical Equipment and Medical Supplies Services Coverage and Limitations Handbook

specifically provides on pages 2-50 through 2-52 that Medicaid will reimburse recipients for hospital beds, including semi-electric beds, and for mattresses.<sup>3</sup>

20. Based on the findings of fact herein, [REDACTED]. has failed to prove by a preponderance of the evidence that his request for a semi-electric hospital bed and a low air loss mattress should be approved by the APD.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Persons with Disabilities enter a final order denying [REDACTED]'s request for a semi-electric hospital bed and a low air loss mattress.

DONE AND ENTERED this 18th day of June, 2009, in Tallahassee, Leon County, Florida.

S

---

PATRICIA M. HART  
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 18th day of June, 2009.



ENDNOTES

COPIES FURNISHED:

Cathy Bedell, Esquire  
Agency for Persons with Disabilities  
Fair Hearing Coordinator  
4030 Esplanade Way, Suite 380  
Tallahassee, Florida 32399-0950

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

  
(Address of record)

Kiernan Patrick Moylan, Esquire  
Office of the Attorney General  
110 Southeast 6th Street, 10th Floor  
Fort Lauderdale, Florida 33301

John Newton, General Counsel  
Agency for Persons with Disabilities  
4030 Esplanade Way, Suite 380  
Tallahassee, Florida 32399-0950

James DeBeaugrine, Executive Director  
Agency for Persons with Disabilities  
4030 Esplanade Way, Suite 380  
Tallahassee, Florida 32399-0950

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.

---

<sup>1/</sup> All references to the Florida Statutes are to the 2008 edition unless otherwise noted.

<sup>2/</sup> The APS Healthcare PSA reviewer testified that [REDACTED] should submit a request to Medicaid for repair of the bed and mattress and explained that, if repairs were not feasible, Medicaid could provide a replacement bed and mattress notwithstanding the fact that the equipment is less than eight years old.

<sup>3/</sup> The Florida Medicaid Durable Medical Equipment and Medical Supplies Services Coverage and Limitations Handbook provides that hospital beds can be replaced only once each eight years and that mattresses can be replaced once every four years.