

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████)
)
Petitioner,)
)
vs.) Case No. 08-2591APD
)
AGENCY FOR PERSONS WITH)
DISABILITIES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On May 14 and 15, 2009, a hearing was held in ██████████, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes.¹ The case was considered by June C. McKinney, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Walter Harvey, Esquire
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For Respondent: Charles M. Fahlbusch, Esquire
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STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Agency for Persons with Disabilities' (APD) reduction in Physical Therapy services is medically necessary, and whether the denial of increased Physical, Occupational, and Respiratory Therapy services was appropriate due to lack of medical necessity.

PRELIMINARY STATEMENT

Maximus was the agency with whom APD contracted to provide annual reviews of services and goods requested by participants in the Medicaid Waiver program. By letter dated April 25, 2008, Maximus notified [REDACTED] that the Physical, Occupational, Respiratory Therapy requested would not be provided because it is not medically necessary. [REDACTED] disputed the determination regarding services requested and requested a hearing.

On May 27, 2008, the case was referred to the Division of Administrative Hearings (DOAH) and assigned to the undersigned administrative law judge.

The case was noticed for hearing on August 12 and 13, 2008. The case was continued several times and was heard on May 14 and 15, 2009. At hearing, Petitioner presented the testimony of Debra Kahn, Petitioner's Waiver Support Coordinator; Lorraine Henry, R.N.; Brenda Diaz, M.S., Occupational Therapist; Veronica Miranda-Adler, Physical Therapist; S.B., Petitioner's stepfather

and guardian; Dr. Reynold Montague Stein, Petitioner's expert witness; Dr. Manual Gonzalez, Petitioner's Medical Doctor (by deposition transcript); and Dr. J. Francisco Rodriguez-Moran, Pulmonologist (by deposition transcript). Petitioner's Exhibits numbered 1 through 26 were admitted into evidence. Respondent presented the testimony of Gary Reavis, R.N., a former Prior Service Authorization Reviewer for Maximus and current Prior Service Authorization Reviewer for APS Healthcare (the current contract medical necessity reviewer for APD), and Vickie Diane Brown, a Certified Respiratory Therapist. Respondent's Exhibits numbered 1 through 40 (including subparts 40A-40P) were admitted into evidence.

The proceeding was recorded but was not transcribed. The parties were given until May 27, 2009, to file proposed recommended orders. Upon request, an extension of time was provided to the parties and the deadline to file proposed recommended orders was extended to June 22, 2009. Both 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 [REDACTED] with developmental disabilities who receives services from the APD Medicaid Waiver Program (Med Waiver Program).

2. [REDACTED] has numerous disabilities including cerebral palsy, chronic lung disease, mental retardation, seizure disorder, microcephaly, spastic quadriplegia, esophageal reflux, scoliosis, and epilepsy. [REDACTED]'s right lung is largely necrotic, with a loss of 95 percent.

3. [REDACTED] resides at home with [REDACTED] stepfather and has significant medical needs. He is non-ambulatory and has minimal communicative ability limited to facial expressions or groans. [REDACTED] takes all [REDACTED] nutrition, hydration and medication through a gastrointestinal tube (G-tube). [REDACTED] needs assistance with all of [REDACTED] daily living.

4. [REDACTED]'s medical condition is unique, delicate, and medically fragile. [REDACTED] can't do anything for himself other than breathe. His inactivity makes [REDACTED] more prone to respiratory problems. Because of [REDACTED] limited capacity of the right lung, [REDACTED]'s breathing is labored and [REDACTED] has to use muscles to breath that most people don't use. [REDACTED] also receives respiratory medication and treatments through a nebulizer. [REDACTED] nurses administer such medications and treatments. [REDACTED] also has a respiration therapy vest, which provides percussive Respiratory Therapy. All of [REDACTED]'s nurses don't use the vest because they are afraid that they will dislodge the G-tube with the rods in [REDACTED]'s body.

5. [REDACTED] has also been receiving Respiratory Therapy one time a week. It is medically necessary that [REDACTED] receive Respiratory Therapy three times a week. During [REDACTED] therapy, [REDACTED] receives deep suctioning treatment from [REDACTED] Respiratory Practitioner. The procedure consists of a catheter going through the nasal cavity to suction out the mucus in [REDACTED] lungs. The invasive draining procedure has numerous risks. Since [REDACTED] has rods up and down [REDACTED] body, the procedure has to be performed properly or a lung can be punctured, can make [REDACTED]'s condition worse or it could be life threatening. Only after suctioning treatments is there a dramatic difference and improvement in [REDACTED]'s breathing. [REDACTED] needs the treatment to stay alive. [REDACTED]'s nurses are not trained to provide such treatment.

6. [REDACTED]'s medical condition has been deteriorating over the last year. [REDACTED] now has noticeable labored breathing and can't urinate on [REDACTED] own. [REDACTED] was hospitalized two times in August 2008 and February 2009.³ At least one of those hospitalizations was for pneumonia. There were other occasions when [REDACTED] could have been hospitalized when [REDACTED] was ill.

7. [REDACTED]'s medical team tries to keep [REDACTED] out of the hospital because of his fragile condition. [REDACTED] blood work is even drawn at home and taken to the lab to try to keep [REDACTED] from being exposed to germs with [REDACTED] weak immune system. [REDACTED] also has been on constant antibiotics in an attempt to heal an

ongoing infection for many months. ■■■■■'s system has become resistant to most medicines and there are only a couple of antibiotics left available to prescribe to help ■■■■■.

8. Diaz is ■■■■■'s licensed Occupational Therapist and has been providing Occupational Therapy services to ■■■■■ since 2007. ■■■■■ receives one hour of Occupational Therapy a week that focuses on ■■■■■ motor skills and development, ability to grasp, and posture. In the last year, ■■■■■'s muscles have contracted and become painful. Because ■■■■■'s muscles are tighter, it takes longer to stretch him in the Occupational Therapy sessions. It is difficult for the Occupational Therapist to extend ■■■■■'s high extremities. Diaz testified that if Occupational Therapy is kept at the present level of services, it will not require ■■■■■ to be institutionalized.

9. Veronica Miranda-Adler has been ■■■■■'s physical therapist off and on for ten years. ■■■■■ receives one hour of Physical Therapy two times a week. Because of ■■■■■ health deteriorating in the last year, ■■■■■ has tightness in ■■■■■ shoulders. Combined with ■■■■■ poor breathing, Miranda-Adler has to allow ■■■■■ to rest in between exercises as well as assist ■■■■■ more with sitting and weight shifting. ■■■■■'s treatment is individualized and different as each session is based on how Miranda-Adler assesses his responses.

10. Miranda-Adler can not teach a non-licensed caregiver to perform the unique Physical Therapy techniques for [REDACTED]. Licensure is required in Florida after completion of a four-year degree program to perform Physical Therapy.

11. Dr. Gonzalez prescribed [REDACTED] receive an increase in Occupational and Physical Therapy service hours to three hours a week for each therapy.

12. 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 Florida Medicaid Developmental Disabilities Waiver Services Coverage and Limitations Handbook July 2007 (Waiver Handbook). The Waiver Handbook has been promulgated as a rule by the Agency. Fla. Admin. Code R. 59G-13.083.

13. In February 2008, Petitioner's request for an increase in Occupational Therapy and Physical Therapy, to three hours per week and Respiratory Therapy to three times a day was submitted to Maximus for Prior Service Authorization (PSA) review and was assigned PSA number [REDACTED].

14. Respondent performed a PSA review of the documents submitted, including the support plan, plan of care, orders, prescriptions, and nursing assessment with comments, and the services requested were denied on February 22, 2008.

15. Petitioner requested reconsideration and Respondent conducted the Prior Service Authorization Reconsideration Review (Reconsideration) by reviewing all the documentation submitted by Petitioner in both [REDACTED] initial request for services and the additional information submitted with the request for reconsideration.

16. Upon reconsideration, the prior determination was upheld, both by the reviewer and a different physician reviewer. Maximus denied the request for increased physical, occupational, and Respiratory Therapy and reduced the Physical Therapy to one hour a week.

17. No dispute exists that the request for hearing was timely filed.

CONCLUSIONS OF LAW

18. The DOAH has jurisdiction over the subject matter of this proceeding and 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).

19. 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, but to determine whether the requested increase of services for Physical, Occupational, and Respiratory Therapy are

medically necessary. The findings of fact "shall be based exclusively on the evidence of record and on matters officially recognized." § 120.57 (1) (j) and (k), Fla. Stat.

20. 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.

21. Florida Administrative Code Rule 59G-13.080 implements and describes Florida's Med Waiver Program. 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).

22. 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).

23. As the party seeking to reduce the Physical Therapy services to Petitioner, Respondent has the burden of proving its

position. See Wiggins v. Fla. Dept. of Children and Families, 919 So. 2d 619 (Fla. 1st DCA 2006).

24. Petitioner has the burden of proving ■ is entitled to the requested additional hours of Physical, Occupational, and Respiratory Therapy services sought as the applicant for increased service hours at issue in this proceeding. See 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).

25. Both parties must meet their burden by the preponderance of the evidence. 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).

26. The Handbook at p. 2-57 provides, in pertinent part:

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.

27. The Handbook at p.2-51 provides, in pertinent part:

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 includes training direct care staff and caregivers and monitoring those individuals to ensure they are carrying out therapy goals correctly.

28. The Handbook at p.2-75 provides, in pertinent part:

Respiratory Therapy is a service prescribed by a physician and relates to impairment of respiratory function and other deficiencies of the cardiopulmonary system. Treatment activities include ventilatory support, therapeutic and diagnostic use of medical gases, respiratory rehabilitation, management of life support systems, bronchopulmonary drainage, breathing exercises and chest physiotherapy. The provider determines and monitors the appropriate respiratory regimen and maintains sufficient supplies to implement the regimen. The provider may also provide training to direct care staff to ensure adequate and consistent care is provided. Respiratory Therapy services may also include a respiratory assessment.

* * *

. . . The waiver cannot reimburse for respiratory supplies and equipment. A recipient shall receive no more than eight units of this service per day. A unit is defined as a 15-minute time period of portion thereof. . . .

29. APD asserts that nurses and caregivers can perform part of the duties of the Physical Therapist, Occupational Therapist, and Respiratory Therapist. However, the record reflects that

each of those professions require specified education, training, and licensure in Florida. Additionally, no evidence was presented to demonstrate [REDACTED]'s nurses had the specified education, training and appropriate licensure for such.

30. In this case, the Respondent has not met its burden to demonstrate that Petitioner's Physical Therapy services should be reduced to one hour per week. The greater weight of the evidence indicates it is medically necessary to keep the services at two times a week so as not to reduce physical disability.

31. The record also demonstrates Miranda-Adler performs specific individualized Physical Therapy treatment for [REDACTED]. Even though Dr. Gonzolez prescribed an hour three times a week, Petitioner failed meet its burden and show a need to increase the Physical Therapy from two times to three a week.

32. Petitioner also requested increase therapy hours for Occupational Therapy. The record reflects that Dr. Gonzolez prescribed one hour three times a week. However, Petitioner failed to show the medical necessity of such an increase. A medical prescription in and of itself is not a need. No evidence was presented to show how increasing Occupational Therapy would prevent significant disability or alleviate severe pain

33. Petitioner did demonstrate that increasing [REDACTED] Respiratory Therapy is needed to help sustain his life. [REDACTED]'s medically fragile condition combined with [REDACTED] health deteriorating, recent hospitalizations, continuous antibiotic treatments, and better breathing after deep suctioning and draining demonstrate the medical necessity for an increase in Respiratory Therapy hours.⁴

RECOMMENDATION

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

RECOMMENDED the Agency for Persons with Disabilities enter a final order:

1. Approving an increase in [REDACTED]'s Respiratory Therapy service hours to one hour three times a week.
2. Denying APD's reduction of Physical Therapy services to one time a week.
3. Dismissing the request for an award of one hour of Physical Therapy three times a week.
4. Dismissing the request for an award of one hour of Occupational Therapy three times a week.

DONE AND ENTERED this 28th day of July, 2009, in
Tallahassee, Leon County, Florida.

S

JUNE C. McKINNEY
Administrative Law Judge
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Filed with the Clerk of the
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this 28th day of July, 2009.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2008 codification.

^{2/} Florida Administrative Code Rule 59G-1.010(165) defines medically fragile as an individual who is medically complex and whose medical condition is of such a nature that he is technologically dependent, requiring medical apparatus or procedures to sustain life, e.g., requires total parenteral nutrition (TPN), is ventilator dependant, or is dependent on a heightened level of medical supervision to sustain life, and without such services is likely to expire without warning.

^{3/} Although there is conflicting testimony regarding ██████'s hospitalization, the undersigned resolves the conflict in favor of R.N., and father, who all testified that the two hospitalization terms occurred.

^{4/} Petitioner requested an increase to three times a day for Respiratory Therapy. The request is not available under the law, which prohibits more than eight units of Respiratory Therapy a day.

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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.