STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH
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(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

[redacted]

Appellant
_____/

Docket No. 2009-25438 CHC
Case No. [redacted]

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.,* following the Appellant's request for a hearing.

After due notice, an in-person hearing was held in [redacted] on [redacted]. [redacted] and [redacted] appeared on behalf of their [redacted] (Appellant). Also appearing as witnesses for the Appellant were [redacted], [redacted]., Service Coordinator, [redacted] Services, [redacted], and [redacted].

[redacted], represented the Michigan Department of Community Health (Department). [redacted], appeared as a Department witness.

ISSUE

Did the Department properly deny the Appellant's request for an increase in Private Duty Nursing services in excess of the twelve (12) hours per day he is currently receiving?

FINDINGS OF FACT

Based upon the competent, material, and substantial evidence presented, I find, as material fact:

1. The Appellant, born [redacted], is a Medicaid beneficiary, and receives Children's Special Health Care Services (CSHCS). His medical diagnoses

include Cerebral Palsy, respiratory system disease, and convulsions. He is also fitted with a permanent tracheostomy. *(Exhibit 1, p. 11)*

2. The Appellant has consistently been receiving 12 hours per day of private duty nursing services since [redacted] Historically, there have been temporary adjustments to accommodate surgeries and/or restrictions of the Appellant's parents during recovery periods. By way of example, the Appellant received an increase from 12 to 14 hours between [redacted]; in [redacted] hours were reduced to 12 hours. *(Exhibit 1; p. 2)*

3. On or about [redacted], the Appellant, by and through his parents, requested an increase in private duty nursing hours. The reason provided is that, because he is now a teenager, is larger and heavier than in the past, he needs assistance with transfer and placement into either a wheelchair and/or shower/bath. The Appellant's request is also based on his parents' alleged physical limitations, which makes transferring and lifting difficult.

4. On [redacted], the Department issued the Appellant a Notification of Denial of the requested increase in private duty nursing hours, concluding that the submitted documentation did not support an increase based on changes/increases in the daily intensity of need requiring skilled nursing assessments, judgments or interventions. *(Exhibit 1; p. 4)*

5. On [redacted], the Appellant, by and through his parents, filed a Request for Hearing with the State Office of Administrative Hearings and Rules for the Department of Community Health.

CONCLUSIONS OF LAW

The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). It is administered in accordance with state statute, the Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

General information regarding Private Duty Nursing (PDN) may be found in the Department's Medicaid Provider Manual, Private Duty Nursing, April 1, 2009 version:

> **SECTION 1 – GENERAL INFORMATION [CHANGES MADE 7/1/09]**
>
> This chapter applies to Independent and Agency Private Duty Nurses. Private duty nursing (PDN) is a Medicaid benefit when provided in accordance with the policies and procedures outlined in this manual. Providers must adhere to all applicable coverage limitations, policies and procedures set forth in this manual.

PDN is covered for beneficiaries under age 21 who meet the medical criteria in this section. If the beneficiary is enrolled in or receiving case management services from one of the following programs, that program **(text deleted 7/1/09)** authorizes the PDN services.

- **(text deleted 7/1/09)**
- Home and Community-Based Services Waiver for the Elderly and Disabled (known as the MI Choice Waiver)
- Children's Waiver (Community Mental Health Services Program [CMHSP])
- Habilitation Supports Waiver (CMHSP)

For a Medicaid beneficiary who is not receiving services from one of the above programs, the Program Review Division reviews the request for authorization and authorizes the services if the medical criteria and general eligibility requirements are met.

Beneficiaries who are receiving PDN services through one Medicaid program cannot seek supplemental PDN hours from another Medicaid Program (i.e., **(text deleted 7/1/09)**, MI Choice Waiver, Children's Waiver, Habilitation Supports Waiver).

For beneficiaries 21 and older, PDN is a waiver service that may be covered for qualifying individuals enrolled in the MI Choice Waiver or Habilitation Supports Waiver. When PDN is provided as a waiver service, the waiver agent must be billed for the services.

The Medicaid covered PDN service limitations are provided in the Medicaid Provider Manual, Private Duty Nursing, Section 1.6.

1.6 BENEFIT LIMITATIONS

The purpose of the PDN benefit is to assist the beneficiary with medical care, enabling the beneficiary to remain in their home. The benefit is not intended to supplant the care giving responsibility of parents, guardians, or other responsible parties (e.g., foster parents). There must be a primary caregiver (i.e., parent, guardian, significant other adult) who resides with a beneficiary under the age of 18, and the caregiver must provide a monthly average of a minimum of eight hours of care during a typical 24-hour period. The calculation of the number of hours authorized per month includes eight hours of care that will be provided by the caregiver during a 24-hour period, which are then averaged across the hours authorized for the month. The caregiver has the flexibility to use the monthly-authorized hours as needed during the month.

> The time a beneficiary is under the supervision of another entity or individual (e.g., in school, in day/child care, in work program) cannot be used to meet the eight hours of obligated care as discussed above, nor can the eight hours of care requirement for beneficiaries under age 18 be met by other public funded programs (e.g., MDCH Home Help Program) or other resources for hourly care (e.g., private health insurance, trusts, bequests, private pay).
>
> ***Medicaid Provider Manual; Private Duty Nursing, Version Date: April 1, 2009; page 4.***

The Appellant's initial and continuing eligibility for PDN is not at issue in this proceeding, but rather, whether his request for more than 12 hours per day of PDN is medically necessary, and appropriate, considering his medical condition(s). Accordingly, contributing to my decision is a discussion of how the Department determines the intensity of care and maximum amount of PDN to approve.

The Medicaid Provider Manual contains criteria for determining the intensity of care and maximum PDN, as follows:

> **2.3 DETERMINING INTENSITY OF CARE AND MAXIMUM AMOUNT OF PDN**
>
> As part of determining the maximum amount of PDN for which a beneficiary is eligible, an appropriate Intensity of Care category must be determined. This is a clinical judgment based on the following factors:
>
> - The beneficiary's medical condition;
> - The type and frequency of needed nursing assessments, judgments and interventions; and
> - The impact of delayed nursing interventions.
>
> Equipment needs alone do not determine intensity of care. Other aspects of care (e.g., administering medications) are important when developing a plan for meeting the overall needs of the beneficiary, but do not determine the number of hours of nursing for which the beneficiary is eligible.
>
> **High Category**
>
> - Beneficiaries requiring nursing assessments, judgments and interventions by a licensed nurse (RN/LPN) at least one time each hour throughout a 24- hour period, when delayed nursing interventions could result in further deterioration of health status, in loss of function or death, or in acceleration of the chronic condition.

Medium Category

- Beneficiaries requiring nursing assessments, judgments and interventions by a licensed nurse (RN/LPN) at least one time every three hours throughout a 24-hour period, or at least 1 time each hour for at least 12 hours per day, when delayed nursing interventions could result in further deterioration of health status, in loss of function or death, or in acceleration of the chronic condition. This category also includes beneficiaries with a higher need for nursing assessments and judgments due to an inability to communicate and direct their own care.

Low Category

- Beneficiaries requiring nursing assessments, judgments and interventions by a licensed nurse (RN/LPN) at least one time every three hours for at least 12 hours per day, as well as those beneficiaries who can participate in and direct their own care.

Medicaid uses the "Decision Guide for Establishing Maximum Amount of Private Duty Nursing to be Authorized on a Daily Basis" (below) to establish the amount of PDN that is approved. The Decision Guide is used to determine the appropriate range of nursing hours that can be authorized under the Medicaid PDN benefit and defines the "benefit limitation" for individual beneficiaries. The Decision Guide is used by the authorizing entity after it has determined the beneficiary meets both general eligibility requirements and medical criteria as stated above. The amount of PDN (i.e., the number of hours) that can be authorized for a beneficiary is based on several factors, including the beneficiary's care needs which establish medical necessity for PDN, the beneficiary's and family's circumstances, and other resources for daily care (e.g., private health insurance, trusts, bequests, private pay). To illustrate, the number of hours covered by private health insurance is subtracted from the hours approved under Medicaid PDN. These factors are incorporated into the Decision Guide. The higher number in the range is considered the maximum number of hours that can be authorized. Except in emergency circumstances, Medicaid does not approve more than the maximum hours indicated in the guide.

Only those factors that influence the maximum number of hours that can be authorized are included on this decision matrix. Other factors (e.g., additional dependent children, additional children with special needs, and required nighttime interventions) that impact the caregiver's availability to provide care should be identified during an assessment of service needs. These factors have implications for service planning and should be considered when determining the actual number of hours (within the range) to authorize.

Decision Guide for Establishing Maximum Amount of Private Duty Nursing to be Authorized on a Daily Basis

INTENSITY OF CARE; (LOW, MEDIUM, HIGH)
Average Number of Hours Per Day

FAMILY SITUATION/ RESOURCE CONSIDERATIONS

Factor I – Availability of Caregivers Living in the Home

2 or more caregivers; both work or are in school F/T or P/T; average number of hours is, as follows: *LOW INTENSITY-4 to 8 hours; MEDIUM INTENSITY-6 to 12 hours; HIGH INTENSITY-10 to 16 hours.*

2 or more caregivers; 1 works or is in school F/T or P/T; average number of hours is, as follows: *LOW INTENSITY-4 to 8 hours; MEDIUM INTENSITY-6 to 12 hours; HIGH INTENSITY-10 to 16 hours.*

2 or more caregivers; neither works or is in school at least P/T

LOW INTENSITY-1 to 4 hours; MEDIUM INTENSITY-4 to 8 hours; HIGH INTENSITY-6 to 12 hours.

1 caregiver; works or is in school F/T or P/T

LOW INTENSITY-4 to 8 hours; MEDIUM INTENSITY-6 to 12 hours; HIGH INTENSITY-10 to 16 hours.

1 caregiver; does not work or is not a student

LOW INTENSITY-1 to 4 hours; MEDIUM INTENSITY-6 to 10 hours; HIGH INTENSITY-8 to 14 hours.

Factor II – Health Status of Caregiver(s)

Significant health issues; Add 2 hours if Factor I <= 8 (Low Intensity)
Add 2 hours if Factor I <= 12 (Medium Intensity)
Add 2 hours if Factor I <= 14(High Intensity)

Some health issues; Add 1 hour if Factor I <= 7 (Low Intensity)
Add 1 hour if Factor I <= 9 (Medium Intensity)

Add 1 hour if Factor I <= 13 (High Intensity)

Factor III – School *

Beneficiary attends school 25 or more hours per week, on average

Maximum of 6 hours per day (Low Intensity)

Maximum of 8 hours per day (Medium Intensity)

Maximum of 12 hours per day (High Intensity)

* Factor III limits the maximum number of hours which can be authorized for a beneficiary:

- Of any age in a center-based school program for more than 25 hours per week; or
- Age six and older for whom there is no medical justification for a homebound school program.

In both cases, the lesser of the maximum "allowable" for Factors I and II, or the maximum specified for Factor III, applies.

When using the Decision Guide, the following definitions apply:

- "Caregiver": legally responsible person (e.g., birth parents, adoptive parents, spouses), paid foster parents, guardian or other adults who are not legally responsible or paid to provide care but who choose to participate in providing care.
- "Full-time (F/T)": working at least 30 hours per week for wages/salary, or attending school at least 30 hours per week.
- "Part-time (P/T)": working at least 15 hours per week for wages/salary, or attending school at least 15 hours per week.
- "Significant" health issues: one or more primary caregiver(s) has a health or emotional condition that prevents the caregiver from providing care to the beneficiary (e.g., beneficiary weighs 70 pounds and has no mobility and the primary caregiver just had back surgery and is in a full-body cast).
- "Some" health issues: one or more primary caregiver(s) has a health or emotional condition, as documented by the caregiver's treating physician, that interferes with, but does not prevent, provision of care (e.g., caregiver has lupus, alcoholism, depression, back pain when lifting, lifting restrictions, etc.).

- "School" attendance: The average number of hours of school attendance per week is used to determine the maximum number of hours that can be authorized for the individual of school age.

The average number of hours is determined by adding the number of hours in school plus transportation time. During planned breaks of at least 5 consecutive school days (e.g., spring break, summer vacation), additional hours can be authorized within the parameters of Factors I and II.

The Local School District (LSD) or Intermediate School District (ISD) is responsible for providing such "health and related services" as necessary for the student to participate in his education program. Unless medically contraindicated, individuals of school age should attend school.

Factor III applies when determining the maximum number of hours to be authorized for an individual of school age. The Medicaid PDN benefit cannot be used to replace the LSD's or ISD's responsibility for services (either during transportation to/from school or during participation in the school program.

Michigan Department of Community Health
Medicaid Provider Manual; Private Duty Nursing
Version Date: April 1, 2009; Pages 9-11

A Medicaid beneficiary bears the burden of proving he or she was denied a medically necessary and appropriate service. See, e.g., *J.K By and Through R.K. v Dillenberg*, 836 F Supp 694, 700 (Ariz, 1993). Whether the Appellant satisfied his burden here must be determined in accord with the preponderance of the evidence standard. See, e.g., *Aquilina v General Motors Corp*, 403 Mich 206, 210; 267 NW2d 923 (1978).

Regarding an appeal filed with the State Office of Administrative Hearing and Rules for the Department of Community Health, the Administrative Law Judge is given ultimate discretion to determine the weight and credibility of the evidence presented. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996) (the fact finder is provided with the unique opportunity to observe or listen to witnesses; and, it is the fact finder's responsibility to determine the credibility and weight of the testimony and other evidence provided).

Based on a preponderance of the evidence presented, I conclude the Appellant has failed to carry his burden of establishing medical necessity for additional private duty nursing hours. The Appellant's parents attempted to introduce extraneous evidence of other medical issues from which the Appellant suffers. However, that evidence was not available, nor was it made available, to the Department for review and consideration before its denial. Thus, it was excluded from the record.

As questioning proceeded, it became clear to me that the Appellant's size and weight made transferring a concrete challenge to both parents and care givers alike. However,

assistance with lifting, transferring and ambulation do not require skilled nursing interventions and judgments. As such, the Appellant's request for an increase in private duty nursing hours cannot be granted for this purpose.

The Department's witness credibly testified its decision to deny an increase was based solely on review of available medical records and progress notes which reflect a stable medical status. The Department's witness also credibly established the primary rationale for the Appellant's request for an increase in hours is for assistance with lifting and transferring due to size. The Department's witness correctly noted that personal care assistance such as this is not properly included as part of private duty nursing services.

The Appellant's parents also claim they need additional hours because they care for [redacted] additional special needs children and adults living in the household.

Present policy on the impact other dependent or special-needs children has on an authorization of PDN hours provides, as follows:

> "... Other factors (e.g., additional dependent children, additional children with special needs, and required nighttime interventions) that impact the caregiver's availability to provide care should be identified during an assessment of service needs. These factors have implications for service planning and should be considered when determining the actual number of hours (within the range) to authorize.
>
> *(Medicaid Provider Manual; Private Duty Nursing; Version Date: April 1, 2009; Page 10*

Under questioning, the Appellant's mother acknowledged that [redacted] special needs individuals receive assistance through the Department of Human Services (DHS). She offered no insight into why she had failed to secure non-skilled nursing, personal care assistance through DHS with regard to this child.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, I decide the Department properly denied the Appellant's request for an increase of greater than 12 PDN hours per day.

IT IS THEREFORE ORDERED THAT:

The Department's decision is AFFIRMED.

Stephen B. Goldstein
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 9/11/2009

***** NOTICE *****

The State Office of Administrative Hearings and Rules may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The State Office of Administrative Hearings and Rules will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.