

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

P.O. Box 30763, Lansing, MI 48909
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IN THE MATTER OF:

████████████████████,

Appellant

Docket No. 2009-5825 CHC
Case No. ██████████
Load No. ██████████

DECISION AND ORDER

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

After due notice, a hearing was held on ██████████. ██████████, Appellant's mother, appeared on behalf of the Appellant; ██████████ represented the Department. ██████████ appeared as a witness on behalf of the Department.

ISSUE

Did the Department properly determine that Appellant no longer met the eligibility criteria for private duty nursing (PDN) services?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. The Appellant is a ██████ year-old Medicaid beneficiary who has Downs Syndrome and is tracheostomy dependent. (Exhibit 1)
2. The Appellant resides with his mother.

3. Appellant had been approved for Medicaid-covered PDN care 10 hours per day.
4. On [REDACTED], the Department received notice from [REDACTED] a PDN agency, that it was no longer providing PDN services to Appellant.
5. On or about [REDACTED], the Department received a PDN application and a handwritten note from Appellant's mother, requesting a change in the PDN agency providing services to Appellant.
6. The Department received documentation to establish that the last date that Appellant received PDN services was on [REDACTED].
7. After receiving the request for PDN services from Appellant's mother, the Department initiated a review of Appellant's eligibility for PDN.
8. According to [REDACTED] for the period of [REDACTED] to [REDACTED], Appellant required suctioning "As needed." (Exhibit 1, p. 27)
9. According to [REDACTED] for the period of [REDACTED], Appellant's oxygen saturation levels were in the normal ranges of 96% to 100%. (Exhibit 1, p. 30)
10. On [REDACTED], the Department received a letter dated [REDACTED], from Appellant's doctor who specializes in pediatric pulmonology, which states in pertinent part:

Appellant was last seen about 1 ½ years ago. **Since then, he has been relatively stable.** As you know, he is a [REDACTED] year old with Down Syndrome and tracheostomy dependence. He has some increase in his secretions and cough recently and is just now finishing a course of Amoxicillin... also has a gastromy tube and gets feedings... three to four times daily. He wears an artificial nose 24 hours daily and he does not like to have a Passy muir valve in place. He does have oxygen at home but usually does not require it unless sick. His last hospitalization was in [REDACTED], one year ago, for rotavirus. According to mom, in the past year he has been treated with antibiotics for bronchitis about four times. He generally responds well to courses of antibiotics. Currently, his secretions are thin and clear to white. **He gets suctioned on an as needed basis and unless he is sick, it is not needed frequently...** (Exhibit 1, p. 50)

11. After reviewing Appellant's medical documentation, on [REDACTED], [REDACTED], the Department sent Appellant's legal guardian notice that Appellant was no longer eligible for PDN services.

12. On [REDACTED], the State Office of Administrative Hearings and Rules (SOAHR) received Appellant's request for a hearing, protesting the denial of PDN services.

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.

The Children's Special Health Care Services program is established pursuant to 42 USC 700, *et seq.* It is administered in accordance with MCL 333.5805, *et seq.*

Children's Special Health Care Services (CSHCS) is a program within the Michigan Department of Community Health (MDCH) created to find, diagnose, and treat children in Michigan who have chronic illnesses or disabling conditions. Title V of the Social Security Act, Michigan Public Act 368 of 1978, and the annual MDCH Appropriations Act mandate CSHCS. CSHCS promotes the development of service structures that offer specialty health care for the CSHCS qualifying condition that is family centered, community based, coordinated, and culturally competent.

MDCH covers medically necessary services related to the CSHCS qualifying condition for individuals who are enrolled in the CSHCS Program. Medical eligibility must be established by MDCH before the individual is eligible to apply for CSHCS coverage. Based on medical information submitted by providers, a medically eligible individual is provided an application for determination of non-medical program criteria.

An individual may be eligible for CSHCS and eligible for other medical programs such as Medicaid, Adult Benefit Waiver I (ABW I), Medicare, or MICHild. To be determined dually eligible, the individual must meet the eligibility criteria for CSHCS and for the other applicable program(s).

Medicaid Provider Manual, Children's Special Health Care Services, Section 1, April 1, 2008

General information regarding Private Duty Nursing (PDN) may be found in the Department's Medicaid Provider Manual, Private Duty Nursing, Section 1.

This chapter applies to Independent & Agency Private Duty Nurses (Provider Types 10, 15). 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. 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 authorizes the PDN services.

- Children's Special Health Care Services (CSHCS)
- Home and Community-Based Services Waiver for the Elderly and Disabled (known as the MI Choice Waiver) Children's Waiver (Community Mental Health Service Program [CMHSP])
- Habilitation Supports Waiver (CMHSP)

For a Medicaid beneficiary who is not receiving services from one of the above programs, the CSHCS Program 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., CSHCS, 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.

*Medicaid Provider Manual, Private Duty Nursing,
Section 1, April 1, 2008*

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

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,
Section 1.6, April 1, 2008.*

The medical criteria for PDN services are provided in the Medicaid Provider Manual, Private Duty Nursing in Section 2.2.

To qualify for PDN, the beneficiary must meet the medical criteria of **either** I and III below **or** II and III below:

Medical Criteria I – The beneficiary is dependent daily on technology-based medical equipment to sustain life. "Dependent daily on technology-based medical equipment" means:

- Mechanical ventilation four or more hours per day or assisted respiration (Bi-PAP or CPAP); or
- Oral or tracheostomy suctioning eight or more times in a 24-hour period; or

- Nasogastric tube feedings or medications when removal and insertion of the nasogastric tube is required, associated with complex medical problems or medical fragility; or
- Total parenteral nutrition delivered via a central line, associated with complex medical problems or medical fragility; or
- Continuous oxygen administration, in combination with a pulse oximeter and a documented need for observations and adjustments in the rate of oxygen administration.

Medical Criteria II – Frequent episodes of medical instability within the past three to six months, requiring skilled nursing assessments, judgments or interventions (as described in III below) due to a substantiated medical condition directly related to the developmental disability. Definitions:

- "Frequent" means at least 12 episodes of medical instability related to the progressively debilitating physical disorder within the past six months, or at least six episodes of medical instability related to the progressively debilitating physical disorder within the past three months.
- "Medical instability" means emergency medical treatment in a hospital emergency room or inpatient hospitalization related to the underlying progressively debilitating physical disorder.
- "Emergency medical treatment" means covered inpatient and outpatient services that are furnished by a provider that is qualified to furnish such services and are needed to evaluate or stabilize an emergency medical condition.
- "Emergency medical condition" means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson who possesses an average knowledge of health and medicine could reasonably expect the absence of immediate medical attention would result in placing the health of the individual in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part.
- "Directly related to the developmental disability" means an illness, diagnosis, or syndrome occurred during the developmental period prior to age 22, is likely to continue indefinitely, and results in significant functional limitations in 3 or more areas of life activity. Illnesses or disability acquired after the developmental period, such as stroke or heart conditions, would not be considered directly related to the developmental disability.

- "Substantiated" means documented in the clinical/medical record, including the nursing notes.

Medical Criteria III – The beneficiary requires continuous skilled nursing care on a daily basis during the time when a licensed nurse is paid to provide services.

Definitions:

- "Continuous" means at least once every 3 hours throughout a 24-hour period, and/or when delayed interventions may result in further deterioration of health status, in loss of function or death, in acceleration of the chronic condition, or in a preventable acute episode.
- Equipment needs alone do not create the need for skilled nursing services.
- "Skilled nursing" means assessments, judgments, interventions, and evaluations of interventions requiring the education, training, and experience of a licensed nurse. Skilled nursing care includes, but is not limited to, performing assessments to determine the basis for acting or a need for action; monitoring fluid and electrolyte balance; suctioning of the airway; injections; indwelling central venous catheter care; managing mechanical ventilation; oxygen administration and evaluation; and tracheostomy care.

Medicaid Provider Manual, Children's Special Health Care Services, Section 1, April 1, 2008

In this case, the Department determined that Appellant no longer met the eligibility criteria for PDN. The Department established that there was a break in Appellant's PDN service beginning ██████████, when Appellant stopped receiving PDN services from ██████████. It was not until ██████████, that the Department received a request for Appellant to receive PDN from another source. The Department witness testified that Medicaid was not billed for any PDN services being received by Appellant in ██████████. The Department witness testified that it received verification that Appellant stopped receiving PDN from ██████████ at his mother's request. (Exhibit 1, p. 20) Since there was a break in service, the Department was required to determine whether Appellant continued to meet the eligibility criteria for PDN. The Department witness testified that based on the medical documentation received at the time of the review, Appellant no longer met the criteria for PDN.

Appellant's mother argued that Appellant has been receiving PDN since he was ██████ months old, and his medical condition has not changed. She testified that she works full

time and has other children, and Appellant needs to be supervised constantly or he will die. She testified that Appellant had started school, but had to be removed due to health reasons, and she is his only caregiver. She testified that she fired the previous nurse from [REDACTED], and [REDACTED] was unable to provide Appellant with another nurse who was able to provide the PDN services that he needed, so she discontinued the PDN services being received from [REDACTED]. She testified further that no one asked her about how often Appellant needed suctioning before it determined that Appellant only needed suctioning on an “as needed” basis.

Based on the evidence on the record, Appellant had been approved for PDN on the basis that he met medical criteria I and III above. All Prior Authorization for PDN forms must be supported by attached medical documentation and completed by the referring physician or appropriate subspecialist. (Exhibit 1, p. 62) According to a completed Prior Authorization request form for PDN, Appellant needs help with tracheostomy care; he gets oxygen at night; he needs monitoring with his respiratory status; and he needs assistance due to Down’s Syndrome issues. Appellant’s mother/representative failed to establish that Appellant continued to meet medical criteria I and III above. Although Appellant is tracheostomy dependent, the medical documentation from [REDACTED] and a qualified medical source does not establish that Appellant requires oral or tracheostomy suction 8 or more times in a 24-hour period. The documentation states clearly that Appellant gets suctioned on an as needed basis. A medical doctor who specializes in pediatric pulmonology stated in a letter dated [REDACTED], that Appellant has been in relatively stable condition, and unless Appellant is sick, he does not need to be suctioned, frequently. In addition, the Clinical Notes from [REDACTED] indicate that Appellant was being suctioned on an as needed basis. Further, there is no evidence on the record that Appellant is dependent daily on technology-based medical equipment for continuous oxygen administration in combination with a pulse oximeter and a documented need for observations and adjustments in the rate of oxygen administration. The [REDACTED] indicate that Appellant’s oxygen saturation levels were in the normal ranges: 96%-100% in [REDACTED]. Appellant’s mother testified that Appellant needs to be suctioned more than one time every hour on a daily basis. However, she failed to provide medical documentation from a qualified medical source to substantiate her testimony and statements concerning the number of times during a 24 hour period that Appellant needs suctioning. Lastly, there’s no medical documentation from a qualified medical source to establish that Appellant requires continuous, at least once every three hours throughout a 24-hour period, skilled nursing care. Accordingly, the Department properly determined that Appellant no longer met the eligibility criteria for PDN.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly denied Appellant’s request for PDN.

[REDACTED]
Docket No. 2009-5825
Decision and Order

IT IS THEREFORE ORDERED that:

The Department's decision is **AFFIRMED**.

Marya A. Nelson-Davis
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 3/10/2009

***** NOTICE *****

The State Office of Administrative Hearings and Rules for the Department of Community Health 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 for the Department of Community Health 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.