STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

[redacted]

Docket No. 2013-35633 PAC
Case No. [redacted]

Appellant
_____/

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 [redacted]. [redacted], mother, and [redacted], father, appeared and testified on behalf of Appellant. Appellant's witness was [redacted], RN, Nurse Supervisor. [redacted], Appeals Review Officer, represented the Department. [redacted], RN, Medicaid Utilization Analyst, appeared as a witness for the Department.

ISSUE

Did the Department properly decrease the Appellant's private duty nursing (PDN) hours?

FINDINGS OF FACT

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

1. Appellant is an [redacted] old Medicaid beneficiary with multiple medical problems related to premature birth as well as myelomeningocele with Chiari II malformation status-post repair and hydrocephalus status post VA shunt. Appellant's medical history includes chronic lung disease, ventilator dependent; tracheostomy tube, pulmonary hypertension; patent foramen ovale; shunted hydrocephalus, VA shunt; rectal prolapse, status-post surgical repair, recurrent; narcotic dependency, on methadone and valium, tapers currently held; osteopenia or prematurity with multiple fractures; lumbar herniation of left kidney; calcaneal valgus feet; hydrocele; risk for VUR, neurongenic bladder due to myelomeningocele;

electrolyte deficiencies, on chronic supplementation. (Exhibit A, pp 42-43, 48, 118)

2. Appellant had been approved for Medicaid-covered PDN care 16 hours per day since he came home from the hospital on [redacted]. (Exhibit A, p 2; Testimony)

3. On [redacted], following a review of Appellant's medical documentation, the Department sent notice to Appellant and his PDN provider that his PDN services would be reduced transitionally as follows: PDN would be reduced to 14 hours per day effective [redacted] and then reduced to 12 hours per day effective [redacted]. (Exhibit A, p 5)

4. On [redacted], a Request for Hearing was filed on the Appellant's behalf. (Exhibit 1)

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. CSHCS is mandated by the Michigan Public Health Code, Public Act 368 of 1978, in cooperation with the federal government under Title V of the Social Security Act and the annual MDCH Appropriations Act. 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 nonmedical program criteria.
>
> An individual may be eligible for CSHCS and eligible for other medical programs such as Medicaid, Adult Benefits Waiver (ABW), 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, 2013*

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

> 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 authorizes the PDN services.
>
> - Children's Waiver (the Community Mental Health Services Program)
> - Habilitation Supports Waiver (the Community Mental Health Services Program)
> - Home and Community-Based Services Waiver for the Elderly and Disabled (the MI Choice Waiver)
>
> 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., Children's Waiver, Habilitation Supports Waiver, MI Choice Waiver).

> For beneficiaries 21 and older, PDN is a waiver service that may be covered for qualifying individuals enrolled in the Habilitation Supports Waiver or MI Choice 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, 2013.*

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 caregiving 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 or more 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, 2013.*

The medical criteria for PDN services are provided in the Medicaid Provider Manual, Private Duty Nursing in Section 2.3.

> 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 progressively debilitating physical disorder.

- "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 who is qualified to furnish such services and which 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 to place the health of the individual in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part.

- "Progressively debilitating physical disorder" means an illness, diagnosis, or syndrome that results in increasing loss of function due to a physical disease process, and that has progressed to the point that continuous skilled nursing care (as defined in III below) is required; and

- "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.

- "Continuous" means at least once every three 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,*
> *Private Duty Nursing Section*
> *Section 2.3, April 1, 2013*

A PDN provider is also required to report changes in a beneficiary's condition that warrant a decrease in the number of approved hours or a discontinuation of services. *Medicaid Provider Manual, Private Duty Nursing, Section 2.6 April 1, 2013.*

In this case, there is no dispute that Appellant meets the eligibility criteria for PDN; the issue is whether the decrease from 16 hours of PDN services per day to 12 hours of PDN services per day was proper. This decrease was prompted by a review of Appellant's medical records by the Department's R.N., Medicaid Utilization Analyst.

The Department's R.N., Medicaid Utilization Analyst testified that she reviewed a discharge summary following Appellant's two day hospital stay between [redacted] and [redacted], which showed that Appellant was discharged in stable condition. (Exhibit A, pp 118-125) The Department's R.N., Medicaid Utilization Analyst also testified that she reviewed a discharge summary following Appellant's overnight hospital stay on [redacted], which also showed that Appellant was discharged in stable condition. (Exhibit A, pp 163-167) The Department's R.N., Medicaid Utilization Analyst also reviewed notes from an office visit Appellant had with [redacted], M.D. on [redacted], which also mentioned that Appellant was stable, as well as notes from a medical appointment on [redacted], where the provider mentioned that Appellant was stable. (Exhibit A, pp 128-136) The Department's R.N., Medicaid Utilization Analyst also referred to a nurse's note from [redacted] which indicated that Appellant had no lingering problems before his mother decided to take him to the ER on that date. (Exhibit A, p 61) The Department's R.N., Medicaid Utilization Analyst also testified that she reviewed a discharge summary following an overnight hospital stay on [redacted], which also showed that Appellant was discharged in stable condition.

The Department's R.N., Medicaid Utilization Analyst also reviewed the amount of suctioning done of Appellant during the times when nurses were on duty and determined that the limited amount of suctioning done supported her decision to reduce Appellant's PDN. For example, the Department's R.N., Medicaid Utilization Analyst noted that on [redacted], nurses were on duty for 13 hours, but only suctioned Appellant 3 times. (Exhibit A, pp 80-84) On [redacted], nurses were on duty 14 hours, but only suctioned Appellant 1 time. (Exhibit A, pp 89-92) On [redacted], nurses were on duty 14 hours, but only suctioned Appellant 1 time. (Exhibit A, pp 97-105) On [redacted], nurses were on duty 16 hours, but only suctioned Appellant 1 time. (Exhibit A, pp 106-117) On [redacted], nurses were on duty

4 hours, but Appellant was only suctioned 1 time. (Exhibit A, pp 147-150) On [redacted], nurses were on duty 12 hours, but Appellant was only suctioned 1 time. (Exhibit A, pp 151-158) On [redacted], nurses were on duty 4 hours, but Appellant was only suctioned 1 time. (Exhibit A, pp 173-176) On [redacted], nurses were on duty 12 hours, but Appellant was only suctioned 2 times. (Exhibit A, pp 177-182) On [redacted], nurses were on duty 4 hours, but Appellant was only suctioned 2 times. (Exhibit A, pp 183-186)

The Department's R.N., Medicaid Utilization Analyst also reviewed the policy that she relied on in making the decision to reduce Appellant's PDN. The Department's R.N., Medicaid Utilization Analyst indicated that according to the Decision Guide for PDN found in the Medicaid Provider Manual, Appellant would be entitled to 10-14 hours of PDN per day because he has two or more caregivers; one of whom works full-time. (Exhibit A, p 198) The Department's R.N., Medicaid Utilization Analyst indicated that Appellant was likely granted 16 hours of PDN upon his initial release from the hospital, just so the family would have time to adjust to the demands of caring for him. The Department's R.N., Medicaid Utilization Analyst also referred to that portion of the PDN policy that indicates that PDN may be considered a transitional service, whereby the provider of PDN is encouraged to train family members to do some of the tasks they would normally handle so that the level of PDN could be reduced over time. (Exhibit A, p 201)

The Department's R.N., Medicaid Utilization Analyst testified that her review of documentation is limited to the information provided by the PDN provider and that the PDN provider is required by policy to submit this information. The Department's R.N., Medicaid Utilization Analyst also noted that during her review she noticed that Appellant had been approved for over 3000 hours of PDN, but had only used slightly over 1000 hours. The Department's R.N., Medicaid Utilization Analyst also testified that she reviewed the information Appellant's family provided with the request for hearing, and that the information did not change her decision. Much of this information involved medical documentation involving Appellant's twin brother, who also has numerous health concerns.

On cross-examination, the Department's R.N., Medicaid Utilization Analyst testified that the Department can consider the needs of others in the household when determining the level of PDN, but that such a request has to be made through the exception process. (Exhibit A, p 199). The Department's R.N., Medicaid Utilization Analyst indicated that no exception had been requested at the time she did her review. The Department's R.N., Medicaid Utilization Analyst also testified on cross-examination that she read all of the narratives in the nursing notes, as well as the chart entries.

The nurse supervisor from Appellant's PDN provider testified that Appellant's case was the most difficult their agency had ever handled and the nurses providing care to Appellant had to undergo additional training. The nurse supervisor from Appellant's PDN provider also testified that if the Department is basing their decision regarding the

level of PDN on the number of times Appellant is being suctioned each day, then that is not an accurate measurement of his needs. For example, the nurse supervisor from Appellant's PDN provider indicated that on [redacted], the nurses may not have suctioned Appellant very often but that they had to bag him (breathe for him) on two occasions. The nurse supervisor from Appellant's PDN provider indicated that Appellant's nurses are so busy providing care they may not be charting everything that they do because of lack of time. The nurse supervisor from Appellant's PDN provider also encouraged the undersigned to read all of the narratives in the nurses' notes, not just the chart entries. The nurse supervisor from Appellant's PDN provider testified that she would tell her nurses to be more specific in their charting in the future.

Appellant's father testified that Appellant is not a typical ventilation patient, so referring only to the amount of times he is suctioned is not giving an accurate picture of his needs. Appellant's father reviewed Appellant's numerous diagnoses and indicated that Appellant is also administered 13 different medications daily. Appellant's father indicated that on more than one occasion, they have almost lost Appellant when he stopped breathing and he does not believe he would have been saved if the nurses were not there. Appellant's father indicated that they may not have taken him home from the hospital if they had known that his PDN hours were going to be reduced. Appellant's father indicated that it would be much more expensive to care for Appellant if he were institutionalized. Appellant's father indicated that his wife has epilepsy and Appellant's twin brother has significant health concerns as well, making the need for additional PDN hours even more important. Appellant's father pointed out that the reason the family has not used all of the PDN hours is that Appellant has been hospitalized so much and has had to go to so many doctor's appointments, where the nurses do not accompany him.

Appellant's mother testified that Appellant is just recovering from meningitis and that suctioning is just a fraction of the care that ne needs.

Based on the documentation submitted to the Department, the determination to decrease the Appellant's PDN hours transitionally from 16 hours per day to 12 hours per day was proper. At the time of the review, Appellant was only entitled to a maximum of 14 hours of PDN per day, based on the Decision Guide in the Medicaid Provider Manual. Appellant had only brief hospital stays during the period reviewed, was always discharged in stable condition, and the amount of suctioning done during the review period was rather low for a ventilation patient. This is not to imply that Appellant does not need extensive assistance or would never be eligible for an increase in PDN hours. As was discussed during the hearing, Appellant may also be entitled to an increase in PDN hours through the exception process. The Department is limited in making its determinations to the documentation provided by the PDN provider. It seems apparent that the documentation submitted may not have provided a full and accurate picture of Appellant's needs and exactly what services the nurses provide on a daily basis. The nurse supervisor at Appellant's PDN provider indicated that she would encourage the nurses to be more specific in their daily charting. Appellant's family was

encouraged to submit another prior authorization request for additional PDN hours or a request for an exception. It also appears that Appellant's condition may have worsened since the review was done in [redacted]. However, based on the evidence submitted, Appellant failed to prove, by a preponderance of evidence that the reduction in PDN was improper at the time it was made.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly reduced the Appellant's PDN hours based on the available information.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

Robert J. Meade
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

[redacted]

cc: [redacted]

Date Signed: July 18, 2013

Date Mailed: July 18, 2013

***** NOTICE *****

The Michigan Administrative Hearing System 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 Michigan Administrative Hearing System 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.