

**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) 373-4147

**IN THE MATTER OF:**

██████████,

Appellant

\_\_\_\_\_ /

**Docket No. 2013-55849 PAC**  
**Case No. ██████████**

**DECISION AND ORDER**

This matter is before the undersigned Administrative Law Judge 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 ██████████. The hearing was continued until ██████████. The record was left open for thirty (30) days pursuant to stipulation for a post hearing review. The Appellant was represented by his mother, ██████████. His witness was his stepfather ██████████, US Army. ██████████ RN, Appeals Review Officer, represented the Department. Her witness was ██████████, R.N., Medicaid analyst /Problem Resolution Division/ MDCH.

**PRELIMINARY MATTER**

At or near the close of proofs the Department discovered and acknowledged on the record that the Appellant's petition had been inadvertently directed to the PRD in error and should have been directed to the Department's Community Mental Health division and its HAB waiver.

The parties stipulated to reach decision on this appeal, holding the record open for thirty (30) days to explore an expedited review [with new medical information allowed] before representatives of the CMH HAB waiver.

They further stipulated that the Appellant's new appeal rights for the CMH decision to issue on receipt of this decision – if needed.

**ISSUE**

Did the Department properly deny Appellant's request for prior authorization (PA) of private duty nursing (PDN)?

**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 a ██████-year-old Medicaid beneficiary. (Appellant's Exhibit #1)
2. The Appellant is afflicted with moderate mental retardation, cerebral degeneration, unspecified, unspecified infantile cerebral palsy, seizures, osteopenia, osteoporosis, scoliosis associated with other condition, asthma, esophageal reflux, disturbance of salivary secretion, other convulsions, delayed milestone and fluctuating weight – among other maladies including; parental debility owing to recent childbirth. (Department's Exhibit A, 4, 20-23 and Appellant's Exhibit #1 pp. 1 – 12 and See Testimony)
3. On ██████████ the Michigan Medicaid/Children's Special Health Care (CSHCS) received a PA request from Maxim Healthcare services for PDN for the Appellant. (Department's Exhibit A, pp. 2 and 26)
4. On ██████████ the Department denied the Appellant's request for PDN for failure to meet medical criteria under the Medicaid Provider Manual (MPM). (Department's Exhibit A, pp. 2, 5 and 6)
5. The Appellant, through his provider, has requested 100-hours of PDN per month. (Department's Exhibit A, pp. 2, 26 and Appellant's Exhibit #1 – throughout)
6. On ██████████ the parties stipulated to a post-hearing review by the Department's CMH and its HAB waiver – with new change of condition items - her appeal rights vesting anew on receipt of this decision and order. (See Testimony)
7. On ██████████, MAHS received the Appellant's Request for Hearing. (Appellant's 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.

It is axiomatic that the Medicaid program exists to ensure that medically necessary services and equipment are made available to those who would not otherwise have the resources to purchase them. It is also fundamental that Medicaid is payor of last resort.

Private duty nursing (PDN) is a Medicaid benefit when provided in accordance with the policies and procedures outlined in the Medicaid Provider Manual (MPM) which provides, in pertinent part, as follows:

**[1] – GENERAL INFORMATION [PRIVATE DUTY NURSING]**

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 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)....

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**[1.1] DEFINITION OF PDN**

Private Duty Nursing is defined as nursing services for beneficiaries who require more individual and continuous care, in contrast to part-time or intermittent care, than is available under the home health benefit. These services are provided by a registered nurse (RN), or licensed practical nurse (LPN) under the supervision of an RN, and must be ordered by the beneficiary’s physician. Beneficiaries requiring PDN must demonstrate a need for continuous skilled nursing services, rather than a need for

intermittent skilled nursing, personal care, and/or Home Help services. The terms "continuous" and "skilled nursing" are further defined in the Medical Criteria subsection for beneficiaries under age 21.

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#### **[1.4] PRIOR AUTHORIZATION**

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The MSA-0732 must be submitted every time services are requested for the following situations:

- for initial services when the beneficiary has never received PDN services under Medicaid, such as following a hospitalization or when there is an increase in severity of an acute or chronic condition;
- for continuation of services beyond the end date of the current authorization period (renewal);
- for an increase in services; or
- for a decrease in services.

Following receipt and review of the MSA-0732 and the required documentation by the Program Review Division, a Notice of Authorization<sup>1</sup> is sent to the PDN provider and beneficiary or primary caregiver, either approving or denying services, or requesting additional information. The provider must maintain this notice in the beneficiary's medical record. For services that are approved, the Notice of Authorization will contain the prior authorization number and approved authorization dates. It is important to include this PA number on every claim and in all other communications to the Program Review Division.

If a beneficiary receiving PDN continues to require the services after the initial authorization period, a new MSA-0732 must be submitted along with the required documentation supporting the continued need for PDN. This request must be received by the Program Review Division no less than 15 business days prior to the end of the current authorization period. Failure to do so may result in a delay of authorization for continued services which, in turn, may result in delayed or no payment for services rendered without authorization. The length of each subsequent authorization period will be determined by the Program Review Division and will be

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<sup>1</sup> There were several editorial changes in the PDN section of the MPM for April of 2013. This amendment did not change the result.

specific to each beneficiary based on several factors, including the beneficiary's medical needs and family situation.

If during an authorization period a beneficiary's condition changes warranting an increase or decrease in the number of approved hours or a discontinuation of services, the provider must report the change to the Program Review Division.<sup>2</sup>

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Medicaid Provider Manual (MPM), Private Duty Nursing, §§ 1 through 1.4, pp. 1 - 4, April 1, 2013.

## **[2] – CARE REQUIREMENTS**

A written plan of care (POC) guides all services provided to the beneficiary by the PDN provider. The POC identifies and addresses the beneficiary's need for PDN. The POC and the process for developing it reflect the beneficiary's and family's basic rights of self-determination and autonomy.

- Family members and the beneficiary (as appropriate to his maturity) participate in developing the POC. They are provided with accurate information and support appropriate to informed decision making; and they must give informed consent for planned services.
- Beneficiary/family strengths, including cultural and ethnic identity, are respected and utilized in the delivery of care. Services delivered in the home accommodate beneficiary/family life activities.
- The plan includes goals directed toward increasing beneficiary/family capability, effectiveness, and control.
- The plan includes compensatory services to support the growth and developmental potential of each beneficiary, given his disability or illness.
- Appointments are coordinated and services are scheduled with the goals of minimizing inconvenience to the beneficiary/family, and of facilitating the family's participation in the beneficiary's care.
- If the services are provided by LPNs, the POC must identify the frequency of the supervisory RN visits.

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<sup>2</sup> See MPM at §2.6 Change in [ ] Condition/PDN as transitional benefit. *Supra*

The written POC must be retained in the beneficiary's medical record.

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### **[2.3] MEDICAL CRITERIA**

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.

For beneficiaries described in II, the requirement for frequent episodes of medical instability is applicable only to the initial determination of medical necessity for PDN. Determination of continuing eligibility for PDN for beneficiaries defined in II is based on the original need for skilled nursing assessments, judgments, or interventions as described in III below.

**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.

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#### **[2.4] DETERMINING INTENSITY OF CARE AND MAXIMUM AMOUNT OF PDN**

As part of determining the maximum amount of PDN a beneficiary is eligible for, his 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 Medium Category Low 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 Low 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.

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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 Michigan Department of Community Health Medicaid Provider Manual 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**

FAMILY SITUATION/ RESOURCE CONSIDERATIONS		INTENSITY OF CARE Average Number of Hours Per Day		
		LOW	MEDIUM	HIGH
<b>Factor I – Availability of Caregivers Living in the Home</b>	2 or more caregivers; both work or are in school F/T or P/T	4-8	6-12	10-16
	2 or more caregivers; 1 works or is in school F/T or P/T	4-6	4-10	10-14
	2 or more caregivers; neither works or is in school at least P/T	1-4	4-8	6-12
	1 caregiver; works or is in school F/T or P/T	4-8	6-12	10-16
	1 caregiver; does not work or is not a student	1-4	6-10	8-14
<b>Factor II – Health Status of Caregiver(s)</b>	Significant health issues	Add 2 hours if Factor I <= 8	Add 2 hours if Factor I <= 12	Add 2 hours if Factor I <= 14
	Some health issues	Add 1 hour if Factor I <= 7	Add 1 hour if Factor I <= 9	Add 1 hour if Factor I <= 13
<b>Factor III – School *</b>	Beneficiary attends school 25 or more hours per week, on average	Maximum of 6 hours per day	Maximum of 8 hours per day	Maximum of 12 hours per day
<p>* Factor III limits the maximum number of hours which can be authorized for a beneficiary:</p> <ul style="list-style-type: none"> <li>▪ Of any age in a center-based school program for more than 25 hours per week; or</li> <li>▪ Age six and older for whom there is no medical justification for a homebound school program.</li> <li>▪</li> </ul> <p>In both cases, the lesser of the maximum "allowable" for Factors I and II, or the maximum specified for Factor III, applies.</p>				

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**[2.5] EXCEPTION PROCESS**

Because each beneficiary and his family are unique and because special circumstances arise, it is important to maintain an exception process to ensure the beneficiary's safety and quality of care. PDN services that exceed the beneficiary's benefit limitation, as established by the Decision Guide, must be prior authorized by the appropriate Medicaid case management program. Limited authority to exceed the published PDN benefit limitations may be granted on a time-limited basis as detailed below.

The beneficiary or his primary care giver must initiate the request for an exception. The applicable Medicaid case management program's representative is responsible for facilitating the request and documenting the necessity for an exception. Factors underlying the need for additional PDN must be identified in the beneficiary's POC, which must include strategies directed toward resolving the factors necessitating the exception, if applicable. Documentation must substantiate all of the following:

- Current medical necessity for the exception;
- Current lack of natural supports required for the provision of the needed level of support; and
- Additional PDN services are essential to the successful implementation of the beneficiary's written plan of care, and are essential to maintain the beneficiary within the least restrictive, safe, and humane environment suitable to his condition.

Exceptions are time-limited and must reflect the increased identified needs of the beneficiary. Consideration for an exception is limited to situations outside the beneficiary's or family's control that place the beneficiary in jeopardy of serious injury or significant deterioration of health status. Exceptions may be considered for either of the following general situations:

**A temporary alteration in the beneficiary's care needs following a hospitalization, resulting in one or both of the following:**

- A temporary increase in the intensity of required assessments, judgments, and interventions.
- A temporary need for additional training to enable the primary caregiver(s) to identify and meet the beneficiary's care needs.

The total number of additional PDN hours cannot exceed two hours per day, for a maximum of six months.

**The *temporary inability of the primary caregiver(s) to provide required care as the result of one of the following:***

("Inability" is defined as the caregiver is either unable to provide care or is prevented from providing care.)

- An acute illness or injury of the primary caregiver(s). The total number of additional PDN hours cannot exceed two

hours per day for the duration of the caregiver's inability, not to exceed six months. In the event there is only one caregiver living in the home and that caregiver is hospitalized, a maximum of 24 hours per day can be authorized for each day the caregiver is hospitalized.

- The death of the primary caregiver(s) or an immediate family member. "Immediate family member" is defined as the caregiver's spouse, partner, parent, sibling, or child. The maximum number of hours allowable under this exception criterion is 24 hours per day for a maximum of seven days.
- The home environment has been determined to be unstable, as evidenced by DHS protective or preventive services involvement.

The written POC and community-based care coordination activities must include strategies directed toward stabilizing service supports and/or the family situation. The maximum number of hours varies by the beneficiary's Intensity of Care category: High = maximum of 18 hours per day; Medium = maximum of 14 hours per day; Low = maximum of 10 hours per day. The length of time for this exception is three months or the time needed to stabilize service supports and/or family situation, whichever is less. A one-time extension of up to three months may be made if there is documented progress toward achieving the stabilized home environment.

(Emphasis supplied)

MPM, Private Duty Nursing,  
§§2 through 2.5, pp. 9-14, April 1, 2013

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In this case, the Department determined that the Appellant did not meet the threshold medical criteria for authorization of PDN hours under the requirements of the MPM at section 2.3 – under either standard I and III or II and III.

The Department witness [██████████ R.N.] testified that there was insufficient evidence submitted which would support the idea that the Appellant was in need of ventilation and suctioning [PDN] hours over and above that which was provided by his mother and/or because his services could be provided by his mother or non-skilled assistants not requiring professional medical judgment from licensed providers. She noted that on last discharge from [██████████] Hospital there were no suction or ventilation instructions.

She reiterated a theme, however, that all of this could change on resubmission of PA with new or additional medical information demonstrating increased loss of function that the Department would review on receipt. (See certification submitted by [██████████],

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R.N., Department's Ex. A at page 17) She also argued that the letter from the Appellant's physician [written ██████████] did not specifically indicate PDN for the Appellant, but rather described his circumstances from baseline through April focusing more on the mother's pending pregnancy than anything else.

The Appellant's representative argued that the Appellant's present unskilled care is limited for their tendency to resign in the face of the level of service and complexity of 24/7 care required by the Appellant.

The Appellant's witness Sgt. ██████████ testified that aides do quit with great frequency – or fail to show up for work. He said, "...it is a run around."

The Department's witness concluded her testimony stating that there was no documentation of change in condition for the Appellant post "██████ of this year" as was suggested by the Appellant's representative. She urged the Appellant's representative to provide that information and to explore the Department of Human Services HHS complex care program.

There was inadequate documentation supporting the current need for PDN services, even though the Appellant's representative and her witness thought otherwise as of the date of hearing.

If there has been a significant change in condition<sup>3</sup> it was neither documented nor communicated to the Department medical reviewers; ██████████, R.N., and Dr. ██████████, M.D., MDCH/MSA. Thus, the greater weight of the evidence supported the Department's conclusion that the Appellant did not meet the MPM standard for PDN.

With a distant hospitalization and some new [but undocumented] medical issues for both the Appellant and his mother, the Department's conclusion that the Appellant did not merit PDN hours was supported in the record.

The Department properly denied the Appellant's request for private duty nursing according to policy.

The Appellant failed to preponderate his burden of proof.

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<sup>3</sup> The Department's witness, ██████████ R.N., as grantor of the PDN exception policy, is also responsible for evaluating documentation purporting to demonstrate a medical necessity exception or lack of natural supports. MPM at §2.5 *Supra*

**DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly denied PDN as specified under policy [§2.3 of the Medicaid Provider Manual].

**IT IS THEREFORE ORDERED** that:

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

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Dale Malewska  
Administrative Law Judge  
for James K. Haveman, Director  
Michigan Department of Community Health

[REDACTED]  
cc: [REDACTED]

Date Signed: October 31, 2013

Date Mailed: October 31, 2013

**\*\*\* NOTICE \*\*\***

The Michigan Administrative Hearing System 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 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.