

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P. O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax (517) 373-4147

IN THE MATTER OF:

Docket No. 14-005308 CMH

██████████

██████████

██████████

Appellant

_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.*, and upon a request for hearing filed on behalf of the minor Appellant.

After due notice, a hearing was held on ██████████ ██████████, Appellant's adoptive mother, appeared and testified on Appellant's behalf. ██████████ Manager of Due Process, represented Respondent ██████████ County Community Mental Health (CMH). ██████████ registered nurse; ██████████, Nursing Supervisor; and ██████████, Compliance Coordinator; from the ██████████ testified as witnesses for the CMH.¹

ISSUE

Did the CMH properly reduce Appellant's 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. The CMH is under contract with the Michigan Department of Community Health (MDCH) to provide Medicaid covered services to people who reside in the CMH's service area.
2. In turn, the CMH contracts with agencies/service providers such as ██████████ to authorize and provide Medicaid covered services.
3. Among the services that the CMH and ██████████ can provide are PDN through the Habilitation Supports Waiver.

¹ ██████████ also had a nurse observer present during the hearing, but she did not participate.

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4. Appellant is a ██████████ year-old Medicaid beneficiary who is enrolled in the Habilitation Supports Waiver and who has been diagnosed with Severe Brain Damage Secondary to a Bilateral Grade IV Intracerebral Hemorrhage; Hydrocephalus; Renal Failure; Chronic Urinary Tract Infections; Uncontrolled Spastic Quadriplegia; Uncontrolled Seizure Disorder; Anoxia-Encephalitis; Cortical Blindness; Cerebral Palsy; Gastroesophageal Reflux Disease; and Central Apnea. (Respondent's Exhibit A, pages 6, 18).
5. Due to Appellant's medical conditions and need for skilled nursing care, the CMH and ██████████ previously authorized ██████████ hours per day of PDN for Appellant. (Respondent's Exhibit A, page 8; Testimony of ██████████).
6. On ██████████, ██████████ conducted a PDN Eligibility Review of Appellant's services. (Respondent's Exhibit A, pages 6-11; Testimony of ██████████).
7. During that review, ██████████ noted that there were four older siblings living in the home, but that three of them had disabilities of their own and are unable to provide any care for Appellant. (Respondent's Exhibit A, page 10).
8. ██████████ also noted that Appellant's mother is the foster mother for a ██████████ year-old child with brain damage. (Respondent's Exhibit A, page 10).
9. Trollman further noted that Appellant requires deep oral or tracheostomy suctioning and is dependent on mechanical interventions to sustain his life. (Respondent's Exhibit A, pages 10-11).
10. After reviewing the available information, including five days of nursing notes, ██████████ also concluded that, while Appellant still requires PDN, he now falls into the low intensity of care category. (Respondent's Exhibit A, page 11; Testimony of ██████████).
11. ██████████ subsequently applied that intensity of care category, along with information regarding Appellant's mother's availability and health, to the "Decision Guide for Establishing Maximum Amount of Private Duty Nursing to be Authorized on a Daily Basis" identified in policy and determined that Appellant's PDN should be reduced to ██████████ hours per day. (Testimony of ██████████).
12. In making that determination, ██████████ did not consider any other factors that could impact Appellant's mother's ability to provide care, such as the presence of additional dependent children; the presence of additional

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dependent children with special needs; or required nighttime interventions.
(Testimony of ██████████).

13. On ██████████ sent Appellant's mother written notice that Appellant's PDN would be reduced to █ hours per day effective ██████████. (Respondent's Exhibit A, pages 3-4).
14. On ██████████, the Michigan Administrative Hearing System (MAHS) received the request for hearing filed on Appellant's behalf. (Petitioner's Exhibit 1, pages 1-5).

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.

Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services.

42 CFR 430.0

The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program.

42 CFR 430.10

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Moreover, Section 1915(b) of the Social Security Act provides:

The Secretary, to the extent he finds it to be cost-effective and efficient and not inconsistent with the purposes of this subchapter, may waive such requirements of section 1396a of this title (other than subsection(s) of this section) (other than sections 1396a(a)(15), 1396a(bb), and 1396a(a)(10)(A) of this title insofar as it requires provision of the care and services described in section 1396d(a)(2)(C) of this title) as may be necessary for a State...

The State of Michigan has opted to simultaneously utilize the authorities of the 1915(b) and 1915(c) programs to provide a continuum of services to disabled and/or elderly populations. Under approval from the Centers for Medicare and Medicaid Services (CMS) the Department of Community Health (DCH) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver.

This case involves the reduction in the minor Appellant's private duty nursing (PDN) through the Habilitation Supports Waiver and, with respect to such services, the applicable version of the Michigan Medicaid Provider Manual (MPM) states:

SECTION 1 – GENERAL INFORMATION

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).

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.

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.

* * *

1.7 BENEFIT LIMITATION

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).

MPM, April 1, 2014 version
Private Duty Nursing Chapter, pages 1, 7

Moreover, with respect to determining the amount of hours of PDN that can be approved, the MPM states:

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.

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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.	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.	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 (prior authorized and billed in 15-minute increments) 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., time) 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
Factor I – Availability of Caregivers Living in the Home	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
Factor II – Health Status of Caregiver(s)	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
Factor III – School *	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"> ▪ 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. <p>In both cases, the lesser of the maximum "allowable" for Factors I and II, or the maximum specified for Factor III, applies.</p>				

*MPM, April 1, 2014 version
Private Duty Nursing Chapter, pages 11-12*

Here, it is undisputed that Appellant needs some PDN and it is only the amount of hours to be authorized that is at issue. As discussed above, Appellant was receiving such services █ hours per day and the CMH/█ has decided to reduce them to █ hours per day.

Appellant and his representative bear the burden of proving by a preponderance of the evidence that the CMH/█ erred in deciding to reduce his PDN services.

For the reasons discussed below, this Administrative Law Judge finds that Appellant has met that burden of proof and the reduction must be reversed. While the Decision Guide identified in the above policy is the primary tool used to establish the amount of

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PDN that is to be approved, the above policy also expressly states that other factors should also be considered:

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.

MPM, April 1, 2014 version
Private Duty Nursing Chapter, page 11

Here, despite the undisputed existence of some of those other factors, including the presence of additional dependent children and additional dependent children with special needs in Appellant's home, ██████████ acknowledged that she did not consider those factors when determining the number of hours. By failing to take those other factors into consideration, as required by policy, the CMH/██████████ clearly erred and the decision to reduce Appellant's PDN must be reversed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the CMH and ██████████ improperly reduced Appellant's PDN services.

IT IS THEREFORE ORDERED that:

The Respondent's decision is **REVERSED** and it must initiate a reinstatement of Appellant's PDN to ████████ hours a day.

Steven Kibit

Steven J. Kibit
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

Date Signed: ██████████

Date Mailed: ██████████

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***** 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.