

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. 2014-5018 PAC

██████████

██████████

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 a hearing filed on behalf of the minor Appellant.

After due notice, a hearing was held on ██████████ and ██████████ Appellant's parents, appeared and testified on Appellant's behalf. ██████████ Appeals Review Officer, represented the Department of Community Health. ██████████ ██████████ Registered Nurse and Private Duty Nursing Specialist, appeared as a witness for the Department.

ISSUE

Did the Department properly decide to decrease Appellant's 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 an ██████-year-old Medicaid beneficiary who has been diagnosed with pulmonary hypertension; bronchopulmonary dysplasia (BPD); ventricular septal defect (VSD); Down's syndrome; respiratory failure, reoccurring pneumonia; bronchomalasia; and hydrospadias. (Respondent's Exhibit A, pages 7-8, 12, 15, 17).
2. Appellant attends school, on average, approximately ██████████ hours per week. (Testimony of ██████████).
3. Since approximately ██████████ Appellant has been receiving PDN through the Department, with ██████████ providing the actual services. (Respondent's Exhibit A, pages 8-18).

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4. The services are provided ██████████ hours a day, ██████████ days a week. (Respondent's Exhibit A, pages 5-18).
5. When Appellant first started receiving PDN services, Appellant was on a ventilator. (Respondent's Exhibit A, pages 7-8).
6. However, he has been off the ventilator since ██████████ (Respondent's Exhibit A, pages 8, 13, 16, 18; Testimony of Appellant's representatives).
7. Appellant continues to be tracheostomy-dependent, as well as requiring a pulse oximeter to measure his respiratory status. (Respondent's Exhibit A, pages 8-18; Testimony of ██████████).
8. On ██████████, the Department sent Appellant's parents written notice of a reduction in PDN services. (Respondent's Exhibit A, pages 5-6).
9. Specifically, that notice provided:

██████████ has been receiving hourly nursing services authorized by Michigan Medicaid. The authorized service will be changed on ██████████. The new determination is:

- A transitional reduction of hours will occur as follows: ██████████ continue @ ██████████ hrs/day; effective ██████████ the authorization will be @ ██████████ /day; then effective ██████████ to ██████████ the authorization will be @ ██████████ hrs/day.

This decision is based on a recent review of medical documentation from ██████████ the plan of care dated ██████████ and the Nursing Notes dated ██████████; ██████████; ██████████; ██████████. This review indicates that a change in the authorized services is warranted because:

- The plan of care dated ██████████ Summary indicates ██████████ has been off the ventilator now for almost ██████████ yrs.”
- The Nursing Notes indicate ongoing tracheostomy care, however, no ventilator care or intervention is/has been provided/required according to those notes.

- Medical review and evaluation of submitted documentation has determined the beneficiary meets medical criteria for authorization of █ PDN hours, at this time.

Respondent's Exhibit A, page 5

10. On █ the Michigan Administrative Hearing System (MAHS) received the request for hearing filed on behalf of Appellant. (Respondent's Exhibit A, page 4).

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.

This case involves the reduction in Appellant's private duty nursing (PDN) services. With respect to such services, 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).

* * *

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 8 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.

*MPM, July 1, 2013 version
Private Duty Nursing Chapter, pages 1, 7, 9-11*

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.

*MPM, July 1, 2013 version
Private Duty Nursing Chapter, page 11*

Specifically, the MPM identifies three Intensity of Care categories:

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.

*MPM, July 1, 2013 version
Private Duty Nursing Chapter, page 11*

Additionally, the MPM describes a Decision Guide used, along with the Intensity of Care categories, in determining the maximum amount of PDN a beneficiary is eligible for. With respect to that Decision Guide, the MPM states:

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

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, July 1, 2013 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 is receiving such services █ hours per day, █ days a week and the Department has decided to reduce them to █ hours per day, █ days a week. The minor Appellant's parents/representatives have appealed that proposed reduction and, given the timing of the appeal, the reduction itself has not been implemented while this appeal has been pending.

Appellant and his representatives bear the burden of proving by a preponderance of the evidence that the Department erred in deciding to reduce his PDN services. For the reasons discussed below, this Administrative Law Judge finds that Appellant has not met that burden of proof.

At the time Appellant was first approved for PDN, he was dependent on a ventilator. However, more recent Plan of Care documents reflect that he has been off a ventilator since ██████████ and his parents/representatives also concede both that he is no longer dependent on a ventilator and that he has been off the ventilator for years. Appellant's mother also testified that Appellant is only off a ventilator because of the care, including PDN, that he has been receiving, but that adjustment still represents a significant change for the better. Accordingly, while Appellant still has respiratory issues, his conditions have clearly improved; the private duty nurses' duties have clearly lessened; and the reduction in such services is justified.

Additionally, the Decision Guide described in the MPM mandates a maximum of █ hours a day of PDN in Appellant's circumstances. Appellant requires significant care, but his representatives failed to establish that he requires nursing assessments, judgments or interventions by a licensed nurse at least once an hour throughout the day, when delayed nursing interventions could result in the further deterioration of health status, in loss of function or death, or in acceleration of the chronic condition. Appellant's parents are understandably more comfortable having a nurse in the home, in case something goes wrong, but that does not demonstrate that a nurse is required. Appellant's parents also testified that Appellant is extremely fragile and that the nursing notes do not reflect all that the nurses do or the fact that Appellant has been in the hospital and missed school during the relevant time period because of his medical problems. However, that testimony, which still does not demonstrate that skilled nursing is required at least █ a hour throughout the day, is not reflected in documentation submitted to Department, which actually provides that Appellant had no hospitalizations in the relevant time period, and this Administrative Law Judge is limited to reviewing the Department's decision in light of the information it had at the time it made that decision.

Accordingly, Appellant falls, at most, into the medium Intensity of Care category. Moreover, it is undisputed in this case that Appellant attends school █ or more hours per week, on average, and, as such, Factor III of the Decision Guide therefore clearly limits him to a maximum of █ hours per day of PDN.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly decided to decrease Appellant's private duty nursing services.

IT IS THEREFORE ORDERED that:

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

Steven Kibit

Steven Kibit
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

SK/db

cc: [REDACTED]

***** 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.