

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

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IN THE MATTER OF:

Docket No. 15-000911 PAC
Case No. [REDACTED]

[REDACTED]
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.*, upon a request for a hearing filed on behalf of the minor Appellant.

After due notice, a hearing was held on [REDACTED]. [REDACTED], Appellant's mother, appeared and testified on Appellant's behalf. [REDACTED], Appeals Review Officer, represented the Department of Community Health. [REDACTED], RN, Medicaid Utilization Analyst, appeared as a witness for the Department.

ISSUE

Did the Department properly authorize a transitional reduction in 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. Appellant is a [REDACTED] month old Medicaid beneficiary, born [REDACTED], who has been diagnosed with a history of prematurity, bronchomalacia, tracheomalacia, pulmonary hypertension, s/p heart catheter, s/p VSD repair, retinopathy of prematurity stage 3, optic nerve hypoplasia, plagiocephaly, pulmonary vein stenosis, dysphagia, s/p nissen and glube placement, chronic respiratory failure with hypercapnia, status post tracheostomy and ventilator dependent. (Exhibit A, pp 5, 8, 13, 17, 26; Testimony)
2. On [REDACTED], Appellant was approved for 16 hours per day of Private Duty Nursing services 7 days per week. The notice indicated that 16 hours of PDN per day would be approved for 6 months to allow for Appellant's transition from the hospital to a home setting and then the need for PDN would be reevaluated. (Exhibit A, pp 43-46; Testimony)
3. On [REDACTED], the Department requested additional information from Appellant's providers in order to complete a review to determine continued

medical necessity and appropriateness for PDN. (Exhibit A, pp 41-42; Testimony)

4. On [REDACTED], the Department submitted another request for additional information when the information provided following the [REDACTED] request was incomplete. The Department later received all requested documents. (Exhibit A, pp 38-40; Testimony)
5. On [REDACTED], the Department sent Appellant's parent written notice of a transitional reduction in PDN services. The notice indicated that 16 hours of PDN per day would continue from [REDACTED] through [REDACTED], 14 hours of PDN would be approved from [REDACTED] through [REDACTED], and 12 hours of PDN would be approved from [REDACTED] through [REDACTED]. (Exhibit A, pp 35-36; Testimony)
6. The Department based its decision on a review of medical documentation submitted from Appellant's physicians. The notice stated that based on a review of the medical documentation and nursing notes submitted by Appellant's provider, Appellant no longer met medical criteria for 16 hours of PDN services per day. (Exhibit A, pp. 35-36; Testimony)
7. On [REDACTED], the Michigan Administrative Hearing System (MAHS) received the request for hearing filed on behalf of the minor Appellant. (Exhibit 1; Testimony)

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 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, Private Duty Nursing*, July 1, 2014 pp. 1, 7, emphasis added].

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.

| 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 | 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 | 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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| status, in loss of function or death, or in acceleration of the chronic condition. | judgments due to an inability to communicate 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 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 | 6-12 | 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 – | Beneficiary attends school 25 or more | Maximum of 6 | Maximum of 8 | Maximum of 12 |

| School * | hours per week, on average | hours per day | hours per day | hours per day |
|--|----------------------------|---------------|---------------|---------------|
| * Factor III limits the maximum number of hours which can be authorized for a beneficiary: | | | | |
| <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. | | | | |
| In both cases, the lesser of the maximum "allowable" for Factors I and II, or the maximum specified for Factor III, applies. | | | | |

[MPM, *Private Duty Nursing*, § 2.4, October 1, 2014 pp. 11-12].

2.6 CHANGE IN BENEFICIARY'S CONDITION/PDN AS A TRANSITIONAL BENEFIT

Medicaid policy requires that the integrated plan of care (POC) be updated as necessary based on the beneficiary's medical needs. Additionally, when a beneficiary's condition changes, warranting a decrease in the number of approved hours or a discontinuation of services, the provider must report the change to the appropriate authorizing agent (i.e., the Program Review Division, Children's Waiver, or Habilitation Supports Waiver) in writing. Changes such as weaning from a ventilator or tracheostomy decannulation can occur after months or years of services, or a beneficiary's condition may stabilize to the point of requiring fewer PDN hours or the discontinuation of hours altogether. It is important that the provider report all changes resulting in a decrease in the number of hours to the authorizing agent as soon as they occur, as well as properly updating the POC. MDCH will seek recovery of monies inappropriately paid to the provider if, during case review, the authorizing agent determines that a beneficiary required fewer PDN hours than was provided and MDCH was not notified of the change in condition.

In some cases, the authorized PDN services may be considered a transitional benefit. In cases such as this, one of the primary reasons for providing services should be to assist the family or caregiver(s) to become independent in the care of the beneficiary. The provider, in collaboration with the family or caregiver(s), may decide that the authorized number of hours should be decreased gradually to accommodate increased independence on the part of the family, caregiver(s), and/or beneficiary. A

detailed exit plan with instructions relating to the decrease in hours and possible discontinuation of care should be documented in the POC. The provider must notify the authorizing agent that hours are being decreased and/or when the care will be discontinued. [MPM, *Private Duty Nursing*, § 2.6, October 1, 2014 p. 15].

Here, it is undisputed that the Appellant needs some PDN services and it is only the amount of hours authorized that is at issue. As discussed above, Appellant was receiving PDN services 16 hours per day, 7 days a week. The Department has now decided to have a transitional reduction in PDN services. The notice indicated that 16 hours of PDN per day would continue from [REDACTED] through [REDACTED], 14 hours of PDN would be approved from [REDACTED] through [REDACTED], and 12 hours of PDN would be

approved from [REDACTED] through [REDACTED]. The Department based its decision on a review of medical documentation submitted from Appellant's physicians and determined that Appellant no longer met medical criteria for 16 hours of PDN services per day.

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

The Department's RN, Medicaid Utilization Analyst testified that the original letter approving Appellant for PDN indicated that 16 hours of PDN were authorized to aide in the transition of Appellant from the hospital to home and that the notice made clear to Appellant's family that a review of the authorized PDN would take place after 6 months. The Department's RN, Medicaid Utilization Analyst indicated that after completing that review, she determined that Appellant no longer met medical necessity for 16 hours of PDN per day. The Department's RN, Medicaid Utilization Analyst indicated that based on the medical records she reviewed, Appellant was stable at home and had not been hospitalized more than once per month since she came home from the hospital. The Department's RN, Medicaid Utilization Analyst also noted that the nursing notes submitted showed that Appellant did not need frequent suctioning of her tracheotomy tube. The Department's RN, Medicaid Utilization Analyst testified that she determined that Appellant fell into the Medium category for PDN, which allows for 8-12 PDN hours per day. The Department's RN, Medicaid Utilization Analyst indicated that she kept Appellant at the high end of the Medium category by approving 12 hours of PDN per day following the transitional reduction. The Department's RN, Medicaid Utilization Analyst indicated that persons in the High category for PDN require more frequent interventions and have more frequent hospitalizations than Appellant has experienced.

Appellant's mother testified Appellant is a triplet who was born extremely premature at 28 weeks and spent the first 15 months of her life in the hospital. Appellant's mother indicated that Appellant's brother and sister also have developmental delays and health issues which complicate caring for Appellant. Appellant's mother indicated that both she and her husband are dentists, that her husband works long hours in supporting the family, and that she also needs to work part-time. Appellant's mother indicated that while Appellant has not been hospitalized frequently since she came home, her medical needs have not really changed since that time. Appellant's mother testified that Appellant is on a ventilator and oxygen 24 hours per day and needs constant monitoring. Appellant's mother testified that Appellant's caregivers are basically only the PDN nurses, herself, and the family's nanny, who works only 22-30 hours per week. Appellant's mother indicated that her husband was not really trained to care for Appellant, but does help out when necessary. Appellant's mother indicated that while Appellant has not been hospitalized many times since she came home, there have been numerous 911 calls.

Appellant's mother testified that part of the reason Appellant has not been hospitalized frequently is because she has been receiving 16 hours of PDN per day. Appellant's mother indicated that 16 PDN hours per day is necessary to allow her to work and to sleep, so that she is able to take care of Appellant and her other two children. Appellant's mother testified that Appellant has two conditions that make her situation especially serious as Appellant

cannot tolerate being off the ventilator for any period of time and she has a condition that could cause one of the veins to her heart to close. As such, Appellant's mother indicated that Appellant really needs trained supervision 24 hours per day. Appellant's mother testified that Appellant also needs to have her medications administered throughout the day.

Appellant's mother pointed to a letter from Appellant's pulmonologist (Exhibit A, pp 5-6) in which the doctor opines that Appellant does fall into the High category for PDN. The doctor opined in the letter that a reduction in Appellant's PDN would result in an increased chance of hospitalization or death. Appellant's mother testified that with three children all with developmental delays it is beneficial for Appellant to receive the one on one care she gets from PDN. Appellant's mother indicated that when she is alone with all three children it is very difficult to monitor Appellant and look after the other two children. Appellant's mother pointed out that the private duty nurses also do occupational, physical, and speech therapy with Appellant, which has helped her develop better than she would have otherwise. Appellant's mother testified that, in her opinion, Appellant falls within the High category for PDN because she requires 24 hours monitoring.

In response, the Department's RN, Medicaid Utilization Analyst testified that part of PDN is to provide the family training so that they are able to more efficiently care for the patient going forward. The Department's RN, Medicaid Utilization Analyst indicated that PDN is designed to maintain life, not to help patients meet developmental goals. The Department's RN, Medicaid Utilization Analyst testified that Appellant's father still qualifies as a caregiver under Medicaid guidelines even though he is not often used as a caregiver.

Based upon the medical documentation submitted, the Department properly determined that a transitional reduction in PDN was warranted. The Appellant has failed to meet her burden of showing by a preponderance of evidence that the Department erred in authorizing a transitional reduction in her PDN services. Clearly, Appellant has very significant health issues, requires an enormous amount of care and Appellant's family should be commended for the constant care that they provide to their daughter. However, based on policy, it is clear that since Appellant has been home, she falls into the Medium category of care for PDN. She has had infrequent hospitalizations and she does not require frequent suctioning or interventions on a daily basis. While Appellant does require monitoring, that monitoring can be conducted by Appellant's parents, her nanny, and other friends and family when PDN is not available. Also, as indicated above, Appellant really has three caregivers – her mother, her father, and her nanny. While it is understood that the family has chosen to allow Appellant's father to focus on providing for the family, under Medicaid guidelines, he is still a caregiver. Finally, the letter from Appellant's doctor opining that Appellant falls into the High category for PDN is not controlling. Appellant's doctor is not trained as a Medicaid Utilization Analyst and her opinion is not supported by the medical documentation submitted. According to the information submitted, the Department's notice of a transitional reduction in services should be affirmed.

[REDACTED]

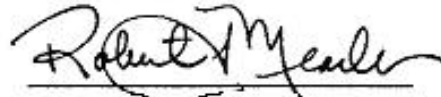
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DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly authorized a transitional reduction in the Appellant's private duty nursing services based on the medical records submitted.

IT IS THEREFORE ORDERED THAT:

Respondent's decision is **AFFIRMED**.



Robert J. Meade
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

RJM [REDACTED]

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.