RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

SHELLY EDGERTON
DIRECTOR

[redacted]

Date Mailed: October 18, 2016
MAHS Docket No.: 16-011558
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Janice Spodarek

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 Petitioner's request for a hearing.

After due notice, a hearing was held on 10/13/16. [redacted], Petitioner's mother, appeared and testified on Petitioner's behalf.

[redacted], Appeals Review Officer, represented the Department of Health and Human Services. [redacted], RN, Reviewer of Private Duty Nursing (PDN) benefits, appeared as a witness for the Department.

ISSUE

Did the Department properly deny Petitioner's private duty nursing (PDN) prior authorization (PA) services request?

FINDINGS OF FACT

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

1. Petitioner is a 10 year old male beneficiary of the SSI, Medicaid, and CSHCS programs, born on [redacted]. Petitioner is developmentally disabled, tube fed, non-verbal, immune globulin, who had a tracheostomy most of his life with respiratory distress. On [redacted], Petitioner had a tracheostomy decannulation. (Exhibit A.18).

2. Petitioner was discharged home [redacted]. (Exhibit A.19).

3. On 8/9/16, [redacted] filed a PDN PA Request for Services. Petitioner's Representative at hearing indicated that she was requesting 8 hours per day, 7 days per week so she could sleep and take care of 2

other children in the home. (Exhibit A; Testimony). Petitioner testified that she had been receiving PDN 7 days, 8 hours per day at night so she could sleep. (Testimony).

4. On 7/19/16, [redacted] issued a letter to Petitioner that effective 7/22/16, the PDN services will end due to Petitioner doing well with no reported episodes of respiratory distress, and that 7/22/16 will be the last shift as Petitioner's "Medical Needs have changed." (Exhibit A.59).

5. On [redacted] Petitioners physician, [redacted], M.D. wrote a letter "To Whom It May Concern" stating that since Petitioner's tracheostomy was removed, and since Petitioner tolerated the decannulation 'so far without incident,' and that Petitioner continues to be tube fed at night. Petitioner's physician indicated that he feels that Petitioner needs to continue to have some nursing care at night, "perhaps a LPN, or CHA" to monitor respiratory status. (Exhibit A.58).

6. On 8/9/16, following a review, the Department sent Petitioner's parent written notice of a denial of the POA filed by [redacted] on 7/29/16 for PDN services on the grounds of the PDN Chapter of the Medicaid Provider Manual (MPM). (Exhibit A.8).

7. The parties stipulated at the hearing that Petitioner needs care during the night, but disagree on the skill level.

8. On 8/23/16, the Michigan Administrative Hearing System (MAHS) received the request for hearing filed on behalf of the minor Petitioner. (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 denial of Petitioner's request to have private duty nursing (PDN) services during the night, 7 days per week, following Petitioner's tracheostomy decannulation. The Respondent argues essentially that due to the change, Petitioner no longer has the need for PDN - a high RN skill level. Petitioner argues for a continuing need for a PDN during the night shift. As noted, the parties do not disagree that Petitioner is in need of some care during the time period disputed.

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 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 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 – 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

* Factor III limits the maximum number of hours which can be authorized for a beneficiary:

- 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, 2015 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, 2015 p. 15].

Here, once again, it is undisputed that Petitioner needs some level of care during the night hours. The dispute here is the level of care. As indicated above, Petitioner was receiving PDN services 8 hours per day, 7 days a week. The transition to no RN PDN care was continued until 7/22/16 (following the medical change in condition that took place in May, 2016).

Petitioner 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 Petitioner has not met that burden of proof.

The Department's RN, Medicaid Utilization Analyst testimony and review examined the medical notes and findings of the hospitalization, and the statement of Petitioner's physician. The Respondent's review identified that the evidence indicates that Petitioner tolerated the procedure well, had no complications post operatively, was discharged in good condition, and had an Oxygen level of 99%--"SpO2 99%." (See Exhibit A.19). Evidence shows that the level of care needed following the tracheostomy decannulation is medically less than before the procedure. An application of the facts here to the MPM PDN Chapter as it relates to the category assessments, as well as guidelines indicated by the law and policy, show that Petitioner no longer meets the intensity of care for the Maximum amount of PDN.

Petitioner argued for a continuation on the basis that Petitioner still has sleep apnea and may have a problem during the night. However, the Respondent did not dispute Petitioner's statement(s), but rather indicated that Petitioner no longer meets the eligibility criteria for PDN-the maximum amount of PDN and intensity.

Based upon the medical documentation submitted, the Department properly determined that the 8/9/16 denial for PDN was supported by credible and substantial medical evidence of record. As such, the undersigned Administrative Law Judge is required to uphold the denial. Petitioner has failed to meet her burden of showing by a preponderance of evidence that the Department erred in denying the PA for PDN services. Clearly, Petitioner has very significant health issues, requires an enormous amount of care and Petitioner's family should be commended for the constant care that they provide to their son. However, it was clear from the documentation submitted that Petitioner does not fall into the Category of PDN. It is noted that even Petitioner's physician did not argue for the most intense level of skilled care. Based on that information, the Department's decision was proper.

It is noted that Petitioner's Representative seemed confused about Medicaid choices, including HHS, and any potential CSCHS care nurse coordinator. However, such issues cannot be addressed at an administrative hearing absent a request for hearing meeting the federal fair hearing jurisdictional requirements.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly denied Petitioner's prior authorization for Private Duty Nursing based on the medical records submitted.

IT IS THEREFORE ORDERED THAT:

Respondent's decision is **AFFIRMED**.

Janice Spodarek

JS/cg

Janice Spodarek
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139

DHHS Department Rep. [redacted]

Petitioner [redacted]

DHHS -Dept Contact [redacted]