STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

RICK SNYDER
GOVERNOR

SHELLY EDGERTON
DIRECTOR

Date Mailed: January 16, 2018
MAHS Docket No.: 17-014266
Agency No.:
Petitioner:

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

The above-captioned matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and upon a request for hearing filed on the minor Petitioner's behalf.

After due notice, a telephone hearing was held on December 13, 2017. , Petitioner's mother, appeared and testified on Petitioner's behalf. , the Pediatric Case Manager at , also testified as a witness for Petitioner. , Petitioner Supports Coordinator at , was present as well. , Appeals Review Officer, represented the Respondent Department of Health and Human Services (DHHS or Department). , Registered Nurse (RN) and Medicaid Benefit Analyst, testified as a witness for the Department.

During the hearing, the Department submitted one exhibit/evidence packet that was admitted into the record as Exhibit A, pages 1-143. Petitioner did not submit any exhibits.

ISSUE

Did the Department properly decide to reduce Petitioner'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. Petitioner is a ███-year-old Medicaid beneficiary who has been diagnosed with, among other conditions, Aicardi syndrome; progressive neuromuscular scoliosis; acute respiratory distress; asthma; cerebral palsy; chronic lung disease; complex partial epilepsy; congenital quadriplegia; and dysphagia. (Exhibit A, pages 75, 88-89).

2. Due to her diagnoses and the effect of those diagnoses, Petitioner is dependent on her caregivers to meet all her needs; she has a tracheostomy; and she utilizes a ventilator, oximeter, G-tube, baclofen pump, vibrating vest, cough assist machine, and wheelchair. (Exhibit A, pages 14-20, 43-44, 74-75).

3. Petitioner has also been approved for PDN. (Testimony of Department's RN).

4. Petitioner's PDN was previously approved through the Children's Waiver Program (CWP) and, as part of that waiver, Petitioner was approved for 12 hours per day of PDN while in school and 16 hours per day of PDN while out of school. (Exhibit A, pages 46-47).

5. Petitioner also received Targeted Case Management, Respite Services provided by a nurse, Music Therapy, and Recreation Therapy through the CWP. (Exhibit A, page 46).

6. The Department subsequently took over the authorization of Petitioner's PDN and, in August of 2017, it authorized Petitioner for 10 hours per day of PDN. (Testimony of Petitioner's representative).

7. On October 11, 2017, the Department received a prior authorization request for renewal of the 10 hours per day of PDN services submitted on Petitioner's behalf by the nursing agency that provides her services. (Exhibit A, pages 10, 13-133).

8. On that prior authorization request form, Petitioner was noted to have two caregivers, both of whom work or attend school. (Exhibit A, page 10).

9. The prior authorization form also indicated that Petitioner attends school 7 hours per day, 5 days per week. (Exhibit A, page 10).

10. Along with the prior authorization request, the nursing agency also submitted a Home Health Certification and Plan of Care (Exhibit A, pages 14-20); Nursing Notes (Exhibit A, pages 22-41); an Evaluation of Petitioner by [redacted] on August 3, 2017 for her Baclofen Pump, with Petitioner noted to be doing well on the pump (Exhibit A, pages 73-77); an Admission Notification Letter dated August 8, 2017 regarding Petitioner's admission to the hospital with a diagnosis of femur fracture (Exhibit A, page 72); Notes dated August 23, 2017 regarding an office visit with the [redacted] with respect to surgery on Petitioner's left femur (Exhibit A, pages 78-86); and Notes dated September 15, 2017 regarding an office visit with the [redacted] with respect to a growing rod lengthening procedure scheduled for August 30, 2017. (Exhibit A, pages 87-93).

11. The nursing agency further included a letter dated October 2, 2017 from its Pediatric Care Manager. (Exhibit A, page 13).

12. In that letter, the Pediatric Care Manager described medical issues, including surgery on a broken left femur bone and increased seizures, that Petitioner had been having since August of 2017. (Exhibit A, page 13).

13. She also noted that, since school started on September 5, 2017, Petitioner had gone home early on 5 of 27 school days because of seizures and a need for medication. (Exhibit A, page 13).

14. Similarly, the documentation attached to the prior authorization request also included an email from Petitioner's mother dated October 11, 2017 in which she noted days that Petitioner's mother left work early or days that Petitioner had missed school due to Petitioner's medical needs since August 1, 2017. (Exhibit A, page 21).

15. Specifically, Petitioner's mother wrote that Petitioner missed 9 days in August due to broken leg/surgery and part of 1 day because of a seizure. (Exhibit A, page 21).

16. She also wrote that Petitioner missed parts of 3 days in September because of seizures; 2 full days in September because of back surgery; 1 day in October due to medical appointments; and part of 1 day in October due to a seizure. (Exhibit A, page 21).

17. Additionally, Petitioner's mother wrote that Petitioner would be missing another day in October due to upcoming medical appointments and potentially up to 5 days because of an upcoming ear surgery. (Exhibit A, page 21).

18. The prior authorization request also included both Petitioner's Individual/Family Plan of Service with Spectrum Community Services, effective January 9, 2017, and a Service Review of that Plan dated April 7, 2017. (Exhibit A, pages 42-64).

19. As part of that Plan of Service, Petitioner was approved for 1,152 hours per year/96 hours per month of respite nursing services, in addition to other services. (Exhibit A, page 47).

20. It also stated that Petitioner attends school 5 days a week. (Exhibit A, page 44).

21. The Service Review provided in part that Petitioner had historically been receiving 12 hours per day of PDN through the CWP under the Medium Level of Care, but that a nursing assessment in January of 2017 had determined that she qualified for a High Level of Care. (Exhibit A, page 54).

22. It also provided that Petitioner was attending school for the first time; she is accompanied by a nurse when transported to school; and that the current protocol is for the school to have a parent pick Petitioner up if she has a seizure while at school, with that protocol being worked on. (Exhibit A, page 54).

23. On October 18, 2017, the Department sent Petitioner's representative a written Notification of Reduction of PDN Services. (Exhibit A, pages 8-9).

24. Specifically, the notification provided that Petitioner would be approved for 10 hours per day of PDN from November 1, 2017 to December 31, 2017 and 8 hours per day of PDN as of January 1, 2018. (Exhibit A, page 8).

25. Regarding the reason for the action, the notification stated:

> This decision is based on a recent review of medical documentation, Plan of Care signed by parent and Physician, parent on 9/27/2017 and physician on 9/27/2017. Current nursing notes 9/1/2017-10/9/2017. This review indicates a change in the authorized services because:
>
> - Beneficiary does not meet continuation of 10 hours per day. Please see Private Duty Nursing Chapter, Section 2.4 Determining Intensity of Care and Maximum amount of PDN. Beneficiary is in medium category based on Factor III (bene attends school 25 hours or more per week, on average), maximum is 8 hours per day.

- School attendance. Authorization of PDN hours will not automatically be increased during breaks from school (vacations) or adjusted beyond the limits of factors I or II. See Private Duty Nursing Chapter, Section 1.7 Benefit Limitation.
- The caregiver must provide a minimum of 8 hours per day. The time a beneficiary is under the supervision of another entity or individual cannot be used to meet the eight hours of obligated care.
- Beneficiary currently receives 10 hours per day of PDN authorized through Medicaid, 96 hours per month of nursing respite authorized by Spectrum Community Services, and she attends school 7 hours per day.
- Please note that the reduction of PDN hours to 8 hours per day DOES NOT meet the parent's minimum requirement of 8 hours per day. Therefore, with the next authorization another reduction may occur.
- Based upon submitted documentation, medical criteria for 10 hours/day of PDN has not been met. Private Duty Nursing Chapter, Section 2.6 Change in Beneficiary's Condition/PDN as a Transitional Benefit.
- Other services may be an option for assistance to this beneficiary: contact DHS Caseworker, Care Manager, or the Children's Special Health Care Services Nurse in the beneficiary's county of residence may be able to assist the family in exploring possible community resources.

Exhibit A, pages 8-9

26. On November 9, 2017, the Michigan Administrative Hearing System (MAHS) received the request for hearing filed on Petitioner's behalf with respect to the decision to reduce her PDN services. (Exhibit A, pages 4-9).

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 Petitioner's private duty nursing (PDN) services and, with respect to such services, the applicable version of the Michigan Medicaid Provider Manual (MPM) states in part:

> **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 the Habilitation Supports Waiver (the Community Mental Health Services Program) and over 21 years of age, that program authorizes the PDN services.
>
> For a Medicaid beneficiary who is not receiving services from the Habilitation Supports Waiver (the Community Mental Health Services Program), the MDHHS Program Review Division (PRD) reviews the request for authorization and authorizes the services if the medical criteria and general eligibility requirements are met.
>
> 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.

Beneficiaries who are receiving PDN services through one Medicaid program cannot seek supplemental PDN hours from another Medicaid Program (i.e, Habilitation Supports Waiver, MI Choice Waiver).

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.

* * *

1.4 PRIOR AUTHORIZATION

PDN services must be authorized by the PRD, before services are provided. (Refer to the Directory Appendix for contact information.) PDN services are authorized and billed in 15-minute incremental units (1 unit = 15 minutes). Prior authorization of a particular PDN provider to render services considers the following factors:

- Available third party resources.
- Beneficiary/family choice.
- Beneficiary's medical needs and age.
- The knowledge and appropriate nursing skills needed for the specific case.
- The understanding of the concept and delivery of home care and linkages to relevant services and health care organizations in the area served.

The Private Duty Nursing Prior Authorization – Request for Services form (MSA-0732) must be submitted when requesting PDN for persons with Medicaid coverage before services can begin and at regular intervals thereafter if continued services are determined to be necessary. A copy of the form is provided in the Forms Appendix and is also available on the MDHHS website. (Refer to the Directory Appendix for website information.) This form is **not** to be used for beneficiaries enrolled in the MI Choice Waiver. Private Duty Nursing is not a benefit under CSHCS. Individuals with CSHCS coverage may be eligible for PDN under Medicaid.

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 PRD, a notice 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 PRD.

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

MDHHS will not reimburse PDN providers for services that have not been prior authorized. All forms and documentation must be completed according to the procedures provided in this chapter. If information is not provided according to policy (which includes signatures and correct information on the MSA-0732, POC and nursing assessment), requests will be returned to the provider. Authorization cannot be granted until all completed documentation is provided to MDHHS. Corrected submissions will be processed as a new request for PDN authorization and no backdating will occur.

If during an authorization period a beneficiary's condition changes warranting an increase or decrease in the number of approved units or a discontinuation of services, the provider must report the change to the PRD. (Refer to the Directory Appendix for contact information.) It is important that the provider report all changes as soon as they occur, as well as properly updating the POC. The request to increase or decrease units must be accompanied by an updated and signed POC; and documentation from the attending physician addressing the medical need if the request is for an increase in PDN units.

Often the request to begin services will be submitted by a PDN agency or individual PDN; however, a person other than the PDN provider (such as the hospital discharge planner, CSHCS case manager, physician, or physician's staff person) may submit the MSA-0732. When this is the case, the person submitting the request must do so in consultation with the PDN agency or individual PDN who will be assuming responsibility for the care of the beneficiary.

If services are requested for more than one beneficiary in the home, a separate MSA-0732 must be completed for each beneficiary.

When a parent/guardian requests a transfer of care from one PDN provider to another, a completed MSA-0732 must be submitted to the PRD along with signed and dated documentation from the parent/guardian indicating that they are requesting a change in providers. The balance of hours authorized to a previous PDN provider will not be automatically transferred to a new provider. The new PDN provider is responsible for submitting the MSA-0732 to the PRD along with documentation from the parent/guardian requesting a new provider.

The PA number is for private duty nursing only. Any CMHSP prior authorized respite services must be billed to the authorizing CMHSP.

Other services provided in the home by community-based programs may affect the total care needs and the amount of PDN authorized. These other services must be disclosed on the MSA-0732 and documented in the POC. Although the amount of PDN authorized considers the beneficiary's medical needs and family circumstances, community-based services provided in the home are also part of this assessment. Disclosure is necessary to prevent duplication of services to allow for an accurate calculation of authorized PDN hours. Providers are advised that failure to disclose all community resources in the home may be cause for recoupment of funds.

1.4.A. DOCUMENTATION REQUIREMENTS

The following documentation is required for all PA requests for PDN services and must accompany the MSA-0732:

- Most recent signed and dated nursing assessment, including a summary of the beneficiary's current status compared to their status during the previous authorization period, completed by a registered nurse;

- Nursing notes for two (2) four-day periods, including one four-day period that reflects the most current medically stable period and another four-day period that reflects the most recent acute episode of illness related to the PDN qualifying diagnosis/condition;

- Most recent updated POC signed and dated by the ordering/managing physician, RN, and the beneficiary's parent/guardian. The POC must support the skilled nursing services requested, and contain dates inclusive of the requested authorization period.
  The POC must include:

  - Name of beneficiary and Medicaid ID number

  - Diagnosis(es)/presenting symptom(s)/condition(s)

  - Name, address, and telephone number of the ordering/managing physician

  - Frequency and duration of skilled nursing visits, and the frequency and types of skilled interventions, assessments, and judgments that pertain to and support the PDN services to be provided and billed

  - Identification of technology-based medical equipment, assistive devices (and/or appliances), durable medical equipment, and supplies

  - Other services being provided in the home by community-based entities that may affect the total care needs

  - List of medications and pharmaceuticals (prescribed and over-the-counter)

  - Statement of family strengths, capabilities, and support systems available for assisting in the provision of the PDN benefit (for renewals, submit changes only)

- If the beneficiary was hospitalized during the last authorization period, include documentation related to the PDN qualifying diagnosis/condition, i.e., all hospital discharge summaries, history and physical examination, social worker notes/assessment, consultation reports (pulmonary; ears, nose and throat [ENT];

ventilator clinic; sleep study; etc.), and emergency department reports (if emergency services were rendered during the last authorization period).

- Teaching records pertaining to the education of parents/caregivers on the child's care.

- Other documentation as requested by MDHHS.

* * *

1.7 BENEFIT LIMITATIONS

The purpose of the PDN benefit is to assist the beneficiary with medical care, enabling the beneficiary to remain in their home. PDN is intended as a transitional benefit to support and teach family members to function as independently as possible. Authorized hours will be modified as the beneficiary's condition and living situation stabilizes or changes. A decrease in hours will occur, for example, after a child has been weaned from a ventilator or after a long term tracheostomy no longer requires frequent suctioning, etc. 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 units 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 time authorized for the month. The caregiver has the flexibility to use the monthly-authorized units as needed during the month. Substantial alterations to the scheduled allotment of daily PDN hours due to family choice (i.e., vacations) unrelated to medical need or emergent circumstances require advance notice to the PRD. The remaining balance of authorized hours will not be increased to cover this type of utilization. Authorized time cannot be carried over from one authorization period to another.

> 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., MDHHS Home Help Program) or other resources for hourly care (e.g., private health insurance, trusts, bequests, private pay).
>
> PDN providers are encouraged to work with families to assist in developing a backup plan for care of their child in the event that a PDN shift is delayed or cancelled, and the parent/guardian is unable to provide care. The parent/guardian is expected to arrange backup caregivers that they will notify, and the parent/guardian remains responsible for contacting these backup caregivers when necessary.

MPM, October 1, 2017 version
Private Duty Nursing Chapter, pages 1, 3-8

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

> **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 (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., the 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	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.

When using the Decision Guide, the following definitions apply:

- "Caregiver": legally responsible person (e.g., birth parents, adoptive parents, spouses), paid foster parents, guardian or other adults who are not legally responsible or paid to provide care but who choose to participate in providing care.

- "Full-time (F/T)": working at least 30 hours per week for wages/salary, or attending school at least 30 hours per week.

- "Part-time (P/T)": working at least 15 hours per week for wages/salary, or attending school at least 15 hours per week.

- "Significant" health issues: one or more primary caregiver(s) has a health or emotional condition that prevents the caregiver from providing care to the beneficiary (e.g., beneficiary weighs 70 pounds and has no mobility and the primary caregiver just had back surgery and is in a full-body cast).

- "Some" health issues: one or more primary caregiver(s) has a health or emotional condition, as documented by the caregiver's treating physician, that interferes with, but does not prevent, provision of care (e.g., caregiver has lupus, alcoholism, depression, back pain when lifting, lifting restrictions, etc.).

- "School" attendance: The average number of hours of school attendance per week is used to determine the maximum number of hours that can be authorized for the individual of school age. The average number of hours is determined by adding the number of hours in school plus transportation time. Authorization of PDN hours will not automatically be increased during breaks from school (vacations) or adjusted beyond the limits of factors I and II.

  The Local School District (LSD) or Intermediate School District (ISD) is responsible for providing such "health and related services" as necessary for the student to participate in his education program. Unless medically contraindicated, individuals of school age should attend school. Factor III applies when determining the maximum number of hours to be authorized for an individual of school age. The Medicaid PDN benefit cannot be used to replace the LSD's or ISD's responsibility for services (either during transportation to/from school or during participation in the school program) or when the child would typically be in school but for the parent's choice to home-school the child.

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 . . .

MPM, October 1, 2017 version
Private Duty Nursing Chapter, pages 12-15

Here, it is undisputed that the Petitioner needs PDN services and it is only the amount of hours to be authorized that is at issue. While Petitioner was previously receiving 10 hours per day of PDN and her representative and nursing agency asked to renew that amount, the Department instead decided to gradually reduce Petitioner's PDN services to 8 hours per day.

In support of that decision, the Department's RN testified that Petitioner continues to meet the requirements for PDN, as she still meets Medical Criteria I and Medical Criteria III, but that fewer PDN hours must be authorized given the applicable policies governing PDN. She also noted that the policies governing PDN are different from those governing the CWP.

Specifically, the Department's RN testified that, based on the documentation submitted, Petitioner falls into the Medium Intensity of Care Category and, given that she had two caregivers, both of whom work, Petitioner could typically be approved for 6-12 hours per day of PDN. However, she also testified that, because Petitioner attends school for 25 or more hours per week on average, Factor III of the Decision Guide found in policy expressly sets a maximum of 8 hours per day of PDN, which is what Petitioner will be approved for.

The Department's RN further testified that the determinations made about Petitioner's Intensity of Care Category and school attendance were based solely on the documentation submitted and that the Department does not control what the nursing agency sent in. She also noted that Petitioner and her nursing agency could send in updated information in the future if Petitioner's circumstances change.

Regarding the review of documentation, the Department's RN testified that, while Petitioner has complex care and multiple health issues, the Department just focuses on Petitioner's respiratory issues and status, as that was the reason she was approved for PDN, and that there was not enough in the documentation to find that Petitioner has a High Intensity of Care given the amount of skilled nursing identified. In particular, the Department's RN described the definition for skilled nursing found in the applicable policy, which does not include assistance with personal care, medications, catheters or cough assistance, and noted the limited amount of times Petitioner required oxygen, suctioning, or had issues with her tracheostomy.

In addition to the maximum amount of PDN allowed by Factor III of the Decision Guide in this case, the Department's RN also testified that Petitioner's PDN services were reduced, and may be reduced further, because her parents/caregivers are required by policy to provide a monthly average of a minimum of eight hours of care during a typical 24-hour period and, given the amount of time she is at school and the nursing respite she receives, Petitioner's caregivers are not providing that minimum amount when Petitioner is approved for 10 hours per day of PDN.

The Department's RN did testify that the Department approved more hours in the past when it received documentation regarding Petitioner missing significant amounts of school and that it could do so again if additional documentation was submitted. At the request of Petitioner's mother, she also described what Department would be looking for.

In response, Petitioner's representative testified that Petitioner has many diagnoses, including more than just respiratory issues, and that it takes "everything", including eyes on Petitioner at all times, to keep Petitioner from dying. Petitioner's representative also testified that Petitioner specifically needs nursing care for the oxygen she requires at night, with the references in the nursing notes to oxygen being provided only referring to an increase in the oxygen Petitioner is already receiving; suctioning; monitoring; providing medications during the night that Petitioner cannot take during the day; and catheter care. Petitioner's representative further testified that Petitioner's care needs are reflected in her Plan of Care and the Nursing Notes, but that, even if Petitioner's nurses are not writing sufficient notes, the PDN hours should still be based on what Petitioner needs.

According to her representative, Petitioner has always been classified as having High Intensity of Care, with some nurses even declining to work with Petitioner because of the severity of Petitioner's conditions, and nothing has changed to suggest that Petitioner now has a Medium Intensity of Care. Petitioner's representative did note that, while Petitioner has previously been hospitalized once a month for years, her caregivers and medical providers have learned to manage her condition better and keep her in the "Yellow Zone" identified in the care plan, but Petitioner's representative also stated the nursing services remain necessary to maintain Petitioner and it is very time-consuming and emotionally draining on the household.

Regarding the number of PDN hours, Petitioner's representative testified that Petitioner received much more hours in the past, up to 16 hours per day when Petitioner was out-of-school, but that they did not appeal when the PDN services were reduced to 10 hours per day in August of 2017. She also testified that, while it is harder with 10 hours per day, Petitioner's family has been working with it and the hours are sufficient. However, she further testified that she does not know how Petitioner will survive or her family will get by on fewer nursing hours given.

Petitioner's representative agreed that Petitioner is approved for respite nursing services, but also testified that those services cannot be scheduled on a daily basis and that they are used to provide care when Petitioner has to leave school earlier due to sickness or she is out of school during breaks.

With respect to Petitioner's attendance at school, her representative testified that Petitioner's attendance is inconsistent and that she comes home early at least once a week and misses a significant number of other days because of her frequent medical appointments or surgeries. Petitioner's representative also testified that she feels like she is being forced to send Petitioner to school even when Petitioner is unstable

because of the limited PDN hours they have and the need for Petitioner's parents to work and provide an income. Petitioner's representative further testified that she would stay home if she could, but the family needs the income and Petitioner has two siblings. She also noted that there are no other natural supports.

The Pediatric Case Manager at the nursing agency that provides Petitioner's PDN testified that, while Petitioner now has a tracheostomy, Petitioner was also receiving PDN services prior to having a tracheostomy and that non-respiratory issues or medical conditions are also aspects of Petitioner's PDN. In particular, the Pediatric Case Manager testified that Petitioner's seizure medications affect her breathing and lead to a need for more suctioning and/or monitoring, which is why Petitioner is sent home from school if she has a seizure. The Pediatric Case Manager also testified that Petitioner does not need to be on oxygen at all times, but that Petitioner does require interventions when her oxygen saturation levels go below 93% and that only a nurse can wean Petitioner back to room air. She further testified that Petitioner requires frequent suctioning and described some of the nursing notes submitted as part of the prior authorization request.

Petitioner bears the burden of proving by a preponderance of evidence that the Department erred in deciding to reduce her PDN services. Moreover, the undersigned Administrative Law Judge is limited to reviewing the Department's decision in light of the information that was available at the time the decision was made.

Here, given the available information and applicable policies, the undersigned Administrative Law Judge finds that Petitioner has not met her burden of proof and that the Department's decision must therefore be affirmed.

While the parties dispute what Intensity of Care Category Petitioner falls into, the reduction in this case would be appropriate regardless of whether Petitioner is in the High Category or the Medium Category given that, as identified in the Notice of Reduction and testified to by the Department's RN, Petitioner's caregivers are not providing the monthly average of a minimum of eight hours of care during a typical 24-hour period required by the above policy.

The MPM expressly provides that PDN services are not intended to supplant the caregiving responsibilities of parents and that any minor beneficiary such as Petitioner must have a primary caregiver who resides with the Petitioner and provides "a monthly average of a minimum of eight hours of care during a typical 24-hour period." *See* MPM, October 1, 2017 version, Private Duty Nursing Chapter, page 7. Moreover, the MPM also expressly states that the time a beneficiary is under the supervision of another entity or individual, such as when Petitioner is in school or receiving respite care, cannot be used to meet the eight hours of obligated care. *See* MPM, October 1, 2017 version, Private Duty Nursing Chapter, page 7.

Here, when taking into account the 96 hours per month of respite nursing Petitioner is approved for, the 35 hours per week the prior authorization form states that she attends

school and the 70 hours per week of PDN that Petitioner was previously authorized, her caregivers would not be providing an average of 8 hours per day. Instead, with an average of 3.2 hours per day of respite, 5 hours per day of school and 10 hours per day of PDN, for a total of 18.2 hours, Petitioner's parents are only averaging 5.8 hours per day.

Moreover, while Petitioner's representative noted that the respite care is not scheduled regularly, it is undisputed that it is always used and the Department must look at the average across the month.

Additionally, Petitioner's representative also testified that Petitioner's school attendance is inconsistent and that she does not attend the 35 hours per week of school she is scheduled for. The documentation submitted along with the prior authorization request likewise includes an email in which Petitioner's representative identified dates of school on which Petitioner missed part or all of the school day. However, even accepting that evidence and testimony as true, it is still insufficient to meet the care requirements. For Petitioner's parents to be providing an average of 8 hours of care per day, Petitioner would need to miss approximately 15.4 hours per week of school and, putting aside the time she missed due to her broken femur, which is unrelated to her need for PDN, occurred months prior to the decision in this case and is unlikely to be repeated, the documentation just does not reflect that amount of time being missed.

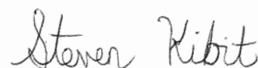
To the extent Petitioner's circumstances have changed or her representative has additional or updated information to provide regarding her attendance at school, then her nursing agency can always submit a request for an increase in PDN hours along with that information. With respect to the decision at issue in this case however, the Department's decision must be affirmed given the available information and applicable policies.

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 reduce Petitioner's PDN services.

IT IS, THEREFORE, ORDERED that:

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



SK/db

Steven Kibit
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 -Dept Contact

DHHS Department Rep.

Petitioner

Authorized Hearing Rep.