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GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
SUZANNE SONNEBORN
EXECUTIVE DIRECTOR

MARLON I. BROWN, DPA
ACTING DIRECTOR



Date Mailed: February 16, 2024
MOAHR Docket No.: 24-000273
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Corey Arendt

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 Petitioner.

After due notice, a hearing was held on February 13, 2024. [REDACTED] Petitioner's Father, appeared on behalf of Petitioner. [REDACTED] Petitioner's Mother also offered testimony on behalf of Petitioner. Leigha Klaver, Appeals Review Officer, appeared on behalf of the Respondent, Michigan Department of Health and Human Services. Melody London, Medicaid Utilization Analyst, appeared as a witness for the Department.

ISSUE

Did the Department properly authorize a reduction in 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. As of November 30, 2023, Petitioner was approved for and receiving PDN daily in the amount of 24 hours. (Exhibit A, pp 2, 11; Testimony.)
2. On or around November 30, 2023, the Department received documentation from Petitioner regarding Petitioner's PDN authorization. These notes provided the following information:

- "...after we got approved for 24 hours it still took about 2 months till the nurses stated coming consistently..."¹
- "...left on our own for hour and hours a day while trying to care for [REDACTED] on the ventilator..."²
- "...who will be present to help my wife while she is also taking care of a newborn, other than waiting for 911..."³
- "If we were to get 16 hours then that would mean that 8 hours of the day I would have to be fully present..."⁴
- "...giving his medication, suctioning, CPT, range of motion, weighing all his diapers, caring for his eyes, etc. It's really not possible to do this all without getting extremely stressed out."⁵
- "[W]hen nurses would cancel in the past, we did take over, so its NOT that we don't know how to take care of him. We just really need 24 hours of care to be sure that he is fully taken care of without me having to feel stressed out and overworking myself."⁶
- "I'm not sure why in general they don't give 24 hours for all kids on vents."⁷
- "...it would be too difficult to handle [REDACTED] care plan 8 hours during the day[.]"⁸
- "Since I nurse my newborn and [REDACTED] I need to eat proper meals and drink a lot. I also need to sleep well and exercise."⁹

¹ Exhibit A, p 20.

² Exhibit A, p 20.

³ Exhibit A, p 20.

⁴ Exhibit A, p 21.

⁵ Exhibit A, p 21.

⁶ Exhibit A, p 21.

⁷ Exhibit A, p 21.

⁸ Exhibit A, p 21.

⁹ Exhibit A, p 21.

- “Everything really adds up and just takes up so much energy and time. I also need to have some time to myself...”¹⁰

3. On November 30, 2023, Department sent Petitioner a Notice of Authorization. The notice indicated the following:

Michigan Medicaid has received your prior authorization request for continuation of 24 hours of Private Duty Nursing (PDN) for the above beneficiary. The previous approval was for 24 hours per day 7 days per week. A temporary continuation of 24 hours per day is granted. The beneficiary is tracheostomy and ventilator dependent. Authorization is as follows: Effective 12/1/23-12-31/23 PDN authorization is at 24 hours per day 7 days per week; then 1/1/24-1/31/24 20 hours per day, then 2/1/24-2/29/24 18 hours per day. Then effective 3/1/24-3/31/24 authorization will be at 16 hours per day 7 days per week.¹¹

4. On January 17, 2024, the Michigan Office of Administrative Hearings and Rules, received from Petitioner, a request for hearing. (Exhibit A, p 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 the denial of a request for an increase in Petitioner’s private duty nursing (PDN) services. 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

¹⁰ Exhibit A, p 23.

¹¹ Exhibit A, p 11.

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 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.

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., Children's Waiver, 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.

* * *

1.7 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 does not automatically include ventilation through Bi-level Positive Airway Pressure (Bi-PAP) or Continuous Positive Airway Pressure (CPAP). Use of these devices to satisfy these criteria will be evaluated on a case-by-case basis; 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.

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	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	1-4	4-8	6-12

Home	in school at least P/T			
	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 *	<u>Beneficiary attends school 25 or more hours per week, on average</u>	Maximum of 6 hours per day	<u>Maximum of 8 hours per day</u>	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.				

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. MDHHS 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.¹²

Petitioner bears the burden of proving by a preponderance of evidence that the Department erred in deciding to deny Petitioner's request for additional PDN services. For the reasons discussed below, this Administrative Law Judge finds that Petitioner has not met that burden of proof.

The Department's Medicaid Utilization Analyst testified that the 24-hour authorization was temporary, and the planned tapering was in accordance with Medicaid policy. The Analyst went on to indicate the family is responsible for 8 hours of care daily, and the records reviewed indicate the family can fulfil that requirement.

Although the Petitioner seeks a continuation of the 24-hour authorization, Petitioner failed to identify any policy that would allow for such a continuation and in fact, acknowledged the policy relied upon by the Department. Furthermore, the rationale used by Petitioner was to require the 8 hours be fulfilled only during the day-time period when Petitioner's father was working. There was no clear reason or Medicaid policy for that matter that would require the 8 hours to be fulfilled only during this time period. Although the evidence indicates the Petitioner's father worked during the day, there was nothing in the record that indicated Petitioner's father couldn't assist with the 8-hour requirement in the evening and nighttime hours.

Based upon the medical documentation submitted, the Department properly determined that a denial of additional PDN was warranted. Petitioner has failed to meet his burden of proving by a preponderance of evidence that the Department erred in authorizing the reduction. Clearly, Petitioner has very significant health issues, requires an enormous amount of care, and Petitioner's parents should be commended for the constant care that is provided. However, the documentation submitted indicates the authorized allotment falls within the appropriate range given the Petitioner's intensity of care category. Therefore, according to the information submitted, the Department's decision to deny additional PDN services should be affirmed.

DECISION AND ORDER

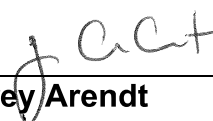
The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly denied a request for additional PDN services based on the medical records and nursing notes submitted.

¹² Medicaid Provider Manual, Private Duty Nursing, October 1, 2020, pp 1, 7-8, 10-13, 16.

IT IS THEREFORE ORDERED THAT:

Department's decision is **AFFIRMED**.

CA/pe



Corey Arendt
Administrative Law Judge
for Elizabeth Hertel, 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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

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

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

Via Electronic Mail:

Agency Representative

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