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[redacted], MI [redacted]

Date Mailed: December 9, 2021
MOAHR Docket No.: 21-005138
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Robert J. Meade

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.,* upon Petitioner's request for a hearing.

After due notice, a telephone hearing was held on December 8, 2021. [redacted], Petitioner's mother, appeared and testified on Petitioner's behalf. Florence Scott-Emuakpor, Appeals Review Officer, represented Respondent, Michigan Department of Health and Human Services (MDHHS or Department). Mellody London, RN, Prior Authorization (PA) Private Duty Nursing (PDN) Reviewer, appeared as a witness for the Department.

ISSUE

Did the Department properly deny Petitioner's request for an increase in Private Duty Nursing (PDN) hours?

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 an [redacted]-year-old Medicaid beneficiary, born [redacted] (Exhibit A, p 21; Testimony)

2. Petitioner is diagnosed with a cervical spinal cord injury with neurologically mediated chronic respiratory failure requiring tracheostomy and ventilator support. In addition, Petitioner has the comorbidities of quadriplegia, neurogenic bowel/bladder, and suffers from severe spasms. Petitioner has a baclofen pump, is completely immobile, and dependent on others for all care. (Exhibit A, p 21; Testimony).

3. On July 9, 2021, the Department received a prior authorization request from Petitioner's PDN providers for an increase in PDN services from 10

hours per day to 12 hours per day. (Exhibit A, pp 24-44; 55-216; Testimony)

4. Petitioner has private insurance through Blue Cross Blue Shield (BCBS) and her PDN is currently being paid by this private insurance. (Exhibit A, p 24; Testimony)

5. According to the Decision Guide for PDN found in the Medicaid Provider Manual, the Department determined that Petitioner fit into the Medium Intensity of Care category with two caregivers, one of who works full-time, and would therefore be entitled to 4-10 hours of PDN per day. (Exhibit A, pp 217-221; Testimony)

6. On August 18, 2021, the Department notified Petitioner's parents that the request to increase Petitioner's PDN from 10 hours per day to 12 hours per day had been denied based on the submitted documentation. The notification provided Petitioner's parents with information on some additional services that might be of assistance. (Exhibit A, pp 18-20; Testimony)

7. On October 27, 2021, Petitioner's request for hearing was received by the Michigan Office of Administrative Hearings and Rules. (Exhibit A, pp 6-17)

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 additional 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 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 P(RD) 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.

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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. 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.

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.

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

Medicaid policy requires that the integrated 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 PRD, 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 MDHHS 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.
>
> *Medicaid Provider Manual*
> *Private Duty Nursing Chapter*
> *July 1, 2021, pp 1, 7, 12-13, 16*

In this case, there is no dispute that Petitioner meets the eligibility criteria for PDN; the issue is whether an increase from 10 hours of PDN services per day to 12 hours of PDN services per day is medically necessary.

The Department's R.N., Prior Authorization (PA) Reviewer testified that the Department received Petitioner's request to increase PDN to 12 hours per day on July 9, 2021. The Department's R.N., PA Reviewer indicated that she reviewed all the documentation attached to the request. Based on the documents submitted, the Department's R.N., PA Reviewer testified that there was nothing in the documentation to support an increase in PDN.

The Department's R.N., PA Reviewer reviewed the PA request and all the documentation on the record and highlighted certain portions that informed her decision. For example, the Department's R.N., PA Reviewer noted that Petitioner has two settings on her ventilator; a sign that Petitioner can breathe a little better during the day. (Exhibit A, p 25.) The Department's R.N., PA Reviewer also noted that most of the nursing notes and interventions were at night. (Id.) The Department's R.N., PA Reviewer noted that Petitioner was able to sometimes communicate her wants and needs. (Exhibit A, pp 25, 61, 153, 156, 157, 183.) The Department's R.N., PA Reviewer noted that Petitioner was oriented to time and place and has two caregivers, one of whom works full-time outside of the home. (Exhibit A, pp 31, 63.) The Department's R.N., PA Reviewer noted that Petitioner had not had an ER visit since July 8, 2021 and there were small signs that her spinal cord was healing. (Exhibit A, p 43.) The Department's R.N., PA Reviewer noted that Petitioner's oxygen saturation levels were normally between 98% and 99% on room air and her vital signs were usually normal. (Exhibit A, pp 67, 160, 164, 166.) The Department's R.N., PA Reviewer noted that she did not see a lot of plugging in the nursing notes. (Exhibit A, p

198.) The Department's R.N., PA Reviewer noted that the Order by Petitioner's physician only requested 10 PDN hours per day, not 12 hours per day. (Exhibit A, p 202.)

The Department's R.N., PA Reviewer also reviewed the policy that she relied on in making the decision to deny the request for an increase in Petitioner's PDN. The Department's R.N., PA Reviewer indicated that according to the Decision Guide for PDN found in the Medicaid Provider Manual, Petitioner fit into the Medium Intensity of Care and would be entitled to 4-10 hours of PDN per day, and she approved the maximum in that category, 10 PDN hours per day, for Petitioner. The Department's R.N., PA Reviewer indicated that because Petitioner can somewhat communicate her needs and participate in her care, she considered placing Petitioner in the Low Intensity of Care category. However, given Petitioner's severe comorbidities and frequency of needed interventions, she felt Petitioner fit most accurately in the Medium Intensity of Care category.

Petitioner's mother testified that it took until about June of 2021 to get coverage through BCBS for three companies to provide PDN services and before that time Petitioner was not getting her full allotment of PDN because of staffing issues at the first two agencies. Petitioner's mother indicated that most of the PDN is now provided through AdvisaCare and she included their notes in her exhibits. (See Exhibit 1). However, Petitioner's mother pointed out that those notes were not included with the PDN request because AdvisaCare is not a Medicaid approved PDN agency.[1] Petitioner's mother testified that the AdvisaCare notes show more how Petitioner's spasms affect her respiratory issues. Petitioner's mother also noted that a lot of Petitioner's respiratory issues happen during the day when she is caring for Petitioner, and she does not chart her activities.[2] Petitioner's mother testified that another thing to note is that Petitioner does not have a lot of respiratory issues because they are so proactive in her care. However, Petitioner's mother indicated that this proactiveness comes at the expense of her own health.

Petitioner's mother testified that the two companies that submitted the PDN prior authorization here, Maxim and FirstDay, rarely care for Petitioner so it is hard for them to give a full representation of Petitioner's needs. Petitioner's mother also noted that due to UTI's, Petitioner is no longer tolerating the secondary setting on her ventilator during the day, and this has been going on since September 2021.

Petitioner's mother testified that they believe Petitioner falls into the High Intensity of Care category in the MPM because of the other issues affecting her respiratory condition. Petitioner's mother noted that while Petitioner can communicate at times to direct her own care, when she has UTI's she becomes disoriented and cannot contribute. Petitioner's mother testified that Petitioner is only 11 years old, and her

[1] Petitioner's mother was advised that notes from AdvisaCare may be considered in the future, but those notes will have to be included with the notes from the agencies requesting PDN through Medicaid.
[2] Petitioner's mother was also advised that she can keep notes of issues that arise while she is caring for Petitioner and submit those with future prior authorization requests.

anxiety is very high. Petitioner's mother indicated that she and her husband are called down many times during the night to assist with Petitioner when she has a spasm because two persons are required to hold and reposition Petitioner. Petitioner's mother testified that the spasms also cause coughing episodes that result in extra suctioning and the need for cough assist. Petitioner's mother noted that Petitioner requires the cough assist device to get anything up; she cannot cough up anything on her own.

Petitioner's mother testified that she also submitted letters from her own doctors regarding swelling that she suffers from that often leaves her bedridden so she cannot care for Petitioner. (See Exhibit 1.) Petitioner's mother also noted that she has suffered from anxiety and depression for many years, and it is obviously worse since Petitioner's accident. (Exhibit 1, p 26.) Petitioner's mother testified that she also submitted evidence showing that her youngest son has autism and indicated that's why she needs day care after school – she cannot care for Petitioner and a six-year-old autistic child at the same time.

Petitioner's mother testified that they try to have Petitioner in school, but Petitioner is unable to make it on a regular basis and is home at least once or twice per week. Petitioner's mother noted that Petitioner also comes home early from school often so she must be there and cannot work outside of the home. Petitioner's mother also noted that some of the nursing notes submitted with the PA request were for times when they were training the nurses; that's why she and her husband were there. Petitioner's mother confirmed that currently BCBS is paying for the PDN, but they want to keep the Medicaid authorization active in case BCBS stops paying at some point.

In response, the Department's R.N., PA Reviewer again reviewed the difference between the Medium and High Intensity of Care categories in the MPM. The Department's R.N., PA Reviewer indicated that she put Petitioner in the Medium category due to the high number of interventions she requires, even though Petitioner can participate in her own care (which would normally place her in the Low category). The Department's R.N., PA Reviewer noted that if PDN were provided due to bladder issues, UTI's, or spasms, Petitioner might be in the High category, but, she noted, PDN is provided for respiratory issues. The Department's R.N., PA Reviewer also noted that there may be other services available to help Petitioner's mother and other family members, as indicated in the Notice of Action sent to Petitioner's family.

Based on the documentation submitted to the Department, the determination to deny Petitioner's request to increase PDN hours to 12 hours per day was proper because there was nothing in the documentation to support an increase in PDN. For the reasons outlined above by the Department's R.N., PA Reviewer, 10 PDN hours per day was sufficient to meet Petitioner's needs based on the information provided. Furthermore, according to the Decision Guide for PDN, Petitioner fits best into the Medium Intensity of Care and would be entitled to 4-10 hours of PDN per day, and the Department is authorizing at the top of that category at 10 PDN hours per day. The Department has a responsibility to ensure that all Medicaid beneficiaries are only receiving those services that are medically necessary and that those services are proper in the amount, scope

and duration necessary to meet the beneficiary's needs. Here, it appears that the Department may not have had the best information available at the time the decision was made, given that the two agencies that submitted prior authorization requests do not provide much care to Petitioner. However, the Department can only base its decision on the information provided. Likewise, the undersigned can only review the Department's decision based on the information it had when the decision was made. Petitioner's mother was given information on how to ensure that the most complete and accurate information is provided to the Department during subsequent authorizations. However, based on the evidence submitted at the time of this request, Petitioner failed to prove, by a preponderance of evidence that the denial of increased PDN was improper at the time it was made.

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 request to increase PDN hours from 10 PDN hours per day to 12 PDN hours per day based on the available information.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

RM/sb

Robert J. Meade
Administrative Law Judge

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
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