

**Managed Care Operations Memorandum**  
**General Operations**  
**MCOPS Memo # 05/2023-004**

**Date:** May 15, 2023

**Subject:** Reviewing Requests for Private Duty Nursing, Home Health, and Personal Care Services For Medical Necessity

**To:** All Physical Health HealthChoices Managed Care Organizations (PH-MCOs)

**From:** Gwendolyn Zander, Director, Bureau of Managed Care Operations, Office of Medical Assistance Programs

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**Purpose:**

To restate and update previous guidance regarding determinations of medical necessity for in-home and community skilled nursing, personal care, and home health aide services in the HealthChoices Physical Health program provided to a member under the age twenty-one (21), including services provided by that member's legally responsible relative employed as a home health aide by a home health agency.

**Background:**

MC Ops Memo #MCS-07/2010-014, Policies Concerning Medical Necessity Determinations for In-Home and Community services, was issued on July 10, 2010. The intent of this MC Ops Memo was to remind all HealthChoices PH-MCOs of the policies governing medical necessity determinations for in-home and community services.

On July 22, 2016, the Department of Human Services (the Department) issued MC Ops Memo #MCS-07/2016-008, Guidance Regarding the Review of Requests for Skilled Nursing, Personal Care Services, including that Provided by Home Health Aides, to provide additional guidance on this policy, which was prompted by the Department's review of prior authorization policies, denial logs, and grievances and appeals data.

The Department's Medical Assistance program has provided coverage of personal care services through home health aides. Although provided by home health aides, these were covered under the Personal Care category of services in the Pennsylvania Medical Assistance State Plan. Personal care services are subject to a federal prohibition found in 42 U.S.C. § 1396d(a)(24)(B) and 42 C.F.R. § 440.167, which prohibits payment to "legally responsible relatives" for provision of personal care services. During the COVID-19 Public Health Emergency (PHE), Pennsylvania received a waiver of these provisions, which allowed for payment to legally responsible relatives providing personal care services, as

described in MC Ops Memo #MCS-11/2020-016. This waiver was limited in duration and is scheduled to expire May 11, 2023 upon the expiration of the PHE.

In an effort to prepare for this expiration, the Department coordinated with the Centers for Medicare & Medicaid Services (CMS) to obtain clarification about the instances in which legally responsible relatives may be paid to provide personal care services following the expiration of the PHE. In February 2023, the Department received guidance from CMS stating that, when these services are provided by a legally responsible relative that is employed and acting in their capacity as a home health aide, and the services meet the requirements in federal law for home health services, these services can be claimed as home health services rather than personal care services. Home health services are not subject to the same prohibition as personal care services, and therefore qualified legally responsible relatives may be paid for providing them.

#### **Discussion:**

#### **Private Duty Nursing (Shift Nursing), Personal Care, and Home Health Aide Services for Members Under Age 21**

Private duty nursing services are skilled nursing services provided to members under 21 years of age who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff of the hospital or skilled nursing facility. These services are provided by a licensed registered nurse or a licensed practical nurse employed by a home health agency under the direction of the member's physician. These services are provided in the member's home, or outside of the home when normal life activities take the recipient outside of those settings. See CMS, State Medicaid Manual § 4310 (attached hereto).

Personal care services, including those provided by home health aides, are used to assist members with personal care needs. Personal care services cannot be denied based on the member's diagnosis or because the need for assistance is the result of a cognitive impairment. The "assistance may be in the form of hands-on assistance (actually performing a personal care task for a person) or cuing so that the person performs the task by him/her self." See CMS, State Medicaid Manual § 4480 (attached hereto). All determinations as to the medical necessity of requests for personal care and home health aide services must be consistent with State Medicaid Manual § 4480.

As outlined in Exhibit J to the HealthChoices Agreement, the PH-MCO is responsible to provide all medically necessary covered services for eligible recipients under twenty-one (21) years of age. The PH-MCO may require prior authorization for skilled nursing, personal care services, and home health services. However, if prior authorization is required, the PH-MCO must receive advance written approval from the Department for the prior authorization policy.

All PH-MCO policies must conform with the following requirements:

1. Each request for service must be reviewed for medical necessity using the definition of medical necessity set forth in the HealthChoices Agreement. The definition must be contained within the PH-MCO prior authorization policy.
2. Medically necessary skilled nursing services, personal care services, and home health services may be provided to a child in the home and in settings outside of the child's home.
3. PH-MCOs cannot require a minimum number of specified hours [e.g., four (4) continuous hours] be medically necessary in order to authorize services.
4. The PH-MCO must have a process in place to obtain the information to determine medical necessity.
  - a. If the requesting provider did not submit a Letter of Medical Necessity (LOMN) and/or a plan of care/treatment plan that identifies the course of treatment, the member's diagnosis, level of care or other information necessary to render a decision, the PH-MCO should outreach to the ordering provider to request the outstanding information by a given date prior to sending a "Request for Additional Information Letter", using Denial Notice Template N(7).
  - b. If the request does not have sufficient information about potential caregivers, the PH-MCO should outreach to the child's family, the requesting provider, and the home health agency, if one is staffing the case, to request additional information, such as caregiver work schedules, and other responsibilities of caregivers in the home.
5. When requests are denied as not medically necessary, the denial notice must include an explanation that identifies the specific reasons why the service requested was determined to be not medically necessary.
6. A request for medically necessary skilled nursing services, home health services, or personal care services may not be denied because:
  - a. A parent or caregiver is present in the home, unless the PH-MCO determines and substantiates the parent or live-in caregiver is actually able and available to provide the level or extent of care that the member needs during the time hours are requested. The PH-MCO must take into consideration the live-in caregiver's work schedule, sleep schedule, and other responsibilities, including other responsibilities both inside and outside of the home.

NOTE: If the parent or caregiver is employed as a nurse or home health aide and may be assigned to staff the member's case, the PH-MCO must consider the time that parent or caregiver is scheduled by his or her employing agency to provide nursing or home health services to be the parent or caregiver's work schedule, during which time the parent or caregiver is unavailable.

In this context, "other responsibilities" includes but is not limited to the following:

- i. Completing essential household duties such as shopping, housekeeping, laundry, yard work, errands, and medical appointments;
  - ii. Coordination of health care and services for the member;
  - iii. Attending religious service; and
  - iv. Care of other children in the home, including attending their extracurricular activities.
- b. The PH-MCO believes that the service should be covered as part of a child's Individualized Education Program (IEP) or Section 504 Plan (Section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794]).
7. PH-MCOs may not deny coverage of or limit the number of authorized hours that may be provided by individual, specific nurses or home health aides, including legally responsible relatives.
- a. It is the responsibility of the employing home health agency to identify qualified, physically capable, safe, acceptable, and trained staff to provide authorized services.
  - b. It is also the responsibility of the employing home health agency to provide adequate supervision of nurses and home health aides to ensure services are rendered in accordance with the authorization and the agency's policies and procedures. This includes ensuring approved ratios (e.g., 1:1) are adhered to, and that staff are sufficiently free from distractions or other responsibilities to competently perform their duties.

**Next Steps:**

1. PH-MCOs shall review all prior authorization policies for services included in the scope of this MC OPS memo and determine whether revisions are necessary. If revisions are necessary, PH-MCOs shall submit revised policies to the Department's Prior Authorization Review Process no later than 60 days after the date of this MC Ops Memo.
2. PH-MCOs shall provide the appropriate level of training on this policy to all staff responsible for the following functions: review of requests for prior authorization, review of complaints and grievances, case management, Special Needs Unit, and member-facing staff.
3. PH-MCOs should submit any questions regarding this MC OPs Memo to their assigned Bureau of Managed Care Operations Contract Manager.

**Obsolete:**

This MC OPS memo replaces the previously issued MC OPS memos, MCS-07/2010-014, MCS-07/2016-008, and MCS-11/2020-016, and will remain in effect until it is superseded.

This MC OPS memo also supersedes any previously issued guidance that is inconsistent with the provisions of this memorandum.

**Attachments:**

CMS, State Medicaid Manual §§ 4310, 4480

## REQUIREMENTS AND LIMITS

04-92

APPLICABLE TO SPECIFIC SERVICES

4310

### 4310. PRIVATE DUTY NURSING SERVICES

A. Background.--Section 1905(a)(8) of the Act includes private duty nursing services in the definition of medical assistance.

Private duty nursing services are optional. You may elect to cover these services under your program.

42 CFR 440.80 defines private duty nursing services as nursing services for recipients who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff of the hospital or nursing facility, and which are provided:

- o By a registered nurse or a licensed practical nurse;
- o Under the direction of the recipient's physician; and
- o At the State's option, to a recipient in one or more of the following locations:
  - His or her own home;
  - A hospital; or
  - A nursing facility.

B. Locations Where Services May be Provided.--Private duty nursing services may be provided in a recipient's home, hospital or nursing facility or, for recipients who are eligible for such services in the home, hospital or nursing facility, services may be provided outside of those settings when normal life activities take the recipient outside of those settings.

Although HCFA has directed, in 42 CFR 440.80, that private duty nursing services may only be provided in a recipient's home, hospital or nursing facility, HCFA's interpretation of these regulations was found to be too narrow under the decision in Detsel v. Sullivan. The Court in Detsel found that these regulations were being interpreted in an outdated and narrow manner so as to preclude a claimant who resided at home from receiving Medicaid payment for private duty nursing services rendered during those few hours each day when normal life activities required the claimant to leave home to attend school. The Secretary, the Court found, did not provide a sufficiently reasonable explanation for the limitation on the locations in which private duty nursing services could be provided. Following the Detsel decision, HCFA adopted the policy that for Medicaid recipients who would otherwise be eligible for private duty nursing services pursuant to 42 CFR 440.80, private duty nursing services rendered during those hours when the recipient's normal life activities take him or her outside the home are covered. Rev. 59 4-339

## REQUIREMENTS AND LIMITS

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The Detsel decision does not, however, alter the basic requirement specified in 42 CFR 440.80(c) that a recipient be required and authorized to receive private duty nursing services in the home, hospital or nursing facility. Therefore, if a recipient wants to obtain private duty services to attend school or other activities outside of the home but does not need such services in the home, hospital or nursing facility, there is no basis for authorizing private duty nursing services. Rather, only those individuals who require and are authorized to receive private duty nursing services in the home, hospital or nursing facility setting may utilize their approved hours outside of those settings during those hours when normal life activities take the recipient outside of those settings. Any limitations a State chooses to impose on private duty nursing services, including maximum hour limits, are not affected by the policy change occasioned by the Detsel case decision. Total time and payment allowed for such services is not expected to exceed that which would have been allowed strictly in a home setting.

C. Scope of Services.--The scope of optional private duty nursing services is broader than that of nursing services under the mandatory home health benefit. Nursing services under the mandatory home health benefit must be provided inside the home (except for certain situations where recipients may receive such services in nursing facilities). (See 42 CFR 440.70(c).) Such services are defined in 42 CFR 440.70(b)(1) as part-time or intermittent. Under the private duty nursing benefit, nursing services can be offered on a more continuous basis and can be offered outside of the home. Regulations define private duty nursing services as more individual and continuous care than is available from a visiting nurse or institutional staff. HCFA has not defined or established parameters for the terms part-time or intermittent but rather leaves it to the State to define home health nursing services and the terms part-time or intermittent. By controlling the definition of these terms, it is the State which dictates where home health nursing services end and private duty nursing services begin.

## 4480. PERSONAL CARE SERVICES

A. General.--Effective November 11, 1997, HCFA published a final regulation in the Federal Register that removed personal care services from regulations at 42 CFR 440.170 and added a new section at 42 CFR 440.167, A Personal Care Services in a home or other location.@ The final rule specifies the revised requirements for Medicaid coverage of personal care services furnished in a home or other location as an optional benefit. This rule conforms to the Medicaid regulations and to the provisions of '13601(a)(5) of the Omnibus Budget Reconciliation Act (OBRA) of 1993, which added '1905(a)(24) to the Social Security Act to include payment for personal care services under the definition of medical assistance

Under '1905(a)(24) of the Act, States may elect, as an optional Medicaid benefit, personal care services furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for persons with mental retardation (ICF/MR), or institution for mental disease. The statute specifies that personal care services must be: (1) authorized for an individual by a physician in a plan of treatment or in accordance with a service plan approved by the State; (2) provided by an individual who is qualified to provide such services and who is not a member of the individual=s family; and (3) furnished in a home or other location.

B. Changes Made by Final Regulation.--Personal care services may now be furnished in any setting except inpatient hospitals, nursing facilities, intermediate care facilities for the mentally retarded, or institutions for mental disease. States choosing to provide personal care services may provide those services in the individual's home, and, if the State so chooses, in settings outside the home.

In addition, services are not required by Federal law to be provided under the supervision of a registered nurse nor does Federal law require that a physician prescribe the services in accordance with a plan of treatment. States are now permitted the option of allowing services to be otherwise authorized for the beneficiary in accordance with a service plan approved by the State.

C. Scope of Services.--Personal care services (also known in States by other names such as personal attendant services, personal assistance services, or attendant care services, etc.) covered under a State=s program may include a range of human assistance provided to persons with disabilities and chronic conditions of all ages which enables them to accomplish tasks that they would normally do for themselves if they did not have a disability. Assistance may be in the form of hands-on assistance (actually performing a personal care task for a person) or cuing so that the person performs the task by him/her self. Such assistance most often relates to performance of ADLs and IADLs. ADLs include eating, bathing, dressing, toileting, transferring, and maintaining continence. IADLs capture more complex life activities and include personal hygiene, light housework, laundry, meal preparation, transportation, grocery shopping, using the telephone, medication management, and money management. Personal care services can be provided on a continuing basis or on episodic occasions. Skilled services that may be performed only by a health professional are not considered personal care services.

1. Cognitive Impairments.--An individual may be physically capable of performing ADLs and IADLs but may have limitations in performing these activities because of a cognitive impairment. Personal care services may be required because a cognitive impairment prevents an individual from knowing when or how to carry out the task. For example, an individual may no



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longer be able to dress without someone to cue him or her on how to do so. In such cases, personal assistance may include cuing along with supervision to ensure that the individual performs the task properly.

2. Consumer-Directed Services.--A State may employ a consumer-directed service delivery model to provide personal care services under the personal care optional benefit to **individuals in need of personal assistance, including persons with cognitive impairments, who have** the ability and desire to manage their own care. In such cases, the Medicaid beneficiary may hire their own provider, train the provider according to their personal preferences, supervise and direct the provision of the personal care services and, if necessary, fire the provider. The State Medicaid Agency maintains responsibility for ensuring the provider meets State provider qualifications (see **E below**) and for **monitoring service delivery. Where an individual does not have the ability or desire to manage their own care, the State may either provide personal care services without consumer direction or may permit family members or other individuals to direct the provider on behalf of the individual receiving the services.**

D. Definition of Family Member.--Personal care services may not be furnished by a member of the beneficiary=s family. Under the new final rule, family members are defined to be A legally responsible relatives.@ Thus, spouses of recipients and parents of minor recipients (including stepparents who are legally responsible for minor children) are included in the definition of family member. This definition necessarily will vary based on the responsibilities imposed under State law or under custody or guardianship arrangements. Thus, a State could restrict the family members who may qualify as providers by extending the scope of legal responsibility to furnish medical support.

E. Providers.--States must develop provider qualifications for providers of personal care services and establish mechanisms for monitoring the quality of the service. Services such as those delegated by nurses or physicians to personal care attendants may be provided so long as the delegation is in keeping with State law or regulation and the services fit within the personal care services benefit covered under a State=s plan. Services such as assistance with taking medications would be allowed if they are permissible in States= Nurse Practice Acts, although States need to ensure the personal care assistant is properly trained to provide medication administration and/or management.

States may wish to employ several methods to ensure that recipients are receiving high quality personal care services. For example, States may opt to a criminal background check or screen personal care attendants before they are employed. States can also establish basic minimal requirements related to age, health status, and/or education and allow the recipient to be the judge of the provider=s competency through an initial screening. States can provide training to personal care providers. States also may require agency providers to train their employees. States can also utilize case managers to monitor the competency of personal care providers. State level oversight of overall program compliance, standards, case level oversight, attendant training and screening, and recipient complaint and grievance mechanisms are ways in which States can monitor the quality of their personal care programs. In this way, States can best address the needs of their target populations and develop unique provider qualifications and quality assurance mechanisms.