

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARINGS SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

Docket No. 2012-41586 EDW

██████████

██████████

Appellant

_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200 et seq. upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████ ██████████. Appellant's aunt/guardian, appeared and testified on behalf of the Appellant. ██████████ ██████████, an R.N. with Personal Touch Home Healthcare, also testified on behalf of the Appellant.

██████████, Regional Manager, appeared and testified on behalf of the Department's MI Choice Waiver Agency, Area Agency on ██████████

ISSUE

Did the MI Choice Waiver Agency properly deny the Appellant's request for 4 additional hours of Private Duty Nursing 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. The Department contracts with Area Agency on ██████████ (AAA ██████████ or Waiver Agency) to provide MI Choice Waiver services to eligible beneficiaries.
2. AAA ██████████ must implement the MI Choice Waiver program in accordance to Michigan's waiver agreement, Department policy and its contract with the Department.
3. Appellant is a ██████████ year old (DOB 1/5/91) Medicaid beneficiary. (Exhibits A & D-E).

4. Appellant aged out of the Children's Special Health Services program (CSHS) when she turned █████ years old and was assessed on that day for enrollment in the MI Choice Waiver program. (Exhibits A-E and testimony).
5. AAA █████ was informed by Appellant's guardian that Appellant was receiving █████ hours per day of Private Duty Nursing (PDN) services. AAA █████ determined that Appellant's assessment for the MI Choice Waiver program supported █████ hours per day of PDN. (Exhibits A-C).
6. Due to the complex nature of the Appellant's condition, with frequent seizures and ventilator dependency for respiratory support, AAA █████ submitted the paperwork to the Department on █████ for the approval of the █████ hours per day of PDN as a Special Memorandum of Understanding (SMOU). (Exhibits A & D).
7. On █████, AAA █████ received an e-mail from the Department that only █████ hours per day of PDN would be approved. AAA █████ then prepared a revised SMOU that authorizes only █████ hours per day of PDN for the Appellant. (Exhibits C & E).
8. On █████, MAHS received Appellant's request for a hearing to contest the denial of the additional hours of PDN services that she was requesting. (Exhibit F).

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 Appellant is claiming services through the Department's Home and Community Based Services for Elderly and Disabled (HCBS/ED). The waiver is called MI Choice in Michigan. The program is funded through the federal Centers for Medicare and Medicaid (formerly HCFA) to the Michigan Department of Community Health (Department). Regional agencies, in this case an Area Agency on Aging (AAA), function as the Department's administrative agency.

Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to adapt their programs to the special needs of particular areas or groups of recipients. Waivers allow exceptions to State plan requirements and permit a State to implement

innovative programs or activities on a time-limited basis, and subject to specific safeguards for the protection of recipients and the program. Detailed rules for waivers are set forth in subpart B of part 431, subpart A of part 440 and subpart G of part 441 of this chapter. *42 CFR 430.25(b)*

A waiver under section 1915(c) of the [Social Security] Act allows a State to include as “medical assistance” under its plan, home and community based services furnished to recipients who would otherwise need inpatient care that is furnished in a hospital, SNF [Skilled Nursing Facility], ICF [Intermediate Care Facility], or ICF/MR [Intermediate Care Facility/Mentally Retarded], and is reimbursable under the State Plan. *42 CFR 430.25(c)(2)*.

Home and community based services means services not otherwise furnished under the State’s Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this subchapter. *42 CFR 440.180(a)*.

Home or community-based services may include the following services, as they are defined by the agency and approved by CMS:

- Case management services.
- Homemaker services.
- Home health aide services.
- Personal care services.
- Adult day health services
- Habilitation services.
- Respite care services.
- Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.

Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization. *42 CFR 440.180(b)*.

The MI Choice Policy Chapter to the *Medicaid Provider Manual, MI Choice Waiver*, April 1, 2012, provides in part:

4.1 COVERED WAIVER SERVICES

In addition to regular State Plan coverage, MI Choice participants may receive services outlined in the following subsections. [p. 9].

* * *

4.1.P. PRIVATE DUTY NURSING

Private Duty Nursing (PDN) services consist of individual and continuous nursing care (in contrast to "Skilled Nursing" services characterized by part-time or intermittent care) provided by licensed nurses within the scope of State law. These services are provided to a participant at home. MI Choice participants 18-21 years old who meet the eligibility requirements for Medicaid State Plan PDN services will continue to receive PDN services through the Medicaid State Plan and will not receive PDN services through MI Choice. Older MI Choice participants may continue to receive PDN services as a MI Choice service.

Participants receiving PDN services must remain on active status when determining reassessment schedules. Refer to the Reassessment of Participants subsection of this chapter for additional information. PDN services cannot be used in place of, or as a substitute for, other waiver or State Plan services. [p. 15].

* * *

8.3.A. EXCEPTIONAL CARE NEEDS

MDCH recognizes that the care needs of some participants are exceptional in comparison with the general MI Choice population. Rather than omit such participants from the program, MDCH provides waiver agencies extra consideration in allowing the waiver agencies to authorize the necessary services and support for such individuals.

A Memorandum of Understanding (MOU) for participants with extensive service and support needs may be requested for participants whose average daily service costs meet or exceed \$120 for a seven-day service week, regardless of how many days the participant actually received services. MDCH will not approve an MOU request to cover short-term increases in service costs due to temporary increases in MI Choice services. MDCH defines short-term as less than 30 days.

MDCH will authorize a Special Memorandum of Understanding (SMOU) for participants with complex medical acuity who require extensive MI Choice services. MDCH will consider an SMOU for participants meeting at least one of the following:

- Participant is aging out of the Children's Special Health Care Services program or transferring from the Habilitation Supports

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- Participant is ventilator-dependent
- Participant has a tracheotomy that requires extensive suctioning, tracheotomy care, or nebulizer treatments
- Participant has multiple wounds at stages 2, 3, or 4 that require frequent dressing changes and treatment
- Participant has a medical condition with a high acuity and the attendant-required care is complex (i.e., a combination of tube feedings, dressing changes, intravenous medications, oxygen therapy, colostomy/ileostomy, etc.)

MDCH will not approve an SMOU for participants for the following:

- Participant requires a temporary increase in services to either provide relief for, or substitute for, informal support
- Participant requires a temporary increase in services to cover night, weekend, or holiday premiums for staff

The waiver agency must apply for an SMOU through procedures stipulated in Appendix C of the waiver agency contract. MDCH approves SMOU requests for up to one year.

Waiver agencies must receive MDCH approval for enhanced services. [p. 25]

The Appellant requested that she receive an additional 4 hours per day of PDN, or the █ hours per day she was previously receiving under the children's waiver program, through the MI Choice Waiver program. The Appellant appealed the denial, and thus, bears the burden of proving, by a preponderance of evidence that she is entitled to the additional 4 hours per day of PDN she is requesting.

██████████ the Regional Manager for AAA █ testified on behalf of the Waiver Agent that she supervised the care managers who authorize Medicaid services. █ stated Appellant was assessed for the MI Choice Waiver program on █ Appellant had aged out of the CSHS program, and under that program she had been receiving █ hours per day of PDN. Appellant was enrolled in the MI Choice program and Ms. Selmek said the assessment supported █ hours per day of PDN. (See Exhibit D).

██████████ stated since Appellant's case involved a person with complex medical needs, she prepared an SMOU for the Department's approval of the █ hours per day of PDN. █ stated she was later informed the Department would only authorize 10 hours per day of PDN, so a revised SMOU was prepared authorizing only █ hours per day of PDN for the Appellant. (See Exhibit E). █ stated they followed the requirements contained in Attachment K to their contract with MDCH in seeking

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authorization for the PDN in this case.

██████████ stated the assessment done by AAA ██████ only took into consideration the Appellant herself and her own needs, along with the prior authorization of 14 hours per day of PDN. AAA ██████ did not have any information on the other persons in the Appellant's home who were also receiving services and what services might be shared by other Medicaid recipients. ██████ stated the Department would have had such additional information when they determined the amount of PDN to be authorized in this case. Accordingly, AAA ██████ authorized the ██████ hours per day of PDN approved by the Department.

The Appellant's guardian ██████ testified she was the Appellant's primary caregiver. ██████ indicated her husband was also an available caregiver in the home. ██████ stated she did not work out of the home, and her husband was retired. ██████ said the Appellant is "total care" and she has two other disabled adults, her son and daughter, who she takes care of in the home. ██████ said there are also two children under ██████ in the home.

██████████ stated the only Medicaid service the Appellant receives is the PDN. She stated she provides all of Appellant's care when a nurse was not present. She stated the Appellant needs constant monitoring and frequent Care interventions. ██████ reaffirmed what she wrote in her Request for Hearing, to appeal from the denial of the additional ██████ hours per day of PDN

██████████ stated he was a registered nurse with Personal Touch Home Healthcare. He stated his concern for the Appellant was the safety issue for the Appellant's respiratory care. ██████ stated Appellant was vent dependent and requires frequent suctioning and intervention to maintain her airway. He stated due to the time needed to intervene, it would be a safety issue if the PDN hours were reduced, and someone was not present to clear the Appellant's airway. Some days Appellant requires very frequent suctioning and this raises a safety concern.

This ALJ finds the MI Choice Waiver Agency properly denied the Appellant's request for the additional ██████ hours per day of PDN services. The Medicaid policy cited above makes it clear that the Waiver Agency must seek approval from MDCH for such enhanced services. The Waiver Agency followed proper procedures in seeking an SMOU from the Department for authorization of the ██████ hours per day being requested by the Appellant.

MDCH denied the request for ██████ hours and instead, based on more complete information, was only able to approve ██████ hours per day of PDN for the Appellant. The Appellant did not submit any new or additional information that was not already considered by the Department when it reached its decision that only ██████ hours per day of PDN would be authorized. Accordingly, the Appellant has failed to meet her burden of showing by a preponderance of the evidence that she should receive the additional ██████ hours per day of PDN.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, this Administrative Law Judge finds the MI Choice Waiver Agency properly denied the Appellant's request for the additional [REDACTED] hours per day of PDN services.

IT IS THEREFORE ORDERED that:

The MI Choice Waiver Agency's decision is **AFFIRMED**.

William D Bond

William D. Bond
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 5-14-12

***** NOTICE *****

The Michigan Administrative Hearing System may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The Michigan Administrative Hearing System will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.