**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) 373-4147

IN THE MATTER OF:

**Docket No.** 2013-40678 EDW

[redacted]

Appellant

[redacted]/

## 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 [redacted] Appellant's mother/guardian, appeared and testified on behalf of the Appellant.

[redacted], R.N., Quality and Training Manager, appeared and testified on behalf of the Department's MI Choice Waiver Agency, the [redacted], the [redacted]

## ISSUE

Did the MI Choice Waiver Agency properly deny the Appellant's request for eight additional hours of Private Duty Nursing services on Saturdays and Sundays?

## 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 [redacted] ([redacted] or Waiver Agency) to provide MI Choice Waiver services to eligible beneficiaries.

2. [redacted] 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[redacted] year old ([redacted] Medicaid beneficiary. (Exhibit A, Attachment 3, p. 1 and testimony).

4. Effective [redacted] Appellant's Private Duty Nursing (PDN) was reduced to [redacted] hours per day [redacted] through [redacted] and [redacted] hours per day on [redacted] and [redacted]. An Advance Action Notice was sent to the Appellant to advise her of the reduction. The notice advised that Appellant's one hour of personal care and [redacted] hours of homemaking would continue without disruption. (Exhibit A, Attachment 2).

5. On [redacted], MAHS received Appellant's request for a hearing to contest the reduction in the PDN services. (Exhibit 1).

## 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 [redacted] 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, 2013, 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].

Limits on the amount of PDN that can be authorized by a Waiver Agency were put into effect on April 1, 2013, and were incorporated in the April 1, 2013 updates to the Medicaid Provider Manual. *Medicaid Provider Manual*, *Private Duty Nursing*, §2.4, pp. 11-12, April 1, 2013, which provides:

> **2.4 DETERMINING INTENSITY OF CARE AND MAXIMUM AMOUNT OF PDN [CHANGE MADE 4/1/13]**
>
> 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 Guideis 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.

| 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.

Appellant's Private Duty Nursing (PDN) was reduced to [redacted] hours per day [redacted] through [redacted] and eight hours per day on [redacted] and [redacted] The Appellant appealed the reduction and requested an additional eight hours per day of PDN, on [redacted] and [redacted]. Thus, the Appellant bears the burden of proving, by a preponderance of evidence that she is entitled to the additional [redacted] hours per day of PDN she is requesting for [redacted] and [redacted]

[redacted] R.N., testified on behalf of the Waiver Agency that the Appellant was a high needs beneficiary. She has a Special Memorandum of Understanding (SMOU) with the Department to allow for more services than the average beneficiary would receive. [redacted] stated that new guidelines for the authorization of PDN were put in place by the Department effective [redacted] accordingly all beneficiaries including the Appellant had to be reviewed in accordance with the new policy to make sure the PDN being authorized complied with the new guidelines. (See §2.4 of the Private Duty Nursing chapter quoted above).

[redacted] stated the Appellant's primary supports coordinator, [redacted] R.N., filed an application with the Department for an SMOU and requested additional PDN services for the Appellant. [redacted] then received an e-mail from [redacted] at MDCH, the person responsible for SMOUs with the Department, indicating that the Waiver Agency could only authorize the [redacted] hours per day [redacted] through [redacted], and only [redacted] hour increments on [redacted] and [redacted]. [redacted] stated that the e-mail referenced the new policy and the policy places a limit on the number of hours that can be authorized when the beneficiary is eligible for skilled nursing services through Medicare, as Medicaid is the payer of last resort.

[redacted] pointed out that there were two caregivers for the Appellant who do not work on the weekends. The amount of PDN hours authorized for the Appellant were in the midrange on the chart quoted above, and would have been limited in part by the fact that the Appellant could apply for Medicare and have additional skilled nursing hours paid for by Medicare, which could get the Appellant back to the number of nursing hours she had before the reduction. [redacted] concluded by stating that the Waiver Agency authorized the maximum number of PDN hours allowed by the Department based on the new policy put into effect on [redacted]

The Appellant's mother/guardian testified that nothing had changed in regards to the Appellant's condition, and she could not understand what the reduction in PDN hours was based on. The sudden change posed a hardship on the family and both the father and mother were still working at that time. Appellant's mother stated the [redacted] hours [redacted] through [redacted] were sufficient, but having only [redacted]t hours on [redacted] and [redacted] has forced her to spend her entire weekends taking care of the Appellant. The Appellant's mother acknowledged that she does have the home healthcare aide, but the aide is not trained to take care of the Appellant alone. The Appellant's mother indicated there is no one else available to help her take care of the Appellant. The Appellant's mother did acknowledge that she could apply for Medicare for her daughter, but could

use some assistance with the application. [redacted] provided her with a toll free number for the person at the Waiver Agency who could assist her with such information.

This ALJ finds the MI Choice Waiver Agency properly denied the Appellant's request for the additional [redacted] hours per day of PDN services on [redacted] and [redacted]. The Medicaid policy cited above makes it clear that the Waiver Agency is limited in the number of PDN hours that can be authorized under the recent changes to the PDN chapter in the Medicaid Provider Manual. Furthermore, the Waiver Agency acted under the direction of the Department when it set the number of PDN hours 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 [redacted] hours per day of PDN would be authorized for [redacted] and [redacted]. Accordingly, the Appellant has failed to meet her burden of showing by a preponderance of the evidence that she should receive the additional [redacted] hours per day of PDN on [redacted] and [redacted].

## 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 on [redacted] and [redacted]

**IT IS THEREFORE ORDERED** that:

The MI Choice Waiver Agency's decision is AFFIRMED.

William D. Bond
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

Date Signed: [redacted]
Date Mailed: [redacted]

WDB/db

cc: [redacted]

***** 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.