

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

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**IN THE MATTER OF:**

██████████,

Appellant

**Docket No.** 2013-37447 EDW  
**Case No.** ██████████

**DECISION AND ORDER**

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

After due notice, a hearing was held on ██████████. Appellant appeared and testified on his own behalf. ██████████, Quality and Training Manager, represented the Department of Community Health's Waiver Agency, The ██████████ ("Waiver Agency" or "██████████"). ██████████, supports coordinator, also testified as a witness for the Waiver Agency.

**ISSUE**

Did the Waiver Agency proper reduce Appellant's services through the MI Choice waiver program?

**FINDINGS OF FACT**

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. Appellant is a ██████ year-old male who has been diagnosed with, among other conditions, quadriplegia, coronary heart disease, peripheral vascular disease, anxiety, and phantom limb syndrome. (Respondent's Exhibit 3, pages 1, 9-10).
2. ██████████ is a contract agent of the Michigan Department of Community Health (MDCH) and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services.
3. Appellant has been enrolled in and receiving MI Choice waiver services through ██████████. (Respondent's Exhibit A, pages 1-19).
4. Specifically, Appellant is authorized for 19 hours of private duty nursing (PDN) and 5 hours of personal care services per day. (Testimony of Appellant; Testimony of ██████████).

5. Appellant had been previously authorized for 24 hours of PDN per day, but requested a switch to the current arrangement. (Testimony of Appellant).
6. According to Appellant, while he was authorized for PDN 24-hours-a-day, he was having difficulties finding reliable staff to work all those hours. (Testimony of Appellant).
7. Appellant never requested back-up nurses through the Waiver Agency and, instead, his mother was filling in the gaps in services. (Testimony of Appellant).
8. Appellant wanted his mother to be compensated for her services, but she is not a licensed nurse and could not be authorized or compensated for PDN. (Testimony of Appellant; Testimony of ██████████).
9. Appellant's mother could be compensated for providing personal care services, so Appellant requested the switch to 19 hours of PDN and 5 hours of personal care services per day, with his mother providing the personal care services. (Testimony of Appellant).
10. The Waiver Agency approved the new arrangement. (Testimony of Appellant; Testimony of ██████████).
11. On ██████████, Waiver Agency conducted a home visit and reassessment of Appellant's services. (Respondent's Exhibit A, pages 1-19).
12. On ██████████, ██████████ sent Appellant a written Advance Action Notice that his services would be reduced on ██████████. (Respondent's Exhibit 2, page 1). The notice specifically stated, in part, that:

Your private duty nursing hours have been decreased to 12 hours 7 days per [sic]. This will take effect on ██████████. The 5 hour [sic] of personal care daily will continue without disruption. [Respondent's Exhibit 2, page 1.]
13. On ██████████, the Michigan Administrative Hearing System (MAHS) received a Request for Hearing filed by Appellant. (Petitioner's Exhibit 1, page 1).
14. The reduction was not implemented and Appellant's were maintained at their current level while the appeal was pending. (Testimony of Appellant; Testimony of ██████████).

## **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.

Appellant is claiming services through the Department's Home and Community Based Services for Elderly and Disabled. The waiver is called MI Choice in Michigan. The program is funded through the federal Centers for Medicare and Medicaid Services to the Michigan Department of Community Health (Department). Regional agencies, in this case [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. See 42 CFR 430.25(c)(2).

Types of services that may be offered include:

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).]

In this case, as discussed above, Appellant has been receiving both personal care services and private duty nursing (PDN).

With respect to personal care services, the applicable version of the Medicaid Provider Manual (MPM) states:

#### **4.1.C. PERSONAL CARE**

Personal Care services encompass a range of assistance to enable program participants to accomplish tasks that they would normally do for themselves if they did not have a disability. This may take the form of hands-on assistance (actually performing a task for the participant) or cueing to prompt the participant to perform a task. Personal Care services are provided on an episodic or on a continuing basis. Health-related services that are provided may include skilled or nursing care to the extent permitted by State law.

Services provided through the waiver differ in scope, nature, supervision arrangement, or provider type (including provider training and qualifications) from Personal Care services in the State Plan. The chief differences between waiver coverage and State Plan services are those services that relate to provider qualifications and training requirements, which are more stringent for personal care provided under the waiver than those provided under the State Plan.

Personal Care includes assistance with eating, bathing, dressing, personal hygiene, and activities of daily living. These services may also include assistance with more complex life activities. The service may include the preparation of meals but does not include the cost of the meals themselves. When specified in the plan of service, services may also include such housekeeping chores as bed

making, dusting, and vacuuming that are incidental to the service furnished or that are essential to the health and welfare of the participant rather than the participant's family. Personal Care may be furnished outside the participant's home. [MPM, January 1, 2013 version, MI Choice Waiver Chapter, page 10.]

With respect to private duty nursing, the MPM provides:

#### **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. [MPM, January 1, 2013 version, MI Choice Waiver Chapter, page 15.]

Moreover, in the specific chapter on PDN in the MPM, the manual 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. [MPM, January 1, 2013 version, Private Duty Nursing Chapter, page 11.]

Specifically, the MPM also identifies three Intensity of Care categories: High, Medium, and Low. Regarding those categories, the MPM also provides:

### **High 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.

\* \* \*

### **Medium Category**

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.

\* \* \*

### **Low Category**

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. [MPM, January 1, 2013 version, Private Duty Nursing Chapter, page 11.]

The Intensity of Care category must be determined as part of determining the maximum amount of PDN a beneficiary is eligible for because it is a factor in the Decision Guide described by the MPM. In addition to using the Intensity of Care categories to determine PDN hours, the MPM also provides:

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.

\* \* \*

When using the Decision Guide, the following definitions apply:

- "Caregiver": legally responsible person (e.g., birth parents, adoptive parents, spouses), paid foster parents, guardian or other adults who are not legally responsible or paid to provide care but who choose to participate in providing care.
- "Full-time (F/T)": working at least 30 hours per week for wages/salary, or attending school at least 30 hours per week.
- "Part-time (P/T)": working at least 15 hours per week for wages/salary, or attending school at least 15 hours per week.
- "Significant" health issues: one or more primary caregiver(s) has a health or emotional condition that prevents the caregiver from providing care to the beneficiary (e.g., beneficiary weighs 70 pounds and has no mobility and the primary caregiver just had back surgery and is in a full-body cast).

- "Some" health issues: one or more primary caregiver(s) has a health or emotional condition, as documented by the caregiver's treating physician, that interferes with, but does not prevent, provision of care (e.g., caregiver has lupus, alcoholism, depression, back pain when lifting, lifting restrictions, etc.).
- "School" attendance: The average number of hours of school attendance per week is used to determine the maximum number of hours that can be authorized for the individual of school age. The average number of hours is determined by adding the number of hours in school plus transportation time. During planned breaks of at least 5 consecutive school days (e.g., spring break, summer vacation), additional hours can be authorized within the parameters of Factors I and II.

The Local School District (LSD) or Intermediate School District (ISD) is responsible for providing such "health and related services" as necessary for the student to participate in his education program. Unless medically contraindicated, individuals of school age should attend school. Factor III applies when determining the maximum number of hours to be authorized for an individual of school age. The Medicaid PDN benefit cannot be used to replace the LSD's or ISD's responsibility for services (either during transportation to/from school or during participation in the school program). [MPM, January 1, 2013 version, Private Duty Nursing Chapter, pages 11-13.]

The Decision Guide itself identifies the number of hours to be authorized, depending on a beneficiary's Intensity of Care category and his family situation/resource considerations, which includes the availability of caregivers in the home and the status of those caregiver(s). [MPM, January 1, 2013 version, Private Duty Nursing Chapter, page 12; Respondent Exhibit 1, page 2.]

Here, it is undisputed that Appellant has significant and complex medical issues, and that he requires some PDN. The dispute in this case is how much PDN should be authorized. According to the Waiver Agency's witnesses, they authorized the maximum amount allowed by the above policy and Decision Guide.

The Waiver Agency first concluded that Appellant falls within the Medium Intensity of Care category. In making that determination, the Waiver Agency found that Appellant only requires nursing assessments, judgments and interventions by a licensed nurse 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.

In addition to the determination regarding Appellant's intensity of care category, the Waiver Agency also found that Appellant has one caregiver, his mother, and that Appellant's caregiver works or is in school full- or part-time.

Given Appellant's family situation/resource considerations and his intensity of care category, the Waiver Agency calculated that, pursuant to the Decision Guide found in the MPM, 12 hours a day was the maximum amount of PDN that could be authorized per day for Appellant.

Appellant does not dispute the Waiver Agency's regarding his caregiver's situation. However, he does argue that he falls within the High Intensity of Care category and is therefore eligible for more, medically necessary PDN hours.

In making that argument, Appellant asserts that he requires nursing assessments, judgments and interventions by a licensed nurse at least one time each hour throughout a 24-hour period. According to Appellant, he has always required and been approved for 24-hours-a-day care through the Waiver Program and that, before his services was changed at his own request, he was receiving PDN 24-hours-a-day. Nothing has changed with respect to Appellant's medical needs.

Appellant acknowledges that he does not currently receive PDN 24-hours-a-day, but he also testified that the lessened hours authorized are by his own choice and due to extenuating circumstances. As described above, Appellant testified that he previously requested that his services be changed from 24 hours per day, 7 days a week, of PDN to 19 hours of PDN and 5 hours of personal care services per day, 7 days a week. Appellant also testified that he requested the change because, while his was authorized PDN at all times, he was having difficulties in staffing nurses and his mother was providing care when there were gaps in PDN. Appellant wanted his mother to be compensated for at least some of her time and he reached an agreement to have the Waiver Agency authorize 5 hours a day of personal care services, with his mother as the paid caregiver. To have Appellant's mother compensated, a change in services had to be made because she is not a licensed nurse and could not be authorized or compensated for PDN.

Regardless of how the change came about, however, it is undisputed that Appellant's mother takes care of Appellant by herself for at least 5 hours a day and, if Appellant's mother can provide appropriate care during those 5 hour blocks, despite the fact that she is not a trained nurse, then there is no need for nursing assessments, judgments and interventions by a licensed nurse at least one time each hour throughout a 24-hour period. The mere fact that the nurses have been providing satisfactory care and that Appellant is more comfortable with having a nurse with him as often as possible does

not mean that such skilled nursing is medically necessary. Similarly, the undisputed fact that some training is required before a person would be qualified to care for Appellant also does not mean that skilled nursing is required at least one time an hour throughout a 24-hour period. A trained provider is not a licensed nurse and, as demonstrated by Appellant's mother, non-nurses can be trained to provide the appropriate amount of care.

This Administrative Law Judge therefore finds that Appellant does not require nursing assessments, judgments and interventions by a licensed nurse 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. Accordingly, he falls, at best, within the Medium Category on the MPM's Decision Guide for PDN and, given his caregiver's situation, his PDN is capped at 12 hours a day. See MPM, January 1, 2013 version, Private Duty Nursing Chapter, page 12; Respondent Exhibit 1, page 2.

Appellant's representative also testified and argued that, if he is only approved for 12 hours of PDN per day, then his mother would be responsible for caring for him at all other times and requiring her alone to care for him 84 hours a week is both unsafe and unreasonable. However, as described above, if the Waiver Agency properly found that Appellant only falls into Medium Category described in the MPM with respect to PDN, then ██████████ has already authorized the maximum amount of PDN that is allowed by policy.

Additionally, as noted by the Waiver Agency, Appellant also receives 5 hours a day of personal care services. While his mother is the paid caregiver for those services at the moment, Appellant can always hire a different caregiver and pay someone else for those 35 hours per week of services. Appellant correctly notes that his mother has received significant training, but the fact that some training might be required before a person would be qualified to provide personal care services for Appellant does not mean that PDN is required. As demonstrated by Appellant's mother, non-nurses can be trained to provide those services. The Waiver Agency's witnesses also indicated a willingness to help Appellant find an appropriate caregiver.

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in deciding to reduce his PDN hours. Here, Appellant has failed to meet that burden. The record fails demonstrate that Appellant requires nursing assessments, judgments or interventions by a licensed nurse at least once an hour as he argues. Rather, given that Appellant's mother alone can provide appropriate care for significant blocks of time despite the fact that she is not a trained nurse, the record instead demonstrates that and there is no need for hourly skilled nursing. Accordingly, the Waiver Agency properly found that Appellant falls within the Medium Category described in the MPM and only authorized 12 hours of PDN per day, which is the maximum amount it could approve under policy.

[REDACTED]  
Docket No. 2013-37447 EDW  
Decision and Order

**DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly reduced Appellant's services.

**IT IS THEREFORE ORDERED** that:

The Waiver Agency's decision to reduce Appellant's waiver services is **AFFIRMED**.

*Steven Kibit*

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Steven J. Kibit  
Administrative Law Judge  
for James K. Haveman, Director  
Michigan Department of Community Health

[REDACTED]  
Date Signed: 6/24/2013

Date Mailed: 6/24/2013

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.