STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P. O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax (517) 373-4147

IN THE MATTER OF:

Docket No. 14-012332 CMH

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*., and upon a request for a hearing filed on Appellant's behalf.

After due notice, a hearing was held on represented Appellant , Appellant's mother and co-legal guardian; , Clinical Nursing Supervisor with Director of Respiratory Services at ; n, owner of and , registered nurse; testified as witnesses for Appellant. , Manager of Due Process, represented Respondent , Unit Director of Supports Coordination; , Supports Coordination Supervisor; , Compliance Coordinator; and Director of Supports Coordination; from the , Inc.) testified as witnesses for

ISSUE

Did properly deny Appellant's request for additional private duty nursing (PDN) 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. is under contract with the Michigan Department of Community Health (MDCH) to provide Medicaid covered services.

2. In turn, contracts with service providers such as .

3. Appellant is a year-old female who receives services through and , and who has been diagnosed with cerebral palsy, tracheostomy, respirator dependent; epilepsy, severe mental retardation, and a seizure disorder. (Respondent's Exhibit 1, pages 6-7).

4. Prior to Appellant's birthday, her services included PDN services approved by MDCH's Program Review Division as part of Appellant's Medicaid coverage. (Testimony of ; Testimony of).

5. Those PDN services included both daily PDN and an additional hours per day of PDN when Appellant was out of school for more than consecutive days. (Testimony of ; Testimony of).

6. After Appellant's t birthday, any PDN would be authorized as part of the Habilitation Supports Waiver (HSW), with as the authorizing entity. (Testimony of .

7. Accordingly, with Appellant's t birthday approaching, held an Individual Plan of Service (IPOS) meeting with Appellant; Appellant's mother/co-legal guardian; Appellant's supports coordinator; l; and one of Appellant's paid care providers. (Respondent's Exhibit 1, page 7).

8. After the IPOS meeting, approved an IPOS in which Appellant was authorized for hours per week of PDN, hours per week of respite nursing, and hours per week of Community Living Supports (CLS). (Respondent's Exhibit 1, pages 11, 19-20).

9. Appellant participates in self-determination program and, with each approved service, the IPOS also noted that Appellant's hours were flexible and could be rearranged in light of Appellant's school hours, family circumstances, or health situation. (Respondent's Exhibit 1, pages 7, 11, 19-20).

10. The IPOS had an effective date of and it specifically noted that the services within it were only being authorized for days because of Appellant's pending request for Home Help Services (HHS) and the need to avoid duplicating services. (Respondent's Exhibit 1, page 8).

11. After receiving the IPOS, requested that replicate the PDN services Appellant has been receiving through the State Plan by authorizing an additional hours per day of PDN when Appellant was out of school for more than consecutive days. (Testimony of Testimony of .

12. In particular, noted that Appellant would be out of school entirely between and (Petitioner's Exhibit A, page 1; Testimony of).

13. On sent Appellant's guardian written notice that the request for additional PDN services was denied on the basis that the additional hours were not medically necessary as the "Current authorization of PDN, CLS, and Respite nursing, in addition to other supports, is sufficient to meet care needs while out of school." (Respondent's Exhibit 1, page 3).

14. The written notice also identified an effective date of , but later testified that she erred in giving "advance" notice of the denial; the denial should have been effective on the day the notice was mailed; and that the denial would have no effect on any future requests for services. (Respondent's Exhibit 1, page 3; Testimony of r).

15. On the Michigan Administrative Hearing System (MAHS) received a request for hearing filed on Appellant's behalf with respect to the denial of additional PDN services.

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:

> Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services.

42 CFR 430.0

Additionally, 42 CFR 430.10 states:

> The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of
>
> title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program.

42 CFR 430.10

Section 1915(b) of the Social Security Act also provides:

> The Secretary, to the extent he finds it to be cost-effective and efficient and not inconsistent with the purposes of this subchapter, may waive such requirements of section 1396a of this title (other than subsection(s) of this section) (other than sections 1396a(a)(15), 1396a(bb), and 1396a(a)(10)(A) of this title insofar as it requires provision of the care and services described in section 1396d(a)(2)(C) of this title) as may be necessary for a State…

42 USC 1396n(b)

The State of Michigan has opted to simultaneously utilize the authorities of the 1915(b) and 1915(c) programs to provide a continuum of services to disabled and/or elderly populations. Under approval from the Centers for Medicare and Medicaid Services (CMS) the Department of Community Health (MDCH) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver.

This case specifically involves Appellant's private duty nursing (PDN) through the Habilitation Supports Waiver (HSW) and, with respect to such services, the applicable version of the Michigan Medicaid Provider Manual (MPM) states in part:

> **SECTION 15 – HABILITATION SUPPORTS WAIVER FOR PERSONS WITH DEVELOPMENTAL DISABILITIES [CHANGES MADE 7/1/14]**
>
> Beneficiaries with developmental disabilities may be enrolled in Michigan's Habilitation Supports Waiver (HSW) and receive the supports and services as defined in this section.

> HSW beneficiaries may also receive other Medicaid state plan or additional/B3 services. A HSW beneficiary must receive at least one HSW service per month in order to retain eligibility. Medical necessity criteria should be used in determining the amount, duration, and scope of services and supports to be used. The beneficiary's services and supports that are to be provided under the auspices of the PIHP must be specified in his individual plan of services developed through the person-centered planning process.
>
> * * *
>
> Private Duty Nursing (PDN) services are skilled nursing interventions provided to individuals age 21 and older, up to a maximum of 16 hours per day, to meet an individual's health needs that are directly related to his developmental disability. PDN includes the provision of nursing assessment, treatment and observation provided by licensed nurses within the scope of the State's Nurse Practice Act, consistent with physician's orders and in accordance with the written health care plan which is part of the beneficiary's individual plan of services (IPOS). PDN services are for beneficiaries who require more individual and continuous care than periodic or intermittent nursing available through state plan services, e.g., Home Health. The individual receiving PDN must also require at least one of the following habilitative services, whether being provided by natural supports or through the waiver.
>
> - Community living supports
> - Out-of-home non-vocational habilitation
> - Prevocational or supported employment
>
> To be determined eligible for PDN services, the PIHP must find that the beneficiary meets Medical Criteria I as well as Medical Criteria III, or meets Medical Criteria II as well as Medical Criteria III. Regardless of whether the beneficiary meets Medical Criteria I or II, the beneficiary must also meet Medical Criteria III.
>
> * * *
>
> Once the Medical Criteria eligibility for PDN has been established, and as part of determining the amount of PDN a

beneficiary is eligible for, the 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 amount 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

The amount of PDN hours authorized represents a monthly total determined by calculating an average amount of PDN per day multiplied by the number of days in the month. The beneficiary has the flexibility to use the hours as needed during the month, not to exceed the total monthly authorized amount.

The amount of PDN (i.e., the number of hours that can be authorized for a beneficiary) is determined through the person-centered planning process to address the individual's

unique needs and circumstances. Factors to be considered should include the beneficiary's care needs which establish medical necessity for PDN; the beneficiary's and family's circumstances (e.g., the availability of natural supports); and other resources for daily care (e.g., private health insurance, trusts, bequests). Although the person-centered planning process is used to determine the exact amount of PDN specified in the IPOS, in general, a beneficiary who has Low Category PDN needs would require eight or fewer hours per day, a beneficiary who has Medium Category PDN needs would require 12 or fewer hours per day, and a beneficiary who has High Category PDN needs would require 16 or fewer hours per day.

The nurse may provide personal care only when incidental to the delivery of PDN, e.g., diaper changes, but may not provide routine personal care. The provision of personal care in unlicensed homes is through Home Help, a state plan service. If the beneficiary receiving PDN services demonstrates the need for Home Help services, the IPOS must document coordination of Home Help and PDN to assure no duplication of services.

Licensed nurses provide the nursing treatments, observation, and/or teaching as ordered by a physician, and that are consistent with the written individual plan of services.

These services should be provided to a beneficiary at home or in the community. A physician's prescription is required.

The PIHP must assess and document the availability of all private health care coverage (e.g., private or commercial health insurance, Medicare, health maintenance organization, preferred provider organization, Champus, Worker's Compensation, an indemnity policy, automobile insurance) for private duty nursing and will assist the beneficiary in selecting a private duty nursing provider in accordance with available third-party coverage. This includes private health coverage held by, or on behalf of, a beneficiary.

If a beneficiary is attending school and the Individualized Educational Plan (IEP) identifies the need for PDN during

> transportation to and from school and/or in the classroom, the school is responsible for providing PDN during school hours. For adults up to age 26 who are enrolled in school, PDN services are not intended to supplant services provided in school or other settings or to be provided during the times when the beneficiary would typically be in school but for the parent's choice to home-school.

MPM, July 1, 2014 version
Mental Health/Substance Abuse Chapter, pages 94, 103, 106-107

It is undisputed in this case that Appellant needs PDN and it is only the amount of hours to be authorized that is at issue. As discussed above, in addition to hours per week of respite nursing and hours per week of CLS, approved hours per week of PDN for Appellant while Appellant seeks to replicate the PDN she was receiving under the State Plan and receive an additional hours per day of PDN when Appellant is out of school for more than consecutive days.

Appellant bears the burden of proving by a preponderance of the evidence that and erred in denying her request for additional PDN. Moreover, this Administrative Law Judge is limited to reviewing the Respondent's decision in light of the information it had at the time it made that decision.

Here, Appellant established that, while Appellant has an extended school year and is never out of school for more than weeks at a time, the school does have frequent week breaks and that one of those week breaks fell within the time period of the IPOS at issue in this case as Appellant was out of school between and . (Petitioner's Exhibit A, page 1; Testimony of).

According to looked at everything when allocating Appellant's total hours and, while there were not different allocations made for the month Appellant was in school full-time and the month she had a week break, Appellant's approved services were flexible and believed that Appellant could plan around any school breaks. (Testimony of).

In response, Appellant's witnesses first testified regarding the services Appellant receives in school. Specifically, Appellant's witnesses testified that, while school is in session, Appellant attends school days a week and is gone from the home for approximately hours per school day, which includes the time it takes to transport Appellant to school and back, and that Appellant requires PDN when being transported (provided as part of Appellant's PDN through and during school hours (provided by the school). (Testimony of ; Testimony of). During school, nurses monitor and provide any necessary services for students, including Appellant, divided up into classrooms. (Testimony of). A nurse is always nearby, if not present, in Appellant's classroom. (Testimony of).

Appellant's witnesses and representative also argued that Appellant's needs do not change simply because she is out of school and that the PDN services provided by the school need to be replaced and all of Appellant's needs accounted for when Appellant has a significant break from school.

further testified that she has upcoming surgeries scheduled for herself, which will significantly affect her ability to provide care and informal supports to Appellant, and that she is worried that there will not be enough PDN hours authorized if Appellant gets sick and misses a significant amount of school.

However, while future changes, such as surgeries for Appellant's primary informal support or a worsening medical condition, may affect Appellant's need for services, those potential issues are not relevant in this case as the undersigned Administrative Law Judge is limited to reviewing the decision at issue in this case in light of the information available at the time. To the extent Appellant's need for services changes or Appellant has new or updated information to provide, she can always request additional services from and

With respect to the sole decision at issue here, the denial of Appellant's request for additional PDN, the undersigned Administrative Law Judge finds that Appellant has failed to meet her burden of proving by the preponderance of the evidence that erred and that the denial must therefore be affirmed. Appellant clearly loses hours of care when on a break from school, but even Appellant's representative and witnesses acknowledge that there does not need to be replacement for school hours as they only seek an additional hours of PDN per day. Moreover, as argued by Respondent, Appellant can utilize her services in such a way to account for the scheduled school breaks and need for more PDN as Appellant has been approved for a significant amount of services and has the flexibility to use them as necessary. For example, while Appellant's total PDN equals hours per day, it does not appear that Appellant needs to use hours of PDN on days when she has school, given the services provided by the school, Appellant's CLS, and Appellant's natural supports; and she can therefore save some of that daily PDN for days when she does not have school. Similarly, Appellant would no longer need to use PDN to transport Appellant to-and-from school on days when Appellant does not have school and she can likewise use that PDN elsewhere.

Overall, given Appellant's significant services and her flexibility in using those services, Appellant has failed to meet her burden of proof or demonstrate that additional PDN hours are medically necessary. The decision to deny her request must therefore be affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that [redacted] properly denied Appellant's request for additional PDN.

IT IS THEREFORE ORDERED that:

The Respondent's decision is **AFFIRMED**.

Steven J. Kibit
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

Date Signed: [redacted]

Date Mailed: [redacted]

SK/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.