

**STATE OF MICHIGAN**  
**MICHIGAN ADMINISTRATIVE HEARING 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.** 2014-8526 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.*, and upon a request for a hearing filed on Appellant's behalf.

A telephone hearing was scheduled for ██████████, but the matter had to be adjourned and rescheduled after Appellant's attorney requested an in person hearing. After due notice, an in person hearing was begun on ██████████. However, the hearing was not completed on that date and was continued, by telephone, on ██████████. Following the completion of the hearing, the record was left open at Appellant's request until ██████████, so that the parties could submit closing briefs.

Attorney ██████████ appeared on behalf of Appellant. ██████████, Appellant's mother; ██████████, Appellant's father; ██████████, one of Appellant's nurses; and ██████████, another of Appellant's nurses; testified on Appellant's behalf.

██████████, Quality and Training Manager, appeared and testified on behalf of the Department of Community Health's Waiver Agency, ██████████ ("Waiver Agency" or "██████████"). ██████████, registered nurse/supports coordinator, and ██████████, Chief Community Care Officer, also testified as witnesses for the Waiver Agency.

**ISSUE**

Did the Waiver Agency properly decide to reduce Appellant's private duty nursing (PDN) 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 Medicaid beneficiary who has been diagnosed with anoxic brain damage; traumatic brain injury; poisoning by other specified drugs and medicinal substances, undetermined whether accidentally or purposely inflicted; persistent vegetative state; incontinence; mechanical complication of gastrostomy; and ulceration of vulva. (Respondent's Exhibit B, pages 1, 8-9).
2. Appellant lives with her parents and they are her legal guardians. (Respondent's Exhibit B, pages 5, 7).
3. █████ 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.
4. Appellant has been receiving services through █████ including private duty nursing (PDN). (Respondent's Exhibit)
5. As of █████, Appellant was receiving █████ hours of PDN per day, █████ days a week, and █████ hours of PDN per day, █████ days a week. (Petitioner's Exhibit 3, page 4; Testimony of █████).
6. Appellant was also receiving █████ hour of personal care and █████ hours of homemaking services per day, █████ days a week, at that time. (Petitioner's Exhibit 3, page 4; Testimony of █████).
7. Due to her complex medical needs, Appellant's services were authorized pursuant to a Special Memorandum of Understanding (SMOU) between the Waiver Agency and the Department. (Testimony of █████).
8. On █████ from the Department emailed █████ to indicate that, while the Department was approving Appellant's Plan of Care through █████ the Department did not see a need for more than █████ hours of services per day. (Respondent's Exhibit G, page 1).
9. █████ also indicated that the waiver program was starting to follow the PDN criteria found in the State Plan so that all state programs are following the same guidelines. (Respondent's Exhibit G, page 1).
10. On █████, the Waiver Agency sent Appellant written notice that her PDN would be reduced to 1 █████ hours per day, █████ days a week, and █████ hours per day, █████ days a week, on █████ (Petitioner's Exhibit 3, pages 1-2).
11. Appellant's personal care services and homemaking services would remain at 1 hour per day, █████ days a week, and █████ hours per day, █████ days a week, respectively. (Petitioner's Exhibit 3, pages 1-2).

12. On ██████████ Appellant's guardians requested a hearing regarding that reduction. (Hearing Officer's Exhibit 1, pages 2, 6).
13. On ██████████ 2013, an administrative hearing was held before Administrative Law Judge ██████████ (Hearing Officer's Exhibit 1, page 1).
14. On ██████████ issued a Decision and Order affirming the Waiver Agency's decision. (Hearing Officer's Exhibit 1, pages 1-8).
15. As part of that Decision and Order, Appellant and her guardians were notified of their right to request a rehearing or to appeal the decision to circuit court. (Hearing Officer's Exhibit 1, page 8).
16. Appellant and her guardians did not request a rehearing or appeal ALJ ██████████ Decision and Order. (Testimony of ██████████).
17. Subsequently, in the Plan of Care Detail Report dated ██████████ it was noted that Appellant's father had retired and was working on a greenhouse at least s ██████ hours per day. (Respondent's Exhibit C, page 5).
18. On ██████████ performed a reassessment with Appellant's guardians/parents. (Respondent's Exhibit B, pages 1-17).
19. During that assessment, it was noted that Appellant is device bound, unable to bear weight, and transferred via hooyer. (Respondent's Exhibit B, page 10).
20. Regarding Appellant's needs, it was also noted that Appellant requires assistance with tracheostomy care; cough assist treatments; oral suctioning; albuterol treatments; tracheostomy suctioning; tube feeding; wound care; passive range of motion exercises; and a bowel program. (Respondent's Exhibit B, pages 10, 14, 16).
21. Those needs were also identified during the hearing in the testimony and affidavits of Appellant's nurses. (Petitioner's Exhibit 5; Petitioner's Exhibit 6; Petitioner's Exhibit's 7; Testimony of ██████████; Testimony of ██████████).
22. It was further noted in the assessment report that Appellant continues to be totally dependent on others for all Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs), including meal preparation, housework, managing her finances, managing her medications, shopping, transportation, bed mobility, transferring, dressing, eating, toileting, personal hygiene, and bathing. (Respondent's Exhibit B, pages 12-14).

23. Regarding Appellant's care, it was also noted that Appellant's parents are her informal supports and that they assist with her with incontinent care, tube care, feeding, suctioning, repositioning, tracheostomy care, decision-making, ADLs, and IADLs. (Respondent's Exhibit B, page 7).
24. Following that reassessment, ██████████ staff reviewed Appellant's services and determined that Appellant's services should be reduced. (Testimony of ██████████; Testimony of ██████████).
25. Specifically, it determined that fewer services were required because Appellant's father is now retired and able to provide more care for her. (Testimony of ██████████; Testimony of ██████████).
26. In making that decision, the Waiver Agency also utilized the provisions of the Private Duty Nursing Chapter of the Michigan Medicaid Provider Manual (MPM), including descriptions of various Intensity of Care categories and a "Decision Guide for Establishing Maximum Amount of Private Duty Nursing to be Authorized on a Daily Basis". (Testimony of ██████████).
27. On ██████████ the Waiver Agency sent written notice to Appellant and her guardians that Appellant's services would be adjusted and reduced on ██████████ as the previous amount of services was no longer medically necessary due to the recent retirement of her father. (Respondent's Exhibit A, pages 1-2).
28. Specifically, Appellant's services would be reduced from ██████ hours of PDN and ██████ hours of Community Living Supports per day, ██████ days a week, and ██████ hours of PDN and ██████ hours of CLS, ██████ days a week, to ██████ hours of PDN and ██████ hours of CLS per day, ██████ days a week. (Respondent's Exhibit A, page 1).
29. On ██████████, the Michigan Administrative Hearing System (MAHS) received a request for hearing in this matter.
30. Given the timing of the request for hearing, the reduction was not implemented and will not be implemented while this matter is pending. (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 ██████████, 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, Skilled Nursing Facility, or Intermediate Care Facility, 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 PDN and CLS through [REDACTED] and, with respect to such services, the MPM states:

#### **4.1.I. COMMUNITY LIVING SUPPORTS**

Community Living Supports (CLS) services facilitate a participant's independence and promote reasonable participation in the community. Services can be provided in the participant's residence or in a community setting to meet support and service needs.

CLS may include assisting, reminding, cueing, observing, guiding, or training with meal preparation, laundry, household care and maintenance, shopping for food and other necessities, and activities of daily living such as bathing, eating, dressing, or personal hygiene. It may provide assistance with such activities as money management, nonmedical care (not requiring nurse or physician intervention), social participation, relationship maintenance and building community connections to reduce personal isolation, non-medical transportation from the participant's residence to community activities, participation in regular community activities incidental to meeting the participant's community living preferences, attendance at medical appointments, and acquiring or procuring goods and services necessary for home and community living.

CLS staff may provide other assistance necessary to preserve the health and safety of the participant so they may reside and be supported in the most integrated and independent community setting.

CLS services cannot be authorized in circumstances where there would be a duplication of services available elsewhere or under the State Plan. CLS services cannot be authorized in lieu of, as a duplication of, or as a supplement to similar authorized waiver services. The distinction must be apparent by unique hours and units in the individual plan of services. Tasks that address personal care needs differ in scope, nature, supervision arrangements or provider type (including

provider training and qualifications) from personal care service in the State Plan. The differences between the waiver coverage and the State Plan are that the provider qualifications and training requirements are more stringent for CLS tasks as provided under the waiver than the requirements for these types of services under the State Plan.

When transportation incidental to the provision of CLS is included, it must not also be authorized as a separate waiver service. Transportation to medical appointments is covered by Medicaid through the State Plan.

Community Living Supports do not include the cost associated with room and board.

\* \* \*

#### **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, October 1, 2013 version  
MI Choice Waiver Chapter, pages 12-13, 15*

However, while both PDN and CLS are covered services, Medicaid beneficiaries are still only entitled to medically necessary Medicaid covered services and the MI Choice waiver did not waive the federal Medicaid regulation that requires that authorized services be medically necessary. See 42 CFR 440.230.

Here, it is undisputed that the Appellant has a medical need for both PDN and CLS, and she has continuously been receiving such services or similar services. However, the amount of Appellant's services is in dispute. As discussed above, ██████████ notified Appellant that it has decided to reduce the services she was receiving from ██████████ hours of PDN services and 4 hours of CLS per day, ██████████ days a week, and ██████████ hours of PDN services and ██████████ hours of CLS per day, ██████████ days a week, to ██████████ hours of PDN and ██████████ hours of CLS per day, ██████████ days a week.

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in deciding to reduce her PDN services. Here, Appellant's attorney argues that the Waiver Agency erred in determining Appellant's intensity of care category; the ability of her father to provide care; and the scope of Appellant's father's Medicare coverage.

According to the Waiver Agency, it decided to reduce Appellant's services on the basis that the circumstances of her informal supports had changed and that less services are now required. Specifically, it argues that Appellant's father is trained in how to care for her and that he is now retired.

However, the Waiver Agency's findings are not supported by the evidence or testimony in this case. At the time of the proposed reduction, Appellant's father had been retired for months and there is nothing in the assessment reports or plan of care details that indicate an increased ability to care for Appellant. Moreover, there is no evidence that the Waiver Agency even specifically discussed with Appellant's parents whether Appellant's father's had any limitations in his ability to care for Appellant, due to either a lack of training or health concerns.

Moreover, regardless of any findings regarding informal supports, this Administrative Law Judge finds that proposed reduction in services must also be reversed on the basis that the Waiver Agency improperly utilized a Decision Guide found in the Private Duty Nursing Chapter of the MPM to the authorization of PDN through the waiver program.

Specifically, the Waiver Agency relied on the following sections of the Private Duty Nursing Chapter of the MPM when authorizing PDN:

**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:

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- 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 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.

FAMILY SITUATION/ RESOURCE CONSIDERATIONS		INTENSITY OF CARE		
		Average Number of Hours Per Day		
		LOW	MEDIUM	HIGH
<b>Factor I – Availability of Caregivers Living in the Home</b>	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
<b>Factor II – Health Status of Caregiver(s)</b>	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
<b>Factor III – School *</b>	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
<p>* Factor III limits the maximum number of hours which can be authorized for a beneficiary:</p> <ul style="list-style-type: none"> <li>▪ Of any age in a center-based school program for more than 25 hours per week; or</li> <li>▪ Age six and older for whom there is no medical justification for a homebound school program.</li> </ul> <p>In both cases, the lesser of the maximum "allowable" for Factors I and II, or the maximum specified for Factor III, applies.</p>				

*MPM, October 1, 2013 version  
MI Choice Waiver Chapter, pages 11-12*

However, while the above policy governs State Plan PDN services, there are no provisions in the MPM, the Waiver's Agency's contract with the Department, or the Minimum Operating Standards for MI Choice Waiver Program Services maintained and published by the Department, providing for the application of the Decision Guide of the Private Duty Nursing Chapter of the MPM to the PDN services through the MI Choice program authorized in this case.

The specific section of the Private Duty Nursing Chapter of the MPM discussing the Decision Guide expressly states that 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", MPM, October 1, 2013 version, MI Choice Waiver Chapter, page 11, and there is no suggestion that it was also meant to determine nursing hours under other programs, such as the MI Choice Program.

Similarly, the specific section of the MI Choice Waiver Chapter of the MPM discussing PDN through the waiver program makes no mention of the Decision Guide of the Private Duty Nursing Chapter and does not refer to any decision guide used to calculate hours. See MPM, October 1, 2013 version, MI Choice Waiver Chapter, page 15. It also reiterates that MI Choice PDN services and Medicaid State Plan PDN services are separate services applying to different age groups. See MPM, October 1, 2013 version, MI Choice Waiver Chapter, page 15. Such an age distinction is significant, as the Decision Guide identifies factors that would be more likely to apply for younger beneficiaries, such as being in school and caregivers living in the same home.

In response, the Waiver Agency's witnesses note that MI Choice is a Medicaid program governed by the MPM, including the Private Duty Nursing Chapter, and that they were directed to the Decision Guide by a representative of the Department, who also identified it as a change in policy.

However, the mere fact that the MI Choice program is a Medicaid program does not resolve this issue as the various chapters and sections of the MPM have different areas of applicability. Moreover, there were no relevant changes between the January 1, 2013 and April 1, 2013 versions of the MPM with respect to PDN that would suggest any new policy of applying the Private Duty Nursing Chapter to MI Choice services and, instead, the language of the MPM has continually limited use of the Decision Guide to State Plan PDN services.

Additionally, while the Waiver Agency was directed to the Decision Guide in an email by a representative of the Department, that direction appears to be in error for the reasons discussed above and, in any event, this Administrative Law Judge is bound by the official, established policy applicable to this case.

Given the applicable policy discussed above, there is no basis for applying the Decision Guide used for State Plan PDN services to the services through the MI Choice Program and the Waiver Agency erred in reducing Appellant's services pursuant to that guide. Moreover, as the previous amount of services was also allocated pursuant to that guide, it is clear that a new reassessment of Appellant's must be completed.

### **DECISION AND ORDER**

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

[REDACTED]  
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**IT IS THEREFORE ORDERED** that:

The Waiver Agency's decision to reduce Appellant's PDN services is **REVERSED** and the Waiver Agency must initiate a reassessment of Appellant's services.

*Steven Kibit*

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Steven J. Kibit  
Administrative Law Judge  
for James K. Haveman, 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.