STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

RICK SNYDER
GOVERNOR

SHELLY EDGERTON
DIRECTOR

Date Mailed: January 31, 2017
MAHS Docket No.: 16-015700
Agency No.:
Petitioner:

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and upon the Petitioner's request for a hearing.

After due notice, an in-person hearing was held on January 18, 2017. , Managing Attorney with , represented Petitioner. Petitioner and , a Licensed Practical Nurse (LPN), testified as witnesses for Petitioner. , Assistant Director of MI Health Link and New Business Strategies, appeared on behalf of the Respondent Area Agency on Aging 1-B. , Assistant Director of Clinical Operations, and , Supports Coordinator, testified as witnesses for Respondent. , Social Worker/Supports Coordinator, was also presented during the hearing.

ISSUE

Did Respondent properly deny Petitioner'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. Respondent is a contract agent of the Michigan Department of Health and Human Services and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services in its service area.

2. Petitioner is a thirty-five-year-old Medicaid beneficiary who has been diagnosed with spinal muscular atrophy; an underdeveloped torso and extremities; paraplegia; a developmental disability; chronic obstructive pulmonary disease; hypertension; arthritis; osteoporosis; anxiety; and a history of hyperplastic left lung. (Exhibit B, pages 1, 8-9).

3. Due to those conditions, Petitioner is dependent on others in all Instrumental Activities of Daily Living (IADLs) and Activities of Daily Living (ADLs). (Exhibit B, pages 15).

4. Petitioner also uses a motorized wheelchair; has a permanent tracheostomy; and is vent dependent, though he is able to be off the vent for approximately one to two hours at a time. (Exhibit B, pages 12-15).

5. The tracheostomy was provided in January of 2015 while Petitioner was hospitalized. (Testimony of Petitioner).

6. Since Petitioner was discharged from the hospital on [redacted], he has not had any changes in his medical condition or new medical orders. (Testimony of Respondent's Assistant Director of Clinical Operations).

7. His roommates at the time, who were also his Community Living Supports (CLS) workers, did receive training with respect to Petitioner's tracheostomy at that time. (Testimony of Petitioner).

8. Petitioner's CLS was approved through Respondent and the MI Choice Waiver Program, and he was receiving 80 hours per week of such services. (Testimony of Respondent's Assistant Director of Clinical Operations).

9. Petitioner was also authorized for 88 hours per week of Private Duty Nursing (PDN) services through Respondent. (Testimony of Respondent's Assistant Director of Clinical Operations).

10. For both types of services, Petitioner uses a self-determination option, where he has a set budget based on the number of approved hours and where he hires and manages his workers directly. (Testimony of Petitioner; Testimony of Respondent's Assistant Director of Clinical Operations).

11. By August of 2016, Petitioner's two roommates/CLS workers had stopped working for him. (Testimony of Petitioner).

12. He also moved into an apartment with one of his LPNs. (Exhibit B, page 3).

13. On September 29, 2016, a routine in-person assessment of Petitioner's needs and services was completed. (Exhibit B, pages 1-17).

14. During that assessment, it was noted that Petitioner had no informal supports, though his LPN roommate would provide up to 15 minutes of unpaid care in the event of an emergency. (Exhibit B, pages 4-5, 17).

15. It was also noted that Petitioner is never left alone and that he continues to receive care 24 hours per day, 7 days a week, through his authorized PDN and CLS. (Exhibit B, pages 5, 16.)

16. Regarding specific types of care, the assessment report further provided that Petitioner requires deep suctioning approximately every two to four hours; a nebulizer two to three times a day; oxygen at night; chest percussion with a life vest one to two times per day typically; and silver nitrate applied to his tracheostomy. (Exhibit B, pages 9, 11).

17. Petitioner’s caregivers must also reposition Petitioner every two hours; apply cream as needed to his pressure-bearing left side; and assist Petitioner with all IADLs and ADLs. (Exhibit B, pages 12, 15).

18. A supports coordinator also reminded Petitioner during the assessment that only his nurses can pass medications to him. (Exhibit C, page 7).

19. Petitioner indicated during the assessment that he wanted all his caregivers to be nurses and he discussed an increase in his PDN services. (Exhibit C, page 7; Testimony of Petitioner’s Supports Coordinator; Testimony of Respondent’s Assistant Director of Clinical Operations).

20. Subsequently, in October of 2016, Petitioner formally requested that his self-determination budget be altered to include 148 hours per week of PDN and 20 hours per week of CLS. (Testimony of Respondent’s Assistant Director of Clinical Operations).

21. On October 10, 2016, a Case Conference was held with respect to that request and Petitioner was advised that his request was denied. (Testimony of Respondent’s Assistant Director of Clinical Operations).

22. On October 12, 2016, Respondent also sent Petitioner written notice that his request to alter his budget and for additional PDN services was denied. (Exhibit A, pages 1-2).

23. The reason for the denial given in the notice was that: “There have been no changes in daily care needs since the original budget was developed and agreed upon.” (Exhibit A, page 1).

24. On November 2, 2016, the Michigan Administrative Hearing System (MAHS) received a request for hearing filed by Petitioner with respect to that denial.

25. During the hearing on January 18, 2017, Petitioner testified that he is now requesting PDN services 24 hours per day, 7 days a week. (Testimony of Petitioner).

26. Petitioner also testified that he is currently using PDN services 24 hours per day, 7 days per week, and that he has been doing so for the past two months. (Testimony of Petitioner).

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.

Petitioner 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 Respondent, 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 through the waiver program 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)

Here, Petitioner has been receiving Community Living Supports (CLS) and Private Duty Nursing (PDN) through Respondent and, with respect to such services, the applicable version of the Michigan Medicaid Provider Manual (MPM) states:

4.1.H. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) facilitate an individual's independence and promote participation in the community. CLS can be provided in the participant's residence or in community settings. CLS include assistance to enable participants to accomplish tasks that they would normally do for themselves if able. The services may be provided on an episodic or a continuing basis. The participant oversees and supervises individual providers on an ongoing basis when participating in self-determination options. Tasks related to ensuring safe access and egress to the residence are authorized only in cases when neither the participant nor anyone else in the household is capable of performing or financially paying for them, and where no other relative, caregiver, landlord, community/volunteer agency, or third party payer is capable of or responsible for their provision. When transportation incidental to the provision of CLS is included, it shall not also be authorized as a separate waiver

service for the participant. Transportation to medical appointments is covered by Medicaid through MDHHS.

CLS includes:

- Assisting, reminding, cueing, observing, guiding and/or training in household activities, ADL, or routine household care and maintenance.

- Reminding, cueing, observing and/or monitoring of medication administration.

- Assistance, support and/or guidance with such activities as:

  - Non-medical care (not requiring nurse or physician intervention) – assistance with eating, bathing, dressing, personal hygiene, and ADL;

  - Meal preparation, but does not include the cost of the meals themselves;

  - Money management;

  - Shopping for food and other necessities of daily living;

  - Social participation, relationship maintenance, and building community connections to reduce personal isolation;

  - Training and/or assistance on activities that promote community participation such as using public transportation, using libraries, or volunteer work;

  - Transportation (excluding to and from medical appointments) from the participant’s residence to community activities, among community activities, and from the community activities back to the participant’s residence; and

  - Routine household cleaning and maintenance.

- Dementia care including, but not limited to, redirection, reminding, modeling, socialization activities, and activities that assist the participant as identified in the individual's person-centered plan.

- Staff assistance with preserving the health and safety of the individual in order that he/she may reside and be supported in the most integrated independent community setting.

- Observing and reporting any change in the participant's condition and the home environment to the supports coordinator.

These service needs differ in scope, nature, supervision arrangements, or provider type (including provider training and qualifications) from services available 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.

CLS services cannot be provided in circumstances where they would be a duplication of services available under the State Plan or elsewhere. The distinction must be apparent by unique hours and units in the approved service plan.

* * *

4.1.P. PRIVATE DUTY NURSING

Private Duty Nursing (PDN) services are skilled nursing interventions provided to a participant age 21 and older on an individual and continuous basis to meet health needs directly related to the participant's physical disorder. 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 participant's plan of service. To be eligible for PDN services, the waiver agency must find the participant meets either Medical Criteria I or Medical Criteria II, and Medical Criteria III. Regardless of whether the participant meets Medical Criteria I or II, the participant must also meet Medical Criteria III.

The participant's plan of service must provide reasonable assurance of participant safety. This includes a strategy for effective back-up in the event of an absence of providers. The back-up strategy must include informal supports or the participant's capacity to manage his/her care and summon assistance.

PDN for a participant between the ages of 18-21 is covered under the Medicaid State Plan.

Medical Criteria I – The participant is dependent daily on technology-based medical equipment to sustain life. "Dependent daily on technology-based medical equipment" means:

- Mechanical rate-dependent ventilation (four or more hours per day) or assisted rate-dependent respiration (e.g., some models of bi-level positive airway pressure); or
- Deep oral (past the tonsils) or tracheostomy suctioning eight or more times in a 24-hour period; or
- Nasogastric tube feedings or medications when removal and insertion of the nasogastric tube is required, associated with complex medical problems or medical fragility; or
- Total parenteral nutrition delivered via a central line, associated with complex medical problems or medical fragility; or
- Continuous oxygen administration (eight or more hours per day), in combination with a pulse oximeter and a documented need for skilled nursing assessment, judgment, and intervention in the rate of oxygen administration. This would not be met if oxygen adjustment is done only according to a written protocol with no skilled assessment, judgment or intervention required. Continuous use of oxygen therapy is a covered Medicaid benefit for beneficiaries age 21 and older when tested at rest while breathing room air and the oxygen saturation rate is 88 percent or below, or the P02 level is 55 mm HG or below.

Medical Criteria II – Frequent episodes of medical instability within the past three to six months requiring skilled nursing assessments, judgments, or interventions (as described in III below) as a result of a substantiated medical condition directly related to the physical disorder.

Definitions of Medical Criteria II:

- "Frequent" means at least 12 episodes of medical instability related to the progressively debilitating physical disorder within the past six months, or at least six episodes of medical instability related to the progressively debilitating physical disorder within the past three months.
- "Medical instability" means emergency medical treatment in a hospital emergency room or inpatient hospitalization related to the underlying progressively debilitating physical disorder.
- "Emergency medical treatment" means covered inpatient and outpatient services that are furnished by a provider who is qualified to furnish such services and that are needed to evaluate or stabilize an emergency medical condition.
- "Emergency medical condition" means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson who possesses an average knowledge of health and medicine could reasonably expect the absence of immediate medical attention would result in placing the health of the individual in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part.
- "Directly related to the physical disorder" means an illness, diagnosis, physical impairment, or syndrome that is likely to continue indefinitely, and results in significant functional limitations in three or more ADL.
- "Substantiated" means documented in the clinical or medical record, including the nursing notes.

Medical Criteria III – The participant requires continuous skilled nursing care on a daily basis during the time when a licensed nurse is paid to provide services.

Definitions of Medical Criteria III:

- "Continuous" means at least once every three hours throughout a 24-hour period, and when delayed interventions may result in further deterioration of health status, in loss of function or death, in acceleration of the chronic condition, or in a preventable acute episode.

- Equipment needs alone do not create the need for skilled nursing services.
- "Skilled nursing" means assessments, judgments, interventions, and evaluations of interventions requiring the education, training, and experience of a licensed nurse. Skilled nursing care includes, but is not limited to,:
  - Performing assessments to determine the basis for acting or a need for action, and documentation to support the frequency and scope of those decisions or actions.
  - Managing mechanical rate-dependent ventilation or assisted rate-dependent respiration (e.g., some models of Bi-PAP) that is required by the participant four or more hours per day.
  - Deep oral (past the tonsils) or tracheostomy suctioning.
  - Injections when there is a regular or predicted schedule, or prn injections that are required at least once per month (insulin administration is not considered a skilled nursing intervention).
  - Nasogastric tube feedings or medications when removal and insertion of the nasogastric tube is required, associated with complex medical problems or medical fragility.
  - Total parenteral nutrition delivered via a central line and care of the central line.
  - Continuous oxygen administration (eight or more hours per day), in combination with a pulse oximeter, and a documented need for adjustments in the rate of oxygen administration requiring skilled nursing assessments, judgments and interventions. This would not be met if oxygen adjustment is done only according to a written protocol with no skilled assessment, judgment or intervention required. Continuous use of oxygen therapy is a covered Medicaid benefit for beneficiaries age 21 and older when tested at rest while breathing room air and the oxygen saturation rate is 88 percent or below, or the P02 level is 55 mm HG or below.

- Monitoring fluid and electrolyte balances where imbalances may occur rapidly due to complex medical problems or medical fragility. Monitoring by a skilled nurse would include maintaining strict intake and output, monitoring skin for edema or dehydration, and watching for cardiac and respiratory signs and symptoms. Taking routine blood pressure and pulse once per shift that does not require any skilled assessment, judgment or intervention at least once every three hours during a 24-hour period, as documented in the nursing notes, would not be considered skilled nursing.
- Participants receiving MI Choice Nursing Services are not eligible to receive Private Duty Nursing services.

- Where applicable, the participant must use Medicaid State Plan, Medicare, or third party payers first.
- The participant's preference for a certain provider or agency is not grounds for declining another payer in order to access waiver services.
- It is not the intent of the MI Choice program to provide PDN services on a continual 24-hours-per-day/7-days-per-week basis. MI Choice services are intended to supplement informal support services available to the participant. Only under extreme circumstances should 24/7 PDN be authorized for a participant. These circumstances must be clearly described in the participant's case record and approved by MDHHS.
- 24/7 PDN services cannot be authorized for participants who cannot direct their own services and supports, make informed decisions for themselves, or engage their emergency back-up plan without assistance. These participants must have informal caregivers actively involved in providing some level of direct services to them on a routine basis.
- All PDN services authorized must be medically necessary as indicated through the MI Choice assessment and meet the medical criteria set forth in this chapter.
- The participant's physician, physician's assistant, or nurse practitioner must order PDN services and work in

conjunction with the waiver agency and provider agency to assure services are delivered according to that order.

MPM, October 1, 2016 version
MI Choice Waiver Chapter, pages 14-15, 21-24

In this case, as described above, Respondent denied Petitioner's request for an altered budget that included more PDN services and instead determined that his services should continue to be authorized at their current level, *i.e.* 88 hours per week of PDN and 80 hours per week of CLS.

In support of that decision, Respondent's Assistant Director of Clinical Operations testified regarding how Petitioner's budget was authorized through self-determination option and described Petitioner's current services, his request for additional PDN, and Respondent's denial of that request. Regarding that denial, she also testified that Petitioner has not had any changes in his medical condition or new medical orders since the last time his budget was set that would warrant additional PDN, and that not all of the care Petitioner receives from his caregivers is PDN. She further testified that other options were discussed with Petitioner, including having nurses paid at two separate rates, depending on the work they were doing; paying nurses at a blended, reduced rate; or using a traditional vendor. Respondent's Assistant Director of Clinical Operations also testified that CLS workers can be trained and Respondent would not necessarily look at staffing issues in deciding to adjust a budget, as it is Respondent's expectation that a worker could be found and trained. She further noted that Respondent does typically look at a beneficiary's informal supports when authorizing services, but that Petitioner does not have any such informal supports and he is already receiving around-the-clock services, which leaves no room for informal supports.

Petitioner's supports coordinator also testified that Petitioner continues to be authorized for care 24 hours a day, 7 days a week, but that he does not need PDN services 24 hours a day, 7 days a week, and his PDN and CLS are separate services. She also testified that Petitioner has, to her knowledge, no unmet needs, but that he did indicate to her during the assessment that he wants all his caregivers to be nurses. She further testified that she is aware that Petitioner cannot predict when he might need a nurse and agreed that there was a risk of negative effects with a delay in necessary treatment, but also testified that nurses cannot just be on stand-by; Respondent looks for a pattern or trend in how PDN is provided in determining the amount of hours; and many risks could be addressed by a treatment regimen when the nurses are present, such as suctioning Petitioner on a schedule. Petitioner's supports coordinator also testified, in determining a need for additional PDN, Respondent wants to look at past nursing notes, but that none were provided here and Petitioner said he does not want to use them. She further testified that CLS aides can be trained to provide deep suctioning, but also agreed that deep suctioning is identified as skill nursing in the MPM

In response, Petitioner testified that he is currently using PDN services 24 hours a day, 7 days a week, and that is what he needs. Petitioner also testified that he has only had

three CLS workers in the past, but they no longer work for him and he has been unable to find any qualified CLS workers to replace them given his needs and the lack of any home care experience for the people who do apply to work for him. In particular, Petitioner testified that while his two former roommates/CLS workers were providing all of his non-skilled care and had received special training, which was only offered as an inpatient service while Petitioner was in the hospital, they stopped working for him as of August of 2016 and he has not been able to fill the gap left in his services. According to Petitioner, the gap they left in his services is a major change that warrants additional PDN, even if his medical needs have not changed. Even with his difficulty in finding qualified workers, Petitioner's preference is to still use the self-determination option offered by Respondent because he cannot trust an agency to find qualified workers when even Petitioner cannot.

Petitioner also testified that he needs to alter the budget to include more PDN, and less CLS, because CLS workers cannot adequately assist him in an emergency. He further noted that his suctioning cannot be planned as he needs it at random times and that he would be worried about over-suctioning if it was provided on a schedule and/or at times when it is unnecessary.

Regarding nursing notes, Petitioner testified that no one from Respondent ever asked him for nursing notes or informed him that he needed them until October of 2016, and that he would have made sure they were completed if he had been told.

One of Petitioner's nurses testified that she has been working for Petitioner since February of 2016 and that, on a typical shift, she provides suctioning; vent monitoring; toileting assistance; assistance with other ADLs; and encouragement for exercises. She also testified that the deep suctioning and silver nitrate treatment she provides requires skilled nursing, and that there is no pattern to when suctioning is needed. She further testified that she would not accept a lower pay rate; she does not have a supervising nurse; and that, while Petitioner told her that no nursing notes are needed, she keeps her own nursing notes.

Petitioner bears the burden of providing by a preponderance of the evidence that Respondent erred in denying his request for additional PDN services.

Given the record in this case, the undersigned Administrative Law Judge finds that Petitioner has failed to meet that burden of proof and that Respondent's decision must therefore be affirmed. Per the above policy, it is not the intent of the MI Choice program to provide PDN services to beneficiaries on a continual 24 hours per day, 7 days per week basis, and, while such services can be approved in extreme circumstances, Petitioner's case record fails to reflect any such extreme circumstances.

Petitioner undisputedly needs someone with him around-the-clock, but it is also clear that not all of the care he needs requires skilled nursing. For example, Petitioner's

caregivers must assist him with all IADLs and ADLs, and there is no suggestion that only a skilled nurse can do those tasks.

Moreover, while some of the care Petitioner needs does require a skilled nurse, such as deep suctioning, and he cannot necessarily predict when such a need will arise, Petitioner cannot demonstrate a medical necessity for increased PDN or around-the-clock nursing based on a statement of those needs alone. Petitioner is already approved for a significant amount of PDN, in addition to the CLS he receives, and he had been stable since the current authorization of services was made. And, while it is true that Petitioner cannot predict when he may need skilled nursing, that is not an extreme or uncommon situation for beneficiaries; the above policy does not call for beneficiaries having nurses on-hand at all times just in case of emergencies; and Petitioner's request is not supported by any nursing notes or plans of care that reflect the frequency of skilled interventions or a need for additional PDN.

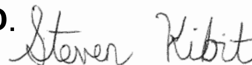
Finally, to the extent Petitioner argues that Respondent failed to consider the change in his CLS workers and informal supports when denying his request, his argument is unpersuasive. Respondent clearly found that Petitioner has no informal supports and, in part because of the lack of informal supports, it has already approved around-the-clock services in the form of both CLS and PDN. Petitioner may have concerns about the qualifications of the workers he could hire to replace his former CLS workers, but he is not replacing skilled nurses; any new CLS worker could be trained; and staffing difficulties do not equate to a medical necessity for more PDN.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Respondent properly denied Petitioner's request for additional PDN services.

IT IS, THEREFORE, ORDERED that:

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



SK/tm

Steven Kibit
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139

DHHS -Dept Contact