



T.M. had been receiving private duty nursing (PDN) and personal care assistance (PCA) services under the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) program for many years. Under this program, children under the age of 21 are eligible to receive any medically necessary service. Once T.M. turned 21, she began receiving services through Managed Long Term Services and Supports (MLTSS). MLTSS refers to the delivery of long-term services and supports through Medicaid Managed Care Organizations (MCOs) whether at home, in an assisted living facility, in community residential services or in a nursing home<sup>1</sup>. As a result of aging out of the EPSDT program, T.M. became subject to the regulatory restrictions which impose a 16 hour daily limit on private duty nursing from all sources and require the primary caregiver to provide a minimum of 8 hours of hands-on care. Both parties agree that Petitioner receives the maximum 16 hours of PDN and that her primary caregiver must provide 8 hours per day of hands-on care. The dispute in this matter focuses on whether Petitioner may also receive 24 hours of weekly PCA services in addition to the 16 hours of PDN she receives.

In her Initial Decision, the ALJ reversed United Healthcare's termination of PCA services finding that there is no regulation that prohibits PDN and PCA services from occurring at the same time and that PCA services are medically

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<sup>1</sup> Beginning July 1, 2014, participants in Home and Community-Based Waivers, such as Global Options (GO), Community Resources for People with Disabilities (CRPD), Traumatic Brain Injury (TBI) and the AIDS Community Care Alternatives Program (ACCAP), were encompassed in the Comprehensive Medicaid Waiver, and enrolled in Managed Long Term Services and Supports (MLTSS) which allows Medicaid managed care organizations (MCO) to manage home and community based services for enrollees.

necessary to accommodate Petitioner's long term chronic or maintenance health care. For the reasons which follow, I disagree with this decision.

While the ALJ is correct that there is no explicit prohibition in the regulations disallowing the provision of PCA services, the termination of PCA services is warranted where the beneficiary is receiving more than the maximum 16 hours of daily hands-on services permitted by the regulations and the MCO contract. In this case, United Healthcare's termination of T.M.'s PCA services is based upon the regulatory and contractual requirements that preclude T.M from receiving more than 16 hours per day of hands-on care and require the primary caregiver to perform 8-hours of daily hands-on care.

As stated above, both parties agree that DMAHS' regulations limit the number of PDN services Petitioner may receive to a maximum of 16 hours per day. N.J.A.C. 10:60-5.9(c) provides:

Private duty nursing services shall be limited to a maximum of 16 hours, including services provided or paid for by other sources, in a 24-hour period, per person in CRPD, ABC and ACCAP. There shall be a live-in primary adult caregiver (as defined in N.J.A.C. 10:60-1.2) who accepts 24-hour per day responsibility for the health and welfare of the beneficiary.

N.J.A.C. 10:60-6.3(b)(2) provides:

Private-duty nursing is a waiver service provided under the Community Resources for People with Disabilities (CRPD) Waiver for any CRPD waiver beneficiary who meets the eligibility criteria for private duty nursing. Private duty nursing shall be provided in the community only, not in an inpatient hospital setting. The beneficiary shall have a live-in primary caregiver (adult relative or significant other adult) who accepts 24-hour responsibility for the health and welfare of the beneficiary. A maximum of 16 hours of private duty nursing, from all payment sources, may be provided in any 24-hour period. A minimum of eight hours of hands-on care shall be provided by the primary caregiver . . . (emphasis added).

Thus, Petitioner's receipt of additional care in the form of PCA services is contrary to the regulations. Clearly, the regulations impose a 16 hour daily limit

on PDN from all sources. Additionally, 8 hours of Petitioner's PDN care must be provided by her caregiver grandmother. The MCO Contract also specifically precludes MLTSS recipients from receiving PDN and PCA assistance simultaneously:

. . . Members are counseled on the program's inability to provide 24 hour care and advised that the total Private Duty Nursing, Personal Care Assistance and Self Direction total services limit is 16 hours per day. This is in accordance with N.J.A.C 10:60-6.3 (b)(2) which indicates that a live-in primary adult caregiver who accepts 24-hour responsibility for the health and welfare of the beneficiary and is required to provide a minimum of eight (8) hours of hands on care daily. Private Duty Nursing is not permitted to overlap with Personal Care Assistance (PCA) Assistance or Self Direction hours as these services are included in Private Duty Nursing and thus considered a duplication of services . . . (Contract, Article 9, page 12).

Petitioner's receipt of PCA hours is additional care that directly overlaps with the care that Petitioner's caregiver is required to provide. Petitioner's argument that it is permitted because it is not specifically precluded by the PCA regulations is puzzling in light of the purpose and intent of the PCA program which is to provide assistance with specific health related tasks. In this case, those tasks (both skilled and unskilled) are indisputably being provided by her private duty nurses and her grandmother.

In her Initial Decision, the ALJ mistakenly concludes that the private duty nurse is prohibited from performing nonmedical services (such as bathing and feeding) and that therefore there is no duplication of services if T.M. is receiving both PDN and PCA. This is simply not true. The prohibition on a private duty nurse from performing nonmedical tasks only applies when the nurse and the beneficiary are outside of the home. See N.J.A.C. 10:60-5.9(a)(2). Moreover, PCA is a delegated nursing task. Indeed, a certified homemaker-home health

aide "is employed by a homecare services agency and who, under the supervision of a registered professional nurse, follows a delegated nursing regimen or performs other tasks that are delegated." N.J.A.C. 13:37-14.2. It simply makes no sense that Petitioner's private duty nurse would delegate a task while she is in the home and fully capable of performing those tasks. This is evident pursuant to T.M.'s plan of care and the actual private duty shift notes which show that the private duty nurse is expected to, and, in fact, does address T.M.'s skilled as well as her unskilled needs. For instance, T.M.'s Plan of Care specifically directs the skilled nurse (SN) to address T.M.'s activities of daily living (ADL) needs such as "SN to reposition client", " SN to perform perineal care with diaper/brief changes as needed", "SN to prepare meals/snacks as requested", "SN to provide light housekeeping (i.e. bed making, dusting client area, tidying client area." See United's cross motion for summary decision, Exhibit J, pages 5-6. Significantly, the shift notes show that the nurse regularly provides assistance with the ADL and IADL tasks identified in the plan of care. For example, the February 21-28, 2016 nursing notes reflect that the nurse washed T.M.'s hair and face, prepared a snack for her, assisted her with transferring and toileting and performed light housekeeping. Exhibit J, pages 8-20. Thus, T.M.'s PCA services are not medically necessary as they are duplicative of the services she already receives through her 16 hours of private duty nursing along with the 8 hours of hands-on care that her grandmother provides.

In Exceptions, Petitioner also argues that she has been denied due process because United Healthcare failed to provide adequate notice explaining the basis for the termination of her PCA services. I disagree. As set forth in exceptions, United issued three letters giving T.M. notice of its decision along with the reason for the termination. The July 29, 2016 letter stated:

You currently receive (one hundred and twelve) 112 hours of private duty nursing services per week. This is the highest amount of service you can receive. Your private duty nurse takes care of both your skilled needs and your personal care needs. Your caregiver is completely responsible for taking over at least eight (8) hours of your care every day. This is not currently taking place. Based on that review, you are approved for zero (0) hours of personal care services as of 8/05/16.


Additionally, in upholding the termination of PCA services, the August 3, 2016 (Stage 1 appeal) notice and the November 29, 2016 (Stage 2 appeal) notice cite to the regulation which limit PDN to 16 hours and require the caregiver to provide 8 hours of daily care. I agree with United that "taken as a whole" these notices advised Petitioner that her PCA services were being terminated along with an explanation for the termination and the supporting regulations. I am also persuaded by the fact that Petitioner has continued to receive PCA services pending the outcome of the fair hearing process.

Moreover, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 U.S. 319, 333 (1976). Thus, assuming *arguendo* that the notice was inadequate, inadequate notice is a procedural defect that may be cured by a *de novo* hearing. In re Appeal of Darcy, 114 N.J. Super. 454, 461 (App. Div. 1971). Here, Petitioner was afforded due process by this OAL hearing and the continuation of PCA services pending the outcome of the appeal.

THEREFORE, it is on this 16<sup>th</sup> day of August 2017,

ORDERED:

That the Initial Decision reversing United Healthcare's termination of  
Petitioner's PCA services is REVERSED.

  
Meghan Davey, Director  
Division of Medical Assistance  
and Health Services