STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH
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IN THE MATTER OF:

Docket No. 2010-30883 EDW
Case No.

,

Appellant
_____________________/

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Appellant's request for a hearing.

After due notice, a hearing was held . The Appellant was represented by her daughter, .

, Regional Supervisor for County Area Agency on Aging (AAA) was present on behalf of the Department of Community Health (hereafter, Department).

ISSUE

Did the Department properly deny the Appellant's request for monitoring services through the MI Choice waiver program?

FINDINGS OF FACT

Based upon the competent, material, and substantial evidence presented, I find, as material fact:

1. Appellant is a Medicaid beneficiary, and enrolled in the MI Choice Waiver program.

2. The Appellant resides in an assisted living facility. She has services authorized through the MI Choice Waiver program.

3. The Appellant's MI Choice waiver services include assistance with bed mobility, transferring, toileting, walking, eating, supervision/cuing for bathing and dressing. She receives escorts to meals, medication reminders and homemaking. She receives nightly checks in 15 minute intervals.

4. The Appellant is receiving 8.25 hours per day authorized services through her participation in the MI Choice waiver.

5. The Appellant is diagnosed with dementia. She is awake at night and engages in combative behavior and is at risk for wandering.

6. The Appellant's daughter has requested monitoring services specifically at night to address her mother's need for 24 hour supervision.

7. The MI Choice waiver agency denied monitoring services as a service not covered and denied additional personal care services as not medically necessary for the Appellant. Residential placement services are offered but refused by the Appellant's daughter to date.

8. The Appellant has natural supports in that her daughter participate in her care, supervision and also have paid for a private care taker to assist with the Appellant's supervision needs.

9. The Appellant, through her daughter, requested a hearing .

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.

This Appellant is claiming services through the Department's Home and Community Based Services for Elderly and Disabled (HCBS/ED). 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 AAA, 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. *42 CFR 430.25(c)(2)*

Home and community-based services under section 1915(c) exist for a period of three years initially, and may be renewed thereafter for periods of five years. *42 CFR 430.25(h)(2)(i)*

Centers for Medicare and Medicaid Services may grant a State an extension of its existing waiver for up to 90 days to permit the State to document more fully the satisfaction of statutory and regulatory requirements needed to approve a new waiver request. CMS will consider this option when it requests additional information on a new waiver request submitted by a State to extend its existing waiver or when CMS disapproves a State's request for extension. *42 CFR 441.304(c)*

1915 (c) (42 USC 1396n (c)) allows home and community based services to be classified as "medical assistance" under the State Plan when furnished to recipients who would otherwise need inpatient care that is furnished in a hospital SNF, ICF or ICF/MR and is reimbursable under the State Plan. 42 CFR 430.25(b)

Home and community based services means services not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this subchapter. 42 CFR 440.180(a)

Included services. 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)

The Operating Standards applicable to the MI Choice Waiver Program were reviewed in order to ascertain which services are available under the waiver program which address the Appellant's needs. It is undisputed she has a need for supervision due to her dementia and potential for wandering and other disruptive behaviors. She is awake at night and can engage in dysfunctional behaviors that include wandering and place her at risk. The Operating standards include the services listed above as services that can/must be offered. Among those is personal care services.

The MI Choice waiver defines Personal Care as follows:

> "Assistance with eating, bathing, dressing, personal hygiene, and other activities of daily living. This service may also include assistance with the preparation of meals but does not include the cost of the meals. When specified in the plan of care, this service may also include such housekeeping chores as bed making, dusting and vacuuming which are incidental to the care furnished, or which are essential to the health and welfare of the individual, rather than the individual's family. . . ."

MI Choice Waiver, Updated September 2002;
Appendix B, pages B1 and B2

The Appellant is receiving personal care services through the Mi Choice waiver. She has assistance with bed mobility, transferring, toileting, walking, eating and cuing for bathing and dressing. The personal care services authorized are sufficient to address the Appellant's actual personal care needs as defined in the operating standards. The definition does not include 24 hour monitoring or supervision. Because personal care services do not include mere monitoring or supervision, the services cannot be authorized for this purpose. Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services, thus additional personal care services cannot be authorized for the Appellant based upon the evidence of record. *See 42 CFR 440.230.*

The Appellant also receives homemaking services through the waiver program. The definition of homemaking services does not include nighttime monitoring and supervision to ensure safety, thus additional homemaking services are not appropriate to address the safety needs of the Appellant.

The need for supervision for safety purposes is only offered as a residential service. It is not among those that are provided in a participant's personal residence or institutional facility not specifically identified in the operating standards. The operating standards define residential services below:

> Residential services include enhanced assistance with activities of daily living and supportive services. Mi Choice

> participants who receive this service must reside in licensed homelike, non-institutional settings. These setting include continuous on-site response capability to meet scheduled or unpredictable resident needs and provide supervision, safety and security. Third parties may only furnish this service with the approval of the participant, licensee, and waiver agent. Payment excludes room and board, items of comfort or convenience and costs of facility maintenance, upkeep and improvement.

The evidence of record does establish residential services have been offered to the Appellant, however, her daughter has rejected the alternatives identified by the agency. They include AFC homes and placements that meet the criteria cited above. The record is replete with evidence of alternate residential placements identified by the agency and rejected by the Appellant's daughter. It is clear the Appellant's needs have been addressed by the agency in offering the residential placement services, however, it is not found suitable by the Appellant's daughter.

The request for an "increase in services" from the Appellant's daughter was not specified as or identified by specific name, however, was phrased as an increase in services in an effort to keep the Appellant from being placed in a nursing home. This ALJ did review the operating standards and all services listed therein to determine the full spectrum of services available under the waiver program and what they encompass in an effort to determine if the services sought are required to be provided. They are not.

This ALJ finds the MI Choice agency did offer and authorize appropriate services available under the program to meet the medically necessary needs of the Appellant. The denial of an increase in services to address a need for monitoring and supervision was appropriate under the operating standards governing the program. While this ALJ has concern for the needs of the Appellant, the operating standards of the program do not require the agency to provide mere monitoring and supervision to address wandering and safety needs on an individual basis.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, I find the Department properly denied the Appellant's request for an increase service hours.

IT IS THEREFORE ORDERED that:

The Department's prior decision is AFFIRMED.

Jennifer Isiogu
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:

Date Mailed: 7/16/2010

***** NOTICE *****

The State Office of Administrative Hearings and Rules for the Department of Community Health 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 State Office of Administrative Hearings and Rules for the Department of Community Health 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 mailing date of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the mailing date of the rehearing decision.