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

[redacted]
Appellant

_____/

Docket No. 2010-54300 CMH
Case [redacted]

DECISION AND ORDER

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

After due notice, a hearing was held on [redacted]. The Appellant was represented by her guardian, [redacted]. Her witness was [redacted]. The Appellant was present – but did not testify. [redacted], Compliance Coordinator, represented the Department. His witnesses were, [redacted], supports coordinator and [redacted], director of care management.

ISSUE

Did the Department properly reduce the Appellant's the Community Living Supports (CLS)?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. The Appellant is a [redacted] Medicaid beneficiary. (Appellant's Exhibit #1)

2. The Appellant is identified as a person afflicted with cerebral palsy, seizure disorder and chronic encephalopathy.

3. The Appellant's mother is her chore provider for Home Help Services. (See Testimony)

4. The Appellant's stepfather is the provider of CLS services. (See Testimony)

5. The Appellant attends a day program, OT, follows a behavior treatment plan and receives out of home respite among other CMH services. (See Testimony of [redacted])

6. On or about [redacted], the Appellant was notified that at some point in the future during the PCP process the CMH would review all services received by the Appellant with the goal of eliminating duplication of service. She was warned that "an adjustment to current staffing hours may occur." (Department's Exhibit B)

7. On [redacted], the CMH unilaterally reduced CLS from 8.00 hours per day to 6.35 hours per day. (See Testimony)

8. On [redacted], the CMH unilaterally reduced CLS further to 3.84 hours per day. (See Testimony)

9. The reductions were made without notice of appeal rights to the Appellant. (See Testimony of [redacted])

10. The Appellant's representative testified that when she executed the PCP on [redacted] she signed in such a manner as to reflect her intent to appeal in the future on implementation of the reduced rates of CLS. (See Testimony of [redacted]

11. The Appellant's representative said she filed (2) two appeals regarding this issue.[1] (See Testimony of [redacted])

12. The formula for ensuring non-duplication of services between DHS and CMH is: Per outcome of Fair Hearing (DHS) for chore provider services, DHS will be providing 4 hours 16 minutes of chore provider services per day. Community Living Support hours will be adjusted as follows to allow for 8 hours of in home services between Community Mental Health and DHS: Effective [redacted] – 3.84 hours in home Community Living Supports authorized daily. Consumer receives 3.84 hours of CLS hours per day – hours maybe adjust [sic] daily based on consumer need +/-3.84 hours but not to exceed 116 hours per month for months with 30 days, not to exceed 119 hours per month for months with 31 days, not to exceed 108 hours for months with 28 days[.]

[1] On review believed to be at page 3 of Appellant's Ex. #1 – consolidated herein by the ALJ for purposes of this decision.

13. The Hearing Summary was received by the tribunal and the parties on the day of hearing, [redacted]. (Department's Exhibit A)

14. The initiating appeal was received by SOAHR on [redacted].

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

> 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 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…

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) Medicaid Managed Specialty Services and Support program waiver in conjunction with a section 1915(c) HSW. Saginaw County Community Mental Health Authority contracts with the Michigan Department of Community Health to provide services under the HSW.

Furthermore, the Medicaid Provider Manual (MPM) at §15 – Habilitation Supports Waiver for Persons with Developmental Disability has established standards by way of amount, duration and scope for services and supports utilized by a beneficiary:

> 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. Service selection guidelines for beneficiaries with developmental disabilities 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. HSW beneficiaries must be enrolled through the MDCH enrollment process completed by the PIHP. The enrollment process must include annual verification that the beneficiary:
>
> - Has a developmental disability (as defined by Michigan law);
> - Is Medicaid-eligible;
> - Is residing in a community setting;
> - If not for HSW services, would require ICF/MR level of care services; and
> - Chooses to participate in the HSW in lieu of ICF/MR services.
>
> The enrollment process also includes confirmation of changes in the beneficiary's enrollment status including termination from the waiver, changes of residence requiring transfer of the waiver to another PIHP, and death. Termination from the HSW may occur when the beneficiary no longer meets one or more of the eligibility criteria specified above as determined by the PIHP, or does not receive at least one HSW service per month, or withdraws from the program voluntarily, or dies. Instructions for beneficiary enrollments and annual re-certification may be obtained from the MDCH Bureau of Community Mental Health Services. (Refer to the Directory Appendix for contact information.)

The PIHP shall use value purchasing for HSW services and supports. The PIHP shall assist beneficiaries to examine their first- and third-party resources to pursue all reimbursements to which they may be entitled, and to make use of other community resources for non-PIHP covered activities, supports or services. Reimbursement for services rendered under the HSW is included in the PIHP capitation rate.

WAIVER SUPPORTS AND SERVICES

….

Community Living Supports (CLS)

Community Living Supports (CLS) facilitate an individual's independence and promote integration into the community. The supports can be provided in the beneficiary's residence (licensed facility, family home, own home or apartment) and in community settings, and may not supplant other waiver or state plan covered services (e.g., out of-home non-vocational habilitation, Home Help Program, personal care in specialized residential, respite). The supports are:

- Assisting*, reminding, observing, guiding or training the beneficiary with:
- Meal preparation;
- Laundry;
- Routine, seasonal, and heavy household care and maintenance;
- Activities of daily living, such as bathing, eating, dressing, personal hygiene; and

* CLS services may not supply state plan services, such as Personal Care (assistance with ADLs in a certified specialized residential setting) and Home Help or Expanded Home Help (assistance with meal preparation, laundry, routine household care and maintenance, activities of daily living and shopping in the beneficiary's own unlicensed home). If such assistance is needed the beneficiary, with the help of the PIHP supports coordinator, must request Home Help, and if necessary Expanded Home Help, from DHS. CLS may be used for those activities while the beneficiary awaits determination by DHS of the amount, scope and duration of Home Help or Expanded Home Help. The PIHP supports coordinator must assist, if necessary, the beneficiary in filling out and sending a request for a Fair Hearing when the beneficiary believes that the DHS authorization of amount, scope and duration of Home Help does not accurately reflect his or her needs based on the findings of the DHS assessment. CLS assistance with meal preparation, laundry, routine household care and maintenance, activities of daily living and/or shopping may be used to complement Home Help or Expanded Home Help services when the beneficiary's needs for this assistance have been officially determined to exceed the DHS's allowable parameters. CLS may also be used for those activities while the beneficiary awaits the decision from a Fair Hearing of the appeal of a DHS decision. Reminding, observing, guiding, and/or training or these activities are CLS coverages that do not supplant Home Help or Expanded Home Help.

- Shopping for food and other necessities of daily living.
- Assistance, support and/or training the beneficiary with:
- Money management;
- Non-medical care (not requiring nurse or physician intervention);
- Socialization and relationship building;
- Transportation (excluding to and from medical appointments that are the responsibility of Medicaid through DHS or health plan) from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence);
- Leisure choice and participation in regular community activities;
- Attendance at medical appointments; and
- Acquiring procedure goods other than those listed under shopping and nonmedical services.
- Reminding, observing, and/or monitoring of medication administration.

The CLS do not include the costs associated with room and board. Payments for CLS may not be made, directly or indirectly, to responsible relatives (i.e., spouses or parents of minor children) or the legal guardian.

The HSW services cannot supplant Medicaid services. The beneficiary must use the DHS Home Help or Expanded Home Help services for assistance with meal preparation, laundry, routine household care and maintenance, activities of daily living (bathing, eating, dressing, personal hygiene), and shopping. (Emphasis Supplied)

MPM §15 et seq [HAB waiver], October 1, 2010, pp. 81, 82

***

The Department witnesses testified that they fortuitously learned that the Appellant was likely receiving duplicate services from the Department of Human Services and Community Mental Health via their respective Home Help and CLS program overlap segments. They testified that a meeting was held during the summer wherein the Department of Human Services representative agreed to compensate the Appellant[2] for HHS services at service ranking of 3 or greater – while the CMH took the lesser rankings of 1 and 2.

This coordination of benefit was never expressly referenced to the Appellant but – in theory – resulted the same figure and hours of service except that it is now shared between the CMH and DHS. *See* Department's Exhibit B

[2] Neither the Appellant nor her representative/guardian or CLS provider participated in this meeting. They were not informed of the meeting according to [redacted].

On review it was learned that the CMH was awaiting action from the DHS as they implemented an order from Administrative Law Judge [redacted] in an unrelated HHS contest where she ordered the Department to reinstate the Appellant's HHS retroactive to [redacted]

Mathematically, it appears that DHS has compiled with ALJ Lack's order and the joint HHS/CLS benefit based on today's proofs appears to be non duplicative as to cost – at least as of the date of this order. However, there is no way to determine what the Appellant lost by way medically necessary CLS [if anything] since she was never provided with timely or adequate notice to properly prepare for this hearing. [42 CFR 431.210; 42 CFR 431.211]

The Department's unilateral reduction of CLS without notice to the Appellant was reached in error. The Department shall reinstate CLS to the level in effect on [redacted] through the date this Decision and Order is received by the Department. Thereafter, the CMH shall apply the newly coordinated rate and notify the Appellant of her right to appeal. *See* Finding of Fact #12

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department improperly reduced the Appellant's CLS, but correctly found the coordinated rate.

IT IS THEREFORE ORDERED that

The Department's decision is REVERSED in part and AFFIRMED in part.

Dale Malewska
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc: [redacted]

[redacted]
Docket No. 2010-54300 CMH
Hearing Decision & Order

[redacted]

Date Mailed: 12/15/2010

***** NOTICE *****

The State Office of Administrative Hearings and Rules 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 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.