STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P. O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax (517) 373-4147

IN THE MATTER OF:

Docket No. [redacted]
Case No. [redacted]

[redacted],

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.*, upon the Appellant's request for a hearing.

After due notice, a hearing was held on [redacted]. Attorney [redacted] appeared on Appellant's behalf. Dr. [redacted], Appellant's physician, and [redacted], Appellant's sister, testified as witnesses on Appellant's behalf. Attorney [redacted] represented the [redacted] County Community Mental Health & Substance Abuse Services ([redacted]). [redacted], Utilization Review Coordinator, appeared as a witness on behalf of [redacted].

ISSUE

Did the [redacted] properly reduce the Community Living Supports (CLS) Appellant was receiving in a one-to-one ratio 24 hours a day?

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 [redacted] year-old woman who has been diagnosed with moderate mental retardation and cerebral palsy. (Exhibit 1, page 10). Appellant also has a legal guardian. (Exhibit 1, pages 6-8).

2. The [redacted] is under contract with the Department of Community Health (MDCH) to provide Medicaid covered services to people who reside in the CMH service area.

3. Appellant has been receiving services through the [redacted], including CLS 24 hours a day at a one-to-one ratio. (Exhibit 1, page 10).

4. When Appellant's CLS was first authorized, she was living with a roommate who also had needs and they shared CLS workers at a 2:1 ratio. Appellant's roommate subsequently moved and Appellant's CLS was then provided 24 hours per day at a one-to-one ratio. (Testimony of).

5. Ultimately, the decided to reduce Appellant's CLS services. (Testimony of).

6. Appellant filed a local appeal with respect to that reduction. (Testimony of DeLeon).

7. On , sent Appellant a notice that the result of the local appeal was to "uphold the decision to reduce her Community Living Support Services (CLS) - as provided in a one-to-one ration - from 24 hours per day to 12 hours per day." (Exhibit 1, page 1).

8. The reduction was to be effective and the notice gives the reason for the decision as Appellant not meeting the medical necessity criteria for 24-hour per day CLS provided in a one-to-one fashion. (Exhibit 1, page 1).

9. The notice further provided three recommendations for Appellant's future care. (Exhibit 1, pages 1-2).

10. The Michigan Administrative Hearing System (MAHS) received Appellant's request for hearing on . (Exhibit 1, pages 4-8).

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…

(42 USC 1396n(b))

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) and 1915(c) Medicaid Managed Specialty Services and Support program waiver.

The Medicaid Provider Manual (MPM), Mental Health/Substance Abuse Section, articulates the relevant policy and, with respect to CLS, it states:

17.3.B. COMMUNITY LIVING SUPPORTS

Community Living Supports are used to increase or maintain personal self-sufficiency, facilitating an individual's achievement of his goals of community inclusion and participation, independence or productivity. The supports may be provided in the participant's residence or in

community settings (including, but not limited to, libraries, city pools, camps, etc.).

Coverage includes:

▪ Assisting (that exceeds state plan for adults), prompting, reminding, cueing, observing, guiding and/or training in the following activities:

> meal preparation

> laundry

> routine, seasonal, and heavy household care and maintenance

> activities of daily living (e.g., bathing, eating, dressing, personal hygiene)

> shopping for food and other necessities of daily living

CLS services may not supplant state plan services, e.g., Personal Care (assistance with ADLs in a certified specialized residential setting) and Home Help or Expanded Home Help (assistance in the individual's own, unlicensed home with meal preparation, laundry, routine household care and maintenance, activities of daily living and shopping). If such assistance appears to be needed, the beneficiary must request Home Help and, if necessary, Expanded Home Help from the Department of Human Services (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. If the beneficiary requests it, the PIHP case manager or supports coordinator must assist him/her in requesting Home Help or in filling out and sending a request for Fair Hearing when the beneficiary believes that the DHS authorization of amount, scope and duration of Home Help does not appear to reflect the beneficiary's needs based on the findings of the DHS assessment.

- Staff assistance, support and/or training with activities such as:

    - money management

    - non-medical care (not requiring nurse or physician intervention)

    - socialization and relationship building

    - transportation from the beneficiary’s residence to community activities, among community activities, and from the community activities back to the beneficiary’s residence (transportation to and from medical appointments is excluded)

    - participation in regular community activities and recreation opportunities (e.g., attending classes, movies, concerts and events in a park; volunteering; voting)

    - attendance at medical appointments

    - acquiring or procuring goods, other than those listed under shopping, and non-medical services

- Reminding, observing and/or monitoring of medication administration

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

CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, state plan coverage Personal Care in Specialized Residential Settings. Transportation to medical appointments is covered by Medicaid through DHS or the Medicaid Health Plan. Payment for CLS services may not be made, directly or indirectly, to responsible relatives (i.e., spouses, or parents of minor children), or guardian of the beneficiary receiving community living supports.

> 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 individual'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 of these activities are CLS coverages that do not supplant Home Help or Expanded Home Help.

(MPM, Mental Health and Substance Abuse Section, January 1, 2011, pages 108-109)

However, Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services and the Specialty Services and Support program waiver did not waive the federal Medicaid regulation that requires that authorized services be medically necessary. *See* 42 C.F.R. § 440.230.

With respect to medical necessity, the MPM provides:

> **2.5 MEDICAL NECESSITY CRITERIA**
>
> The following medical necessity criteria apply to Medicaid mental health, developmental disabilities, and substance abuse supports and services.
>
> **2.5.A. MEDICAL NECESSITY CRITERIA**
>
> Mental health, developmental disabilities, and substance abuse services are supports, services, and treatment:
>
> - Necessary for screening and assessing the presence of a mental illness, developmental disability or substance use disorder; and/or
> - Required to identify and evaluate a mental illness, developmental disability or substance use disorder; and/or
> - Intended to treat, ameliorate, diminish or stabilize the symptoms of mental illness, developmental disability or substance use disorder; and/or

- Expected to arrest or delay the progression of a mental illness, developmental disability, or substance use disorder; and/or

- Designed to assist the beneficiary to attain or maintain a sufficient level of functioning in order to achieve his goals of community inclusion and participation, independence, recovery, or productivity.

2.5.B. DETERMINATION CRITERIA

The determination of a medically necessary support, service or treatment must be:

- Based on information provided by the beneficiary, beneficiary's family, and/or other individuals (e.g., friends, personal assistants/aides) who know the beneficiary; and

- Based on clinical information from the beneficiary's primary care physician or health care professionals with relevant qualifications who have evaluated the beneficiary; and

- For beneficiaries with mental illness or developmental disabilities, based on person-centered planning, and for beneficiaries with substance use disorders, individualized treatment planning; and

- Made by appropriately trained mental health, developmental disabilities, or substance abuse professionals with sufficient clinical experience; and

- Made within federal and state standards for timeliness; and

- Sufficient in amount, scope and duration of the service(s) to reasonably achieve its/their purpose.

- Documented in the individual plan of service.

(MPM, Mental Health and Substance Abuse Section, January 1, 2012, pages 12-13)

Here, the found that:

> Based on our records, does not meet the Medicaid medical necessity for 24-hour per day CLS provided in a one-to-one fashion. Her physical and mental health needs do not rise to that level of support need. For example, from notes she has not utilized staff in the overnight shift in over year. The staff in her home during those hours have had no service interventions to perform overnight.

(Exhibit 1, page 1)

In response, Appellant's sister did testify that there have been nighttime interventions during the past year. However, she also conceded that there is no record of any interventions and she cannot provide any further details beyond remembering that they occurred.

Appellant's doctor also testified that the presence of a CLS worker during the night provides Appellant with reassurance and, consequently, has helped avoid the need for nighttime interventions. Dr. further testified that the absence of a CLS worker during the night would likely cause Appellant stress and would lead to incontinency issues.

The burden is on Appellant to show by a preponderance of the evidence that the ' decision was in error. Here, given the records kept by Appellant's caregivers and the lack of any specific details contradicting those records, this Administrative Law Judge finds that there have been no nighttime interventions in over a year. Moreover, this Administrative Law Judge also agrees that the complete lack of nighttime interventions for over a year demonstrates that the one-to-one CLS during the night is not medically necessary. In fact, while Appellant's doctor testified as to some benefits regarding the presence of a CLS worker during the night, there has never been a finding that a worker must be present at all times. Appellant was never authorized a CLS worker 24 hours a day at a one-to-one ratio based on her own needs and, instead, she only arrived at this situation after her roommate moved out. Now that the is addressing Appellant's needs solely on their own merits, Appellant has failed to meet her burden of proof of demonstrating that 24 hours a day of CLS at a one-to-one ratio is medically necessary. Accordingly, the ' decision is sustained.

Nevertheless, while the decision to reduce CLS hours is sustained, it is not clear what exact services will be provided in the future. Respondent has identified at least three options following the reduction and it is not clear which, if any, Appellant and her guardian would want. Moreover, it is unclear if one of those options is even sufficient. For example, asserts that Appellant's needs can be met through 12 hours of CLS and an overnight monitoring system, including an emergency button for Appellant to push if necessary. However, both Appellant's doctor and her sister testified that Appellant is incapable of using the emergency button while Respondent's witness

conceded that she was not sure if Appellant was mentally capable of using the emergency button. To the extent, a final decision regarding the implementation of services needs to be made, that issue is not before this Administrative Law Judge. With respect to the issue before this Administrative Law Judge, *i.e.* the reduction from CLS 24 hours a day at a one-to-one ratio, the ’ decision is affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the properly reduced Appellant’s CLS from 24 hours a day at a one-to-one ratio.

IT IS THEREFORE ORDERED that:

The ' decision is AFFIRMED.

Steven J. Kibit
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc:

Date Mailed: 5/31/2012

***** 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.