

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARINGS SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

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IN THE MATTER OF:

Docket No. 2012-53278 EDW

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]. At the conclusion of the hearing on [REDACTED] the matter was continued so that the parties could pursue settlement. The hearing was continued on [REDACTED]. Following the hearing on [REDACTED] the matter was placed on hold so that the parties could pursue settlement in the instant matter and also a related appeal Appellant had filed against Washtenaw County Community Support and Treatment Services (CSTS), Docket No. 2012-63888 CMH.

[REDACTED] appeared as an Authorized Hearing Representative on behalf of the Appellant, [REDACTED] (Appellant). [REDACTED] Appellant's mother, appeared as a witness for Appellant. [REDACTED] appeared as an interpreter for Appellant's mother. Following the [REDACTED] hearing, [REDACTED] withdrew as Appellant's Authorized Hearing Representative. On [REDACTED] the undersigned was informed that [REDACTED] from Michigan Protection and Advocacy was representing Appellant.

[REDACTED] Regional Manager, represented the Department's MI Choice Waiver Agency, Area Agency on Aging 1-B. (Waiver Agency or AAA1B). [REDACTED] RN Care Manager; [REDACTED] Supports Coordinator; and [REDACTED], Head Services Supervisor appeared as witnesses for the Waiver Agency. [REDACTED] Special Projects Manager, represented the Waiver Agency at the [REDACTED] hearing.

ISSUE

Did the MI Choice Waiver Agency properly deny the Appellant's request for 24 hour per day, 7 day per week services?

FINDINGS OF FACT

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

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1. The Department contracts with Area Agency on Aging 1-B (AAA 1-B or Waiver Agency) to provide MI Choice Waiver services to eligible beneficiaries.
2. AAA 1-B must implement the MI Choice Waiver program in accordance to Michigan's waiver agreement, Department policy and its contract with the Department.
3. Appellant is a [REDACTED] year old Medicaid beneficiary, born [REDACTED] (Exhibit 1, p 5).
4. Appellant aged out of the Children's Special Health Services program (CSHS) when he turned [REDACTED] years old and was assessed on [REDACTED] for enrollment in the MI Choice Waiver program. (Exhibits 1, pp 5-22).
5. Due to the complex nature of the Appellant's condition as a quadriplegic, Appellant's mother requested 24 hour per day, 7 day per week services for Appellant. AAA 1-B submitted a Special Memorandum of Understanding (SMOU) to the Department to obtain additional services. The Department approved 18.2 hours of services per day, which included 8 hours per day private duty nursing, 8 hours per day community living supports, and 16 hours per week private duty nursing for respite for Appellant's mother. (Exhibit 1).
6. On [REDACTED] an Adequate Action Notice was mailed to Appellant's mother, informing her that her request for 24 hour per day care had been denied, but that 18.2 hours of care per day had been approved. (Exhibit 1).
7. On [REDACTED] MAHS received Appellant's request for an expedited hearing to contest the denial of the additional hours of PDN services that she was requesting. (Exhibit 3).
8. On [REDACTED] [REDACTED] withdrew as Authorized Hearing Representative so that she could represent Washtenaw County Community Support and Treatment Services (CSTS) in Docket No. 2012-63888 CMH.

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.

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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 (formerly HCFA) to the Michigan Department of Community Health (Department). Regional agencies, in this case an Area Agency on Aging (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 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)*.

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 MI Choice Policy Chapter to the *Medicaid Provider Manual, MI Choice Waiver*, April 1, 2012, provides in part:

4.1 COVERED WAIVER SERVICES

In addition to regular State Plan coverage, MI Choice participants may receive services outlined in the following subsections. [p. 9].

* * *

4.1.P. PRIVATE DUTY NURSING

Private Duty Nursing (PDN) services consist of individual and continuous nursing care (in contrast to "Skilled Nursing" services characterized by part-time or intermittent care) provided by licensed nurses within the scope of State law. These services are provided to a participant at home. MI Choice participants 18-21 years old who meet the eligibility requirements for Medicaid State Plan PDN services will continue to receive PDN services through the Medicaid State Plan and will not receive PDN services through MI Choice. Older MI Choice participants may continue to receive PDN services as a MI Choice service.

Participants receiving PDN services must remain on active status when determining reassessment schedules. Refer to the Reassessment of Participants subsection of this chapter for additional information. PDN services cannot be used in place of, or as a substitute for, other waiver or State Plan services. [p. 15].

* * *

8.3.A. EXCEPTIONAL CARE NEEDS

MDCH recognizes that the care needs of some participants are exceptional in comparison with the general MI Choice population. Rather than omit such participants from the program, MDCH provides waiver agencies extra consideration in allowing the waiver agencies to authorize the necessary services and support for such individuals.

A Memorandum of Understanding (MOU) for participants with extensive service and support needs may be requested for participants whose average daily service costs meet or exceed \$120 for a seven-day service

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week, regardless of how many days the participant actually received services. MDCH will not approve an MOU request to cover short-term increases in service costs due to temporary increases in MI Choice services. MDCH defines short-term as less than 30 days.

MDCH will authorize a Special Memorandum of Understanding (SMOU) for participants with complex medical acuity who require extensive MI Choice services. MDCH will consider an SMOU for participants meeting at least one of the following:

- Participant is aging out of the Children's Special Health Care Services program or transferring from the Habilitation Support Services Waiver program and requires continuing private duty nursing services
- Participant is ventilator-dependent
- Participant has a tracheotomy that requires extensive suctioning, tracheotomy care, or nebulizer treatments
- Participant has multiple wounds at stages 2, 3, or 4 that require frequent dressing changes and treatment
- Participant has a medical condition with a high acuity and the attendant-required care is complex (i.e., a combination of tube feedings, dressing changes, intravenous medications, oxygen therapy, colostomy/ileostomy, etc.)

MDCH will not approve an SMOU for participants for the following:

- Participant requires a temporary increase in services to either provide relief for, or substitute for, informal support
- Participant requires a temporary increase in services to cover night, weekend, or holiday premiums for staff

The waiver agency must apply for an SMOU through procedures stipulated in Appendix C of the waiver agency contract. MDCH approves SMOU requests for up to one year.

Waiver agencies must receive MDCH approval for enhanced services. [p. 25]

Appellant's mother testified that Appellant suffered a severe traumatic brain injury and has been cared for since that time in her home. Appellant's mother indicated that prior to his birthday, Appellant was receiving 21 hours per day of in-home services through Washtenaw County Community Support and Treatment Services (CSTS). At the time of the transition, Appellant's mother was informed that CSTS would continue to provide some services to Appellant, so she believed that she would be getting the 24-hour per day care she desired. However, when CSTS informed her that they could not continue to provide services to Appellant, Appellant's mother filed the instant appeal.

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Appellant's mother testified that she is a single parent with no informal supports in the area. Appellant's mother also testified that she had been struggling to care for Appellant even before the hours of care were reduced from 21 hours per day to 18.2 hours per day.

The Waiver Agency's representative testified that Appellant's mother requested 24 hour per day care for the Appellant. The Waiver Agency's representative stated that since Appellant's case involved a person with complex medical needs, she prepared an SMOU for the Department's approval requesting 24 hour per day care. The Waiver Agency's representative stated that the Department only approved 18.2 hours per day of care and that AAA 1B is bound by the Department's determination. The Waiver Agency's representative stated that they followed the requirements contained in Attachment K to their contract with MDCH in seeking authorization for services in this case. The Waiver Agency's representative stated that the amount of care was determined based on an in-home assessment conducted on [REDACTED]. The Waiver Agency's representative also testified that she believed that CSTS could and should coordinate services with AAA 1B to provide Appellant the level of services he needed.

Following the hearing on [REDACTED] the matter was continued so that the parties could pursue settlement. The hearing was continued on [REDACTED]. At the hearing on [REDACTED] the Waiver Agency's representative testified that they submitted another request to the Department for an SMOU, but that this request came back authorizing only 13.5 hours of care per day. The Waiver Agency's representative reiterated that it was her belief that CSTS should be coordinating care for Appellant with AAA 1B.

Following the hearing [REDACTED] the matter was placed on hold so that the parties could pursue settlement in the instant matter and also in a related appeal Appellant had pending against Washtenaw County Community Support and Treatment Services (CSTS) in Docket No. 2012-63888 CMH. On [REDACTED] the undersigned was informed by a Department representative who participated in the settlement discussions, that the Waiver Agency had again reassessed Appellant and sought another SMOU from the Department. As a result, as of [REDACTED] the Waiver Agency was providing Appellant 21.5 hrs of care per day (11 hours of PDN and 10.5 hours of personal care/CLS), slightly more hours than Appellant had been receiving before aging out of the Children's Special Health Services program (CSHS).

This ALJ finds the MI Choice Waiver Agency properly denied the Appellant's request for 24 hour per day services. The Medicaid policy cited above makes it clear that the Waiver Agency must seek approval from MDCH for such enhanced services. The Waiver Agency followed proper procedures in seeking several SMOUs from the Department and the Department ultimately authorized 21.5 hours per day of services for Appellant, slightly more hours than Appellant had been receiving before aging out of the Children's Special Health Services program (CSHS). This determination was made following another in-home assessment of Appellant's medically necessary needs by the Waiver Agency. This ALJ's review of the in-home assessments finds that the

assessments demonstrate that the Appellant's medically necessary needs are met with the authorized 21.5 hours per day of services.

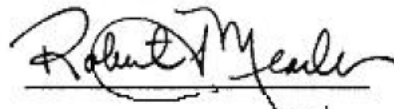
Accordingly, the Appellant has failed to meet the burden of showing by a preponderance of the evidence that he should receive 24 hour per day care.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, this Administrative Law Judge finds that the MI Choice Waiver Agency properly denied the Appellant's request for 24 hour per day care. The Waiver Agency shall continue to provide Appellant 21.5 hours of care per day.

IT IS THEREFORE ORDERED that:

The MI Choice Waiver Agency's decision is MODIFIED.



Robert J. Meade
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 9/18/2012

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***** 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.