

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**
P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 373-4147

IN THE MATTER OF:

██████████

Appellant

_____ /

Docket No. 2013-40013 EDW
Case No. ██████████

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 ██████████. Appellant appeared and testified on her own behalf. ██████████, caregiver, appeared as a witness for Appellant.

██████████, Hearing Coordinator, appeared on behalf of the Department's Waiver Agency, ██████████ (██████████ or Waiver Agency). ██████████, Case Manager and ██████████, RN, Case Manager appeared as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly reduce Appellant's Community Living Supports (CLS) by 2 hours per day, 7 days per week?

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 Department contracts with ██████████ to provide MI Choice Waiver services to eligible beneficiaries. (Exhibit A, Testimony)
2. ██████████ must implement the MI Choice Waiver program in accordance with Michigan's waiver agreement, Department policy and its contract with the Department. (Testimony)
3. Appellant is a ██████ year-old Medicaid beneficiary, born ██████████. Appellant is diagnosed with debility NOS, chronic obstructive pulmonary disease, hypertension, peripheral vascular disease, stroke/CVA, anxiety, depression, diabetes mellitus, hyperlipidemia, anticoagulation disorder,

sleep apnea, altered mental status, lack of coordination, chronic pain, malaise and fatigue, and morbid obesity. Appellant has a history of falls and sepsis. Appellant's surgical history includes a tonsillectomy, adenoidectomy, tubal ligation and release of Achilles tendons. (Exhibit A, pp 12-13; Testimony)

4. Appellant lives alone in an apartment. Appellant's boyfriend ██████ visits her daily and prepares dinner for her nightly. (Exhibit A, p 6; Testimony)
5. Following an in-home reassessment on ██████████, Appellant's Supports Coordinator determined that Appellant's CLS hours would be reduced by 2 hours per day due to Appellant's increased independence. At the reassessment, Appellants Supports Coordinator noted that Appellant was transferring herself independently, toileting herself and showering herself. (Exhibit A, pp 21-25; Testimony)
6. On ██████████, the Waiver Agency sent Appellant an Advance Action Notice informing her that her CLS hours would be reduced from 4 hours per day to 2 hours per day, 7 days per week, effective ██████████. (Exhibit A, pp 22-23)
7. On ██████████, the Michigan Administrative Hearing System received a request for hearing from the Appellant. (Exhibit 1). In her request for hearing, Appellant stated:

I need help more than two hours a day. I've had falls. I need more time to have my laundry done. I need assistance with getting dressed, leg braces and shoes properly. I need more hours so my house is sufficiently cleaned. Need more time for my meals to be prepped – can't do it all myself, have also had another back injury due to falling the last time. (Exhibit 1)

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 (formerly HCFA) to the Michigan Department of Community Health (Department). Regional agencies 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*, 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.I. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) services facilitate a participant's independence and promote reasonable participation in the community. Services can be provided in the participant's residence or in a community setting to meet support and service needs.

CLS may include assisting, reminding, cueing, observing, guiding, or training with meal preparation, laundry, household care and maintenance, shopping for food and other necessities, and activities of daily living such as bathing, eating, dressing, or personal hygiene. It may provide assistance with such activities as money management, nonmedical care (not requiring nurse or physician intervention), social participation, relationship maintenance and building community connections to reduce personal isolation, non-medical transportation from the participant's residence to community activities, participation in regular community activities incidental to meeting the participant's community living preferences, attendance at medical appointments, and acquiring or procuring goods and services necessary for home and community living.

CLS staff may provide other assistance necessary to preserve the health and safety of the participant so they may reside and be supported in the most integrated and independent community setting.

CLS services cannot be authorized in circumstances where there would be a duplication of services available elsewhere or under the State Plan. CLS services cannot be authorized in lieu of, as a duplication of, or as a supplement to similar authorized waiver services. The distinction must be apparent by unique hours and units in the individual plan of services. Tasks that address personal care needs differ in scope, nature, supervision arrangements or provider type (including provider training and qualifications) from personal care service in the State Plan. The differences between the waiver coverage and the State Plan are that the provider qualifications and training requirements are more stringent for CLS tasks as provided under the waiver than the requirements for these types of services under the State Plan.

██████████
Docket No. 2013-40013 EDW
Hearing Decision & Order

When transportation incidental to the provision of CLS is included, it must not also be authorized as a separate waiver service. Transportation to medical appointments is covered by Medicaid through the State Plan. Community Living Supports do not include the cost associated with room and board.

Medicaid Provider Manual
MI Choice Waiver Section
April 1, 2013, pp 12-13

The MI Choice Waiver Program is a Medicaid-funded program and its Medicaid funding is a payor of last resort. In addition, Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services. 42 CFR 440.230. In order to assess what MI Choice Waiver Program services are medically necessary, and therefore Medicaid-covered, the Waiver Agency performs periodic assessments.

Appellant bears the burden of proving, by a preponderance of evidence, that 28 hours per week (4 hours per day) of CLS hours are medically necessary.

Appellant's Case Manager testified that following an in-home reassessment on ██████████, her team determined that Appellant's CLS hours would be reduced by 2 hours per day due to Appellant's increased independence. At the reassessment, Appellant's Case Manager noted that Appellant is now transferring herself independently, toileting herself and showering herself. Appellant's Case Manager also noted that the notes from the aides assisting Appellant supported the reduction in CLS hours because those notes showed that the aides were only helping Appellant with homemaking activities.

Appellant's friend and former caregiver testified that he was present for the assessment on ██████████ and that as of ██████████, Appellant has been completely dropped from the Waiver program. Appellant's friend and former caregiver indicated that Appellant did agree to the reduction in CLS hours on ██████████, but that it readily became apparent that 2 hours per day would be insufficient to care for Appellant. Appellant's friend and former caregiver testified that Appellant did take a bath by herself one time, but that she probably should not have even done that. Appellant's friend and former caregiver indicated that Appellant can stand and walk a bit, with the use of her leg braces and a one-handed walker (because Appellant only has the use of 1 arm), but that it is extremely difficult for her to do anything around the house. Appellant's friend and former caregiver indicated that Appellant is mostly in a wheel chair these days because she is not stable on her legs. Appellant's friend and former caregiver testified that Appellant has to have a commode in the bedroom and one in the living room because of her incontinence. Appellant's friend and former caregiver also indicated that Appellant needs her bed linens changed frequently because of her incontinence and she is unable to do that task by herself. Appellant's friend and former caregiver indicated that the information provided at the assessment was true at that time, but that things have changed for the worse since then.

Appellant testified that she cannot completely dress herself because she cannot put on her leg braces or her shoes. Appellant indicated that she only took a bath on her own one time. Appellant's friend and former caregiver testified that she does not think that persons who meet with her for 15-30 minutes every 4 months are in a position to make decisions regarding her care. Appellant indicated that the workers who performed the assessment should have known that she could not dress herself completely. Appellant indicated that she could not remember what she told the workers at the assessment because her memory is bad.

This ALJ finds that the Waiver Agency properly reduced Appellant's CLS hours from 28 to 14 per week (4 hours per day to 2 hours per day). The evidence presented demonstrated that Appellant's independence had increased since her last assessment and that she was, therefore, able to do more things for herself. Because Appellant was more independent, she should have been able to get by with less CLS hours. Clearly, Appellant's Case Managers can only base their decisions on the information provided to them by Appellant and the information contained in the logs of Appellant's aides. Based on that information, the decision to reduce Appellant's CLS hours was proper.

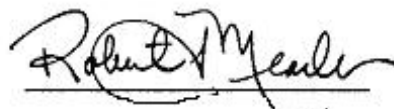
Appellant was also advised that the subsequent decision to terminate Appellant's Waiver services was not the subject of this appeal and that she would need to appeal that decision separately. Appellant's Case Manager did give a brief overview of why Appellant's services have been terminated.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the MI Choice Waiver agency properly reduced Appellant's CLS hours from 28 to 14 hours per week (4 hours per day to 2 hours per day).

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.



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

**Docket No. 2013-40013 EDW
Hearing Decision & Order**

cc:



Date Signed: 6/5/2013

Date Mailed: 6/5/2013

***** 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.