

**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. 2013-44409 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 his own behalf. Appellant's witness was ██████████, caregiver.

██████████, Director, Long-Term Care Programs, ██████████, represented the Department's Waiver Agency. (Waiver Agency or ██████████). ██████████, Social Worker Care Manager; ██████████, R.N. Care Manager; and ██████████, Care Management Supervisor, appeared as witnesses for the Waiver Agency.

**ISSUE**

Did the Waiver Agency properly deny Appellant's request for 13 additional CLS hours 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. Appellant has been enrolled in the MI Choice Waiver Program since ██████████. (Exhibit A, p 1; Testimony)
2. The Waiver Agency is a contract agent of the Michigan Department of Community Health (MDCH) and is responsible for waiver eligibility determinations and the provision of MI Choice Waiver Services.
3. Appellant is a ██████ year-old Medicaid beneficiary, born ██████████, who is diagnosed with cerebral palsy, kidney stones and hypertension. Appellant is unable to ambulate on his own and navigates independently with the use of an electric wheelchair. Appellant requires extensive

assistance with most Activities of Daily Living (ADL's) and Instrumental Activities of Daily Living (IADL's). Appellant's caregivers assist him with bathing, dressing, transfers, toileting, bed mobility, personal hygiene, shopping, meal preparation, transportation, and housekeeping. (Exhibit A, p 1; Testimony)

4. Appellant lives alone in an apartment. (Exhibit A, p 1; Testimony)
5. When Appellant enrolled in the program, his initial service plan included approximately 44.5 hours of care per week, allocated as 6.5 hours of daily assistance 6 days per week and 1 day of 8.5 hours of assistance, to allow for grocery shopping. (Exhibit A, p 1; Testimony)
6. In ██████████, Appellant requested additional hours of assistance in order to get out into the community more, to address toileting issues and to do shopping activities in the evening when traffic was less congested. Appellant's request was approved and his care hours were increased to 68 hours per week. (Exhibit A, p 1; Testimony)
7. In ██████████, Appellant's care hours were again increased, to 71.5 hours per week, to address further concerns of Appellant. (Exhibit A, Item 1, p 3)
8. In ██████████, Appellant switched to a fully self-directed care arrangement. (Exhibit A, Item 1; Testimony)
9. On ██████████, Appellant requested additional care hours for additional assistance in the afternoon related to increased incontinence episodes related to a medical order to increase fluid intake because of his kidney stones. Appellant's request was approved and he was authorized for 78 care hours per week, or approximately 11 hours per day. (Exhibit A, Item 1, p 2)
10. On ██████████, Appellant requested 13 additional care hours per week to again address incontinence. (Exhibit A, Item 3)
11. The Waiver Agency reviewed Appellant's care logs and concluded that there were no instances where essential services were not being provided within the allocated time of 11 hours per day. The exception was that on occasion some housekeeping tasks were not completed until the next "shift" arrived. The Waiver Agency found two episodes of incontinence when caregivers were not present over a 17 day period and two instances where Appellant remained in bed after an incontinence episode before the worker arrived. (A review of the care logs at the hearing showed that there were actually 13 incidents of incontinence over the 17 day period.) (Exhibit A, Item 4)
12. On ██████████, the Waiver Agency sent Appellant a letter informing him

that it believed there was no need to increase care hours and that the issues could be resolved by Appellant rearranging his workers' schedules and the use of incontinence products. (Exhibit A, Item 5) The Waiver Agency also included the required Adequate Action Notice informing Appellant that his request for an additional 13 care hours per week had been denied. (Exhibit A, Item 7)

13. On ██████████, the Michigan Administrative Hearing System received the Appellant's request for an administrative hearing. (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).

#### **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.

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 12-16*

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 additional care hours were medically necessary.

The Waiver Agency's R.N. Care Manager testified that when Appellant enrolled in the program, his initial service plan included approximately 44.5 hours of care per week, allocated as 6.5 hours of daily assistance 6 days per week and 1 day of 8.5 hours of assistance, to allow for grocery shopping. The Waiver Agency's R.N. Care Manager testified that in ██████████, Appellant requested additional hours of assistance in order to get out into the community more, to address toileting issues and to do shopping activities in the evening when traffic was less congested. Appellant's request was approved and his care hours were increased to 68 hours per week. The Waiver Agency's R.N. Care Manager indicated that in ██████████, Appellant's care hours were again increased, to 71.5 hours per week, to address further concerns of Appellant. The Waiver Agency's R.N. Care Manager testified that on ██████████, Appellant requested additional care hours for additional assistance in the afternoon related to increased incontinence episodes related to a medical order to increase fluid intake because of his kidney stones. Appellant's request was approved and he was authorized for 78 care hours per week, or approximately 11 hours per day.

The Waiver Agency's R.N. Care Manager testified that on ██████████, Appellant requested 13 additional care hours per week to again address incontinence. The

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Waiver Agency's R.N. Care Manager indicated that the Care Management Supervisor reviewed Appellant's care logs and concluded that there were no instances where essential services were not being provided within the allocated time of 11 hours per day. The exception was that on occasion some housekeeping tasks were not completed until the next "shift" arrived. The Waiver Agency found two episodes of incontinence when caregivers were not present over a 17 day period and two instances where Appellant remained in bed before the worker arrived. (A review of the care logs at the hearing showed that there were actually 13 incidents of incontinence over the 17 day period.) The Waiver Agency's R.N. Care Manager indicated that on [REDACTED], the Waiver Agency sent Appellant a letter informing him that it believed there was no need to increase care hours and that the issues could be resolved by Appellant rearranging his workers' schedules and the use of incontinence products. The Waiver Agency also included the required Adequate Action Notice informing Appellant that his request for an additional 13 care hours per week had been denied.

The Waiver Agency's R.N. Care Manager also testified that in the past, and during his most recent reassessment, Appellant has indicated that he has friends who can help out in situations where paid care is not available. The Waiver Agency's R.N. Care Manager also indicated that Appellant told her last week that his episodes of incontinence have become less frequent recently.

The Waiver Agency's Care Management Supervisor testified that she reviewed Appellant's care logs and determined that there was no need to increase care hours and that Appellant's issues could be resolved by Appellant rearranging his workers' schedules and the use of incontinence products. The Waiver Agency's Care Management Supervisor also testified that when she spoke to Appellant about having his caregivers work shorter shifts, he indicated that he did not think the caregivers would like that arrangement. The Waiver Agency's Care Management Supervisor testified that she informed Appellant that it was actually more common for caregivers to work shorter shifts than the shifts Appellant was scheduling.

The Waiver Agency's Program Director testified that there is a difference between home care and nursing home care; specifically that in a nursing home someone is available 24 hours a day, 7 days a week to assist patients, but that with home care it is impossible to have someone in the home at all times. The Waiver Agency's Program Director also testified that the Waiver Program is task oriented and that the Waiver Agency cannot pay for caregivers to be present all of the time just in case something might happen. The Waiver Agency's Program Director testified that the self-determination arrangement Appellant has gives him the most possible flexibility to manage his caregivers and that the hours allotted should be sufficient to meet Appellant's needs.

Appellant testified that there were actually 13 incidents of incontinence identified in the care logs that he provided and he had his primary caregiver review each of the incidents. The incidents were reported mostly in the body of the care logs, not under the heading "Unaccomplished Tasks". Appellant indicated that he could wear incontinence products but that he would still have to sit in the soiled products after an

accident until his workers show up. Appellant indicated that having the requested increase in hours would prevent him from having to do that. Appellant indicated that he also did not want to move up the start times for his caregivers because that would prevent them from assisting him with participation in the many community events he is involved in. Appellant indicated that this is really a quality of life issue. Regarding having friends assist him, Appellant indicated that his friends are not always available and he does not want to burden them. Appellant testified that his family is in Indiana, so he relies heavily on his caregivers for support. Appellant also testified that he does not think it is dignified for a 25 year old to wear incontinence products.

This ALJ finds that the Waiver Agency properly denied Appellant's request for an additional 13 CLS per week. Since Appellant has been in the Program, his care hours have increased from 44.5 hours per week to 78 hours per week, or approximately 11 hours per day. As the Waiver Agency points out, incontinence is an unpredictable event and the Waiver Agency cannot have someone in the home constantly just in case Appellant has an incident. If properly managed, 11 hours a day of care should be sufficient to meet Appellant's needs, especially if he uses the informal supports that he has available. Based on the evidence presented, the Waiver Agency's denial was proper.

**DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly denied Appellant's request for an additional 13 CLS per week.

**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

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cc:



Date Signed: June 28, 2013

Date Mailed: June 28, 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.