

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
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IN THE MATTER OF:

██████████,

Appellant

_____ /

Docket No. 2013-52752 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.* and upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. ██████████, Appellant's wife, appeared and testified on Appellant's behalf. ██████████, Clinical Manager, represented the Department of Community Health's Waiver Agency, the ██████████ ("Waiver Agency" or ██████████). Supports Coordinators ██████████ and ██████████ also testified as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency proper deny Appellant's request for additional Community Living Supports (CLS) through the MI Choice waiver program?

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 ██████ year-old male who has been diagnosed with a cerebrovascular accident or stroke; coronary heart disease; chronic obstructive pulmonary disease; hypertension; arthritis; hemiplegia; seizure disorder; anxiety; depression; diabetes mellitus; sleep apnea; legal blindness in left eye; and neuropathy. (Respondent's Exhibit A, pages 1, 9-10).
2. ██████ 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 has been enrolled in and receiving MI Choice waiver services through ██████. (Respondent's Exhibit A, pages 1-19).
4. Specifically, Appellant is authorized for 35 hours of Community Living

- Supports (CLS) a week through ██████. (Respondent's Exhibit A, pages 8-9).
5. Appellant also receives 6 hours a week of CLS through the Department of Veterans Affairs (VA). (Respondent's Exhibit A, pages 8-9).
 6. Appellant lives with his wife/representative and she is his main caregiver. Their ██████ year-old son also lives with them and provides some assistance. (Respondent's Exhibit A, page 4).
 7. Outside of his wife and son, Appellant has limited informal supports. (Respondent's Exhibit A, page 8).
 8. On ██████████, the Waiver Agency conducted a home visit and reassessment of Appellant's services. (Respondent's Exhibit A, pages 1-17).
 9. As part of that reassessment, Appellant's wife/representative stated that she was "very burned out" from taking care of Appellant the majority of the time and that the constant care was having a negative effect on her and her son, who had recently run into some legal troubles. (Respondent's Exhibit A, pages 4, 8; Testimony of Appellant's representative; Testimony of Warner).
 10. Due to those circumstances, Appellant's representative also requested additional CLS hours through the waiver program. (Respondent's Exhibit A, page 17).
 11. The Waiver Agency reviewed the request for more CLS hours and decided that it should be denied. It did, however, offer Appellant and his representative respite services and counseling. (Respondent's Exhibit A, page 8).
 12. Appellant's representative refused the initial offer of respite services as she and Appellant previously had difficulties while utilizing them. (Respondent's Exhibit A, page 8; Testimony of Appellant's representative).
 13. On ██████████, ██████ sent Appellant written notice that the request for additional CLS hours was denied as his current services, including the offered respite and counseling services, were sufficient to meet Appellant's needs. (Respondent's Exhibit C, page 1).
 14. On ██████████, the Michigan Administrative Hearing System (MAHS) received a Request for Hearing filed by Appellant. (Petitioner's Exhibit 1, pages 1-3).
 15. Following the denial and appeal, Appellant's representative has accepted

and utilized the respite services offered by the Waiver Agency. (Respondent's Exhibit B, pages 1-3; Testimony of Appellant's representative).

16. Appellant's representative has not been able to meet with a counselor as the Waiver Agency has not yet referred or identified an available counselor. (Testimony of Appellant's representative).

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.

Appellant is claiming services through the Department's Home and Community Based Services for Elderly and Disabled. The waiver is called MI Choice in Michigan. The program is funded through the federal Centers for Medicare and Medicaid Services to the Michigan Department of Community Health (Department). Regional agencies, in this case ██████████, 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. See 42 CFR 430.25(c)(2).

Types of services that may be offered include:

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)

In this case, Appellant has been approved for CLS and it is the request for additional CLS that is at issue. With respect to CLS, the MI Choice Waiver Chapter of the Michigan Medicaid Provider Manual (MPM) states:

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.

*MPM, April 1, 2013 version
MI Choice Waiver Chapter, pages 12-13*

As discussed above, the Waiver Agency denied the request for additional CLS and offered respite and counseling services instead. With respect to respite, the MPM states:

4.1.D. RESPITE CARE

Respite Care services are provided to participants unable to care for themselves and are furnished on a short-term basis due to the absence of, or need of relief for, those individuals normally providing care for the participant. Services may be provided in the participant's home, in the home of another, or in a Medicaid-certified hospital or a licensed Adult Foster Care facility. Respite care does not include the cost of room and board, except when provided as part of respite care furnished in a facility approved by MDCH that is not a private residence.

Services include:

- Attendant Care (participant is not bed-bound), such as companionship, supervision, and assistance with toileting, eating, and ambulation.
- Basic Care (participant may or may not be bed-bound), such as assistance with ADLs, a routine exercise regimen, and self-medication.

There is a 30-days-per-calendar-year limit on respite services provided outside the home.

*MPM, April 1, 2013 version
MI Choice Waiver Chapter, page 10*

Additionally, with respect to counseling, the MPM states:

4.1.J. COUNSELING

Counseling services seek to improve the participant's emotional and social well-being through the resolution of personal problems or through changes in a participant's social situation.

Counseling services must be directed to participants who are experiencing emotional distress or a diminished ability to function. Family members, including children, spouses or

other responsible relatives, may participate in the counseling session to address and resolve the problems experienced by the participant and to prevent future issues from arising. Counseling services are typically provided on a short-term basis to address issues such as adjusting to a disability, adjusting to community living, and maintaining or building family support for community living. Counseling services are not intended to address long-term behavioral health needs.

*MPM, April 1, 2013 version
MI Choice Waiver Chapter, page 13*

Given the above policy, it is clear that the Waiver Agency properly denied the request for additional CLS and, instead, offered respite services and counseling.

Appellant and his wife/representative requested additional CLS hours because the wife/representative was getting very burned out from taking care of Appellant the majority of the time and that the constant care was having a negative effect on her and her son, who had recently run into some legal troubles.

However, per policy, CLS are meant to facilitate a participant's independence and promote reasonable participation in the community. They are not meant to alleviate stress, no matter how reasonable, from caring for a participant or to provide general care or supervision.

Respite services, on the other hand, are authorized for the specific reason behind the request for additional CLS hours. Per policy, respite services may be provided on a short-term basis due to the need of relief for those individuals normally providing care for the participant. Moreover, while the initial offer of respite was rejected, it appears that Appellant and his wife subsequently utilized respite services to great effect.

Similarly, while no suitable counselor has been located yet, counseling services for Appellant and his family are more appropriate in this case than increased CLS given the basis for the request at issue in this case.

Appellant and his representative bear the burden proving by a preponderance of the evidence that the Waiver Agency erred in denying the request for additional CLS. Here, given the undisputed reasons the request was made in the case and the policies regarding CLS, respite and counseling, Appellant has failed to meet that burden of proof.

Appellant's representative did testify that, after the denial and appeal in this case, Appellant's six (6) hours of CLS through the VA was terminated. The Waiver Agency only learned of that termination during the hearing and the termination may have an effect on the amount of CLS that should be authorized by the Waiver Agency. However, that issue is not before this Administrative Law Judge at this time. This

