

**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. 14-007792 EDW

██████████

██████████

██████████

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

After due notice, an in-person hearing was held on ██████████ ██████████, Appellant's friend and care provider, appeared and testified on Appellant's behalf. Appellant also testified on her own behalf. ██████████, Manager of ██████████, appeared and testified on behalf of the Michigan Department of Community Health's Waiver Agency, the ██████████ ("Waiver Agency" or "██████"). ██████████, supports coordinator, also testified as a witness for the Waiver Agency.

ISSUE

Did the Waiver Agency properly reduce Appellant's services?

FINDINGS OF FACT

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

1. ██████████ is a contract agent of the Michigan Department of Community Health and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services in its service area.
2. Appellant is a ██████████ year-old Medicaid beneficiary who has been diagnosed with chronic obstructive pulmonary disease; Friedreich's ataxia; arthritis; and depression. (Respondent's Exhibit B, pages 1, 7-8).
3. Appellant has been receiving services through the Waiver Agency, including ██████████ hours per week of Community Living Supports (CLS) for assistance with A.M. and P.M. care; toileting; meal preparation; homemaking; shopping; and showering/bathing. (Respondent's Exhibit B, page 15).

4. Appellant's representative is the paid care provider through ██████, as well as Appellant's roommate. (Respondent's Exhibit B, pages 3, 15).
5. Appellant and her representative also pay for a private care worker to come in and assist Appellant ██████ hours per week (██████████ to ██████████ through ██████████). (Respondent's Exhibit B, page 15; Testimony of Appellant's representative).
6. They further pay for that private care provider to assist with homemaking ██████ a month. (Testimony of Appellant's representative).
7. On ██████████ staff performed a routine reassessment in Appellant's home. (Respondent's Exhibit B, pages 1-16).
8. During that reassessment, it was noted that there have been no significant changes with respect to Appellant's Activities of Daily Living (ADLs) or Instrumental Activities of Daily Living (IADLs) since the last assessment. (Respondent's Exhibit B, page 14).
9. On the day of the reassessment, ██████████ also completed a Plan of Care Worksheet form used by ██████ to calculate the recommended number of services that should be authorized in the home. (Respondent's Exhibit D, pages 1-3).
10. In completing that form, ██████████ authorized no time for assistance with housework or shopping because she had determined that those tasks were being performed by Appellant's private pay worker or Appellant's representative on an informal basis. (Respondent's Exhibit D, pages 2-3; Testimony of ██████████).
11. After completion, that Plan of Care Worksheet recommended ██████ hours per week of services. (Respondent's Exhibit D, page 3).
12. During a case conference on ██████████ staff determined that Appellant's services should be reduced to ██████ hours per week based on its findings that Appellant's housekeeping and shopping were being performed by Appellant's private pay worker or Appellant's representative on an informal basis; the fact that Appellant and her representative shared a communal living space; and the recommendation of the Plan of Care Worksheet. (Respondent's Exhibit C, page 3).
13. On ██████████, the Waiver Agency sent Appellant written notice that, in ██████ days, her services would be reduced. (Respondent's Exhibit A, pages 1-2).

14. On ██████████, the Michigan Administrative Hearing System (MAHS) received the request for hearing filed in this matter. (Petitioner's Exhibit 1, pages 1).
15. However, ████████ did not receive notice of any appeal or request for hearing as on ██████████ and, on that date, the reduction took effect. (Respondent's Exhibit C, page 2).
16. On ██████████ MAHS sent out notice of a telephone hearing in this matter scheduled for ██████████
17. On ██████████, Appellant requested an in-person hearing.
18. On ██████████, the matter was rescheduled as an in-person hearing on ██████████

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)

Here, Appellant has been receiving CLS through the Waiver Agency and, with respect to such services, the applicable version 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, July 1, 2014 version
MI Choice Waiver Chapter, pages 12-13*

However, while CLS are Medicaid covered services, Medicaid beneficiaries are still only entitled to medically necessary Medicaid covered services and the MI Choice Waiver did not waive the federal Medicaid regulation that requires that authorized services be medically necessary. See 42 CFR 440.230.

Here, █████ determined that Appellant's CLS should be reduced from █████ hours per week to █████ hours per of week because only █████ hours were medically necessary. Specifically, its witnesses testified that, because the MI Choice program is the payor of last resort under the applicable policy, all formal or informal supports must be exhausted before the Waiver Agency will authorize services and, in this case, assistance with homemaking and shopping should therefore be removed because that assistance was being provided by Appellant's private pay worker or Appellant's representative on an informal basis.

In response, Appellant's representative acknowledged both that he provides informal supports, in addition to the formal care he is paid to provide, and that the private pay worker also assists with shopping and homemaking. However, Appellant and her representative also testified that they need the additional money to pay off a Hoyer lift that they had to purchase while Appellant was on the waiting list for waiver services and that Appellant's medical conditions have worsened since the assessment and her care needs have increased.

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in deciding to reduce her services. Moreover, this Administrative Law Judge is limited to reviewing the Waiver Agency's decision in light of the information it had at the time it made that decision.

Given the record in this case, the undersigned Administrative Law Judge finds that Appellant and her representative have failed to meet their burden of proof and that the reduction in services must therefore be affirmed. Appellant's representative confirmed that homemaking and shopping assistance are provided by a private pay worker, both during regular shifts and █████ a month when paid for separately, and that he provides significant informal supports to Appellant. Moreover, the reasons offered for why the additional hours should be reinstated are insufficient. For example, while Appellant and her representative testified that they use the money paid to Appellant's representative to pay off a Hoyer lift that they needed to purchase, that testimony is immaterial as the undersigned Administrative Law Judge is only concerned with what hours are medically necessary and what the money earned from formal care is used for is irrelevant to that

determination. Similarly, while Appellant's representative testified that Appellant's medical conditions have worsened since the assessment and that her care needs have therefore increased, that testimony is also immaterial in this case as the undersigned Administrative Law Judge's jurisdiction is limited to reviewing the Waiver Agency's decision in light of the information available at the time that decision was made.

To the extent Appellant's medical conditions have worsened since the assessment and her care needs have increased, Appellant and her representative are free to submit a request for additional hours or services. However, with respect to the decision at issue in this case, the Waiver Agency's actions must be affirmed given the available information.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly reduced Appellant's services.

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision to reduce Appellant's services is **AFFIRMED**.

Steven Kibit

Steven J. Kibit
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

SK/db

cc: [REDACTED]

***** 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.