**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.** 14-011867 EDW

[redacted],

Appellant

[redacted]/

## 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, a hearing was held on [redacted], Appellant's son, appeared and testified on Appellant's behalf. [redacted], Manager of [redacted], appeared and testified on behalf of the Michigan Department of Community Health's Waiver Agency, the [redacted] ("Waiver Agency" or [redacted], social worker/supports coordinator, also testified as a witness for the Waiver Agency.

## ISSUE

Did the Waiver Agency properly decide to 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. [redacted] 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 [redacted] year-old Medicaid beneficiary who has been diagnosed with osteoporosis, anxiety, depression, breast cancer, general muscle weakness, sub-acute delirium, debility, vaginitis, anemia, and constipation. (Respondent's Exhibit D, pages 1, 8-9).

3. Appellant has been receiving services through the Waiver Agency, including [redacted] hours per week of Community Living Supports (CLS). (Respondent's Exhibit D, page 14).

4. Appellant's representative provides [redacted] hours per week of that formal care, with other aides providing the remainder. (Testimony of Appellant's representative).

5. Appellant's representative lives with Appellant, but does not provide any additional care beyond the [redacted] hours per week he is paid for. (Testimony of Appellant's representative).

6. On [redacted] staff performed a routine reassessment in Appellant's home with Appellant. (Respondent's Exhibit D, pages 1-15).

7. During that reassessment, it was noted that there have been no changes with respect to Appellant's informal supports; need for assistance with Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs); or service utilization. (Respondent's Exhibit D, pages 5, 13-14).

8. On the day of the reassessment, [redacted] also completed a Plan of Care Worksheet form used by [redacted] to calculate the recommended number of services that should be authorized in the home. (Respondent's Exhibit C, pages 1-3)

9. After completion, that Plan of Care Worksheet recommended [redacted] hours per week of services. (Respondent's Exhibit C, page 3).

10. Based on that Plan of Care Worksheet and the fact that Appellant lives with her representative, and he can therefore provide her with informal supports, the Waiver Agency decided to reduce Appellant's services to [redacted] hours per week. (Respondent's Exhibit B, page 2; Testimony of [redacted]

11. On [redacted], the Waiver Agency sent Appellant written notice that, in [redacted] days, her services would be reduced. (Respondent's Exhibit A, pages 1-2).

12. On [redacted], the Michigan Administrative Hearing System (MAHS) received the request for hearing filed in this matter. (Petitioner's Exhibit 1, pages 1-3).

13. Given the timing of the appeal and the pending hearing, the proposed reduction was not implemented. (Testimony of Appellant's representative; Testimony of [redacted].

## 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 [redacted], 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, [redacted] determined that fewer services through the Waiver Agency were medically necessary in this case as some of Appellant's needs were being met through informal supports and that Appellant's CLS could therefore be reduced from [redacted] to [redacted] hours per week. Specifically, [redacted] testified that, while she did not know how Appellant's CLS hours were being utilized or how many hours of formal care Appellant's representative was already providing, she determined that Appellant's representative was also providing Appellant with significant informal supports as they lived in the same apartment. Accordingly, while [redacted] also acknowledged that Appellant's medical conditions and need for assistance have not changed, she believed that Appellant's services should be reduced.

In response, Appellant's representative testified that, while he was not present during the assessment and does not know what Appellant reported, some of the findings made regarding Appellant's needs are erroneous. However, Appellant's representative also

agreed that, as found by the Waiver Agency, there had been no significant changes in Appellant's needs or services. Moreover, regarding the supports that he provides, Appellant's representative testified that he does not provide any other care outside of the [redacted] hours per week he is paid for by [redacted].

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in deciding to reduce her services. However, the Waiver Agency also bears the initial burden of going forward with sufficient evidence to show that its action is correct and in accordance with law and policy.

Given the record in this case, the undersigned Administrative Law Judge finds that the decision to reduce Appellant's services must be reversed.

The Waiver Agency's witness testified that the reduction was based solely on the fact that Appellant's son is living with her and, in the Waiver Agency's view, providing her with informal supports that must be exhausted before the Waiver Agency will authorize services as the payor of last resort.

However, there is no evidence suggesting that Appellant's representative is actually providing any informal supports. Appellant's representative credibly testified that he only provides the [redacted] hours per week of formal care that he is paid for and that he never indicated he is ready or available to provide more care. Moreover, the Waiver Agency failed to refute or contradict that testimony as [redacted] testified that she did not have any evidence that Appellant's representative is actually providing any informal supports and that she did not even know how many formal hours of care Appellant's representative is providing.

Rather than producing any evidence that Appellant's representative is or will be providing informal supports, the Waiver Agency instead relies on the fact that Appellant and her representative live in a communal living arrangement. According to the Waiver Agency, as Appellant's roommate, Appellant's representative provides informal supports.

However, the Waiver Agency fails to point to any specific policy that supports it position that a roommate must provide informal supports or that it can authorize fewer services simply because a beneficiary lives in a shared living arrangement. At most, the Waiver Agency appears to argue that Appellant's services should be reduced due to the fact that some tasks, such as meal preparation, are completed for both Appellant and her representative at the same time while the waiver services are only authorized for the benefit of Appellant. Nevertheless, even if that argument is valid, there was no discussion prior to the reduction in this case as to whether any tasks were completed together and, instead, the Waiver Agency simply assumed that a roommate must provide informal supports.

Appellant's representative has been providing formal care to Appellant paid for by the Waiver Agency and there is no suggestion that Appellant's needs or services have changed. Accordingly, the mere fact that Appellant's representative also lives with Appellant is an insufficient basis to reduce Appellant's services or demand that Appellant's representative provide some of that care on an informal basis.

## DECISION AND ORDER

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

**IT IS THEREFORE ORDERED** that:

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

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.