

**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:

Docket No. 14-007794 EDW
Case No. [REDACTED]

[REDACTED]

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. upon Appellant's request for a hearing.

After due notice, a hearing was held on [REDACTED]. [REDACTED], Appellant's authorized hearing representative, appeared and testified on Appellant's behalf.

[REDACTED], Manger, [REDACTED], appeared and testified on behalf of the Department's MI Choice Waiver Agency, the [REDACTED]. ([REDACTED] or Waiver Agency). [REDACTED], R.N., Supports Coordinator, appeared as a witness for the Waiver Agency.

ISSUE

Did the Waiver Agency properly reduce Appellant's Community Living Supports (CLS) from 44.5 hours per week to 23 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. The Department contracts with [REDACTED] to provide MI Choice Waiver services to eligible beneficiaries. (Exhibit A, Testimony)
2. [REDACTED] 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 an [REDACTED] year-old Medicaid beneficiary, born [REDACTED]. Appellant is diagnosed with coronary artery disease; hypertension, arthritis; anxiety; depression; and dementia. (Exhibit A, pp 5, 12-13; Testimony)

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4. Appellant lives her son ██████████ and his wife ██████████, who is also her paid caregiver, as well as her granddaughter. (Exhibit A, p 8; Testimony)
5. Following an in-home reassessment on ██████████, the Waiver Agency determined that Appellant's CLS hours would be reduced from 44.5 hours per week to 23 hours per week based on Appellant's current needs for hands on assistance and the fact that Appellant lives in a shared household. (Exhibit A, pp 5-24; Testimony)
6. In determining the amount of CLS hours Appellant was entitled to, the Waiver Agency utilized a Plan of Care Worksheet, which is a standard tool used for calculating service hours. According to the Plan of Care Worksheet, Appellant was entitled to 12.21 CLS hours per week. The Waiver Agency then added 4 hours per week for laundry because Appellant is incontinent, and 7 hours per week because Appellant needs assistance transferring, for a total of 23 CLS hours per week. (Exhibit A, pp 25-27; Testimony)
7. On ██████████, the Waiver Agency sent Appellant an Advance Action Notice informing her that CLS hours would be reduced from 44.5 hours per week to 23 hours per week, effective 12 days from the date of the notice. (Exhibit A, p 23; Testimony)
8. On ██████████, the Michigan Administrative Hearing System received a request for hearing from Appellant. (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.

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.

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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 44.5 CLS hours are medically necessary.

The Waiver Agency witness testified that Appellant's CLS hours were reduced based on the fact that she lives in a shared household and based on the amount of actual hands-on care Appellant requires. The Waiver Agency witness testified that Appellant was not allotted any hours for meal preparation and cleanup, housework, or shopping and errands, because those tasks are done for the benefit of the whole household, not just Appellant. The Waiver Agency witness indicated that in determining the amount of CLS hours Appellant was entitled to, she utilized a Plan of Care Worksheet, which is a standard tool used for calculating service hours. According to the Plan of Care Worksheet, Appellant was entitled to 12.21 CLS hours per week. The Waiver Agency then added 4 hours per week for laundry because Appellant is incontinent, and 7 hours per week because Appellant needs extensive assistance with transferring, for a total of 23 CLS hours per week.

Appellant's representative testified that he attended a hearing back in [REDACTED] when the Waiver Agency tried to reduce Appellant's CLS hours, but that the administrative law judge (ALJ) in that case reversed the Waiver Agency's decision. Appellant's representative indicated that Appellant has been receiving the same amount of services for 3-4 years and her condition has not improved, so the current reduction in services amounts to the Waiver Agency indicating that they were wrong in the past and that the ALJ was wrong when he reversed the decision back in April. Appellant's representative testified that because Appellant has dementia, her condition will not be improving. Appellant's representative indicated that Appellant's son works full-time and his wife, Appellant's caregiver, goes to school, so they are not always able to care for Appellant. Appellant's representative also indicated that if the Waiver Agency was adding 11 CLS hours this time around, then Appellant's CLS hours should be higher because back in April they tried to reduce her CLS hours to 21 hours per week without any mention of the 11 hour increase. Appellant's representative testified that Appellant's dietary needs are different as she cannot eat salt, greasy foods, or spicy foods and that the family has to buy special bread for her because she is very picky with what she will eat because of her dementia. Appellant's representative also indicated that Appellant's area needs to be cleaned often.

In response, the Waiver Agency witness indicated that they used an independent translator during this assessment so that they could ensure that Appellant's actual needs were being measured, but had not used a translator for the assessment that led to the hearing back in April. The Waiver Agency witness testified that the amount of

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services authorized has to be based on the actual hands-on assistance needed by the Appellant and that services cannot be authorized for companionship or supervision. The Waiver Agency witness also indicated that Appellant was specifically asked, through the translator, whether she had any special dietary needs, and she answered no. With regard to salt and spices, the Waiver Agency witness pointed out that those items can be left out of the food when prepared and then added after Appellant is given her portion.

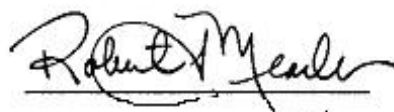
This ALJ finds that the Waiver Agency properly reduced Appellant's CLS hours from 44.5 hours per week to 23 hours per week. The evidence presented demonstrated that Appellant lives in a shared household, has significant informal support and that her actual hands-on care needs can be met with 23 CLS hours per week. The Plan of Care Worksheet adequately measures Appellant's needs and, in this case, the number of care hours was increased by 11 hours per week from the result in the Plan of Care Worksheet to reflect Appellant's individual needs and situation. While it is true that an ALJ reversed the Waiver Agency's decision to reduce Appellant's CLS hours by a similar amount back in April, it appears that the Waiver Agency did a better job this time supporting its decision with verifiable evidence.

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 44.5 hours per week to 23 hours per week.

IT IS THEREFORE ORDERED that:

The Department's decision is **AFFIRMED**.



Robert J. Meade
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

cc:



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RJM/

Date Signed:

Date Mailed:

***** 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.