

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

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IN THE MATTER OF:

██████████,

Appellant

_____ /

Docket No. 14-007806 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 a request for a hearing filed on behalf of the Appellant/Petitioner.

After due notice, a hearing was held on ██████████. The Appellant's Wife (Mrs. ██████████) appeared and offered testimony on the Appellant's behalf along with ██████████ (Speech Therapist). ██████████, Program Manager, appeared and testified on behalf of the Department of Community Health's Waiver Agency, the ██████████ Home Care ("Waiver Agency" or ██████████). ██████████, Clinical Supervisor and ██████████, Data Technician and Biller also testified as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly deny Petitioner's request to provide Magic Cups?

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 Medicare MI-Choice waiver participant who suffers from Huntington's disease. (Testimony).
2. Prior to ██████████, the Waiver Agency provided the Appellant with a product called Magic Cups. (Testimony).
3. Prior to ██████████, the Waiver Agency used a code of B40150 BO for the Magic Cups. (Testimony).
4. On or around ██████████, the Waiver Agency was notified that they were not properly coding the Magic Cups and that Magic Cups are not considered an enteral formula and were therefore an unapproved

Medicaid MI Choice Waiver item. (Testimony)

5. On ██████████, the Waiver Agency informed the Appellant they would be no longer providing Magic Cups. (Testimony)
6. In ██████ or ██████████, the Waiver Agency requested a prior authorization for approval to bill for Magic Cups. (Testimony)
7. In ██████████, the Wavier Agency's prior approval request was denied. The denial indicated Boost and Thicken products were available and approved. (Testimony)
8. On ██████████, the Michigan Administrative Hearing System (MAHS) received a request for hearing filed by the Appellant. (Testimony)

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 AAA, 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 generally 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)

With respect to such services, the applicable version of the Michigan Medicaid Provider Manual (MPM) states:

4.1.F. GOODS AND SERVICES

Goods and Services are services, equipment or supplies not otherwise provided through either MI Choice or the Medicaid State Plan that address an identified need in the individual plan of services (including improving and maintaining the participant's opportunities for full membership in the community) and meet the following requirements. The item or service would:

- decrease the need for other Medicaid services,
- promote inclusion in the community, and
- increase the participant's safety in the home environment.

These goods and services are only available if the participant does not have the funds to purchase the item or service or the item or service is not available through another source.

Goods and Services are only approved by CMS for participants choosing the self-determination option. **(revised 10/1/14)** Experimental or prohibited treatments are excluded. Goods and Services must be documented in the individual plan of services.

4.1.L. HOME DELIVERED MEALS

Home Delivered Meals (HDM) is the provision of one to two nutritionally sound meals per day to a participant who is unable to care for their own nutritional needs. The unit of service is one meal delivered to the participant's home or to the participant's selected congregate meal site that provides a minimum of one-third of the current recommended dietary allowance (RDA) for the age group as established by the Food and Nutritional Board of the National Research Council of the National Academy of Sciences. Allowances shall be made in HDMs for specialized or therapeutic diets as indicated in the participant's plan of service. A Home Delivered Meal cannot constitute a full nutritional regimen. Limitations on who can get a meal include:

- The participant must be unable to obtain food or prepare complete meals.
- The participant does not have an adult living at the same residence or in the vicinity who is able and willing to prepare all meals.
- The participant does not have a paid caregiver who is able and willing to prepare meals for the participant.
- The provider can appropriately meet the participant's special dietary needs, and the meals available will not jeopardize the participant's health.
- The participant must be able to feed himself/herself.
- The participant must agree to be home when meals are delivered, or contact the program when an absence is unavoidable.

*MPM, October 1, 2014 version
MI Choice Waiver Chapter, pages 13, 18.*

However, while CLS are Medicaid-covered services, Medicaid beneficiaries are still only entitled to medically necessary covered services for which they are eligible and services must be provided in the appropriate scope, duration, and intensity to reasonably achieve the purpose of the covered service. See 42 CFR 440.230.

In support of its position, the AAA primarily relies on the Minimum Operating Standards for MI Choice Waiver Program Services and, as provided in the MPM, such standards do apply in this case:

4.5 OPERATING STANDARDS

MDCH maintains and publishes the "Minimum Operating Standards for MI Choice Waiver Program Services" (known as the Minimum Operating Standards) document. This document defines both general and specific operating criteria for the program. All waiver agencies and service providers are subject to the standards, definitions, limits, and procedures described therein.

For each service offered in MI Choice, the Operating Standards are used to set the minimum qualifications for all direct service providers, including required certifications, training, experience, supervision, and applicable service requirements. Billing codes and units are also defined in the document.

*MPM, October 1, 2014 version
MI Choice Waiver Chapter, page 17*

Specifically, the Waiver Agency relies on portions of Attachment I of the Minimum Operating Standards:

IV. SUPPORTS COORDINATION

SC is the method that facilitates access to and arrangement of services and other forms of support needed and wanted by MI Choice participants. SCs work with participants to determine how and who will meet the participant's LTC needs. SCs assist participants in arranging for services and supports and monitor the quality of services received. SC includes valuing the cultural backgrounds of participants in the decision making process.

A. DEFINITION

SC is a service designed to inform, assist, and coordinate a variety of home and other community-based services needed by elderly and other adults with disabilities aged 18 years and older who meet the NFLOC. SCs utilize all available services and supports before authorizing MI Choice services while assisting the participant in planning interventions. SCs work in partnership with participants to determine the interventions that will promote the participant's goals and facilitate the achievement of desired outcomes while addressing the participant's service and support needs.

SCs build participant choices and preferences into the SC process to assure a person focused, self-determination approach to the receipt of services and supports. SCs arrange formal services based upon participant choice and approval. The participant and their SCs explore other funding options and intervention opportunities when personal goals expand beyond meeting basic needs.

* * *

D. INVOLVEMENT OF ALLIES

SCs work with participants to engage a team of family, friends, professionals, supports brokers, caregiver staff, and other allies to assist in the development of plans of service and to strengthen the skills of participants to address planned activities. Generally, MI Choice services are not used to replace existing unpaid supports, but rather bolster and help sustain ongoing allies' involvement.

E. USE OF OTHER PAID SERVICES

Before authorizing MI Choice services for a participant, the waiver agency must take full advantage of services and supports in the community that are available to the participant and paid for by other fund sources, including third party reimbursements and the Medicaid State Plan services. MI Choice funding is the payment source of last resort. Two exceptions are Physical Disability Services (PDS) funds and OSA in-home services funds. These are extremely limited fund sources and would be quickly exhausted if used for MI Choice participants. (Note: An executive order cut PDS funds from the FY 2010 budget.

MDCH does not expect the Governor to reinstate these funds for FY 2014.)

Minimum Operating Standards for MI Choice Waiver Program Services, Attachment F, FY 2014, pages 14-15, 49

The above standards provide that MI Choice funding is the payment source of last resort and that the Waiver Agency must first take full advantage of other services and supports in the community that are available to Appellant and paid for by other fund sources, including third party reimbursements. Additionally, the above policy provides that MI Choice services may only bolster and sustain unpaid supports from allies.

At issue in this case, is the Waiver Agency's refusal to provide Magic Cups. The Waiver Agency testified the Magic Cups are not an approved good/service/meal as they do not meet the definition of an enteral formula and do not have a Medicaid approved billing code. The Appellant in this matter did not offer up any evidence to dispute this. The argument that the Magic Cups were at one time provided does not indicate that they still qualify.

Accordingly, this Administrative Law Judge finds the Waiver Agency's argument and reliance on the above policy to be persuasive with respect to the Waiver Agency's actions.

Therefore, for the reasons discussed above, this Administrative Law Judge finds the Waiver Agency acted appropriately in no longer providing the Magic Cups.

Magic Cups may be approved through the State Plan and the Appellant is encouraged to seek this approval.

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 the Appellant's request for Magic cups.

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision is **AFFIRMED**.

Corey A. Arendt
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

[REDACTED]
Docket No. 14-007806 EDW
Decision and Order

CAA [REDACTED]

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

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.