

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:

██████████

Appellant

_____ /

Docket No. 14-011596 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. upon Appellant's request for a hearing.

After due notice, an in-person hearing was held on ██████████. ██████████, Appellant's sister, appeared and testified on Appellant's behalf. Appellant appeared but did not testify. ██████████, Appellant's sister and ██████████, Appellant's father, appeared as witnesses.

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

ISSUE

Did the Waiver Agency properly deny Appellant's request for an increase in Community Living Supports (CLS) from 11 hours per week to 14 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 ██████████ provide MI Choice Waiver services to eligible beneficiaries. (Exhibit A; Testimony)
2. ██████████ must implement the MI Choice Waiver program in accordance with Michigan's waiver agreement, Department policy and its contract with the Department. (Exhibit A; Testimony)

Docket No. 14-011596 EDW
Hearing Decision & Order

3. Appellant is a [REDACTED] year-old Medicaid beneficiary, born [REDACTED]. Appellant is diagnosed with advanced multiple sclerosis and is a quadriplegic with no mobility below the neck and very limited mobility of the neck and facial muscles. (Exhibit 2; Testimony)
4. Appellant lives in an apartment with a roommate. Appellant's family lives locally and provides her with extensive informal supports. (Exhibits A, 2; Testimony)
5. On [REDACTED], Appellant's sister requested an increase in CLS hours from 11 hours per day to 14 hours per day as well as an overnight stipend for care provided by the Self-Determination worker at night. (Exhibit A, pp 1, 7; Testimony)
6. Appellant's supports coordinator informed Appellant's sister that the request would be denied because at the time the request was made, Appellant had unused self-determination hours remaining from earlier in the year that were being used to allow for 14 hours of CLS per day. In addition, the supports coordinator concluded that there had been no recent change in Appellant's functional status or psychological support system indicating a need for increased service. (Exhibit A, pp 1, 7; Testimony)
7. On [REDACTED], the Waiver Agency sent Appellant an Advance Action Notice informing her that the request to increase Appellant's CLS hours from 11 hours per day to 14 hours per day was denied. (Exhibit A, pp 2-3; Testimony)
8. On [REDACTED], 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.

Docket No. 14-011596 EDW
Hearing Decision & Order

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.

Docket No. 14-011596 EDW
Hearing Decision & Order

Community Living Supports do not include the cost associated with room and board.

Medicaid Provider Manual
MI Choice Waiver Section
July 1, 2014, pp 12-13

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 14 CLS hours per week are medically necessary.

The Waiver Agency's Manager testified that on [REDACTED], Appellant's sister requested an increase in CLS hours from 11 hours per day to 14 hours per day as well as an overnight stipend for care provided by the self-determination worker at night. The Waiver Agency's Manager indicated that the request was denied because at the time the request was made, Appellant had unused self-determination hours remaining from earlier in the year that were being used to allow for 14 hours of CLS per day and because there had been no recent change in Appellant's functional status or psychological support system indicating a need for increased service.

Appellant's Supports Coordinator testified that she made it clear to Appellant's sister when they spoke on [REDACTED] that the request for an increase in CLS would be denied at that time because Appellant still had unused self-determination hours available to fill the gap. Appellant's Supports Coordinator also indicated that at the time Appellant's roommate was filing to become Appellant's self-determination worker, so she was available to provide care to Appellant at night.

Appellant's sisters testified that what the Waiver Agency indicated was factually accurate, but that as of [REDACTED], Appellant had exhausted all of the unused self-determination hours and Appellant's care hours fell to 11 hours per day. Appellant's sisters indicated that Appellant has always received (and needed) 14 CLS hours per day and that the family had paid out of pocket for 3 extra hours of CLS in the past, but due to a change in financial circumstances, could no longer afford to do so. Appellant's sisters also indicated that they had been paying Appellant's roommate a stipend to care for Appellant at night, but could also no longer afford to do that. Appellant's sisters indicated that since the reduction in CLS hours, Appellant has suffered bed sores, infections, and difficulties with medication management. Appellant's sisters testified that since [REDACTED], there has been a change in functioning and an increase to 14 CLS hours per day is now justified.

Docket No. 14-011596 EDW
Hearing Decision & Order

In response, the Waiver Agency's Manager indicated that if Appellant's status has changed, she can request an increase in CLS hours at this time, but that the hearing only involved the request and denial from [REDACTED]. Appellant's sisters indicated they had made such a request recently, but that Appellant's current supports coordinator told them that she was not going to act on the request because of the pending hearing. The Waiver Agency's Manager indicated that the supports coordinator should not have held up the request because of the pending hearing and that she would process the request once she returned to the office.

Appellant's sisters also indicated that the underutilized CLS hours arose because the family has had difficulty in the past finding workers to use all of the hours allocated. Appellant's father testified that this request is not just about dollars and cents but wanting to make sure that Appellant gets all of the care she needs. Appellant's father indicated that the Waiver program is wonderful and it is great that Appellant can be cared for without having to go into a facility. Appellant's father also pointed out that before Appellant was receiving 14 hours of care per day, she had frequent hospitalizations and the family did not want to go down that road again. Appellant's father also indicated that while he is willing to help his daughter in any way he can, there are simply some things that he cannot do for his daughter.

Appellant's physician and caregivers submitted letters indicating that Appellant needs 14 hours of CLS per day and that her condition has worsened since the CLS hours were reduced to 11 hours per day. (Exhibits 2 and 3)

This ALJ finds that the Waiver Agency properly denied Appellant's request for an increase in CLS hours from 11 hours per day to 14 hours per day in June 2014 because, at that time, Appellant was receiving 14 CLS hours per day due to the use of underutilized CLS hours from earlier in the year. Apparently, those additional CLS hours were exhausted as of [REDACTED] and the family put in another request for an increase, but that request was mistakenly not processed due to the pending hearing. The Waiver Agency should process that request immediately, and, if approved, make the approval retroactive to the time of the request. If the request is denied, Appellant will have further appeal rights arising out of that denial. However, as indicated above, the instant hearing only involved the denial from [REDACTED] and based on the circumstances at the time, that denial was proper.

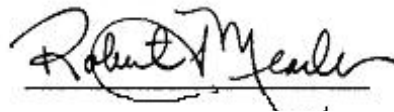
[REDACTED]
Docket No. 14-011596 EDW
Hearing Decision & Order

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 denied Appellant's request to increase her CLS hours from 11 to 14 hours per week in [REDACTED].

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:

[REDACTED]

RJM/[REDACTED]

Date Signed: [REDACTED]

Date Mailed: [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.