

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. 14-013317 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, a hearing was held on ██████████ ██████████, Appellant's legal guardian, appeared and testified on Appellant's behalf. ██████████, Clinical Administrator, and ██████████, Director of Assisted Living, from Appellant's Adult Foster Care ("AFC") home also testified as witnesses for Appellant. Appellant herself was present, but did not participate. ██████████ 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 coronary artery disease, hypertension, peripheral vascular disease, arthritis, osteoporosis, anxiety, bipolar disorder, Alzheimer's disease, and Parkinson's disease. (Respondent's Exhibit C, pages 1, 7-8).

3. Appellant has been receiving services through the Waiver Agency, including Community Living Supports (CLS) paid to her AFC home at a per diem rate of ██████████ per day. (Respondent's Exhibit C, page 14).
4. On ██████████ performed a routine assessment in Appellant's AFC home with Appellant and Appellant's legal guardian. (Respondent's Exhibit C, pages 1-15; Respondent's Exhibit D, page 3).
5. During that reassessment, Appellant and her legal guardian reported that Appellant's health had improved since entering the AFC home and that Appellant was now independent in bathing, toileting, transferring, personal hygiene and dressing. (Respondent's Exhibit C, pages 13-14; Testimony of Appellant's representative).
6. On ██████████ and Appellant's legal guardian discussed a need to decrease Appellant's services due to the improvement in Appellant's health status and, the next day, ██████████ sent a written Decrease in Services form in which she asked Appellant and her guardian to agree to a decrease in the per diem CLS rate to ██████████ per day. (Respondent's Exhibit B, pages 1-2; Respondent's Exhibit D, page 2).
7. ██████████ also made the reduction in the per diem rate effective ██████████ (Testimony of ██████████).
8. However, after subsequently learning that Appellant and Appellant's legal guardian did plan to appeal any reduction, ██████████ reinstated the ██████████ per diem rate, with a retroactive effective date of ██████████. (Testimony of ██████████).
9. On ██████████ the Waiver Agency sent Appellant written notice that, it had decided to reduce her CLS from a per diem rate of ██████████ to a per diem rate of ██████████. (Respondent's Exhibit A, pages 1-2).
10. On ██████████, the Michigan Administrative Hearing System (MAHS) received the request for hearing filed in this matter. (Petitioner's Exhibit 1, pages 1-5).
11. Appellant's per diem rate has remained at ██████████ per day while the appeal is pending. (Testimony of ██████████ Testimony of ██████████).

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 per diem CLS rate should be reduced from ████████ to ████████ because Appellant's needs could be met with that lesser amount. Specifically, ████████ testified that, during the ██████████ reassessment, Appellant and Appellant's legal guardian expressly reported that Appellant's health had improved since entering the AFC home and that Appellant was now independent in bathing, toileting, transferring, personal hygiene and dressing. ████████ also testified that she spoke to a worker at the AFC home who confirmed the reports of Appellant and her legal guardian.

In response, Appellant's representative/guardian confirmed that he and Appellant reported during the assessment that Appellant's health had improved since entering the AFC home and that Appellant was now independent in bathing, toileting, transferring, personal hygiene and dressing. However, Appellant's representative also testified that Appellant likes to exaggerate what she can do; he only went along with her exaggerations because he wanted to pacify her; and that ██████████ should have spoken to the administrators of the AFC home if she wanted an accurate picture of the care Appellant is receiving. Appellant's representative and other witnesses also testified that Appellant has not significantly improved since coming to the AFC home and that she continues to require assistance in most areas.

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. Whatever Appellant's witnesses testified to during the hearing, 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 and, in this case, it is undisputed that Appellant and legal guardian expressly reported during the assessment that Appellant had improved and was now independent in significantly more tasks. Appellant may have wanted to exaggerate what she can do and Appellant's legal guardian may have wanted to pacify her, but they have a duty to accurately report Appellant's needs and the Waiver Agency was justified in relying upon what was reported by Appellant and her legal guardian. Moreover, based on those reports, ██████████ properly reduced Appellant's services.

To the extent Appellant and her legal guardian have additional or updated information to provide, they are free to request additional hours or services in the future and it appears that another assessment was conducted while this appeal was pending. However, any future disputes would have to be the subject of a new request for hearing and the undersigned Administrative Law Judge's jurisdiction is limited to reviewing the past decision to reduce services. With respect to that decision, the undersigned Administrative Law Judge finds that the Waiver Agency's actions must be affirmed given the available information.

[REDACTED]
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Decision and Order

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.