

**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. 2014-26579 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 the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. ██████████ appeared and testified on Appellant's behalf. ██████████ Clinical Manager, appeared and testified on behalf of the Department of Community Health's Waiver Agency, the ██████████ ██████████ ("Waiver Agency" or ██████████). ██████████ nurse/case manager, 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 an ██████████ year-old Medicaid beneficiary who has been diagnosed with coronary artery disease; hypertension, arthritis; anxiety; depression; and dementia. (Respondent's Exhibit C, pages 8-9).
3. Appellant also has memory problems and moderately impaired decision-making skills. (Respondent's Exhibit C, page 6).
4. Appellant has been receiving services through the Waiver Agency, including ██████████ hours per week of homemaker services and ██████████ hours a week of personal care services. (Respondent's Exhibit C, page 14).
5. Appellant's daughter-in-law is her paid caregiver. (Testimony of ██████████).

6. Appellant lives with that daughter-in-law, Appellant's son, and two of Appellant's grandchildren. (Respondent's Exhibit A, page 4).
7. On ██████████ staff conducted a reassessment of Appellant's services. (Respondent's Exhibit C, pages 1-15).
8. During that reassessment, Appellant's daughter-in-law/primary caregiver answered all of the Waiver Agency's questions because of Appellant's cognitive deficits and lack of ██████████. (Respondent's Exhibit C, page 4).
9. Based on the daughter-in-law's reports regarding Appellant's needs, as well as its staff's observations, ██████████ determined that Appellant is totally dependent on others for meal preparation, ordinary housework, managing finances, managing medications, shopping, transportation, dressing, personal hygiene, and bathing. (Respondent's Exhibit A, pages 11-13).
10. ██████████ also determined that Appellant requires extensive assistance with transferring, locomotion, toileting, and walking. (Respondent's Exhibit A, pages 12-13; Respondent's Exhibit D, pages 1-2).
11. ██████████ further determined that Appellant requires limited assistance with bed mobility and eating. (Respondent's Exhibit A, pages 12-13; Respondent's Exhibit D, pages 1-2).
12. On ██████████, the Waiver Agency sent Appellant written notice that, following a review of her long term care needs, it has been determined that ██████████ hours of Community Support Services would be reduced in ██████████ days from the date of the notice. (Respondent's Exhibit A, pages 1-2).
13. On ██████████, the Department received the Request for Hearing filed by Appellant and her representative in this matter. (Petitioner's Exhibit 1, pages 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.

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 both homemaker and personal care services through the Waiver Agency and, with respect to such services, the applicable version of the Michigan Medicaid Provider Manual (MPM) states:

4.1.B. HOME MAKER

Homemaker services include the performance of general household tasks (e.g., meal preparation and routine household cleaning and maintenance) provided by a qualified homemaker when the individual regularly responsible for these activities, e.g., the participant or an informal supports provider, is temporarily absent or unable to manage the home and upkeep for himself or herself. Each provider of Homemaker services must observe and report any change in the participant's condition or of the home environment to the supports coordinator.

4.1.C. PERSONAL CARE

Personal Care services encompass a range of assistance to enable program participants to accomplish tasks that they would normally do for themselves if they did not have a disability. This may take the form of hands-on assistance (actually performing a task for the participant) or cueing to prompt the participant to perform a task. Personal Care services are provided on an episodic or on a continuing basis. Health-related services that are provided may include skilled or nursing care to the extent permitted by State law.

Services provided through the waiver differ in scope, nature, supervision arrangement, or provider type (including provider training and qualifications) from Personal Care services in the State Plan. The chief differences between waiver coverage and State Plan services are those services that relate to provider qualifications and training requirements, which are more stringent for personal care provided under the waiver than those provided under the State Plan.

Personal Care includes assistance with eating, bathing, dressing, personal hygiene, and activities of daily living. These services may also include assistance with more complex life activities. The service may include the preparation of meals but does not include the cost of the meals themselves. When specified in the plan of service, services may also include such housekeeping chores as bed making, dusting, and vacuuming that are incidental to the

service furnished or that are essential to the health and welfare of the participant rather than the participant's family. Personal Care may be furnished outside the participant's home.

*MPM, January 1, 2014 version
MI Choice Waiver Chapter, pages 9-10*

When reducing Appellant's services, the Waiver Agency also combined Appellant's homemaker and personal care services into Community Living Supports (CLS). CLS can encompass both homemaker and personal care services; and the change between types of services is not disputed in this case. With respect to CLS, the 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, January 1, 2014 version
MI Choice Waiver Chapter, pages 12-13*

However, while homemaker services, personal care services and CLS are all 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, it is undisputed that the Appellant has a need for some services and she has been continually been authorized for either homemaker/personal care or CLS. Instead, the sole dispute is the amount of hours to be authorized, with the Waiver Agency having reduced Appellant's services from ██████ hours per week to ██████ hours per week.

According to the Waiver Agency, it reduced Appellant's services on the basis that the Waiver Program is the payor of last resort and that Appellant's daughter-in-law can provide additional informal supports in place of the formal supports the Waiver Agency has been paying her for. In particular, ██████ noted that Appellant's daughter-in-law prepares meals, performs housework and does the laundry for the entire family, including Appellant, at the same time. Therefore, in the Waiver Agency's view, that assistance should be removed as Appellant's daughter-in-law can continue to provide it informally at the same time she is assisting the rest of her family.

In response, Appellant's witness testified that Appellant's medical conditions, assistance needs and family circumstances have remained the same since the previous authorization of services and, consequently, her services should also remain the same.

He also testified that Appellant is on a special diet and that her meals and shopping are therefore completed separately. He further testified that Appellant's laundry is also completed more often and separately from the rest of the family's laundry.

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.

In this case, given the available information, the Waiver Agency erred in reducing Appellant's services. Appellant's undisputed needs for assistance are significant and encompass a number of tasks. For example, as found by the Waiver Agency, Appellant is totally dependent on others for meal preparation, ordinary housework, managing finances, managing medications, shopping, transportation, dressing, personal hygiene, and bathing; while also requiring requires extensive assistance with transferring, locomotion, toileting, and walking; and limited assistance with bed mobility and eating.

Moreover, it is also disputed in this case that Appellant's needs have not changed and, while each assessment is evaluated independently, the Waiver Agency's justification for why services were reduced at this point are insufficient given Appellant's continuing and undisputed needs.

For example, while ██████████ and ██████████ testified that the Waiver Agency could afford to pay for services that beneficiaries wanted in the past but can only pay for the services that a beneficiary needs, they failed to identify any reduction based on the removal of assistance that Appellant wanted but did not need.

Similarly, while the Waiver Agency testified that Appellant's services were being reduced due to the availability of informal supports, it failed to support that testimony with any evidence. Instead, the Waiver Agency's witnesses appeared to simply assume Appellant's daughter-in-law, who is her paid care provider, will continue to provide the same services regardless of whether she is getting paid for it. Appellant's daughter-in-law has no legal duty to do so and the mere fact that she has provided assistance in the past as a paid caregiver is not evidence that she is an informal support able and available to provide the necessary care.

Additionally, even assuming for the sake of argument that Appellant's daughter-in-law would provide the same assistance even if she was not paid because she is already preparing meals, shopping and completing laundry for the rest of the family at the same time, the Waiver Agency's reduction would still be excessive. The tasks identified by the Waiver Agency as shared tasks are all assistance with homemaking and only ██████████ hours per week of Appellant's previous services were authorized for homemaker services; and yet the Waiver Agency reduced Appellant's total hours by ██████████ hours per week. There was no explanation regarding any additional reductions and, as discussed above, Appellant's personal care needs are both unchanged and undisputed.

[REDACTED]
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Decision and Order

Given the insufficient basis offered by the Waiver Agency, as well as the significant and undisputed needs identified by Appellant's representative, Appellant has met her burden of proving by a preponderance of the evidence that the Waiver Agency erred in reducing her services and its decision to do so must therefore be reversed.

DECISION AND ORDER

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

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision is **REVERSED** and the Waiver Agency must reinstate Appellant's services to their previous level.

Steven Kibit

Steven J. Kibit
Administrative Law Judge
for James K. Haveman, 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.