

**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. 2014-26595 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 on Appellant's behalf. ██████████, Appellant's husband, testified as a witness for Appellant. ██████████, Home Care Program Manager, appeared and testified on behalf of the Department of Community Health's Waiver Agency, the ██████████ ██████████ ██████████ ██████████ ("Waiver Agency" or "██████████"). ██████████, Clinical Supervisor, also testified as a witness for the Waiver Agency.

ISSUE

Did the Waiver Agency properly deny Appellant's request for additional 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 (MDCH) 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 multiple sclerosis and depression. (Respondent's Exhibit A, pages 1, 8-9).
3. Appellant applied for waiver services through ██████████ and an initial assessment was conducted on ██████████ (Respondent's Exhibit B, page 9).
4. During that assessment, it was noted that Appellant's husband has neuropathy and walks with a cane, and that his physical condition limits his ability to help care for Appellant. (Respondent's Exhibit B, page 9).

5. Following that assessment, it was recommended that Appellant receive ██████ hours of Community Living Supports (CLS). (Stipulation of the representatives for the parties).
6. However, ██████ reviewed that request and determined that only ██████ hours per week of CLS should be authorized, effective ██████ given Appellant's care needs and the presence of informal supports. (Testimony of ██████).
7. In utilizing the approved hours, CLS workers from an agency would typically work ██████ hours a day, ██████ days a week, in ██████ shifts: ██████ to ██████ to ██████.; and ██████ or ██████ to ██████ or ██████ (Testimony of ██████).
8. On the weekends, one of Appellant's daughters would provide the remaining ██████ CLS hours. (Testimony of ██████).
9. As part of Appellant's two week follow-up, ██████, a registered nurse, noted that she telephoned Appellant on ██████ and learned that, despite the fact that Appellant was receiving physical therapy, Appellant had not been offered a Home Help Aide (HHA). (Respondent's Exhibit B, page 4).
10. ██████ then telephoned the physical therapist to request that he offer a HHA, but the physical therapist declined to talk with her because she did not have a consent form. (Respondent's Exhibit B, pages 3-4).
11. According to ██████ progress notes, she telephoned Appellant again on ██████ and Appellant reported that she had declined a HHA because the safety and quality of the assistance provided by such an aide could not be guaranteed. (Respondent's Exhibit B, page 3).
12. Appellant's husband is unaware of Appellant ever being offered a HHA or refusing one. (Testimony of ██████).
13. Appellant subsequently requested that the Waiver Agency authorize more time for assistance and that request was reviewed during an assessment conducted by ██████ and ██████ on ██████. (Respondent's Exhibit A, pages 1-15; Testimony of ██████).
14. During that assessment, ██████ noted that Appellant requires total assistance with personal care and that it takes ██████ people to transfer her. (Respondent's Exhibit A, page 3).
15. ██████ also noted, with respect to Appellant's informal supports, that Appellant's husband assists with her personal care, but is expressing difficulty providing hands-on assistance due to his physical disabilities and

chronic health conditions. (Respondent's Exhibit A, page 4).

16. ██████████ further noted that one of Appellant's daughters provides formal supports on the weekend and limited assistance with personal care during the week, but is gone twelve hours a day ██████████ through ██████████ and is moving to the state of ██████████ soon. (Respondent's Exhibit A, page 4).
17. Regarding Appellant's other daughter, ██████████ noted that she lives nearby and assists as needed. (Respondent's Exhibit A, page 5).
18. ██████████ also noted that Appellant wears disposable briefs ██████████ hours a day, ██████████ days a week. (Respondent's Exhibit A, page 11).
19. During the ██████████ reassessment, ██████████, Appellant and Appellant's husband revised Appellant's plan of care in order to allow more time for assistance with meals and toileting. (Respondent's Exhibit B, page 1).
20. However, ██████████ and ██████████ also informed Appellant and her husband that any additional services would need ██████████ approval. (Respondent's Exhibit B, page 1).
21. ██████████ subsequently reviewed and denied the request for additional services. (Testimony of ██████████).
22. On ██████████, the Michigan Administrative Hearing System (MAHS) received the Request for Hearing filed by Appellant and her representative in this matter. (Petitioner's Exhibit 1, pages 1-3).

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 MORC, 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 MORC and, with respect to such services, the applicable version of 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 CLS is a covered service, 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 CLS and she has been continually been authorized for such services. Instead, the sole dispute is the amount of CLS hours to be authorized, with the Waiver Agency only approving ██████ hours per week of such services and Appellant requesting assistance ██████ hours a day, ██████ days a week.

According to the Waiver Agency, it authorized ██████ hours per week in light of Appellant's need for personal care assistance and her informal supports, including her husband and daughters. The Waiver Agency's witnesses also noted that, per policy, ██████ is the payor of last resort and that Appellant is required to utilize other services, including the HHA she declined, prior to receiving waiver services and it therefore cannot pay for the services that could have been provided by the HHA.

In response, Appellant's husband testified that Appellant needs assistance with everything and that the authorized hours are insufficient. Specifically, he testified that, while the ██████ CLS hours paid to one of their daughters is sufficient on the weekends, the ██████ hours of CLS utilized throughout the rest of the week leaves gaps in Appellant's care. Appellant's CLS provider generally works ██████ shifts a day ██████ through ██████ and the ██████ hour gap between the afternoon and evening shifts leaves Appellant without anyone to assist her with her incontinence/diapers or change her clothes.

With respect to Appellant's informal supports, Appellant's husband testified that he can only provide limited assistance to Appellant, such as cooking, feeding and very light housework, due to his own medical conditions. He further noted that he has an upcoming surgery and the daughter who is providing both formal and informal supports to Appellant is getting busier with her own obligations and will be moving to the state of ██████ soon.

Appellant's husband also testified that he never refused the assistance of a HHA and that he would never do so, although he also conceded that he does not know if Appellant refused any such assistance.

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 information available at the time the Waiver Agency made its decision, the undersigned Administrative Law Judge finds that Appellant has failed to meet her burden of proving that the Waiver Agency erred and ██████████'s decision to deny any additional services must be affirmed.

The mere fact that Appellant's case workers recommended additional hours after both assessments is insufficient on its own to justify an increase in hours and ██████████ credibly testified as to how it came up with the hours authorized, particularly in light of Appellant's needs and informal supports.

Appellant's husband's testimony, on the other hand, confirmed that the weekend hours are sufficient at this point and, while he is seeking additional hours ██████████ through ██████████, his testimony does not reflect a need for ██████████ more hours of assistance a day on those days. He only identified minimal assistance that is missing during the time between CLS workers' shifts and such assistance does not justify another ██████████-hour shift, especially where the hours Appellant is currently authorized can be simply rescheduled.

Moreover, the evidence that the Waiver Agency properly refused to provide some additional hours because it is the payor of last resort and will not pay for services that could have been provided by the HHA, if the Appellant had accepted such services, is essentially unchallenged, as Appellant's husband and sole witness could merely testify that he is not aware of Appellant refusing any such services.

With respect to the informal supports identified and taken into account by the Waiver Agency, Appellant's husband limitations were specifically noted during the assessment and the assistance ██████████ expects him to provide, such as helping with laundry, meals at night and errands, are tasks that he testified he does perform.

Additionally, even if the daughter that provides both informal and formal supports is moving to another state soon and therefore will not be able to provide services in the future, she is still currently providing assistance and, as discussed above, 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.

To the extent Appellant's circumstances change in the future, she can always request additional waiver services when appropriate. With respect to the decision at issue in

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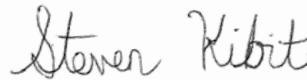
this case, however, the Waiver Agency's actions are affirmed given the information available at the time it made its decision.

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 Appellant's request for additional services.

IT IS THEREFORE ORDERED that:

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



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.