

**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. 2014-30778 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 ██████████ Appellant's sister and designated power of attorney, appeared and testified on Appellant's behalf. ██████████, Manager, appeared and testified on behalf of the Department of Community Health's Waiver Agency, the ██████████ ("Waiver Agency" or "██████"). ██████████, registered nurse/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 amputation bilateral; hypertension; arthritis; cerebrovascular accident; paraplegia; Parkinson's disease; anxiety; depression; and diabetes mellitus. (Respondent's Exhibit A, pages 17-18).
3. Appellant has been receiving services through the Waiver Agency, including ██████ hours a day of Community Living Supports (CLS) and ██████ hours per day of respite care services. (Respondent's Exhibit A, page 23; Testimony of Appellant's representative; Testimony of ████████).

14. On ██████████ the Department received the Request for Hearing filed by Appellant and his representative in this matter. (Petitioner's Exhibit 1, pages 1-11).

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)

Moreover, regarding the program and waiver services in general, the applicable version of the Medicaid Provider Manual (MPM) states in part:

SECTION 1 – GENERAL INFORMATION

MI Choice is a waiver program operated by the Michigan Department of Community Health (MDCH) to deliver home and community-based services to elderly persons and persons with physical disabilities who meet the Michigan nursing facility level of care criteria that supports required long-term care (as opposed to rehabilitative or limited term stay) provided in a nursing facility. The waiver is approved by the Centers for Medicare and Medicaid Service (CMS) under section 1915(c) of the Social Security Act. MDCH carries out its waiver obligations through a network of enrolled providers that operate as organized health care delivery systems (OHCDS). These entities are commonly referred to as waiver agencies. MDCH and its waiver agencies must abide by the terms and conditions set forth in the waiver.

* * *

SECTION 4 - SERVICES

The array of services provided by the MI Choice program is subject to the prior approval of CMS. Waiver agencies are

required to provide any waiver service from the federally approved array that a participant needs to live successfully in the community, that is:

- indicated by the current assessment;
- detailed in the plan of service; and
- provided in accordance with the provisions of the approved waiver.

Services must not be provided unless they are defined in the plan of service and must not precede the establishment of a plan of service. Waiver agencies cannot limit in aggregate the number of participants receiving a given service or the number of services available to any given participant. Participants have the right to receive services from any willing and qualified provider.

MDCH and waiver agencies do not impose a copayment or any similar charge upon participants for waiver services. MDCH and waiver agencies do not impose a premium, enrollment fee, or similar cost-sharing arrangement on waiver participants.

Although MI Choice participants must have services approved by the waiver agency, participants have the option to select any participating provider, thereby assuring freedom of choice.

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

Here, Appellant has been receiving both respite care services and CLS through the Waiver Agency and, with respect to such services, the MPM states:

4.1.D. RESPITE CARE

Respite Care services are provided to participants unable to care for themselves and are furnished on a short-term basis due to the absence of, or need of relief for, those individuals normally providing care for the participant. Services may be provided in the participant's home, in the home of another, or in a Medicaid-certified hospital or a licensed Adult Foster Care facility. Respite care does not include the cost of room and board, except when provided as part of respite care

furnished in a facility approved by MDCH that is not a private residence.

Services include:

- Attendant Care (participant is not bed-bound), such as companionship, supervision, and assistance with toileting, eating, and ambulation.
- Basic Care (participant may or may not be bed-bound), such as assistance with ADLs, a routine exercise regimen, and self-medication.

There is a 30-days-per-calendar-year limit on respite services provided outside the home.

* * *

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 10, 12-13*

However, while CLS and respite care services are both 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, the Waiver Agency determined that Appellant's respite care services should be terminated and his CLS reduced from █ hours per day to █ hours per day. Appellant and his representative dispute that reduction.

Appellant bears the ultimate burden of proving by a preponderance of the evidence that the Waiver Agency erred in reducing his services. However, the Waiver Agency also bears the burden of going forward and establishing that its action was proper and in accordance with the applicable law and policy.

In this case, the Waiver Agency's representative testified that, while Appellant's needs have not changed, the CLS he has been receiving is excessive and that, if broken up

into two shifts, █ hours a day is sufficient. She also testified that the respite care services were improperly being provided on a long-term regular basis. █ further testified that, while she did tell Appellant's representative that the reduction was based on budget cuts and she has since learned that to reduce services for budgetary reasons is improper, she still stands by the reduction.

Appellant's representative testified that Appellant's needs have not changed and confirmed that █ told her that the reduction in services was based on budget cuts. Appellant's representative also testified that █ hours a day of services is insufficient and that she is Appellant's primary paid caregiver and provides the majority of his formal supports.

Given the above testimony and evidence, the undersigned Administrative Law Judge finds that the Waiver Agency erred in reducing Appellant's services and that its decision must be reversed.

It is undisputed in this case that the Waiver Agency improperly initiated the reduction, at least in part, for budgetary reasons. Moreover, while the Waiver Agency now argues that the reduction is still appropriate for reasons other than budgetary reasons, it is also undisputed that Appellant's needs have not changed, he was previously authorized for █ hours a day of services, and that the Waiver Agency also recommended that Appellant actually move to a nursing facility due to his complex care needs.

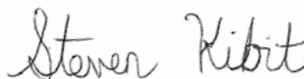
Given the improper initial basis offered by the Waiver Agency for the reduction, as well as Appellant's significant and undisputed needs, Appellant has met his burden of proving by a preponderance of the evidence that the Waiver Agency erred in reducing his services and its decision to do so must therefore 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 initiate a reinstatement of Appellant's services to their previous level.



Steven J. Kibit
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

Date Signed: █
Date Mailed: █

[REDACTED]
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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.