

**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. 2014-34662 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, a hearing was held on ██████████. ██████████, Appellant's mother, appeared and testified on Appellant's behalf. Appellant also appeared and testified.

██████████, Associate Director, appeared on behalf of the Department's Waiver Agency, ██████████ (██████████ or Waiver Agency). ██████████, RN, Case Manager; ██████████, Social Services Technician; and ██████████, Eligibility Specialist, appeared as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly deny Appellant's request for additional Community Living Supports (CLS) through self-determination?

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 ██████████ to 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)
3. Appellant is a ██████ year-old Medicaid beneficiary, born ██████████, who is diagnosed with Friedrich's Ataxia, a rare genetic degenerative disease, which has led to scoliosis, loss of coordination, fatigue and muscle loss,

vision and hearing impairment, diabetes mellitus and a heart condition. (Exhibit A, pp 11-12; Exhibit 2; Testimony)

4. Appellant lives in an apartment attached to his parent's home. Appellant is non-ambulatory, but is able to push himself in a wheelchair. Appellant has difficulty with fine motor activity but is able to feed himself. Appellant does attempt to transfer himself from the wheelchair to the toilet, but he often falls during these times. Appellant has a Personal Emergency Response System (PERS). Appellant is unable to care for his diabetes mellitus on his own because he cannot give himself insulin shots, load the glucometer with strips, or poke himself for blood testing. (Exhibit A, p 11; Exhibit 2; Testimony)
5. In ██████████, Appellant requested that his Community Living Supports (CLS) be increased from 45 hours per week to 80 hours per week. (Exhibit A, pp 2, 11; Testimony)
6. ██████████ reviewed Appellant's request and determined that 80 CLS hours per week were not medically necessary, but that Appellant's CLS hours could be increased to 49 hours per week. In making this determination, ██████████ also reviewed Appellant's Self-Determination Timesheets and a Time Study prepared by Appellant's mother. (Exhibit A, pp 2, 5-6, 23-46; Testimony)
7. On ██████████, ██████████ sent Appellant an Adequate Action Notice informing him that his request for 80 CLS hours per week through self-determination was denied. (Exhibit A, p 22; Testimony).
8. On ██████████, 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.

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*, April 1, 2014, 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. Community Living Supports do not include the cost associated with room and board.

The MI Choice Waiver Contract FY 2013, Attachment I, page 49 provides: MI Choice services are not used to replace existing unpaid supports but rather bolster and help sustain ongoing allies involvement.

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 additional CLS hours through self-determination are medically necessary.

The Waiver Agency's Associate Director testified that in ██████████, Appellant requested that his Community Living Supports (CLS) be increased from 45 hours per week to 80 hours per week. The Waiver Agency's Associate Director indicated that ██████████ reviewed Appellant's request and determined that 80 CLS hours per week were not medically necessary, but that Appellant's CLS hours could be increased to 49 hours per week. In making this determination, ██████████ also reviewed Appellant's Self-Determination Timesheets and a Time Study prepared by Appellant's mother. The Waiver Agency's Associate Director testified that according to the time sheets, a significant amount of time was allotted towards supervision, which would not be an appropriate use of CLS hours. The Waiver Agency's Associate Director also testified that Appellant lives in an apartment attached to his parent's home and they can provide significant informal supports to him. Based on the review, the Waiver Agency's Associate Director testified that on ██████████, ██████████ sent Appellant an Adequate Action Notice informing him that his request for 80 CLS hours per week through self-determination was denied, but that an increase to 49 CLS hours per week had been approved. The Waiver Agency's Associate Director indicated that, per policy, MI Choice services are not used to replace existing unpaid supports but rather bolster and help sustain ongoing informal support.

Appellant's mother testified that she did not think it was a parent's responsibility to care for a ██████ year old son. Appellant's mother questioned why she could not be paid to provide Appellant's medical care through self-determination, given that she is trained in CPR, First Aid, and blood born pathogens. Appellant's mother testified that Appellant goes to physical therapy two times per week, which takes 7 hours of care, or Appellant's entire daily allowance of care, but he still needs assistance throughout the rest of the evening and night. Appellant's mother testified that all of Appellant's care throughout the day is hands on care and that Appellant can be left alone for an hour, at most. Appellant's mother testified that Appellant's condition is getting worse, that he often falls

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out of his chair, and could not live on his own. Appellant's mother indicated that she is also concerned about caregiver burnout, given that she is both his paid and unpaid caregiver. Appellant's mother testified that she had to quit her job to take care of Appellant and if they could get the additional hours being requested, her husband could also stay home to help care for Appellant, especially helping with all of the heavy lifting. Appellant's mother testified that the family does appreciate the help received from the Waiver Program, but that it is not enough to meet all of Appellant's needs. Appellant's mother testified that if Appellant could even get 11 CLS hours per day, Appellant's father could quit work and give them all a break.

In response, the Waiver Agency's Associate Director indicated that she understands the complexity of Appellant's condition and the situation, but that the Waiver Agency must consider available informal supports when making determinations. The Waiver Agency's Associate Director also indicated that Appellant's mother could give herself a break in caring for Appellant by using some of the self-determination hours to hire someone to care for Appellant once or twice a week.

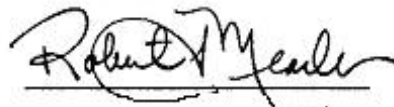
This ALJ finds the Waiver Agency properly denied Appellant's request for additional CLS hours through self-determination. Appellant lives in an apartment attached to his parent's home and Appellant's parents are available to provide significant informal assistance in addition to the paid, formal support provided by Appellant's mother through self-determination. Per policy, MI Choice services are not used to replace existing unpaid supports but rather bolster and help sustain ongoing informal support.

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 for additional care hours through self-determination.

IT IS THEREFORE ORDERED that:

The Department's decision is **AFFIRMED**.



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

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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.