

**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. 2014-35586 EDW

██████████

██████████

Appellant

_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 upon the Appellant's request for a hearing.

After due notice, an in-person hearing was held on ██████████. Attorney ██████████, ██████████, appeared on behalf of the Appellant. Appellant testified on his own behalf. ██████████, Appellant's provider also testified on the Appellant's behalf.

██████████, R.N., Clinical Manager, ██████████, appeared and testified on behalf of the Department's Waiver Agency. ██████████, R.N., Nurse Supports Coordinator, ██████████, also testified on behalf of the Department's Waiver Agency.

ISSUE

Did the Waiver Agency act properly in reducing the Appellant's CLS services under the MI Choice Waiver program from █ hours per week down to █ hours per week?

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 Appellant is a Medicaid beneficiary who is enrolled in the MI Choice Waiver program. Appellant had been receiving █ hours per week of CLS through Self Determination. (Exhibit A, pp. 2, 38 and testimony).
2. The Appellant is a █-year-old man (DOB ██████████). (Exhibit A, pp. 4, 18 and testimony).

[REDACTED]
Docket No. 2014-35586 EDW
Hearing Decision & Order

3. On [REDACTED], a [REDACTED]-day reassessment was conducted with the Appellant and his provider by [REDACTED], R.N., Nurse Supports Coordinator, [REDACTED], LBSW, Social Work Supports Coordinator, and [REDACTED], R.N., Clinical Manager, in their home. A new Nursing Facility Level of Care Determination (LOCD) was conducted and it was determined that the Appellant did not meet medical criteria for eligibility but remained eligible for the MI Choice Waiver program through Door 7. A new Care Plan Worksheet was completed based on the reassessment and the worksheet recommended [REDACTED] hours per month or [REDACTED] hours per week. (Exhibit A, pp. 2, 4-17, 36-37, 39-41 and testimony).
4. On [REDACTED], the Clinical Manager, [REDACTED] called Appellant to advise of the need to reduce his hours to six hours per week. (Exhibit A, p. 36).
5. On [REDACTED], the Waiver Agency increased Appellant's caregiver's wage from [REDACTED] per hour to [REDACTED] per hour. (Exhibit A, p. 35).
6. On [REDACTED], Appellant made multiple calls to the Waiver Agency, and the Clinical Manager, [REDACTED] spoke to the Appellant. Appellant demanded another assessment indicating that the one completed on [REDACTED] was not accurate. Appellant indicated he has delusions and hallucinations, which was not addressed during the assessment. [REDACTED] advised Appellant that his care hours were being reduced based on their recent review of his care needs and the fact that his provider shares the home with him. Accordingly, the caregiver can be paid to clean his private room, but as part owner of the home she would be responsible for the common areas that they share. (Exhibit A, p. 35).
7. On [REDACTED] did a new LOCD finding Appellant eligible under Door 6, due to his reported delusions and hallucinations, and also due to his verbally abusive and socially inappropriate behaviors on 2 of the past 7 days, as indicated by his conversations and phone messages left with [REDACTED] staff. (Exhibit A, p. 34).
8. On [REDACTED], R.N., conducted a reassessment with the Appellant over the phone. Each question on the assessment was gone over with the Appellant, and the Appellant asked for a copy and indicated the new assessment should be good since they had reviewed each section of the assessment during their phone interview. [REDACTED] noted the earlier proposed reduction from [REDACTED] CLS hours per week down to 6 hours per week, and advised that the final recommendation was for a reduction from [REDACTED] hours per week down to [REDACTED] hours per week. (Exhibit A, p. 34, 18-32 and testimony).
9. On [REDACTED], an Advance Action Notice was sent to the Appellant stating effective [REDACTED] his CLS hours would be reduced from 1 [REDACTED] hours per week to [REDACTED] hours per week. Appellant's hours are being provided on a Self Determination basis. The notice stated the reason for the reduction was

that the “Participant’s medical needs do not warrant existing hours”. (Exhibit A, p. 38 and testimony).

10. On ██████████, MAHS received the Appellant’s request for an Administrative Hearing. On ██████████, MAHS received a request for an in-person hearing. (A duplicate file, 2014-35710 EDW, was opened pursuant to the request for an in-person hearing, which was dismissed as a duplicate). (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 *Medicaid Provider Manual, MI Choice Waiver*, April 1, 2014, provides 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.

MI Choice services are available to qualified participants throughout the state and all provisions of the program are available to each qualified participant unless otherwise noted in this policy and approved by CMS. [p. 1].

* * *

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.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. [p. 9, emphasis added].

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. [p. 10, emphasis added].

* * *

4.1.H. CHORE SERVICES

Chore Services are needed to maintain the home in a clean, sanitary and safe environment. This service includes heavy household chores such as

washing floors, windows and walls, tacking down loose rugs and tiles, and moving heavy items of furniture in order to provide safe access and egress. Other covered services might include yard maintenance (mowing, raking and clearing hazardous debris such as fallen branches and trees) and snow plowing to provide safe access and egress outside the home. These types of services are allowed only in cases when neither the participant nor anyone else in the household is capable of performing or financially paying for them, and where no other relative, caregiver, landlord, community or volunteer agency, or third party payer is capable of, or responsible for, their provision. In the case of rental property, the responsibility of the landlord, pursuant to the lease agreement, will be examined prior to any authorization of service.

4.1.I. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) services facilitate an individual'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, non-medical 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 individual'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 individual so they may reside and be supported in the most integrated 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 may not 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's plan of service. 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. [pp. 12-13].

The issue appealed is whether the Waiver Agency properly reduced the Appellant's CLS from █ hours per week down to █ hours per week. Appellant appealed the reduction and stated the Waiver Agency had reduced the hours before because his caregiver lives in the home. He questions whether they can do the same thing again.

The Waiver Agency's witnesses testified that on ██████████ a █-day reassessment for MI Choice Waiver services was conducted with the Appellant and the Appellant's provider by ██████████, R.N., Nurse Supports Coordinator, ██████████, LBSW, Social Work Supports Coordinator, and ██████████, R.N., Clinical Manager. The assessment was conducted in the home co-owned by the Appellant and his caregiver. (See Exhibit A, pp. 2, 4-27). A new Nursing Facility Level of Care Determination (LOCD) was conducted and it was determined that the Appellant did not meet medical criteria for eligibility but remained eligible for the MI Choice Waiver program through Door 7. A new Care Plan Worksheet was completed based on the reassessment and the worksheet recommended █ hours per month or █ hours per week.

██████████ summarized the information gathered at the ██████████ in-person assessment in the Appellant's progress notes. ██████████ stated she observed the Appellant was able to ambulate steadily and without assistance. Appellant was able to sit in his chair and stand and walk without using the lift mechanism in his lift chair. It was determined from the assessment that the Appellant was able to complete his ADLs without assistance, but his caregiver did provide assistance washing his back, and helped him dress his lower body, mostly his shoes and socks. Appellant reported receiving █ therapy at ██████████, and denied any behaviors or problems in recent days.

██████████ reported the Appellant's caregiver was present during the assessment and that she lives in the home and is a part owner of the residence. It was determined the Appellant has his own private bedroom, but the remainder of the house, except the providers bedroom, is jointly occupied. Appellant's caregiver advised that she and the neighbor worked together during the winter to shovel snow. The caregiver said she has to vacuum constantly due to the dog and cats in the home. She also fixes them breakfast and dinner each day. Appellant reported that he could fix simple meals on occasion. Appellant also reported that he does drive himself, and mostly goes for doctor's appointments and therapy.

A care conference was held later that day at the Waiver Agency with ██████████, ██████████, and ██████████ the Waiver Agency's Deputy Director. During the care conference the Waiver Agents proposed to offer the Appellant a back scrubber to assist him with his showers, along with a shoe horn and sock aide to assist him with dressing. They also discussed that the Appellant and the caregiver live together and were purchasing the home together. They noted that except for separate bedrooms, they share all other living spaces in the home, and the Waiver program could only pay the caregiver, who is a joint owner, to clean the Appellant's private bedroom. As co-owner the caregiver would be responsible for cleaning the shared living space.

The Waiver Agents noted that the caregiver does the Appellant's laundry and picks up his medications as needed. They determined that the Appellant's personal care needs could be met with hands-on assistance with showering ██████ hour per week, dressing lower body ██████ hour per week, cleaning his bedroom ██████-hour per week, doing his laundry ██████ hours per week, and running errands ██████ hour per week. The other cleaning, cooking, shopping and chores could not be covered with Waiver dollars, because they were not the personal care needs of the Appellant, but rather joint activities that benefitted the caregiver who is a co-owner and resident of the home, which Medicaid policy deems the responsibility of a capable co-owner and resident of the home.

On ██████████, the Clinical Manager, ██████████ called Appellant to advise of the need to reduce his hours to ██████ hours per week. Appellant was advised his caregiver's hourly rate would be increased, however, and on ██████████, the Waiver Agency increased Appellant's caregiver's wage from ██████████ per hour to ██████████ per hour.

On ██████████, Appellant made multiple calls to the Waiver Agency, and the Clinical Manager, ██████████ spoke to the Appellant. Appellant demanded another assessment indicating that the one completed on ██████████ was not accurate. Appellant indicated he has delusions and hallucinations, which was not addressed during the assessment. Nurse Warner advised Appellant that his care hours were being reduced based on their recent review of his care needs and the fact that his provider shares the home with him. Accordingly, the caregiver can be paid to clean his private room, but as part owner of the home she would be responsible for the common areas that they share.

On ██████████ did a new LOCD finding Appellant eligible for the MI Choice Waiver program under Door 6, due to his reported delusions and hallucinations, and also due to his verbally abusive and socially inappropriate behaviors on ██████ of the past ██████ days, as indicated by his conversations and phone messages left with ██████████ staff. Thereafter, on ██████████, R.N., conducted a reassessment with the Appellant over the phone. Each question on the assessment was gone over with the Appellant, and the Appellant asked for a copy and indicated the new assessment should be good since they had reviewed each section of the assessment during their phone interview. ██████████ noted the earlier proposed reduction from ██████ CLS hours per week down to ██████ hours per week, and advised that the final recommendation was for a reduction from ██████ hours per week down to ██████ hours per week.

The assessment report by ██████████ notes the informal support provided by Appellant's caregiver who resides in the home and is a co-owner. ██████████ stated the caregiver prepares their breakfast and dinner. They share living spaces other than their bedrooms. The caregiver does the Appellant's laundry and picks up his medications as needed. ██████████ noted that the Appellant's medications were also set up as an informal support. She concluded that per the Appellant's personal care needs, he would be eligible for assistance with showering █ hours and █ minutes per week, dressing assistance █ hours and █ minutes per week, cleaning his bedroom █ hour per week, laundry █ hours per week, and running errands █ hour per week, for a total of just under █ hours per week. The other cleaning cooking, shopping and chores were the responsibility of the Appellant's caregiver, co-owner and resident in the home.

Thereafter, on ██████████, an Advance Action Notice was sent to the Appellant stating effective ██████████ his CLS hours would be reduced from █ hours per week to █ hours per week. Appellant's hours are being provided on a Self Determination basis. The notice stated the reason for the reduction was that the "Participant's medical needs do not warrant existing hours".

Appellant testified he had a knee replacement and a fused ankle. He indicated his caregiver washes his lower extremities, provides messages, and helps with dressing every day. She helps him get his pants up and helps him with his socks and shoes. Appellant stated he also has asthma and it limits his ability to get around as he gets out of breath. He said his gait waivers, but has not had any recent falls.

Appellant stated he has been in the MI Choice Waiver program since ██████████ and he has had the same caregiver the whole time. He said originally he was approved for █ hours per week. It was reduced to █ hours per week. Then they were going to reduce the hours to █ hours per week before setting it at █ hours per week. Appellant said he wants to keep his caregiver. He said she reminds him to take his medications throughout the day and puts the medications in the compartments for him. He also said that he wants to see his grandson more often and needs help to get there.

Appellant testified that his caregiver pays for the insurance on his car, that they use to go to appointments and she uses to go to work. She also pays for the food costs for the household. She also assists with paying other bills and obligations of the household such as, the mortgage payments, utility bills, the car payment, fuel expenses, and trash services. Appellant indicated they spend about ██████████ per month for food. Appellant indicated his monthly income would not cover the household expenses without a contribution from his caregiver, and he could not stay in the home without her help with the finances.

Appellant's provider testified that she has been the Appellant's caregiver since ██████████. She testified about the daily tasks she performs in the home. Appellant's caregiver said she assists with getting the Appellant washed up and dressed for the day. She makes their breakfast. She cleans the house and does laundry. She fills his medication boxes for him and picks his medications up from the pharmacy. She helps him bathe in the evenings.

Appellant's caregiver said the Appellant gets one meal a day from meals-on-wheels for lunch, but if he doesn't eat the meal from meals-on-wheels she will make lunch.

Appellant's caregiver indicated she has a job outside of the home that she goes to █ days per week and works █ hours per week. She will take the Appellant out into the community if he wants to go out. She has taken him to the park, the grocery store, and to his sons in █. Appellant's caregiver said she does the yard work and shovels the snow. She said it takes about an █ per week to mow the lawn. She said in the evening she helps with the Appellant's shower and with getting him dressed, she makes him a snack, helps with his medications, and sits up with him if he needs company. She stated that her best guess is that she spends about █ hours per week taking care of the household and caring for the Appellant. Appellant's caregiver testified if she were only paid for █ hours a week to care for the Appellant it would not be feasible for her to continue caring for him. She said she could not make ends meet on only █ hours per week.

The Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency did not act properly in reducing his MI Choice Waiver services. The testimony of the Appellant and his provider did not establish that the Waiver Agency acted improperly when it proposed a reduction in his CLS services. The Waiver Agency acted in accordance with the Medicaid policy quoted above. The Waiver Agent's completed a proper assessment of the Appellant's needs, and correctly determined that he qualified for the Waiver program through Door 6 on the LOCD based on the information gathered from the █ assessments conducted in this case. The Waiver Agency cannot provide waiver services that benefit the household in general, but only services which meet the specific needs of the Appellant. The preponderance of the evidence in this case shows that the services authorized are sufficient to meet the Appellant's individual needs.

Appellant has failed to recognize that the Waiver program can only pay for services that directly benefit the Appellant. Furthermore, policy indicates that someone such as the Appellant's caregiver, who is a resident in the home, as well as, a co-owner, would normally be expected to care for the home that they jointly own with the Waiver beneficiary. The services authorized by the Waiver Agency must be sufficient to meet the beneficiary's personal needs, and are not meant to provide a certain level of income to the caregiver. The fact that the Appellant's caregiver may not personally be able to make ends meet on the reduced hours is of no consequence to the decision by the Waiver Agency to authorize services. Furthermore, the suggestion that the Appellant can't cover all of the household expenses based on his own income is also not relevant. Since Appellant's caregiver is a resident of the household, and a co-owner, it is only logical that she would be expected to contribute towards the household expenses.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency acted properly when it reduced the Appellant's CLS services under the MI Choice Waiver program from █ hours per week to █ hours per week.

[REDACTED]
Docket No. 2014-35586 EDW
Hearing Decision & Order

IT IS THEREFORE ORDERED that:

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

William D Bond

William D. Bond
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

WDB/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.

