STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF HEALTH AND HUMAN SERVICES
P. O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax (517) 373-4147

IN THE MATTER OF:

Docket No. 15-003473 CMH
Case No.

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 request for hearing filed on Appellant's behalf.

After due notice, an in-person hearing was held on . Attorney appeared on Appellant's behalf. Appellant's father and guardian and Appellant's step-mother, appeared as witnesses.

Attorney Timothy Perrone represented Respondent, Community Mental Health of Central Michigan (CMH or Department). Tonya Bondale, Fair Hearing Officer; Lorraine Crawford, Case Manager; Kathie Swan, Deputy Director; and Kara Kine, Utilization Manager, appeared as witnesses for Respondent.

ISSUE

Did Respondent properly reduce Appellant's Community Living Supports (CLS) and instruct Appellant's guardian that CLS could no longer be used while Appellant was sleeping?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. CMH is under contract with the Michigan Department of Health and Human Services (MDHHS) to provide Medicaid covered services to people who reside in its service area. (Exhibit 1, Testimony)

2. Appellant is a Medicaid beneficiary, born with severe intellectual disabilities and seizures. (Exhibits 5, A; Testimony)

3. Appellant has been receiving services through CMH pursuant to the Habilitation Supports Waiver Program. (Exhibits 5, A; Testimony).

4. Appellant resides in his own apartment in the lower level of the family home. The apartment has separate entrances, a full kitchen, living room, bedrooms and a bathroom. Modifications were made to the entrances and bathroom for handicap accessibility. Appellant's natural supports consist of his father and step-mother. (Exhibits 5, A; Testimony)

5. Appellant is unable to complete any of his own activities of daily living, although Appellant can sometimes pull a shirt on or off or move his arms to assist with dressing. Appellant can chew food and swallow on his own, but needs food placed in front of him and put on a utensil. (Exhibits 5, A; Testimony)

6. Appellant attends Mid-Michigan Industries (MMI) five days per week and periodically attends Indian Trails Camp. (Exhibits 5, A; Testimony)

7. On [redacted], Appellant's father/guardian met with Appellant's case manager to complete an Addendum to Appellant's Person Centered Plan (PCP). Following the meeting, Appellant's CLS hours were reduced from 97 hours per week to [redacted] hours per week to reflect the [redacted] hours per week of Home Help Services (HHS) Appellant began receiving. Appellant's father/guardian was also informed during the meeting that CLS hours had to be for face to face time with Appellant and could no longer be used during periods when Appellant was asleep. (Exhibits 5, A; Testimony)

8. The Encounter Reporting guidelines issued by MDHHS and used by the CMH for billing, indicate that CLS may only be used, and billed, for face-to-face encounters. (Exhibit 7; Testimony).

9. On [redacted] Appellant's father/guardian was provided with an Action Notice & Hearing Rights regarding the changes made in his PCP. (Exhibit 6; Testimony)

10. On [redacted], the Michigan Administrative Hearing System (MAHS) received Appellant's Request for Hearing.

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.

> Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to

> low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services. [42 CFR 430.0.]
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> * * *
>
> The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program. [42 CFR 430.10.]

Moreover, Section 1915(b) of the Social Security Act provides:

> The Secretary, to the extent he finds it to be cost-effective and efficient and not inconsistent with the purposes of this subchapter, may waive such requirements of section 1396a of this title (other than subsection(s) of this section) (other than sections 1396a(a)(15), 1396a(bb), and 1396a(a)(10)(A) of this title insofar as it requires provision of the care and services described in section 1396d(a)(2)(C) of this title) as may be necessary for a State…

The State of Michigan has opted to simultaneously utilize the authorities of the 1915(b) and 1915(c) programs to provide a continuum of services to disabled and/or elderly populations. Under approval from the Centers for Medicare and Medicaid Services (CMS) the Department of Health and Human Services (MDHHS) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver.

With respect to the Habilitation Waiver and CLS, the applicable version of the Medicaid Provider Manual (MPM) provides:

SECTION 15 – HABILITATION SUPPORTS WAIVER FOR PERSONS WITH DEVELOPMENTAL DISABILITIES

Beneficiaries with developmental disabilities may be enrolled in Michigan's Habilitation Supports Waiver (HSW) and receive the supports and services as defined in this section. HSW beneficiaries may also receive other Medicaid state plan or additional/B3 services. A HSW beneficiary must receive at least one HSW service per month in order to retain eligibility. Medical necessity criteria should be used in determining the amount, duration, and scope of services and supports to be used. The beneficiary's services and supports that are to be provided under the auspices of the PIHP must be specified in his individual plan of services developed through the person-centered planning process.

HSW beneficiaries must be enrolled through the MDCH enrollment process completed by the PIHP. The enrollment process must include annual verification that the beneficiary:

- Has a developmental disability (as defined by Michigan law);
- Is Medicaid-eligible;
- Is residing in a community setting;
- If not for HSW services, would require ICF/MR level of care services; and
- Chooses to participate in the HSW in lieu of ICF/MR services.

The enrollment process also includes confirmation of changes in the beneficiary's enrollment status, including termination from the waiver, changes of residence requiring transfer of the waiver to another PIHP, and death. Termination from the HSW may occur when the beneficiary no longer meets one or more of the eligibility criteria specified above as determined by the PIHP, or does not receive at least one HSW service per month, or withdraws from the program voluntarily, or dies. Instructions for beneficiary enrollments and annual re-certification may be obtained from the MDCH Bureau of Community Mental Health Services. (Refer to the Directory Appendix for contact information.)

The PIHP shall use value purchasing for HSW services and supports. The PIHP shall assist beneficiaries to examine their first- and third-party resources to pursue all reimbursements to which they may be entitled, and to make use of other community resources for non-PIHP covered activities, supports or services.

Reimbursement for services rendered under the HSW is included in the PIHP capitation rate.

Beneficiaries enrolled in the HSW may not be enrolled simultaneously in any other §1915(c) waiver.

Habilitation services under the HSW are not otherwise available to the beneficiary through a local educational agency under the Individuals with Disabilities Education Act (IDEA) or the Rehabilitation Act of 1973.

15.1 WAIVER SUPPORTS AND SERVICES

Community Living Supports (CLS)

Community Living Supports (CLS) facilitate an individual's independence, productivity, and promote inclusion and participation. The supports can be provided in the beneficiary's residence (licensed facility, family home, own home or apartment) and in community settings (including, but not limited to, libraries, city pools, camps, etc.), and may not supplant other waiver or state plan covered services (e.g., out-of-home nonvocational habilitation, Home Help Program, personal care in specialized residential, respite). The supports are:

- Assisting (that exceeds state plan for adults), prompting, reminding, cueing, observing, guiding and/or training the beneficiary with:

  - Meal preparation;

  - Laundry;

  - Routine, seasonal, and heavy household care and maintenance (where no other party, such as a landlord or licensee, has

responsibility for provision of these services);

- Activities of daily living, such as bathing, eating, dressing, personal hygiene; and
- Shopping for food and other necessities of daily living.

▪ Assistance, support and/or training the beneficiary with:

- Money management;
- Non-medical care (not requiring nurse or physician intervention);
- Socialization and relationship building;
- Transportation (excluding to and from medical appointments that are the responsibility of Medicaid through DHS or health plan) from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence);
- Leisure choice and participation in regular community activities;
- Attendance at medical appointments; and
- Acquiring goods and/or services other than those listed under shopping and non-medical services.

▪ Reminding, observing, and/or monitoring of medication administration.

The CLS do not include the costs associated with room and board. Payments for CLS may not be made, directly or indirectly, to responsible relatives (i.e., spouses or parents of minor children) or the legal guardian.

For beneficiaries living in unlicensed homes, CLS assistance with meal preparation, laundry, routine household care and maintenance, ADLs, and/or shopping may be used to complement Home Help or Expanded Home Help services when the individual's needs for this assistance have been officially determined to exceed DHS's allowable parameters. Reminding, observing, guiding, and/or training of these activities are CLS coverages that do not supplant Home Help or Expanded Home Help. CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, State Plan coverage of Personal Care in Specialized Residential Settings.

If beneficiaries living in unlicensed homes need assistance with meal preparation, laundry, routine household care and maintenance, ADLs, and/or shopping, the beneficiary must request Home Help and, if necessary, Expanded Home Help from DHS. CLS may be used for those activities while the beneficiary awaits determination by DHS of the amount, scope and duration of Home Help or Expanded Home Help. If the beneficiary requests it, the PIHP must assist with applying for Home Help or submitting a request for a Fair Hearing when the beneficiary believes that the DHS authorization of amount, scope and duration of Home Help does not accurately reflect his or her needs. CLS may also be used for those activities while the beneficiary awaits the decision from a Fair Hearing of the appeal of a DHS decision.

Community Living Supports (CLS) provides support to a beneficiary younger than 18, and the family in the care of their child, while facilitating the child's independence and integration into the community. This service provides skill development related to activities of daily living, such as bathing, eating, dressing, personal hygiene, household chores and safety skills; and skill development to achieve or maintain mobility, sensory-motor, communication, socialization and relationship-building skills, and participation in leisure and community activities. These supports must be provided directly to, or on behalf of, the child. These supports may serve to reinforce skills or lessons taught in school, therapy, or other settings. For children and adults up to age 26 who are enrolled in school, CLS services are not intended to supplant services provided in school or other settings or to be provided during the times when the child or

> adult would typically be in school but for the parent's choice to home-school.
>
> *Medicaid Provider Manual*
> *Mental Health/Substance Abuse Chapter*
> *January 1, 2015, pp 97-98*
> Emphasis added

CMH's Case Manager testified that she has been Appellant's case manager for some time and participated in the [redacted] PCP meeting that led to the changes in Appellant's services leading to the instant hearing. CMH's Case Manager testified that she was working with Appellant's family to find services that could assist when Appellant was sleeping given that the Department had done away with a sleep stipend that had been used in the past and because CMH had been instructed by MDHHS that CLS could not be used when a beneficiary was sleeping. CMH's Case Manager testified that the [redacted] CLS hours per week authorized, in conjunction with the [redacted] hours of HHS Appellant receives each week was sufficient in amount, scope and duration to meet Appellant's needs. CMH's Case Manager testified that Appellant's home has audio and video monitoring equipment and that Appellant also has natural supports available, including his father and step-mother, who live in a home attached to Appellant's apartment. CMH's Case Manager testified that there is a training and learning component to CLS, so CLS cannot be used while someone is sleeping; the person actually has to be doing something. CMH's Case Manager opined that she believed Appellant could be safe at night without CLS and with the systems the family currently has in place.

CMH's Utilization Manager testified that the Encounter Reporting guidelines issued by MDHHS also indicated that CLS may only be used, and billed, for face-to-face encounters. (See Exhibit 7). CMH's Utilization Manager indicated that CLS involves training, so training could not be provided to a person who is asleep. CMH's Utilization Manager also testified that the CMH must consider HHS and natural supports before authorizing CLS and that if Appellant did not have natural supports, the CMH would likely have to look to a more restrictive setting for him because he would not be safe at home alone.

CMH's Deputy Director testified that she oversees all services provided to beneficiaries in the six counties served by CMH. CMH's Deputy Director testified that CMH utilizes the Supports Intensity Scale (SIS), a tool chosen by MDHHS to assist agencies in determining the amount, scope and duration of services. CMH's Deputy Director indicated that the amount of Appellant's services were determined using assessments, the PCP process, the SIS, and clinical judgment. CMH's Deputy Director also indicated that the CMH also has to ensure that services are distributed equitably over the six counties that it serves, so consumers are compared to ensure that services are delivered equally. CMH's Deputy Director testified that the amount of Appellant's services were equal to other similarly situated consumers served by the CMH.

Appellant's father testified that Appellant moved home from an Adult Foster Care (AFC) home in [redacted]. Appellant's father testified that he worked with Appellant's Case Manager to work out a budget and that Appellant's Case Manager was aware that the family was using CLS hours while Appellant was sleeping from the time he came home until the [redacted] meeting. Appellant's father testified that through the fall, Appellant's Case Manager had been telling him that the use of CLS while consumers were sleeping was going to be discontinued at some point because the CMH had been informed by MDHHS that using CLS hours while a consumer was sleeping was improper. Appellant's father testified that he was told at the [redacted] PCP meeting that CLS could no longer be used while Appellant was sleeping and that he was not told that he could continue to use CLS that way while the appeal was pending. Appellant's father testified that he has been paying privately for CLS while Appellant is sleeping and that the cost would come to approximately [redacted].

Appellant's father testified that Appellant needs CLS at night for safety and hygiene reasons. Appellant's father explained an incident that occurred where Appellant tried unsuccessfully to get to the restroom on his own when staff was not present at night. Appellant's father indicated that Appellant lies in the same position all night so if he soils himself he will be laying in it all night. Appellant's father testified that if Appellant cannot get help at night, he will have to return to a group home. Appellant's father noted that the PCP allows one hour, broken up into four 15 minute units, to be used per week at night for toileting Appellant, but that such a breakdown is completely impractical because he could not hire someone to come for only 15 minutes per night. Appellant's father also testified that Appellant could have a seizure at night, so monitoring is required for that. Appellant's father indicated that the monitoring system they have in place is only useful if there is someone there to watch or hear it.

Appellant's father testified that they decided to move Appellant home into his own apartment because it is a less restrictive setting and Appellant was not doing well in the AFC home. Appellant's father indicated that he feels like the money he and his wife are able to put into Appellant's care is being used against them by the CMH. Appellant's father pointed out that Appellant is now an adult and they are not financially responsible for him. Appellant's father testified that Appellant has responded amazingly well since he moved home and has been using more words and signs since that time. Appellant's father testified that the greatest problem is not with the number of CLS hours authorized but with the fact that those hours can no longer be used while Appellant is sleeping. Appellant's father pointed out that keeping Appellant safe is the main purpose of CLS and Appellant requires CLS at night to be safe. Appellant's father also testified that CLS workers could also be doing things like laundry, cleaning or preparing food while Appellant is asleep, so long as they are there if Appellant needs them.

As described in the above policy, CLS may be used to complement HHS when the individual's needs for that assistance have been officially determined to exceed DHS's allowable parameters. The CLS provided by CMH should be complementing Appellant's HHS while also facilitating Appellant's independence, productivity, inclusion, and participation.

Appellant bears the burden of proving by a preponderance of the evidence that the reduction in his CLS hours, as well as the instruction not to use CLS when sleeping, was inappropriate. Based on the evidence presented, Appellant failed to meet this burden. First, it was clearly appropriate for the CMH to reduce Appellant's CLS hours by the amount of HHS he receives each week. Policy indicates that CLS hours are to compliment HHS and Appellant's father really did not dispute the overall number of care hours Appellant is allocated each week.

The real question is whether it was appropriate for CMH to instruct Appellant's father that he could no longer use CLS while Appellant was sleeping. As indicated above, CLS is designed to facilitate an individual's independence, productivity, and promote inclusion and participation. CLS involves assisting, prompting, reminding, cueing, observing, guiding and/or training the beneficiary with meal preparation, laundry, household care and maintenance, activities of daily living, and shopping. CLS also involves assistance, support and/or training the beneficiary with money management, non-medical care, socialization and relationship building, transportation, leisure choice and participation in regular community activities, attendance at medical appointments, acquiring goods and/or services and reminding, observing, and/or monitoring of medication administration.

Having reviewed the above definition of CLS and its uses, it cannot be said that the CMH was wrong in telling Appellant's father that he could not use CLS while Appellant was sleeping. All of the above uses of CLS involve a beneficiary being awake, doing something, or being trained to do something. None of the above uses of CLS could be undertaken while a beneficiary is asleep.

In support of its assertion that CLS is properly used while a beneficiary is sleeping, Appellant argued that CLS while sleeping assists Appellant with his safety and hygiene, which in turn promotes his independence and inclusion in the community. Appellant argued that CLS while he is sleeping keeps him safe because he could have a seizure during the night and keeps him clean because a CLS worker could assist him with toileting if he awakes during the night. In support of his position, Appellant points to the definition of CLS found in MPM Section 17 – Additional Mental Health Services (B3s), which indicates that CLS may be used for, "Staff assistance with preserving the health and safety of the individual in order that he/she may reside or be supported in the most integrated, independent community setting."

However, as indicated above, Appellant is not receiving Additional Mental Health Services (B3s) but rather is receiving services under the Habilitation Supports Waiver and the above provision is not found under the CLS definition in the Habilitation Supports Waiver. And, even if the provision did appear under the definition of CLS under that Habilitation Supports Waiver, Appellant's argument would still fail because reading the provision in the context of the entirety of Section 17.3.B, it is clear that CLS is designed to assist or train beneficiaries to do things while they are awake, not to monitor or supervise them while they are asleep.

Appellant's parents should be commended on the enormous support that they provide

to their son. While they are no longer legally obligated to provide this care, the CMH must consider that care when authorizing services for as long as Appellant's parents are willing and able to provide that assistance. When the day comes when Appellant's parents are not willing or able to provide that assistance, then likely Appellant will need to be moved to a more restrictive group home setting because it would clearly not be possible to leave him alone.

Based on the evidence in this record, CMH's decision is based on competent and material evidence. With that said, there is nothing to stop Appellant's parents and the CMH from continuing to search for possible avenues of support for when Appellant is sleeping. That support simply cannot come from the allocation of CLS hours.

Appellant also made a motion during the hearing for an interim order instructing CMH to reimburse Appellant's father for the money he spent to provide CLS to Appellant while Appellant was sleeping, while the appeal was pending. The request was denied because, while services should usually remain in place if an appeal is filed before the effective date of the action, the CMH is not required to maintain services if the sole issue on appeal is one of Federal or State law or policy and the CMH notifies the Appellant in writing that services will not be continued. (See 42 CFR 431.230). Here, the issue on appeal is one solely of policy, i.e. whether policy allows CLS to be used while a beneficiary is sleeping and the CMH did notify Appellant in writing, both in the PCP and the Action Notice, that services would not be continued. 42 CFR 431.230 also allows an agency to recoup amounts spent during the pendency of an appeal if the agency prevails at the hearing. Hence, even if the CMH had continued services during the pendency of the appeal, it would have been able to recoup those costs from Appellant following this favorable decision.

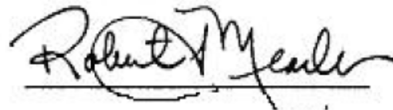
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH properly reduced Appellant's CLS to offset his receipt of HHS.

CMH also properly instructed Appellant's father that he could no longer utilize CLS while Appellant is asleep.

IT IS THEREFORE ORDERED that:

Respondent's decision is AFFIRMED.



Robert J. Meade
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Health and Human Services

Date Signed:

Date Mailed:

cc:

***** 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.