

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF HEALTH AND HUMAN SERVICES
P.O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax: (517) 373-4147**

IN THE MATTER OF:

██████████

Docket No. 15-021200 EDW
Case No. ██████████

Petitioner
_____ /

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 Appellant's request for a hearing.

After due notice, an in-person hearing was held on ██████████. Petitioner personally appeared but did not testify. Appellant was represented by ██████████ legal guardian, daughter, and Hearing Representative who also testified on behalf of Petitioner.

Respondent-██████████ subcontractor with the Michigan Department of Health and Human Services (Respondent was represented by ██████████ Assistant Director of MI Health Link and New Business Strategies, and ██████████ Social Work Supports Coordinator.

ISSUE

Did the Respondent properly propose to reduce Petitioner's Community Living Supports (CLS) hours due to an increase in Adult Day Health 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. Respondent is a contract agent of the Michigan Department of Community Health and is responsible for waiver eligibility determinations of the MI Choice waiver services in its service area.
2. Appellant is a ██████████ year-old Medicaid and SSI beneficiary who has had services with the Respondent since at least ██████████ (Exhibit A; Testimony)

3. Prior to the proposed action herein, Appellant had been receiving services through the Waiver Agency, including Community Living Supports ("CLS") at 40 hours per week, and, Adult Day health Services 3 days per week. (Exhibit A; Testimony).
4. On ██████████ Petitioner requested additional Adult Day Services. (Exhibit A; Testimony).
5. Unrefuted evidence is that during the time period at issue here, Appellant has had no changes in her medical condition(s). (Testimony).
6. Petitioner was last assessed in the summer, ██████████ the Respondent has regularly contacted Petitioner every 30 days.
7. On ██████████ and again by issuing an identical notice on ██████████ the Respondent issued an Advanced Action Notice informing Petitioner that she may increase her Adult Day health services to 4 or 5 days per week. If Petitioner attended the 4 day option, Petitioner's CLS hours would be reduced to 27 hours per week. If Petitioner attended Adult Day health services 5 days per week, Petitioner's CLS hours will correspondingly be reduced to 21 CLS hours per week. (Exhibit A.9-10; Testimony).
8. On ██████████ the Michigan Administrative Hearing System (MAHS) received the request for hearing filed in this matter.
9. The Respondent reinstated the action pending the outcome of the administrative hearing based on its assessment of the timely hearing request filed by Petitioner.

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 Health and Human Services. Regional agencies, in this case AAA, 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 through the waiver program 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 the Waiver Agency and, with respect to such services, the applicable version of the Michigan Medicaid Provider Manual (MPM) states:

4.1.H. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) facilitate an individual's independence and promote participation in the community. CLS can be provided in the participant's residence or in community settings. CLS include assistance to enable participants to accomplish tasks that they would normally do for themselves if able. The services may be provided on an episodic or a continuing basis. The participant oversees and supervises individual providers on an ongoing basis when participating in self-determination options. Tasks related to ensuring safe access and egress to the residence are authorized 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/volunteer agency, or third party payer is capable of or responsible for their provision. When transportation incidental to the provision of CLS is included, it shall not also be authorized as a separate waiver service for the participant. Transportation to medical appointments is covered by Medicaid through DHS.

CLS includes:

- Assisting, reminding, cueing, observing, guiding and/or training in household activities, ADL, or routine household care and maintenance.
- Reminding, cueing, observing and/or monitoring of medication administration.
- Assistance, support and/or guidance with such activities as:
 - Non-medical care (not requiring nurse or physician intervention) – assistance with eating, bathing, dressing, personal hygiene, and ADL;
 - Meal preparation, but does not include the cost of the meals themselves;

- Money management;
 - Shopping for food and other necessities of daily living;
 - Social participation, relationship maintenance, and building community connections to reduce personal isolation;
 - Training and/or assistance on activities that promote community participation such as using public transportation, using libraries, or volunteer work;
 - Transportation (excluding to and from medical appointments) from the participant's residence to community activities, among community activities, and from the community activities back to the participant's residence; and
 - Routine household cleaning and maintenance.
- Dementia care including, but not limited to, redirection, reminding, modeling, socialization activities, and activities that assist the participant as identified in the individual's person-centered plan.
 - Staff assistance with preserving the health and safety of the individual in order that he/she may reside and be supported in the most integrated independent community setting.
 - Observing and reporting any change in the participant's condition and the home environment to the supports coordinator.

These service needs differ in scope, nature, supervision arrangements, or provider type (including provider training and qualifications) from services available 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.

CLS services cannot be provided in circumstances where they would be a duplication of services available under the State Plan or elsewhere. The distinction must be apparent by unique hours and units in the approved service plan.

*MPM, January 1, 2015 version
MI Choice Waiver Chapter, pages 13-14*

More specific to the facts here, the MPM specifically disallows use of CLS to be used at the same time, or in conjunction with Adult Day Health services. That is, they cannot be provided at the same time:

Participants cannot receive Community Living Supports while at the Adult Day Health Center. Payment for Adult Day Health services includes all services provided while at the center. Community Living Supports may be used in conjunction with Adult Day Health services, but cannot be provided at the exact same time. MPM, MI Choice Waiver, Page 11

First, it should be noted that there was a change in the meals; Petitioner stipulated at the administrative hearing that she was not appealing this action and that it was not at issue here.

The issue here, after much discussion initially at the administrative hearing, appears to be whether the Respondent properly reduced the CLS hours when and if Petitioner used Adult Day Health services. Respondent stated that the change took place pursuant to Petitioner's request of ██████████ (See Exhibit A.13). However, at the hearing, Petitioner vehemently argued that she was not requesting an increase in Adult Day Services permanently, but was only requesting to add 1 day of Adult Day Health services for 1 week. At the same time, Petitioner argued vigorously at the administrative hearing for a permanent increase in Adult Day Health services without a corresponding reduction in CLS hours.

As noted in the Findings of Fact, the action here was pended. Thus, Petitioner has not had a change in services. This ALJ is somewhat confused as to why Petitioner argued that she did not request a permanent change in services while at the same time argued for a permanent addition of Adult Day health services.

The essence of the Issue here is whether the Respondent properly proposes to reduce CLS hours when there is a corresponding increase of Adult Day Health services. Respondent argues that the MPM and its contract with the state does not allow for these services to be provided at the same time. Petitioner made a number of arguments that the services cannot be substituted for each other as they are substantially different.

Policy found in the MPM cited above clearly states that "Participant cannot receive CLS while at the Adult Day Health Center...CLS cannot be provided at the exact same time." MPM MI Choice Waiver Chapter, page 11. It is noted that there is no factual dispute that Petitioner's medical condition has changed. Petitioner made a number of arguments that the services for the 2 programs are not identical and should not be considered the same. Petitioner's arguments were persuasive. However, Petitioner's arguments are irrelevant given the policy found in the MPM clearly prohibits both services at the same time. Neither this ALJ nor the Respondent has any authority to deviate from the structure of the benefits identified in the Department policy, under the authority of the federal government. Given this above policy and regulation, the notice provided in this case was correct, as it is required by the MPM. Thus, it must be upheld.

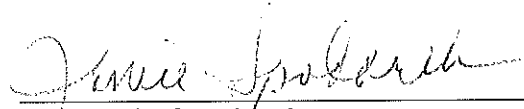
It is noted that there is no reason that Petitioner cannot withdraw her request to have Adult Day Health services increased if that is in fact what she desires; particularly here as the action was pended. However, should she actually want to add Adult Day health services without reducing the CLS when there has been no change, Petitioner cannot prevail based on the plain language of the MPM.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly proposed to reduce Petitioner's CLS hours when and if Petitioner increases her Adult Day Health services.

IT IS THEREFORE ORDERED that:

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



Janice G. Spodarek
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of
Health and Human Services

Date Mailed: [REDACTED]

JS/cg

cc: [REDACTED]

[REDACTED]
Docket No. 15-021200 EDW
Decision and Order

Brian Barrie

***** 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.