

**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:

██████████,

Appellant

Docket No. 15-021003 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 the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. Attorney ██████████ (P██████████) represented Appellant at the hearing. ██████████, Appellant's Guardian, appeared and testified on Appellant's behalf.

██████████, Registered Nurse Supports Coordinator, ██████████, Social worker/Supports Coordinator; and ██████████, Waiver manager, appeared and testified on behalf of the Department's MI Choice Waiver Agency, the ██████████ (Waiver Agency).

ISSUE

Did the Waiver Agency properly reduce Appellant's Community Living Supports (CLS) from 54 hours per week to 35 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 Department contracts with the ██████████ to provide MI Choice Waiver services to eligible beneficiaries.
2. The ██████████ must implement the MI Choice Waiver program in accordance with Michigan's waiver agreement, Department policy and its contract with the Department.
3. Appellant is a ██████ year-old Medicaid beneficiary, born ██████████
4. Appellant is diagnosed with multiple sclerosis which has led to her being bedbound. Appellant has a feeding tube which is necessary for her to

maintain an appropriate level of nutrition. In ██████, appellant underwent an ileostomy wherein her colon was removed due to chronic constipation and intestinal blockage.

5. Appellant lives with her Guardian, her husband and her daughter.
6. Following an in-home reassessment conducted on ████████████████████, Appellant's Supports Coordinator determined that Appellant's CLS hours would be reduced from 56 hours per week to 35 hours per week.
7. On ████████████████████, the Waiver Agency sent Appellant an Advance Action Notice informing her that her CLS hours would be reduced from 56 hours per week to 35 hours per week, effective ████████████████████. The notice cited 42 CFR 440.230 (d) as authority for the reduction but gave no reason for the reduction of CLS services.
8. On ████████████████████, the Michigan Administrative Hearing System received a request for hearing from the Appellant.

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*, 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.H. 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.

Medicaid Provider Manual
MI Choice Waiver Section
October 1, 2013, pp 12-13 (Revised January 1, 2016)

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.

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Appellant bears the burden of proving, by a preponderance of evidence, that 56 CLS hours are medically necessary.

The Waiver Agency witness testified that Appellant's CLS hours were reduced when it was discovered that Appellant was being given three hours per day for meal preparation and she is on a feeding tube and is rarely given solid foods. Appellant's CLS hours were reduced by 21 hours per week to 35 hours per week to reflect three hours per day in which Appellant's caregivers do not prepare meals for her. Appellant has a home care nurse who checks on and services the feeding tube.

Appellant's representative testified that Appellant's caregivers have to prepare and supply a new can of food. Additionally, time is required at each feeding to clean the feeding tube so that material does not accumulate in the tube. Appellant must be provided with liquids on a continuous basis. She requires that her water bottle be filled and provided to her, as she is unable to get a glass of water on her own or take medication on her own. Appellant cannot handle a full-sized water bottle without assistance and her caregivers must provide medication management. Someone must hold the bottle and straw in order to provide her with hydration. Appellant is totally dependent for eating because she is unable to get food for herself and is unable to feed herself. Appellant must be provided with appropriate hours for the time it takes her caregivers to provide her with food, water and the time it takes to prepare and clean her feeding tube.

In response, the Waiver Agency witness indicated that the assessment is based on the individual needs of the client, that the Waiver Agency also considers the availability of informal supports, and that 35 hours per week is sufficient to meet Appellant's medical needs. The Waiver Agency witness indicated that they would agree to give Appellant 37 hours of CLS services per week to reflect that her caregivers must turn and reposition Appellant instead of 35 hours per week. Appellant does not eat solid foods so there is no need for caregivers to go grocery shopping specifically for Appellant's needs. The feeding tube and incontinence supplies are delivered to her home. Shopping for clothing and personal items can be done on a monthly basis. Appellant does not get out of bed on a daily basis and usually gets into her wheelchair one a month.

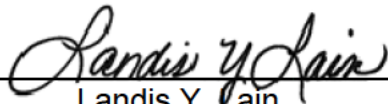
This ALJ finds that the Waiver Agency properly reduced Appellant's CLS hours from 56 hours per week to 35 hours per week. Appellant was properly authorized for 35 CLS hours per week.

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 reduced Appellant's CLS hours from 56 hours per week to 35 hours per week.

IT IS THEREFORE ORDERED that:

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



Landis Y. Lain
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Health and Human
Services

LYL [REDACTED]

cc: [REDACTED]

Date Mailed: February 11, 2016

***** 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.