



RICK SNYDER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
Christopher Seppanen  
Executive Director

SHELLY EDGERTON  
DIRECTOR

[REDACTED]

Date Mailed: June 27, 2016  
MAHS Docket No.: 16-000683  
Agency No.: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Robert J. Meade**

**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 Petitioner's request for a hearing.

After due notice, a hearing began on May 19, 2016 and was completed on June 23, 2016. Attorney [REDACTED] appeared on behalf of Petitioner. [REDACTED], Petitioner's daughter and caregiver, appeared as a witness. Petitioner also appeared, but did not testify.

[REDACTED], Assistant Director, appeared and testified on behalf of the Department's MI Choice Waiver Agency, the [REDACTED] ([REDACTED] or Waiver Agency). [REDACTED], R.N., Supports Coordinator, appeared as a witness for the Waiver Agency.

**ISSUE**

Did the Waiver Agency properly reduce Petitioner's Community Living Supports (CLS) from 16 hours per day to 8.5 hours per day?

**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 [REDACTED] to provide MI Choice Waiver services to eligible beneficiaries. (Exhibit A, Testimony)
2. [REDACTED] must implement the MI Choice Waiver program in accordance with Michigan's waiver agreement, Department policy and its contract with the Department. (Testimony)

3. Petitioner is an [REDACTED] year-old Medicaid beneficiary, born [REDACTED]. Petitioner is diagnosed with congestive heart failure, hypertension, peripheral vascular disease, arthritis, osteoporosis, renal failure, and diabetes mellitus. (Exhibit A, pp 15-16; Testimony)
4. Petitioner lives alone in a single family home. Petitioner's daughter [REDACTED] is her paid caregiver. Petitioner's daughters [REDACTED] and [REDACTED] are her primary sources of informal support. Petitioner also has family and friends in the area who visit and call her often and provide informal supports. (Exhibit A, pp 12-13; Testimony)
5. In [REDACTED], after Petitioner's husband died, Petitioner sought an increase in her CLS hours from the 4 hours per day she was allocated at the time. The Waiver Agency increased Petitioner's CLS hours to 5 hours per day and Petitioner appealed. Prior to an administrative hearing scheduled for [REDACTED], the parties agreed that Petitioner would be allocated 16 CLS hours per day for a period of 90 days. (Exhibits A, 1, 2, 3; Testimony)
6. On [REDACTED], the Waiver Agency's R.N. Supports Coordinator conducted an approximately three hour in-home reassessment, during which she interviewed and observed Petitioner, as well as her daughter and caregiver. Following the reassessment, the Waiver Agency determined that Petitioner's CLS hours would be reduced from 16 hours per day to 8.5 hours per day based on Petitioner's current needs for assistance. (Exhibit A, pp 12-23; Testimony)
7. Petitioner was also allocated reimbursement for 150 miles of transportation per month. (Exhibit A, p 4; Testimony)
8. In determining the amount of CLS hours Petitioner was entitled to, the Waiver Agency's R.N. Supports Coordinator considered Petitioner's individual needs and allotted a reasonable amount of time for each task. Specifically, the Waiver Agency's R.N. Supports Coordinator allocated 1 hour per day for A.M. (morning) care, 1.5 hours per day for meal preparation, 1 hour per day for P.M. (evening) care, 2 hours per day for toileting, 1.5 hours per week for laundry, 2 hours per week for homemaking, 2 hours per week for shopping, 30 minutes per day for exercise, and 2 hours per week for outings. (Exhibit A, pp 12-23; Testimony)

9. On [REDACTED], the Waiver Agency sent Petitioner an Advance Action Notice informing her that her CLS hours would be reduced from 16 hours per day to 8.5 hours per day, effective 12 days from the date of the notice. (Exhibit A, pp 5-6; Testimony)
10. On [REDACTED] the Michigan Administrative Hearing System received a request for hearing from Petitioner. (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 Petitioner 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).

With regard to Community Living Supports, the Medicaid Provider Manual provides in pertinent part:

#### **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 MDHHS.

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.

*Medicaid Provider Manual  
MI Choice Waiver Section  
January 1, 2016, pp 14-15*

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.

Petitioner bears the burden of proving, by a preponderance of evidence, that 16 CLS hours per day are medically necessary.

The Waiver Agency's R.N. Supports Coordinator testified that Petitioner's CLS hours were reduced based on a reassessment conducted on [REDACTED] in which she determined that Petitioner's needs could be met with 8.5 CLS hours per day, allocated as follows: 1 hour per day for A.M. (morning) care, 1.5 hours per day for meal preparation, 1 hour per day for P.M. (evening) care, 2 hours per day for toileting, 1.5 hours per week for laundry, 2 hours per week for homemaking, 2 hours per week for shopping, 30 minutes per day for exercise, and 2 hours per week for outings. The Waiver Agency's R.N. Supports Coordinator testified that based on her reassessment, 8.5 CLS hours per day are what is minimally, medically necessary to meet Petitioner's needs. The Waiver Agency's R.N. Supports Coordinator observed Petitioner use the restroom twice during the approximately three hour assessment, make a request to use the restroom to her daughter, and observed her daughter accompany Petitioner to the restroom, but not provide any hands on assistance. The Waiver Agency's R.N. Supports Coordinator also noted that it was reported that Petitioner sleeps 10-12 hours per day, which was taken into consideration in the overall determination. The Waiver Agency's R.N. Supports Coordinator also indicated that she reviewed a list of caregiver duties provided by Petitioner's daughter and caregiver. The Waiver Agency's R.N. Supports Coordinator also noted that the 16 hours of CLS per day that Petitioner had

been receiving was reached based on a settlement following a prior appeal, not, she believed, on a true assessment of Petitioner's needs. The Waiver Agency's R.N. Supports Coordinator indicated that it did not appear that Petitioner's condition or diagnoses significantly changed from the prior authorization period; rather the Waiver Agency's R.N. Supports Coordinator opined based on her clinical judgment that Petitioner never would have been medically eligible 16 CLS hours per day.

Petitioner's daughter and caregiver testified that she has been caring for her mother since [REDACTED] when she first became eligible for the MI Choice Waiver program. Petitioner's daughter and caregiver indicated that reimbursement had always been approved for transportation, other than for medical appointments. Petitioner's daughter and caregiver testified that there were no changes in Petitioner's condition between [REDACTED], when the settlement went into effect, and the reassessment on [REDACTED]. Petitioner's daughter and caregiver indicated that she had been trying to get Petitioner's CLS hours increased since her father's death in [REDACTED]. Petitioner's daughter and caregiver testified that Petitioner cannot be left alone, that she is unstable on her feet, and is a fall risk. Petitioner's daughter and caregiver indicated that Petitioner is forgetful and her memory is worsening. Petitioner's daughter and caregiver testified that Petitioner is also incontinent, which has to be managed day and night, and which involves assisting Petitioner with toileting and cleaning up messes when Petitioner has accidents. Petitioner's daughter and caregiver indicated that she also has to monitor Petitioner's blood pressure and her medications throughout the day. Petitioner's daughter and caregiver testified that Petitioner is becoming weaker and it takes more time for her to do things. Petitioner's daughter and caregiver also indicated that Petitioner's renal failure has been worsening and she may eventually have to go on dialysis. Petitioner's daughter and caregiver testified that meal preparation takes longer than what is allocated because she has to prepare Petitioner ethnic food, she cannot make simple meals for her because Petitioner will not eat those meals. Petitioner's daughter and caregiver testified that the listing of the time spent caring for Petitioner that she prepared for the hearing (Exhibit 2) was an accurate and honest representation of the time she typically spends caring for Petitioner. Petitioner's daughter and caregiver testified that Petitioner does have a Personal Emergency Response System (PERS), which she can use in an emergency.

Based on the above findings of fact and conclusions of law, this administrative law judge (ALJ) finds that the Waiver Agency properly reduced Petitioner's CLS hours from 16 hours per day to 8.5 hours per day. The evidence presented demonstrated that Petitioner's actual care needs can be met with 8.5 CLS hours per day, allocated as shown above. Petitioner sleeps 10-12 hours per day, was observed using the restroom twice with no hands on assistance during the assessment, and Petitioner has significant informal supports available to her. Petitioner also has a PERS that she can use in case of emergency. It also appears that the 16 hours of CLS per day that Petitioner was previously receiving was reached based on a settlement following a prior appeal, not based on a true assessment of Petitioner's needs. The assessment conducted on [REDACTED] adequately measures Petitioner's individual needs and the Waiver Agency's R.N. Supports Coordinator credibly opined, based on her training and

experience, that 8.5 CLS hours per day were all that were medically necessary for Petitioner at the time of the assessment in January 2016. Of course, if Petitioner's condition has worsened since [REDACTED], then she may be entitled to additional CLS hours.

**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 Petitioner's CLS hours from 16 hours per day to 8.5 hours per day.

**IT IS THEREFORE ORDERED** that:

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



RM/cg

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



**NOTICE OF APPEAL:** A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings  
Reconsideration/Rehearing Request  
P.O. Box 30763  
Lansing, Michigan 48909-8139

**DHHS -Dept Contact**

[REDACTED]

**DHHS -Dept Contact**

[REDACTED]

**Petitioner**

[REDACTED]

**Community Health Rep**

[REDACTED]

**Counsel for Petitioner**

[REDACTED]