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: July 28, 2016
MAHS Docket No.: 16-007497
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Robert J. Meade

DECISION AND ORDER

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

After due notice, a hearing was held on [redacted]. [redacted], Petitioner's aunt and Guardian, appeared and testified on Petitioner's behalf. [redacted], uncle and Co-Guardian; [redacted], Program Director at the facility where Petitioner resides; [redacted], Petitioner's Supports Coordinator; and [redacted] Petitioner's Direct Caregiver, appeared as witnesses for Petitioner.

[redacted], Assistant Corporation Counsel, Macomb County Community Mental Health Authority (CMH), represented the Department (CMH or Department). [redacted], Access Center Manager, appeared as a witness for the Department.

ISSUE

Did the CMH properly reduce Petitioner's Community Living Supports (CLS) hours?

FINDINGS OF FACT

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

1. Petitioner is a [redacted] year old Medicaid beneficiary, born [redacted], receiving services through Macomb County Community Mental Health (CMH). (Exhibit A, p 9; Testimony)

2. CMH is under contract with the Department of Health and Human Services (MDHHS) to provide Medicaid covered services to people who reside in the CMH service area.

3. Petitioner is diagnosed with mild mental impairment and a seizure disorder. Petitioner's full scale IQ is 68. (Exhibit A, p 9; Testimony)

4. Petitioner is independent in ambulation and demonstrates good receptive and expressive language skills. Petitioner lacks appropriate boundaries and safety skills, likes to please others, and could easily be victimized. (Exhibit A, pp 9, 21; Testimony)

5. Petitioner lives with one roommate in a rented condominium. The roommate also has a developmental disability and receives in-home services and supports. Prior to moving into the condominium approximately one year and seven months ago, Petitioner lived at home with her aunt and uncle and their other children. (Exhibit A, pp 9-21; Testimony)

6. Petitioner has been employed at [redacted] for the past eight years and holds a housekeeping staff position. Petitioner works [redacted] and [redacted] only. Staff arrange for the Smart bus to pick her up at the house and transport her to and from work. Petitioner's job duties include cleaning bathrooms, wiping down tables, sweeping the floor, as well as light stocking of cups, napkins and drink lids. (Exhibit A, p 9; Testimony)

7. Petitioner's current services through CMH include supports coordination, assessments and community living supports (CLS). Petitioner applied for Home Help Services through the Department of Health and Human Services but did not qualify for said services. (Exhibit A; Testimony)

8. Following Petitioner's Annual Assessment on [redacted], Petitioner's Supports Coordinator requested that Petitioner's CLS hours remain at 644 units per week, or approximately 23 CLS hours per day. (Exhibit A, pp 14-17; Testimony)

9. Following a review of Petitioner's request by the CMH Access Center, Petitioner was approved for 392 units of CLS per week, or approximately 14 CLS hours per day. The Access Center determined that 14 CLS hours per day were sufficient in amount, scope and duration to meet Petitioner's needs and the goals in Petitioner's Individual Plan of Service (IPOS). (Exhibit A, pp 9-21; Testimony)

10. On [redacted], CMH sent Petitioner an Advance Action Notice informing her that the request for 644 units of CLS hours per week (approximately 23 CLS hours per day) had been denied, but that 344 units of CLS (approximately 14 CLS hours per day) had been approved. (Exhibits A, p 5; Testimony)

11. On [redacted], Petitioner's request for hearing was received by the Michigan Administrative Hearing System. (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.

> 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

> 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

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 (MDCH) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver. CMH contracts with the Michigan Department of Health and Human Services to provide services under the waiver pursuant to its contract obligations with the Department.

Medicaid beneficiaries are entitled to medically necessary Medicaid covered services for which they are eligible. Services must be provided in the appropriate scope, duration, and intensity to reasonably achieve the purpose of the covered service. *See 42 CFR 440.230.*

The CMH is mandated by federal regulation to perform an assessment for the Petitioner to determine what Medicaid services are medically necessary and determine the amount or level of the Medicaid medically necessary services.

The Medicaid Provider Manual articulates Medicaid policy for Michigan. It states, in relevant part:

> **2.5 MEDICAL NECESSITY CRITERIA**
>
> The following medical necessity criteria apply to Medicaid mental health, developmental disabilities, and substance abuse supports and services.
>
> **2.5.A. MEDICAL NECESSITY CRITERIA**
>
> Mental health, developmental disabilities, and substance abuse services are supports, services, and treatment:
>
> - Necessary for screening and assessing the presence of a mental illness, developmental disability or substance use disorder; and/or
> - Required to identify and evaluate a mental illness, developmental disability or substance use disorder; and/or
> - Intended to treat, ameliorate, diminish or stabilize the symptoms of mental illness, developmental disability or substance use disorder; and/or
> - Expected to arrest or delay the progression of a mental illness, developmental disability, or substance use disorder; and/or
> - Designed to assist the beneficiary to attain or maintain a sufficient level of functioning in order to achieve his goals of community inclusion and participation, independence, recovery, or productivity.

2.5.B. DETERMINATION CRITERIA

The determination of a medically necessary support, service or treatment must be:

- Based on information provided by the beneficiary, beneficiary's family, and/or other individuals (e.g., friends, personal assistants/aides) who know the beneficiary; and

- Based on clinical information from the beneficiary's primary care physician or health care professionals with relevant qualifications who have evaluated the beneficiary; and

- For beneficiaries with mental illness or developmental disabilities, based on person centered planning, and for beneficiaries with substance use disorders, individualized treatment planning; and

- Made by appropriately trained mental health, developmental disabilities, or substance abuse professionals with sufficient clinical experience; and

- Made within federal and state standards for timeliness; and

- Sufficient in amount, scope and duration of the service(s) to reasonably achieve its/their purpose.

- Documented in the individual plan of service.

2.5.C. SUPPORTS, SERVICES AND TREATMENT AUTHORIZED BY THE PIHP

Supports, services, and treatment authorized by the PIHP must be:

- Delivered in accordance with federal and state standards for timeliness in a location that is accessible to the beneficiary; and

- Responsive to particular needs of multi-cultural populations and furnished in a culturally relevant manner; and

- Responsive to the particular needs of beneficiaries with sensory or mobility impairments and provided with the necessary accommodations; and

- Provided in the least restrictive, most integrated setting. Inpatient, licensed residential or other segregated settings shall be used only when less restrictive levels of treatment, service or support have

been, for that beneficiary, unsuccessful or cannot be safely provided; and

- Delivered consistent with, where they exist, available research findings, health care practice guidelines, best practices and standards of practice issued by professionally recognized organizations or government agencies.

2.5.D. PIHP DECISIONS

Using criteria for medical necessity, a PIHP may:

- Deny services that are:
    - deemed ineffective for a given condition based upon professionally and scientifically recognized and accepted standards of care;
    - experimental or investigational in nature; or
    - for which there exists another appropriate, efficacious, less-restrictive and cost effective service, setting or support that otherwise satisfies the standards for medically-necessary services; and/or
- Employ various methods to determine amount, scope and duration of services, including prior authorization for certain services, concurrent utilization reviews, centralized assessment and referral, gate-keeping arrangements, protocols, and guidelines.

A PIHP may not deny services based solely on preset limits of the cost, amount, scope, and duration of services. Instead, determination of the need for services shall be conducted on an individualized basis.

Medicaid Provider Manual
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
April 1, 2016, pp 12-14

17.2 CRITERIA FOR AUTHORIZING B3 SUPPORTS AND SERVICES

The authorization and use of Medicaid funds for any of the B3 supports and services, as well as their amount, scope and duration, are dependent upon:

- The Medicaid beneficiary's eligibility for specialty services and supports as defined in this Chapter; and

- The service(s) having been identified during person-centered planning; and

- The service(s) being medically necessary as defined in the Medical Necessity Criteria subsection of this chapter; and

- The service(s) being expected to achieve one or more of the above-listed goals as identified in the beneficiary's plan of service; and

- Additional criteria indicated in certain B3 service definitions, as applicable.

Decisions regarding the authorization of a B3 service (including the amount, scope and duration) must take into account the PIHP's documented capacity to reasonably and equitably serve other Medicaid beneficiaries who also have needs for these services. The B3 supports and services are not intended to meet all the individual's needs and preferences, as some needs may be better met by community and other natural supports. Natural supports mean unpaid assistance provided to the beneficiary by people in his/her network (family, friends, neighbors, community volunteers) who are willing and able to provide such assistance. It is reasonable to expect that parents of minor children with disabilities will provide the same level of care they would provide to their children without disabilities. MDCH encourages the use of natural supports to assist in meeting an individual's needs to the extent that the family or friends who provide the natural supports are willing and able to provide this assistance. PIHPs may not require a beneficiary's natural support network to provide such assistance as a condition for receiving specialty mental health supports and services. The use of natural supports must be documented in the beneficiary's individual plan of service.

Provider qualifications and service locations that are not otherwise identified in this section must meet the requirements identified in the General Information and Program Requirement sections of this chapter.

17.3.B. COMMUNITY LIVING SUPPORTS

Community Living Supports are used to increase or maintain personal self-sufficiency, facilitating an individual's achievement of his goals of community inclusion and participation, independence or productivity. The supports may be provided in the participant's residence or in community settings (including, but not limited to, libraries, city pools, camps, etc.).

Coverage includes:

- Assisting, (that exceeds state plan for adults) prompting, reminding,

cueing, (revised 7/1/2011), observing, guiding and/or training in the following activities:

- meal preparation
- laundry
- routine, seasonal, and heavy household care and maintenance
- activities of daily living (e.g., bathing, eating, dressing, personal hygiene)
- shopping for food and other necessities of daily living

CLS services may not supplant state plan services, e.g., Personal Care (assistance with ADLs in a certified specialized residential setting) and Home Help or Expanded Home Help (assistance in the individual's own, unlicensed home with meal preparation, laundry, routine household care and maintenance, activities of daily living and shopping). If such assistance is needed, the beneficiary, with the help of the PIHP case manager or supports coordinator must request Home Help and, if necessary, Expanded Home Help from the Department of Human Services (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. The PIHP case manager or supports coordinator must assist, if necessary, the beneficiary in filling out and sending a request for Fair Hearing when the beneficiary believes that the DHS authorization amount, scope and duration of Home Help does not accurately reflect the beneficiary's needs based on findings of the DHS assessment.

- Staff assistance, support and/or training with activities such as:
  - money management
  - non-medical care (not requiring nurse or physician intervention)
  - socialization and relationship building
  - transportation from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence (transportation to and from medical appointments is excluded)
  - participation in regular community activities and recreation opportunities (e.g., attending classes, movies, concerts and events in a park; volunteering; voting)

- attendance at medical appointments
- acquiring or procuring goods, other than those listed under shopping, and nonmedical services

➢ Reminding, observing and/or monitoring of medication administration

➢ 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.

CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, state plan Personal Care services. Transportation to medical appointments is covered by Medicaid through DHS or the Medicaid Health Plan. Payment for CLS services may not be made, directly or indirectly, to responsible relatives (i.e., spouses, or parents of minor children), or guardian of the beneficiary receiving community living supports.

Medicaid Provider Manual
Behavioral Health and Intellectual and
Developmental Disability Supports and Services Chapter
April 1, 2016, pp 120, 122-123
Emphasis added.

CMH's Access Center Manager testified that the Access Center makes level of care determinations for beneficiaries, approves on-going care, and connects beneficiaries with providers. CMH's Access Center Manager reviewed Petitioner's age, diagnoses, living situation, and the current services Petitioner is receiving through CMH. CMH's Access Center Manager indicated that the CLS services Petitioner is receiving are B3 services under the State Plan and are not intended to meet all of Petitioner's needs and preferences. CMH's Access Center Manager reviewed the function of CLS, which includes increasing or maintaining personal self-sufficiency and facilitating an individual's achievement of goals of community inclusion and participation, independence or productivity. Here, CMH's Access Center Manager indicated that Petitioner's request for 23 CLS hours per day was denied because it was determined that 14 CLS hours per day were sufficient in amount, scope and duration to meet Petitioner's needs. CMH's Access Center Manager noted that Petitioner's CLS hours were basically reduced by the amount of time it was expected that Petitioner would be sleeping each night because Petitioner would not be able to participate in any CLS activities while asleep. CMH's Access Center Manager also noted that decisions regarding the authorization of B3 services must take into account the CMH's ability to care for other beneficiaries. CMH's Access Center Manager testified that alternatives for safety and monitoring have been discussed with Petitioner's family, such as a Personal Emergency Response System (PERS), a video monitoring unit, or the use of natural supports. CMH's Access Center Manager indicated that if Petitioner is unable to

live on her own without one to one 24 hour support and monitoring, then it may be time to look at a more restrictive setting, such as a group or AFC home.

Petitioner's aunt and guardian testified that she and her husband have been Petitioner's guardians for the past 15 years, since their parents passed away. Petitioner's aunt and guardian indicated that Petitioner has a mental handicap and a seizure disorder and cannot be left alone or attend to her own needs or safety. Petitioner's aunt and guardian pointed out that Petitioner has poor reasoning skills, does not recognize danger, and would happily walk off with a stranger if asked. Petitioner's aunt and guardian indicated that Petitioner does not know when a seizure is going to occur and does not know what to do when she has a seizure. Petitioner's aunt and guardian testified that during a seizure Petitioner will just fall to the ground and would be unable to push a PERS unit. Petitioner's aunt and guardian also indicated that because of her mental impairment, Petitioner would be likely to push the PERS unit at inappropriate times as well. Petitioner's aunt and guardian testified that Petitioner's roommate also does not have the mental capacity to monitor or supervise Petitioner, or to push the PERS unit or call 911 in an emergency. Petitioner's aunt and guardian indicated that Petitioner wanted to become more independent so they pursued this move to a more independent setting for her, only to now feel that the rug is being pulled out from under them because services are being reduced. Petitioner's aunt and guardian testified that Petitioner is too high functioning for a group home and that they have no other family or natural supports in the area to assist her.

Petitioner's uncle and guardian testified that he works a lot of hours, but that when Petitioner was still living with them, he observed Petitioner having seizures and she did not know when they were coming and cannot catch herself when one comes on. Petitioner's uncle and guardian indicated that Petitioner is not unintelligent and is highly intelligent in the many areas that interest her, but that she has no fear of strangers and they are concerned what might happen if she is left alone. Petitioner's uncle and guardian testified that they live about 5 miles away from Petitioner. Petitioner's uncle and guardian indicated that Petitioner has been taking seizure medication for 16 years, but the seizures are still uncontrolled.

The Program Director at the facility where Petitioner resides testified that if someone knocked on Petitioner's door and there was no worker there, she is afraid that Petitioner would just let them in. The Program Director indicated that Petitioner has no fear of strangers. The Program Director pointed out that Petitioner's contract for services at CMH is through self-determination, so she should be able to use her hours as she likes.

Petitioner's Supports Coordinator testified that over the years, Petitioner has gradually increased her independence and that the move to the condominium about a year and a half ago was a big step towards that independence. Petitioner's Supports Coordinator indicated that a group home would actually be a regression for Petitioner. Petitioner's Supports Coordinator testified that Petitioner's family is very afraid about her being left alone and that they were planning on retiring themselves and thought they would be able to now that Petitioner was supported in a more independent setting. Petitioner's Supports Coordinator testified that Petitioner applied for Home Help Services, but did

not qualify. Petitioner's Supports Coordinator indicated that Petitioner's family has followed all recommendations she has put forth for other services. Petitioner's Supports Coordinator testified that monitoring for safety is considered under CLS services through B3 services. Petitioner's Supports Coordinator testified that Petitioner does have the ability to make some decisions on her own. Petitioner's Supports Coordinator indicated that she has only been Petitioner's Supports Coordinator for about a month, but did review all of Petitioner's files.

Petitioner's Direct Care Worker testified that she works with Petitioner daily and that she is not aware of "stranger danger". Petitioner's Direct Care Worker indicated that Petitioner should not be left alone at night because she would not be safe. Petitioner's Direct Care Worker testified that she has tried to speak to Petitioner about alternatives, such as a PERS unit or a group home but that Petitioner is very afraid of those options. Petitioner's Direct Care Worker testified that she is worried that if Petitioner went into a group home that she would adopt bad behaviors of other residents because she is easily influenced.

Petitioner bears the burden of proving by a preponderance of the evidence that 23 hours of CLS per day are medically necessary. CMH provided sufficient evidence that it adhered to federal regulations and state policy when authorizing 14 hours per day of CLS for Petitioner. Petitioner failed to prove by a preponderance of the evidence that the additional 9 hours per day of CLS was medically necessary.

As indicated above, B3 services are not intended to meet all of a consumer's needs and preferences and the CMH must take into account its ability to serve other beneficiaries. Here, Petitioner receives support and services for approximately 14 hours per day, 7 days per week; a significant amount of services for someone as independent as Petitioner. Petitioner also has a roommate who receives services through CMH, so the two may be able to work together to always ensure that there is a paid caregiver in the home to monitor for safety. However, Petitioner is independent in all of her activities of daily living, she is able to work outside of the home for several hours each week, and she has very supportive and caring natural supports in her aunt and uncle. And while Petitioner does need monitoring at night while she sleeps in case of an emergency, there are other options for monitoring Petitioner while she sleeps, such as a video monitoring system, as well as other options to be used in case of emergency, such as a Personal Emergency Response System (PERS). These alternatives may also be covered by Medicaid. Here, it seems that the CMH authorized Petitioner a very large number of CLS hours per day after her move into the condo in order to see if she could develop the skills to live more independently. However, if the CMH was required to provide one-on-one around the clock care to all beneficiaries with needs similar to Petitioner, it is highly unlikely that there would be enough resources to serve everyone in the CMH service area. Finally, if Petitioner is unable to live on her own without one to one 24 hour support and monitoring, then the current housing arrangement may not be the least restrictive setting for her. Based on the evidence presented, the current amount of CLS authorized is sufficient in amount, scope and duration to reasonably meet Petitioner's needs.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH properly denied Petitioner's request for 23 CLS hours per day and authorized 14 CLS hours per day.

IT IS THEREFORE ORDERED that:

The CMH decision is AFFIRMED.

RM/cg

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

Agency Representative [redacted]

Petitioner [redacted]

DHHS -Dept Contact [redacted]

DHHS-Location Contact [redacted]