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: September 6, 2016
MAHS Docket No.: 16-008343
Agency No.: 0
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Colleen Lack

DECISION AND ORDER

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

After due notice, a hearing was held on August 8, 2016. The Petitioner was represented by [redacted], Attorney. [redacted], the Petitioner, appeared and testified. [redacted], Sister in Law; and [redacted], Brother, appeared as witnesses for Petitioner. [redacted], Waiver Director, represented the Department of Health and Human Services' Waiver Agency, [redacted] ("Waiver Agency" or [redacted]). [redacted], Social Work Care Manager, appeared as a witness for [redacted].

A telephone hearing was originally scheduled for August 23, 2016. On July 18, 2018, the Michigan Administrative Hearing System (MAHS) received a request for an in-person hearing from Petitioner. On July 19, 2016, a Notice of In Person Hearing was issued re-scheduling the hearing to August 8, 2016. On August 1, 2016, Petitioner's attorney filed an appearance and request for adjournment. On August 2, 2016, an Order Denying Adjournment and Amending the Notice of Hearing was issued changing the time of the August 8, 2016, hearing to 3:30 pm.

During the hearing proceedings, the following documents were admitted into the record: the Waiver Agency's Hearing Summary packet was admitted as marked, Exhibits 1-6; Petitioner's hearing request was marked as Exhibit A; the unnumbered portion of Petitioner's additional medical documentation was marked as Exhibit B; and the pre-numbered portion of Petitioner's additional medical documentation was admitted as Exhibit C, pp, 1-322.

ISSUE

Did the Waiver Agency properly propose a reduction of Petitioner's services though the MI Choice Waiver program?

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 entered into the MI Choice program in November 1998. ([redacted] Hearing Summary)

2. Petitioner is a thirty eight (38)-year-old Medicaid beneficiary who lives in a private home with her brother and sister in law, who are her self-determination caregivers. (Exhibits 1 and 3)

3. Petitioner has multiple diagnoses, including muscular dystrophy/congenital fiber type disproportion myopathy, femur fracture in November 2015, asthma, scoliosis, arthritis, anxiety, and depression. Petitioner has a tracheostomy and utilizes a ventilator. (Exhibits 1 and 3; Exhibits B and C)

4. Following the November 2015 hospitalization for the closed left distal femur fracture and a November 24, 2015 assessment, Petitioner had been receiving 38 hours per week of Community Living Supports (CLS) during the daytime and 32 hours per week of night time monitoring. (UPCAP Hearing Summary)

5. The Self-Determination Employee Task Sheets and Calendars for the period of December 2015 through April 2016 indicate that Petitioner was only receiving night time monitoring three days per week totaling 16 hours. (Exhibit 2)

6. On May 25, 2016, another assessment was completed. In part, it was reported that Petitioner: was doing well with the recovery from the femur fracture; had been discharged from in home skilled physical therapy on May 12, 2016; began outpatient physical and aqua therapy that she was able to complete without her ventilator; was currently able to be off the ventilator around 12 hours a day and was typically only on it at night; and currently had significantly increased independence with several activities of daily living. (Exhibits 1 and 3)

7. On June 13, 2016, [redacted] issued a Reduction/Suspension of Waiver Services or Case Closure notice to Petitioner stating the CLS hours would be reduced to 29 hours per week and the night time monitoring would be suspended. (Exhibit 4)

8. On June 29, 2016, MAHS received Petitioner's hearing request contesting the Waiver Agency's action. (Exhibit A)

CONCLUSIONS OF LAW

The Medical Assistance Program (MA) 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.

Petitioner is seeking 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 to the Michigan Department of Health and Human Services. Regional agencies, in this case [redacted], 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.
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> *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)

The Medicaid Provider Manual addresses CLS through the MI Choice Waiver Program:

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.
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> Medicaid Provider Manual, MI Choice Waiver Chapter, April 1, 2016, pp. 14-15.

As discussed above, the Waiver Agency decided to reduce Petitioner's services from 38 hours per week of CLS during the daytime and 32 hours per week of night time monitoring to 29 hours of CLS per week.

The Waiver Agency asserted that the information available at the time of this assessment did not support continuing the night time monitoring and only supported 29 hours of ongoing CLS for daily assistance with activities of daily living. In part, it was reported that Petitioner: was doing well with the recovery from the femur fracture; had been discharged from in home skilled physical therapy on May 12, 2016; began outpatient physical and aqua therapy that she was able to complete without her ventilator; was currently able to be off the ventilator around 12 hours a day and was typically only on it at night; and currently had significantly increased independence with several activities of daily living. The Self-Determination Employee Task Sheets and Calendars for the period of December 2015 through April 2016 indicate that Petitioner was only receiving night time monitoring three days per week totaling 16 hours. Additionally, there were no reports of respiratory distress issues arising with the ventilator at night; Petitioner's sister in law had changed to working days so she was also in the home overnight; and there were walkie-talkies and a baby monitor in the home to communicate. (Exhibits 1, 2, and 3; [redacted] Hearing Summary; Testimony of Waiver Director and Social Work Care Manager)

Petitioner asserts that she needs more than the proposed 29 hours of CLS, and specifically that she continues to need the nighttime monitoring. (Exhibit A; Testimony of Petitioner) Petitioner and her witnesses explained that they have not been submitting accurate time sheets for the hours actually worked because they were told that if her brother and sister in law submit hours during the same day the time sheets would be rejected because they all live in the same home. Accordingly, the have split up the time

sheets so that only one caregiver claims hours each day. (Testimony of Petitioner, Brother, and Sister-in-Law) This testimony is consistent with how things were reported on the Self-Determination Employee Task Sheets and Calendars for the period of December 2015 through April 2016. (Exhibit 2) The Waiver Agency indicated this was not correct information regarding billing hours when the caregivers live in the same home, and they would be looking into correcting this with the agency involved. It is important that accurate time sheets are submitted for serval reasons. As seen in this case, the inaccurate time sheets give the impression that an authorized service, daily nighttime monitoring, was no longer medically necessary because it appeared it was not being consistently utilized on a daily basis and only half the authorized hours were billed.

It was also noted that Petitioner also has a tendency toward talking about her functional abilities and needs for assistance with rose colored glasses, i.e. overstating her actual abilities and minimizing her needs for assistance. (Testimony of Petitioner, Brother, and Sister-in-Law) While it is understandable to want to be as independent as possible, it is very important to honestly report functional abilities and needs for assistance during assessments for MI Choice Waiver services so that the appropriate services are authorized.

Lastly, Petitioner has had significant changes in her condition and needs for assistance since the hearing request was filed. This includes the June 2016 hospitalization for respiratory failure, acute exacerbation chronic bronchitis, fiber disproportion Muscular Dystrophy, and ventilator dependence. (Exhibit B, pp. 83-108; testimony of Petitioner) As discussed, these recent changes cannot be considered for reviewing the June 13, 2016, determination at issue. However, these recent changes should be considered for determining the appropriate ongoing services for Petitioner. The Waiver Agency indicated they would complete a new assessment.

Petitioner bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in proposing the reduction of her services. Given the record in this case, the undersigned Administrative Law Judge finds that Petitioner has failed to meet that burden of proof. The proposed reduction was based on Petitioner's improvement in physical functioning at that time. The reports by Petitioner and her sister in law during the May 25, 2016, assessment indicated that Petitioner had been doing well in her recovery from the femur fracture and had significant improvements with her functional abilities. This was supported by the documentation from the physical therapy discharge. (Exhibit 1 and 3) The detailed breakdown of weekly minutes for each task for the proposed CLS reduction was consistent with the available information about Petitioner's functional abilities and needs for assistance at that time. Similarly, the lack of any reported respiratory distress issues arising with the ventilator at night combined with the inaccurate time sheets indicated night time monitoring was no longer medically necessary. Overall, the evidence supports the Waiver Agency's proposed determination to reduce Petitioner's MI Choice Waiver services based on the information available at that time.

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 a reduction of Petitioner's services though the MI Choice Waiver program based on the information available at that time.

IT IS THEREFORE ORDERED that

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

CL/sb

Colleen Lack
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

[redacted]