



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: November 4, 2016
MAHS Docket No.: 16-011223
Agency No.: [REDACTED]
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 October 6, 2016. [REDACTED], Attorney, [REDACTED], appeared on behalf of the Petitioner. [REDACTED], Mother and Guardian, and [REDACTED], Father, appeared as a witness for Petitioner. [REDACTED], Fair Hearings Officer, represented the Respondent, [REDACTED] County Community Mental Health (CMH). [REDACTED], Director of Programs and Services, and [REDACTED], Case Manager, appeared as witnesses for the CMH.

During the hearing, the CMH's Hearing Summary Packet was admitted as marked, Exhibits 1-11, and the CMH's additional Exhibits 12 and 13 were admitted with copies to be forwarded to the ALJ after the close of the telephone hearing proceeding; Petitioner's Exhibits were re-labeled and entered as Exhibit's A-I.

ISSUE

Did Respondent properly deny Petitioner's request for additional hours of Community Living Supports (CLS) for overnight 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 thirty (30)-year-old Medicaid beneficiary who lives in a private home setting. (Exhibit 3, p. 2)

2. Petitioner functions in the severe range of mental impairment and has also been diagnosed with pica, Angelman's syndrome, scoliosis with Harrington rod placement and spinal fusion, and has allergies as well as swallowing and balance problems. (Exhibit 3, p. 2)
3. Petitioner receives services through the Home Help Services (HHS) program administered by the Department of Health and Human Services (DHHS) as well as services through the CMH, which include CLS through the Habilitation and Supports Wavier (HSW) program. (Uncontested)
4. In accordance with a July 27, 2016, Administrative Hearing Decision and Order, the CMH completed a re-assessment of Petitioner's request for additional CLS. A Treatment Plan Addendum was completed on July 27, 2016. (Exhibits 2 and 7)
5. On July 28, 2016, an Action Notice and Review Rights was issued to Petitioner's Guardian stating:

Based upon the [Person Centered Plan] PCP amendment on 7-27-16; The 8 hour of CLS requested for the overnight hours while the consumer is asleep are denied based on the definition of CLS per the Michigan Medicaid provider Manual. (Exhibit 1, p. 1)

6. On September 29, 2016, the Michigan Administrative Hearing System (MAHS) received the request for hearing filed on Petitioner's behalf in this matter. (Amended Request for Hearing with attached Exhibits A-I)

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:

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...

42 USC 1396n(b)

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 (DHHS) operates a section 1915(b) Medicaid Managed Specialty Services and Support program waiver in conjunction with a section 1915(c).

With respect to CLS through the Habilitation Supports Waiver, the Medicaid Provider Manual (MPM) provides:

COMMUNITY LIVING SUPPORTS (CLS)

Community Living Supports (CLS) facilitate an individual's independence, productivity, and promote inclusion and participation. The supports can be provided in the beneficiary's residence (licensed facility, family home, own home or apartment) and in community settings (including, but not limited to, libraries, city pools, camps, etc.), and may not supplant other waiver or state plan covered services

(e.g., out-of-home non-vocational habilitation, Home Help Program, personal care in specialized residential, respite). The supports are:

- Assisting (that exceeds state plan for adults), prompting, reminding, cueing, observing, guiding and/or training the beneficiary with:
 - Meal preparation;
 - Laundry;
 - Routine, seasonal, and heavy household care and maintenance (where no other party, such as a landlord or licensee, has responsibility for provision of these services);
 - Activities of daily living, such as bathing, eating, dressing, personal hygiene; and
 - Shopping for food and other necessities of daily living.

- Assistance, support and/or training the beneficiary with:
 - Money management;
 - Non-medical care (not requiring nurse or physician intervention);
 - Socialization and relationship building;
 - Transportation (excluding to and from medical appointments that are the responsibility of Medicaid through MDHHS or health plan) from the beneficiary's residence to community activities, among community activities, and from the community activities back to the beneficiary's residence);
 - Leisure choice and participation in regular community activities;
 - Attendance at medical appointments; and
 - Acquiring goods and/or services other than those listed under shopping and non-medical services.
 - Reminding, observing, and/or monitoring of medication administration.

The CLS do not include the costs associated with room and board. Payments for CLS may not be made, directly or indirectly, to responsible relatives (i.e., spouses or parents of minor children) or the legal guardian.

For beneficiaries living in unlicensed homes, CLS assistance with meal preparation, laundry, routine household care and maintenance, ADLs, and/or shopping may be used to complement Home Help or Expanded Home Help services when the individual's needs for this assistance have been officially determined to exceed DHS's allowable parameters. Reminding, observing, guiding, and/or training of these activities are CLS coverages that do not supplant Home Help or Expanded Home Help. CLS may be provided in a licensed specialized residential setting as a complement to, and in conjunction with, State Plan coverage of Personal Care in Specialized Residential Settings.

If beneficiaries living in unlicensed homes need assistance with meal preparation, laundry, routine household care and maintenance, ADLs, and/or shopping, the beneficiary must request Home Help and, if necessary, Expanded Home Help from MDHHS. CLS may be used for those activities while the beneficiary awaits determination by MDHHS of the amount, scope and duration of Home Help or Expanded Home Help. If the beneficiary requests it, the PIHP must assist with applying for Home Help or submitting a request for a Fair Hearing when the beneficiary believes that the MDHHS authorization of amount, scope and duration of Home Help does not accurately reflect his or her needs. CLS may also be used for those activities while the beneficiary awaits the decision from a Fair Hearing of the appeal of a MDHHS decision.

Community Living Supports (CLS) provides support to a beneficiary younger than 18, and the family in the care of their child, while facilitating the child's independence and integration into the community. This service provides skill development related to activities of daily living, such as bathing, eating, dressing, personal hygiene, household chores and safety skills; and skill development to achieve or maintain mobility, sensory motor, communication, socialization and relationship-building skills, and participation in leisure and community activities. These supports must be provided directly to, or on behalf of, the child. These supports may serve to reinforce skills or lessons taught in

school, therapy, or other settings. For children and adults up to age 26 who are enrolled in school, CLS services are not intended to supplant services provided in school or other settings or to be provided during the times when the child or adult would typically be in school but for the parent's choice to home-school.

*MPM, July 1, 2016 version
Behavioral Health and Intellectual and Developmental Disability
Supports and Services Chapter, pages 103-104*

With respect to CLS through as a B3 Support and Service, the MPM provides:

17.3.B. COMMUNITY LIVING SUPPORTS

NOTE: This service is a State Plan EPSDT service when delivered to children birth-21 years.

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, 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 services otherwise available to the beneficiary through a local educational agency under the Individuals with Disabilities Education Act (IDEA) or the Rehabilitation Act of 1973 or 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 appears to be needed, the beneficiary must request Home Help and, if necessary, Expanded Home Help from MDHHS. CLS may be used for those activities while the beneficiary awaits determination by MDHHS of the amount, scope and duration of Home Help or Expanded Home Help. If the beneficiary requests it, the PIHP case manager or supports coordinator must assist him/her in requesting Home Help or in filling out and sending a request for Fair Hearing when the beneficiary believes that the MDHHS authorization of amount, scope and duration of Home Help does not appear to reflect the beneficiary's needs based on the findings of the MDHHS 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 non-medical 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 coverage Personal Care in Specialized Residential Settings. Transportation to medical appointments is covered by Medicaid through MDHHS 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.

CLS assistance with meal preparation, laundry, routine household care and maintenance, activities of daily living and/or shopping may be used to complement Home Help or Expanded Home Help services when the individual's needs for this assistance have been officially determined to exceed the DHS's allowable parameters. CLS may also be used for those activities while the beneficiary awaits the decision from a Fair Hearing of the appeal of a MDHHS decision. Reminding, observing, guiding, and/or training of these activities are CLS coverages that do not supplant Home Help or Expanded Home Help.

Community Living Supports (CLS) provides support to a beneficiary younger than 18, and the family in the care of their child, while facilitating the child's independence and integration into the community. This service provides skill development related to activities of daily living, such as bathing, eating, dressing, personal hygiene, household chores and safety skills; and skill development to achieve or maintain mobility, sensory motor, communication, socialization and relationship-building skills, and participation in leisure and community activities. These supports must be provided directly to, or on behalf of, the child. These supports may serve to reinforce skills or lessons taught in school, therapy, or other settings. For children and adults up to age 26 who are enrolled in school, CLS services are not intended to supplant services provided in school or other settings or to be provided during the times when the child or

adult would typically be in school but for the parent's choice to home-school.

*MPM, July 1, 2016 version
Behavioral Health and Intellectual and Developmental Disability
Supports and Services Chapter, pages 128-129
(Underline added by ALJ)*

At the time of the case action at issue, there is a difference in the CLS policy under the HSW as opposed to a B3 service. The HSW CLS policy does not include the bullet point for 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. For ease of reference, this will be referred to as the health and safety provision for CLS as a B3 service.

The MPM policy also addresses HSW beneficiaries receiving additional supports and services:

Beneficiaries with developmental disabilities may be enrolled in Michigan's Habilitation Supports Waiver (HSW) and receive the supports and services as defined in this section. HSW beneficiaries may also receive other Medicaid state plan or additional/B3 services.

*MPM, July 1, 2016 version
Behavioral Health and Intellectual and Developmental Disability Supports
and Services Chapter, page 102
(Underline added by ALJ)*

Accordingly, the MPM policy would allow for medically necessary CLS that would only fall within the health and safety provision for CLS as a B3 service to be provided to a HSW beneficiary as an additional B3 service. This is consistent with the email from the Department that was referenced in a prior Administrative Hearing Decision and Order the CMH included in their exhibits. This email indicated the CMH could potentially bill the overnight CLS as a B3 service for that HSW beneficiary, i.e. after other alternatives had been considered. (Exhibit 11, p. 12)

Petitioner's mother is requesting overnight CLS hours overnight for Petitioner. It was explained that Petitioner has a long history of not sleeping at night. If Petitioner gets up she may need assistance with activities such as going to the bathroom, getting a drink of water, re-direction to return to bed, taking a medication to help her get back to sleep. Petitioner has pica and also needs monitoring to prevent ingesting inappropriate items. For example, Petitioner has chewed on electrical cords and swallowed inedible items such as papers, screws, and a battery that had to be surgically removed. Over the past four years, Petitioner has required interventions up to 22 nights per month. (Mother Testimony)

The CMH representative did not dispute that that it is medically necessary for Petitioner to have care 24 hours a day 7 days per week. Further, the testimony of both the Director of Programs and Services as well as the Case Manager, acknowledged that Petitioner needs 24 hour staffing and supports and that Petitioner cannot be left alone without supervision and monitoring for her health and safety. (Director of Programs and Services Testimony; Case Manager Testimony)

Rather, the CMH indicted their understanding was that CLS could not be provided when the consumer is asleep based on the above cited MPM policy addressing what CLS supports are. Further, the CMH asserted that the draft, and later adopted as finalized, language addressing the use of CLS billing codes would not allow for the requested use of CLS in Petitioner's circumstances, a self-determination HSW participant in an unlicensed residential setting. (Exhibits 8 and 12)

A September 9, 2016, memo from the Department clarified that there are no restrictions on the time of day the billing codes for CLS can be used. (Exhibit 9) The CMH asserted that there was still no clarification on whether the beneficiary had to be awake when the CLS is provided. No citation was found in the MPM policy that requires the beneficiary to be awake when CLS is provided. Rather, the CMH refers to the CLS policies cited above for the HSW and as a B3 service indicating that CLS involves assisting (that exceeds state plan services for adults), prompting, reminding, cueing, observing, guiding and/or training the beneficiary with the listed activities. These uses would generally involve the beneficiary being awake to complete the activities. However, it is noted that the health and safety provision for CLS as a B3 service specifically allows for the 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. It is possible that there are circumstances where it is medically necessary to provide CLS overnight, even when the beneficiary may be asleep for portions of those hours, in order to preserve the health and safety of the individual so that they may reside or be supported in the most integrated, independent community setting. Each case will require individualized assessment to determine the medically necessary supports and services, but nothing found in the policies that specifically requires that the beneficiary must be awake all hours that CLS is provided. It is also noted that the MPM, and also the September 9, 2016, memo, indicate that medical necessity should be the basis for determining what supports and services will be authorized, rather than concerns related to how billing codes can be utilized.

As noted above, the CMH did not contest that it is medically necessary for Petitioner to have care 24 hours a day 7 days per week. This is consistent with Petitioner's mother's testimony regarding Petitioner's history of needing frequent interventions during the overnight hours for assistance with activities such as going to the bathroom, getting a drink of water, re-direction to return to bed, taking a medication to help her get back to sleep, as well as monitoring to ensure Petitioner's health and safety, such as preventing

ingesting inappropriate items. The CMH should initiate completing a re-assessment and authorizing appropriate supports and services based on medical necessity.

At the conclusion of the telephone hearing proceeding, Petitioner requested to be awarded fees and costs. MCL 24.323 addresses awarding costs and fees:

24.323 Awarding costs and fees; finding; hearing; evidence; reduction or denial of award; final action; amount of costs and fees; applicability of section.

Sec. 123.

(1) The presiding officer that conducts a contested case shall award to a prevailing party, other than an agency, the costs and fees incurred by the party in connection with that contested case, if the presiding officer finds that the position of the agency to the proceeding was frivolous. To find that an agency's position was frivolous, the presiding officer shall determine that at least 1 of the following conditions has been met:

(a) The agency's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party.

(b) The agency had no reasonable basis to believe that the facts underlying its legal position were in fact true.

(c) The agency's legal position was devoid of arguable legal merit.

(2) If the parties to a contested case do not agree on the awarding of costs and fees under this section, a hearing shall be held if requested by a party, regarding the awarding of costs and fees and the amount thereof. The party seeking an award of costs and fees shall present evidence establishing all of the following:

(a) That the position of the agency was frivolous.

(b) That the party is a prevailing party.

(c) The amount of costs and fees sought including an itemized statement from any attorney, agent, or expert witness who represented the party showing the rate at which the costs and fees were computed.

(d) That the party is eligible to receive an award under this section. Financial records of a party shall be exempt from public disclosure if requested by the party at the time the records are submitted pursuant to this section.

(e) That a final order not subject to further appeal other than for the judicial review of costs and fees provided for in section 125 has been entered in the contested case regarding the subject matter of the contested case.

(3) The presiding officer may reduce the amount of the costs and fees to be awarded, or deny an award, to the extent that the party seeking the award engaged in conduct which unduly and unreasonably protracted the contested case.

(4) The final action taken by the presiding officer under this section in regard to costs and fees shall include written findings as to that action and the basis for the findings.

(5) Subject to subsection (6), the amount of costs and fees awarded under this section shall include those reasonable and necessary costs actually incurred by the party and any costs allowed by law or by a rule promulgated under this act. Subject to subsection (6), the amount of fees awarded under this section shall be based upon the prevailing market rate for the kind and quality of the services furnished, subject to the following:

(a) The expenses paid for an expert witness shall be reasonable and necessary as determined by the presiding officer.

(b) An attorney or agent fee shall not be awarded at a rate of more than \$75.00 per hour unless the presiding officer determines that special circumstances existed justifying a higher rate or an applicable rule promulgated by the agency provides for the payment of a higher rate because of special circumstances.

(6) The costs and fees awarded under this section shall only be awarded to the extent and amount that the agency caused the prevailing party to incur those costs and fees.

(7) This section does not apply to any agency in its role of hearing or adjudicating a case. Unless an agency has discretion to proceed, this section does not apply to an

agency acting ex rel on the information and at the instigation of a nonagency person who has a private interest in the matter nor to an agency required by law to commence a case upon the action or request of another nonagency person.

(8) This section does not apply to an agency that has such a minor role as a party in the case in comparison to other nonprevailing parties so as to make its liability for costs and fees under this section unreasonable, unjust, or unfair.

Petitioner's request for fees and costs must be denied. MCL 24.323(1) allows for costs and fees to be awarded to the prevailing party, other than an agency, when the presiding officer finds that the position of the agency was frivolous. While Petitioner is the prevailing party, the evidence does not support a determination that the waiver agency's position was frivolous as outlined in MCL 24.323. This ALJ does not find that the CMH's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party; that the CMH had no reasonable basis to believe the facts underlying its legal position were in fact true; or that the CMH's legal position was devoid of arguable legal merit. Rather, there has been significant confusion regarding the use of CLS hours overnight with many agencies, not just the Respondent CMH. For example, on September 9, 2016, well after the July 28, 2016, case action at issue for this appeal occurred, the Department issued the written memo to all of these agencies to provide clarification regarding the use of CLS hours during the night because there had been various regional interpretations to define and establish how the codes and CLS could be utilized. (Exhibit 9)

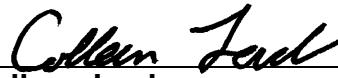
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the CMH improperly denied Petitioner's request for additional hours of Community Living Supports (CLS) for overnight hours.

IT IS THEREFORE ORDERED that

The CMH's decision is REVERSED. The CMH shall initiate completing a re-assessment and authorizing appropriate supports and services based on medical necessity.

CL/cg



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 -Dept Contact

[REDACTED]

Counsel for Petitioner

[REDACTED]

DHHS Department Rep.

[REDACTED]

Petitioner

[REDACTED]