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GOVERNOR

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

SHELLY EDGERTON
DIRECTOR



Date Mailed: December 28, 2016
MAHS Docket No.: 16-013989
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 December 6, 2016, from Lansing, Michigan. [REDACTED], Guardian and mother, represented Petitioner. [REDACTED], the Petitioner, was present. [REDACTED], Director of Quality, represented the Department of Health and Human Services' Waiver Agency, [REDACTED] ("Waiver Agency" or [REDACTED]). [REDACTED], MI Choice Waiver Director, appeared as a witness for the Waiver Agency.

During the hearing proceeding, the Waiver Agency's Hearing Summary packet was admitted as Exhibit A, pp. 1-2, and Petitioner's hearing request was admitted as Exhibit 1, pp. 1-3.

ISSUE

Did the Waiver Agency properly terminate providing a Personal Emergency Response System (PERS) for Petitioner through 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 is a Medicaid beneficiary who has been receiving services through the MI Choice Waiver program.
2. Petitioner's MI Choice Waiver program services included the PERS.
3. On August 30, 2016, a re-assessment was conducted at Petitioner's residence. In part, it was discussed that Petitioner did not meet the criteria for the PERS. (Exhibit A, p. 1; Director of Quality Testimony)

4. On September 20, 2016, written notice was issued to Petitioner stating the PERS would be terminated as of September 30, 2016, because she did not meet the criteria. (Exhibit 1, p. 3)
5. On October 4, 2016, a hearing request was filed on Petitioner's behalf contesting the denial. (Exhibit 1, pp. 1-3)

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 Respondent, 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. 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 Minimum Operating Standards for MI Choice Waiver Program Services regarding PERS, in part, states:

Limitations

1. Where applicable, the participant must use Medicaid state plan, Medicare, or other available payers first.
2. The participant's preference for a certain provider or agency is not grounds for declining another payer in order to access waiver services.
3. PERS does not cover monthly telephone charges associated with phone service.
4. PERS is limited to persons who either live alone or who are left alone for significant periods on a routine basis and who could not summon help in an emergency without this device.
5. Waiver agencies may authorize PERS units for persons who do not live alone if both the waiver participant and the person with whom they reside would require extensive routine supervision without a PERS unit in the home. For example, if one or both spouses are waiver participants and both are frail and elderly, the waiver agency may authorize a PERS unit for the waiver participant(s). Supports coordinators must clearly document in the case record the reason for the provision of a PERS unit when the participant does not live alone or is not left alone for significant lengths of time.

6. Waiver agencies may provide a purchased unit similar to a PERS device. This type of unit does not require an installation or monthly fee, but is a one-time cost. These units are covered under the Specialized Medical Equipment and Supplies service. Participants should not have both a purchased and a rented unit.

*Michigan Department of Health and Human Services,
Minimum Operating Standards for
MI Choice Waiver Program Services, Attachment H,
August 24, 2015, p. 51*

In the present case, the Waiver Agency issued written notice to Petitioner stating the PERS service would be terminated as of September 30, 2016, because she did not meet the criteria. (Exhibit 1, p. 3)

On August 30, 2016, a re-assessment was conducted at Petitioner's residence. In part, it was discussed with Petitioner and her mother that Petitioner did not meet the criteria for the PERS unit. For example, Petitioner does not live alone, she lives with family. Additionally, Petitioner is unable to be left alone and needs 24 hour supervision. If Petitioner is left alone for a brief period of time, that would not meet the criteria for a PERS. The Waiver Agency considers a brief period of time to be not more than 4 hours. It is documented that Petitioner is not able to be left alone for more than 4 hours. Also, the individual has to be able to understand and utilize the button correctly. (Exhibit A, p. 1; Director of Quality Testimony; MI Choice Waiver Director Testimony)

Petitioner's mother disagrees with the termination and asserts that the PERS unit is medically necessary for Petitioner. Petitioner's mother stated that Petitioner is left alone and Petitioner is able to use the PERS unit. It was noted that the MI Choice Waiver program does not provide 24 hour supervision for Petitioner, and there have been staffing difficulties to fulfil even the authorized hours. The PERS unit is Petitioner's security when she is left alone, for example when her parents have to go to their own doctor appointments. Both of Petitioner's parents have heart doctors and they cannot take Petitioner with them to such appointments. Petitioner's mother also indicated that she is able to call Petitioner via cell phone to call to make sure that Petitioner has her wrist band on and this and that when they are out. (Mother Testimony)

Additionally, Petitioner's mother's testimony indicated that there have been changes in circumstances since the September 20, 2016, termination notice was issued. For example, since Petitioner's father had a major heart attack in November and he is still not doing real great. It was indicated that the frequency of how often her parents leave Petitioner home alone to go to doctor appointments has increased. Petitioner's mother described Petitioner's impairments and noted that on September 27, 2016, Petitioner's doctor wrote that the PERS unit is medically necessary. (Mother Testimony)

The Director of Quality explained that the 24 hour supervision did not mean that the Waiver Agency was required to provide 24 hour care. Rather, the Waiver Agency has

to first consider informal supports before providing waiver program services for gaps in care. For example, to have a Community Living Supports (CLS) worker come in during the time Petitioner's parents are gone for doctor appointments. (Director of Quality Testimony)

Petitioner bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in terminating the PERS service. Given the record in this case, the undersigned Administrative Law Judge finds that Petitioner has failed to meet that burden of proof. The Waiver Agency's determination must be reviewed based on the information available at the time of the determination. The Waiver Agency provided credible testimony that at the time of this September 20, 2016, determination, Petitioner did not live alone and was not being left alone for significant periods on a routine basis. Rather, Petitioner was to have 24 hour supervision through a combination of informal supports and MI Choice Waiver program services. Changes in circumstances, such as the ability and availability of informal supports to continue providing care for Petitioner due to changes in their own health, should be considered when determining the appropriate ongoing MI Choice Waiver program services for Petitioner. Similarly, if the staffing issues have not been resolved, the Waiver Agency should also consider that in determining the appropriate ongoing MI Choice Waiver program services for Petitioner. Overall, the September 20, 2016, determination to terminate the PERS service for Petitioner is upheld 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 terminated providing a PERS for Petitioner through 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/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]

DHHS -Dept Contact

[REDACTED]

Community Health Rep

[REDACTED]

Petitioner

[REDACTED]

Authorized Hearing Rep.

[REDACTED]