



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: December 7, 2016
MAHS Docket No.: 16-014227
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Landis Lain

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 the Petitioner's request for a hearing.

After due notice, a hearing was held on December 1, 2016. Petitioner [REDACTED] and his caregiver, [REDACTED] appeared on behalf of the Petitioner. [REDACTED], Hearing Officer; [REDACTED], Registered Nurse and [REDACTED], Supports Coordinator appeared to represent the Respondent [REDACTED] ([REDACTED] or Waiver Agency) Waiver Division on behalf of the Michigan Department of Health and Human Services (Department).

Respondent's Exhibit A pages 1-33 were admitted as evidence.

ISSUE

Did the Waiver agency properly reduce Petitioner's Community Living Supports (CLS)?

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.
2. [REDACTED] must implement the MI Choice Waiver Program in accordance with Michigan's waiver agreement, Department policy and its contract with the Department.
3. Petitioner was receiving Community Living Supports in the amount of seven hours per day seven days per week.

4. On September 19, 2016, an assessment was completed with Petitioner to determine that the care plan is appropriate and current.
5. On September 26, 2016, the Support Coordinator sent Petitioner an Advance Negative Action Notice that Community Living Supports would be reduced to five hours per day seven days per week effective 12 days from the date of Notice.
6. On October 7, 2016, the Michigan Administrative Hearing system received a Request for Hearing to contest the reduction of CLS hours.

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 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).

The MI Choice Policy Chapter to the *Medicaid Provider Manual, MI Choice Waiver*, provides in part:

4.1 COVERED WAIVER SERVICES

In addition to regular State Plan coverage, MI Choice participants may receive services outlined in the following subsections. [p. 9].

4.1.H. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) services facilitate a participant's independence and promote reasonable participation in the community. Services can be provided in the participant's residence or in a community setting to meet support and service needs.

CLS may include assisting, reminding, cueing, observing, guiding, or training with meal preparation, laundry, household care and maintenance, shopping for food and other necessities, and activities of daily living such as bathing, eating, dressing, or personal hygiene. It may provide assistance with such activities as money management, nonmedical care (not requiring nurse or physician intervention), social participation, relationship maintenance and building community connections to reduce personal isolation, non-medical transportation from the participant's residence to community activities, participation in regular community activities incidental to meeting the participant's community living preferences, attendance at medical appointments, and acquiring or procuring goods and services necessary for home and community living.

CLS staff may provide other assistance necessary to preserve the health and safety of the participant so they may reside and be supported in the most integrated and independent community setting.

CLS services cannot be authorized in circumstances where there would be a duplication of services available elsewhere or under the State Plan. CLS services cannot be authorized in lieu of, as a duplication of, or as a supplement to similar authorized waiver services. The distinction must be apparent by unique hours and units in the individual plan of services. Tasks that address personal care needs differ in scope, nature, supervision arrangements or provider type (including provider training and qualifications) from personal care service 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.

When transportation incidental to the provision of CLS is included, it must not also be authorized as a separate waiver service. Transportation to medical appointments is covered by Medicaid through the State Plan. Community Living Supports do not include the cost associated with room and board.

*Medicaid Provider Manual
MI Choice Waiver Section*

October 1, 2013, pp 12-13 (Revised January 1, 2016)

The MI Choice Waiver Program is a Medicaid-funded program and its Medicaid funding is a payer 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 49 CLS hours are medically necessary.

The Waiver Agency witness testified that Petitioner's CLS hours were reduced when it was discovered that Petitioner stated that he could dress independently and perform self-hygiene if articles are placed within reach. Petitioner is able to transfer from motorized wheelchair with the use of a walker. Petitioner receives 30 miles per week for non-medical transportation and also receives 10 meals (five hot/five cold) per week from home delivered meals. Petitioner reports that he is able to transport self through public transportation and does this on a regular basis. Petitioner also reports he wants the extra two hours per day for companionship. He was advised on alternatives such as

adult day health or informal support for companionship.

Petitioner alleges that the Waiver Agency representative has discriminated against him and lied on him. He states that he was lying in bed during the assessment. Petitioner alleges that he cannot dress himself and needs help in the bath tub. Petitioner testified that he has Degenerative Joint Disease in his knees, a laminectomy, surgery on the left ankle, diabetes, heart problems, arthritis, headaches, Gastro-Esophageal Reflux Disease (GERD) and ulcers. He often cannot eat the meals that are delivered because he has no teeth.

Petitioner's caregiver testified that she changes his urinal, cooks breakfast, cleans the home, gives him one hour of therapy to help him walk, and three errands per day. Sometimes she shops to get Petitioner food because Petitioner has no teeth and is unable to chew.

In response, the Waiver Agency witness indicated that the assessment is based on the individual needs of the client, that the Waiver Agency also considers the availability of informal supports, and that 35 hours per week is sufficient to meet Appellant's medical needs.

This ALJ finds that the Waiver Agency properly reduced Appellant's CLS hours from 49 hours per week to 35 hours per week. The evidence presented demonstrated that Appellant's services were previously being duplicated in the mornings. Once that duplication of services was removed, Appellant was properly authorized for 35 CLS hours per week.

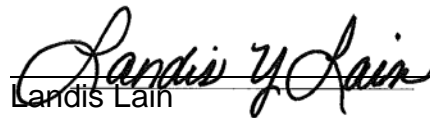
DECISION AND ORDER

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 49 hours per week to 35 hours per week.

IT IS THEREFORE ORDERED that:

The Department's decision is **AFFIRMED**.

LL/sb



Landis Lain

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

Community Health Rep

[REDACTED]

DHHS -Dept Contact

[REDACTED]

DHHS -Dept Contact

[REDACTED]

Petitioner

[REDACTED]