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GOVERNOR

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

MIKE ZIMMER
DIRECTOR



Date Mailed: March 23, 2016
MAHS Docket No.: 16-000590
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 [REDACTED]. Petitioner and his caregiver/provider [REDACTED] appeared and testified on Petitioner's behalf.

[REDACTED], Supports Coordinator; and [REDACTED], Nurse, Project and Training Manager appeared and testified on behalf of the Department's MI Choice Waiver Agency, the [REDACTED] (Waiver Agency or Respondent).

Respondent's Exhibit A pages 1-69 were admitted as evidence.

ISSUE

Whether the Waiver Agency properly determined that Petitioner's request for re-entry into the Self Determination option should be denied?

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 the [REDACTED] to provide MI Choice Waiver services to eligible beneficiaries.
2. The [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 is a Medicaid beneficiary, who has been diagnosed with morbid obesity, heart failure, rheumatoid arthritis, diabetes mellitus, osteoarthritis and bone problems in his feet.
4. Petitioner receives Community Living Supports through the MI Choice Waiver Program.
5. On [REDACTED], Petitioner requested the Self Determination Option.
6. On [REDACTED], the Waiver Agency Agent decided that the Self Determination option would not be the appropriate option for Petitioner.
7. On [REDACTED], the Waiver Agency sent Petitioner an Adequate Action Notice stating that Petitioner's request was not authorized because there is a hearing decision dated [REDACTED] that finds (you) were not able to manage the responsibilities of Self Determination. The legal basis for this decision is 42 CFR 440.230 (d).
8. On [REDACTED], the Michigan Administrative Hearings System received Petitioner's request for a hearing to contest the Waiver Agency's determination.

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.

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.

Section 6.3 SELF-DETERMINATION states:

Self-Determination provides MI Choice participants the option to direct and control their own waiver services. Not all MI Choice participants choose to participate in self-determination. For those that do, the participant (or chosen representative(s)) has decision-making authority over staff who provide waiver services, including:

- Recruiting staff
- Referring staff to an agency for hiring (co-employer)
- Selecting staff from worker registry
- Hiring staff (common law employer)
- Verifying staff qualifications
- Obtaining criminal history review of staff
- Specifying additional service or staff qualifications based on the participant's needs and preferences so long as such qualifications are consistent with the qualifications specified in the approved waiver application and the Minimum Operating Standards
- Specifying how services are to be provided and determining staff duties consistent with the service specifications in the approved waiver application and the Minimum Operating Standards
- Determining staff wages and benefits, subject to State limits (if any)
- Scheduling staff and the provision of services
- Orienting and instructing staff in duties
- Supervising staff
- Evaluating staff performance
- Verifying time worked by staff and approving timesheets
- Discharging staff (common law employer)
- Discharging staff from providing services (co-employer)
- Reallocating funds among services included in the participant's budget
- Identifying service providers and referring for provider enrollment
- Substituting service providers
- Reviewing and approving provider invoices for services rendered

Participant budget development for participants in self-direction occurs during the person-centered planning process and is intended to involve individuals the participant chooses. Planning for the participant's plan of service precedes the development of the participant's budget so that

needs and preferences can be accounted for without arbitrarily restricting options and preferences due to cost considerations. A participant's budget is not authorized until both the participant and the waiver agency have agreed to the amount and its use. In the event that the participant is not satisfied with the authorized budget, he/she may reconvene the person-centered planning process. The waiver services of Fiscal Intermediary and Goods and Services are available specifically to self-determination participants to enhance their abilities to more fully exercise control over their services.

The participant may, at any time, modify or terminate the arrangements that support self-determination. The most effective method for making changes is the person-centered planning process in which individuals chosen by the participant work with the participant and the supports coordinator to identify challenges and address problems that may be interfering with the success of a self-determination arrangement. The decision of a participant to terminate participation in self-determination does not alter the services and supports identified in the participant's plan of service. When the participant terminates self-determination, the waiver agency has an obligation to assume responsibility for assuring the provision of those services through its network of contracted provider agencies.

Attachment N, Michigan Department of Health and Human Services SD in Long Term Care (LTC) Contract Requirements, FY 2016, pages 10-11, states in pertinent part:

In determining which arrangements are to be used, the person and others involved in the person centered planning process should consider:

- The participant's preference;
- The participant's ability to manage the desired arrangement. Ability is gauged by considering the support available from chosen family and friends to assist with managing the preferred arrangement. Some individuals with very significant disabilities have the support to enable them to directly control provider arrangements, even though they would be unable to do so themselves;
- Evidence that a particular arrangement would pose significant risk to the participant that cannot be balanced with available support; and
- Other related factors that appear to impinge on or assist the potential success of a given approach.

A distinction exists between the legal right any individual may have to enter into a contract (including an employment contract) and his or her authority to direct funds under the stewardship of the waiver agency to pay for that arrangement. While the individual's right to enter into agreements under common law cannot be terminated, the use of the waiver agency's funds to directly arrange for and control providers of services must be authorized by the waiver agency for the sole purpose of implementing the service plan. If use of the SD in (LTC) option is beyond the ability of the participant, even with the provision of available support, authorizing such arrangements is inappropriate. This is especially true where there is a significant potential for harm to the individual.

In the instant case, Respondent's representative argues that Petitioner could not successfully manage the budget in the past. He was often over budget in the past. Also, there were some conflict issues between the Petitioner and his caregiver. In [REDACTED], Petitioner went to [REDACTED]. He did not report when he was leaving the service area. Petitioner had meals delivered to his neighbor while he was in [REDACTED], which indicates a history of dishonesty. Petitioner offered to sell his Food Assistance Program benefits to the caseworker. Petitioner was the payee for both his provider and for his own adult son, which was inappropriate.

Petitioner argues that he did have some problems in [REDACTED] but those problems have been resolved. He has lost 240 pounds (from 623 pounds). He wants to pay his caregiver directly instead of through an agency, because his caregiver will make more money personally. He was originally removed from the Self Determination option due to a caseworker error. He did go to [REDACTED] with his caregiver, but the caregiver continued to assist him during the trip. The caregiver often stays extra hours, up to 20 hours per day. His caregiver has not been given a raise even though [REDACTED], Inc. has received an increase in payments for Petitioner's care. Petitioner stated that he was joking about selling his Food Assistance Program benefits. Petitioner's son is homeless but Petitioner is not currently the son's payee. Self Determination would be appropriate for Petitioner's level of care.

This Administrative Law judge determines that the Waiver Agency denied Petitioner's request to participate in the Self Determination program of the MI Choice Waiver Program in [REDACTED]. Petitioner appealed the decision and Administrative Law Judge [REDACTED] affirmed the Waiver Agency's decision, stating that Petitioner consistently did not fulfill his responsibility to stay within his Self Determination budget. Self Determination contracts require that participants agree to manage the use of funds so that expenditures in the aggregate do not exceed the amounts identified in the individual budget. Petitioner has demonstrated his inability to remain within his budget in the past. Given the past problems that arose with Petitioner's inability to stay within his budget and his conflicts with his caregiver, the Waiver Agency's decision to deny Petitioner's request for re-entry into the Self Determination program must be upheld.

The Waiver Agency provided sufficient evidence that it implemented the MI Choice procedure in accordance with Department policy; therefore, its actions were proper.

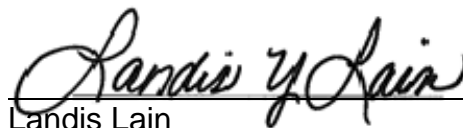
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the MI Choice Waiver agency properly denied Petitioner's request for re-entry into the Self Determination program under the circumstances.

IT IS THEREFORE ORDERED that:

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

LL ■



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]