



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: October 28, 2016
MAHS Docket No.: 16-012320
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 September 28, 2016. [REDACTED], the Petitioner, appeared on her own behalf. [REDACTED], Medical Assistant, appeared as a witness for Petitioner. [REDACTED], Hearing Officer, represented the Department of Health and Human Services' Waiver Agency, [REDACTED] ("Waiver Agency" or [REDACTED]). [REDACTED], Registered Nurse (RN), and [REDACTED], Social Worker (SW), appeared as witnesses for the Waiver Agency.

During the hearing proceedings, the Waiver Agency's Hearing Summary Packet was admitted as Exhibit A, pp. 1-41.

ISSUE

Did the Waiver Agency properly deny Petitioner's request to participate as a Self-Determination client in the MI Choice Waiver services program resulting in a denial of fiscal intermediary services?

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 receives services through the MI Choice Waiver program.
2. As a Self-Determination participant for the MI Choice Waiver program, Petitioner would receive fiscal intermediary services along with other waiver services. (Exhibit A, p. 7; Hearing Officer Testimony)

3. Petitioner's prior participation as a Self-Determination client in the MI Choice Waiver program in [REDACTED] was unsuccessful. (Exhibit A, pp. 2 and 12; RN Testimony)
4. During a [REDACTED], telephone call, Petitioner requested to participate as a Self-Determination client again. (Exhibit A, p. 12)
5. On [REDACTED], a 90 day reassessment visit was completed. (Exhibit A, p. 12)
6. The Waiver Agency determined that Petitioner's current request for Self-Determination participation should be denied for multiple factors including: Petitioner's prior participation as a Self-Determination client in the MI Choice Waiver services in [REDACTED] was unsuccessful; previous allegations of caregivers fraudulently reporting hours worked; Adult Protective Services (APS) involvement [REDACTED], alleging lack of care being provided and Petitioner having increased skin breakdown/rash; and other instability factors in the home that would make it very difficult and unsafe for Petitioner to manage this program. (Exhibit A, pp. 2 and 11-12; RN Testimony)
7. On [REDACTED] an Adequate Action Notice was issued to Petitioner indicating the request to participate as a Self-Determination client was denied because it was unsuccessful in the past. (Exhibit A, p. 3)
8. On [REDACTED], Petitioner's hearing request was received by the Michigan Administrative Hearing System. (Hearing Request)

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. 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.

Appellant 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 A&D, 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)

The Medicaid Provider Manual addresses self-determination for the MI Choice Waiver Program:

6.3 SELF-DETERMINATION

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.

A waiver agency may terminate self-determination for a participant when problems arise due to the participant's inability to effectively direct services and supports. Prior to terminating a self-determination agreement (unless it is not feasible), the waiver agency informs the participant in writing of the issues that have led to the decision to terminate the arrangement. The waiver agency will continue efforts to resolve the issues that led to the termination.

Attachment N to the MI Choice Waiver contract, Self-Determination in Long Term Care, addresses Factors to Consider in Self-Determination:

D. Factors to Consider in Self-Determination

As the forum for developing arrangements that support self-determination, the person-centered planning process is also the forum for determining whether an individual desires and possesses the abilities—with or without support—to participate in SD in LTC. The person-centered planning process must produce a consensus regarding the appropriateness of particular arrangements.

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 a 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. When the methods of SD in LTC are deemed to be inappropriate for an individual, given his or her current circumstances, the waiver agency must document the basis for the decision and work with the individual and his allies to determine how needed informal supports can be cultivated.

It is unacceptable for the waiver agency to arbitrarily determine which methods a person may access and use simply for the convenience of the waiver agency. For example, a waiver agency may not deny individual participants the right to select, employ and manage their own qualified providers because this choice may affect existing arrangements with traditional providers.

Clear information and guidance must be provided by the waiver agency to the participant and/or their representative so that they understand the nature of the arrangements and the responsibilities involved with controlling public funds and employing workers. It must be made clear that these responsibilities could be accompanied by problems, if they are not handled properly. The waiver agency should provide for support mechanisms (e.g., use of a properly defined, constructed and oriented fiscal intermediary) to ensure tasks the participant will not directly handle are properly performed.

MI Choice Waiver Contract, Attachment N,
August 26, 2015, pp. 10-11
(Exhibit A, pp. 8-9)

On [REDACTED], an Adequate Action Notice was issued to Petitioner indicating the request to participate as a Self-Determination client was denied because it was unsuccessful in the past. (Exhibit A, p. 3) The records document that Petitioner's previous participation as a Self-Determination participant following a [REDACTED], Self-Determination application ended effective [REDACTED] (Exhibit A, pp. 27-31)

As a Self-Determination participant for the MI Choice Waiver program, the Petitioner would receive fiscal intermediary services along with other waiver services. (Exhibit A, p. 7; Hearing Officer Testimony) Therefore, the Waiver Agency's determination to deny Petitioner Self-Determination participation resulted in a denial of fiscal intermediary services.

During a [REDACTED], telephone call, Petitioner requested to participate as a Self-Determination client again and she wanted it to happen very quickly. In part, the number of agencies and caregivers Petitioner has had as well as the trouble Petitioner had finding workers when she was previously a Self-Determination participant was discussed. Petitioner reported that she has three persons willing to work for her from the present agency. Setting up a time for the 90 day reassessment visit was also discussed. Additionally, it was noted that Petitioner was recently in court facing potential eviction from her rental apartment and that Petitioner has unstable informal supports. (Exhibit A, p. 12) On [REDACTED], a 90 day reassessment visit was completed. (Exhibit A, p. 12)

The Waiver Agency determined that Petitioner's current request for Self-Determination participation should be denied for multiple factors including: Petitioner's prior participation as a Self-Determination client in the MI Choice Waiver services in [REDACTED] was unsuccessful; previous allegations of caregivers fraudulently reporting hours worked; Adult Protective Services (APS) involvement [REDACTED], alleging lack of care being provided and Petitioner having increased skin breakdown/rash; and other instability factors in the home that would make it very difficult and unsafe for Petitioner to manage this program. (Exhibit A, pp. 2 and 11-12; RN Testimony)

Petitioner disagrees with the denial of Self-Determination participation and testified the three workers she sent in to have the background checks done on were all approved. Petitioner explained that she wants Self-Determination participation because she does not like the current company. However, Petitioner acknowledged that the Waiver Agency has arranged for changes with companies in the past. Petitioner also explained that she wants Self-Determination participation so she can have the people she wants and trusts there to work for her. (Petitioner Testimony)

The Medical Assistant testified that when she and two others took over caring for Petitioner, they helped Petitioner in numerous ways to be more independent and to progress. While Petitioner has had people take advantage of her in the past, they are all out of the home now. The Medical Assistant recently quit the company and went to working directly for another client through Self-Determination. While she no longer works for the company, the Medical Assistant still does some things for Petitioner to help her out. The Medical Assistant stated that she now sees Petitioner going downhill, for example skin breakdown and things that could be prevented. (Medical Assistant Testimony)

Overall, the evidence establishes that the Waiver Agency properly used the person-centered planning process to consider Petitioner's request to participate as a Self-Determination client again. The Waiver Agency considered Petitioner's preference as well as her ability to manage the desired arrangement, evidence that this arrangement would pose a significant risk to Petitioner that cannot be balanced with available support, and other related factors that appear to impinge on the potential success of the requested approach. At the time Petitioner made the request, [REDACTED], she had recently been in court facing potential eviction, her informal supports were noted to be unstable, and there had been a relatively recent prior attempt at self-determination participation that ended unsuccessfully in [REDACTED]. Further, the evidence indicates that Petitioner had not reported any difficulties with the current company to the Waiver Agency at the time of this request, which would have allowed for an opportunity to try to work out any issues with this company or to make appropriate changes. Rather, Petitioner reported that through Self-Determination participation, she wanted to hire three caregivers from the current company. (Exhibit A, pp. 11-12) The determination to deny Petitioner's [REDACTED] request to participate as a Self-Determination client in the MI Choice Waiver services program, which would result in a denial of fiscal intermediary services, was appropriate based on Petitioner's current circumstances.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly denied Petitioner's request to participate as a Self-Determination client in the MI Choice Waiver services program resulting in a denial of fiscal intermediary services.

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]

Community Health Rep

[REDACTED]

DHHS -Dept Contact

[REDACTED]

Petitioner

[REDACTED]