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: February 9, 2017
MAHS Docket No.: 16-016701
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and upon a request for a hearing filed on the minor Petitioner's behalf.

After due notice, an in-person hearing was held on January 18, 2017. [redacted], Petitioner's mother, appeared and testified on Petitioner's behalf. [redacted], Medicaid Fair Hearings Officer, represented the Respondent [redacted], with [redacted], an attorney with [redacted], Inc., the Manager of Respondent's Comprehensive Provider Network (MCPN) presenting Respondent's case at its representative's request. Supports coordinators [redacted], and [redacted] testified as witnesses for Respondent. [redacted], Medicaid Fair Hearings Officer, was also present during the hearing.

ISSUE

Did Respondent properly deny Petitioner's request for additional 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. Petitioner is a sixteen-year-old Medicaid beneficiary who has been diagnosed with intractable seizure disorder; asthma; severe chronic static encephalopathy; and quadriplegic cerebral palsy. (Exhibit 2, page 2).

2. Due to her conditions, Petitioner is dependent on others in all areas of self-care; unable to communicate verbally; dependent on a wheelchair that

she cannot propel for mobility; and has a G-tube. (Exhibit A, pages 22, 29).

3. Petitioner resides with her mother and younger brother. (Exhibit A, page 22).

4. Her mother has been diagnosed with lumbago and chronic low back pain; cannot lift more than twenty pounds; and has been advised against lifting or bending more than necessary. (Exhibit 2, page 4).

5. Petitioner has been receiving through Respondent pursuant to the Habilitation Supports Waiver (HSW). (Exhibit A, page 31).

6. Specifically, her services had included 8 hours per day of CLS; approximately 14 hours per month of respite care services; and supports coordination services. (Exhibit A, pages 8, 31; Testimony of Petitioner's representative; Testimony of Ms. [redacted]).

7. On November 14, 2016, a meeting was held with respect to Petitioner's Person Centered Plan (PCP) for the upcoming plan year. (Exhibit A, page 20).

8. Petitioner, her mother, and [redacted], Petitioner's supports coordinator, were present for that meeting. (Exhibit A, page 20).

9. During that meeting, Ms. [redacted] provided Petitioner's mother with a Notice and Plan Review Rights Packet. (Exhibit A, page 21).

10. In the PCP that was developed, it was noted that an area of focus is increasing Petitioner's hair brushing skills; Petitioner is provided with around-the-clock support due to her disability and she is always in visual sight of someone; she sleeps well during the night, with her mother checking on her two-to-three times a night to discontinue the feeding pump when appropriate and to change Petitioner's diaper; and that Petitioner sometimes wakes up wet and will grind her teeth or hit the bed in order to alert her mother that she is awake. (Exhibit A, page 27).

11. While Petitioner's representative requested that Petitioner's CLS continue to be approved in the amount of 8 hours per day, the PCP provided that Petitioner would only be approved for 5 hours per day of CLS. (Exhibit A, page 27).

12. Petitioner's representative was given an Adequate Action Notice during the meeting on November 14, 2016. (Exhibit A, pages 43-44).

13. On November 17, 2016, the Michigan Administrative Hearing System (MAHS) received the request for hearing filed on Petitioner's behalf in this

matter regarding the reduced amount of CLS that was approved. (Exhibit 1, page 1).

14. On November 29, 2016 or November 30, 3016, the MCPN sent Petitioner's mother a copy of the PCP and asked for her signature and feedback. (Exhibit A, pages 17-34).

15. The MCPN also sent Petitioner another Adequate Action Notice. (Exhibit A, pages 39-41).

16. On December 2, 2016, Petitioners plan was amended to reflect that, while the authorization of 8 hours per day of CLS continued through the end of her previous plan, only 5 hours per day of CLS would be approved for the time period of November 16, 2016 through February 14, 2017. (Exhibit A, page 7).

17. On December 7, 2016, the MCPN sent Petitioner written notice that the request for 8 hours per day of CLS was denied, but that 5 hours per day of such services would be approved. (Exhibit A, pages 12-13).

18. Regarding the reason for the denial, the notice stated in part:

> The request from the parent for eight hours per day of community living supports was denied, in part for [Petitioner] for the reasons that the parent of the child indicated that her request for more than eight hours a day was to accommodate the mother's work schedule, which does not meet the criteria for medical necessity or community living supports. Per Section 15.1 of the Medicaid Provider Manual, "CLS provides support for a 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. The supports must be provided directly to, or on behalf of the child for skill development in those areas stated above and other areas such as communication, socialization and relationship-building skills, and participation in community activities." Community Living Supports are not meant to provide supports so that a parent can work outside of the home.

> Given the above, five hours of community living supports has been authorized during this personal plan year (as discussed with parent with a review every ninety days) to reasonably achieve the goals/areas of focus as identified in the Person Centered Plan. All other supports to be provided to the minor child is the responsibility of the parent. Per Section 17.2 of the Medicaid Provider Manual, it is reasonable to expect that parents of minor children with disabilities will provide the same level of care that they would provide to their children without disabilities.
>
> *Exhibit A, page 12*

19. On December 15, 2016, the MCPN sent Petitioner's mother written notice that the request for 8 hours per day of CLS was denied, but that five hours per day of such services would be approved. (Exhibit A, pages 10-11, 15-16).

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).

Here, as discussed above, Petitioner has been receiving CLS through Respondent pursuant to the HSW and, with respect to such services, the applicable version of the Medicaid Provider Manual (MPM) states:

> **SECTION 15 – HABILITATION SUPPORTS WAIVER FOR PERSONS WITH DEVELOPMENTAL DISABILITIES**
>
> 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. A HSW beneficiary must receive at least one HSW service per month in order to

retain eligibility. ***Medical necessity criteria should be used in determining the amount, duration, and scope of services and supports to be used.*** The beneficiary's services and supports that are to be provided under the auspices of the PIHP must be specified in his individual plan of services developed through the person-centered planning process.

HSW beneficiaries must be enrolled through the MDHHS enrollment process completed by the PIHP. The enrollment process must include annual verification that the beneficiary:

- Has a developmental disability (as defined by Michigan law);
- Is Medicaid-eligible;
- Is residing in a community setting;
- If not for HSW services, would require ICF/IID level of care services; and
- Chooses to participate in the HSW in lieu of ICF/IID services.

The enrollment process also includes confirmation of changes in the beneficiary's enrollment status, including termination from the waiver, changes of residence requiring transfer of the waiver to another PIHP, and death. Termination from the HSW may occur when the beneficiary no longer meets one or more of the eligibility criteria specified above as determined by the PIHP, or does not receive at least one HSW service per month, or withdraws from the program voluntarily, or dies. Instructions for beneficiary enrollments and annual re-certification may be obtained from the MDHHS Bureau of Community Mental Health Services. (Refer to the Directory Appendix for contact information.)

The PIHP shall use value purchasing for HSW services and supports. The PIHP shall assist beneficiaries to examine their first- and third-party resources to pursue all reimbursements to which they may be entitled, and to make use of other community resources for non-PIHP covered activities, supports or services.

Reimbursement for services rendered under the HSW is included in the PIHP capitation rate.

Beneficiaries enrolled in the HSW may not be enrolled simultaneously in any other §1915(c) waiver.

Habilitation services under the HSW are not otherwise available to the beneficiary through a local educational agency under the Individuals with Disabilities Education Act (IDEA) or the Rehabilitation Act of 1973.

15.1 WAIVER SUPPORTS AND SERVICES

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 nonvocational 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 DHS 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' 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, October 1, 2016 version
Behavioral Health and Intellectual and Developmental Disability Supports and Services
Pages 102-104
(Emphasis added)

Regarding medical necessity, the MPM also provides:

> **2.5 MEDICAL NECESSITY CRITERIA**
>
> The following medical necessity criteria apply to Medicaid mental health, developmental disabilities, and substance abuse supports and services.
>
> **2.5.A. MEDICAL NECESSITY CRITERIA**
>
> Mental health, developmental disabilities, and substance abuse services are supports, services, and treatment:
>
> - Necessary for screening and assessing the presence of a mental illness, developmental disability or substance use disorder; and/or
> - Required to identify and evaluate a mental illness, developmental disability or substance use disorder; and/or
> - Intended to treat, ameliorate, diminish or stabilize the symptoms of mental illness, developmental disability or substance use disorder; and/or

- Expected to arrest or delay the progression of a mental illness, developmental disability, or substance use disorder; and/or

- Designed to assist the beneficiary to attain or maintain a sufficient level of functioning in order to achieve his goals of community inclusion and participation, independence, recovery, or productivity.

2.5.B. DETERMINATION CRITERIA

The determination of a medically necessary support, service or treatment must be:

- Based on information provided by the beneficiary, beneficiary's family, and/or other individuals (e.g., friends, personal assistants/aides) who know the beneficiary;

- Based on clinical information from the beneficiary's primary care physician or health care professionals with relevant qualifications who have evaluated the beneficiary;

- For beneficiaries with mental illness or developmental disabilities, based on person-centered planning, and for beneficiaries with substance use disorders, individualized treatment planning;

- Made by appropriately trained mental health, developmental disabilities, or substance abuse professionals with sufficient clinical experience;

- Made within federal and state standards for timeliness;

- Sufficient in amount, scope and duration of the service(s) to reasonably achieve its/their purpose; and

- Documented in the individual plan of service.

2.5.C. SUPPORTS, SERVICES AND TREATMENT AUTHORIZED BY THE PIHP

Supports, services, and treatment authorized by the PIHP must be:

- Delivered in accordance with federal and state standards for timeliness in a location that is accessible to the beneficiary;

- Responsive to particular needs of multi-cultural populations and furnished in a culturally relevant manner;

- Responsive to the particular needs of beneficiaries with sensory or mobility impairments and provided with the necessary accommodations;

- Provided in the least restrictive, most integrated setting. Inpatient, licensed residential or other segregated settings shall be used only when less restrictive levels of treatment, service or support have been, for that beneficiary, unsuccessful or cannot be safely provided; and

- Delivered consistent with, where they exist, available research findings, health care practice guidelines, best practices and standards of practice issued by professionally recognized organizations or government agencies.

2.5.D. PIHP DECISIONS

Using criteria for medical necessity, a PIHP may:

- Deny services:

  - that are deemed ineffective for a given condition based upon professionally and scientifically recognized and accepted standards of care;

- that are experimental or investigational in nature; or

- for which there exists another appropriate, efficacious, less-restrictive and cost-effective service, setting or support that otherwise satisfies the standards for medically-necessary services; and/or

- Employ various methods to determine amount, scope and duration of services, including prior authorization for certain services, concurrent utilization reviews, centralized assessment and referral, gate-keeping arrangements, protocols, and guidelines.

A PIHP may not deny services based **solely** on preset limits of the cost, amount, scope, and duration of services. Instead, determination of the need for services shall be conducted on an individualized basis.

MPM, October 1, 2016 version
Behavioral Health and Intellectual and Developmental Disability Supports and Services
Pages 13-14

It is undisputed in this case that Petitioner should be approved for CLS and that such services are medically necessary. Instead, the parties dispute the amount of such services that should be approved, with Petitioner seeking to continue receiving 8 hours per day of CLS and Respondent deciding to only authorize 5 hours per day of CLS.

In support of Respondent's decision, Ms [redacted] that Petitioner requested the additional time because her mother is not able to work without more CLS, but that allowing Petitioner's mother to work is not the purpose of CLS. Ms. [redacted] also testified that Petitioner has never applied for Home Help Services (HHS) through the Department of Health and Human Services despite attempts to assist her in doing so.

Ms. [redacted] testified that, while Petitioner was receiving 8 hours per day of CLS previously, each new request is reviewed on its own, based on the information available at the time, and that information in this case did not demonstrate a need for 8 hours of CLS. She also testified that Petitioner is approved for approximately 14 hours per month of respite care services.

In response, Petitioner's mother/representative testified that lack of natural support outside of Petitioner's mother, including two older siblings who are out-of-the-home and

cannot help and a grandfather who is elderly and can only do so much. Petitioner's representative also testified that she has to be there for her other child in the home and that, while she does a lot for Petitioner, it is so hard to help her, even with basic tasks such as bathing, feeding, or brushing teeth. Petitioner's representative further testified that Petitioner's situation has not changed, but that the notes Respondent is reviewing may not reflect all that she needs and all that is being provided. With respect to HHS, Petitioner's representative testified that she was initially told that HHS were not for kids, and that she later thought that Ms. [redacted] was handling any application.

Petitioner bears the burden of proving by a preponderance of the evidence that Respondent erred in denying the request for additional CLS services.

Given the record and available information in this case, the undersigned Administrative Law Judge finds that Petitioner has failed to meet that burden of proof in this case and that the Respondent's decision must therefore be affirmed. While it does not appear that anything has changed with respect to Petitioner's conditions or needs, Petitioner has still failed to show that the denial of additional hours in her most recent plan was improper given the goals of that plan and the availability of other services. Petitioner is still authorized for a significant amount of CLS, in addition to her respite care services, and the authorized hours appear to be sufficient to meet the specific goals identified in the minor Petitioner's PCP, irrespective of her mother's work situation. Moreover, the above policy expressly provides that beneficiaries such as Petitioner must request HHS and, if necessary, Expanded HHS, in order to receive CLS and Petitioner has failed to do so. Such services are available to minor children in certain circumstances[1] and Petitioner's representative's testimony regarding why they were not applied for in the past is unpersuasive.

Accordingly, taking into account the above policies, the Petitioner's specific plan and the amount of services Petitioner is authorized for, the undersigned Administrative Law Judge finds that Petitioner has failed to meet her burden of proof with respect to the denial of additional CLS and that Respondent's decision must therefore be affirmed.

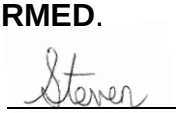
[1] "When providing for minor children, personal care services must be shown to be a necessary supplement to usual parental care, justified by the high service needs of the family. High service needs are those which arise from a physical, medical, emotional, or mental impairment of the minor child and which require significantly higher levels of intervention than those required by a child of the same age without similar impairments." Adult Services Manual 101 (8-1-2016), page 4 of 5.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Respondent properly denied Petitioner's request for additional CLS.

IT IS THEREFORE ORDERED that

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



SK/tm

Steven Kibit
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

Authorized Hearing Rep.

[redacted]

[redacted]

[redacted]

[redacted]