



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: March 31, 2017
MAHS Docket No.: 17-000556
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Robert J. Meade

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 Petitioner's request for a hearing.

After due notice, a hearing was held on March 29, 2017. Petitioner appeared and testified on his own behalf. [REDACTED], former caregiver appeared as an interpreter and witness for Petitioner. [REDACTED], current caregiver, appeared as a witness.

[REDACTED], Hearing Officer, appeared and testified on behalf of the Department's MI Choice Waiver Agency, [REDACTED] ([REDACTED] or Waiver Agency). [REDACTED], RN, Nurse Case Manager and [REDACTED], Social Worker, Case Manager, appeared as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly deny Petitioner's request to hire his former care worker through self-determination?

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. (Exhibit A, Testimony)
2. [REDACTED] must implement the MI Choice Waiver program in accordance with Michigan's waiver agreement, Department policy and its contract with the Department. (Exhibit A, Testimony)
3. Petitioner is a [REDACTED] year-old Medicaid beneficiary, born [REDACTED], who has been receiving services through [REDACTED]. [REDACTED] contracts with local agencies to provide direct care to clients, such as Petitioner. (Exhibits A, 1; Testimony)

4. On December 6, 2016, [REDACTED] from [REDACTED], Petitioner's agency care provider, contacted [REDACTED] and informed them that he would be firing Petitioner's caregiver [REDACTED] due to company policy violations. [REDACTED] informed [REDACTED] that [REDACTED] would continue to serve Petitioner with a different caregiver if he wished to remain with [REDACTED]. (Exhibit A, pp 2, 21-22; Testimony)
5. [REDACTED] from [REDACTED] outlined his reasons for firing [REDACTED] in writing and provided same to [REDACTED]. (Exhibit A, pp 8-9; Testimony)
6. On December 6, 2016, [REDACTED] contacted Petitioner and informed him that [REDACTED] would be firing his caregiver [REDACTED]. Petitioner asked that he be able to hire [REDACTED] as his caregiver through self-determination. After review of Petitioner's request, [REDACTED] informed Petitioner that [REDACTED] was not deemed hireable through self-determination because of enmeshment, interfering with care, and Petitioner needing an alternate advocate. (Exhibit A, pp 2, 21-22; Testimony)
7. On December 21, 2016, the Waiver Agency sent Petitioner an Adequate Action Notice informing him that his request to hire [REDACTED] as his caregiver through self-determination had been denied. (Exhibit A, p 3; Testimony)
8. On January 24, 2017, the Michigan Administrative Hearing System received Petitioner's request for hearing. (Exhibit 1).

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)*.

With regard to Self-Determination, the Medicaid Provider Manual provides in pertinent part:

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.

The Michigan Department of Health and Human Services Minimum Operating Standards for MI Choice Waiver Program Services provides, in pertinent part:

C. Self-Determined Service Providers

4. Provider Qualifications

Providers of self-determined services must minimally:

- a. Be 18 years old.
- b. Be able to communicate effectively both orally and in writing and follow instructions.
- c. Be trained in universal precautions and blood-borne pathogens. The waiver agency must maintain a copy of the employees' training record in the participant's case file.
- d. Providers of self-determined services cannot also be the participant's spouse, guardian, legally responsible decision maker, or designated representative.

(Exhibit A, p 16; Emphasis added)

The Waiver Agency witness testified that on December 6, 2016, [REDACTED] from [REDACTED], Petitioner's agency care provider, contacted [REDACTED] and informed them that he would be firing Petitioner's caregiver [REDACTED] due to company policy violations. The Waiver Agency witness indicated that [REDACTED] informed [REDACTED] that [REDACTED] would continue to serve Petitioner with a different caregiver if he wished to remain with C [REDACTED]. The Waiver Agency witness testified that on December 6, 2016, [REDACTED] contacted Petitioner and informed him that [REDACTED] would be firing his caregiver [REDACTED]. The Waiver Agency witness indicated that Petitioner asked that he be able to hire [REDACTED] as his caregiver through self-determination. The Waiver Agency witness testified that after review of Petitioner's request, [REDACTED] informed Petitioner that [REDACTED] was not deemed hireable through self-determination because of enmeshment, interfering with care, and Petitioner needing an alternate advocate. The Waiver Agency witness testified that on December 21, 2016, the Waiver Agency sent Petitioner an Adequate Action Notice informing him that his request to hire [REDACTED] as his caregiver through self-determination had been denied. The Waiver Agency witness testified that it has no power over [REDACTED] firing caregiver [REDACTED].

Petitioner's former caregiver [REDACTED] read from her statement, which was admitted as Exhibit 2.

Petitioner testified that the other caregivers were lying about [REDACTED] and him and that [REDACTED] only got fired because she argued with the owner's wife. Petitioner indicated that he is

a terminally ill man with only a few people that he trusts and that these people come over to see him, not for drug dealing or any other reason. Petitioner testified that he has never had any trouble with any aide who actually came to the house to work, but did have trouble with aides who came and did not want to work. Petitioner indicated that when he would try to speak to the aides about not working, they would quit or go back to the agency and make up stuff about him. Petitioner testified that [REDACTED] has been working as his aide for over two years, she has never called in sick, and was always willing to work when someone else called in sick. Petitioner indicated that for [REDACTED] to be fired on false accusations was not fair. Petitioner testified that he is a sick man and has enough stress in his life without having to deal with this. Petitioner indicated that he needs people he knows and can trust.

First, it is arguable that the Waiver Agency has taken no action here giving rise to a Medicaid fair hearing. The Code of Federal Regulations (CFR) affords a Medicaid beneficiary a right to a fair hearing when the Department takes an action that is a denial, reduction, suspension, or termination of a requested or previously authorized Medicaid covered service. *42 CFR 438.400*. Here, it could be argued that there has been no denial, reduction, suspension, or termination of a requested or previously authorized Medicaid covered service because self-determination is not really a Medicaid covered service, it is a method through which participants can receive a Medicaid covered service. The Waiver Agency here did not reduce Petitioner's care hours in any way, they just denied his request to receive those services in a certain way. And while the Waiver Agency did not raise this argument, the undersigned Administrative Law Judge (ALJ) thinks the argument has some merit.

However, even if it is determined that self-determination is a Medicaid covered service, based on the above findings of fact and conclusions of law, this ALJ finds that the Waiver Agency properly denied Petitioner's request to hire his former caregiver [REDACTED] through self-determination. As indicated above, "Providers of self-determined services cannot also be the participant's spouse, guardian, legally responsible decision maker, or designated representative." Here, while Petitioner denied that [REDACTED] is his designated representative, he did list her as his authorized hearing representative on the request for hearing filed in this matter. The record also contains evidence that [REDACTED] has interfered with Petitioner's care in the past. (See Exhibit A, pp 10-12). As such, the Waiver Agency's decision was proper and should be upheld.

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 to hire his former caregiver [REDACTED] through self-determination.

IT IS THEREFORE ORDERED that:

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



RM/sb

Robert J. Meade
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

[REDACTED]

Community Health Rep

[REDACTED]

DHHS -Dept Contact

[REDACTED]

DHHS -Dept Contact

[REDACTED]

Authorized Hearing Rep.

[REDACTED]

Petitioner

[REDACTED]