

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]

Date Mailed: August 14, 2020
MOAHR Docket No.: 20-002547
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Colleen Lack

DECISION AND ORDER

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 *et seq*; 42 CFR 438.400 *et seq*; and Mich Admin Code, R 792.11002.

After due notice, a hearing was held on June 9, 2020. [REDACTED], Mother and Guardian, represented the Petitioner. Claire Warner, Special Projects Training Manager, represented the Respondent Department of Health and Human Services' (DHHS) Waiver Agency, Region 2 Area Agency on Aging ("Waiver Agency"). Kara Lorenz-Goings, Assistant Director; Kelly Naughton, Clinical Supervisor; Sarah Wahtola, Registered Nurse (RN) Support Coordinator (SC); and Kathleen Learman, Social Work (SW) SC, appeared as witnesses for Respondent.

During the hearing proceeding, Respondent's Hearing Summary packet was admitted as Exhibit A, pp. 1-43; Petitioner's Hearing Request was admitted as Exhibit 1, pp. 1-17; Petitioner's additional documentation packet dated March 1, 2020 and a May 22, 2020 letter from the family medicine doctor was admitted as Exhibit 2, pp. 1-16; and a March 2, 2020, Person-Centered Plan (PCP) was admitted as Exhibit 3, pp. 1-9.

ISSUE

Did the Waiver Agency properly deny Petitioner's requests for Community Transportation for mileage reimbursement and meals for Petitioner's parents/Guardians transporting her to medical appointments through the MI Choice Waiver program?

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 Medicaid beneficiary and an ongoing recipient of services through the MI Choice Waiver program.
2. Petitioner's parents were her Guardians during the time period relevant to the contested action¹. (Exhibit A, pp. 12 and 28-39; Exhibit 2, p. 1; Exhibit 3, p. 2)
3. Petitioner is a self-determination (SD) participant in the MI Choice Waiver program. (Exhibit A, pp. 27-36)
4. On February 12 and 13, 2020, Petitioner's parents/Guardians requested mileage reimbursement for a medical appointment Petitioner's mother took her to and for appointments going forward. (Exhibit A, p. 40; Exhibit 2, p. 4)
5. On February 14, 2020, the Waiver Agency emailed DHHS regarding whether a MI Choice Waiver participant's parents could be reimbursed for mileage when taking the participant to and from medical appointments through the DHHS field office or the Medical Services Administration (MSA). (Exhibit A, p. 40)
6. On February 17, 2020, an email exchange with the SW SC, in part, discussed the reimbursement for mileage for medical appointment transportation. Petitioner's mother stated it would not make sense to use CLS for this because the CLS staff would not be able to answer the doctor's questions, explain Petitioner's medical history or why she was there. Petitioner's mother noted they are not financially responsible for Petitioner's care, and they are on a fixed income. (Exhibit A, p. 40)
7. On February 17, 2020, Petitioner's mother emailed DHHS regarding whether a guardian can be reimbursed for mileage when transporting a MI Choice Waiver participant to a medical appointment, as well as asking about the meals section of community transportation. (Exhibit 2, p. 13)
8. On February 18, 2020, a Notice of Adverse Benefit Determination was issued stating that the request for mileage reimbursement to Petitioner's parents/Guardians for taking Petitioner to medical appointments would not be authorized. Petitioner's Community Living Supports (CLS) services include transportation costs. When transportation incidental to the provision of CLS is included, the Waiver Agency must not also authorize transportation as a separate waiver service. Further, a participant's preference for a certain provider or agency is not grounds for declining another payer in order to access waiver services. Additionally, community transportation can be authorized, however, when possible the waiver agency must utilize family, neighbors, friends, or community agencies that can provide this service without charge. Petitioner's self-determination worker could also assist in taking her to medical appointments,

¹ The progress notes indicate Petitioner's father was being removed from being Petitioner's Guardian following a May 12, 2020, meeting with the Probate Judge. (Exhibit A, p. 28)

or a back-up SD worker could be hired to assist with taking Petitioner to medical appointments. (Exhibit A, pp. 2-5)

9. On February 25, 2020, DHHS emailed the Waiver Agency and confirmed that if the client is on the MI Choice Waiver, MDHHS will not pay for transportation as it has to come from the Waiver Agency. It was noted that a family member could be paid if the client was not on the MI Choice Waiver, but it has to be authorized and they would have to become a vendor with the State. (Exhibit A, p. 39)
10. On February 25, 2020, DHHS emailed Petitioner's mother stating nothing in the Community Transportation service definition specifically prohibits the mileage reimbursement mentioned, but there are requirements to use other funding sources. Additionally, waiver agencies are allowed to set their own criteria for when meals are reimbursable. (Exhibit 2, pp. 13-14)
11. On March 3, 2020, an email exchange with the RN SC, in part discussed the request for reimbursement for meals for when Petitioner has to travel to appointments. The RN SC indicated she sent the request and would let Petitioner's mother know when she heard back. (Exhibit A, p. 37)
12. Between March 3, 2020, and March 19, 2020, additional email exchanges between the Waiver Agency and Petitioner's mother, in part, address the request for Community Transportation services for mileage reimbursement and meals for transporting Petitioner to medical appointments. (Exhibit A, pp. 34-37)
13. On March 5, 2020, the Waiver Agency received Petitioner's Internal Appeal. (Exhibit A, pp. 6-7)
14. On March 27, 2020, a Notice of Internal Appeal Decision-Denial was issued upholding the denial of community transportation mileage reimbursement as well as the request for meals during community transportation to medical appointments citing several provisions of Attachments N and H to explain the basis of the denial. (Exhibit A, pp. 8-11)
15. On April 24, 2020, the Michigan Office of Administrative Hearings and Rules (MOAHR) received Petitioner's hearing request. (Exhibit 1)

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.

Petitioner 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 the Respondent, 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/IID (Intermediate Care Facility for Individuals with Intellectual Disabilities) and is reimbursable under the State Plan. See 42 CFR 430.25(c)(2).

The MPM references the use of Minimum Operating Standards maintained and published by MDHHS, see MPM, January 1, 2020, version, MI Choice Waiver Chapter, page 26. In support of their determination in the case, the Waiver Agency cited Attachments N and H of those operating standards, specifically:

The goal of arrangements that support self-determination is to provide the means and methods to enable participants to have meaningful lives in their communities. Most people living in their community already have the involvement of family members, friends, coworkers, and these individuals constitute their informal support network. They may also have important relationships with paid support workers or other professionals. Each person's situation and relationships are unique; some people may have more support than others may. Very few people will not have informal supports.

B. The Role of Informal Support

A discussion of possibilities for informal support must start with this legal fact: State law presumes all individuals, regardless of their abilities and disabilities, competent unless there is a legal determination otherwise. That legal determination may be in the form of a guardian or conservator under the Estates and Protected Individuals Act for a person who is determined legally incapacitated. In cases where the person has a legal guardian with authority over contracts, the guardian must be the employer of record. While some people have guardians, many participants in arrangements that support self-determination successfully use informal supports and representatives to assist them in managing their services and supports.

VI. WAIVER AGENCY REQUIREMENTS FOR SD IN LTC

MDHHS has specific requirements for waiver agencies serving participants choosing the SD in LTC option. These requirements help to assure accountability for Medicaid funds, the health and welfare of participants, and to maximize participant control of needed supports and services.

A. Enrolling and Informing Participants

[portions of list omitted by ALJ]

6. An individual worker may not be a legally recognized spouse or guardian of the participant. MDHHS may approve the spouse of the participant's designated representative to be an individual worker upon request from the waiver agency.

*Minimum Operating Standards for MI Choice Waiver Program Services
Attachment N, FY 2020, pages 8-9 and 17
(underline added by ALJ)*

NAME
Community Living Supports

DEFINITION

Community Living Supports facilitate an individual's independence and promote participation in the community. Community Living Supports can be provided in the

participant's residence or in community settings. Community Living Supports include assistance to enable program participants to accomplish tasks that they would normally do for themselves if able. The services may be provided on an episodic or a continuing basis. The participant oversees and supervises individual providers on an on-going basis when participating in self-determination options. These services are provided only in cases when neither the participant nor anyone else in the household is capable of performing or financially paying for them, and where no other relative, caregiver, landlord, community/volunteer agency, or third party payer is capable of or responsible for their provision. When transportation incidental to the provision of community living supports is included, it must not also be authorized as a separate waiver service for the beneficiary.

Limitations

[portions of list omitted by ALJ]

7. The phrase "These services are provided only in cases when neither the participant nor anyone else in the household is capable of performing or financially paying for them, and where no other relative, caregiver, landlord, community/volunteer agency, or third party payer is capable of or responsible for their provision" included in the definition of this service shall be interpreted as follows:

- a. All informal supports must agree to provide the uncompensated (informal) services and supports to the participant as specified in the person-centered service plan. Specifically, the record must show the following:
 - i. All persons providing informal services and supports included on the person-centered service plan are aware of and capable of performing the tasks assigned to them for the benefit of the participant as included in the person-centered service plan.
 - ii. All informal supports agree to any financial liability related to the informal services and supports assigned to them on the person-centered service plan. This includes uncompensated or voluntary transportation of the participant.

- iii. Supports coordinators or other waiver agency staff did not arbitrarily assign the completion of services and supports that could otherwise be included as CLS to informal supporters. Rather, both the participant (or their responsible party) and the informal support agree in writing (by their signature on the person-centered service plan) to the provision of the identified services and supports as discussed during a person-centered planning meeting.
- b. Relatives, caregivers, landlords, community or volunteer agencies, or other third-party payers have been contacted on behalf of the participant and agree to provide services and supports to the participant because they are both capable of and responsible for the provision of the identified services and supports. This agreement is noted by an authorized signature on the person-centered service plan from a representative of the entity identified as responsible for the services and supports.

NAME

Community Transportation

DEFINITION

The Community Transportation (CT) service combines non-emergency medical transportation and non-medical transportation into one transportation service.

Community Transportation (CT) services are offered to enable waiver participants to access waiver and other community services, activities, and resources as specified in the individual plan of services.

The CT service may also be utilized for expenses related to transportation and other related travel expenses determined necessary to secure medical examinations/appointments, documentation, or treatment for participants.

Delivery services for medical items, such as medical supplies or prescriptions, should be utilized before authorizing CT services through the MI Choice program.

Minimum Standards for Traditional Service Delivery

1. Community Transportation includes expenses for transportation and other related travel expenses determined necessary to secure medical examinations, documentation, treatment, or non-medical community activities, outings and resources for a MI Choice participant. Waiver agencies will ensure MI Choice participants have access to transportation as needed to obtain medical services and other non-medical activities.
2. CT includes, but is not limited to, transportation to obtain the following medical services:
 - a. Chronic and ongoing treatment,
 - b. Prescriptions,
 - c. Medical supplies and devices,
 - d. One time, occasional and ongoing visits for medical care, and
 - e. Services received at a Veteran Affairs hospital.
3. Travel expenses related to the provision of CT include:
 - a. The cost of transportation for the MI Choice participant by wheelchair vans, taxis, bus passes and tickets, secured transportation containing an occupant protection system that addresses safety needs of disabled or special needs individuals, and other forms of transportation,
 - b. Mileage reimbursement for individuals or volunteers with a valid driver's license utilizing personal vehicles to transport the MI Choice participant,
 - c. The cost of meals and lodging en route to and from medical care, and while receiving medical care,
 - d. The cost of an attendant to accompany the MI Choice participant, if necessary and not billed as a separate service,
 - e. The cost of the attendant's transportation, meals, and lodging, while assisting the participant who is traveling for medical care and
 - f. The attendant's salary, if the attendant is not a volunteer or a member of the MI Choice participant's family or reimbursed as a

separate MI Choice service (such as CLS) provider.

4. Each direct service provider must have written policies and procedures compatible with the "General Operating Standards for Waiver Agencies and Contracted Direct Service Providers," and minimally, Section B of the "General Operating Standards for MI Choice Waiver Providers."
5. Waiver agencies may authorize CT as a MI Choice service for waiver participants. However, when possible, the waiver agency must utilize family, neighbors, friends, or community agencies that can provide this service without charge.
6. When authorizing CT, waiver agencies are to authorize the least expensive available means suitable to the participant's needs.
7. Waiver agencies may only authorize CT to provide transportation assistance to the participant. The participant must travel away from home to other locations within the community. CT does not include reimbursement for caregivers of the participant to run errands or otherwise travel on behalf of the participant.
8. The Secretary of State must appropriately license all drivers and vehicles used for CT. The provider must cover all vehicles used with insurance as required by law.
9. Each provider must operate in compliance with P.A. 1 of 1985 regarding seat belt usage.
10. Additionally, delivery services for medical items, such as medical supplies or prescriptions, should be utilized before authorizing CT through the MI Choice program.
11. Waiver agencies must use the SC modifier when billing for ancillary items that are only available for specific medically-related travel. This includes meals (A0190, A0210), lodging (A0180, A0200), and waiting time for air ambulances and non-emergency vehicles (T2007).
12. Waiver agencies may utilize a process to prior authorize requests for the following:
 - a. All outstate travel that is non-borderland for medical treatment.
 - b. Overnight stays if within 50 miles one-way from the participant's home for medical treatment.

- c. Overnight stays beyond five nights, including meals and lodging when traveling for medical treatment.
- d. An attendant in addition to the driver of a wheelchair lift/medivan vehicle.
- e. Mileage and meal expenses for daily long-distance trips for medical treatment.

Minimum Standards for Self-Determined Service Delivery

- 1. Each chosen provider must minimally comply with standards for Traditional Service Delivery specified above.
- 2. Volunteer drivers do not need to comply with standard 9 of the Minimum Standards for Traditional Service Delivery specified above. Volunteer drivers are those drivers who only seek reimbursement for mileage when furnishing CT.

Limitations

- 1. Where applicable, the participant must use other available payers or non-cost transportation first.
- 2. When the costs of transportation are included in the provider rate for another waiver service (e.g., Adult Day Health or CLS), there must be mechanisms to prevent the duplicative billing of CT.
- 3. The participant's preference for a certain provider or agency is not grounds for declining another payer in order to access waiver services.
- 4. Waiver agencies must not authorize MI Choice CT services to reimburse caregivers (paid or informal) to run errands for participants when the participant does not accompany the driver in the vehicle. The purpose of the CT service is to enable MI Choice participants to gain access to medical services and community activities/outings.
- 5. Reimbursement for CT DOES NOT include the following:
 - a. Waiting time unless for an air ambulance or non-emergency vehicle. *exceptions apply – Refer to item 6
 - b. Transportation for medical services that have already been provided
 - c. Transportation costs to meet a participant's personal choice of provider for routine medical care outside the community when comparable

care is available locally. Participants are encouraged to obtain medical care in their own community unless referred elsewhere by their local health care professional.

- d. Reimbursement for meals or lodging when the purpose of travel is not related to the receipt of Medicaid-covered medical services. Meals and lodging are only reimbursed when the participant and attendant are traveling to seek Medicaid-covered medical services.
6. Waiting times may be covered if built into the transportation reimbursement rate. Waiting times are also covered if the participant cannot wait for the transportation vehicle after outings due to medical conditions (i.e., cannot stay in wheelchair for long periods of time due to swelling or pain, etc.).
7. All paid drivers for transportation providers supported entirely or in part by MI Choice funds must be physically capable and willing to assist persons requiring help to and from and to get in and out of vehicles. The provider must offer such assistance unless expressly prohibited by either a labor contract or insurance policy.
8. The provider must train all paid drivers for transportation programs supported entirely or in part by MI Choice funds to cope with medical emergencies, unless expressly prohibited by a labor contract or insurance policy.
9. Each waiver agency and provider must attempt to receive reimbursement from other funding sources, as appropriate and available before utilizing MI Choice funds for transportation services. Examples include the American Cancer Society, Veterans Administration, MDHHS Field Offices, MDHHS Medical Services Administration, United Way, Department of Transportation programs, etc.

[remainder of list omitted by ALJ]

*Minimum Operating Standards for MI Choice Waiver Program Services
Attachment H, FY 2020, pages 24 and 28-33*

On February 12 and 13, 2020, Petitioner's parents/Guardians requested mileage reimbursement for a medical appointment Petitioner's mother took her to and for appointments going forward. (Exhibit A, p. 40; Exhibit 2, p. 4)

The March 27, 2020, Notice of Internal Appeal Decision-Denial upholding the denial of community transportation mileage reimbursement as well as the request for meals during community transportation to medical appointments referenced several provisions in Attachments N and H to explain the determination. (Exhibit A, pp. 8-11) Attachment H addresses several other factors that would be considered in reviewing a request for community transportation services, including: whether the service could be provided by informal supports, another authorized service (CLS), or other community resources; whether the transportation had already been provided; and whether comparable care was available locally. However, Attachment N is definitive regarding the contested action. Attachment N is applicable because Petitioner is a self-determination participant. A Guardian is not allowed to be a worker for a self-determination participant. Therefore, Petitioner's mother/father could not be reimbursed for mileage/meals when transporting Petitioner to medical appointments because they were her Guardians. It is noted that in the emails between Petitioner's mother and DHHS, it was not specified that the individual was a self-determination participant in the MI Choice Waiver. Accordingly, the question and response did not consider the Attachment N prohibition regarding Guardians being workers for self-determination participants. (Exhibit 2, pp. 13-14)

Petitioner bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in their determination to deny the request for Community Transportation for mileage reimbursement and meals for Petitioner's parents/Guardians transporting her to medical appointments. Given the record in this case, the undersigned Administrative Law Judge finds that Petitioner has not met that burden of proof. At all times relevant to the contested action, Petitioner's parents were her Guardians and Petitioner was a self-determination participant. Therefore, Petitioner's parents could not be reimbursed for mileage/meals when transporting Petitioner to medical appointments pursuant to Attachment N. Accordingly, the Waiver Agency's determination to deny Petitioner's requests for Community Transportation for mileage reimbursement and meals for Petitioner's parents/Guardians transporting her to medical appointments through the MI Choice Waiver program is upheld.

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 requests for Community Transportation for mileage reimbursement and meals for Petitioner's parents/Guardians transporting her to medical appointments through the MI Choice Waiver program based on the available information.

IT IS THEREFORE ORDERED that:

The Waiver Agency's determination is **AFFIRMED**.

CL/dh


Colleen Lack
Administrative Law Judge
for Robert Gordon, 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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139

DHHS Department Rep.

Heather Hill
400 S. Pine 5th Floor
Lansing, MI 48933

Authorized Hearing Rep.

[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]

Community Health Rep

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DHHS -Dept Contact

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