[redacted]
[redacted]
[redacted], MI [redacted]

Date Mailed: May 3, 2021
MOAHR Docket No.: 21-001057
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, 42 CFR 431.200 *et seq*. and 42 CFR 438.400 *et seq*. upon Petitioner's request for a hearing.

After due notice, a telephone hearing was held on April 27, 2021. Attorney Simon Zagata, Disability Rights Michigan, appeared on Petitioner's behalf. Petitioner [redacted] and [redacted], Petitioner's mother, appeared as witnesses.

Kimberly Motter, Director of Quality Assurance, appeared and testified on behalf of the Department's Waiver Agency, Reliance Community Care Partners (Waiver Agency or Reliance)

EXHIBITS

Petitioner's Exhibits:

Exhibit 1: Person Centered Plan, dated August 25, 2020

Exhibit 2: Confirmation of Service, dated November 18, 2020

Exhibit 3: Request for Hearing, dated March 3, 2021

Respondent's Exhibits:

Exhibit A: Hearing Summary, dated April 16, 2021

ISSUE

Did the Waiver Agency properly authorize and provide Petitioner's Community Living Supports (CLS), Respite, and Private Duty Nursing (PDN)?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:[1]

1. The Department contracts with the Waiver Agency to provide MI Choice Waiver services to eligible beneficiaries. (Exhibit A, Testimony)

2. The Waiver Agency 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, [redacted], is [redacted] years old. (Exhibits A, 1, 2; Testimony)

4. Petitioner's primary diagnosis is quadriplegia. (Exhibits A, 1, 2; Testimony)

5. Petitioner has a nursing facility level of care need. (Exhibits A, 1, 2; Testimony)

6. Petitioner is a MI Choice Waiver recipient. (Exhibits A, 1, 2; Testimony)

7. Under the MI Choice Waiver, Petitioner qualifies for Community Living Support (CLS), respite, and nursing services. (Exhibits A, 1, 2; Testimony)

8. Via the person-centered planning process, Reliance Community Care Partners (RCCP) authorized 119 hours a week of CLS and 35 hours a week of nursing services for Petitioner as medically necessary. (Exhibits A, 1, 2; Testimony)

9. Petitioner needs full assistance with meal preparation, housework, transportation, transferring, dressing, toileting, personal hygiene and bathing. (Exhibits A, 1, 2; Testimony)

10. Petitioner needs catherization twice a day, completion of a bowel program twice a day, bladder management, medication administration and administration, vital sign monitoring and reporting, and skin assessments and reporting. (Exhibits A, 1, 2; Testimony)

11. Someone must reposition Petitioner throughout the night. (Exhibits A, 1, 2; Testimony)

12. As a wheelchair user, Petitioner is at high risk of developing pressure sores and/or ulcers. (Exhibits A, 1, 2; Testimony)

[1] Petitioner's Proposed Findings of Fact dated April 14, 2021 are also included in these Findings of Fact and are adopted in their entirety.

13. Petitioner's bladder and bowel needs are a condition that could easily deteriorate if not completed promptly and correctly. (Exhibits A, 1, 2; Testimony)

14. Petitioner currently receives only 80 CLS hours a week. (Exhibits A, 1, 2; Testimony)

15. His mother provides 40 of those CLS hours through a provider agency. (Exhibits A, 1, 2; Testimony)

16. Petitioner's CLS workers are paid $12/hour[2] (Exhibits A, 1, 2; Testimony)

17. On March 3, 2021, Petitioner's request for hearing was received by the Michigan Office of Administrative Hearings and Rules. (Exhibit 3)

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.

Here, 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 Health and Human Services (MDHHS). 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

[2] During the COVID-19 pandemic, Petitioner's Waiver Agency receives an extra $2.25 per hour to provide to its direct caregivers.

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).

According to 42 CFR 440.180(b), 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.

With regard to Community Living Supports, the Medicaid Provider Manual provides in pertinent part:

4.1.H. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) facilitate an individual's independence and promote participation in the community. CLS can be provided in the participant's residence or in community settings. CLS include assistance to enable 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 ongoing basis when participating in self-determination options. Tasks related to ensuring safe access and egress to the residence are authorized 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 CLS is included, it shall not also be authorized as a separate waiver service for the participant. Transportation to medical appointments is covered by Medicaid through MDHHS.

CLS includes:

- Assisting, reminding, cueing, observing, guiding and/or training in household activities, ADL, or routine household care and maintenance.

- Reminding, cueing, observing and/or monitoring of medication administration.

- Assistance, support and/or guidance with such activities as:

  - Non-medical care (not requiring nurse or physician intervention) – assistance with eating, bathing, dressing, personal hygiene, and ADL;

  - Meal preparation, but does not include the cost of the meals themselves;

  - Money management;

  - Shopping for food and other necessities of daily living;

  - Social participation, relationship maintenance, and building community connections to reduce personal isolation;

  - Training and/or assistance on activities that promote community participation such as using public transportation, using libraries, or volunteer work;

  - Transportation (excluding to and from medical appointments) from the participant's residence to community activities, among community activities, and from the community activities back to the participant's residence; and

  - Routine household cleaning and maintenance.

- Dementia care including, but not limited to, redirection, reminding, modeling, socialization activities, and activities that assist the participant as identified in the individual's person-centered plan.

- Staff assistance with preserving the health and safety of the individual in order that he/she may reside and be supported in the most integrated independent community setting.

- Observing and reporting any change in the participant's condition and the home environment to the supports coordinator.

These service needs differ in scope, nature, supervision arrangements, or provider type (including provider training and qualifications) from services available 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.

CLS services cannot be provided in circumstances where they would be a duplication of services available under the State Plan or elsewhere. The distinction must be apparent by unique hours and units in the approved service plan.

Medicaid Provider Manual
MI Choice Waiver Section
January 1, 2021, pp 14-15

The MI Choice Waiver Program is a Medicaid-funded program and its Medicaid funding is a payor of last resort. In addition, Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services. *42 CFR 440.230.* To assess what MI Choice Waiver Program services are medically necessary, and therefore Medicaid-covered, the Waiver Agency performs periodic assessments.

Petitioner bears the burden of proving, by a preponderance of evidence, that the Waiver Agency erred in authorizing and/or delivering his medically necessary services.

Respondent's Director of Quality Assurance (DQA) testified that Petitioner's request for current services came to the Waiver Agency in August 2020 but was not handled properly by the Waiver Agency at that time. Respondent's DQA testified, however, that following an Internal Appeal, Petitioner's services as requested were approved and authorized. Respondent's DQA testified that specifically Petitioner is approved for 119 CLS hours and 35 PDN hours per week.[3] Respondent's DQA indicated that since that time though the Waiver Agency has not been able to fully staff Petitioner's CLS hours and, while the PDN hours are fully staffed, the Waiver Agency has not been able to find a back-up PDN provider. Respondent's DQA testified that the staffing issues are widespread throughout the 12-county area served by the Waiver Agency. Respondent's DQA indicated that it is difficult to find workers, even with the additional $2.25 being provided through the Cares Act. Respondent's DQA also indicated that it is

[3] The issue of Petitioner's respite did not come up during the hearing.

difficult in Petitioner's case because of the time of day Petitioner needs the services. Respondent's DQA testified that the only option the Waiver Agency sees at this time is self-determination, where Petitioner finds and hires his own caregivers.

On cross-examination, Respondent's DQA testified that Petitioner was approved for his current level of services in October 2020, and she was unsure who was providing Petitioner's hours prior to that time, except for Petitioner's mother. Respondent's DQA indicated that the increased amount people can receive via unemployment during the COVID pandemic has also led to difficulty finding and keeping staff. Respondent's DQA testified that the Waiver Agency has used Cares Act money to try to identify and locate more workers as well the increased $2.25 per hour in wages that is supposed to go directly to caregivers. Respondent's DQA testified that the Waiver Agency is currently doing an audit to ensure that Agency providers are paying that entire $2.25 directly to caregivers, as opposed to taking any of the funds for administrative costs. Respondent's DQA noted that she also believes the legislature is involved in trying to increase the overall capitation rate paid to Waiver Agencies. Respondent's DQA testified that it is also difficult to find a back-up nurse for Petitioner's PDN because hospitals are paying so well during the pandemic. Respondent's DQA testified that the Waiver Agency pays providers $20.00 per hour but she cannot speak directly to how much each provider agency pays its workers. Respondent's DQA testified that providers have reported similar problems finding help and the Waiver Agency has held focus groups in an attempt to deal with the problem. Respondent's DQA noted that someone can make more working at McDonalds then they can working as a caregiver.

Petitioner testified that he has been receiving services for some time now, although he could not recall exactly when those services started. Petitioner indicated that his CLS and PDN workers help him with a wide range of things, including dressing, showering, shaving, cathing, range or motion, feeding, laundry and transportation. Petitioner testified that his end goal is to be independent, self-sufficient and a contributing member of society. Petitioner indicated that he currently lives in an apartment attached to his parent's home but would ideally like to live on his own. Petitioner testified that he graduated with a BA in cyber security last year and has obtained a job with the federal government. Petitioner indicated that he needs reliable care, and back up care, in order to meet his goals.

Currently, Petitioner indicated that his CLS is being provided by his parents, who each are paid for 40 hours of CLS per week, leaving 39 hours of CLS unstaffed each week. Petitioner testified that having his parents as his CLS workers is not ideal and even if it were ideal, they are getting older and will not be able to provide the care forever. Petitioner testified that he is 6'4" tall, so it is not easy to care for him.

Petitioner's mother described the care that she provides to Petitioner, beginning with removing his splints in the morning, performing range of motion exercises, cathing, bathing, dressing and feeding Petitioner. Petitioner's mother indicated that each day is a little bit different, but involves all of those tasks, plus general housekeeping, cooking, doing dishes, administering medications, and performing paperwork for the provider agency. Petitioner's mother testified that she has been working as Petitioner's CLS

worker for approximately 3.5 years. Petitioner's mother indicated that the work is not easy physically and she has seen women half her age leave the job because it is so difficult. Petitioner's mother testified that you are on your feet all day and transferring Petitioner is very difficult and has resulted in putting her back out and dislocated ribs. Petitioner's mother testified that she received training on caring for Petitioner when he was in the hospital following his accident and when Petitioner was fully ventilated.

Petitioner's mother testified that she has worked as a lab technician in the past and earned $13.00 over 30 years ago as a lab tech. Petitioner's mother testified that she started working through Petitioner's current provider agency in 2019, that there was no training provided, and, if anything, she trained provider agency workers. Petitioner's mother testified that if she did not have to care for Petitioner, she does have opportunities to make much more money working as a lab tech, in a medical office, or as a private tutor as she homeschooled all of her children. Petitioner's mother noted that she would also be entitled to benefits in those other jobs, benefits she does not receive as Petitioner's CLS worker.

Petitioner's mother testified that she has talked to other caregivers in the industry about why they leave the job, and it is mostly because there are opportunities to make more money elsewhere. Petitioner's mother indicated that some people have a calling to be a direct caregiver, but those individuals are few and far between. Petitioner's mother noted that wealthier people also pay caregivers a higher rate directly in order to get the best care. Petitioner's mother testified that she serves as Petitioner's CLS worker because she loves her son and wants the best for him. Petitioner's mother indicated that Petitioner's doctors and nurses comment on the good care she provides Petitioner, and she knows he would not get as good care in an institution. Petitioner's mother testified that she and her husband are paid for 40 hours each of CLS but that they provide the other 39 hours, and more, unpaid.

Petitioner argues that the Waiver Agency's failure to provide all of Petitioner's CLS relates to the pay rate the Waiver Agency pays to its provider agencies and that rate must be increased in order to ensure that Petitioner's CLS hours are fully staffed. Petitioner argues that the pay rate paid to caregivers must be a minimum of $15.00 per hour, regardless of what rate the Waiver Agency pays the provider agency.

Respondent argues that they would like to pay providers more, but they simply do not have the funds to do so. Respondent argues that currently only 15% of the money it receives through the state goes to administrative costs and 85% goes directly to patient care. Respondent argues that its Waiver Agency is not unusual in this regard and that they actually pay more than most Waiver Agencies in the state. Respondent argues that this is a systematic problem with Medicaid that must be addressed through increased capitation payments to Waiver Agencies from the state. Respondent argues that they have taken no negative action in this case because Petitioner's services are authorized at a medically necessary level.

Petitioner bears the burden of proving by a preponderance of the evidence that the Waiver Agency has improperly authorized and/or provided his CLS, PDN and respite.

Based on the evidence presented, Petitioner has proven by a preponderance of the evidence that the Waiver Agency has failed to provide all of the CLS authorized in Petitioner's Plan of Service (POS).

While Petitioner's authorization for CLS, PDN and respite is adequate to meet his medically necessary needs, the Waiver Agency has failed to actually provide this adequate level of service to Petitioner due to a lack of caregivers. And, while Respondent argues that it has taken no negative action because Petitioner's services are properly authorized, the Waiver Agency must both authorize and deliver all medically necessary services to Medicaid beneficiaries. The Waiver Agency has failed to do so in this case, so the Waiver Agency's actions must be reversed. While there may be legitimate reasons why the Waiver Agency cannot properly fulfill Petitioner's CLS, that does not excuse Respondent's responsibility to do so.

Therefore, based on the evidence presented, Petitioner has proven by a preponderance of the evidence that the Waiver Agency's actions were improper. The Waiver Agency must ensure that Petitioner receives all of the services authorized under Petitioner's IPOS.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency's actions were improper.

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision is REVERSED.

Within 10 days of the issuance of this Decision and Order, the Waiver Agency must certify that it has taken all steps necessary to deliver Petitioner's authorized CLS, PDN and respite.

RM/sb

Robert J. Meade
Administrative Law Judge

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 -Dept Contact	Heather Hill CCC 5th Floor Lansing, MI 48909 **HillH3@michigan.gov**
DHHS -Dept Contact	Brian Barrie CCC 7th Floor Lansing, MI 48919 **barrieb@michigan.gov**
DHHS -Dept Contact	Elizabeth Gallagher 400 S. Pine 5th Floor Lansing, MI 48909 **gallaghere@michigan.gov**
Community Health Rep	Reliance Community Care Partners Kim Motter 2100 Raybrook St SE #203 Grand Rapids, MI 49546 **Kim.Motter@relianceccp.org**
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