



Minnesota Department of **Human Services**

**DECISION OF
STATE AGENCY
ON APPEAL**

In the Appeal of: [REDACTED]
For: Medical Assistance – Developmental Disabilities Waiver Program
Agency: [REDACTED] County
Docket: 187799

On February 15, 2017, and March 15, 2017, Human Services Judge Ngoc Nguyen held evidentiary hearings under Minn. Stat. § 256.045, subd. 3.

The following persons appeared at the hearings:

[REDACTED], Appellant’s Mother and Authorized Representative;
[REDACTED], Case Manager; and
[REDACTED], Adults and Disability Unit Supervisor.

The Human Services Judge, based on the evidence in the record and considering the arguments of the parties, recommends the following Findings of Fact, Conclusions of Law, and Order.

STATEMENT OF ISSUE

The issue raised in this appeal is:

Whether the Agency properly assessed Appellant's needs in its annual Developmental Disabilities Waiver reassessment, which resulted in a reduction in his Consumer Directed Community Supports budget from \$67,050 to \$45,449.80.

FINDINGS OF FACT

1. *Procedural History.*

a. On January 10, 2017, ██████ County ("Agency") sent a Notice of Action to Appellant's mother and authorized representative, ██████, informing her that Appellant's Consumer Directed Community Supports ("CDCS") budget would be decreased. *Exhibit 1.* In response, Ms. ██████ submitted a request for a fair hearing on behalf of Appellant, which was received by the Appeals Office on January 10, 2017. *Exhibit 2.*

b. On February 15, 2017, Human Services Judge Ngoc Nguyen held an evidentiary hearing by telephone conference. The Judge accepted into the record one exhibit from Appellant and one exhibit from the Agency. At that time, Ms. ██████ requested a continuance in order to have another assessment. The hearing was continued to accommodate the request.

c. On February 22, 2017, a second MnChoices assessment was conducted at Appellant's home.

d. On March 15, 2017, the Human Services Judge held a second evidentiary hearing. The record remained open until the end of the day to allow the agency to submit the updated assessment. A total of four exhibits were accepted into the record.¹

2. *Appellant.* ██████ ("Appellant") is 22 years old and lives with his parents, ██████ and ██████. *Testimony of ██████.* He is diagnosed with Autism, developmental and cognitive disorder, and he is non-verbal. Appellant uses 6-10 signs and sometimes uses picture cards. Ms. ██████ is also Appellant's authorized representative. Appellant has a developmental disability and is a participant in the Medical Assistance Developmental Disabilities Waiver ("DD Waiver") program. *Testimony of ██████, Exhibit 1, Exhibit 3.*

3. *DD Waiver Assessment.*

¹Exhibit 1 – Agency Appeals Summary with attachments A-C: (A) Screening Report; (B) MnChoices Assessment Report; (C) Statutes; Exhibit 2 – Appeal; Exhibit 3 – February 22, 2017.

a. Appellant's DD Waiver services have been and continue to be administered through ██████ County. On December 16, 2016, an annual DD assessment of Appellant's needs was conducted face-to-face. This reassessment used the relatively new MnCHOICES assessment tool, which differs in some respects from the DD Screening Document used for Appellant's previous assessment three years prior. *Testimony of* ██████.

b. Both assessment tools require the assessor to rank Appellant's level of need in numerous areas, such as mobility, communication, living skills, and behaviors. *Exhibit 1, 3*. The assessment combines all waiver screening. Answers are entered into a system and are provided a weight. The system then determines a budget. *Testimony of* ██████.

c. The assessment on December 16, 2016 determined Appellant's CDCS budget as \$45,449.80. *Testimony of* ██████. After the reassessment on February 22, 2017, the budget increased and determined to be \$48,347.90. The agency does not know why there was a decrease from the budget previously of \$67,050. *Id.*

4. ***Areas of Disagreement.***

a. Ms. ██████ disagreed with the agency's determination that Appellant is not a participant of the Bowel Program. *Testimony of* ██████. Ms. ██████ reported that Appellant's bowel movements are monitored. His supplements and diet are adjusted as needed. No enema is used. *Id.*

b. Ms. ██████ disagreed with the agency's assessment that Appellant has "some" expressive communication and uses single signs or gestures to express wants and needs. Ms. ██████ reported that Appellant does know some signs; however he uses it inconsistently and incorrectly often. She asserted that his expressive language is not functional. *Id.*

c. Ms. ██████ disagreed with the use of the MnChoices assessment tool. *Id.* She reported that Appellant is in need of 24 hours of care and 16 hours of awake supervision. *Testimony of* ██████. There is a need for two people to supervise during Appellant's waking hours. Wages alone for Appellant's care is \$61,320. Ms. ██████ reviewed group homes and the cost was over \$66,000

CONCLUSIONS OF LAW

1. ***Jurisdiction.*** This appeal is timely and the Commissioner of Human Services has jurisdiction over its subject matter, pursuant to Minnesota Statute 256.045, subdivision 3.

2. ***Burden of Persuasion.*** In an administrative appeal, the burden of persuasion is governed by state or federal laws that apply to the hearing. *Minn. Stat. § 256.0451, subd. 17*. When there is no specific burden of persuasion provision, the party

seeking that a certain action be taken must prove the facts at issue by a preponderance of the evidence. *Id.* Therefore, in this appeal involving the reduction of Appellant’s CDCS budget, the Agency proposing the reduction has the burden of showing why its determinations were correct.

3. ***Medical Assistance Waivers.*** The Minnesota Department of Human Services has authorization from the federal government to offer services exceeding the scope and limitations of the standard Minnesota Medicaid program, known as Medical Assistance. *Minn. Stat. § 256B.49; 42 U.S.C. §§ 1396 et seq.* The authorized federal waivers are intended to avoid institutionalization, to not exceed the cost of institutionalization, and to make broader services available to address recipient needs unmet by Medical Assistance. *Id.* These home and community-based waiver programs include the DD Waiver program that Appellant participates in.

4. ***DD Waiver Purpose and Eligibility.***

a. The DD Waiver program provides home- and community-based services that promote the optimal health, independence, safety and integration of persons who would otherwise require the level of care provided in an intermediate care facility. *Minnesota Department of Human Services Community-Based Services Manual (“CBS Manual”).*²

b. In addition to requiring the level of care described above, eligibility for the DD Waiver requires that the individual:

- is eligible for Medical Assistance based on a disability diagnosis;
- has a developmental disability or related condition;
- require daily interventions and services, and a 24-hour plan of care;
- needs a residential habilitation service;
- has chosen waiver services instead of intermediate care facility services; and
- has an assessed need for supports and services over and above those available through the Medical Assistance State Plan.

CBS Manual – DD Waiver.

5. ***Reassessments.***

a. The Agency administering a recipient’s DD Waiver must conduct at least annual reassessments of the individual’s needs. In addition, the plan for serving the individual under the Waiver must be reviewed more often than annually if necessary to meet his needs and preferences. Put simply, the reassessment process involves reviewing the recipient’s circumstances and needs, and assigning values for each of those circumstances and needs. *CBS Manual – BI, CAC, CADI and DD Waiver General*

² The Community-Based Services Manual can be accessed from the Minnesota Department of Human Services website at <http://mn.gov/dhs>. Specifically, select “General Public”, then “Publications, forms and resources”, then “Manuals”, and then “Community-Based Services Manual”.

Process and Procedures.

b. Prior to 2015, DD Waiver assessments and reassessments of needs were done using the DD Screening Document (DHS Form 3067). Beginning in September 2015, however, counties began using the MnCHOICES assessment tool for DD Waiver reassessments. (█████ County began using MnCHOICES for new DD Waiver assessments in the Fall 2014.) According to DHS, MnCHOICES was created as an assessment tool in order to provide greater consistency in eligibility determinations, and to allow for the use of a single, comprehensive tool to determine needs and develop support plans across age, ability and financial statuses.³

6. CDCS Budget.

a. Among the services that can be authorized through the DD Waiver are Consumer Directed Community Supports. *CBS Manual – DD Waiver*. The CDCS service option provides the recipient with more flexibility and responsibility for directing his services and supports, including hiring and managing direct care staff. *CBS Manual – Consumer Directed Community Supports*. Those who receive CDCS services receive individual budgets that include the costs of all authorized waiver services. *Id.*

b. The CDCS budget amount is issued annually by DHS, while the Agency is responsible to inform the recipient of his available budget. Based in part on the budget, the Agency develops a person-centered Community Support Plan that includes costs for services up to the annual CDCS budget amount. *Consumer Directed Community Supports Lead Agency Operations Manual (“CDCS Manual”) § 4.4.*⁴

c. Reassessments may change the CDCS budget, in which case the Agency must inform the recipient of the new amount. If the budget is increased, the recipient should determine whether there are currently unmet needs and if so, revise the Community Support Plan and submit to the lead agency for approval and/or re-authorization. If the budget decreases, and is less than the amount currently authorized, the recipient must determine changes to services or supports within the new budget amount. *CDCS Manual § 4.4.*

d. As required by the legislature, DHS updated its process for determining DD Waiver recipients’ CDCS budgets in 2004. The process was approved by the federal government and went into effect that year. The creation of the budgeting process involved reviewing services commonly needed by DD Waiver recipients, determining the costs of those services, and determining how the costs fluctuate based on the level of need of an individual for those services. Put another way, the process recognizes that services related to some needs are much more costly than services related to other needs, and that within a given area of need, there is variation of the acuteness of

³ See, *MnCHOICES Fact Sheet, DHS Form 6477*, at <https://edocs.dhs.state.mn.us/lfsrserver/Public/DHS-6477-ENG>.

⁴ The Consumer Directed Community Supports Lead Agency Operations Manual can be accessed from the Minnesota Department of Human Services website at <http://mn.gov/dhs>. Specifically, select “General Public”, then “Publications, forms and resources”, then “Manuals”, and then “C Consumer Directed Community Supports Lead Agency Operations Manual”.

that need for each individual. In short, the process attempts to provide similar budgets to those with similar needs. *Developmental Disability Waiver Consumer-Directed Services Budget Formula.*⁵

e. To be more specific, the budget formula referenced above assigns daily budget dollar amounts to each area of potential need for a DD Waiver recipient. The daily dollar amount is then multiplied by the level of need. For example, the daily dollar amount for “property destruction” is \$5.63. Someone with a level of need of 1 (meaning mild) would have \$5.63 per day added to their budget, in order to help pay for services to address that need. Someone with a level of need of 5 (meaning very severe) would have \$28.15 per day added to their budget (\$5.63 multiplied by 5). Someone who did not exhibit that need at all would not have their budget changed by this area. *Developmental Disability Waiver Consumer-Directed Services Budget Formula.*

7. **Conclusion.**

a. In this case, there is no dispute regarding Appellant’s eligibility for the DD Waiver or for CDCS services. Instead, the dispute centers on the use of the MnCHOICES tool and the resulting budget. Ms. [REDACTED] also disagreed with the determination that Appellant is involved in the Bowel Program and has limited expressive language. In review of information, I find that the agency was correct in its assessment that Appellant is not a participant of the Bowel Program. The Program is specific to those who cannot eliminate bowels due to neurological issues and have ongoing bowel management and prescribed by a physician. In Appellant’s case, he is not participating in a program prescribed by his physician. I also agree that Appellant has limited expressive language. Although he is familiar with only 6-10 signs, he is able to use them. I have carefully reviewed this in light of the assessment selections made by the Agency during the reassessment. The budget appears to be correct and without irregularities, based on the inputs that resulted from the reassessment.

b. Turning to the reassessment itself, besides those two questions, Ms. [REDACTED] acknowledged that Appellant’s current level of need within each category that resulted in a budget decrease was accurate at the time of the evidentiary hearings.

c. Finally, while Ms. [REDACTED] disagrees with the impact of the MnCHOICES assessment tool as it relates to Appellant, I do not have the authority to override this federally-approved and legislatively-mandated process. As a tool that is designed to work across age, income and ability, it is unsurprising that it will not satisfy all waiver recipients, and Ms. [REDACTED] raised legitimate concerns about its limitations for her son. Representatives of the county agency appeared to take these concerns very seriously, and committed to working with Ms. [REDACTED] to help ensure that Appellant is well-served under the waiver.

d. In summary, because the assessment appears to have been done accurately the second time, to have accounted for Appellant’s needs at the time of

⁵ This document can be found at <http://mn.gov/dhs>, by entering 029336 (the document number) into the search field.

assessment, and to have resulted in the correct budget amount, the Agency's determination of the budget amount of \$48,347.90 is correct. The initial budget amount of \$45,559.80 is reversed.

RECOMMENDED ORDER

THE HUMAN SERVICES JUDGE RECOMMENDS THAT the Commissioner of Human Services REVERSE the Agency's initial assessment of Appellant's needs in its annual DD Waiver reassessment, and the resulting CDCS budget decrease from \$67,050 to \$45,449.80. The correct amount is based on the second assessment in the amount of \$48,347.90.

Ngoc Nguyen
Human Services Judge

Date

ORDER OF THE COMMISSIONER

IT IS THEREFORE ORDERED THAT based upon all the evidence and proceedings, the Commissioner of Human Services adopts the Human Services Judge's recommendation as the Commissioner's final decision.

FOR THE COMMISSIONER OF HUMAN SERVICES:

Date

cc: , Appellant's Representative
 County Social Services
, Minnesota Department of Human Services

FURTHER APPEAL RIGHTS

This decision is final, unless you take further action.

Appellants who disagree with this decision should consider seeking legal counsel to identify further legal recourse.

If you disagree with this decision, you may:

- **Request the Appeals Office reconsider this decision.** The request must state the reasons why you believe your appeal should be reconsidered. The request may include legal arguments and may include proposed additional evidence supporting the request; however, if you submit additional evidence, you must explain why it was not provided at the time of the hearing. The request must be *in writing*, be made *within 30 days of the date of this decision*, and a *copy of the request must be sent to the other parties*. Send your written request, with your docket number listed, to: *Appeals Office, Minnesota Department of Human Services, P.O. Box 64941, St. Paul, MN 55164-0941*. You may also fax the request to (651) 431-7523.
- **Start an appeal in the district court.** This is a separate legal proceeding that you must start *within 30 days of the date of this decision*. You start this proceeding by serving a written copy of a notice of appeal upon the Commissioner and any other adverse party of record, and filing the original notice and proof of service with the court administrator of the county district court. The law that describes this process is Minnesota Statute § 256.045, subdivision 7.⁶

⁶ County agencies do not have the option of appealing decisions about Supplemental Nutrition Assistance Program (SNAP), Minnesota Family Investment Program (MFIP), or Diversionary Work Program (DWP) benefits to district court under 7 C.F.R. § 273.15(q)(2) and Minnesota Statute § 256J.40.