



Waskul, et al v. WCCMH, et al

Summary of the Settlement between MDHHS and Plaintiffs





Litigation Background

The *Waskul* litigation was filed in Michigan's Eastern District Federal Court in 2016. The suit alleges that a 2015 change in budgeting procedure for participants enrolled in the Habilitation and Supports Waiver (HSW) using a self-determination budgeting arrangement caused Plaintiffs to be unable to pay for staff and Community Living Supports (CLS) services/supports in their Individual Plans of Service (IPOS).

Plaintiffs: Four individuals with severe intellectual and developmental disabilities who receive Medicaid-funded CLS on a self-determination basis under the HSW.



Litigation Background cont.

Plaintiffs

Individuals with severe intellectual and developmental disabilities who receive Medicaid-funded CLS on a self determination basis under the HSW.

- Plaintiff **Washtenaw Association for Community Advocacy** is an unincorporated association whose members include the individual Plaintiffs.



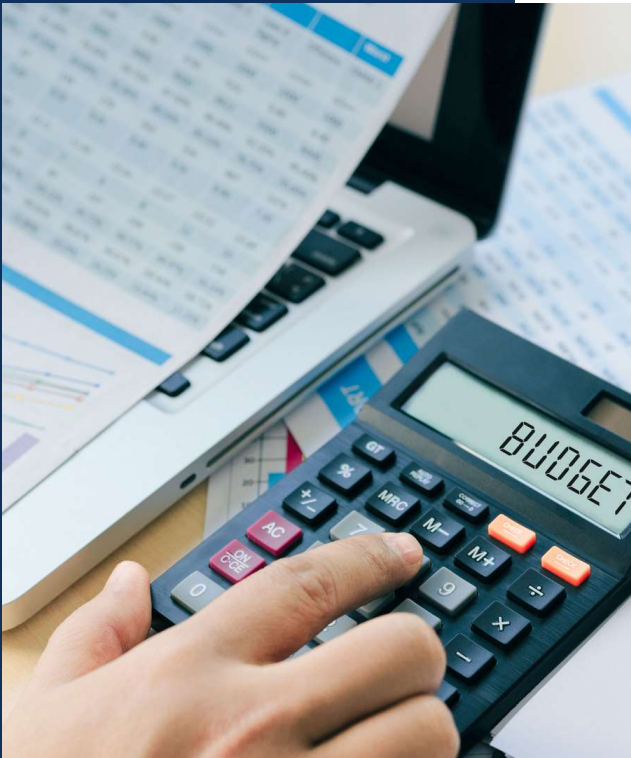
Defendants

Defendants are the three tiers of Medicaid administration in Michigan.

- The Settling Defendant, **MDHHS**, is the single state agency responsible for administering Medicaid in MI, and Defendant Elizabeth Hertel is its director.
- The non-settling Defendants are the **Community Mental Health Partnership of Southeast Michigan (CMHPSM)** and **Washtenaw County Community Mental Health (WCCMH)**.



Litigation Background cont.



The principal relief sought in the lawsuit is the effectuation and enforcement of HSW provisions requiring that self-determination budgets “cost out” the services and supports in the IPOS and be “sufficient to implement the IPOS.”

- The failure to meet this HSW obligation underlies each of the several claims for relief in this lawsuit.



The Settlement with MDHHS



On December 1, 2023 a signed settlement agreement between Plaintiffs and Defendant MDHHS was filed with the Court.

- This agreement fully resolves Plaintiffs' claims against Defendant MDHHS.
- Plaintiffs are seeking approval of the settlement and a declaratory judgment requiring the non-settling Defendants to comply with its terms.
- Plaintiffs' motion for approval and declaratory relief was filed on January 9, 2024.



How the Settlement Works



The settlement **provides two principal, alternative forms of relief** addressing the sufficiency of HSW self-determination budgets. The first and primary form of relief is the implementation of CLS and OHSS minimum fee schedules for HSW self-determination participants. This relief is subject to certain contingencies. In the event the contingencies are not met within 18 months after execution of the settlement agreement, “costing out” will become policy statewide.



How the Settlement Works cont.

Primary Relief

Statewide minimum fee schedule (contingencies are met)

- Statewide minimum fee schedule for all self-determination CLS recipients under the Michigan Habilitation Supports Waiver, setting an hourly rate of reimbursement at \$31 per service hour, to be adjusted for inflation. OHSS fee schedule will be set at 70% of the CLS rate.

Secondary Relief

“Costing out” self-determination budgets (contingencies are not met)

- If the contingencies are not met within eighteen months of execution of the settlement agreement, then “Attachment C” will come into effect, which implements the “costing out” requirement of the HSW



The Contingencies

Subject to certain contingencies, all self-determination CLS recipients under the Michigan Habilitation Supports Waiver will have their CLS services budgeted and paid for at the rate of \$31 per service hour. (§ C(2)).

Contingencies include:



Securing of necessary appropriations from the **Michigan Legislature** to fund settlement.



The federal Medicaid authority's (**CMS**) approval.



Execution of a contract amendment agreeing to the Minimum Fee Schedule by **Defendant CMHPSM**. § D(1)(b).



Scope of the Relief



A \$31 per service hour rate for all self-determination CLS recipients served by Michigan's Habilitation Supports Waiver is estimated to represent an additional annual expenditure of **\$22.1 million**, a 34.7% increase over the base year (FY2021) expenditure of \$63.1 million.

- This is a five-year deal, expiring in September 2029 (§ E(6)). The State has further agreed to adjust the \$31/hour base rate for inflation. (§ C(10)).
- Assuming implementation by the start of Fiscal Year 2025 in October 2024, **the additional spending mandated by the agreement will exceed \$100 million**, even without taking into account additional agreed upon expenditures for Overnight Health and Safety Supports ("OHSS") § C(3).

Relief Obtained if Contingencies Not Met



Attachment C of the Settlement Agreement comes into effect.

Preliminary requirements:

- Both the PIHP/CMH and the participant must agree, during person centered planning, to the amounts in the individual budget before a budget is authorized.
 - If a budget is not agreed upon, the PIHP/CMH shall set the budget equal to the budget immediately preceding.
 - The participant can then appeal the sufficiency of the budget and proceed to a Medicaid Fair Hearing after exhausting the internal appeal.
- The IPOS must set forth, in detail and with specificity, the amount, scope and duration of the participant's CLS services.



Relief Obtained if Contingencies Not Met cont.

The amount of the recipient's CLS budget will be determined by "costing out" the medically necessary services and supports in the IPOS. Services and supports subject to "costing out" consist of:

Staff wages

- Staff wages shall be costed out by:
 - Starting with a wage sufficient to provide the medically necessary services in the IPOS, not to exceed the staff wage necessary to do so;
 - Multiplying the wage by the number of authorized units; then
 - Adding Worker's Compensation, Unemployment Insurance, and tax components
- Appropriate staff wage considerations may include (but are not limited to):
 - CLS staff wages for self-determination providers in the community for similarly situated CLS recipients;
 - Staff wages for the individual's self-determination staff for other services;
 - Staff wages CLS recipient previously paid to CLS self-determination staff;
 - Staff wages requested by CLS self-determination staff the recipient wishes to hire;
 - Staff wages requests by CLS self-determination staff responding to job advertisements posted by the CLS recipient; and
 - The CLS recipient's efforts to locate staff at any given staff wage.



Relief Obtained if Contingencies Not Met cont.



Anticipated costs for activities and tasks

- Covered costs for activities and tasks consists of:
 - Transportation (i.e. mileage) to and from community activities
 - Does not include staff home-to-work or workplace-to-home transportation time or expense
 - Fees and other charges for a community activity for a CLS participant and for the CLS worker to accompany the participant in the community activity
 - The settlement agreement includes examples of gym fees, movie tickets, theme park admissions, meals at a restaurant, fees for bowling. (Attachment A)



Relief Obtained if Contingencies Not Met cont.



Costs that will not be covered as CLS under any circumstance continue to include:

- Room and board
- Fiscal intermediary services
- Purchase or rental of a vehicle
- In-home entertainment subscription
- Payments to legal guardians

The CLS budget must be **sufficient to implement the IPOS.**

- If the allotted budget does not allow an individual to obtain the CLS supports and services contained in the individual's IPOS, the participant can request, and the ALJ can order, an upward adjustment in the budget.

Additional Relief: Policy Adoption and Contract Amendments



Additional procedural relief relates to forming Individual Plans of Service (“IPOSs”) and their related budgets, protecting HSW participants’ right to self-determination, and ensuring the Medicaid Fair Hearing System has (and knows it has) the authority to grant effective relief in cases involving budget or service authorization disputes.

- The settlement will result in both Policy Adoptions and Contract Amendments (If contingencies are met). With one exception (compliance with ALJ decisions), each form of relief contingent on contract amendment will become policy if CMHPSM refuses to sign a contract.

Policy Adoptions

(Amendments to the Medicaid Provider Manual)



- Clarification of “medical necessity.” See Attachment B.
 - Clarifies “scope” of CLS services and provides safeguards relating to the person-centered planning process.
- Requiring discussion at a granular level during person-centered planning process of beneficiaries’ needs and the way those needs might be met. C(9)(b).
 - During person-centered planning, PIHPs/CMHSPs will be required to discuss the various components of CLS (transportation, activities, staff wages, employer costs, training time, etc.) and the amount, scope, and duration of each component that may be medically necessary.

Policy adoptions



(Amendments to the Medicaid Provider Manual) cont.

- **Protections against PIHP's/CMHSP's failing to engage directly in person-centered planning around budgets.**
 - Requires PIHPs/CMHSPs to ensure that fiscal intermediaries are not tasked with making final determinations affecting the amount, scope, and duration of services, by requiring that no aspect of creating a budget is delegated to the fiscal intermediary.
- **Protections against unwarranted termination of self-determination arrangements.**
 - The Medicaid Provider Manual will require PIHPs/CMHSPs to notify, in writing, any HSW CLS SD participant whose self-determination arrangement is at-risk of termination, that such a risk exists.
 - The written notice shall specify the issues leading to the risk of termination and provide meaningful opportunities for problem solving involving the participant.
 - If problem solving efforts are unsuccessful, the PIHP/CMHSP shall issue an Advance Action Notice with appeal rights consistent with 42 C.F.R. § 438.400 et seq.

Contract Amendments for CMHPSM and WCCMH



CMHPSM's contract will be amended to include:

- Subject to CMHPSM signing a contract amendment and CMS approval, **requiring CMHPSM to comply with Orders issued by Administrative Law Judges in Medicaid Fair Hearings. C(9)(e).**
- Subject to CMHPSM signing a contract amendment and CMS approval, **requiring CMHPSM to offer new and existing HSW CLS beneficiaries the option to self-determine CLS services.**
 - If CMHPSM does not sign the contract amendment or CMS does not approve, MDHHS must commence, and diligently pursue to completion, the process for adopting this requirement into Policy.
- Subject to CMHPSM signing a contract amendment and CMS approval, **requiring CMHPSM to provide meaningful notice of budget or service reductions and denials.**
 - Any reduction in budget shall provide, in writing, the specific justification for the reduction.
 - IPOSs shall have a separate section titled "Requests not approved."
 - If CMHPSM does not sign the contract amendment or CMS does not approve, MDHHS must commence, and diligently pursue to completion, the process for adopting this requirement into Policy.

Additional Relief – Medicaid Fair Hearings



The Settlement Agreement provides procedural relief to ensure that the Medicaid Fair Hearing system has the authority to grant effective relief in cases involving budget or service disputes for HSW self-determination CLS and OHSS participants.

The settlement will require DHHS to instruct MOAHR that it is MDHHS policy that, after internal appeals have been exhausted:

- ALJs have authority in hearings challenging the CLS and/or OHSS portions of an HSW participant's SD Budget:
 - To review assertions that an insufficient number of units of HSW CLS or OHSS was authorized.
 - This includes assertions addressing the proper allocation between CLS and OHSS.
 - To reverse a PIHP's/CMHSP's budget or unit determination and order a specific budget or unit authorization.
 - To reverse the budget or unit determination and remand to the PIHP/CMHSP for further evidence or assessment.
 - To affirm the determination.

Additional Relief – Medicaid Fair Hearings

cont.

- ALJs now have the authority to review PIHPs'/CMHSPs' decisions to terminate a self-determination arrangement
 - At the Medicaid Fair Hearing, the ALJ will determine whether the evidence presented establishes that there is good cause for termination.
 - If good cause is not established, ALJs can reverse the PIHP's/CMHSP's decision to terminate the self-determination arrangement and direct the continuation of such arrangement.
- This relief will be implemented notwithstanding existing MDHHS policy or guidance stating that the termination of self-determination is not subject to a Medicaid Fair Hearing.
- MDHHS may make the final determination as to the authorized budget, service authorization level, or termination of self-determination arrangement so long as the final determination is within the timeframe for "final administrative action" set forth in 42 C.F.R. § 431.244(f).

THANK YOU

Disability Rights Michigan

4095 Legacy Parkway
Lansing, MI 48911

800.288.5923 (Toll Free)
517.487.1755 (Voice)
517.374.4687 (TTY)

www.drmich.org

