

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

Docket No. 2009-35822 EDW

██████████,

Appellant

_____ /

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 the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. ██████████
██████████, represented the
Appellant. ██████████ was present. ██████████
represented the Department's waiver agency. ██████████
██████████ appeared as witnesses for the
Department.

ISSUE

Did the Waiver Agency properly deny the Appellant MI Choice waiver services?

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 Appellant is a Medicaid beneficiary.
2. The Appellant is a ██████████ woman with infantile cerebral palsy and a history of brain tumor growth. (Exhibits A, B, and 1). Appellant is dependent on others for her activities of daily living and independent activities of daily living. (Exhibit A).
3. Appellant is enrolled in and receiving services from her county community mental health services program (CMH). (Exhibit B). Appellant is not enrolled in the Habilitation and Supports Waiver.
4. Appellant lives in a rental condominium with her mother/legal guardian.

The condominium is owned by Appellant's aunt (her mother's sister).

5. Appellant attends a protected workshop (██████████) five days a week (M-F) for eight hours per day. (Exhibit B, p 1).
6. Appellant's mother works a 10:30 – 22:30 shift on various days of the week, but never works on Mondays. (Exhibit B, p 2).
7. Appellant receives CMH provided community living supports (CLS) for 6 hours, three times per week and every third weekend when her mother works. (Exhibit B, p 2).
8. Appellant receives 17 hours per week respite. (Exhibit B, p 2).
9. Appellant receives approximately 17 hours per week of Home Help Services (HHS) through the Department of Human Services (DHS). Appellant's mother is paid to provide the HHS services. (Exhibit B).
10. In or before ██████████ a referral to the MI Choice Waiver program was made on behalf of the Appellant. (Exhibit B, p 4).
11. On ██████████, a MI Choice Waiver intake assessment was conducted for the Appellant by the Waiver Agency in the Appellant's home. (Exhibit B, p 3).
12. During the intake assessment Appellant's mother/guardian discussed the need for bathroom modifications and respite services. (Exhibit B, p 3).
13. On ██████████, the Department sent the Appellant a denial notice stating that respite would not be authorized, "since (Appellant) goes to ██████████ each day you have respite when she's gone." (Exhibit 1, p 2).
14. On ██████████, the Department received the Appellant's request for an Administrative Hearing. (Exhibit 1, p 1). Appellant's request for hearing only indicated an appeal on the issue of bathroom modification denial.

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.

Effective November 1, 2004, the Michigan Department of Community Health (MDCH) implemented revised functional/medical eligibility criteria for Medicaid nursing facility, MI

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Choice, and PACE services. Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria.

This Appellant 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 Health Care Financing Administration to the Michigan Department of Community Health (Department). Regional agencies, in this case the Waiver Agency, 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)*

The waiver to the Social Security Act section 1915 (c) (42 USC 1396n) allows home and community based services to be classified as "medical assistance" under the State Plan when furnished to recipients who would otherwise need inpatient care that is furnished in a hospital SNF, ICF or ICF/MR and is reimbursable under the State Plan. (42 CFR 430.25(b)).

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)).

The Appellant's request for hearing only indicated an appeal on the denial of bathroom modification. No written notice of denial of bathroom modification was issued by the Waiver Agency; it only issued a respite denial notice. The Waiver Agency was required under the federal regulations to issue a written denial notice and did not, but their error will not preclude the Appellant from this Medicaid fair hearing. (42 CFR 438.404). In addition, because the issue of respite was addressed during hearing it will be discussed in this Decision and Order.

The Appellant's representative stated that the Appellant needs a lot of help with personal care. The Appellant's representative acknowledged that the Appellant was receiving DHS HHS for personal care and added that CMH-provided CLS was also providing care. The document evidence showed that a physical therapy assessment was performed on the need for bathroom modifications, and a need was indicated.

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The Waiver Agency representative and witness testified that in [REDACTED] a MI Choice services intake assessment was conducted with the Appellant's mother/guardian present. The Waiver Agency representative stated that Appellant scored eligible for services through door 1. The Waiver Agency further explained that in order to receive MI Choice Waiver services a person must also be receiving at least one MI Choice Waiver service. *MI Choice Waiver Appendix B-6 a.*

The Waiver Agency representative testified that as it gathered information about Appellant's bathroom modification request, it learned that the Appellant was receiving services from CMH. The Waiver Agency explained that because the CMH had current respite services authorized for the Appellant and was providing respite; it could not duplicate services and had to deny respite services. The Waiver Agency further explained that it also learned the CMH already had Appellant's request for bathroom modifications, including estimates, and therefore it had to deny the bathroom modifications.

Upon this Administrative Law Judge's questioning the Waiver Agency elaborated on the information it used to deny services. Testimony provided by the Waiver Agency told of a situation where the CMH was serving Appellant, including respite and CLS. As told, the CMH received Appellant's request for bathroom modifications, CMH secured a PT evaluation and modification estimates, and then sent the modification estimates to DHS. As further told, the DHS sent the estimates back to CMH with policy explaining that environmental modifications were the responsibility of CMH. The Waiver Agency explained that after DHS returned the estimates to CMH, CMH faxed the estimates to the Waiver Agency. At some point the Appellant was referred to the MI Choice Waiver program for the same services CMH was addressing.

This Administrative Law Judge is cognizant of the fact that a portion of the Waiver Agency testimony is hearsay, therefore reviewed the document evidence, which corroborates the Waiver Agency testimony:

[REDACTED], notes from Appellant's case manager [REDACTED]

I called [REDACTED], DHS. (Appellant) goes to [REDACTED] 8hrs/day Monday thru Friday. Therefore, mother has plenty of respite on the days she is not working. Also, regarding bathroom modifications: [REDACTED] from CMH faxed the estimates to me and the quotes go from [REDACTED] up to [REDACTED]. According to [REDACTED] had sent the estimates to DHS and they sent them right back to [REDACTED] with a copy of their policy that it is CMH's responsibility to take care of the modifications.. [REDACTED] stated that the referral to Waiver should never have been made. I will call [REDACTED] supervisor tomorrow at CMH and see what they can do about the modifications. Then I will get back with (my supervisor) to see if Waiver is going to get involved.

(Exhibit B, p 1).

Both the CMH waiver program and the MI Choice Waiver program cover respite and environmental modifications, subject to specific limitations and eligibility criteria. (See *Medicaid Provider Manual, Mental Health/Substance Abuse, 17.3.D. Environmental Modifications and 17.3.J, Respite Care Services; and MI Choice Waiver, eff. 10-07, Appendix C, Respite and Environmental Accessibility Adaptations.*)

The MI Choice Waiver contains several references to an applicant's Freedom of Choice between benefit programs but prohibits duplication of services between programs. One such reference is:

Any individual applying for Medicaid services, nursing facility care, home and community based services, home help, or PACE must meet functional eligibility through the Michigan Medicaid Nursing Facility Level of Care. Once an applicant has qualified for services under the nursing facility level of care criteria, they must be informed of their benefit options and elect, in writing, to receive services in a specific program. This election must take place prior to initiating services under Medicaid.

The applicant, or legal representative, must be informed of the following services available to persons meeting the nursing facility level of care. Services available in a community setting include the MI Choice Program, PACE program, Home Health, Home Help, or nursing facility institutional care. Appendix B-7 a. (Underline added).

One of the reasons the Waiver Agency articulated for denying Appellant respite and environmental modification services was because CMH was currently providing respite and CLS, and was considering bathroom modification. The Waiver Agency asserted it could not duplicate services already being provided by the CMH. The Waiver Agency further asserted that if the Appellant would not be receiving at least one MI Choice Waiver service she would not be eligible for the MI Choice Waiver program. The above-listed MI Choice Waiver provision supports the Waiver Agency's position. A review of the document evidence reveals no CMH advance action notice for denial of respite service, no CMH adequate action notice of denial of environmental modifications, and no Appellant-signed written election to receive those services from the MI Choice Waiver instead of CMH. As such, the MI Choice Waiver Agency denial of respite and environmental accessibility modification services was proper.

The services available to be provided by CMH include respite and environmental modifications. No CMH witness was available to testify as to why CMH actively pursued modification payment from DHS, or to testify why, when informed by DHS bathroom modification was CMH responsibility, CMH instead faxed the modification estimates to MI Choice, and to testify why CMH actively referred Appellant to the MI Choice Waiver program for consideration of modifications payment and for payment of respite services. From the preponderance of credible evidence in this case this Administrative Law Judge determines that Appellant was not in the Freedom of Choice situation envisioned by the

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Department's home and community-based waiver or the specialty mental health services waiver. The evidence shows the Appellant merely sought bathroom modifications from CMH; she was not seeking other programs or providers. Rather, the CMH actively sought other payors for the Appellant and referred her to DHS and the MI Choice Waiver. The evidence shows that changes are difficult for the Appellant and her "choice" would be to stay with her current CMH CLS and respite provider. (Exhibit B, p 2).

The Waiver Agency provided sufficient evidence that its denial of respite services and environmental accessibility adaptation services was proper. Because the Waiver Agency denial action was proper based on this reason, there is no need to address other reasons discussed during the hearing.

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 the Appellant MI Choice Waiver services.

IT IS THEREFORE ORDERED that:

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

Lisa K. Gigliotti
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:



Date Mailed: 12/10/2009

***** NOTICE *****

The State Office of Administrative Hearings and Rules may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The State Office of Administrative Hearings and Rules will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.