

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

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IN THE MATTER OF:

██████████

Appellant

_____ /

Docket No. 2010-11841 HHS

Case No. ██████████

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 ██████████ ██████████ and ██████████, Michigan Protection and Advocacy Service, Inc. represented the Appellant. ██████████ advocate, appeared for the Appellant at hearing. ██████████, appeals review officer, represented the Department. Her witnesses were; ██████████, ASW supervisor, ██████████

PRELIMINARY MATTER

At the threshold of hearing the Department, contesting the Appellant's motion for application of res judicata, indicated they were not withdrawing their most recent notice of termination.

On objection, the ALJ ruled that the Department's hearing summary [Exhibit A] was admitted with the exception of pages 14 through 29 and pages 32 through 35. The omitted pages consisted of notes and unsworn statements.

The omitted pages were neither competent, material nor substantial evidence. MCL 24.285. As testimonial statements, absent cross examination, I did not find the proffered exhibits reliable, probative or relevant. McCormick, Evidence (4th) ed, §352, pp. 608-610.

All of this material could have been addressed on ██████████ – but the Department chose [correctly, I believe] then to go with its reduction case and base its presentation of evidence on the face-to-face assessment of the ASW. To argue a termination case on the same facts begs reversal.

On the promise of new evidence the hearing proceeded subject to the evidentiary ruling on Department's Exhibit A, above.¹

ISSUE

Did the Department properly terminate the Appellant's Home Help Services (HHS)?

FINDINGS OF FACT

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

1. At the time of hearing the Appellant is a ██████████, disabled, Medicaid and SSI beneficiary. (Appellant's Exhibit #1)
2. The Appellant is afflicted with; MS, collagen vascular disease, UTI, allergies, arthritis, pharyngitis, and fibromyalgia. (Appellant's Exhibit #1, sub A and Department's Exhibit A, p. 11)
3. On ██████████, the ASW conducted an in-home assessment of home help needs for the Appellant. This review demonstrated the Appellant only required assistance with her IADLs. (See Testimony and Department's Exhibit A, p. 2 and Appellants' Exhibit #1, sub A)
4. On ██████████, the ASW sent the Appellant an advance negative action notice that home help services were being reduced or eliminated in the areas of; bathing, grooming, dressing, toileting – the remaining areas of IADL, previously established, were not disturbed. (Appellant's Exhibit #1 – throughout)
5. The ASW said the reduction was based on her in-home observations and discussions with the Appellant during the in-home visit conducted on ██████████. (Appellant's Exhibit #1 – throughout)
6. On ██████████ the Department sent DHS 1212 – advance negative action notices advising the Appellant that her HHS services were now terminated “following the review conducted on ██████████” and because of new evidence. (See Testimony and Department's Exhibit A, pp. 6-8)
7. The “new evidence” consisted of unsworn, investigative witness statements from individuals known to the Appellant. This material, although hearsay², was available at the hearing held on ██████████. (See Testimony of Rodgers)

¹ The Appellant sought a rehearing on ██████████, which was denied following review by ALM Snider. Appellant's counsel stated there was no appeal to circuit court.

² Hearsay evidence is not necessarily inadmissible in administrative hearings. See McCormick, *supra*.

8. The Appellant filed a request for hearing on ██████████. (Appellant's Exhibit #1)

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 Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

Home Help Services are provided to enable functionally limited individuals to live independently and receive care in the least restrictive, preferred settings. These activities must be certified by a physician and may be provided by individuals or by private or public agencies.

COMPREHENSIVE ASSESSMENT

The Adult Services Comprehensive Assessment (DHS-324) is the primary tool for determining need for services. The comprehensive Assessment will be completed on all open cases, whether a home help payment will be made or not. ASCAP, the automated workload management system provides the format for the comprehensive assessment and all information will be entered on the computer program.

Requirements for the comprehensive assessment include, but are not limited to:

- A comprehensive assessment will be completed on all new cases.
- A face-to-face contact is required with the customer in his/her place of residence.
- An interview must be conducted with the caregiver, if applicable.
- Observe a copy of the customer's social security card.
- Observe a picture I.D. of the caregiver, if applicable.
- The assessment must be updated as often as necessary, but minimally at the six month review and annual re-determination.

- A release of information must be obtained when requesting documentation from confidential sources and/or sharing information from the agency record.
- Follow specialized rules of confidentiality when ILS cases have companion APS cases.

Functional Assessment

The **Functional Assessment** module of the **ASCAP** comprehensive assessment is the basis for service planning and for the HHS payment.

Conduct a functional assessment to determine the customer's ability to perform the following activities:

Activities of Daily Living (ADL)

- Eating
- Toileting
- Bathing
- Grooming
- Dressing
- Transferring
- Mobility

Instrumental Activities of Daily Living (IADL)

- Taking Medication
- Meal Preparation and Cleanup
- Shopping
- Laundry
- Light Housework

Functional Scale ADL's and IADL's are assessed according to the following five-point scale:

1. Independent
Performs the activity safely with no human assistance.
2. Verbal Assistance
Performs the activity with verbal assistance such as reminding, guiding or encouraging.

3. Some Human Assistance
Performs the activity with some direct physical assistance and/or assistive technology.
4. Much Human Assistance
Performs the activity with a great deal of human assistance and/or assistive technology.
5. Dependent
Does not perform the activity even with human assistance and/or assistive technology.

Note: HHS payments may only be authorized for needs assessed at the 3 level or greater.

Time and Task The worker will allocate time for each task assessed a rank of 3 or higher, based on interviews with the client and provider, observation of the client's abilities and use of the reasonable time schedule (RTS) as a guide. The RTS can be found in ASCAP under the Payment module, Time and Task screen. When hours exceed the RTS rationale must be provided.

Adult Service Manual (ASM), §363, pp. 2, 3 of 23, 9-1-2008.

The Department witness testified that the Appellant's benefits were terminated post hearing because the hearing itself helped to clarify the Appellant's state of readiness to perform all ADLs and IADLs without assistance. She admitted, however, that her new decision was based largely on supporting statements from past workers.

On cross examination she admitted that she attempted to call all of the Appellant's former workers, but some did not respond and others had disconnected telephone service.

She said in the first hearing [REDACTED] that the Appellant told her she could use the bathroom, do dishes, fold laundry, bathe, groom and dress herself – most of the time. At that time the ASW determined that a reduction in service was the proper assessment – the ALJ agreed and ruled in support of the Department's proposed reduction.

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The Appellant testified that following the hearing she received multiple termination notices which caused her great confusion. She obtained counsel.³ At today's hearing she admitted that her physical condition has improved over the past "ten years" and through counsel she supported the decision affirming reduced HHS services issued by the ALJ on ██████████.

On review of the evidence the ALJ finds that the ██████████, comprehensive assessment was accurate and drawn according to policy. By definition the Appellant demonstrated to the ASW that she was in an improved condition – needing some assistance – but not as much as previously granted. She reaffirmed this position today.

The ASW observations were consistent with improved physical ability and a corresponding *reduction* in benefits – but not termination. She admitted the underlying “new evidence” consisted of [inadmissible] hearsay statements written by some former chore providers.

Again, the ALJ agreed with the following task and time adjustments as prepared by the ASW during her in-person assessment conducted on ██████████.

Bathing – was eliminated (previously 9 hours)⁴.
Grooming – was eliminated (previously 5 hours).
Dressing – was eliminated (previously 7 hours).
Toileting – was eliminated (previously 11 hours).

Eating – was not changed.
Housework – was not changed.
Laundry – was not changed.
Medication – was not changed.
Meal preparation - was not changed.

The ALJ does not uphold the new conclusion reached by the ASW calling for termination of HHS because it is unsupported by the evidence.

This matter was decided on ██████████, following hearing on ██████████
██████████ Today's exercise represents a second attempt to reach a different result with the same evidence. The ALJ is not persuaded that the assessment conducted on ██████████, was in error and there is no evidence to support a termination based on those facts.

³ The potential for a procedural due process violation owing to multiple notices to terminate was not lost on the ALJ. Temporarily reinstating benefits did ameliorate the Appellant's immediate financial plight, but did not cure her case preparation predicament.

⁴ Per month at \$14.50 an hour.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department improperly proposed termination of the Appellant's HHS.

IT IS THEREFORE ORDERED that:

The Department's decision is REVERSED.

IT IS FURTHER ORDERED that:

The Department shall reinstate the previous [REDACTED] award of reduced HHS.

Dale Malewska
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 2/22/2010

***** 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.