

**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. 2010-17419 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 ██████████. ██████████, power of attorney, appeared as the Appellant's representative. ██████████ was present. ██████████, Executive Director Personal Assistance Options, ██████████, ██████████, and ██████████, Support Coordinator Community Mental Health, were present as witnesses for the Appellant. ██████████ Appeals Review Officer, represented the Department. ██████████ Services Worker, and ██████████ Registered Nurse DCH Home Help Services Program, appeared as witnesses for the Department.

ISSUE

Did the Department properly reduce Home Help Services payments to the Appellant?

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 ██████████ who has been diagnosed with cerebral palsy with spasticity, seizure disorder, mental retardation, hepercholesterolemia, and arthritis. (Exhibit 1, pages 25-26 and 29)
3. No changes had been made to the Home Help Services hours authorized in the Appellant's case since ██████████ Testimony)

Docket No. 2010-17419 HHS
Decision and Order

4. The Appellant is ranked as a level 5 for all activities of daily living and instrumental activities of daily living, except eating (level 4) and respiration (level 1). (Exhibit 1, page 31)
5. On [REDACTED], a DHS Adult Services Worker (worker) made a visit to the Appellant's home to conduct a Home Help Services assessment. (Exhibit 1, page 9)
6. On [REDACTED], the worker requested approval for the Appellant's case from the Department of Community Health (DCH) central office due to an increase in the pay rate for HHS providers effective [REDACTED], which would increase the total cost of care in the Appellant's case. (Exhibit 1, pages 24-31)
7. On [REDACTED], the Registered Nurse (RN) who reviewed the Appellant's case requested additional information from the worker. (Exhibit 1, pages 20-23)
8. On [REDACTED] revisions were made to the time and task schedule after review by the RN. In the final time and task schedule, reductions were made to the hours for bathing, eating, toileting, transferring, and mobility. (Exhibit 1, pages 12-16)
9. On [REDACTED], the Department sent an Advance Negative Action Notice notifying the Appellant that his Home Help Services payments would be reduced to [REDACTED] per month, effective [REDACTED] (Exhibit 1, page 9)
10. On [REDACTED], the State Office of Administrative Hearings and Rules received the Appellant's Requests for Hearing. (Exhibit 1, page 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.

Home Help Services (HHS) 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.

Adult Services Manual (ASM 363, 9-1-08), pages 2-5 of 24 addresses the issue of assessment:

COMPREHENSIVE ASSESSMENT

The Adult Services Comprehensive Assessment (FIA-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 client in his/her place of residence.
- An interview must be conducted with the caregiver, if applicable.
- Observe a copy of the client'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 redetermination.
- A release of information must be obtained when requesting documentation from confidential sources and/or sharing information from the department 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 client'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.

IADL Maximum Allowable Hours

There are monthly maximum hour limits on all IADLs except medication. The limits are as follows:

- 5 hours/month for shopping
- 6 hours/month for light housework
- 7 hours/month for laundry
- 25 hours/month for meal preparation

These are maximums; as always, if the client needs fewer hours, that is what must be authorized. Hours should continue to be prorated in shared living arrangements.

Service Plan Development

Address the following factors in the development of the service plan:

- The specific services to be provided, by whom and at what cost.
- The extent to which the client does not perform activities essential to caring for self. The intent of the Home Help program is to assist individuals to function as independently as possible. It is important to work with the recipient and the provider in developing a plan to achieve this goal.
- The kinds and amounts of activities required for the client's maintenance and functioning in the living environment.
- The availability or ability of a responsible relative or legal dependent of the client to perform the tasks the client does not perform. Authorize HHS **only** for those services or times which the responsible relative/legal dependent is unavailable or unable to provide.
- Do **not** authorize HHS payments to a responsible relative or legal dependent of the client.
- The extent to which others in the home are able and available to provide the needed services. Authorize HHS **only** for the benefit of the client and **not** for others in the home. If others are living in the home, prorate the IADL's by at least 1/2, more if appropriate.
- The availability of services currently provided free of charge. A written statement by the provider that he is no longer able to furnish the service at no cost is sufficient for payment to be authorized as

long as the provider is not a responsible relative of the client.

- HHS may be authorized when the client is receiving other home care services if the services are not duplicative (same service for same time period).

Adult Services Manual (ASM) 363, 9-1-2008, Pages 2-5 of 24.

The Appellant's case was received by the central office for review on ██████████. (Exhibit 1, page 24) After additional information was requested and received, the RN who reviewed the Appellants case ultimately made several reductions to the Appellant's case. The Appellant disagrees with the reductions.

Toileting

The HHS hours for toileting were reduced from 27 hours and 5 minutes per month (54 minutes per day) to 15 hours and 3 minutes per month (30 minutes per day). (Exhibit 1, pages 12-13) The RN testified the reduction was based upon her belief that the Appellant can assist to some extent with this activity. The RN explained that this belief was based upon the information indicating that the Appellant is able to do some standing and walking and that there was no evidence a lift is required. However, the RN also noted that the allowed 30 minutes per day, approximately 15 hours per month, still exceeds the 14 hours per month that would typically be allowed for an individual ranked at a level 5 by the Department's reasonable time schedule for this task. (See Exhibit 1, page 22)

The Appellant's representative testified that the Appellant does need assistance with all aspects of toileting, including sitting and standing back up, placing his penis into toilet, wiping and adjusting his clothing. The Appellant's representative testified that due to his impairments, the Appellant needs to go to the bathroom more frequently than a typical person and that he does have some accidents.

The assumption made by the RN regarding the Appellant's ability and need for assistance with toileting was incorrect based upon the Appellant's representative's testimony. However, the home help schedule submitted by the Appellant's representative does not indicate frequent toileting. Toileting is only listed as occurring at 7:10 am, 7:15 pm, and 10:00 pm during the weekdays and only at 8:40 am on the weekend days. The weekday schedule also indicates that the Appellant is absent from the home from 10:10 am until 3:30 pm. (Exhibit 1, pages 6-8) This ALJ assumes that toileting does actually occur more frequently than listed on the schedule. However, without additional documentation showing the frequency of the bathroom trips, the reduction of HHS hours for toileting is sustained.

Transferring

The HHS hours for transferring were reduced from 14 hours and 3 minutes per month (28 minutes per day) to 5 hours and 1 minute per month (10 minutes per day). (Exhibit 1, pages 12-13) The RN testified this was based upon the information that the Appellant can use his hands and feet to assist with transfers but does require some physical assistance. The RN notes there was no evidence a lift is needed to transfer the Appellant. Accordingly, she recommended the reasonable time schedule allowance for an individual ranked as a level 4 for this activity, 5 hours per month.

The CMH Support Coordinator testified that she has assisted the Appellant with transferring and mobility. She stated that it does take a while to make sure that the Appellant is stable before he is moved, and that the process is no faster than using a lift. The Appellant's representative testified that transferring is performed frequently due to the bathroom trips. The Appellant's representative also discussed transporting the Appellant for swimming exercise. However, transferring is described as including:

Moving from sitting to lying position to another sitting or lying position; e.g. from bed to or from a wheelchair or sofa, coming to a standing position and/or repositioning to prevent skin breakdown. Adult Services Manual (ASM) 365, 10-1-1999, Page 1 of 2.

Transportation to the pool for swimming exercise can not be considered part of transferring under the Home Help Services program. The Appellant's representative did acknowledge that besides the bathroom trips, transferring does not happen often within the home. As noted above, the home help schedule submitted by the Appellant's representative does not document frequent bathroom trips. Accordingly, the reduction to HHS hours for transferring is sustained.

Eating

The HHS hours for eating were reduced from 30 hours and 6 minutes per month (1 hour per day) to 25 hours and 5 minutes per month (50 minutes per day). (Exhibit 1, pages 12-13) The RN explained that the Department's reasonable time schedule, which typically allow 28 hours per month for an individual ranked at a level 5. (Exhibit 1, page 22) However, she recommended the further reduction to 25 hours per month and a ranking change to level 4 because the Appellant can assist to some extent. The RN also stated that time spent supervising typically be allowed for an individual ranked at a level 5 by the Department's reasonable time schedule for this task eating, as opposed to physical hands on assistance, is not compensated under the Home Help Program.

The Appellant's representative testified that the Appellant is spoon fed about 75% of the time and there are only a few foods he can self feed. The Appellant's representative explained that because the Appellant is easily distracted, he eats better if he is spoon fed.

██████████
Docket No. 2010-17419 HHS
Decision and Order

Based on the testimony of the Appellant's representative, the Appellant is receiving mostly hands on assistance with eating, not just verbal reminders and supervision. However, according to the submitted home help schedule he is out of the home from about 10:10 am to 3:30 pm during the weekdays. (Exhibit 1, page 6) If the Appellant is gone over lunch, he is not getting assistance with this meal five days per week. The reduction to HHS hours for eating is sustained.

Mobility

The HHS hours for mobility were reduced from 24 hours and 5 minutes per month (48 minutes per day) to 15 hours and 3 minutes per month (30 minutes per day). (Exhibit 1, pages 12-13) The RN testified that this reduction was based upon the information that the Appellant can walk short distances using a walker as well as supervision and stand by assistance. (See also Exhibit 1, page 21) The RN noted that the allowed 15 hours per month was more than the reasonable time schedule allowance of 9 hours per month. (Exhibit 1, page 22)

The Appellant's representative testified that there is a lot of mobility time due to the doctors order that the Appellant walk around the home five times per day. The CMH Supports Coordinator explained that the Appellant rarely uses the walker, which his doctor suggested to help with balance. The method for assisting the Appellant with walking was described as putting an arm around his back, balancing with the other arm, holding tight and walking right beside him. The Appellant's representative explained that the Appellant can be combative and can not be rushed or else he becomes more difficult.

The RN testified that the time for the doctor ordered walks around the home is included under the range of motion task, instead of mobility which is just the general moving from room to room within the home. The information submitted by the worker for review only requested one hour per day for range of motion with a justification that walking exercise has been required since ██████████ and must be done 4 times per day. (Exhibit 1, pages 12 and 31) The Appellant's representative testified that the walking is actually done 5 times per day pursuant to the doctor's order and submitted supporting documentation. (Exhibits 2 and 3) However, the ██████████ dates on these documents indicate that they were not available to the Department at the time the worker completed the home visit in ██████████ or by the time the RN made the final revisions to the case in ██████████. Accordingly, the Department has not yet had the opportunity to make any needed adjustments to the HHS hours authorized for Range of Motion based upon this new information.

The requested time for the walking exercise was granted under the Range of Motion task, and therefore can not be included under the mobility task as well. Besides the walking for range of motion exercises, most mobility within the home would occur with the bathroom trips, the frequency of which is not documented. The reduction to HHS hours for mobility is sustained.

Bathing

While bathing was not addressed by the Department during the hearing this appears to be an oversight as the HHS hours for this task were reduced from 22 hours and 34 minutes per month (45 minutes per day) to 15 hours and 3 minutes per month (30 minutes per day). (Exhibit 1, pages 12-13) This reduction is also sustained as 30 minutes per bath is consistent with the times listed for bathing in the home help schedule submitted by the Appellant's representative. (Exhibit 1, pages 6-8)

Advance Notice

Pursuant to the ██████████, Advance Negative Action Notice, it appears that the Department intends to make the reductions to the Appellant's case retroactive to ██████████. The Code of Federal Regulations, Chapter 42 addresses the Appellant's rights with respect to Advance Negative Notice of an agency action:

§ 431.211 Advance notice.

The State or local agency must mail a notice at least 10 days before the date of action, except as permitted under §§ 431.213 and 431.214 of this subpart.

§ 431.213 Exceptions from advance notice.

The agency may mail a notice not later than the date of action if—

- (a) The agency has factual information confirming the death of a recipient;
- (b) The agency receives a clear written statement signed by a recipient that—
 - (1) He no longer wishes services; or
 - (2) Gives information that requires termination or reduction of services and indicates that he understands that this must be the result of supplying that information;
- (c) The recipient has been admitted to an institution where he is ineligible under the plan for further services;
- (d) The recipient's whereabouts are unknown and the post office returns agency mail directed to him indicating no forwarding address (See § 431.231 (d) of this subpart for procedure if the recipient's whereabouts become known);
- (e) The agency establishes the fact that the recipient has been accepted for Medicaid services by another local jurisdiction, State, territory, or commonwealth;
- (f) A change in the level of medical care is prescribed by the recipient's physician;
- (g) The notice involves an adverse determination made with regard to the preadmission screening requirements of section 1919(e)(7) of the Act; or

(h) The date of action will occur in less than 10 days, in accordance with § 483.12(a)(5)(ii), which provides exceptions to the 30 days notice requirements of § 483.12(a)(5)(i)

§ 431.214 Notice in cases of probable fraud.

The agency may shorten the period of advance notice to 5 days before the date of action if—

- (a) The agency has facts indicating that action should be taken because of probable fraud by the recipient; and
- (b) The facts have been verified, if possible, through secondary sources.

The ██████████, Advance Negative Action Notice issued by the Department clearly failed to provide the Appellant with the required advance notice of at least 10 days that his HHS payments would be reduced as the effective date of the reduction was ██████████. (Exhibit 1, page 9) None of the exceptions to the advance notice requirement were present in this case. Therefore, the Department must not make the reductions to the Appellant's Home Help Services case effective any earlier than 10 days from the date of the Advance Negative Action Notice, ██████████.

Overall, this ALJ is concerned that the information submitted to the RN for review was not complete. The recent information from the Appellant's doctors regarding range of motion exercises indicates that walking should be done 5 days per day and that there are additional range of motion exercises. However, the information submitted to the RN only included walking 4 times per day. It also appears that the information submitted on the home help schedule at this hearing was not fully accurate. For example the frequency of bathroom trips, 3 on weekdays and only 1 on weekend days does not appear accurate. Additionally, shaving is listed twice on the weekend schedule and it is not clear when the walking and range of motion exercises are being performed. (Exhibit 1, pages 6-8) While the reductions were sustained based on the information available for this assessment, it appears that a new comprehensive assessment would be appropriate to obtain additional information and documentation to ensure that the authorized HHS hours are appropriate for each task.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds that the Department properly reduced Home Help Services payments to the Appellant. However, the reductions can not be made retroactively effective to ██████████ as indicated in the Advance Negative Action Notice.

IT IS THEREFORE ORDERED THAT:

The Department's decision is **PARTIALLY AFFIRMED** and **PARTIALLY REVERSED**. The reductions are sustained but can not be made effective earlier than 10 days from [REDACTED], the date of the Advance Negative Action Notice.

Colleen Lack
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 5/3/2010

***** NOTICE *****

The State Office of Administrative Hearings and Rules March 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 March 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.