

**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. 2010-47836 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. ██████████, Appellant's ██████████, appeared as a witness for the Appellant and provided testimony. The Appellant was not present.

██████████ (AAA) was present on behalf of the Department of Community Health (Department). ██████████, appeared as a witness for the AAA.

**ISSUE**

Did the Department properly deny the Appellant an additional 17.5 hours per day of MI Choice Waiver personal care 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. Appellant is a Medicaid beneficiary, and enrolled in the MI Choice Waiver program.
2. The Appellant resides in her home with her ██████████.
3. Appellant's ██████████ assists the Appellant with some of her needs. (Exhibit 3, page 16).
4. The Appellant's ██████████, lives in the vicinity and provides some care for Appellant. (Exhibit 3, page 7).

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5. The Appellant's [REDACTED] handle her finances, medical decisions and medication management. (Exhibit 3, page 7).
6. The Appellant or [REDACTED] pays for a private aide to stay with her on a daily basis. (Exhibit 3, page 16).
7. The Appellant has services authorized through the MI Choice Waiver program, her most recent authorization in [REDACTED], at which time her service authorization hours were increased.
8. The Appellant's current MI Choice waiver services include 40 hours per week (about 5.7 hours per day) of personal care. MI Choice waiver personal care includes assistance with bathing, dressing, meal preparation, or cuing for activities of daily living. (Exhibit 5).
9. The Appellant's private pay aide is present 11.5 hours per day. The Appellant's private pay aide is present during the hours per day the MI Choice waiver paid is not present so that the Appellant has an aide present 24 (23.2) hours per day in addition to her [REDACTED] who is also present in the home 24 hours per day.
10. In or around [REDACTED], the Appellant's [REDACTED] requested an increase in MI Choice waiver hours; 17.5 additional personal care hours above the hours added in [REDACTED]. The Appellant's [REDACTED] stated that the increased hours were needed because her [REDACTED] had become more confused since the [REDACTED] authorization. (Exhibit 3, page 7).
11. On [REDACTED], the MI Choice waiver team performed a full assessment of the Appellant at Appellant's home with Appellant's [REDACTED] present. (Exhibit 3).
12. During the full assessment the MI Choice waiver social worker care manager asked the Appellant questions and assessed that the Appellant was alert, oriented, able to state the date and able to state current circumstances, as well as denying any memory problems. (Exhibit 3, page 7).
13. During the full assessment the MI Choice waiver social worker care manager asked the Appellant questions and observed her abilities and assessed that she had a decrease in phone use and bed mobility, but the degree of overall change from the assessment in [REDACTED] was minimal.
14. Based on the MI Choice waiver agency in-person observations, that there was a minimal change since the [REDACTED] assessment, the MI Choice waiver denied the 17.5 additional personal care hours requested by Appellant's [REDACTED].

15. The MI Choice waiver funding is a payment source of last resort. The MI Choice waiver must consider all available community resources, third-party insurance coverages, or private pay services before it can authorize any MI Choice Waiver Service. (Exhibit 6) The Appellant has natural supports in that her ██████████ participate in her care and supervision, and she also has a paid private caregiver to assist the Appellant.
16. On ██████████, the Appellant, through her attorney, requested a hearing to contest the denial of an 17.5 hour per day increase in personal care hours.

### **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.

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 Centers for Medicare and Medicaid (formerly HCFA) to the Michigan Department of Community Health (Department). Regional agencies, in this case an Area Agency on Aging (AAA), 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)*

A waiver under section 1915(c) of the [Social Security] Act allows a State to include as "medical assistance" under its plan, home and community based services furnished to recipients who would otherwise need inpatient care that is furnished in a hospital, SNF [Skilled Nursing Facility], ICF [Intermediate Care Facility], or ICF/MR [Intermediate Care Facility/Mentally Retarded], and is reimbursable under the State Plan. *42 CFR 430.25(c)(2)*

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).

Home or community-based services may include the following services, as they are defined by the agency and approved by CMS:

- Case management services.
- Homemaker services.
- Home health aide services.
- Personal care services.
- Adult day health services
- Habilitation services.
- Respite care services.
- Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.

Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization. 42 CFR 440.180(b).

The Operating Standards applicable to the MI Choice Waiver Program list services available under the waiver program and address the standards expected for each service. The Operating Standards include personal care services, the service for which Appellant is currently approved to receive 5.7 hours per day.

The MI Choice waiver defines Personal Care as follows:

“...assistance with eating, bathing, dressing, personal hygiene, and other activities of daily living. This service may also include assistance with the preparation of meals but does not include the cost of the meals. When specified in the plan of care, this service may also include such housekeeping chores as bed making, dusting and vacuuming which are incidental to the care furnished, or which are essential to the health and welfare of the individual, rather than the individual's family. . . .”

*MI Choice Waiver, Updated September 2002;  
Attachment H, pages 43 and 44*

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The Appellant is receiving 5.7 personal care services per day through the MI Choice waiver since at least ██████████. In or around ██████████ the Appellant's ██████████ requested an additional 17.5 hours per day of personal care services for a total of almost 24 hours of care per day (23.2 hours).

The MI Choice waiver is a Medicaid funded program and its Medicaid funding is a payor of last resort. In other words, a MI Choice waiver enrollee must utilize every community and private resource, including family members, community resources, and private pay insurance or caregivers before any MI Choice waiver hours can be authorized.

In addition, Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services. *42 CFR 440.230*. In order to assess what MI Choice waiver program services are medically necessary and therefore Medicaid-covered, the MI Choice waiver program performs periodic assessments.

In ██████████, the MI Choice waiver program assessment team performed an in-person assessment for the Appellant and determined that 5.7 hours per day of personal care was medically necessary. A couple months later, when the Appellant's ██████████ contacted the MI Choice waiver program to increase the personal care hours by 17.5 hours, bringing the total to almost 24 hours per day of care, a MI Choice waiver team went to the Appellant's home. On that day, ██████████, the MI Choice assessment team performed a full assessment with the Appellant and her ██████████.

During the full assessment the MI Choice waiver social worker care manager asked the Appellant questions and observed the Appellant. Based on the Appellant's answers, the MI Choice waiver social worker care manager, a professional experienced with assessing a person's mental status, assessed that the Appellant was alert, oriented, able to state the date and able to state current circumstances, and that the Appellant had denied having any memory problems. (Exhibit 3, page 7).

As part of the full assessment the MI Choice waiver team is required to assess all the other care resources available to the Appellant. The MI Choice waiver team identified that the Appellant's ██████████ who lived in the home with Appellant 24 hours per day, was available to provide at least prompting and cues to the Appellant. Other resources that were identified were a private aide paid to care for the Appellant 11.5 hours per day. Even more resources were noted, Appellant's ██████████ handle her finances, medical decisions and medication management.

Based on the MI Choice waiver assessment team's observations of the Appellant, answers to questions by the Appellant and her ██████████, and including the other supports available to the Appellant, the MI Choice waiver agency denied the additional 17.5 hours of personal care requested by the Appellant's ██████████. In particular, the MI Choice waiver assessment team noted that the Appellant's overall need had changed only minimally since the authorization in ██████████, and that the Appellant had substantial other sources of assistance.

The Appellant argues that there are no limits to the number of hours that can be authorized for the Appellant and the MI Choice program cannot limit the hours. The issue in the case is not whether the MI Choice program has capped the number of hours for Appellant, rather that the Appellant must demonstrate she has a medical need for 17.5 additional hours of Medicaid-paid MI Choice waiver personal care.

The Appellant's ██████████ testified that she had been paying for private aide services for her ██████████ but she recently stopped paying. The Appellant's ██████████ testified that she would continue to pay for private services if she had to. The Appellant's ██████████ testified that the Appellant's ██████████ is currently paying for the private care aide out of limited income. The Appellant's attorney argued that the "goal" was not to have the Appellant and her ██████████ run out of money. It is important to note that it is not the MI Choice waiver program goal to deplete financial resources, but Medicaid regulations require that all resources be utilized before Medicaid funding can be utilized.

The request for an increase of 17.5 hours of personal care from the Appellant's ██████████ was not accompanied by a task-per-unit explanation of medical need or medical documentation certifying a medical need for task-per-unit equaling 17.5 additional personal care hours.

This ALJ finds the MI Choice agency did authorize an appropriate number of personal care service hours to meet the medically necessary needs of the Appellant. The Appellant failed to establish by a preponderance of the evidence that an additional 17.5 personal care hours were medically necessary for the Appellant. Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services, thus additional personal care services cannot be authorized for the Appellant based upon the evidence of record. *42 CFR 440.230.*

**DECISION AND ORDER**

Based on the above findings of fact and conclusions of law, this Administrative Law Judge finds the Department properly denied the Appellant's request for an increase of 17.5 personal care service hours.

**IT IS THEREFORE ORDERED** that:

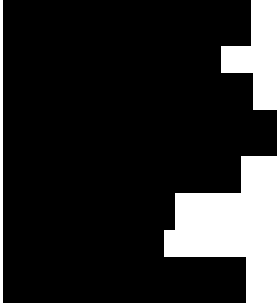
The Department's prior decision is **AFFIRMED**.

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

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cc:



Date Mailed: 11/4/2010

**\*\*\* 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.