

**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. 2011-11434 EDW  
Case No. 81274368

**DECISION AND ORDER**

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Appellant's request for a hearing.

After due notice, a hearing was held \_\_\_\_\_. \_\_\_\_\_ appeared on her own behalf. \_\_\_\_\_ appeared as a witness for the Appellant.

\_\_\_\_\_, appeared on behalf of \_\_\_\_\_, the Department's MI Choice program waiver agency (hereafter, Department).

**ISSUE**

Did the Department properly eliminate the Appellant's overnight sleep shift under the MI Choice Waiver program?

**FINDINGS OF FACT**

Based upon the competent, material, and substantial evidence presented, I find, as material fact:

1. The Appellant is a Medicaid beneficiary, and enrolled in the MI Choice Waiver program.
2. The Appellant had been diagnosed with multiple sclerosis, hypertension, atherosclerosis, neurogenic bladder, osteomyelitis, and depression. (Exhibit 3, pages 17-18)
3. The Appellant resides in her own apartment, is dependant on others and requires assistance with most activities of daily living and instrumental activities of daily living. (Exhibit 3, pages 21-23)

4. The Appellant had been receiving an overnight sleep shift because she would be unable to re-position herself in bed until the insurance authorized a trapeze bar and because the Appellant was unable to let a caregiver in to her apartment if left alone overnight. (Hearing Coordinator Testimony)
5. The Appellant is now able to buzz someone into her apartment from her bed and a trapeze bar has been installed. (Hearing Coordinator Testimony)
6. On ██████████, a social worker completed a re-assessment and a Level of Care Determination at the Appellant's home. (Exhibit 3)
7. The Appellant testified she requires assistance overnight with repositioning because she can not reposition herself utilizing the trapeze bar, for problems with her bowels, draining her catheter, and throwing up overnight.
8. The Level of Care Determination indicates the Appellant is independent with bed mobility, while the re-assessment indicates the Appellant requires extensive assistance with bed mobility. (Exhibit 3, pages 2 and 22)
9. On ██████████, the waiver agency issued Notice to the Appellant that her self determination overnight sleep shift will be terminated effective ██████████ because it is no longer necessary. (Exhibit 1, page 3)
10. The Appellant requested a hearing ██████████. (Exhibit 1, page 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 Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

The 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 Services to the Michigan Department of Community Health (Department). Regional agencies, in this case ██████████, functions 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)<sup>1</sup> 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)

It is undisputed that the Appellant has a need for personal care services.

The MI Choice waiver defines Service and Personal Care as follows:

“A range of assistance to enable program participants to accomplish tasks that they would normally do for themselves if they did not have a disability. This may take the form of hands-on assistance (actually performing a task for the person) or cueing to prompt the participant to perform a task. Personal care services may be provided on an episodic or on a continuing basis. Health-related services that are provided may include skilled or nursing care to the extent permitted by

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<sup>1</sup> Services for the chronically mentally ill.

State law. Personal care under the waiver differs in scope, nature, supervision arrangements or provider type (including provider training and qualifications) from personal care services in the State plan. The differences between the waiver coverage and the State plan are that the provider qualification and the training requirements are more stringent for personal care as provided under the waiver than the requirements for this services under the State plan. Personal care includes assistance with eating, bathing, dressing, personal hygiene, and activities of daily living. This service may include assistance with preparation of meals, but does not include the cost of the meals themselves. 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 service furnished, or which are essential to the health and welfare of the individual, rather than the individual's family. Personal care may be furnished outside the participant's home. The participant oversees and supervises individual providers on an ongoing basis when participating in SD options." (Emphasis supplied)

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Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services. See 42 CFR 440.230.

The ██████████ testified that in ██████████, the Appellant was enrolled in the MI Choice Waiver as she transitioned from a nursing home into the community. An overnight shift was authorized due to the Appellant not being able to let a caregiver into the apartment in the morning if left alone overnight and because she would be unable to reposition herself in bed until a trapeze bar was authorized by her insurance company. She explained that the key to the Appellant's apartment could not be duplicated and initially the Appellant could not buzz anyone into her apartment from her bed. However, the Appellant's insurance company eventually authorized the trapeze bar, which has been installed in the Appellant's apartment. Further, the Appellant can now buzz someone into her apartment by phone from her bed. (██████████ Testimony) Accordingly, on ██████████ the waiver agency gave advance notice to the Appellant that her overnight sleep shift will be terminated because it was determined that it is no longer necessary. (Exhibit 1, page 3)

The Appellant disagrees with the termination of her overnight sleep shift and testified she is unable to reposition herself overnight using the trapeze bar. She explained that she also needs the overnight sleep shift due to problems with her bowels, draining her catheter, and for throwing up overnight. The Appellant stated that she discussed these needs with the

social worker during the home visit. (Appellant Testimony) The Appellant's caregiver was present for the home visit but could not recall what was discussed. However, she has not worked the overnight shift.

The evidence presented was not consistent regarding the Appellant's needs for an overnight shift. The documentation from the ██████████ home visit regarding bed mobility shows the Appellant is independent on the Michigan Nursing Facility Level of Care Determination while the Re-Assessment indicates the Appellant requires extensive assistance. (Exhibit 3, pages 2 and 22) It is uncontested that a trapeze bar was installed. However the Appellant testified she is unable to use this to reposition herself overnight. The ██████████ indicated she did not see any documentation in the case file that the Appellant is unable to utilize the trapeze bar or regarding a need for assistance overnight due to bowel problems. The social worker who completed the home visit was not present at the hearing to explain the discrepancy in the documentation regarding bed mobility or what was discussed during the ██████████ home visit regarding the Appellant's abilities and needs for assistance during the overnight shift.

This ALJ finds that there is insufficient evidence to support the termination of the Appellant's overnight shift. A new assessment is necessary to determine the appropriate amount of ongoing services. If appropriate, documentation can be obtained for the re-assessment regarding the issues raised by the Appellant, such as her ability to utilize the trapeze bar and bowel problems.

### **DECISION AND ORDER**

Based on the above findings of fact and conclusions of law, I decide the Department did not properly eliminate the Appellant's overnight sleep shift under the MI Choice Waiver program.

**IT IS THEREFORE ORDERED** that:

The Department's decision is REVERSED. The MI Choice waiver agency is ORDERED to complete a new assessment to determine appropriate ongoing services available under the program to meet the medically necessary needs of the Appellant. The Appellant's overnight sleep shift shall continue until the re-assessment is completed.

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Colleen Lack  
Administrative Law Judge  
for Olga Dazzo, Director  
Michigan Department of Community Health

[REDACTED]  
Docket No. 2011-11434 EDW  
Decision and Order

cc:

[REDACTED]

Date Mailed: 3/9/2011

**\*\*\* NOTICE \*\*\***

The State Office of Administrative Hearings and Rules for the Department of Community Health 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 for the Department of Community Health 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 mailing date of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the mailing date of the rehearing decision.