

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

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IN THE MATTER OF

██████████,

Appellant.

_____ /

Docket No. 2011-27480 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 ██████████. Appellant appeared on his own behalf. ██████████, Appellant's current chore provider, also testified on his behalf. ██████████ represented the Department of Community Health. ██████████, Appellant's Adult Services Worker (ASW) at the ██████████ DHS Office, appeared as a witness for the Department.

ISSUE

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

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 ██████ year-old Medicaid beneficiary.
2. Appellant has been diagnosed by a physician with diabetes mellitus (DM), hypertension (HTN), neuropathy, chronic obstructive pulmonary disease (COPD), Hepatitis C, schizophrenia, seizure disorder, and leg pains. (Exhibit 1, page 13).
3. Appellant had been receiving 81 hours and 17 minutes of HHS per month, with a care cost of ██████ per month. (Exhibit 1, page 9).
4. On ██████████, ASW ██████████ conducted a home visit with Appellant as part of an annual review. (Exhibit 1, page 16).
5. Based on her assessment and information provided by Appellant, ASW ██████████ terminated HHS for transferring, meal preparation and cleanup, grooming, dressing, and eating. ASW ██████████ also made reductions to the

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HHS time authorized for taking medication, housework, shopping, and bathing. The eliminations and reductions resulted in a total of 22 hours and 17 minutes of HHS per month, with a monthly care cost of ██████████. (Exhibit 1, page 11).

6. On ██████████, ASW ██████████ issued an Advance Negative Action Notice to Appellant indicating that his HHS payments would be reduced effective ██████████. (Exhibit 1, pages 5-6, 8-10).
7. On ██████████ the Department received Appellant's Request for Hearing. (Exhibit 1, page 4).

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 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.

On ██████████, ASW ██████████ completed a home visit as part of an annual review of Appellant's case and an HHS comprehensive assessment in accordance with Department policy. Following that assessment, the ASW terminated HHS for transferring, meal preparation/cleanup, grooming, dressing, and eating. ASW ██████████ also made reductions to the HHS hours authorized for taking medication, housework, shopping, and bathing. Appellant disagrees with those eliminations and reductions. Each of the specific disputed activities will be addressed in turn and, for the reasons discussed below, this Administrative Law Judge finds that the Department properly reduced the Appellant's HHS payments based on the available information.

However, for the reasons discussed below, this Administrative Law Judge also finds that the Department failed to provide Appellant with proper notice of the reduction and improperly made the negative action retroactive. Accordingly, the Department must re-determine Appellant's eligibility for HHS during the period of ██████████ to ██████████, and reimburse for benefits Appellant is otherwise entitled to.

Reduction of HHS Payments

Adult Services Manuals 361 (6-1-07) (hereinafter “ASM 361”) and Adult Services Manual 363 (9-1-08) (hereinafter “ASM 363”) address the issues of what services are included in HHS and how such services are assessed:

Home Help Payment Services

Home help services (HHS, or personal care services) are non-specialized personal care service activities provided under ILS to persons who meet eligibility requirements.

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.

Personal care services which are eligible for Title XIX funding are limited to:

Activities of Daily Living (ADL)

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

Instrumental Activities of Daily Living (IADL)

- Taking medication.
- Meal preparation/cleanup.
- Shopping for food and other necessities of daily living.
- Laundry.
- Housework.

(ASM 361, page 2 of 5)

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 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:

- Five hours/month for shopping
- Six hours/month for light housework
- Seven 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.

(ASM 363, pages 2-4 of 24)

Necessity For Service

The adult services worker is responsible for determining the necessity and level of need for HHS based on:

- Client choice.
- A complete comprehensive assessment and determination of the client's need for personal care services.
- Verification of the client's medical need by a Medicaid enrolled medical professional. The client is responsible for obtaining the medical certification of need. The Medicaid provider identification number must be entered on the form by the medical provider. The Medical Needs form must be signed and dated by one of the following medical professionals:
 - Physician.
 - Nurse practitioner.
 - Occupational therapist.
 - Physical therapist.

(ASM 363, page 9 of 24)

Services not Covered by Home Help Services

Do not authorize HHS payment for the following:

- Supervising, monitoring, reminding, guiding or encouraging (functional assessment rank 2);
- Services provided for the benefit of others;
- Services for which a responsible relative is able and available to provide;
- Services provided free of charge;
- Services provided by another resource at the same time;
- Transportation - See Program Administrative Manual (PAM) 825 for medical transportation policy and procedures.
- Money management, e.g., power of attorney, representative payee;
- Medical services;
- Home delivered meals;
- Adult day care.

(ASM 363, pages 14-15 of 24)

Transferring

ASW ████████ terminated Appellant's HHS for transferring during the most recent assessment. Appellant had previously been receiving 6 minutes per day, 7 days a week of HHS for transferring. (Exhibit 1, pages 11-12). As stated in her notes and testified to during the hearing, ASW ████████ eliminated HHS for transferring because Appellant can get up and move around the home with the help of his cane. According to ████████, she observed Appellant moving around his home without difficulty and climbing stairs without assistance. (Exhibit 1, pages 14-16; Testimony of ASW ████████) Appellant testified that, to the extent ASW ████████ says she saw him without his cane, she is lying because he is never without it. Appellant also stated that he was using his cane during the assessment. (Testimony of Appellant).

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In discussing this issue, the parties appeared to have confused the tasks of transferring and mobility. As stated in the Functional Assessment Definitions and Ranks of Activities of Daily Living, “Transferring” is “Moving from one sitting position or 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” while “Mobility” is “Walking or moving around inside the living area, changing locations in a room, moving from room to room, does respond adequately if he/she stumbles or trips. Does step over or maneuver around pets or obstacles, including uneven floor surfaces. Does climb or descend stairs. Does **not** refer to transfers, or to abilities or needs once destination is reached.” Adult Services Manual 365 (10-1-99) (hereinafter “ASM 365”), page 1 of 2. Given those definitions, the parties’ focus on Appellant’s ability to walk and climb stairs, with or without a cane, when discussing transferring appears misplaced.

With respect to transferring, the Department’s decision must therefore be affirmed. There is simply no evidence or testimony that Appellant needs help in switching positions or standing up.

To the extent the dispute is actually over mobility and the denial of HHS for that task, the Department’s decision must still be affirmed. ASW ██████████ wrote in her notes and testified at the hearing that she observed Appellant move around the home with the help of his cane and climb stairs without assistance. In response, Appellant only testified that he always needs a cane and, even if that testimony is accepted, there is no suggestion that he requires physical assistance from a provider. HHS payments may only be authorized for needs assessed at the 3 level or greater. ASM 363, page 3 of 24. In Ranking Level 3 for Mobility, a person “Requires physical assistance from another person for specific maneuvers; e.g., pushing wheelchair around sharp corner, negotiating stairs, or moving on certain surfaces. ASM 365, page 1 of 2. Appellant does not require such physical assistance and, to the extent he disputes the ranking for mobility, the Department’s decision is sustained.

Taking Medication

Appellant also disputes the reduction of HHS time allocated for assistance with medication from 6 minutes per day, 7 days per week to 2 minutes per day, 7 days a week. (Exhibit 1, pages 11-12). According to the ASW, she reduced the time because, while Appellant told her that he needs some help with his medication because he will forget to take them on his own and will drop the medications all over the place (Exhibit 1, pages 14-16; Testimony of ASW ██████████), Appellant cannot receive HHS for the time the provider spends reminding him to take the medications. Appellant disputes the reduction on the basis that he is taking 13 medications and his provider assists him in taking them. (Testimony of Appellant).

The above evidence demonstrates that the provider does physically assist Appellant with taking Appellant’s medications. However, Appellant also seeks HHS for the time the provider spends making sure Appellant takes the medication and, as described above, such hands-off verbal reminders or supervision are not covered by HHS. ASM 363, pages 14-15 of 24. Appellant does not specifically challenge the time allotted for

physical assistance and two minutes a day to help with 13 medications is sufficient. Based on the information available at the time of the decision, the Department's reduction of time for medication is sustained as it is reflective of Appellant's need for assistance.

Housework

With respect to housework, Appellant's HHS time was reduced from 12 minutes per day, 7 days a week, to 6 minutes per day, 7 days a week. (Exhibit 1, pages 11-12). ASW ██████████ testified that the time for housework was prorated and reduced by one-half because Appellant lives in a rooming house and shares all rooms, except for his bedroom, with other adults. (Exhibit 1, pages 15-16; Testimony of ASW ██████████). Appellant disputes that reduction on the basis that, while he lives with other people, everyone in the rooming house is responsible for cleaning up after themselves. (Testimony of Appellant).

ASM 363 addresses the issue of proration of IADL services:

IADL Maximum Allowable Hours

There are monthly maximum hour limits on all IADLs except medication.

The limits are as follows:

- Five hours/month for shopping.
- Six hours/month for light housework.
- Seven hours/month for laundry.
- 25 hours/month for meal preparation

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

(ASW 363, pages 3-4 of 24 (underline added by ALJ))

Service Plan Development

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

- 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.

(ASM 363, pages 4-5 of 24)

The evidence in this case establishes that the Appellant was living with other adults in a shared living arrangement. Therefore, the Department was bound to follow the mandated policy and prorate the HHS time and payment for any IADLs by at least 1/2. Here, the Department has properly prorated housework by one-half and its decision must be sustained.¹

Shopping and Errands

The HHS time for shopping was reduced from 35 minutes a day, 2 days per week, to 45 minutes per day, 1 day a week during the most recent assessment. (Exhibit 1, pages 11-12). ASW ██████████ testified that she reduced the time for this task because Appellant told her he can go along with his provider on shopping trips and she wrote in her notes that Appellant is able to go the store with the provider and select the groceries or medications he needs, just as he was leaving to do at the end of the assessment. (Exhibit 1, pages 15-16; Testimony of ASW ██████████). Appellant testified that his provider goes shopping for him and he goes along if he feels like it. (Testimony of Appellant).

Appellant does not dispute that he was leaving to go shopping after the assessment or that he can now accompany his provider on shopping trips at times. His needs have clearly changed and he requires less assistance for the task of shopping than before. Accordingly, the reduction of HHS time allocated for shopping is sustained as it is reflective of Appellant's need for assistance with that activity.

Meal Preparation and Cleanup

With respect to meal preparation and cleanup, Appellant's HHS time was terminated during the most recent assessment. Previously, Appellant had been receiving 36 minutes per day, 7 days per week, for that task. (Exhibit 1, pages 11-12). ASW ██████████ reduced the time for that task because, despite Appellant's claims that he cannot stand to cook for long periods of time or make food other than cereal or toast, she observed him moving around the house and climbing stairs without difficulty, and she therefore concluded that Appellant could stand up for the amount of time necessary to prepare and cleanup meals. (Exhibit 1, page 16; Testimony of ASW ██████████).² Appellant disputes that reduction on the basis that he can only prepare breakfast because of problems with his leg. (Testimony of Appellant).

¹ The Department did not, however, prorate the other IADLs. To the extent the Department did not follow the proration policy, it was generous in favor of the Appellant and the failure to follow policy cannot support Appellant here.

² In the system, ASW ██████████ did rank Appellant as a 4 for this task, which would entitle him to HHS. (Exhibit 1, page 15). However, she also testified that the ranking was in error and that she meant to terminate HHS time for meal preparation/cleanup. (Testimony of ASW ██████████).

Mobility is different from the task of meal preparation/cleanup, but the only dispute between the parties here focuses on Appellant's ability to stand while preparing a meal. With respect to that dispute, ASW ██████████ is more credible and her observations that Appellant can move around the home with the help of his cane and climb stairs without assistance demonstrate that Appellant does not require assistance with meal preparation and cleanup. As discussed above, Appellant did not testify that he requires physical assistance from a provider to move around and his claim that he needs such assistance for this task must be rejected. Based on the information available at the time of the decision, the Department's decision to reduce the time for HHS for meal preparation and cleanup is sustained.

Bathing

The HHS hours for bathing assistance were reduced from 18 minutes per day, 7 days per week to 16 minutes per day, 7 days a week. (Exhibit 1, pages 11-12). ASW ██████████ testified and wrote in her notes that she reduced Appellant's ranking and the HHS time for this task because Appellant told her that, while the provider washes him, he can get in-and-out of the bathtub on his own. (Exhibit 1, pages 14, 16; Testimony of ASW ██████████). Appellant only disputes that reduction on the basis that he needs the provider to wash him. (Testimony of Appellant).

Appellant also testified that he only bathes every other day (Testimony of Appellant), which suggest that the ASW erred in allocating HHS for bathing assistance seven days a week. In any event, Appellant did not deny that he can get in-and-out of the bathtub on his own. Based on the information available at the time of the decision, the Department's reduction of time for bathing is sustained as it is reflective of Appellant's need for assistance.

Grooming

ASW ██████████ terminated Appellant's HHS for grooming during the most recent assessment. Appellant had previously been receiving 12 minutes per day, 7 days a week of HHS for grooming. (Exhibit 1, pages 11-12). According to ASW ██████████ notes and testimony, she terminated HHS for grooming because, while Appellant lets his provider shave him because she does it better and knows how, Appellant can shave himself. (Exhibit 1, pages 14-16; Testimony of ASW ██████████). Appellant does not disagree with ASW ██████████, but he did testify that he cannot shave himself when he has seizures. (Testimony of Appellant).

It is undisputed that Appellant was only receiving HHS for grooming in order to provide assistance with shaving and that Appellant can now shave himself. Appellant did testify that he cannot shave when he has seizures, but he also cannot do anything else when he has seizures and allocating HHS time because of the rare and unpredictable seizures would require constant care. When grooming, Appellant requires no physical assistance or HHS. Accordingly, based on the information available at the time of the decision, the Department's decision to terminate HHS for grooming is sustained.

Dressing

ASW ██████████ also terminated Appellant's HHS for dressing during the most recent assessment. Appellant had previously been receiving 16 minutes per day, 7 days a week of HHS for dressing. (Exhibit 1, pages 11-12). ASW ██████████ testified and wrote in her notes that she terminated HHS for dressing because Appellant can dress himself, but does not know how to tie a tie so his provider dresses him when he goes to church on Sundays. (Exhibit, pages 14-16; Testimony of ASW ██████████). Appellant testified to the same thing. (Testimony of Appellant).

As stated in the Functional Assessment Definitions and Ranks of Activities of Daily Living, "Dressing" is "Putting on and taking off, fastening and unfastening garments and undergarments, special devices such as back or leg braces, corsets, elastic stockings/garments and artificial limbs or splints." ASM 365, page 1 of 2. Here, Appellant needs no physical assistance with this task and he is able to cloth himself for health and safety. While Appellant cannot tie a tie, that is a matter of style and, in any event, there is no suggestion that he is physically incapable of tying a tie. Based on the available information, that Appellant can dress himself, the termination of HHS time allocated for dressing is sustained as it is reflective of Appellant's need for assistance with that activity.

Eating

With respect to eating, Appellant's HHS time was terminated during the most recent assessment. Previously, Appellant had been receiving 32 minutes per day, 7 days per week, for that task. (Exhibit 1, pages 11-12). ASW ██████████ testified and wrote in her notes that she terminated HHS for that task because Appellant told her he can eat food on his own. (Exhibit 1, page 16; Testimony of ASW ██████████). Appellant's testimony confirmed that he is able to eat on his own, except when he is having a seizure. (Testimony of Appellant).

While Appellant cannot eat when having a seizure, he cannot do anything else either and allocating HHS time because of the rare and unpredictable seizures would require constant care. When eating, Appellant requires no physical assistance or HHS. Accordingly, based on the information available at the time of the decision, the Department's decision to terminate HHS for eating is sustained.

Notice of Reduction

The ██████████ Advance Negative Action Notice in this case indicates that the Department intends to make the reductions to the Appellant's case retroactive to ██████████ (Exhibit 1, pages 5-6). 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 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 ██████████. None of the exceptions to the advance notice requirement were present in this case and ASW ██████████ acknowledged that the failure to provide 10 days notice was an error. (Testimony of ASW ██████████). Moreover, because it was impossible for Appellant to request a hearing before the effective date of the negative action, the Department implemented the reductions to the Appellant's HHS payments.³

Given the clear regulations regarding notice, the Department cannot make the reductions to the Appellant's HHS case effective any earlier than 10 days after the ██████████ Advance Negative Action Notice. Moreover, it is undisputed that the Department did in fact make the reductions retroactive despite the fact that there was improper notice. Accordingly, the Department must re-determine Appellant's eligibility for HHS during the period of ██████████ to ██████████, and reimburse for benefits Appellant is otherwise entitled to.

³ ASM 362 provides that where HHS are to be reduced or terminated and the client requests a hearing before the effective date of the negative action, the Department is to continue the payments at the old level until a hearing decision has been made. ASM 362, page 4 of 5. Similarly, Bridges Administrative Manual 600 (4-1-11), page 18 of 36, provides that, where a client timely requests a hearing within eleven days of the effective date of a negative action, he must continue to receive the assistance authorized prior to the notice of the negative action while waiting for a hearing decision.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds that the Department properly reduced the Appellant's HHS payments based on the available information. However, as the Department failed to provide the proper advance notice of the reduction and retroactively reduced payments, the Department must re-determine Appellant's eligibility for HHS during the period of [REDACTED] to [REDACTED] and reimburse for benefits Appellant is otherwise entitled to.

IT IS THEREFORE ORDERED THAT:

The Department's decision is **AFFIRMED IN PART** and **REVERSED IN PART**.

Steven Kibit
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 7/1/2011

***** NOTICE *****

The Michigan Administrative Hearing System 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 Michigan Administrative Hearing System 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.