STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

[redacted],

Docket No. 2011-30127 HHS
Case No. 56357533

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 [redacted]. [redacted], Appellant's legal guardian, mother and chore provider, appeared and testified on Appellant's behalf. [redacted], Appellant's brother, and [redacted], a psychologist, also testified on Appellant's behalf. [redacted], Appeals Review Officer, represented the Department of Community Health. [redacted], Adult Services Supervisor, and [redacted], Social Services Specialist, from the [redacted] County DHS-District 45 Office appeared as witnesses for the Department.

ISSUE

Did the Department properly reduce 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 [redacted] year-old Medicaid beneficiary has been diagnosed with cerebral palsy, autism, epilepsy, severe developmental disability (DD), and obesity. (Exhibit 1, page 18).

2. Appellant's Mother is his plenary guardian. (Testimony of [redacted]).

3. Appellant had been receiving 172 hours and 1 minute of HHS per month, with a monthly care cost of $[redacted]. (Exhibit 1, page 16).

4. On [redacted], Social Services Specialist [redacted] conducted a home visit with Appellant and Appellant's provider. (Exhibit 1, page 17).

5. Following that home visit, [redacted] reduced the HHS hours authorized for assistance with bathing, grooming, dressing, toileting, eating, taking

medication, housework, shopping and errands, meal preparation and cleanup, specialized skin care, and transferring. (Exhibit 1, pages 15-17). The HHS for assistance with mobility was increased and the HHS for laundry remained the same. (Exhibit 1, pages 15-17).

6. After the changes, Appellant would receive a total of 81 hours and 46 minutes of HHS per month, with a monthly care cost of $[redacted]. (Exhibit 1, page 15).

7. On [redacted], [redacted] issued an Advance Negative Action Notice to Appellant indicating that his HHS payments would be reduced effective [redacted]. (Exhibit 1, pages 9-14).

8. On [redacted], the Department received Appellant's Request for Hearing. (Exhibit 1, pages 4-8).

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.

On [redacted], Social Services Specialist [redacted] conducted a home visit and comprehensive assessment as part of a six month review of Appellant's case. Following that assessment, [redacted] made reductions to the HHS hours authorized for assistance with bathing, grooming, dressing, toileting, eating, taking medication, housework, shopping and errands, meal preparation/cleanup, specialized skin care, and transferring. Appellant disagrees with all of the reductions.

For the reasons discussed below, this Administrative Law Judge finds that the Department failed to give proper notice of the reduction in payment. This Administrative Law Judge also finds that, while the reductions due to proration of Instrumental Activities of Daily Living (IADLs) and the termination of specialized skin care are affirmed, the Department erred by reducing the HHS assistance for all other tasks.

Notice

As a preliminary matter, this Administrative Law Judge would note that the Department failed to provide Appellant with proper notice of the reduction in HHS payments. The [redacted] Advance Negative Action Notice in this case indicates that the Department

intends to make the reductions to the Appellant's case retroactive to [redacted]. (Exhibit 1, pages 9-14). 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 [redacted] 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 [redacted]. None of the exceptions to the advance notice requirement were present in this case. 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.[1]

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 [redacted] 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 [redacted] to [redacted] and reimburse for benefits Appellant is otherwise entitled to.

Reductions Based on Proration

The Department's decision to reduce HHS assistance for housework, shopping and meal preparation/cleanup pursuant to its proration policy is sustained. Adult Services Manual 363 (9-1-08) (hereinafter "ASM 363") addresses the proration of such IADL services:

> IADL Maximum Allowable Hours
>
> There are monthly maximum hour limits on all IADLs except medication.

[1] 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.

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.

(ASM 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 undisputed evidence in this case establishes that the Appellant was living with his provider 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 one-half.

The Department did prorate HHS for housework, shopping, and meal preparation/cleanup by one-half and that decision must be sustained as ASM 363 does not provide for any exceptions. To the extent the Department failed to follow policy by not prorating the IADL of laundry, it was generous in favor of the Appellant. Appellant can point to no error that harmed him and the Department's decision to prorate and reduce HHS for housework, shopping and meal preparation/cleanup is sustained.

Reductions Made Per "Policy'

In addition to the reductions based on the Department's proration policy, [redacted] also reduced the HHS times for assistance with bathing, grooming, dressing, toileting, taking medication, and transferring on the basis that the previous authorized times were improper. (Exhibit 1, page 17; Testimony of [redacted]). However, as acknowledged by Adult Supervisor [redacted] during the hearing, [redacted]'s assessment in this case was

inadequate. (Testimony of [redacted]). Given the inadequacy of the assessment, the Department's reductions for the above tasks must be reversed.

Adult Services Manuals 361 (6-1-07) (hereinafter "ASM 361") and ASM 363 address the issues of what services are included in Home Help Services 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.

(ASM 363, pages 2-3 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)

Here, while [redacted] reduced the HHS times for assistance with bathing, grooming, dressing, toileting, taking medication, and transferring on the basis that the previous authorized times were improper, this Administrative law Judge finds that the Department's reductions for those tasks must be reversed.

With respect to those tasks, [redacted] testified and wrote in his notes that the previously authorized hours were manipulated beyond policy allotments and that he was reducing them to the "policy times". (Exhibit 1, page 17; Testimony of [redacted]). According to [redacted], those policy times referred to the times generated by the computer after he entered in the rankings for each task. (Testimony of [redacted]).

[redacted] also testified that those times generated by the computer are only recommendations, but he failed to assess Appellant any further in order to see if such recommended times were appropriate in this case. (Testimony of [redacted]). For example, with respect to bathing, it is undisputed that Appellant is totally dependent on the assistance of his chore provider for that task. (Testimony of [redacted]; Testimony of [redacted]). [redacted] therefore ranked Appellant a 5 for bathing and allocated 22 minutes per day for bathing assistance per "policy". (Exhibit 1, pages 17, 19). However, the new time for bathing assistance was a reduction from the previous amount authorized, 1 hour per day. (Exhibit 1, pages 15-16). [redacted] can provide no explanation for the reduction other than that the 22 minutes per day is the time allocated "per policy". (Testimony of [redacted]). He also expressly testified that he never asked Appellant's provider about bathing in general or how long it takes her to bathe Appellant. (Testimony of [redacted]).

Similarly, ASW [redacted] made reductions in the HHS times for assistance with the tasks of grooming, dressing, toileting, taking medication and transferring solely on the basis that the new times were 'policy". (Exhibit 1, page 17; Testimony of [redacted]). However, as described above, ASM 363 expressly provides that "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*." ASM 363, page 3 of 24 (emphasis added). By failing to ask any further questions or actually observe Appellant, [redacted] failed to complete the comprehensive assessment and treated the recommended times as mandatory, rather than as just one factor in the assessment.

[redacted] offers no reasoning for the majority of the reductions other then that are "policy", but it is clear that he failed to follow policy by comprehensively assessing Appellant's needs or the times for HHS. Accordingly, the reductions in time with respect to HHS for the tasks of bathing, grooming, dressing, toileting, mobility, taking medication, and transferring are reversed.

This Administrative Law Judge would further note that the improper assessment of the times and tasks in this case is compounded by the Department's failure to coordinate benefits. Both ASM 361 and ASM 363 are replete with statements regarding the need to coordinate benefits with other agencies, departments or community resources.

> **PARTNERSHIPS**
>
> **The ILS specialist has a critical role in developing and maintaining partnerships with community resources.**
>
> To facilitate this partnering, the ILS specialist will:
>
> - Advocate for programs to address the needs of ILS clients.
> - Emphasize client choice and quality outcomes.
> - Encourage access and availability of supportive services.
>
> Work cooperatively with other agencies to ensure effective coordination of services.
>
> (ASM 361, page 4 of 5)
>
> **SERVICE PLAN**
>
> A service plan must be developed for all ILS cases. The service plan is formatted in ASCAP and interacts with the comprehensive assessment.
>
> The service plan directs the movement and progress toward goals identified jointly by the client and specialist.
>
> **Philosophy**

Service planning is person-centered and strength-based.

Areas of concern should be identified as an issue in the comprehensive assessment to properly develop a plan of service.

Participants in the plan should involve not only the client, but also family, significant others, and the caregiver, if applicable.

Involvement of the client's support network is based on the best practice principles of adult services and the mission of the Department of Human Services, which focus on:

- Strengthening families and individuals.
- The role of family in case planning.
- Coordinating with all relevant community-based services, and
- Promoting client independence and self-sufficiency.

Service plans are to be completed on all new cases, updated as often as necessary, but minimally at the six month review and annual reassessment.

(ASM 363, page 4 of 24)

Service Plan Development

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

***

- 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).

(ASM 363, pages 4-5 of 24)

Good Practices

Service plan development practices will include the use of the following skills:

- **Listen actively** to the client.

- Encourage clients to **explore options** and select the appropriate services and supports.
- Monitor for **congruency** between case assessment and service plan.
- Provide the necessary supports to **assist** clients **in applying for resources**.
- Continually **reassess** case planning.
- Enhance/preserve the client's **quality of life**.
- **Monitor and document** the status of all **referrals** to waiver programs and other community resources **to ensure quality outcomes**.

(ASM 363, pages 5-6 of 24)

Here, [redacted] never asked whether Appellant was receiving any other benefits or services. (Testimony of [redacted]). [redacted] also testified that he was unaware of any other benefits or services Appellant was receiving. (Testimony of [redacted]). During the hearing, [redacted] testified that Appellant is receiving significant support from CMH. (Testimony of [redacted]). The exact services and amount of services remains unclear, but they should be taken into account and coordinated with HHS. The failure to coordinate benefits was not a basis for the reductions in this case, but it again demonstrates how the assessment was neither comprehensive nor complete.

Given the failure to comprehensively assess Appellant, the Department's decision to reduce Appellant's HHS times for assistance with bathing, grooming, dressing, toileting, taking medication, and transferring for must be reversed.

Other Reductions

In addition to the reductions based on proration or policy, the Department also reduced or terminated Appellant's HHS time for assistance with eating and specialized skin care. Appellant disputes those negative actions as well.

With respect to HHS assistance with the task of eating, the time for assistance was reduced from 50 minutes per day, 7 days a week, to 5 minutes per day, 7 days a week. (Exhibit 1, pages 15-16). Regarding eating assistance, [redacted] testified and wrote in his notes that [redacted] informed him during the home visit that Appellant could generally eat by himself and that the only assistance he required was for her to cut his food. (Exhibit 1, page 17; Testimony of [redacted]). However, during the hearing, [redacted] testified that she told [redacted] that Appellant can only eat finger foods by himself and that she must assist him with all other types of food. (Testimony of [redacted]. [redacted] and [redacted] also testified that the home visit lasted less than 10 minutes and that [redacted] never directly observed Appellant.

(Testimony of [redacted]; Testimony of [redacted]). Given the shortness of that visit, the inadequate assessment done with respect to most tasks, and Appellant's undisputed severe total limitations in almost all other areas, this Administrative Law Judge finds that [redacted] erred by reducing the time for assistance with eating.

Regarding specialized skin care, while Appellant had been receiving 15 minutes per day of assistance 7 days a week, [redacted] testified and wrote in his notes that there were no pressure sores or scratch marks present on Appellant during the home visit and that no licensed health professional was overseeing the progress of any wound. (Exhibit 1, page 17; Testimony of [redacted]). [redacted] also asserted that there were no indications on Appellant's medical needs forms that Appellant requires such specialized care and that a scratch does not equal a wound. (Exhibit 1, page 17; Testimony of [redacted]). [redacted] and [redacted] testified that the home visit lasted less than 10 minutes and that Jackson never directly observed Appellant (Testimony of [redacted]; Testimony of [redacted]) while a previous worker did find that Appellant has a need for specialized skin care due to open sores/self-mutilation (Exhibit 1, page 22). However, there is no medical documentation or finding by a medical professional with respect to such a need in the record and Appellant's representative also failed to produce such evidence during the hearing. Accordingly, Appellant has failed to meet his burden of proving by a preponderance of the evidence that the Department erred and the Department's decision to terminate specialized skin care is sustained.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds that the Department failed to provide Appellant with proper notice and, consequently, it must re-determine Appellant's eligibility for HHS during the period of [redacted] to [redacted] and reimburse for benefits Appellant is otherwise entitled to. With respect to the reductions, this Administrative Law Judge finds that the decision to reduce HHS assistance for housework, shopping and meal preparation/cleanup pursuant to its proration policy is sustained while the reductions in HHS times for assistance with bathing, grooming, dressing, toileting, eating, taking medication, specialized skin care, and transferring are reversed

IT IS THEREFORE ORDERED THAT:

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

- Due to improper notice, any reduction in payment cannot begin until [redacted] 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.

- The Department's decisions to reduce HHS for housework, shopping and meal preparation/cleanup and to terminate specialized skin care are sustained.

- The Department's decisions to reduce Appellant's HHS times for assistance with bathing, grooming, dressing, toileting, taking medication, transferring, and eating are reversed.

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

cc: [redacted]

Date Mailed: 8/26/11

***** 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 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.