

**STATE OF MICHIGAN  
MICHIGAN ADMINISTRATIVE HEARINGS 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:

**Docket No.** 2011-30142 EDW  
**Case No.** [REDACTED]

[REDACTED]

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, appeared on his own behalf. [REDACTED], Appellant's chore provider, appeared as a witness for the Appellant.

[REDACTED], Waiver Eligibility Specialist and Hearings Coordinator, represented the Department's MI Choice waiver agency, [REDACTED], social worker case manager; [REDACTED], nurse case manager; and [REDACTED], LPN nurse case specialist for Leelin home health care; appeared as witnesses on behalf of [REDACTED] care management.

**ISSUE**

Did the MI Choice Waiver agency properly reduce the Appellant's personal care service from 43 hours per week to 28 hours per week?

**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.
2. Appellant has been enrolled in the MI Choice Waiver program for at least two years. (Exhibit 1).
3. Appellant's primary diagnosis is head injury. Appellant also has a history of seizures, incontinence, and paralysis, but is able to ambulate, transfer, and feed himself. (Exhibit 1, pages 9 and 24).

4. The Appellant resides in an apartment that is approximately 1,000 square feet or less, and one-story. (Testimony of ██████████).
5. Previous to ██████████, Appellant lived in a larger, double-story home. (Testimony of ██████████).
6. On ██████████, the waiver social worker care manager and nurse (care team) met with Appellant in his home. (Exhibit 1, pages 1-19).
7. On ██████████, the MI Choice waiver team performed a full reassessment of the Appellant at Appellant's home. (Exhibit 1, pages 1-19).
8. During the full reassessment the MI Choice waiver social worker care manager and nurse asked the Appellant questions, observed his abilities and consulted Appellant's other medical documentation. (Exhibit 1, pages 1-19).
9. During the reassessment the Appellant informed the care team that he can ambulate, can transfer on his own, and is able to feed himself. (Exhibit 1).
10. Based on the MI Choice waiver agency ██████████ in-person observations, that the Appellant's home was substantially smaller, and he was able to perform many personal care tasks on his own, the MI Choice waiver agency determined there was medical need for only 28 hours per week for personal care and therefore reduced the Appellant's six to seven personal care hours per day (43 per week) to 28 per week. (Exhibit 1).
11. On ██████████, the MI Choice waiver agency was provided notice of reduction in personal care hours from 43 hours per week to 28 hours per week (Exhibit 1, pages 27).
12. On ██████████, the Appellant requested a hearing to contest the reduction of personal care hours. (Exhibit 1, page 26).

### **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

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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 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 was approved to receive six to seven 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 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, Appendix C, July 2009*

The MI Choice waiver is a Medicaid-funded program and its Medicaid funding is a payor of last resort. 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.

The Appellant was receiving six to seven hours per day personal care service hours per day through the MI Choice waiver. The Appellant bears the burden of proving, by a preponderance of evidence that the 43 hours per week are medically necessary.

In ██████████, the MI Choice waiver program reassessment team performed an in-person reassessment for the Appellant. During full reassessment the MI Choice waiver social worker care and nurse asked the Appellant questions and observed the Appellant. Based on the Appellant’s answers, the MI Choice waiver social worker and nurse determined that four hours per day of personal care was medically necessary.

The MI Choice waiver program reached its determination after noting that Appellant needed substantially fewer hours to house-keeping of his smaller home, and that he had the ability to ambulate, transfer, and feed himself. The MI Choice waiver program also consulted documentation from other assistance programs utilized by Appellant, and the Appellant’s statement ,that he could ambulate and therefore should be eligible for certain incontinence products.

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The Appellant testified it takes him about 45 minutes to one hour to shower with assistance from aides, and that the aides need to give him an injection. The Appellant testified that it also takes a long time when an aide takes him shopping. The Appellant testified he could prepare his own microwave meals but he did not believe that was a proper way to eat.

The MI Choice waiver agency refuted Appellant's testimony: while agreeing that he needs help with housekeeping, argued he is able to perform many more tasks than he reports. The MI Choice waiver agency further countered the medical need for more hours by indicating that the Appellant receives at least one home-delivered meal per day during the week.

The Appellant testified that he cannot ambulate or transfer, but after being shown physical therapy progress reports that he could ambulate for 180 feet, was full-weight-bearing and could transfer on his own, he contradicted his testimony.

This ALJ finds the MI Choice agency did authorize 28 hours per week as 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 43 personal care hour per week were medically necessary. 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*.

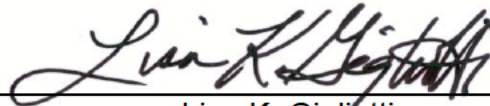
The MI Choice waiver program did not institute the reduction to 28 hours per week on ██████████, as indicated in its notice, pending outcome of Appellant's hearing and this Decision and Order. If a MI Choice waiver beneficiary requests services during pendency of hearing process, he must repay services if a determination is made that he was not eligible for the services. As the MI Choice Waiver Agency properly determined only 28 hours per week of personal care was medically necessary effective ██████████ ██████████ the Appellant must repay the MI Choice Waiver agency for the services that were provided (the difference between 43 and 28 hours per week) for which he was not eligible from ██████████ through the date of this Decision's issuance.

**DECISION AND ORDER**

Based on the above findings of fact and conclusions of law, this Administrative Law Judge finds the MI Choice Waiver Agency properly reduced the Appellant's personal care hours to 28 per week.

**IT IS THEREFORE ORDERED** that:

The MI Choice Waiver Agency's decision is **AFFIRMED**.



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Lisa K. Gigliotti  
Administrative Law Judge  
for Olga Dazzo, Director  
Michigan Department of Community Health

cc:



Date Mailed: 8/25/2011

**\*\*\* 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.