

**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:

██████████,

Appellant

Docket No. 2011-51305 EDW  
Case No. 62875131

**DECISION AND ORDER**

This matter is before the undersigned Administrative Law Judge (ALJ), pursuant to M.C.L. § 400.9 and 42 C.F.R. § 431.200 *et seq.*, upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. Appellant appeared and testified on her own behalf. ██████████, Waiver Program Director, represented the Department of Community Health's Waiver Agency, the ██████████ Michigan Community Service Agency ("Waiver Agency" or "██████████"). ██████████, Nurse Care Manager, and ██████████, Social Work Case Manager, also testified as witnesses for the Waiver Agency.

**ISSUE**

Did the Waiver Agency properly terminate Appellant's private duty nursing through the MI Choice Waiver Program?

**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 woman and has been diagnosed with coronary heart disease, hypertension, arthritis, multiple sclerosis, and anxiety. (Exhibit 1, pages 1, 6-7).
2. Appellant is enrolled in and has been receiving MI Choice waiver services since March of ██████. Among the services Appellant was receiving was a private duty registered nurse coming to her house once a week to administer an injection. (Testimony of Appellant; Testimony of ██████).
3. ██████████ is a contract agent of the Michigan Department of Community Health (MDCH) and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services.

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4. On ██████████, Waiver Agency staff completed a reassessment of Appellant's services per policy. (Exhibit 1, pages 1-15).
5. That same day, the Waiver Agency sent Appellant a notice that it was terminating the private duty nursing as of ██████████. As stated in that notice, "Informal supports need to be utilized before services can be purchased through waiver services. ██████████ is not homebound [and] could get injections [at] dr. office or spouse is able to provide shot." (Exhibit 1, page 16).
6. On ██████████, the Department received Appellant's request for an administrative hearing. (Exhibit 1, page 17).

**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.

Appellant is claiming services through the Department's Home and Community Based Services for Elderly and Disabled. 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 ██████████, 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 440.180(b))

Here, Appellant was receiving a number of services through the MI Choice program, including the service of having a private duty registered nurse coming to her house once a week to administer an injection. (Testimony of Appellant; Testimony of ██████████). That private duty nursing service was subsequently terminated on the basis that "[i]nformal supports need to be utilized before services can be purchased through waiver services. ██████████ is not homebound [and] could get injections [at] dr. office or spouse is able to provide shot." (Exhibit 1, page 16). For the reasons discussed below, this Administrative Law Judge finds that the termination should be affirmed.

Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services. See 42 C.F.R. § 440.230. The MI Choice waiver did not waive the federal Medicaid regulation that requires that authorized services be medically necessary. Here, it is undisputed that Appellant is not homebound and can drive. Therefore, there is no medical reason why a private duty nurse has to come to her house. Moreover, the

definition for “private duty nursing” demonstrates that it is being unnecessarily applied in this case. The Code of Federal Regulations, which the State of Michigan is legally obligated to follow in this case, provides:

*Private Duty Nursing Services* means nursing services for recipients who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff or routinely provided by the nursing staff of the hospital or skilled nursing facility.

(42 C.F.R. § 440.80)

Similarly, the MI Choice Waiver definition of Private Duty Nursing states that it is “[i]ndividual and continuous care (in contrast to part time or intermittent care) provided by licensed nurses...” (Minimum Operating Standards for MI Choice Waiver Program, Attachment H, Page 45). In this case, given the lack of continuous care and the small service performed by the private duty nurse, in addition to the fact that Appellant is not homebound and can drive herself, the Waiver Agency’s finding that the private duty nursing is medically unnecessary is sustained.

Moreover, as argued by the Waiver Agency, the “availability of natural supports to assist with care” also supports the termination in this case. The relevant policy provides:

#### **D. INVOLVEMENT OF ALLIES**

[Support Coordinators] work with participants to engage a team of family, friends, professionals, caregiver staff, and other allies to assist in the development of plans of care and to strengthen the skills of participants to address planned activities. Generally MI Choice services are not used to replace existing unpaid supports, but rather bolster and help sustain ongoing allies’ involvement.

#### **E. USE OF OTHER PAID SERVICES**

Before authorizing MI Choice services for a participant, the waiver agent must take full advantage of LTC services that are available to the participant and paid for by other fund sources, including third party reimbursements. MI Choice funding is the payment of last resort . . .

(Attachment K of the MI Choice Home and Community-Based Waiver Contract, page 44 of 76)

Here, the existence and availability of Appellant’s spouse and children is undisputed. Moreover, while some training is required to perform the injections, the training has been offered and refused. However, Appellant’s representative offers no reason, medical or otherwise, as to why additional natural supports are unavailable to assist with Appellant’s care.

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Appellant's need for at least some care services is not disputed in this case, but the MI Choice Program is not intended to satisfy all her requests and she is not entitled to services beyond those that are medically necessary. Moreover, the burden is on Appellant to demonstrate by a preponderance of evidence that the termination of the private duty nursing was in error. Given the fact that Appellant is not homebound and can drive, as well as the purpose of private duty nursing and the potential availability of natural supports, Appellant has failed to meet her burden of proof. Accordingly, the termination of the private duty nursing is upheld.

**DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly denied terminated Appellant's private duty nursing.

**IT IS THEREFORE ORDERED** that:

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

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

cc:



Date Mailed: 10/31/2011

**\*\*\* 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.