

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P.O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax: (517) 373-4147

IN THE MATTER OF:

██████████

Appellant

_____ /

Docket No. 2012-54838 EDW
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.* and 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 Supervisor, represented the Department of Community Health's Waiver Agency, the Macomb-Oakland and Regional Center, Inc. ("Waiver Agency" or "MORC"). ██████████, registered nurse/supports coordinator, and ██████████ social worker/supports coordinator, also testified as witnesses for MORC.

ISSUE

Did the Waiver Agency properly reduce Appellant's services 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 ██████████ woman who has been diagnosed with bilateral lower extremity paraplegia, spinal osteoarthritis, spinal hemangioma, hypertension, and depression among other conditions. (Exhibit 1, page 16; Exhibit 3, page 7).
2. MORC 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.
3. Appellant has been enrolled in and receiving MI Choice waiver services through MORC, including personal care and homemaker services. Appellant was also authorized a Personal Emergency Response System

(PERS) unit. (Exhibit 1, page 12; Testimony of ██████████).

4. On ██████████ MORC staff completed a reassessment of Appellant's needs and services. (Exhibit 1, pages 7-25).
5. Based on Appellant's reports and their own observations during that reassessment, the Waiver Agency found that Appellant's personal care and homemaker services should be reduced. It also determined that her PERS could be terminated. (Exhibit 1, page 7; Testimony of Draeger).
6. Appellant was receiving 27 hours of personal care services and 13 hours of homemaker services per week prior to the reassessment of Appellant's services. Following the reassessment, the Waiver Agency determined that Appellant's needs could be met through a decreased amount of services and it decided to reduce her personal care services by 9 hours a week and her homemaker services by 2.25 hours a week. (Testimony of Draeger).
7. On ██████████ MORC sent Appellant a notice that it was reducing her services through the waiver program. The effective date of the termination was identified as ██████████ (Exhibit 1, page 5).
8. The notice sent to Appellant gave the proper amount of advance notice of the negative action. However, because the MORC staff mistakenly used an Adequate Action Notice instead of an Advance Action notice, the written notice in this case did not advise Appellant that her services would remain in place pending a final decision if she filed a Request for Hearing prior to the effective date of the action. (Testimony of ██████████).
9. On ██████████ the Department received a Request for Hearing regarding the termination of services in this case. (Exhibit 2, page 1).
10. During the hearing, the Waiver Agency's representative agreed to reinstate Appellant's services while a final decision in this matter is still pending. (Testimony of ██████████).

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 MORC, 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).]

Types of services that may be offered include:

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).]

Here, it is undisputed that the Appellant has a need for some services and she has continuously been receiving care. However, Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services and the MI Choice waiver did not waive

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the federal Medicaid regulation that requires that authorized services be medically necessary. See 42 CFR 440.230.

As discussed above, Appellant was receiving 27 hours of personal care services and 13 hours of homemaker services per week prior to the reassessment of Appellant's services. She also had a PERS unit. Following the reassessment, the Waiver Agency determined that Appellant's needs could be met through a decreased amount of services and it decided to terminate her PERS while reducing her personal care services by 9 hours a week and her homemaker services by 2.25 hours a week.

During the hearing, AAA's witnesses testified that they adjusted Appellant's services because of information provided to them by Appellant. For example, ██████████ testified that Appellant reported that she had a cell phone and a cordless land-line that she can use to call for help, and that she lives with her caregiver. Similarly, ██████████ testified that Appellant told her that Appellant no longer has diarrhea or incontinence because she now utilizes a bowel regimen once a night and straight catheterization four times a day. According to ██████████ Appellant could not recall the last time she had diarrhea.

The Waiver Agency found that the agency should reduce both personal care services, because of a lessened need for assistance with toileting, and homemaker services, because of a lessened need for laundry given the lack of diarrhea. It also found that PERS was completely unnecessary given Appellant's abilities and living arrangement.

In response, Appellant testified that, while she rarely has diarrhea, she does not recall what she told her workers regarding diarrhea. However, she does remember reporting that she and her caregiver complete her bowel regimen twice a day. Appellant further testified that she requires assistance with her catheterizations, which occur 4 times per day, and cleaning up afterward. Appellant also testified that her caregiver does 10 loads of laundry per week and that the PERS unit makes her feel safer.

This Administrative Law Judge will examine each of the disputed services in turn and, for the reasons discussed below, finds that the Waiver Agency's decision should be affirmed.

With respect to PERS, the facts are not in dispute and it is clear that Appellant does not need the emergency unit. Given that lack of medical necessity, the Waiver Agency properly terminated the service. Appellant may understandably like having PERS, but it is unnecessary given her ability to use her phones and the presence of her caregiver/roommate.

Regarding personal care services, the Medicaid Provider Manual (MPM) provides:

4.1.C. PERSONAL CARE

Personal Care services encompass 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

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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 State law.

Services provided through the waiver differ in scope, nature, supervision arrangement, or provider type (including provider training and qualifications) from Personal Care services in the State Plan. The chief differences between waiver coverage and State Plan services are those services that relate to provider qualifications and training requirements, which are more stringent for personal care provided under the waiver than those provided under the State Plan.

Personal Care includes assistance with eating, bathing, dressing, personal hygiene, and activities of daily living. These services may also include assistance with more complex life activities. The service may include the preparation of meals but does not include the cost of the meals themselves. When specified in the plan of service, services may also include such housekeeping chores as bed making, dusting, and vacuuming that are incidental to the service furnished or that are essential to the health and welfare of the participant rather than the participant's family. Personal Care may be furnished outside the participant's home. [MPM, MI Choice Waiver Chapter, ██████████ pages 9-10.]

Here, the Waiver Agency reduced Appellant's personal care services from 27 hours per week to 18 hours per week due to a lessened need for assistance with toileting. As recorded and testified to by ██████████ Appellant told them that she is no longer has diarrhea or incontinence, and cannot even remember the last time she had diarrhea. ██████████ testified that Appellant told them that she goes through a bowel regimen each night and does a straight catheterization four times a day. ██████████ and ██████████ also role-played the assistance that Appellant would require with toileting and found that her services were excessive.

Appellant testified that she does her bowel regimen, with the assistance of her caregiver, twice a day. Appellant also testified that she needs assistance with the four catheterizations she does a day. Appellant further testified that, while she sometimes has loose bowels and diarrhea, she does not remember what she told workers regarding her toileting needs.

This Administrative Law Judge is limited to reviewing the Waiver Agency's decision in light of the information it had at the time it made that decision. In this case, Appellant does not recall what she told the workers at the time of the reassessment. ██████████ and ██████████, however, testified as to what they were told and their testimony is credible.

Given that testimony, and Appellant's reports regarding her toileting needs, a reduction in services was appropriate. The MORC staff also sufficiently explained how they came to the amount authorized, especially given the fact that Appellant's caregiver is not authorized to perform straight catheterizations and can only help set up and clean up. Accordingly, the Waiver Agency's decision with respect to personal care services should be sustained.

With respect to homemaker services, the MPM states:

4.1.B. HOME MAKER

Homemaker services include the performance of general household tasks (e.g., meal preparation and routine household cleaning and maintenance) provided by a qualified homemaker when the individual regularly responsible for these activities, i.e., the participant or an informal supports provider, is temporarily absent or unable to manage the home and upkeep for himself or herself. Each provider of Homemaker services must observe and report any change in the participant's condition or of the home environment to the supports coordinator. [MPM, MI Choice Waiver Chapter, January 1, 2012, page 9.]

In this case, MORC reduced Appellant's homemaker services from 13 hours a week to 10.75 hours a week because, given Appellant's denial of diarrhea and incontinence, she has a lessened need for laundry. Moreover, as discussed above, Appellant testified that she does not remember what she told the workers regarding diarrhea and their testimony regarding what they are told is credible.

Appellant did testify that her loose bowels and catheterizations do lead to a greater need for laundry, and that her caregiver/roommate does 10 loads of laundry per week. However, it is not clear that those 10 loads are solely for Appellant or how long the caregiver spends performing physical assistance with respect to laundry.

Appellant bears the burden of providing by a preponderance of the evidence the Waiver Agency erred when reducing her services. Given the lack of clarity regarding how laundry is performed, in addition to the lack of diarrhea and incontinence, Appellant has failed to meet that burden in this case. Therefore, the Waiver Agency's reduction of homemaker services is affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly reduced Appellant's MI Choice waiver services.

IT IS THEREFORE ORDERED that:

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

Steven Kibit

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

[REDACTED]
Date Mailed: 7/25/2012

***** 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.