

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

P.O. Box 30763, Lansing, MI 48909
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IN THE MATTER OF:

██████████,

Appellant

Docket No. 2013-55719 EDW
Case No. ██████████

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.*, and upon a Request for Hearing filed on behalf of the minor Appellant/Petitioner.

After due notice, a hearing was held on ██████████. Attorney ██████████ appeared on Appellant's behalf. ██████████, Appellant's mother and legal guardian, testified as a witness for Appellant. Appellant and ██████████, Appellant's nurse, were present during the hearing, but did not participate. ██████████, Clinical Manager, appeared and testified on behalf of the Department of Community Health's Waiver Agency, the ██████████ ("Waiver Agency" or ██████████).

ISSUE

Did the Waiver Agency properly terminate 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 ██████ year-old male who has been diagnosed with Canavan disease and a seizure disorder. (Respondent's Exhibit C, page 2).
2. Appellant's mother is his plenary guardian. (Petitioner's Exhibit 1, pages 3-4).
3. Since ██████, Appellant has been dually enrolled in the MI Choice Waiver Program and the Department's Home Help Program. (Testimony of Appellant's guardian; Respondent's Exhibit D, page 4).
4. ██████ is a contract agent of the Department and the agency responsible for the provision of Appellant's MI Choice services. (Testimony of ██████).

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5. The sole service Appellant receives from ██████ is payment of the monthly premium for his private insurance. (Testimony of Appellant's guardian; Respondent's Exhibit D, page 4).
6. In ████████████████████, the Department attempted to terminate Appellant's Home Help Services (HHS) on the basis that Appellant was enrolled in the waiver program. (Respondent's Exhibit D, page 3).
7. Appellant appealed that termination and the Department's decision was reversed by ALJ ██████████ in a Decision and Order dated ██████████. (Respondent's Exhibit D, page 10).
8. As found by ALJ ██████, the applicable policy did not prohibit a beneficiary from being enrolled in both programs and the Department could not terminate Appellant's HHS based on the mere fact that Appellant was dually enrolled. (Respondent's Exhibit D, pages 9-10).
9. ALJ ██████ also did note that termination would be appropriate if there was duplication in the services between the two programs and, when reversing the Department's decision, she ordered that a new comprehensive assessment be completed to determine Appellant's ongoing eligibility for HHS. (Respondent's Exhibit D, page 10).
10. There was and is no duplication of services between the two programs in this case. Accordingly, Appellant has remained enrolled in both programs. (Testimony of Appellant's guardian; Testimony of ██████████).
11. In ██████████, ██████ sought written approval from the Department for Appellant's services through ██████. The Waiver Agency also attached a copy of ALJ ██████'s decision to that request. (Respondent's Exhibit B, pages 1-2).
12. A representative from the Department responded that, based on policy promulgated after ALJ ██████'s decision, Appellant no longer has the option of receiving services from both programs and Appellant must make a decision regarding the program in which he wishes to remain enrolled. (Respondent's Exhibit B, pages 1-2).
13. On or about ██████████, Appellant's case manager at ██████ informed Appellant's guardian about the Department's position and asked the guardian to choose between the two programs. (Testimony of Appellant's guardian; Respondent's Exhibit D, pages 3-4).
14. Appellant's guardian declined to choose and stated that she would appeal any termination from either program. (Testimony of Appellant's guardian; Respondent's Exhibit D, pages 3-4).

15. On ██████████, ██████ sent Appellant written notice that his MI Choice enrollment and the payment of the insurance premium through the MI Choice Waiver Program would be terminated in twelve (12) days. (Petitioner's Exhibit 1, pages 5-6).
16. On ██████████, the Michigan Administrative Hearing System (MAHS) received a Request for Hearing filed on behalf of Appellant by his guardian. (Petitioner's Exhibit 1, pages 1-6).
17. ██████ has continued providing Appellant's waiver services while this appeal is pending. (Testimony of Appellant's guardian; Testimony of ██████).
18. An in-person hearing was held on ██████████.
19. During that hearing, the Waiver Agency's representative indicated that, if the decision to terminate is upheld, ██████ would give Appellant another chance to choose between the two programs and explore the possibility of Appellant receiving more services through ██████. (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 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. See 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, the sole service Appellant receives from ██████████ is payment of the monthly premium for his private insurance. However, ██████████ decided to terminate that service on the basis that Appellant was also enrolled in the Department’s Adult Home Help Program; a beneficiary cannot received services from both programs at the same time; and Appellant’s guardian refused to choose between the two programs or end Appellant’s home help.

With respect to a beneficiary receiving both MI Choice services and Adult Home Help, the Michigan Medicaid Provider Manual (MPM) states:

2.2.B. FREEDOM OF CHOICE

Applicants or their legal representatives must be given information regarding all long-term care service options for

which they qualify through the nursing facility LOCD, including MI Choice, Nursing Facility and the Program of All-Inclusive Care for the Elderly (PACE). That a participant might qualify for multiple programs does not mean they can be served by all or a combination thereof for which they qualify. Nursing facility, PACE, MI Choice, and Adult Home Help services cannot be chosen in combination with each other. Applicants must indicate their choice, subject to the provisions of the Need for MI Choice Services subsection of this chapter, and document via their signature and date that they have been informed of their options via the Freedom of Choice (FOC) form that is provided to an applicant at the conclusion of any LOCD process. Applicants must also be informed of other service options that do not require Nursing Facility Level of Care, including Home Health and Home Help State Plan services, as well as other local public and private service entities. The FOC form must be signed and dated by the applicant (or their legal representative) seeking services and is to be maintained in the applicant's case record.

*MPM, April 1, 2013 version
MI Choice Waiver Chapter, pages 2-3
(emphasis added)*

Pursuant to section 2.2.B, the Waiver Agency asked Appellant's guardian to choose between the waiver services and the HHS. Appellant's guardian declined to choose or give up the HHS, and the Waiver Agency sent a notice of termination.

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in deciding to terminate his enrollment in the waiver program and the payment of his monthly insurance premium. Given the clear policy quoted above, Appellant has failed to meet that burden of proof.

The clear and plain language of the above policy supports the Waiver Agency's decision as it expressly provides that MI Choice services and Adult Home Help services cannot be chosen in combination with each other. Appellant's representative refused to choose between the two programs or stop receiving HHS, and the Waiver Agency therefore properly terminated Appellant's enrollment and service.

Appellant's representative first argues that the section of the MPM quoted above only applies to nursing facility residents and is therefore inapplicable to this case. However, that argument has no basis in the language of the policy and is not persuasive. The quoted policy is from the MI Choice Waiver Chapter of the MPM and applies to the provision of MI Choice services. Moreover, while it acknowledges that a beneficiary who qualifies for waiver services may also qualify for other types of services, including

nursing facility services and home help, it clearly provides that waiver services cannot be chosen in combination with other types of services, including nursing facility services and home help.¹

Appellant's representative also argues that the intent behind the policy does not apply in this case as there is no duplication of services or fraud. Here, it is undisputed that the sole service Appellant receives from ██████████ is payment of the monthly premium for his private insurance and that such payment is not a covered service under home help. The Waiver Agency's representative also acknowledges that there is no duplication of services or fraud. Moreover, while the MI Choice Waiver Chapter does not identify the purpose of the prohibition against choosing MI Choice services and Adult Home Help in combination with each other, the applicable policy governing HHS, Adult Services Manual 125 (11-1-2011) (hereinafter "ASM 125"), gives a reason for the prohibition: "MI Choice participants **cannot** receive services from both the **home help** program and the **waiver** as this is a duplication of Medicaid services." See ASM 125, page 4 of 10.

Nevertheless, the above policy is clear and this ALJ is bound by its plain language. The section of the MPM applicable to this case expressly provides that MI Choice services and Adult Home Help services cannot be chosen in combination with each other and that policy contains no exceptions. Additionally, while ASM 125 suggests that the reason for the policy does not apply in this case, that manual also contains a clear prohibition against being enrolled in the two programs at the same time. Moreover, while ALJ ██████████ once reversed a proposed termination of Appellant's HHS, she did so in light of the old manual, which only prohibited a duplication of services, and not ASM 125, which now expressly prohibits participants from receiving services from both programs. In any event, this case is governed by the MI Choice Waiver Chapter and it is not this ALJ's role to ascertain the reason behind the clear policy provided in that policy. Applying that clear policy, the Waiver Agency properly decided to terminate Appellant's enrollment and the payment of the premium.

Appellant's representative further argues that this case is a unique situation not contemplated by policy and that indiscriminately applying the prohibition on dual enrollment would put Appellant's health and life at risk. However, given the wide variety of services that could be provided through the MI Choice program, it is not clear that a departure from the clear policy is necessary, even if an exception could be made. Covered waiver services can include, among other types of services, homemaker services, personal care services, respite care, community living supports, and private duty nursing. See MPM, April 1, 2013 version MI Choice Waiver Chapter, pages 9-18. While the exact form and provision of Appellant's services may change, it appears that Appellant's needs could be met solely through the MI Choice program if his guardian chooses that program and that, even if an exception to dual enrollment was allowed by

¹ With respect to the language of the MPM, Appellant's guardian also argues that another part of the MPM, Section 9 of the Home Health Chapter, suggests that MI Choice services and HHS can be used in combination with each other. However, the section cited to by Appellant's guardian merely discusses the coordination of Home Health services with either of the two programs at issue in this case and does not provide, expressly or implicitly, that MI Choice services and HHS can be chosen together.

policy, an exception is not necessary in this case.

Appellant's representative also argues that, even if it is possible to meet Appellant's needs in just one program, Appellant's current arrangement is the most cost-effective method of meeting Appellant's needs and any other arrangement would be significantly more costly to the State of Michigan. That argument may be true, but cost is not a factor in the decision of this ALJ. The policy is clear and, even if it is less costly, Appellant cannot choose MI Choice services and HHS in combination.

Given the clear prohibition against dual enrollment in the MI Choice Waiver Program and the Adult Home Help Program found in the MPM, the Waiver Agency properly asked Appellant's guardian to choose between Appellant's waiver services and his HHS. Additionally, after Appellant's guardian declined to choose between the programs or give up the HHS, and the Waiver Agency properly sent an advance notice of termination of his enrollment in the waiver program and the payment of his monthly insurance premium.

While the advance notice of termination was properly sent, the Waiver Agency's representative indicated that, if the decision to terminate Appellant's services is upheld, ██████████ would give Appellant another chance to choose between the two programs. Moreover, she also indicated that, if Appellant's guardian chose the waiver program, Appellant would likely be eligible for additional services through ██████████ if his HHS were removed.

Giving Appellant another opportunity to choose is proper in this case given the fact that Appellant still qualifies for MI Choice services; his guardian will most likely choose that program over the Adult Home Help Program; and that Appellant will likely have to be authorized for and transitioned to more services through ██████████. Policy makes clear, however, that Appellant's current arrangement cannot continue and the Waiver Agency's past decision to terminate Appellant's services is sustained based on the information it had at the time.

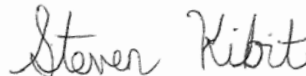
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DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly decided to terminate Appellant's services.

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision to terminate Appellant's waiver services is **AFFIRMED**.



Steven J. Kibit
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

Date Signed: 9/27/2013

Date Mailed: 9/27/2013

[REDACTED]
cc: [REDACTED]

***** 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.