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) 373-4147

IN THE MATTER OF:

[redacted]

Docket No. 14-007775 EDW
Case No. [redacted]

Appellant
_____/

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 upon the Appellant's request for a hearing.

After due notice, a hearing was held on [redacted]. Pursuant to a stipulation by the parties, the record was left open for a submission of additional documentation. On 1[redacted] the record closed in this matter.

[redacted] appeared and testified on her own behalf. Witness included: [redacted], [redacted], and [redacted].

The following individuals appeared as witnesses on behalf of the [redacted] on Aging (Waiver Agency or Agency): [redacted], Assistant Director, [redacted], Social Worker Care Manager, and [redacted], Care Manager Supervisor.

ISSUE

Did the Waiver Agency properly propose to reduce Appellant's CLS services under the MI Choice Waiver program/Community Support Services from 35 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 an [redacted] year old female beneficiary of the MA-extended care Medicaid category enrolled in the MI Choice Waiver program. (Exhibit A; Testimony)

2. Appellant's home care provider is [redacted], Michigan, ([redacted]). (Exhibit A.5)

3. Appellant's daughter and son-in-law live with Appellant, and 'informally' help with Appellant's care. (Exhibit A; Testimony)

4. Prior to the proposed negative action herein, Appellant was receiving 35 CLS hours per week.

5. In [redacted], the Agency received information that Appellant's daughter and son-in-law were going to [redacted] on [redacted] and would be temporarily absent. (Exhibit A.1-2;5;21) Based on this information, on or about [redacted], the Agency increased Appellant's hours by adding 1 hour per day, from 7 days at 4 hours to 7 days, 5 hours per day after verifying with [redacted]-Appellant's caregiver's employer. (Exhibit A.5)

6. One of Appellant's witnesses-[redacted], (an aide) and an RN who filed the subsequent statement-[redacted]-are both employees of [redacted].

7. On [redacted], the Agency received an e-mail from [redacted], Human Resources & Staffing Coordinator at [redacted], which states in part: "the aides have a lot of Rs for refusal. My nurse, [redacted] expressed she didn't think [redacted] doesn't need [sic] as many hours as she has. One of things that [redacted] has observed …is that [redacted] likes to cook…has seen [redacted] shu the caregivers away from the kitchen when trying to do dishes or make her a meal. So with this information, I am not sure how you want to handle … [redacted] hours." (Exhibit A.5)

8. On [redacted] the Agency Care Manager (CM) met at Appellant's home. Progress notes of [redacted] state: "…discussed the recent trip to [redacted] … [redacted] [the daughter] did not go to [redacted], discussed that the Agency understood that [redacted] was going and that they requested an increase of hours for that purpose and agreed when [redacted] left that the Agency would increase hours during that time". (Exhibit A.4)

9. On [redacted] the Agency issued a notice of reduction of hours to 28 hours per week. (Exhibit A.4)

10. On [redacted], MAHS received the Appellant's request for an Administrative Hearing. The Agency reinstated the action pending the outcome of the hearing.

11. On [redacted] Appellant submitted a statement from [redacted]-the RN referred to in the e-mail from her employer of [redacted] of [redacted]-stating in part that [redacted] only observed Appellant "shu" a caregiver away in the kitchen one time; and that an "R" on a care sheet includes tasks not done, not required, not approved, and refused. [redacted] also states that she must have "communicated these facts poorly on my part."

12. The Agency filed no response to Appellant's [redacted] statement and the record closed on [redacted].

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 Medicaid (formerly HCFA) to the Michigan Department of Community Health (Department). Regional agencies 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:
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> - 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 *Medicaid Provider Manual, MI Choice Waiver*, April 1, 2014, provides in part:

> **SECTION 1 – GENERAL INFORMATION**
>
> MI Choice is a waiver program operated by the Michigan Department of Community Health (MDCH) to deliver home and community-based services to elderly persons and persons with physical disabilities who meet the Michigan nursing facility level of care criteria that supports required long-term care (as opposed to rehabilitative or limited term stay) provided in a nursing facility. The waiver is approved by the Centers for Medicare and Medicaid Service (CMS) under section 1915(c) of the Social Security Act. MDCH carries out its waiver obligations through a network of enrolled providers that operate as organized health care delivery systems (OHCDS). These entities are commonly referred to as waiver agencies. MDCH and its waiver agencies must abide by the terms and conditions set forth in the waiver.
>
> MI Choice services are available to qualified participants throughout the state and all provisions of the program are available to each qualified participant unless otherwise noted in this policy and approved by CMS. [p. 1].
>
> * * *
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> **4.1 COVERED WAIVER SERVICES**
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> In addition to regular State Plan coverage, MI Choice participants may receive services outlined in the following subsections. [p. 9].
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> * * *
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> **4.1.B. HOMEMAKER**
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> 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, e.g., 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. [p. 9, emphasis added].

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 form of hands-on assistance (actually performing a task for the participant) or cueing to prompt the participant to perform a task. Personal Care services are 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. [p. 10, emphasis added].

* * *

4.1.H. CHORE SERVICES

Chore Services are needed to maintain the home in a clean, sanitary and safe environment. This service includes heavy household chores such as washing floors, windows and walls, tacking down loose rugs and tiles, and moving heavy items of furniture in order to provide safe access and egress. Other covered services might include yard maintenance (mowing, raking and clearing hazardous debris such as fallen branches and trees) and snow plowing to provide safe access and egress outside the home. These types of services are allowed only in cases when neither the participant nor anyone else in the household is capable of performing or financially paying for them, and where no other relative, caregiver, landlord, community or volunteer agency, or third party payer is capable of, or responsible for, their provision.

In the case of rental property, the responsibility of the landlord, pursuant to the lease agreement, will be examined prior to any authorization of service.

4.1.I. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) services facilitate an individual's independence and promote reasonable participation in the community. Services can be provided in the participant's residence or in a community setting to meet support and service needs.

CLS may include assisting, reminding, cueing, observing, guiding, or training with meal preparation, laundry, household care and maintenance, shopping for food and other necessities, and activities of daily living such as bathing, eating, dressing, or personal hygiene. It may provide assistance with such activities as money management, non-medical care (not requiring nurse or physician intervention), social participation, relationship maintenance and building community connections to reduce personal isolation, non-medical transportation from the participant's residence to community activities, participation in regular community activities incidental to meeting the individual's community living preferences, attendance at medical appointments, and acquiring or procuring goods and services necessary for home and community living.

CLS staff may provide other assistance necessary to preserve the health and safety of the individual so they may reside and be supported in the most integrated independent community setting.
CLS services cannot be authorized in circumstances where there would be a duplication of services available elsewhere or under the State Plan. CLS services may not be authorized in lieu of, as a duplication of, or as a supplement to similar authorized waiver services. The distinction must be apparent by unique hours and units in the individual's plan of service. Tasks that address personal care needs differ in scope, nature, supervision arrangements or provider type (including provider training and qualifications) from personal care service in the State Plan. The differences between the waiver coverage and the State Plan are that the provider qualifications and training requirements are more stringent for CLS tasks as provided under the waiver than the requirements for these types of services under the State Plan.

When transportation incidental to the provision of CLS is included, it must not also be authorized as a separate waiver service. Transportation to medical appointments is covered by Medicaid through the State Plan.

Community Living Supports do not include the cost associated with room and board. [pp. 12-13].

Federal regulations are found at 42 CFR 440.230 wherein it states:

> The agency may place appropriate limits on a service based on such criteria as medical necessity or a utilization control procedures.

In this case, the issue is whether the Agency properly reduced Appellant's hours from 35 to 28 per week.

The purview of an administrative law judge (ALJ) is to review the Department's action and to make a determination if those actions are in compliance with Department policy, and not contrary to law. The ALJ must base the hearing decision on the preponderance of the evidence offered at the hearing or otherwise included in the record. The ALJ at an administrative hearing must base a decision upon the evidence of record focusing at the time of the assessment. The Department cannot be held accountable for evidence it was unaware of at the time of its determination. Facts that are not in existence at the time the Department took its action are generally irrelevant to the action.

Appellant argues that the evidence the Agency used in reducing the hours is incorrect in that it contained statements of false accusations, that the statements in the e-mail from [redacted] are misrepresentations, that the Agency does not understand the coding system used by [redacted], and that Appellant will be living by herself as of [redacted] and needs more hours.

The Agency argues that the increase was based upon the absence of [redacted] and [redacted] from the home for a temporary time period, that [redacted] never left the home, that it was [redacted] that presented the facts, and that the reduction was not based on any one sole fact but all of the factors in this case.

Regarding Appellant's arguments, Appellant and her witnesses focused heavily at the hearing on statements which they believed were misrepresentations by the Agency regarding what Appellant can do and/or the total hours utilized, i.e. shu-ing the caregiver out of the kitchen when cooking; refusing tasks. However, a careful review of the evidentiary packet shows that in fact, these were not based on Agency representations or misrepresentations, but, in fact, based on [redacted]'s representations to the [redacted]. Specifically, the Human Resources manager sent an e-mail indicating that the numerous "Rs" are refusals, and, relayed a discussion regarding Appellant cooking in the kitchen. [redacted] references that this happened more than once. Thus, the statement by Appellant and her witnesses that this information is a misrepresentation by the Agency is nonsensical. Moreover, while the Appellant could have requested that [redacted] attend the administrative hearing, she did not. Moreover, the subsequent statement submitted by [redacted]'s nurse, does not clarify the representations made by [redacted], and at best, state that she must have communicated poorly with her employer, [redacted].

As to the absence of certain individuals to the state of [redacted], little to no discussion was focused on this matter at the administrative hearing. However, this fact offers support for the reduction.

As to Appellant living alone in the future, this ALJ has no authority to consider this fact- evidentiary rules require this ALJ to rule that it is irrelevant. The law, policy and rules do not allow a review of future events to relate back to an assessment of whether the Agency acted correctly, at a prior point in time when the fact did not exist and has no bearing.

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency did not act properly in reducing his MI Choice Waiver services. The testimony of the Appellant and his representative did not establish that the Waiver Agency acted improperly when it reduced Appellant's CLS services. The preponderance of evidence supports finding that the Waiver Agency acted in accordance with the Medicaid policy quoted above.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency acted properly when it proposed to reduce the Appellant's CLS services under the MI Choice Waiver program from 35 hours per week to 28 hours per week.

IT IS THEREFORE ORDERED that:

The Department's proposed decision is AFFIRMED.

Janice Spodarek
Administrative Law Judge
for Nick Lyons, Director
Michigan Department of Community Health

Date Signed: [redacted]

Date Mailed: [redacted]

JS[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.