SSTATE 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:

Docket No. 14-010554 EDW

[redacted] [redacted] [redacted]

Appellant

[redacted]/

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 [redacted], Appellant's step-father and co-guardian, appeared and testified on Appellant's behalf. [redacted], Manager of [redacted], appeared and testified on behalf of the Michigan Department of Community Health's Waiver Agency, the [redacted] ("Waiver Agency" or "[redacted], social worker/supports coordinator, and [redacted], registered nurse/supports coordinator, also testified as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly deny Appellant's request for respite care services and terminate Appellant's personal care and homemaking 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. [redacted] is a contract agent of the Michigan Department of Community Health and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services in its service area.

2. On [redacted], Appellant was enrolled with the Waiver Agency and approved for [redacted] hours per week of personal care and homemaking services. (Testimony of [redacted] Testimony of [redacted] [redacted]

3. The services were to be provided through a care provider agency, with Appellant's representative being employed by that agency and paid to provide care. (Testimony of [redacted]; Testimony of [redacted].

4. Appellant's representative then applied for employment with the care provider agency. (Testimony of Appellant's representative; Testimony of [redacted]

5. While that process was taking place, Appellant's representative declined to have any other workers sent out and provided all of the necessary care himself as an unpaid worker. (Testimony of [redacted].

6. Appellant's representative did request respite care services as relief for the significant unpaid care he was providing, but the Waiver Agency verbally denied that request. (Testimony of Appellant's representative; Testimony of [redacted]

7. Due to difficulties with the care provider agency, Appellant's representative was never hired by the agency and no formal services were ever provided by Appellant's representative or paid for by the Waiver Agency between [redacted] and [redacted] (Testimony of Appellant's representative; Testimony of [redacted].

8. On [redacted], the Waiver Agency sent Appellant written notice that his personal care and homemaking services would no longer be authorized as of that date. (Respondent's Exhibit A, pages 1-2).

9. Regarding the reason for the decision, the notice stated: "Service Eligibility Note met-refused service greater than [redacted] days." (Respondent's Exhibit A, page 1).

10. On [redacted], the Michigan Administrative Hearing System (MAHS) received the request for hearing filed in this matter regarding the denial of respite care services and the termination of personal care and homemaking services. (Petitioner's Exhibit 1, pages 1-2).

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 [redacted], 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)*

Similarly, the applicable version of the Medicaid Provider Manual (MPM) identifies covered waiver services as including:

> **4.1.B. HOMEMAKER**
>
> 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.
>
> **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.

4.1.D. RESPITE CARE

Respite Care services are provided to participants unable to care for themselves and are furnished on a short-term basis due to the absence of, or need of relief for, those individuals normally providing care for the participant. Services may be provided in the participant's home, in the home of another, or in a Medicaid-certified hospital or a licensed Adult Foster Care facility. Respite care does not include the cost of room and board, except when provided as part of respite care furnished in a facility approved by MDCH that is not a private residence.

Services include:

- Attendant Care (participant is not bed-bound), such as companionship, supervision, and assistance with toileting, eating, and ambulation.

- Basic Care (participant may or may not be bed-bound), such as assistance with ADLs, a routine exercise regimen, and self-medication.

There is a 30-days-per-calendar-year limit on respite services provided outside the home.

MPM, July 1, 2014 version
MI Choice Waiver Chapter, pages 9-10

However, while homemaker, personal care and respite care are Medicaid covered services, Medicaid beneficiaries are still only entitled to medically necessary Medicaid covered services and the MI Choice Waiver did not waive the federal Medicaid regulation that requires that authorized services be medically necessary. *See* 42 CFR 440.230.

Moreover, to be eligible for the MI Choice Program, it "must be established that the applicant needs at least one waiver service and that the service needs of the applicant cannot be fully met by existing State Plan or other services." MPM, July 1, 2014 version, MI Choice Waiver Chapter, page 1.

With respect to that requirement, the MPM also provides:

> **2.3 NEED FOR MI CHOICE SERVICES**
>
> In addition to meeting financial and functional eligibility requirements and to be enrolled in the program, MI Choice applicants must demonstrate the need for a minimum of one covered service as determined through an in-person assessment and the person-centered planning process.
>
> **Note:** Supports coordination is considered an administrative activity in MI Choice and does not constitute a qualifying requisite service. Similarly, informal support services do not fulfill the requirement for service need.
>
> An applicant cannot be enrolled in MI Choice if their service and support needs can be fully met through the intervention of State Plan or other available services. State Plan and MI Choice services are not interchangeable. MI Choice services differ in nature and scope from similar State Plan services and often have more stringent provider qualifications.
>
> *MPM, July 1, 2014 version*
> *MI Choice Waiver Chapter, page 3*

In this case, the Waiver Agency first denied Appellant's request for respite care services and then subsequently terminated the personal care and homemaking services that had previously been approved.

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in deciding to terminate the services he was previously approved for or in denying his request for additional services.

Here, the undersigned Administrative Law Judge finds that the Waiver Agency did err by failing to provide proper notice of its decisions and that the termination and denial must therefore be reversed due to improper notice.

With respect to notice of negative actions and appeals involving MI Choice program, the MPM states:

> **SECTION 11 - APPEALS**
>
> The Michigan Department of Community Health has established participant and provider appeal processes that are applicable to MI Choice. The participant appeals process conforms to the Medicaid fair hearing requirements found at

42 CFR Part 431, Subpart E of the Code of Federal Regulations. Provider appeal rights conform to the requirements of Michigan law and rules found at MCL 400.1 et seq. and MAC R 400.3401 et seq.

11.1 PARTICIPANT APPEALS

MI Choice has established notice and appeals requirements to which waiver agencies must adhere when adverse action has been taken for program applicants or participants.

According to 42 CFR 431.201

"Action" means a termination, suspension, or reduction of Medicaid eligibility or of covered services. This also includes determinations by the waiver agent that the applicant or participant does not meet the nursing facility level of care criteria and other denials of Medicaid eligibility or of covered services.

11.1.A. ADEQUATE ACTION NOTICES

MI Choice waiver agencies must send an Adequate Action Notice to applicants or participants informing them of adverse actions and determinations taken under the following circumstances:

- when the waiver agency is at operating capacity and unable to enroll MI Choice applicants who request a Michigan Medicaid Nursing Facility Level of Care Determination (LOCD).

- when the waiver agency determines applicants to be functionally ineligible for MI Choice services based on the results of a LOCD.

- when a participant requests additional services or additional amounts of services and the waiver agency denies the request

- when an existing benefit is reduced, suspended or terminated, and meets the requirements for an exception from an Advance Action Notice as specified in 42 CFR 431.213.

11.1.B. ADVANCE ACTION NOTICES

An Advance Action Notice must be sent to MI Choice participants when action is being taken to reduce, suspend, or terminate service(s) a participant currently receives. This notice must be provided at least 12 days in advance of the intended action.

An Advance Action Notice is also issued if it is determined that a reduction in level or number of services is warranted based on the participant's current assessment. The notice must inform the participant that services will not be reduced until a formal decision has been rendered through the Medicaid Fair Hearings process if the participant formally requests a hearing before the specified date of the intended action.

11.1.C. NOTICES

Advance Action Notices and Adequate Action Notices that relate to the LOCD process are posted on the MDCH website. (Refer to the Directory Appendix for website information.)

Waiver agencies may use additional notices for actions not related to the LOCD process. These notices must be approved by MDCH prior to use to assure compliance with 42 CFR 431.210. Waiver agencies must supply a copy of the Request for Hearing form (DCH-0092) and a return envelope with each notice sent to an applicant or participant, or any time an applicant or participant requests such material. Waiver agencies are required to assist applicants or participants who request help in filing an LOCD exception review through the Michigan Peer Review Organization (MPRO), or a formal appeal for any reason through the Medicaid fair hearings process.

MPM, July 1, 2014 version
MI Choice Waiver Chapter, pages 34-35

With respect to respite care, it is undisputed that Appellant and his guardian requested respite care services and that their request was verbally denied without any written Adequate Action Notice being sent. As such, the Waiver Agency violated the above

policy by not sending out an Adequate Action Notice as required when the participant requested additional services and the Waiver Agency denied the request.

Moreover, while the Waiver Agency did send written notice with respect to the termination of the services that had been previously approved, it is also undisputed that the termination took effect the same day the notice was sent. As such, the Waiver Agency violated the above policy by not providing [redacted] days advance notice of the intended termination as required.

Accordingly, given the clear policy quoted above, the Waiver Agency failed to provide proper notice of either decision at issue in this case and therefore both decisions must be reversed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency improperly terminated Appellant's personal care/homemaking services and denied Appellant's request for respite care services.

IT IS THEREFORE ORDERED that:

> The Waiver Agency's decisions are **REVERSED** and it must initiate a reassessment of Appellant's request for respite care services and a reinstatement of Appellant's personal care and homemaking services.

Steven J. Kibit
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

Date Signed: [redacted]

Date Mailed: [redacted]

SK/db

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.