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. 14-013218 EDW

[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 telephone hearing was held on [redacted], Appellant's daughter appeared and testified on the Appellant's behalf. [redacted], Appellant's son and caregiver was present but did not testify.

[redacted], Manager of [redacted], [redacted] appeared on behalf of the Department's Waiver Agency. [redacted], LBSW, Supports Coordinator, [redacted] testified on behalf of the Department's Waiver Agency.

ISSUE

Did the Waiver Agency act properly in reducing the Appellant's Community Living Support service hours from [redacted] hours per week to [redacted] hours per week under 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. The Appellant is a Medicaid beneficiary who is enrolled in the MI Choice Waiver program. Appellant had been receiving [redacted] Community Living Support service hours per week under the MI Choice Waiver program. (Exhibit A, pp. 2, 6-7 and testimony).

2. The Appellant is an [redacted]-year-old male (DOB [redacted]. (Exhibit A, p. 8 and testimony).

3. On [redacted], LBSW, Appellant's Supports Coordinator did a home visit and conducted a reassessment to determine the Appellant's current need for services in the MI Choice Waiver Program. The Waiver Agent found the Appellant continued to eligible for the MI Choice Waiver program. After reviewing Appellant's need for services the Waiver Agent determined that his Community Living Support service hours should be reduced from [redacted] hours per week to [redacted] hours per week. (Exhibit A, p. 2, 6-7, 8-23, and testimony).

4. On [redacted] the Waiver Agency sent the Appellant an Advance Action Notice stating that it had been determined there would be a change in his MI Choice Waiver Services, and [redacted] hours of care per week would be terminated effective [redacted] days from the date of the notice. (Exhibit A, pp. 2, 3-4, 5-6 and testimony).

5. On [redacted], MAHS received the Appellant's request for an Administrative Hearing. (Exhibit 1).

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:

- 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*, July 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].

* * *

SECTION 2 - ELIGIBILITY

The MI Choice program is available to persons 18 years of age or older who meet each of three eligibility criteria:

- An applicant must establish his/her financial eligibility for Medicaid services as described in the Financial Eligibility subsection of this chapter.

- The applicant must meet functional eligibility requirements through the online version of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD).

- 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.

All criteria must be met in order to establish eligibility for the MI Choice program. MI Choice participants must continue to meet these eligibility requirements on an ongoing basis to remain enrolled in the program. [p.1].

* * *

2.2.A. MICHIGAN MEDICAID NURSING FACILITY LEVEL OF CARE DETERMINATION

MI Choice applicants are evaluated for functional eligibility via the Michigan Medicaid Nursing Facility Level of Care Determination. The LOCD is available online through Michigan's Single Sign-on System. Refer to the Directory Appendix for website information. Applicants must qualify for functional eligibility through one of seven doors.
These doors are:

- Door 1: Activities of Daily Living Dependency
- Door 2: Cognitive Performance
- Door 3: Physician Involvement
- Door 4: Treatments and Conditions
- Door 5: Skilled Rehabilitation Therapies
- Door 6: Behavioral Challenges
- Door 7: Service Dependency

The LOCD must be completed in person by a health care professional (physician, registered nurse (RN), licensed practical nurse (LPN), licensed social worker (BSW or MSW), or a physician assistant) or be completed by staff that have direct oversight by a health care professional.

The online version of the LOCD must be completed within fourteen (14) calendar days after the date of enrollment in MI Choice for the following:

- All new Medicaid-eligible enrollees
- Non-emergency transfers of Medicaid-eligible participants from their current MI Choice waiver agency to another MI Choice waiver agency
- Non-emergency transfers of Medicaid-eligible residents from a nursing facility that is undergoing a voluntary program closure and who are enrolling in MI Choice

Annual online LOCDs are not required; however, subsequent redeterminations, progress notes, or participant monitoring notes must demonstrate that the participant continues to meet the level of care criteria on a continuing basis. If waiver agency staff determines that the participant no longer meets the functional level of care criteria for participation (e.g., demonstrates a significant change in condition), another face-to-face online version of the LOCD must be conducted reflecting the change in functional status. This subsequent redetermination must be noted in the case record and signed by the individual conducting the determination. [pp. 1-2].

* * *

2.3.B. REASSESSMENT OF PARTICIPANTS

Reassessments are conducted by either a properly licensed registered nurse or a social worker, whichever is most appropriate to address the circumstances of the participant. A team approach that includes both disciplines is encouraged whenever feasible or necessary. Reassessments are done in person with the participant at the participant's home. [p. 4].

* * *

4.1 COVERED WAIVER SERVICES

In addition to regular State Plan coverage, MI Choice participants may receive services outlined in the following subsections. [p. 9].

* * *

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. [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].

* * *

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].

The issue appealed is whether the Waiver Agency properly reduced the Appellant's Community Living Support service hours. Appellant appealed the reduction.

The Waiver Agency's witness [redacted], LBSW, Supports Coordinator, established through credible testimony that on [redacted] she met with Appellant along with the

Appellant's son and daughter and conducted a reassessment to determine the Appellant's current needs for services in the MI Choice Waiver Program. The Waiver Agent found the Appellant continued to eligible for the MI Choice Waiver program. After reviewing Appellant's need for services the Waiver Agent determined that his Community Living Support service hours should be reduced from [redacted] hours per week to [redacted] hours per week.

[redacted] stated she has been the Appellant's Supports Coordinator for the past [redacted] to [redacted] years. [redacted] stated there haven't been any changes in the Appellant's ADLs, IADLs, cognitive or physical functioning for the Appellant during this period of time. [redacted] stated her rationale for reducing the Appellant's Community Living Support service hours was there were informal supports available which would allow for a reduction in services. [redacted] noted the Appellant and his spouse, who is also receiving Community Living Support service hours under the Waiver program, both live in their son's home who is the paid caregiver for the Appellant under the Waiver program, and who is also providing informal supports for both participants.

[redacted] stated the Appellant's son was being paid for the full [redacted] hours per week of Community Living support service hours being provided under the Waiver program at the time of the reassessment. She stated the son was also providing informal supports. [redacted] stated based on the reassessment she reduced the service hours [redacted] hour per day [redacted] days per week for the Appellant (and for his spouse), which included a reduction in hours for homemaking, cleaning, meals, shopping for groceries, and laundry, tasks that were generally being done together for the occupants in the home. [redacted] stated there was a communal living setting in the home and these needs were able to be met by the informal supports being provided by the Appellant's son.

[redacted] stated she considered the Appellant's and his spouse's needs separately, and she made an adjustment for meals because the Appellant and his spouse are both diabetic and require special diabetic diets, so [redacted] hours per week were included in the service hours approved for each recipient. [redacted] stated that house cleaning, laundry, shopping and errands for the home were considered for the reduction in service hours as the son was providing these tasks on an informal basis for the whole household. [redacted] notes from the reassessment clearly states that: "the participant resides with his spouse in [redacted] home. [redacted] participant's son as the informal support provides the participant with the following care: homemaking, laundry, errands/shopping, transportation, meal preparation, managing financial and insurance matters and medication." (Exhibit A, p. 6).

Appellant's daughter, who was present at the reassessment, testified at the hearing that she did not live in the home, but she visits most of the time. The reassessment report states that the daughter has two small children and the times she able to provide assistance to the Appellant is limited. (Exhibit A, p. 12). Appellant's daughter did not agree with the Waiver Agency cutting [redacted] hour per day from the service hours authorized for the Appellant. She said the Waiver Agents were trying to say that the shopping, the cleaning, the laundry, meal preparation, and everything is combined, but she said everything is done completely separate. She said she is not sure why the Waiver Agents

are combining everything together. Appellant's daughter said their rooms are cleaned separately, and different foods are cooked for each parent due to their food preferences. Appellant's daughter said she helped her brother write the letter attached to the Appellant's request for hearing because her brother does not speak good [redacted]. She said she wrote down what her brother told her. Appellant's daughter said her brother was present but would not testify because he did not speak good [redacted] and does not understand some of the words.

The 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's witness did not establish that the Waiver Agency acted improperly when it reduced his MI Choice Waiver services. The preponderance of the evidence in this case shows that the services authorized at the time were sufficient to meet the Appellant's individual need for services.

The issue in this case is not whether certain tasks are being provided separately, or combined together for the entire household, but rather whether some tasks are being provided as informal supports rather than as paid Waiver services. Despite the testimony of the Appellant's daughter, the preponderance of the evidence shows that the Appellant lives in his son's home, who is providing many homemaking tasks on an informal basis. Being that it is the son's home, the son is regularly responsible for many of the homemaking tasks, and it has not been shown that he is unable to manage the home and its upkeep as he would be expected to do since it is his home. Paid Waiver services cannot supplant unpaid informal supports. Accordingly, the Waiver Agency acted properly in reducing the Appellant's service hours from [redacted] hours per week down to [redacted] hours per week.

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 in reducing the Appellant's services under the MI Choice Waiver program.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

William D Bond

William D. Bond
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

Date Signed: [redacted]

Date Mailed: [redacted]

[redacted]
Docket No. 14-013218 EDW
Hearing Decision & Order

WDB/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.