

**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:

Docket No. 14-0078903 EDW

██████████

██████████

██████████

Appellant

_____ /

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's sister, appeared and testified on Appellant's behalf. Appellant; ██████████, Appellant's brother-in-law; and ██████████, Appellant's mother; also testified as witnesses for Appellant. ██████████, Assistant Director, appeared and testified on behalf of the Department of Community Health's Waiver Agency, the ██████████ ("Waiver Agency" or "██████████", social worker/care manager; ██████████, registered nurse/care manager; ██████████, social work supervisor; and ██████████ nursing supervisor; also testified as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly reduce Appellant's Community Living Supports (CLS)?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. ██████████ 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. Appellant is a ██████ year-old Medicaid beneficiary who has been diagnosed with coronary artery disease; hypertension; dementia; a stroke; bipolar disorder; and diabetes mellitus. (Respondent's Exhibit A, pages 13-15).
3. Appellant has been receiving services through the Waiver Agency, including CLS. (Respondent's Exhibit A, page 13).

4. As of ██████████ Appellant was authorized for █ hours per day, █ days per week, of CLS. (Respondent's Exhibit A, page 13).
5. On ██████████ staff performed a reassessment of Appellant's services with Appellant in his home. (Respondent's Exhibit A, pages 5-23).
6. During that assessment, it was noted that Appellant was "Independent, setup help only" in bathing. (Respondent's Exhibit A, page 20).
7. On ██████████, the Waiver Agency sent notice to Appellant's provider stating that, effective ██████████, Appellant's CLS were increased to █ hours per day, █ days per week. (Respondent's Exhibit A, page 3).
8. On ██████████ met with Appellant to conduct their monthly contact and, during that meeting, she noted that Appellant continues to do many things independently and refuses some services, such as help with bathing, when the aide asks him. (Respondent's Exhibit A, page 3).
9. On ██████████, the Waiver Agency sent Appellant an "Adequate Action Notice" stating that his CLS services shall not be authorized effective ██████████ as Appellant is providing all of his own personal care. (Respondent's Exhibit A, pages 24-25).
10. On ██████████, after speaking with Appellant's representative and noting that the representative was going to appeal, Vatter had Appellant's CLS reinstated to █ hours per day. (Respondent's Exhibit A, page 3).
11. On ██████████, the Michigan Administrative Hearing System (MAHS) received the request for hearing in this matter. (Petitioner's 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.

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 Tri-County, 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, Appellant has been receiving CLS through the Waiver Agency and, with respect to such services, the applicable version of the Michigan Medicaid Provider Manual (MPM) states:

4.1.I. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) services facilitate a participant'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, nonmedical 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 participant'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 participant so they may reside and be supported in the most integrated and 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 cannot 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 plan of services. 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.

*MPM, July 1, 2014 version
MI Choice Waiver Chapter, pages 12-13*

However, while CLS 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.

Here, it is undisputed that the Appellant has a need for some services and he has been continually been authorized for CLS. Instead, the sole dispute is the amount of such services to be authorized, with the Waiver Agency seeking to reduce Appellant's CLS from █ hours per day, █ days per week, to █ hours per day, █ days per week.

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in deciding to reduce his services. Moreover, 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.

As a preliminary matter, the undersigned Administrative Law Judge would first note that the Waiver Agency failed to provide proper notice of the reduction and that its decision to reduce his services must therefore be reversed. 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*

Similarly, the section of the Code of Federal Regulations regarding Advance Notice, 42 CFR 431.211, also provides that "The State or local agency must send a notice at least 10 days before the date of action", except in certain circumstances not applicable to this case.

In this case, the Waiver Agency clearly failed to comply with the requirements regarding advance notice. First, by stating that waiver services would no longer be authorized rather than stating they would be reduced, the ██████████ notice failed to provide any notice of the actual action being taken. Second, by taking effect the day after it was sent, the notice failed to provide ██████ days advance notice of the intended reduction.

The Waiver Agency's witnesses argued in response that the notice was sufficient because Appellant agreed to the reduction, but there is no support in the above policy for their assertions that a factually incorrect notice taking immediate effect is ever proper, even in cases where a reduction is initially agreed to. Moreover, outside of their testimony, there is no indication that Appellant actually agreed to any reduction and the Waiver Agency's own progress notes fail to document such an agreement.

Accordingly, given the clear policy and regulation cited above, the notice at issue in this case was improper and the decision to reduce Appellant's services should therefore be reversed.

Additionally, even if the improper notice was ultimately harmless given that Appellant's services were reinstated while the appeal was pending and his representative was aware of the action taken and the reason for that action, the Waiver Agency also erred in deciding to reduce Appellant's CLS and its decision to do so would still have to be reversed.

The Waiver Agency's witnesses testified that the reduction was being made because Appellant completes many tasks independently and refuses some services, with the only specific example of such a refusal being assistance with bathing. However, it is undisputed that Appellant does not require assistance with bathing and he has never been receiving such assistance. In fact, after an assessment conducted just a month before the reduction, the Waiver Agency actually increased Appellant's services despite noting that Appellant was "Independent, setup help only" in bathing. The Waiver Agency's witnesses also did not explain during the hearing why they now wanted to reduce his services on the basis that he did not want or need bathing assistance. Appellant has never received assistance with bathing and his lack of need for such assistance therefore cannot form the basis for a reduction.

With respect to the assistance that Appellant does need, his representative credibly testified that nothing has changed and, as discussed above, the Waiver Agency failed to identify any change or new information that would justify a reduction in services. Therefore, the undersigned Administrative Law Judge finds that the Waiver Agency's decision to reduce Appellant's services must be reversed.

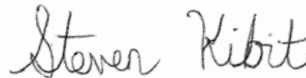
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Docket No. 14-0078903 EDW
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DECISION AND ORDER

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

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision is **REVERSED**.



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.