

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:

██████████

Appellant

Docket No. 2014-30759 EDW

██████████

██████████

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 ██████████ and ██████████ from the ██████████ appeared on Appellant's behalf. Appellant was also present. ██████████ Social Work Manager, represented the Department of Community Health's Waiver Agency, the ██████████ ("Waiver Agency" or ██████████). ██████████ Appellant's supports coordinator, was also present on behalf of the Waiver Agency.

Due to miscommunication within the ██████████ County Department of Human Services (DHS), whose office was hosting the hearing, the hearing began significantly later than scheduled and the parties only had time to address the Motion to Dismiss filed by Appellant the day before the hearing. However, for the reasons discussed below, the undersigned Administrative Law Judge finds that, as the motion should be granted and Respondent's decision reversed due to improper notice, no further hearing need be held.

ISSUE

Did the Waiver Agency properly reduce Appellant's services?

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 receives waiver services through ██████████ hours a day, ██████████ days a week.

3. On ██████████ issued an Advanced Negative Action Notice stating that Appellant's services would be reduced as of ██████████
4. With respect to the reason for the reduction, the notice only stated: "as described in the person-centered planning meeting ██████████
5. No person-centered planning meeting had been held on ██████████
6. With respect to Appellant's services, the notice only stated:

CLS – Personal Care ██████ hrs per day
Homemaking ██████ hrs per day
Private Duty Nursing ██████ hrs per day
Non medical transportation ██████ times per month
7. On ██████████ the Michigan Administrative Hearing System (MAHS) received the Request for Hearing filed in this matter.
8. Due to the timing of the request for hearing, the Waiver Agency has not implemented the proposed reduction in services.

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 ██████████, 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 a number of services through the Waiver Agency, including, homemaker; personal care; private duty nursing; and non-medical transportation services.

As discussed above, ██████ has now decided to reduce those services and Appellant is appealing that reduction. In doing so, Appellant has the ultimate burden of proving by a preponderance of the evidence that the Waiver Agency erred. However, the Waiver Agency also bears the initial burden of going forward and establishing that its action was proper and in accordance with the applicable law and policy

Appellant filed a Motion to Dismiss the Negative Action on the day before the hearing. In that motion, Appellant argues that the Waiver Agency's decision to reduce his services must be reversed because it failed to provide him with proper notice of that negative action.

With respect to notice of negative actions and appeals involving MI Choice, the Michigan Medicaid Provider Manual (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.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, January 1, 2014 version
MI Choice Waiver Chapter, pages 34-35*

Moreover, the section of the Code of Federal Regulations referenced in the MPM, 42 CFR 431.210, also provides:

A notice required under § 431.206(c)(2), (c)(3), or (c)(4) of this subpart must contain--

(a) A statement of what action the State, skilled nursing facility, or nursing facility intends to take;

(b) The reasons for the intended action;

(c) The specific regulations that support, or the change in Federal or State law that requires, the action;

(d) An explanation of--

(1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or

(2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and

(e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

Given the above policy and regulation, the notice provided in this case was inadequate and the decision to reduce Appellant's services must therefore be reversed.

First, while the Waiver Agency must provide advance notice of what action it intends to take, see 42 CFR 431.210(a), ████████ did not describe the specific action it would be taking in this case beyond stating that there would be a reduction. Instead, the notice simply provided a list of services and, as argued by Appellant's representatives and conceded by ████████'s representative, the notice itself is unclear on whether Appellant's services are being reduced *by* that amount or *to* that amount.

Second, the notice also failed to provide advance notice of the reasons for the intended action as required by 42 CFR 431.210(b). With respect to the reason for the reduction, the notice only stated: "as described in the person-centered planning meeting 2/25/14". Merely alluding to some previous conversation defeats the purpose of providing written notice and fails to meet the requirements of the regulation, especially where, as undisputed by the parties in this case, the notice identifies the wrong date for any conversation that was held.

[REDACTED]
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By failing to provide advance written notice of either the action it intends to take or the reasons for that intended action, [REDACTED] has failed to provide Appellant with proper notice in this case and its decision to reduce Appellant's services must therefore 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 failed to provide proper notice of the reduction or meet its initial burden of going forward and establishing that its action was proper and in accordance with the applicable law and policy.

IT IS THEREFORE ORDERED that:

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

Steven Kibit

Steven J. Kibit
Administrative Law Judge
for James K. Haveman, 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.