

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:

Docket No. 2014-34660 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. upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████ Appellant's daughter/guardian appeared and testified on the Appellant's behalf.

██████████, Social Work Manager, appeared on behalf of the Department of Community Health's Waiver Agency, the ██████████ ("Waiver Agency" or ██████████, LLMSW, Care Manager/Social Work Supports Coordinator testified on behalf of the Department of Community Health's (Department) Waiver Agency.

ISSUE

Did the Department's Waiver Agency properly reduce Appellant's MI Choice Waiver 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. The Appellant is a ██████ year-old, (DOB: ██████), who is enrolled in the MI Choice Waiver Program. (Exhibit A, p. 1 and testimony).
2. The Department contracts with the Waiver Agency to provide MI Choice Waiver services to eligible beneficiaries. (Testimony).
3. On ██████████ (and again on ██████████), Social Work Supports Coordinator ██████████ ██████████, LLMSW, met with Appellant's

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daughter/caregiver and conducted a [REDACTED]-day reassessment to determine the Appellant's current needs for services in the MI Choice Waiver Program. She completed a Michigan Medicaid Nursing Facility Level of Care Determination (LOCD). [REDACTED] found the Appellant continued to eligible for the MI Choice Waiver program, but determined that her MI Choice Waiver Services should be reduced from [REDACTED] hours per week to [REDACTED] hours per week to more accurately reflect the hands-on care needed by the Appellant, and that in-home respite services would be appropriate to allow for someone to monitor the Appellant while her daughter needs to run errands for the Appellant. (Exhibit A, p. 1 and testimony).

4. On [REDACTED] a notice was sent to the Appellant indicating her MI Choice Waiver Services would be reduced from [REDACTED] hours per week to [REDACTED] hours per week effective [REDACTED] to more accurately reflect the hands-on care needed by the Appellant. (Testimony).
5. On [REDACTED], MAHS received the Appellant's request for an Administrative Hearing. (Exhibit 1).
6. The [REDACTED] negative action notice was subsequently determined to be improper by [REDACTED] and was rescinded. Thereafter, an Advance Action notice was sent to Appellant on [REDACTED], stating the Appellant's MI Choice Waiver Services would be reduced from [REDACTED] hours per week to [REDACTED] hours per week effective [REDACTED]. (Testimony).

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 requested 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 (CMS, 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

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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)].

The policy regarding enrollment in the MI Choice Waiver program is contained in the *Medicaid Provider Manual, MI Choice Waiver*, April 1, 2014, which 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

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- 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].

* * *

SECTION 4 – SERVICES

The array of services provided by the MI Choice program is subject to the prior approval of CMS. Waiver agencies are required to provide any waiver service from the federally approved array that a participant needs to live successfully in the community, that is:

- indicated by the current assessment;
- detailed in the plan of service; and
- provided in accordance with the provisions of the approved waiver. [p. 9].

* * *

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).

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.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. [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.

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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 Waiver Agency provided evidence that on [REDACTED] (and again on [REDACTED], [REDACTED], Social Work Supports Coordinator [REDACTED], LLMSW, met with Appellant's daughter/caregiver and conducted a [REDACTED]-day reassessment to determine the Appellant's current needs for services in the MI Choice Waiver Program. She completed a Michigan Medicaid Nursing Facility Level of Care Determination (LOCD). [REDACTED] found the Appellant continued to eligible for the MI Choice Waiver program, but determined that her MI Choice Waiver Services should be reduced from [REDACTED] hours of down to [REDACTED] hours per week to more accurately reflect the hands-on care needed by the Appellant.

[REDACTED] stated on [REDACTED], a notice was sent to the Appellant indicating her MI Choice Waiver Services would be reduced from [REDACTED] hours per week to [REDACTED] hours per week effective [REDACTED] to more accurately reflect the hands-on care needed by the Appellant. [REDACTED] stated, however, that the [REDACTED] negative action notice was subsequently determined to be improper by [REDACTED] and was rescinded. Thereafter, the Appellant was sent an Advance Action Notice on [REDACTED] decreasing her MI Choice Waiver services to [REDACTED] hours per week, i.e., [REDACTED] hours per day, [REDACTED] days per week effective [REDACTED].

[REDACTED] stated the MI Choice Waiver services authorized for the Appellant were primarily personal care services including feeding, bathing, changing the Appellant,

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changing her bed linen, changing the Appellant's incontinent garments as she is bed bound and non-verbal, and repositioning the Appellant every [REDACTED] hours. The waiver services also include light housekeeping, which includes cleaning the Appellant's bedroom, preparing and pureeing the Appellant's food, and doing the laundry.

[REDACTED] stated she discussed the Appellant's care needs with the Appellant's daughter/caregiver at the [REDACTED] reassessment and again on [REDACTED] reassessment. [REDACTED] also looked in on the Appellant, and assessed the Appellant's environment. [REDACTED] stated that considering the Appellant's actual personal care needs, [REDACTED] hours of MI Choice Waiver services per day, [REDACTED] days per week would be adequate Medicaid covered services to meet the Appellant's current needs. [REDACTED] advised the Appellant's daughter that Community Living Support services in the MI Choice Waiver program do not cover sitting with the beneficiary and providing companionship, that respite services might be appropriate to allow someone to be with the Appellant when she has to leave and run errands for her mother. [REDACTED] offered to coordinate the Community Living Support services being provided with in-home respite care for the Appellant. Appellant's daughter indicated she wanted no reduction in services and requested a hearing.

Appellant's daughter testified Appellant's paid caregiver works for [REDACTED]. Appellant's daughter said the caregiver is only with the Appellant [REDACTED] hours per day. She stated the caregiver prepares breakfast, purees the food, and feeds the Appellant. She bathes the Appellant, changes her clothes, does grooming, puts on skin lotion, and changes the bed linen when the Appellant has an accident in the bed. Appellant's daughter said the caregiver does the laundry, cleans the kitchen after meals, and turns the Appellant every [REDACTED] hours. She said the caregiver gives the Appellant her medications crushed up in applesauce, gets her to drink. The caregiver also puts [REDACTED] hand braces, an arm brace, and special boots on the Appellant.

Appellant's daughter said her mother is like a baby and needs care [REDACTED]. Appellant's daughter says she has a baby monitor on for the [REDACTED] hours that she sleeps. She said she has to go out to get medical supplies, groceries, and toiletries for the Appellant. Appellant's daughter said she provides personal care for the Appellant along with the aide. She said she did not tell [REDACTED] that she needed a companion for her mother. She said she needs someone to monitor the Appellant when she has to go out. Appellant's daughter said her mother can't do any of her ADLs; she is totally bed bound, and totally incontinent. She said she believes the reduction is due to a cut in the Agency's budget, and she thinks that her mother has gotten worse and she should have increased services not reduced services.

In response to the daughter's testimony, [REDACTED] pointed out that several of the tasks listed by the daughter as being performed by the caregiver are not authorized services. These tasks include suctioning, cleaning the kitchen which the daughter also uses for her own cooking, passing medicines, and putting orthopedic equipment on the Appellant. [REDACTED] stated the caregivers are not trained/authorized to do suctioning, pass medications, or to place the orthopedic equipment on the Appellant.

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The Appellant bears the burden of proving, by a preponderance of evidence, that the Waiver Agency did not properly reduce her MI Choice Waiver services. A preponderance of the material and credible evidence in this case establishes that the MI Choice Waiver Agency acted properly when it reduced the Appellant's MI Choice Waiver services. Considering the Appellant's actual need for services, the [REDACTED] hours of hours authorized by the Waiver Agency are sufficient to meet the Appellant's current needs for homemaking and personal care.

Appellant's daughter testified the caregiver is only with the Appellant [REDACTED] hours per day, and she did not indicate that any of the Appellant's personal care needs were not being met by either her or the paid caregiver. Appellant's daughter acknowledged that she was also providing personal care for her mother, and the MI Choice Waiver program is not meant to replace such informal unpaid supports with Medicaid covered services. Furthermore, the Waiver Agency has offered to provide in-home respite services in addition to the [REDACTED] hours of Community Living Support services per week that are currently authorized for the Appellant. This would provide the Appellant's daughter some relief from providing unpaid care for the Appellant, and would provide someone to monitor and provide some personal care for the Appellant when the daughter needs to be away. The Appellant's daughter is encouraged to consider the Agency's offer to coordinate in-home respite along with the authorized Community Living Support services.

DECISION AND ORDER

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

IT IS THEREFORE ORDERED that:

The Department's decision is **AFFIRMED**.

William D Bond

William D. Bond
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

Date Signed:

Date Mailed:

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WDB/db

cc:



***** 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.