

**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.** 2014-35371 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 appeared and testified on her own behalf. ██████████, Appellant's mother, also testified on Appellant's behalf. ██████████, Social Work Manager, represented the Department of Community Health's Waiver Agency, the ██████████ ("Waiver Agency" or ██████████), Appellant's supports coordinator, also testified on behalf of the Waiver Agency.

**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 is a ██████████ year-old female who has been diagnosed with paraplegia NOS; depression; diabetes mellitus; hypertension; systemic lupus; iron-deficiency anemia NOS; mononeuritis NOS; and a right neck abscess. (Respondent's Exhibit A, pages 10-11).
3. Appellant had receiving eight hours per day of services through the Waiver Agency. (Testimony of Appellant; Testimony of ██████████).
4. ██████████ hours of services per day were provided through a care provider agency while the remaining ██████████ hours per day were provided by Appellant's mother. (Testimony of Appellant).

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5. On ██████████, the Waiver Agency sent Appellant written notice that her services would be reduced to █ hours per day, effective immediately. (Petitioner's Exhibit 1, page 1-2).
6. The reduction was implemented immediately and Appellant was only authorized for four hours of services per day. (Testimony of Appellant; Testimony of ██████████)
7. In allocating the reduced hours, Appellant had her aides continue to provide and be paid for █ hours a day while her mother, despite the fact that she continued to provide the same amount of care, was now only paid for one hour a day of services. (Testimony of Appellant; Testimony of ██████████)
8. On ██████████ conducted a routine reassessment of Appellant's services. (Respondent's Exhibit A, pages 1-19).
9. On ██████████, the Michigan Administrative Hearing System (MAHS) received the request for hearing filed in this matter. (Petitioner's Exhibit 2, pages 1-2).
10. After receiving notice of the request, the Waiver Agency reviewed the disputed action and discovered that it had improperly reduced Appellant's services without proper advance notice. (Testimony of ██████████)
11. On ██████████, the Waiver Agency reinstated Appellant's services to █t hours per day. (Testimony of ██████████).
12. The reinstatement was not retroactive and was instead effective as of ██████████. (Testimony of ██████████).
13. That same day, the Waiver Agency also sent Appellant written notice that her services would be reduced to █ hours a day effective ██████████ (Respondent's Exhibit A, page 24).
14. Given the pending hearing, the Waiver Agency did not intend to implement the reduction on ██████████ and decided that services would remain in place at █ hours a day until a decision was rendered on Appellant's appeal. (Testimony of ██████████).
15. However, while ██████████ spoke with Appellant on ██████████ she did not inform Appellant that the reduction would not be implemented. (Testimony of ██████████; Testimony of ██████████).
16. Consequently, on ██████████, Appellant and her providers returned to the same arrangement as before given that the most recent notice stated that services would be reduced as of that date. (Testimony of Appellant).

## **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, as discussed above, Appellant had been receiving eight hours per day of services through the Waiver Agency before ██████████ reduced those services to ██████████ hours per day.

Appellant is now appealing that reduction and, in doing so, she 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.

Given the record in this case, the Waiver Agency has failed to meet that burden of going forward and its decision to reduce Appellant's services must be reversed because it failed to provide her 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*

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 as the ██████████ reduction at issue in this case took immediate effect. Accordingly, given the clear policy and regulation cited above, the notice at issue in this case was clearly improper and the decision to reduce Appellant’s services must therefore be reversed.

Moreover, while the Waiver Agency acknowledged that the notice was defective and attempted to correct it after the request for hearing was filed, its subsequent actions failed to remedy the defective notice or meet its burden of demonstrating that that its actions were proper and in accordance with the applicable law and policy.

For example, the Waiver Agency failed to make the reinstatement of services to eight hours a day retroactive to the time the improper reduction was issued or to even investigate whether Appellant’s care providers should be reimbursed for services they provided during the time when the reduction was implemented due to the Waiver Agency’s failure to provide proper advance notice. Such a reimbursement would be possible in this case as Appellant’s mother has continued to provide at least ██████ hours a day of services, despite the fact that she is now only paid for ██████ hour.

Similarly, due to the Waiver Agency’s failure to properly notify Appellant of its actions, Appellant’s providers are once again only getting reimbursed for ██████ hours a day of services. The Waiver Agency may have decided, due to the pending hearing, not to implement the reduction again on ██████████, but that is not what is stated in the second notice it sent; it failed to inform Appellant that the reduction would not be implemented again; and it has not been paying for ██████ hours of services per day

Overall, the Waiver Agency has continually erred in its handling of Appellant’s case. It failed to provide Appellant with the required advance notice of the reduction at issue in this case or remedy that initial mistake once its error was discovered. Therefore, the undersigned Administrative Law Judge finds that the Waiver Agency’s decision to reduced Appellant’s services is reversed and that it must reinstate Appellant’s services to ██████ hours a day as of the effective date of the reduction, ██████████

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To the extent the Waiver Agency still wishes to reduce Appellant's services, it may send out new and proper advance notice of that decision. Appellant would then have an opportunity to file a new request for hearing and, if necessary, another administrative would be held. With respect to the decision at issue in this case, however, the Waiver Agency's decision must be reversed.

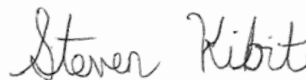
**DECISION AND ORDER**

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

**IT IS THEREFORE ORDERED** that:

The Waiver Agency's decision is **REVERSED** and it must initiate a reinstatement of Appellant's services, with an effective date of

[REDACTED].



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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.