

**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. 2014-8000 EDW

██████████,

██████████

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 hearing was held on ██████████. ██████████ appeared on the Appellant's behalf. ██████████, Appellant's daughter/guardian, and Appellant's caregivers, ██████████, and ██████████ testified on the Appellant's behalf.

██████████, Quality and Training Manager, ██████████ appeared on behalf of the Department's Waiver Agency. ██████████, LLMSW, Supports Coordinator, ██████████, also testified on behalf of the Department's Waiver Agency.

ISSUE

Did the Waiver Agency act properly by reducing Appellant's MI Choice Waiver services from ██████ hours per day ██████ days per week to ██████ hours per day ██████ days per week?

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 an ██████ year old Medicaid beneficiary (██████████) who has been enrolled in the MI Choice Waiver program since ██████████. Appellant is currently authorized to receive ██████ hours per day of Comprehensive Community Supports to care for her ADLs and IADLs by the Waiver Agency through Self Determination and ██████████. Appellant's daughter provides an additional ██████ hours of informal support daily. (Exhibit A, pp. 3, 7, 11, 15, 17 and testimony).

2. Appellant has a primary diagnosis of Alzheimer's disease. She has a history of HTN, hyperlipidemia, hypothyroidism and aphasia. Appellant is nonverbal and totally dependent on others to make decisions for her. (Exhibit A, pp. 8, 17 and testimony).
3. On ██████████, a reassessment was conducted with the Appellant and her daughter, by Supports Coordinators ██████████, RN, and ██████████ LLBSW, in the Appellant's apartment to determine her continued eligibility for the MI Choice Waiver Program. Two of the Appellant's caregivers were also present for the reassessment. The Supports Coordinators determined that the Appellant remained eligible for the Waiver Program. They determined that the Appellant's daughter was the only one who could provide informal supports for the Appellant and was not able to increase her informal supports due to her work and class schedules. They offered other options for ██████ hour care such as AFC homes, assisted living or ██████, but the Appellant's daughter declined these possible options and it was noted Appellant had a bad experience in a nursing facility. The Supports Coordinators concluded stating the Appellant would remain active in the Waiver program, but service levels would be re-evaluated. (Exhibit A, pp. 4-20 and testimony).
4. On ██████████, an Advance Action Notice was sent to the Appellant stating effective ██████████ the Waiver Agency was reducing her services to ██████ hours per day, ██████ days per week. The Notice stated:

The MI Choice Medicaid Waiver program expects a combination of formal and informal support for your care needs. Due to MI Choice Waiver program not being a ██████ hrs ██████ days per week program, ██████████ will no longer provide ██████ hrs per day, ██████ days per week care. Multiple other community resources and programs were discussed with your daughter to explore extra care for you such as ██████████, Licensed Care Settings, Assisted Living Facilities, increasing informal support assistance (family support), and private pay; at which your daughter denied all other resources discussed with her. Your daughter currently private pays ██████ hrs per day in addition to ██████ hrs per day that MI Choice Waiver was supplying. It was stated that your daughter would private pay for services if your services were reduced. Because MI Choice Waiver program is payer of last resort, we are reducing services to ██████ hrs per day, ██████ days per week. Your daughter can supplement your care as she desires through private pay. (Exhibit 1, p. 5).

5. On ██████████, 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*, October 1, 2013, 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 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.

Services must not be provided unless they are defined in the plan of service and must not precede the establishment of a plan of service. Waiver agencies cannot limit in aggregate the number of participants receiving a given service or the number of services available to any given participant. Participants have the right to receive services from any willing and qualified provider.

MDCH and waiver agencies do not impose a copayment or any similar charge upon participants for waiver services. MDCH and waiver agencies do not impose a premium, enrollment fee, or similar costsharing arrangement on waiver participants.

Although MI Choice participants must have services approved by the waiver agency, participants have the option to select any participating provider, thereby assuring freedom of choice. [p. 9, emphasis added].

The issue appealed is whether the Waiver Agency properly reduced the Appellant's MI Choice Waiver services from █████ hours per day █████ days per week to █████ hours per day █████ days per week. Appellant has appealed the reduction.

The Waiver Agency's witness testified a reassessment for MI Choice Waiver services was conducted on ██████████ with the Appellant and her daughter, by Supports Coordinators ██████████, RN, and ██████████ LLBSW, in the Appellant's apartment to determine her continued eligibility for the MI Choice Waiver Program. The witness testified that the Appellant has a diagnosis of Alzheimer's disease with severely impaired cognitive status, she is unable to make decisions for herself, and has very limited verbal communication. She further testified that the daughter and caregivers use nonverbal communications to determine the needs of the Appellant. The Agency's witness testified the Appellant is bed bound and requires total care for all ADLs and IADLs. The witness stated Appellant requires extensive assistance with transfers.

The Waiver Agency's witness testified for the MI Choice Waiver Program Supports Coordinators assess for the care needs of the participant, but also whether they can safely live in their own home or whether they need facility type care with staff available on a █████ hour basis. The witness stated due to the Appellant's cognitive and physical functioning, The Senior Alliance did not feel the Appellant was safe living in her own home, and that the Appellant requires █████ hour care and supervision. The Waiver Agency's witness testified the MI Choice Waiver Program is not a █████ hour program, but can work in conjunction with █████ hour care facilities, such as assisted living facilities, homes for the aged facilities to supplement care needs. The witness testified that this was discussed with the Appellant's daughter, who declined such options due to a prior bad experience with a nursing facility.

The Waiver Agency's witness testified after the daughter declined the option of utilizing a █████ hour care facility, they continued to work with the Appellant's daughter to find a

resolution utilizing █████ hours of care rather than the █████ hours previously determined to be necessary by the Waiver Agency, considering the fact that the Waiver Agency believes the Appellant was unsafe living alone in her own home. The Supports Coordinator suggested having the Appellant move in with the daughter, or having the daughter increase her informal supports. The witness alleged that the Appellant's daughter told their Waiver Manager that she would have to private pay for services with the proposed reduction to █████ hours per day. The witness again indicated Waiver is not a █████ hour program and it enhances informal supports, but does not replace them. The witness also pointed out that Waiver is the payer of last resort, and that all other resources need to be considered before authorizing Medicaid Waiver services.

The Waiver Agency's witness testified that ████████████████████ proposes use of a █████ hour care facility in conjunction with waiver services to meet the Appellant's needs. The witness indicated that based on the assessment █████ hours of care is not supported. She further indicated if the daughter continues to deny the use of a █████ hour care facility the █████ hours of care recommended by the Waiver Agency could be broken down into █████ hour shifts to allow continued repositioning every █████ hours and which would allow time to meet the Appellant's other care needs throughout the day. The witness concluded by stating the daughter could continue to provide informal support assistance as needed, and could supplement the waiver services through private pay.

Later in her testimony, however, the Waiver Agency's witness acknowledged that neither their contract with the Department of Community Health or the Medicaid Provider Manual states that the MI Choice Waiver Program is not a █████ hour program. The Waiver Agency did include Attachments from their contract with the Department which set forth some general limitations to the authorization of Waiver services. Attachment I §D states: "Generally, MI Choice services are not used to replace existing unpaid supports, but rather bolster and help sustain ongoing allies' involvement. Attachment I §E states: "Before authorizing MI Choice services for a participant, the waiver agency must take full advantage of services and supports in the community that are available to the participant and paid for by other fund sources, including third party reimbursements and Medicaid State Plan services. MI Choice funding is the payment source of last resort." (Exhibit A, p. 35). Attachment H, Limitations section also states: "Where applicable, the participant must use Medicaid state plan, Medicare, or other available payers first." (Exhibit A, p. 40).

Appellant's daughter testified she comes over to the Appellant's at █████ every day to give her mother her medicines and then waits until a caregiver shows up at █████ Appellant's daughter testified that she does grocery shopping and bathes her mother, does cooking, and picks up the Appellant's medicine. The daughter stated she does come over whenever she can to be with her mother because of her condition with Alzheimer's disease. The daughter also said she has monthly meetings with the caregivers to make sure they know how to care for her mother. Appellant's daughter testified she never told the Waiver Manager that she would private pay for additional services if the Waiver services were reduced.

The Appellant's daughter and the care givers all testified that the Appellant is never left alone. The daughter stated that the Appellant is receiving good care from her caregivers.

They all stated the Appellant is very safe in her own home with the services she is currently being provided.

The Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency did not act properly in reducing her MI Choice Waiver services. The Waiver Agency's decision to reduce services must be reviewed based upon their reassessment on ██████████ and the information available to them at that time. Despite the fact that they had previously determined that the Appellant required ██████ hours of care along with the █████ hour of informal support that the daughter was able to provide. Also, despite the fact that they have not shown that the Appellant's condition has changed since the prior assessment. They are now proposing to reduce her MI Choice Waiver services to █████ hours per day with a recommendation that she be placed in a █████ hour care facility where she will be able to get the █████ hour care and supervision that she needs. This is based primarily on their belief that she is not safe living alone in her own home. They have further suggested that if the Appellant is not placed in a █████ hour care facility; that they would authorize █████ hours per day of care that could be split up into █████ hour shifts, which would facilitate repositioning the Appellant every █████ hours and still provide for the Appellant's other care needs throughout the day. The Waiver Agency suggests that it would then be up to the daughter to either private pay for additional services, or provide additional informal supports that their own assessment demonstrated the Appellant's daughter was not able to provide.

By recommending the use of a █████ hour care facility, and by previously authorizing █████ hours of care per day for the Appellant, the Waiver Agency is acknowledging that the Appellant's needs have not changed and that she still needs █████ hour care. They have not shown that there are other services or supports in the community that are available to the Appellant that would be paid for by other fund sources. They have not established that their contract with the Department or the policy contained within the Medicaid Provider Manual precludes them from providing MI Choice services at the previously authorized level, or that they can force the Appellant's daughter to move the Appellant to a █████ hour care facility. Accordingly, the preponderance of the evidence shows that based on the ██████████ assessment, the Waiver Agency acted improperly in reducing the Appellant's MI Choice Waiver services from █████ hours per day █████ days per week to █████ hours per day █████ days 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 improperly when it reduced the Appellant's MI Choice Waiver services from █████ hours per day █████ days per week to █████ hours per day █████ days per week.

IT IS THEREFORE ORDERED that:

The Department's decision is REVERSED.

[REDACTED]
Docket No. 2014-8000 EDW
Hearing Decision & Order

William D Bond

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

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

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.

