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. 14-012806 EDW
Case No. [redacted]

[redacted],

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 telephone hearing was held on [redacted]. Appellant appeared. [redacted], Appellant's daughter, appeared and testified.

[redacted], Manager for [redacted] represented the waiver Area [redacted], Michigan (Waiver Agency). [redacted], Social Work Supports Coordinator, testified on behalf of the Department's Waiver Agency.

ISSUE

Did the Waiver Agency act properly in reducing the Appellant's CLS services under the MI Choice Waiver program/Community Support Services from 20 hours per week down to 7 hours 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. Appellant is a Medicaid [redacted] year old male MA-extended care Medicaid category enrolled in the MI Choice Waiver program. Appellant had been receiving 20 hours per week of CLS through Self Determination. (Exhibit A; and Testimony).

2. Appellant's diagnoses include hypertension, arthritis, diabetes mellitus. (Exhibit A.8-9).

3. On [redacted] the Waiver Agency conducted an in-home reassessment and utilized a Plan of Care Worksheet. (Exhibit A). The Agency determined that Appellant's CLS hours should be reduced to 7 hours per week, and, that Appellant was no longer eligible for 50 miles of transportation monthly, and home delivered meals. (Exhibit A.4-5).

4. On [redacted], the Waiver Agency issued a Negative Action Notice to inform Appellant that the following MI-Choice Waiver Services for community service hours will be terminated: "…home delivered meals; 50 miles of transportation monthly; and 13 hours of care weekly…" with an effective date of the change in the services to be "12 days from the date of this notice." (Exhibit A.4-5).

5. The Agency's Advanced Action Notice states that Appellant has a right to a Medicaid Fair Hearing that must be mailed to Michigan Administrative Tribunal, [aka MAHS] and, that Appellant "…if your request for a fair hearing is received prior to the effective date of action stated above…" then Appellant "will continue to receive the affective services until the hearing is rendered". (Exhibit A.5).

6. On [redacted], MAHS received the Appellant's request for an Administrative Hearing. The Agency failed to continue benefits on the grounds that it was not aware that it is stated in writing anywhere that Appellant has a right to continued benefits when the Agency is not given notice of hearing by MAHS within the pended period of time. (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 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:
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> - 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*, April 1, 2014, provides in part:

> **<u>SECTION 1 – GENERAL INFORMATION</u>**
>
> 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].

* * *

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, emphasis added].

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, emphasis added].

* * *

4.1.H. CHORE SERVICES

Chore Services are needed to maintain the home in a clean, sanitary and safe environment. This service includes heavy household chores such as washing floors, windows and walls, tacking down loose rugs and tiles, and moving heavy items of furniture in order to provide safe access and egress. Other covered services might include yard maintenance (mowing, raking and clearing hazardous debris such as fallen branches and trees) and snow plowing to provide safe access and egress outside the home. These types of services are allowed only in cases when neither the participant nor anyone else in the household is capable of performing or financially paying for them, and where no other relative, caregiver, landlord, community or volunteer agency, or third party payer is capable of, or responsible for, their provision. In the case of rental property, the responsibility of the landlord, pursuant to the lease agreement, will be examined prior to any authorization of service.

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.

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].

Federal regulations are found at 42 CFR 440.230 wherein it states:

The agency may place appropriate limits on a service based on such criteria as medical necessity or a utilization control procedures.

Subpart E—Fair Hearings for Applicants and Beneficiaries

NOTICE

§431.210 Content of notice.

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.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56505, Nov. 30, 1992]

Procedures

§431.230 Maintaining services.

(a) If the agency sends the 10-day or 5-day notice as required under §431.211 or §431.214 of this subpart, and the beneficiary requests a hearing before the date of action, the agency may not terminate or reduce services until a decision is rendered after the hearing unless—

(1) It is determined at the hearing that the sole issue is one of Federal or State law or policy; and

(2) The agency promptly informs the beneficiary in writing that services are to be terminated or reduced pending the hearing decision.

(b) If the agency's action is sustained by the hearing decision, the agency may institute recovery procedures against the applicant or beneficiary to recoup the cost of any services furnished the beneficiary, to the extent they were furnished solely by reason of this section.

[44 FR 17932, Mar. 29, 1979, as amended at 45 FR 24882, Apr. 11, 1980; 78 FR 42302, July 15, 2013]

§431.231 Reinstating services.

(a) The agency may reinstate services if a beneficiary requests a hearing not more than 10 days after the date of action.

(b) The reinstated services must continue until a hearing decision unless, at the hearing, it is determined that the sole issue is one of Federal or State law or policy.

> (c) The agency must reinstate and continue services until a decision is rendered after a hearing if—
>
> (1) Action is taken without the advance notice required under §431.211 or §431.214 of this subpart;
>
> (2) The beneficiary requests a hearing within 10 days from the date that the individual receives the notice of action. The date on which the notice is received is considered to be 5 days after the date on the notice, unless the beneficiary shows that he or she did not receive the notice within the 5-day period; and
>
> (3) The agency determines that the action resulted from other than the application of Federal or State law or policy.
>
> (d) If a beneficiary's whereabouts are unknown, as indicated by the return of unforwardable agency mail directed to him, any discontinued services must be reinstated if his whereabouts become known during the time he is eligible for services.
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> [44 FR 17932, Mar. 29, 1979, as amended at 78 FR 42302, July 15, 2013]

On , , MPA, Manager of Home and Community Based Services Section for the Long Term Care Services Division with the Michigan Department of Community Health issued a mandate to the informing it that the MDCH mandates immediately that the Agency immediately cease the use of the Plan of Care Worksheet and Policy for the purposes of planning service and supports for MI Choice participants. The communication further mandated that the Agency, within 30 days from the date of the letter, develop a corrective action plan to reevaluate all persons whose hours have been decreased, terminated, or suspended. Furthermore, the mandate specifically mandated that where there are informal supports/caregivers, the case must verify the ability and willingness to provide an agreement of the participant or the person responsible for furnishing the informal supports.

Regarding the reduction in meals, Agency evidence indicates that a support person in the home was providing meals while Appellant was receiving home delivered meals at the same time. In order to receive home delivered meals, the Department argued that there must not be anyone else in the home who is able or willing to prepare meals. The Department emphasized that Appellant's wife was available; Appellant argued that she is not to the extent that the Department's action would support. As s letter specifically discusses the degree of informal supports, and as it is not clear in this case as to the degree to which the Agency relied on the invalid worksheet, the cancellation cannot be supported. As with the meals, the same issues exist with regard to homemaking-it cannot be reasonably discerned the degree to which the Worksheet was utilized in making the reduction here without evidence by the Agency that it complied with the mandate to reassess.

Here, the facts in this case fall under the mandate issued by the MDCH against the Agency-the Agency did use the Plan of Care Worksheet referenced by the communication. In addition, many of the concerns raised in Manager 's communication fall under the facts here-the Agency emphasized that Appellant's wife provided informal support(s); meals were discontinued; the Worksheet is patently ambiguous. The ambiguity lies in the lack of hours totaled on the worksheet. The Agency failed to address the Worksheet calculation, and/or if it was subsequently modified. It is not clear that this Worksheet was actually utilized pursuant to the assessment here as the total hours are missing. Moreover, the narrative portions of the evidentiary packet discuss informal supports; however, the informal supports box on the Worksheet is left blank. While admittedly the Agency used the Plan of Care and a person centered assessment, the mandate from the MDCH is clear-the tool cannot be used to assess, and where it is used to reduce services, the Agency must establish a reevaluation. The Agency presented no evidence of having done so in this matter. There is insufficient evidence of record to show that the Agency's reductions and discontinuance of services in this case were independent of the Worksheet. The Agency did not show that the action here can be supported without the consideration and use of the Worksheet. Thus, this ALJ must reverse the reduction.

It is noted that this ALJ has no authority to review any disagreement the Agency may have with the mandate issued by the MDCH pursuant to the Delegation of Authority wherein it states:

> Administrative law judges have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulation, or overrule or make exceptions to Department policy. MDCH Delegation of Authority.

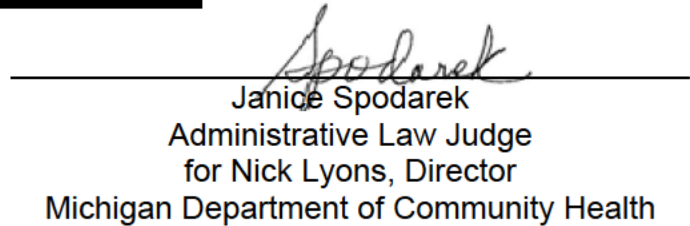
It is further noted, that the Agency was required to reinstate benefits due to a timely hearing request pursuant to its own notice it issued, and 42 CFR 431.230 and 431.231. Moreover, the Agency cited the Administrative Hearings Pamphlet as authority that it did not have to reinstate the action here. However, that Pamphlet in fact requires the Agency to do so pursuant to Pages 11-22.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the reliance by the Waiver Agency's on the Plan of Care Worksheet and the failure to present evidence of a reassessment was not in compliance with MCDH policy.

IT IS THEREFORE ORDERED that:

> The Department's decision is REVERSED and it must immediately reinstate all benefits from the date that benefits were stopped and reduced, and reinstate CLS hours to the prior level. The Agency is also ordered initiate actions to follow the corrective actions mandated in the MDCH [redacted] letter from [redacted].



Janice Spodarek
Administrative Law Judge
for Nick Lyons, Director
Michigan Department of Community Health

JS

Date Signed:

Date Mailed:

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.