STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P.O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax: (517) 373-4147

IN THE MATTER OF:

[redacted],

Docket No. 15-000070 EDW
Case No. [redacted]

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 Appellant's request for a hearing.

After due notice, a telephone hearing was held on [redacted]. Appellant appeared and testified on his own behalf. [redacted], registered nurse/clinical manager, appeared and testified on behalf of the Michigan Department of Community Health's Waiver Agency, the [redacted] ("Waiver Agency" or [redacted]). Support Coordinators [redacted] and [redacted] also testified as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly decide to terminate 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. [redacted] 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 [redacted] year-old Medicaid beneficiary who has been diagnosed with a psychotic disorder, not otherwise specified; schizophrenia; coronary artery disease; hypertension; anxiety; and depression. (Exhibit C, pages 10-12).

3. Appellant had been receiving services through the Waiver Agency, including 30 hours per week of Community Living Supports ("CLS"). (Respondent's Exhibit C, page 20).

4. In [redacted], the Waiver Agency sent Appellant written notice of its decision to reduce Appellant's CLS to 5 hours per week. (Testimony of [redacted]).

5. Appellant appealed that decision and an administrative hearing was held. (Testimony of Keaster).

6. In [redacted], Administrative Law Judge [redacted] issued a Decision and Order affirming the Waiver Agency's decision to reduce Appellant's services. (Testimony of [redacted]).

7. However, even after that decision was affirmed, the Waiver Agency did not implement the reduction. (Testimony of [redacted]).

8. On [redacted], [redacted] conducted a reassessment of Appellant's services. (Exhibit C, pages 1-22).

9. During that reassessment, [redacted] staff noted that Appellant lives alone in an apartment, Appellant had been recently hospitalized after falling in his home, and that Appellant has daily pain in his shoulders, arms and legs. (Exhibit C, pages 4, 12-13).

10. The Waiver Agency staff also found that Appellant continued to require assistance with meal preparation, housework, finances, shopping, transportation, and bathing. (Exhibit C, pages 17-18).

11. Appellant and the Waiver Agency staff then discussed the option of Appellant's needs being met through alternate programs, including the Home Help Program administered by the Michigan Department of Human Services ("DHS"). (Exhibit C, pages 19, 22).

12. Following the reassessment, the Waiver Agency determined that Appellant's services should be terminated because his needs could be met through the Home Help Program. (Testimony of [redacted]).

13. However, it also decided to continue to approve 8.5 hours per week of CLS while Appellant applied for Home Help Services ("HHS") so that he would not be without services at any time and there would be a smooth transition between the two programs. (Exhibit B, page 6).

14. The change to 8.5 hours per week of CLS took effect on [redacted]. (Exhibit D, page 1).

15. Appellant continued to engage in discussions with both [redacted] and DHS regarding a change in programs, but he ultimately decided not to apply for HHS because he felt that program could not meet his needs. (Exhibit B, pages 3-4; Testimony of Appellant).

16. [redacted] gave Appellant what it believed to be ample time to file an application for HHS before deciding that it had to terminate waiver services. (Exhibit B, page 2; Testimony of [redacted]).

17. On [redacted], the Waiver Agency sent Appellant written notice that his services would be terminated on [redacted] because there was no medical need for services through the waiver program. (Exhibit A, page 1).

18. On [redacted], the Michigan Administrative Hearing System ("MAHS") received the request for hearing filed in this matter. (Exhibit 1, page 1).

19. Given the appeal, the proposed termination was not implemented and Appellant's services have remained in place while this matter is pending. (Testimony of Appellant; Testimony of [redacted]).

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 [redacted], 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 through the waiver program 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 CLS through the Waiver Agency and, with respect to such services, the applicable version of the Michigan Medicaid Provider Manual (MPM) states:

> **4.1.H. COMMUNITY LIVING SUPPORTS [RE-NUMBERED AND CHANGES MADE 10/1/14]**
>
> Community Living Supports (CLS) facilitate an individual's independence and promote participation in the community. CLS can be provided in the participant's residence or in community settings. CLS include assistance to enable participants to accomplish tasks that they would normally do for themselves if able. The services may be provided on an episodic or a continuing basis. The participant oversees and supervises individual providers on an ongoing basis when participating in self-determination options. Tasks related to ensuring safe access and egress to the residence are authorized 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/volunteer agency, or third party payer is capable of or responsible for their provision. When transportation incidental to the provision of CLS is included, it shall not also be authorized as a separate waiver service for the participant. Transportation to medical appointments is covered by Medicaid through DHS.

CLS includes:

- Assisting, reminding, cueing, observing, guiding and/or training in household activities, ADL, or routine household care and maintenance.

- Reminding, cueing, observing and/or monitoring of medication administration.

- Assistance, support and/or guidance with such activities as:

  - Non-medical care (not requiring nurse or physician intervention) – assistance with eating, bathing, dressing, personal hygiene, and ADL;

  - Meal preparation, but does not include the cost of the meals themselves;

  - Money management;

  - Shopping for food and other necessities of daily living;

  - Social participation, relationship maintenance, and building community connections to reduce personal isolation;

  - Training and/or assistance on activities that promote community participation such as using public transportation, using libraries, or volunteer work;

  - Transportation (excluding to and from medical appointments) from the participant's residence to community activities, among community activities, and from the community activities back to the participant's residence; and

- Routine household cleaning and maintenance.

- Dementia care including, but not limited to, redirection, reminding, modeling, socialization activities, and activities that assist the participant as identified in the individual's person-centered plan.

- Staff assistance with preserving the health and safety of the individual in order that he/she may reside and be supported in the most integrated independent community setting.

- Observing and reporting any change in the participant's condition and the home environment to the supports coordinator.

These service needs differ in scope, nature, supervision arrangements, or provider type (including provider training and qualifications) from services available 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.

CLS services cannot be provided in circumstances where they would be a duplication of services available under the State Plan or elsewhere. The distinction must be apparent by unique hours and units in the approved service plan. **(revised per bulletin MSA 14-26)**

MPM, October 1, 2014 version
MI Choice Waiver Chapter, pages 13-14
(Internal highlighting omitted)

However, while Appellant has been receiving CLS, the Waiver Agency has now found that his needs can be met through the Home Help Program administered by DHS. Home Help Services (HHS) are provided to enable functionally limited individuals to live independently and receive care in the least restrictive, preferred settings. These activities must be certified by a physician and may be provided by individuals or by private or public agencies. Adult Services Manual 101 (12-1-2013) (hereinafter "ASM 101") addresses what services may be provided as HHS:

Home help services are non-specialized personal care service activities provided under the independent living

services program to persons who meet eligibility requirements.

Home help services are provided to enable individuals with functional limitation(s), resulting from a medical or physical disability or cognitive impairment to live independently and receive care in the least restrictive, preferred settings.

Home help services are defined as those tasks which the department is paying for through Title XIX (Medicaid) funds. These services are furnished to individuals who are **not** currently residing in a hospital, nursing facility, licensed foster care home/home for the aged, intermediate care facility (ICF) for persons with developmental disabilities or institution for mental illness.

These activities **must** be certified by a Medicaid enrolled medical professional and may be provided by individuals or by private or public agencies. **The medical professional does not prescribe or authorize personal care services.** Needed services are determined by the comprehensive assessment conducted by the adult services specialist.

Personal care services which are eligible for Title XIX funding are limited to:

Activities of Daily Living (ADL)

- Eating.
- Toileting.
- Bathing.
- Grooming.
- Dressing.
- Transferring.
- Mobility.

Instrumental Activities of Daily Living (IADL)

- Taking medication.
- Meal preparation/cleanup.
- Shopping for food and other necessities of daily living.
- Laundry.
- Housework.

> An individual must be assessed with at least one activity of daily living (ADL) in order to be eligible to receive home help services.
>
> **Note:** If the assessment determines a need for an ADL at a level 3 or greater but these services are not paid for by the department, the individual would be eligible to receive IADL services.
>
> **Example:** Ms. Smith is assessed at a level 4 for bathing however she refuses to receive assistance. Ms. Smith would be eligible to receive assistance with IADL's if the assessment determines a need at a level 3 or greater.
>
> **Note:** If an individual uses adaptive equipment to assist with an ADL, and without the use of this equipment the person would require hands-on care, the individual must be ranked a level 3 or greater on the functional assessment. This individual would be eligible to receive home help services.
>
> **Example:** Mr. Jones utilizes a transfer bench to get in and out of the bathtub which allows him to bathe himself without the hands-on assistance of another. The adult services specialist must rank Mr. Jones a 3 or greater under the functional assessment. Mr. Jones would be eligible to receive home help services.
>
> Assistive technology would include such items as walkers, wheelchairs, canes, reachers, lift chairs, bath benches, grab bars and handheld showers.
>
> *ASM 101, pages 1-3 of 5*

The applicable policies of the MPM acknowledge that there may be overlap between waiver services and HHS, and that a beneficiary may qualify for both programs, in addition to any other programs the beneficiary may met the criteria for. Moreover, in general, a beneficiary who qualifies for both programs has to freedom to choose between them:

> **2.2.B. FREEDOM OF CHOICE [CHANGES MADE 10/1/14]**
>
> Applicants or their legal representatives must be given information regarding all long-term care service options for which they qualify through the nursing facility LOCD, including MI Choice, Nursing Facility and the Program of All-Inclusive Care for the Elderly (PACE). Qualified applicants

> may only enroll in one of these long-term care programs at any given time. **(revised 10/1/14)** Nursing facility, PACE, MI Choice, and Adult Home Help services cannot be chosen in combination with each other. Applicants must indicate their choice, subject to the provisions of the Need for MI Choice Services subsection of this chapter, and document via their signature and date that they have been informed of their options via the Freedom of Choice (FOC) form that is provided to an applicant at the conclusion of any LOCD process. Applicants must also be informed of other service options that do not require Nursing Facility Level of Care, including Home Health and Home Help State Plan services, as well as other local public and private service entities. The FOC form must be signed and dated by the supports coordinator and **(text added 10/1/14)** the applicant (or their legal representative) seeking services and is to be maintained in the applicant's case record.
>
> *MPM, October 1, 2014 version*
> *MI Choice Waiver Chapter, page 3*
> *(Internal highlighting omitted)*

However, the MPM also requires that Waiver Agencies comply with the Minimum Operating Standards for MI Choice Waiver Program Services published by the Department and Attachment K of those Operating Standards provides that persons who qualify for the Home Help program and for whom that program will fully meet their support needs do not qualify for the MI Choice program:

> **4.5 OPERATING STANDARDS [CHANGE MADE 10/1/14]**
>
> MDCH maintains and publishes the "Minimum Operating Standards for MI Choice Waiver Program Services" (known as the Minimum Operating Standards) document. This document defines both general and specific operating criteria for the program. All waiver agencies and service providers are subject to the standards, definitions, limits, and procedures described therein.
>
> For each service offered in MI Choice, the Minimum **(revised 10/1/14)** Operating Standards are used to set the minimum qualifications for all direct service providers, including required certifications, training, experience, supervision, and applicable service requirements. Billing codes and units are also defined in the document.
>
> *MPM, October 1, 2014 version*

MI Choice Waiver Chapter, page 24
(Internal highlighting omitted)

C. STANDARDS OF SUPPORTS COORDINATION

Waiver agencies provide SC activities consistent with the principles listed below:

1. SCs follow the principles of PCP; including providing opportunities for participants to express goals, desires, and expectations and supporting the involvement of allies to participate in planning activities.

2. Qualified SCs perform the initial MI Choice assessment function as a team. Qualified staff includes a Registered Nurse (RN) and a Social Worker (SW), both with valid Michigan licenses to practice their profession.

3. SCs receive ongoing training and supervision, as appropriate.

4. SCs endeavor to identify and discuss all potential support and service options and emphasize participant choices and preferences.

5. The SC shall assure the participant's rights. This includes the right to participate actively in SC services including the development of the plan of service, the right to use a supports broker, the right to receive or refuse services, the right to choose providers, and the right to participate in a PCP process.

a) Every MI Choice participant signs a Freedom of Choice consent form to receive services from MI Choice. The single sign on system will generate this form for each participant once the waiver agency completes the participant's NFLOC Determination in the on-line system. Waiver agencies follow the requirements defined in the MI Choice chapter of the Medicaid Provider Manual available online at: http://www.mdch.state.mi.us/dchmedicaid/manuals/MedicaidProviderManual.pdf

b) Participants must be informed of the following:

(1) Services available in MI Choice, PACE, and nursing facilities. Participants or their legal representative must sign the freedom of choice form to indicate their preference for MI Choice. Waiver agencies maintain properly completed, signed, and dated forms in the participant's case record.

(2) The consent to receive MI Choice services remains in effect as long as the participant's case is open or until revoked by the participant or by a relative or other legally responsible adult only when the participant is determined legally incompetent or is physically unable.

(3) *Services available through the Medicaid State Plan which may meet their needs. Examples include the Home Help Services program available through the Department of Human Services (DHS). Persons who qualify for the Home Help program and for whom this program will fully meet their services and support needs do not qualify for the MI Choice program because they do not have the need for a waiver service.*

MI Choice Program Operating Criteria, FY 2015
Attachment K, pages 16-17
(Emphasis added)

Requirements

* * *

6. Waiver agencies enroll applicants the waiver agency determines eligible for MI Choice services, who consent to participate in MI Choice, and for whom the other community-based services, such as the Home Help Services program will not fully meet the service and support needs of the applicant.

MI Choice Program Operating Criteria, FY 2015

Attachment K, pages 26-27
(Emphasis added)

E. USE OF OTHER PAID SERVICES

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 the Medicaid State Plan services. MI Choice funding is the payment source of last resort. Two exceptions are Physical Disability Services (PDS) funds and OSA in-home services funds. These are extremely limited fund sources and would be quickly exhausted if used for MI Choice participants. (Note: An executive order cut PDS funds from the FY 2010 budget. MDCH does not expect the Governor to reinstate these funds for FY 2014.)

MI Choice Program Operating Criteria, FY 2015
Attachment K, page 48
(Emphasis added)

Here, as discussed above, the Waiver Agency determined that Appellant's services should be terminated because his needs could be met through the Home Help Program. Moreover, its witnesses also testified that the Waiver Agency gave Appellant between [redacted] and [redacted], to apply for HHS so that he would not be without services at any time and that there would be a smooth transition between the two programs. Despite having ample time to transition between programs, Appellant failed to apply for HHS and, per the above policy, the Waiver Agency decided to terminate his services, with the actual implementation of the termination being put on hold once Appellant filed his request for hearing.

In response, Appellant testified that, while he discussed transitioning between the two programs with both [redacted] and DHS, he did not complete an application for HHS because he did not believe that the Home Help Program could meet his needs. Specifically, Appellant testified that he needs assistance with bathing, dressing, shopping, transferring/lifting, mobility and meal preparation, and that it was his understanding that HHS would not include assistance with transferring/lifting or shopping.

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in deciding to terminate his services.

Given the record in this case, the undersigned Administrative Law Judge finds that Appellant has failed to meet that burden of proof and the Waiver Agency's decision to terminate his services must therefore be affirmed. As provided in the above policy, the MI Choice program is the payor of last resort and persons who qualify for the Home

Help program, and for whom that program will fully meet their services and support needs, do not qualify for the MI Choice program because they do not have the need for a waiver service. Here, all of the tasks that Appellant stated that he needs assistance with are covered by the Home Help program and Appellant's needs can be met through that program. Moreover, to the extent Appellant testified that it was his understanding that HHS would not include transferring/lifting or shopping assistance, the applicable home help policies directly contradict his beliefs and it appears that Appellant never fully pursued HHS or properly gained an understanding of what those services entail. He has had ample time to do so and, as his needs can be met through the Home Help program, the Waiver Agency properly decided to terminate his services after giving him an opportunity to transition between programs.

DECISION AND ORDER

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

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision to terminate Appellant's services is **AFFIRMED**.

Steven Kibit

Steven J. Kibit
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

Date Signed: [redacted]

Date Mailed: [redacted]

SK[redacted]

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.