STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF HEALTH AND HUMAN SERVICES
P.O. Box 30763, Lansing, MI 48909
(517) 373-0722; Fax: (517) 373-4147

IN THE MATTER OF:

MAHS Docket No. 15-015732 EDW

[redacted]

Appellant.

[redacted]/

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, an in-person hearing was held on [redacted], Appellant's sister, appeared and testified on Appellant's behalf. Appellant was also present, but did not otherwise participate. [redacted], General Manager, appeared and testified on behalf of the Department of Health and Human Services' Waiver Agency, [redacted] ("Waiver Agency" or [redacted]). Also testifying as witnesses for Respondent were [redacted], Waiver Manager; [redacted] nurse/supports coordinator; Joann Flannery, social worker/supports coordinator; and [redacted], nurse/supports coordinator.

ISSUE

Did the Waiver Agency properly deny Appellant's requests for additional 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 Health and Human Services and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services in its service area.

2. In [redacted], Appellant was found eligible and approved for waiver services through [redacted] (Undisputed testimony during hearing).

[1] The hearing in this matter was consolidated with the hearing in another matter involving the same parties in Docket No. 15-018333 EDW.

3. On [redacted], an in-home assessment was performed with Appellant, his sister/representative, and his sister-in-law. (Exhibit C, pages 1-26).

4. At that time Appellant lived with his brother and sister-in-law, and the assessment was performed in their home. (Exhibit C, page 2).

5. During that assessment, it was determined that Appellant is totally dependent on others for meal preparation, housework, managing finances, managing medications, phone use, shopping, and transportation; and that he requires supervision for tasks such as dressing, toilet use, and bathing. (Exhibit C, pages 21-23).

6. No environmental issues or need for durable medical equipment was noted by [redacted] staff. (Exhibit C, page 9).

7. The parties did discuss one of Appellant's sisters, who lives in another county, being paid to provide respite care services, with the [redacted] staff member stating that she would have to look into it. (Exhibit C, page 14).

8. The parties also discussed Appellant's representative receiving mileage for transporting Appellant to medical appointments, with the [redacted] staff member stating that Medicaid is responsible for medical transportation. (Exhibit C, page 14).

9. It was further noted that Appellant has hearing issues and was in the process of getting a hearing aid. (Exhibit C, pages 11, 14).

10. Following the assessment, Appellant was approved for [redacted] hours per day of Comprehensive Community Supports/Community Living Supports (CLS), [redacted] days per week. (Exhibit C, page 26).

11. Appellant's sister-in-law was to be his CLS worker. (Testimony of Appellant's representative).

12. In a [redacted] telephone call, Appellant's representative informed [redacted] that she was unhappy with the approved services as the representative was not getting paid for the services she provides and Appellant's other sister could not be paid for the services she provides simply because she lives in another county. (Exhibit B, pages 11-12).

13. In a [redacted], email to [redacted], Appellant's representative also asked for a denial notice for each service requested, with the justification for the denial identified, so that Appellant and his representative could start the appeal process. (Exhibit D, page 3).

14. That same day, the Waiver Agency sent Appellant an Adequate Action Notice stating in part:

> Following a review of the services for which you have applied, it has been determined that the following services shall not be authorized. The reason for the action is noted below. The legal basis for this decision is 42CFR440.230d).
>
> The following services have been authorized: 3 hours, [redacted] days weekly of Comprehensive Community Supports. All other services requested will not be authorized at this time.
>
> If you do not agree with this action, you may request a Michigan Department of Community Health (department) hearing within [redacted] days of the date of the notice. You have the right to choose who assists and represents you in the hearing. Hearing requests must be made in writing and signed by you or your authorized person.

Exhibit I, page 1

15. In a [redacted], telephone call, Appellant's representative also informed [redacted] that she was dissatisfied with the approved services and the lack of any reasons given for a denial; she was having communication problems with the Waiver Agency; and there was a lack of person-centered planning in this case. (Exhibit A, page

16. On [redacted] another assessment was performed in the home where Appellant lived with his brother and sister-in-law. (Exhibit C, pages 27-50).

17. During that assessment, it was again noted that Appellant's representative manages his money. (Exhibit C, page 30).

18. The [redacted] staff also noted that no environmental issues were observed, but that Appellant's representative was reporting a need for a shower bench, grab bars, and a railing. (Exhibit C, pages 34, 47).

19. Appellant's need for a hearing aid was discussed and it was determined that the supports coordinator would send resources for hearing aids. (Exhibit C, page 35).

20. Appellant's representative also reported that she believed that Appellant was eligible for more hours and that she was waiting on a hearing date to have a judge determine what Appellant's is eligible for. (Exhibit C, page 48).

21. Appellant's services remained the same following that assessment. (Testimony of Appellant's representative).

22. In [redacted], Appellant moved out of his brother and sister-in-law's home and into his representative's home. (Testimony of Appellant's representative).

23. His representative also became his CLS worker following the move. (Exhibit B, page 3; Testimony of Appellant's representative).

24. [redacted] staff subsequently attempted to schedule a reassessment in Appellant's new home, but were unable to do so. (Exhibit B, pages 1-2).

25. On [redacted], MAHS received the request for hearing in this matter, (Exhibit 1, pages 1-31).

26. The request identified a number of different issues on appeal, including the denial of respite care services; the denial of mileage reimbursement for medical transportation; the denial of additional CLS; the denial of environmental adaptions and durable medical equipment; and the denial of a hearing aid. (Exhibit 1, page 1).

27. Appellant and his representative also attached, other among other documents, the [redacted] adequate action notice sent by the Waiver Agency. (Exhibit 1, page 2).

28. On [redacted], the Waiver Agency sent Appellant a negative action notice stating that his services would be terminated due to the lack of contact and reassessment. (Exhibit B, pages 1-2).

29. Appellant and his representative subsequently requested a hearing with respect to that proposed termination. (Exhibit 2, page 1).

30. By [redacted], the date of the hearing in this matter, the Waiver Agency was no longer seeking to terminate Appellant's services and the parties were working on scheduling a new assessment. (Testimony of Appellant's representative; Testimony of Respondent's representative).

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. 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 seeking 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 (formerly HCFA) to the 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)*

The Medicaid Provider Manual (MPM) outlines the approved policies regarding the Waiver Program and it generally provides:

> MI Choice is a waiver program operated by the Michigan Department of Health and Human Services (MDHHS) 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 & Medicaid Services (CMS) under section 1915(c) and section 1915(b) of the Social Security Act. MDHHS carries out its waiver obligations through a network of enrolled providers that operate as Prepaid Ambulatory Health Plans (PAHPs). These entities are commonly referred to as waiver agencies. MDHHS 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. MDHHS will not enact any provision to the MI Choice program that prohibits or inhibits a participant's access to a person-centered plan of service, discourages participant direction of services, interferes with a participant's right to have grievances and complaints heard, or endangers the health and welfare of a participant. The program must monitor and actively seek to improve the quality of services delivered to participants. Safeguards are utilized to ensure the integrity of payments for waiver services and the adequacy of systems to maintain compliance with federal requirements.
>
> Waiver agencies are required to provide oral and written assistance to all Limited English Proficient applicants and participants. Agencies must arrange for translated materials to be accessible or make such information available orally through bi-lingual staff or through the use of interpreters.
>
> *MPM, January 1, 2016 version*
> *MI Choice Waiver Chapter, page 1*

Here, Appellant and his representative raise a number of issues on appeal, including the denial of respite care services; the denial of mileage reimbursement for medical transportation; the denial of additional CLS; the denial of environmental adaptions and durable medical equipment; and the denial of a hearing aid.

Some the decisions made by the Waiver Agency were clearly correct. For example, while Appellant seeks mileage reimbursement for medical transportation through the Waiver Agency, the applicable policy clearly provides that medical transportation is a State Plan service and not the responsibility of the Waiver Agency:

> **4.1.M. NON-MEDICAL TRANSPORTATION**
>
> Non-Medical Transportation services are offered to enable waiver participants to access waiver and other community services, activities, and resources as specified in the individual plan of services. Whenever possible, family, neighbors, friends, or community agencies who can provide transportation services without charge must be utilized before MI Choice provides transportation services.
>
> Non-Medical Transportation services offered through MI Choice are in addition to medical transportation required under 42 CFR 431.53 and transportation services under the State Plan, defined at 42 CFR 440.170(a), and does not replace State Plan services. MI Choice transportation

> services cannot be substituted for the transportation services that MDHHS is obligated to provide under the listed citations. Such transportation, when provided for medical purposes, is not reimbursable through MI Choice. When the costs of transportation are included in the provider rate for another waiver service (e.g., Adult Day Health), there must be mechanisms to prevent the duplicative billing of Non-Medical Transportation services.
>
> *MPM, January 1, 2016 version*
> *MI Choice Waiver Chapter, page 19*

Moreover, other issues identified by Appellant and his representative appear to be moot or significantly altered by changing circumstances. For example, while Appellant raised the issue of Environmental Accessibility Adaptations and such adaptions are a covered service of under the MPM, *see* MPM, January 1, 2016 version, MI Choice Waiver Chapter, pages 16-17, Appellant has since moved after any request was made and no request or assessment has been made regarding adaptions to the new living arrangement. Similarly, while Appellant requested additional CLS and the request appears to have been denied because his sister-in-law was providing CLS and his representative was providing informal supports, Appellant's sister-in-law is no longer providing any supports and his representative is now his formal CLS worker.

Regardless of whether any particular decision appears correct or the issue has become moot, it is clear that the Waiver Agency failed to properly provide Appellant with adequate notice of its decisions in this case. MI Choice waiver agencies must send an Adequate Action Notice to applicants or participants informing them of adverse actions and determinations when a participant requests additional services or additional amounts of services and the waiver agency denies the request. *See* MPM, MI Choice Waiver Chapter, page 39. Moreover, any such Adequate Action Notice must conform with the fair hearings requirements found in 42 CFR 431.210, which requires that the notice contain, among other things, a statement of what action is to be taken; the reasons for the intended action; and the specific regulations that support, or the change in Federal or State law that requires, the action. *See* MPM, MI Choice Waiver Chapter, pages 39-40; 42 CFR 431.210.

In this case, the only notice ever sent by [redacted] regarding services merely provided that [redacted] hours of CLS per day, [redacted] days a week, was approved and that all other services requested will not be authorized at this time. *See* Exhibit I, page 1. However, as noted by Appellant's representative, the above notice failed to provide Appellant with notice of the specific decisions made, the reasons for the decisions, and the specific regulations or policy that support the decisions.

The notice sent by Respondent in this case therefore failed to conform to the applicable fair hearing requirements and was clearly deficient. Accordingly, its decisions were improper and must be reversed at this time, with the Waiver Agency also being ordered

to conduct a new assessment of Appellant's requests and, if any request is again denied, to send out a proper notice of its decision.

In making that reassessment, the undersigned Administrative Law Judge would also conclude that, even if it sends proper notice, the Waiver Agency cannot again deny respite care services on the basis that Appellant seeks to have a sister who lives in a different county provide the respite care.

The MPM contains no such limitation when discussing respite:

> **4.1.B. RESPITE**
>
> Respite 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 services and supports 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 does not include the cost of room and board, except when provided as part of respite furnished in a facility approved by MDHHS 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 Activities of Daily Living (ADL), a routine exercise regimen, and self-medication.
>
> There is a 30-days-per-calendar-year limit on respite services provided outside the home. The costs of room and board are not included except when respite is provided in a facility approved by the State that is not a private residence. Respite services cannot be scheduled on a daily basis, except for longer-term stays at an out-of-home respite facility. Respite should be used on an intermittent basis to provide scheduled relief of informal caregivers.
>
> *MPM, January 1, 2016 version*
> *MI Choice Waiver Chapter, page 11*

Similarly, while the MPM refers to the Minimum Operating Standards for MI Choice Waiver Program Services document provided in part by Respondent in its exhibits and states that the Waiver Agency is subject to the standards, definitions, limits, and procedures described in that document, *see* MPM, January 1, 2016 version, MI Choice Waiver Chapter, page 25, [redacted] fails to point to any specific provision in those standards supporting its position and the section of Attachment H discussing respite in home or in home of another, pages 60-63, does not contain any such limitation.

In addition to the lack of proper notice, the Waiver Agency therefore also erred in the decision itself when denying Appellant's request for respite on the basis that his sister could not provide it because she lived in another county. Accordingly, the Respondent's decision must be reversed and, in conducting the required reassessment, it must only determine the amount of hours to be approved and cannot again deny Appellant's request for the same reasons as before.

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 both failed to provide proper notice of all its decisions in this matter and improperly denied Appellant's request for respite.

IT IS THEREFORE ORDERED that:

> The Waiver Agency's decision is **REVERSED** and it must initiate a reassessment of Appellant's request for additional services, including a determination of the amount of respite services to be approved, and issue proper notice of any approvals or denials.

Steven Kibit

Steven Kibit
Administrative Law Judge
for Director, Nick Lyon
Michigan Department of Health and Human Services

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.