

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

Docket No. 2010-49938 EDW

██████████
Appellant
_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. ██████████ appeared on his own behalf. ██████████ appeared as a translator.

██████████, Program Manager, and ██████████, RN Supports Coordinator, both from ██████████, appeared on behalf of the Department of Community Health. ██████████ is the MI Choice Waiver agent for the Michigan Department of Community Health, (hereinafter Department).

ISSUE

Did the Waiver Agency properly terminate participation in the MI Choice Waiver program following eligibility review?

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 a ██████████ and has been participant in MI Choice Waiver Services since 1999.
2. The Appellant has multiple diagnoses including cerebral palsey, hypertension, arthritis, osteoporosis, hemiplegia, dysrythmia, anxiety, and depression. (Exhibit 2, page 6)
3. On ██████████, the waiver agency completed a re-assessment with the Appellant. (Exhibit 2, pages 1-14)

Docket No. 2010-49938 EDW
Decision and Order

4. On [REDACTED], the waiver agency also completed a Michigan Medicaid Nursing Facility Level of Care Determination (LOC determination) because it had been several years since one was last completed. (RN Supports Coordinator Testimony and Exhibit 3, pages 1-9)
5. The Appellant and the RN Supports Coordinator signed the LOC determination on [REDACTED] 0, indicating the Appellant met the criteria through door 7 and wishes to remain on the program. (Exhibit 3, page 8)
6. On [REDACTED], the waiver agency issued an Advance Action Notice to the Appellant indicating all waiver services would terminate effective [REDACTED] because he does not need waiver services as the Home Help Program can meet his needs, based on the review of [REDACTED]. (Exhibit 1)
7. The Appellant requested a formal, administrative hearing on [REDACTED]
[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.

This Appellant is claiming eligibility for 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 Medicare Services to the Michigan Department of Community Health (Department). Regional agencies, in this case the Waiver Agency, 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)*

Docket No. 2010-49938 EDW
Decision and Order

1915(c) (42 USC 1396n (c) allows home and community based services to be classified as “medical assistance” under the State Plan when furnished to recipients who would otherwise need inpatient care that is furnished in a hospital SNF, ICF or ICF/MR and is reimbursable under the State Plan. (42 CFR 430.25(b))

Effective November 1, 2004, the Michigan Department of Community Health (MDCH) implemented revised functional/medical eligibility criteria for Medicaid nursing facility, MI Choice, and PACE services. Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria.

Section 4.1 of the Medicaid Provider Manual Nursing Facilities Section references the use of an online Michigan Medicaid Nursing Facility Level of Care Determination tool (*Michigan Medicaid Nursing Facility Level of Care Determination, March 7, 2005, Pages 1 – 9 or LOC*). The LOC must be completed for all Medicaid-reimbursed admissions to nursing facilities or enrollments in MI Choice or PACE on and after November 1, 2004.

The Level of Care Assessment Tool consists of seven-service entry Doors. The doors are: Activities of Daily Living, Cognition, Physician Involvement, Treatments and Conditions, Skilled Rehabilitative Therapies, Behavior, or Service Dependency. In order to be found eligible for MI Choice Waiver services, the Appellant must meet the requirements of at least one Door. The Department presented testimony and documentary evidence that the Appellant did not meet any of the criteria for Doors 1 through 7.

Door 1
Activities of Daily Living (ADLs)

Scoring Door 1: The applicant must score at least six points to qualify under Door 1.

- (A) Bed Mobility, (B) Transfers, and (C) Toilet Use:
 - Independent or Supervision = 1
 - Limited Assistance = 3
 - Extensive Assistance or Total Dependence = 4
 - Activity Did Not Occur = 8
- (D) Eating:
 - Independent or Supervision = 1
 - Limited Assistance = 2
 - Extensive Assistance or Total Dependence = 3
 - Activity Did Not Occur = 8

The Appellant explained that he suffers from right sided paralysis and that he has unpredictable movement of his right arm. The Appellant testified that he needs assistance with dressing, lifting his leg into the shower, meal preparation, and medications. However, these are not activities of daily living considered under Door 1. The evidence presented by

Docket No. 2010-49938 EDW
Decision and Order

the waiver agency indicated that the Appellant is independent in bed mobility, transfers, toileting and eating. (Exhibits 2 and 3) The Appellant did not score at least six (6) points, thus did not qualify through Door 1.

Door 2
Cognitive Performance

Scoring Door 2: The applicant must score under one of the following three options to qualify under Door 2.

1. "Severely Impaired" in Decision Making.
2. "Yes" for Memory Problem, and Decision Making is "Moderately Impaired" or "Severely Impaired."
3. "Yes" for Memory Problem, and Making Self Understood is "Sometimes Understood" or "Rarely/Never Understood."

The waiver agency evidence is not consistent regarding whether or not the Appellant has a short term memory problem. (Exhibit 2, page 3 and Exhibit 3, page 3) The waiver agency failed to mark a box on the LOC determination for the Appellant's cognitive skills for daily decision making. (Exhibit 3, page 3) However, the assessment report indicated that the Appellant is independent in this area. (Exhibit 2, page 3) The waiver agency also failed to mark a box on the LOC determination regarding the Appellant's ability to make himself understood. (Exhibit 3, page 4) However the assessment report indicates that he can make himself understood and expresses ideas without difficulty. (Exhibit 2, page 4) The Appellant was also able to make himself understood during the hearing proceedings with use of a translator. The evidence presented does not support that the Appellant qualified under Door 2.

Door 3
Physician Involvement

Scoring Door 3: The applicant must meet either of the following to qualify under Door 3

1. At least one Physician Visit exam AND at least four Physicians Order changes in the last 14 days, OR
2. At least two Physician Visit exams AND at least two Physicians Order changes in the last 14 days.

There was no evidence presented the Appellant had met any of the criteria listed for Door 3 at the time of the assessment, [REDACTED]. The assessment indicates he did not have any physician visits or order changes within the past 14 days. (Exhibit 3, page 4) Accordingly, the Appellant did not qualify under Door 3.

Door 4
Treatments and Conditions

Scoring Door 4: The applicant must score “yes” in at least one of the nine categories above and have a continuing need to qualify under Door 4.

In order to qualify under Door 4 the applicant must receive, within 14 days of the assessment date, any of the following health treatments or demonstrated any of the following health conditions:

- A. Stage 3-4 pressure sores
- B. Intravenous or parenteral feedings
- C. Intravenous medications
- D. End-stage care
- E. Daily tracheostomy care, daily respiratory care, daily suctioning
- F. Pneumonia within the last 14 days
- G. Daily oxygen therapy
- H. Daily insulin with two order changes in last 14 days
- I. Peritoneal or hemodialysis

No evidence was presented indicating the Appellant had met any of the criteria listed for Door 4.

Door 5
Skilled Rehabilitation Therapies

Scoring Door 5: The applicant must have required at least 45 minutes of active ST, OT or PT (scheduled or delivered) in the last 7 days and continues to require skilled rehabilitation therapies to qualify under Door 5.

No evidence was presented indicating the Appellant was receiving skilled rehabilitation therapies that would have allowed him to qualify through Door 5.

Door 6
Behavior

Scoring Door 6: The applicant must score under one of the following 2 options to qualify under Door 6.

1. A “Yes” for either delusions or hallucinations within the last 7 days.

Docket No. 2010-49938 EDW
Decision and Order

2. The applicant must have exhibited any one of the following behaviors for at least 4 of the last 7 days (including daily): Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, or Resisted Care.

No evidence was presented demonstrating that Appellant met the criteria set forth above to qualify under Door 6.

Door 7
Service Dependency

Scoring Door 7: The applicant must be a current participant and demonstrate service dependency under Door 7.

The assessment provides that the applicant could qualify under Door 7 if he is currently (and has been a participant for at least one (1) year) being served by either the MI Choice Program, PACE program, or Medicaid reimbursed nursing facility, requires ongoing services to maintain current functional status, and no other community, residential, or informal services are available to meet the applicant's needs.

It is uncontested that the Appellant has been a participant since [REDACTED]. The waiver agency asserted that the Appellant did not meet the criteria to remain eligible through Door 7 as the services he needs could be obtained through other community, residential, or informal services. However, the evidence does not support the waiver agency's termination on this basis. The LOC determination is marked that the Appellant met the criteria for Door 7. (Exhibit 3, page 7) Further, the Appellant and the RN Supports Coordinator signed the Freedom of Choice portion of the LOC determination on [REDACTED] indicating the Appellant does meet the functional/medical criteria by scoring through Door 7 and wishes to stay on the program. (Exhibit 3, page 8) The waiver agency testimony was inconsistent regarding the Appellant's wife's ability to meet the Appellant's needs and called into question whether or not he could obtain services from the Department of Human Services Home Help Program.

The Appellant has been a program participant for at least one year. The waiver agency has not established that ongoing services are not required for the Appellant to maintain functional status or that other community, residential or informal services are available to meet the Appellant's needs. Accordingly, the evidence does not support a finding that the Appellant does not meet the nursing facility level of care criteria. The Appellant shall be re-instated into the MI Choice Waiver program.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds the Waiver Agency improperly terminated the Appellant's MI Choice Waiver services.

**Docket No. 2010-49938 EDW
Decision and Order**

IT IS THEREFORE ORDERED that:

The Department's decision is REVERSED. The Appellant shall be re-instated in the MI Choice Waiver program.

Colleen Lack
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:



Date Mailed: 11/12/2010

***** NOTICE *****

The State Office of Administrative Hearings and Rules for the Department of Community Health 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 State Office of Administrative Hearings and Rules for the Department of Community Health 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.