

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

P.O. Box 30763, Lansing, MI 48909
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IN THE MATTER OF:

Docket No. 2010-49958 PCE

████████████████████

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. upon the Appellant's request for a hearing.

Procedural Summary

After due notice, a hearing was commenced on ██████████. At the outset of the hearing the ██████████ witnesses testified that the Appellant did not clearly meet any of the criteria in the seven door Michigan Medicaid Nursing Facility Level of Care assessment tool. The ██████████ representatives testified that they believed the Appellant should have the services PACE offers and therefore sought a frailty exception to the eligibility criteria from MPRO.

During the hearing it was agreed by the parties that the hearing would be continued at a date when an MPRO representative would be present to provide testimony regarding the Department's frailty exception policy and an application of that policy to Appellant's case.

The hearing was continued on ██████████. ██████████, ██████████, and ██████████ represented the Appellant. The Appellant's ██████████, ██████████, and ██████████ advocates including ██████████ and ██████████ were present on Appellant's behalf.

████████████████████ Pacer Department, appeared on behalf of the Department's agent, MPRO.

ISSUE

Whether the PACE organization's denial of eligibility for PACE services was in accordance with the Department's PACE policy?

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 ██████████ with legal blindness and other health conditions. (Exhibit B).
2. On or before ██████████, the Appellant sought eligibility for the Department of Community Health's Program for All-Inclusive Care for the Elderly (PACE). (Exhibit 3).
3. ██████████ is an organization that contracts with the Department to implement a PACE program in Appellant's geographical area. (Exhibit 3).
4. In order to be eligible for the PACE program a person must meet the Michigan Medicaid Nursing Home Level of Care. (Exhibit 1).
5. On or before ██████████, ██████████ performed the seven doors Michigan Medicaid Nursing Facility Level of Care Determination for the Appellant, but determined the Appellant did not meet the criteria for enrollment with the PACE program based on the level of care determination. (Exhibit 3).
6. On ██████████, ██████████ contacted MPRO and requested a long-term-care frailty exception and immediate review of Appellant's level of care determination, seeking a frailty exception so that he could be enrolled in the PACE program. (Exhibit 3).
7. Appellant resides in his home with no other residents. (Exhibit B).
8. On ██████████, MPRO mailed an Adequate Action Notice to Appellant notifying him that he did not qualify for a nursing facility level of care and therefore not for the ██████████ PACE program. (Exhibit A).
9. On ██████████, the Department received the Appellant's request for an administrative hearing. (Exhibit B).

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.

SECTION 1 – GENERAL INFORMATION

The Program of All-Inclusive Care for the Elderly (PACE) is an innovative model of community-based care that enables elderly individuals, who are certified by their state as needing nursing facility care, to live as independently as possible.

The PACE capitated benefit was authorized by the Balanced Budget Act of 1997 and features a comprehensive service delivery system with integrated Medicare and Medicaid financing.

(MDCH Medicaid Provider Manual, Program of All-Inclusive Care for the Elderly, July 1, 2010, Page 1.)

At the outset of the hearing the Appellant's advocates, employees of ██████████ the Department's agent for implementing the PACE program in Appellant's geographic area, testified that a nursing facility level of care determination was performed for Appellant but he did not clearly meet any of the criteria for PACE eligibility.

The Michigan Department of Community Health (MDCH or Department) policy for eligibility in the PACE program states that a person must meet a nursing facility level of care:

SECTION 3.1 – ELIGIBILITY REQUIREMENTS

To be eligible for PACE enrollment, applicants must meet the following requirements:

- Be age 55 years or older
- Meet applicable Medicaid financial eligibility requirements. (Eligibility determinations will be made by the Michigan Department of Human Services for all counties except Wayne. Determinations for Wayne County will be made by MDCH.)
- Reside in the PACE organization's service area
- Be capable of safely residing in the community without jeopardizing health or safety while receiving services offered by the PACE organization.
- Receive a comprehensive assessment of participant needs by an interdisciplinary team.

- **Be appropriate for placement in PACE based on completion of the Michigan Medicaid Nursing Facility Level of Care Determination**

(Bold, underline added for emphasis).

- Be provided timely and accurate information to support Informed Choice for all appropriate Medicaid options for Long Term Care
- Not concurrently enrolled in the MI Choice program
- Not concurrently enrolled in an HMO

(MDCH Medicaid Provider Manual, Program of All-Inclusive Care for the Elderly, July 1, 2010, Page 3).

The Appellant's ██████████ advocates explained that even though the Appellant did not meet a Medicaid nursing facility level of care, they believed the Appellant, because of his legal blindness and additional health issues, should be enrolled in the PACE program and receive PACE program services to help him remain living in his own home.

The Michigan Department of Community Health policy on when a person can be granted an exception and therefore be eligible for PACE services is found in its Medicaid Provider Manual:

5.1.D.2 Nursing Facility Level Of Care Exception Process

The above-quoted PACE policy clearly states that the PACE organization determines what services are necessary. The following guidelines describe the second level review criteria for those applicants who did not meet the Michigan Medicaid Nursing Facility Level of Care Determination through the electronic web-based form. These criteria are used by the Michigan Department of Community Health (MDCH) or its designee on a provider's request to evaluate long term care program needs and appropriateness for Medicaid-reimbursed nursing facility care, the MI Choice Program, or the Program of All Inclusive Care for the Elderly (PACE).

Applicants who exhibit the following characteristics and behaviors may be admitted to programs requiring the Nursing Facility Level of Care definition. An applicant need trigger only one element to be considered for an exception.

Frailty

The applicant has a significant level of frailty as demonstrated by at least one of the following categories:

- Applicant performs late loss ADLs (bed mobility, toileting, transferring, and eating) independently but requires an unreasonable amount of time
- Applicant's performance is impacted by consistent shortness of breath, pain, or debilitating weakness during any activity
- Applicant has experienced at least two falls in the home in the past month
- Applicant continues to have difficulties managing medications despite the receipt of medication set-up services
- Applicant exhibits evidence of poor nutrition, such as continued weight loss, despite the receipt of meal preparation services
- Applicant meets criteria for Door 3 when emergency room visits for clearly unstable conditions are considered

Behaviors

The applicant has at least a one month history of any of the following behaviors, and has exhibited two or more of any these behaviors in the last seven days, either singly or in combination:

- Wandering
- Verbal or physical abuse
- Socially inappropriate behavior
- Resists care

Treatments

The applicant has demonstrated a need for complex treatments or nursing care.

*Michigan Medicaid Nursing Facility Level of Care
Determination Nursing Facility Level of Care Exception Process,
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██████████ explained in detail the policy criteria considered by MPRO/Department in order to be granted an exception to the nursing facility level of care requirement for enrollment into the PACE program. ██████████ testified and provided document

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evidence as to how on ██████████, the Appellant did not meet any of the frailty exception criteria. (Exhibits 2 and 3).

In particular, ██████████ noted that she reviewed each of the frailty exception criteria in Appellant's case and found:

- The Appellant took less than five minutes to get out of a chair or transfer.
- The Appellant had endurance that exceeded the 15 minute incapacitation for shortness of breath, and the Appellant had had no falls in the month prior to the exception determination.
- The Appellant had assistance setting up his medications by his ██████████.
- The Appellant had Meals on Wheels delivered to his home and did not have a 10 pound weight loss in the month prior to the frailty exception determination.
- The Appellant had not had two physician visits or physician order changes in the 14 days prior to the frailty exception determination.
- The Appellant had not exhibited any of the identified behaviors in the one month prior to the exception determination.
- The Appellant had not had any skilled nursing or complex treatments immediately prior to his frailty exception determination.

Appellant's ██████████, ██████████, testified that with regard to medication set up, the person who had been setting up medication for the Appellant was his ██████████. ██████████ explained that while in the past it may have been okay for the Appellant's ██████████ to set up his medication, the Appellant's ██████████ recently found out she also had macular degeneration and weakening eyesight. ██████████ added that the Appellant's ██████████ was currently receiving radiation that caused colitis, and with the two health conditions would not be able to continue to set up the Appellant's medication on a regular basis as she had before.

██████████ responded that the information about Appellant's ██████████ no longer able to regularly assist with Appellant's medication set up was not provided to the Department at the time it was making its frailty exception determination, and therefore was not considered. This administrative law judge is limited to considering evidence that the Department had at the time it made its decision in ██████████. Being that the Department did not have the information about medication set up, and noting that no information was provided that would establish that the Appellant's met any of the frailty exception criteria, it is decided that the Department was proper when it found the

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Appellant did not meet the nursing home facility level of care and did not meet the frailty exception criteria.

The Appellant bears the burden of proving, by a preponderance of the evidence, that he met all the criteria for PACE program enrollment. The Appellant failed to prove by a preponderance of evidence, that the PACE organization's actions were not in accordance with the federal regulations and PACE policy.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the MPRO/Department's denial of an eligibility for PACE services was in accordance with the Department's PACE policy.

IT IS THEREFORE ORDERED that:

The Department's decision is **AFFIRMED**.

Lisa K. Gigliotti
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:



Date Mailed: 11/1/2010

***** NOTICE *****

The State Office of Administrative Hearings and Rules 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 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.