**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. 2010-55815 EDW

[redacted]

Appellant

_____/

## DECISION AND ORDER

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

After due notice, a hearing was held on [redacted]. The Appellant, [redacted], appeared on her own behalf. Her mother, [redacted], appeared as her witness. [redacted]) Waiver Program Manager, and [redacted], Registered Nurse, appeared on behalf of the Department of Community Health. [redacted] is the MI Choice Waiver agent for the Michigan Department of Community Health.

## ISSUE

Did the waiver agency properly terminate the Appellant's participation in the MI Choice Waiver program?

## FINDINGS OF FACT

The Administrative Law Judge, based on the competent, material, and substantial evidence on the whole record, finds as material fact:

1. The Appellant is a [redacted] participant in MI Choice Waiver Services.

2. The Appellant has multiple diagnoses, including Chrohn's disease, anorexia, bulimic, depression, osteoporosis, and anemia. (Respondent's Exhibit 1, pages 7-8; Testimony of [redacted])

3. On [redacted], the waiver agency completed a re-assessment with the Appellant. (Respondent's Exhibit 1, pages 4-15)

4. On [redacted], the waiver agency also completed a Michigan Medicaid Nursing Facility Level of Care Determination (LOC determination). (Respondent's Exhibit 2)

5. The Appellant and the Registered Nurse signed the LOC determination on [redacted] indicating that the Appellant did not meet the functional/medical eligibility criteria for Medicaid Nursing Facility Level of Care. (Respondent's Exhibit 2, page 6)

6. On [redacted], the waiver agency issued an Advance Action Notice to the Appellant, indicating that her waiver services were being terminated because she does not meet a nursing home level of care. (Respondent's Exhibit 1, page 3)

7. The Appellant requested a formal, administrative hearing on [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)*

1915(c) (42 USC 1396n (c) allows home and community based services to be classified as "medical assistance" under the State Plan <u>when furnished to recipients who would otherwise need inpatient care that is furnished in a hospital SNF, ICF or ICF/MR</u> 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 waiver agency 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 waiver agency determined that the Appellant is independent in bed mobility, transfers, toileting, and eating. (Testimony of [redacted]) Since the Appellant did not score at least six points, she did not qualify through Door 1.

The Appellant testified that she is capable of performing all of the activities of daily living independently, except for transferring. Regarding transferring, the Appellant testified that she needs help getting around on her bad days, which she states can sometimes be 4 days per week. The Appellant's mother confirmed that she helps her daughter up sometimes when she falls out of bed. Conversely, the Registered Nurse testified that she has met with the Appellant every 3 months since her case opened in [redacted], and the Appellant has never exhibited or expressed a need for assistance with transfers. She further testified that the

Appellant is ambulatory and capable of driving, and the Appellant's caregivers never indicated that the provided any assistance with transferring. Based on the evidence presented, the waiver agency properly determined that the Appellant did not qualify under 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 Appellant testified that she does have issues with her decision making and short-term memory because of her depression, but she admitted that she did not articulate any of these issues to the Registered Nurse. The Registered Nurse testified that the Appellant has never exhibited any problems with decision making or short-term memory. She further stated that the Appellant can make herself understood. Based on the evidence presented, the waiver agency properly determined that the Appellant did not qualify 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.

The Appellant testified that she sees her physician 1 to 2 times per month. However, she conceded that there had been no recent order changes to qualify her under Door 3. Therefore, the waiver agency properly determined that 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 the criteria listed for Door 4 at the time of the assessment.

## 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 had met the criteria listed for Door 5 at the time of the assessment.

## 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.
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 indicating 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 LOC Determination provides that the applicant could qualify under Door 7 if she is currently (and has been a participant for at least one 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. The Appellant has been in the program for more than one year. However, the services that the Appellant is receiving are available through the Department of Human Service's Home Help Services (HHS) Program. The Appellant was receiving the following services through the waiver agency: homemaking, personal care (bathing assistance), and shopping. These services are all available through HHS. Therefore, the Appellant does not satisfy the criteria for eligibility under Door 7. (Testimony of [redacted])

While this Administrative Law Judge is sympathetic to the Appellant's circumstances, I do not have authority to override or disregard the policy set forth by the Department. The Appellant did not meet the nursing facility level of care to be eligible for ongoing waiver services.

## DECISION AND ORDER

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

**IT IS THEREFORE ORDERED** that:

The Department's decision is AFFIRMED.

Kristin M. Heyse
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 12/22/2010

***** 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.