STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

[redacted],

Appellant
_____/

Docket No. 2011-52740 EDW
Case No. 22907105

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.

After due notice, a hearing was held on Wednesday, [redacted]. [redacted], Appellant's niece/guardian, appeared and testified on behalf of the Appellant. [redacted], Director of the [redacted], appeared as a witness for the Appellant.

[redacted], Quality and Training Support Coordinator, for the [redacted] (MI Choice waiver program), appeared and testified on behalf of the Department's Waiver Agency. [redacted], the Appellant's Supports Coordinator, a Limited Licensed Bachelor Social Worker with the [redacted] MI Choice Waiver Program, appeared as a witness for the Waiver Agency.

ISSUE

Did the Waiver Agency properly determine the Appellant was not eligible for the MI Choice waiver program?

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 was enrolled in the MI Choice Waiver Program. Appellant was a transfer waiver case from the [redacted] Area Agency on Aging. She is currently receiving residential services which include medication management, meal prep, homemaking, and reminders for ADLs as needed. (Exhibit 1 and Testimony).

2. The Appellant is a [redacted] year-old woman ([redacted]) diagnosed with anxiety, schizophrenia, heart disease, COPD TIAs and seizures. (Exhibit

4, p. 8 of 16).

3. The Appellant is currently residing in an apartment at the [redacted], an assisted living facility in [redacted], MI. (Exhibit 4, p. 2 of 16, and testimony).

4. The Waiver Agency is a contract agent of the Michigan Department of Community Health (MDCH) and is responsible for waiver eligibility determinations and the provision of MI Choice Waiver services.

5. On [redacted], [redacted], LLBSW, Appellant's Supports Coordinator, met with Appellant and [redacted] to do a Nursing Facility Level of Care Determination (NFLOC) to determine Appellant's continued eligibility for the MI Choice Waiver Program. [redacted] found that the Appellant did not appear to medically qualify for the waiver services, but was unable to complete the paper NFLOC Determination at that time. (Exhibits 4, p. 8 of 16, and Testimony).

6. On [redacted], [redacted] again met with Appellant and [redacted] to complete the paper NFLOC Determination for the Appellant and [redacted] to sign. [redacted] found that Appellant no longer qualified through any of the Doors (1 through 7) on the NFLOC Determination, and accordingly she was ineligible medically for the MI Choice Waiver Program. (Exhibits 1 & 3, and Testimony).

7. [redacted] sought an exception for Appellant from MPRO on [redacted], due to the fact that Appellant's current medical condition prevents her from being able to care for herself independently, but the request for an exception was denied based on the NFLOC Determination. (Exhibit 1 and testimony).

8. On [redacted], the Waiver Agency sent Appellant an advance action notice that it determined she was no longer eligible for the MI Choice Waiver Program based on Michigan Medicaid NFLOC Determination and advised her that services would be terminated within 90 days from the date of the notice. (Exhibit 5).

9. On [redacted], MAHS received the Appellant's request for an administrative hearing. (Exhibit 6).

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 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 Medicaid (formerly HCFA) 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. *42 CFR 430.25(c)(2)*

> Home and community based services means services not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this subchapter. 42 CFR 440.180(a).
>
> 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).

The Michigan Department of Community Health, Medical Services Administration issued bulletin number MSA 11-27 on July 1, 2011, effective August 1, 2011, for the purpose of adding a MI Choice Policy Chapter to the Medicaid Provider Manual. This new policy chapter provides in part:

> **SECTION 1 – GENERAL INFORMATION**
>
> MI Choice is a waiver program operated by the Michigan Department of Community Health (MDCH) 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 and Medicaid Service (CMS) under section 1915(c) of the Social Security Act. MDCH carries out its waiver obligations through a network of enrolled providers that operate as organized health care delivery systems (OHCDS). These entities are commonly referred to as waiver agencies. MDCH 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. (p. 1).
>
> * * *
>
> **SECTION 2 - ELIGIBILITY**
> The MI Choice program is available to persons 18 years of age or older who meet each of three eligibility criteria:
>
> - An applicant must establish his/her financial eligibility for Medicaid services as described in the Financial Eligibility subsection of this chapter.
>
> - The applicant must meet functional eligibility requirements through the online version of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD).

- It must be established that the applicant needs at least one waiver service and that the service needs of the applicant cannot be fully met by existing State Plan or other services.

All criteria must be met in order to establish eligibility for the MI Choice program. MI Choice participants must continue to meet these eligibility requirements on an ongoing basis to remain enrolled in the program.

2.2. FUNCTIONAL ELIGIBILITY

The MI Choice waiver agency must verify applicant appropriateness for services by completing the online version of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) within 14 calendar days after the date of participant's enrollment. Refer to the Directory Appendix for website information. The LOCD is discussed in the Michigan Medicaid Nursing Facility Level of Care Determination subsection of this chapter. Additional information can be found in the Nursing Facility Coverages Chapter and is applicable to MI Choice applicants and participants.

* * *

2.2.A. MICHIGAN MEDICAID NURSING FACILITY LEVEL OF CARE DETERMINATION

MI Choice applicants are evaluated for functional eligibility via the Michigan Medicaid Nursing Facility Level of Care Determination. The LOCD is available online through Michigan's Single Sign-on System. Refer to the Directory Appendix for website information. Applicants must qualify for functional eligibility through one of seven doors.
These doors are:

- Door 1: Activities of Daily Living Dependency
- Door 2: Cognitive Performance
- Door 3: Physician Involvement
- Door 4: Treatments and Conditions
- Door 5: Skilled Rehabilitation Therapies
- Door 6: Behavioral Challenges
- Door 7: Service Dependency

The LOCD must be completed in person by a health care professional (physician, registered nurse (RN), licensed practical nurse (LPN), licensed social worker (BSW or MSW), or a physician assistant) or be completed by staff that have direct oversight by a health care professional.

The online version of the LOCD must be completed within fourteen (14) calendar days after the date of enrollment in MI Choice for the following:

- All new Medicaid-eligible enrollees
- Non-emergency transfers of Medicaid-eligible participants from their current MI Choice waiver agency to another MI Choice waiver agency
- Non-emergency transfers of Medicaid-eligible residents from a nursing facility that is undergoing a voluntary program closure and who are enrolling in MI Choice

Annual online LOCDs are not required, however, subsequent redeterminations, progress notes, or participant monitoring notes must demonstrate that the participant continues to meet the level of care criteria on a continuing basis. If waiver agency staff determines that the participant no longer meets the functional level of care criteria for participation (e.g., demonstrates a significant change in condition), another face-to-face online version of the LOCD must be conducted reflecting the change in functional status. This subsequent redetermination must be noted in the case record and signed by the individual conducting the determination.

* * *

2.3.B. REASSESSMENT OF PARTICIPANTS
Reassessments are conducted by either a properly licensed registered nurse or a social worker, whichever is most appropriate to address the circumstances of the participant. A team approach that includes both disciplines is encouraged whenever feasible or necessary. Reassessments are done in person with the participant at the participant's home.

The Waiver Agency provided evidence that on [redacted], the Waiver Agency's witness, [redacted], completed an in-home Michigan Medicaid Nursing Facility Level of Care Determination to see if the Appellant met the criteria for the MI Choice waiver program. The Waiver Agency's staff determined that the Appellant appeared to be ineligible for the MI Choice waiver program because the Level of Care Assessment Tool indicated that she no longer qualified to go through any of the doors on the NFLOC Determination. (Exhibit 4, p. 8 of 16, and Testimony). On [redacted], a paper

NFLOC Determination was completed for the Appellant's signature which shows that she no longer met the medical eligibility for the Program. (Exhibits 1 & 3).

The Level of Care Assessment Tool consists of seven service entry Doors. (Exhibit 3). 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 Medicaid Nursing Facility placement the Appellant must meet the requirements of at least one Door. The Waiver Agency presented evidence that based on the Appellant's answers and her niece's answers during the in-person assessment, and their observations, she did not meet any of the criteria for Doors 1 through 7.

[redacted] indicated that previously Appellant had qualified through Door 2, but based on their current assessment, she did not show any problems with cognitive performance, such as problems with her short term memory. Appellant was given a memory test (the three word test) and she did great on the test indicating Appellant had no problems with her short term memory. [redacted] stated that while it had been reported that Appellant suffers from hallucinations, at the time of the assessment there were no such hallucinations reported within the 7 day look back period. Accordingly, the Appellant did not meet the criteria for behavior under Door 6.

The Appellant's niece and guardian [redacted] testified that she feels the Appellant needs to remain in the waiver program. She stated the Appellant has had another seizure since the assessment was done. Appellant has good and bad days. [redacted] said Appellant sometimes has hallucinations and at times believes her son is still alive. Appellant sees things in a child like manner and needs to be coaxed to eat or reminded to take her medications. [redacted] stated the staff at [redacted] is needed to help the Appellant. She stated the Appellant is also seeing a neurologist to determine what is causing her seizures.

[redacted], the director of the [redacted] testified that she is a nurse. [redacted] stated she agreed with the assessment that was done by [redacted]. She stated the Appellant is schizophrenic and does well at their facility. [redacted] believes that Appellant will not receive as good of care if she has to leave the [redacted], and she is concerned with what might happen to the Appellant if she does leave.

Weighing the evidence in this case the Waiver Agency provided a preponderance of evidence to show that the Appellant is not eligible for Medicaid nursing facility services and thus not eligible for the MI Choice program. The Appellant did not prove by a preponderance of evidence that she requires a Nursing Facility Level of Care and MI Choice program eligibility. The Appellant does not meet the requirements for any Door 1 through 7 on the Medicaid Nursing Facility Level of Care Determination Tool. Therefore, she is not eligible for MI Choice program eligibility.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly determined the Appellant was not eligible for the MI Choice waiver.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

William D Bond

William D. Bond
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 10/31/2011

***** 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.