

**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:

Docket No. 2011-25351 EDW

██████████,

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.

After due notice, a hearing was held ██████████. ██████████ served as hearing representative for the Appellant.

██████████ was present on behalf of the Appellant.

██████████ at the Appellant's nursing facility was present on her behalf.

██████████ was present on behalf of the Appellant.

██████████, represented the Department's waiver agency, the ██████████. ██████████ was present as a witness on behalf of the Department.

██████████ was present on behalf of the waiver agency.

ISSUE

Did the Waiver agency properly deny MI Choice Wavier eligibility to the Appellant?

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 Department contracts with the ██████████ to provide MI Choice Waiver services to eligible beneficiaries.
2. The ██████████ must implement the MI Choice Waiver program in accordance to Michigan's waiver agreement, Department policy and its contract with the Department.
3. The Appellant is a ██████ year-old woman seeking MI Choice Waiver services.

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4. The Appellant currently resides in a nursing facility.
5. A Michigan Medicaid Level of Care determination was completed when nursing facility transition services/priority categorization was requested of the MI Choice Waiver agency, on the Appellant's behalf.
6. The Appellant was participating in physical therapy services in an amount sufficient to medically qualify for MI Choice Waiver services on the date of the first LOC assessment in ██████████. (Department hearing summary indicating medical eligibility for waiver services and uncontested testimony at hearing)
7. The Waiver Agency denied MI Choice Waiver eligibility to the Appellant indicating she is likely eligible for Home Help Services through the Department of Human Services.
8. A second Level of Care Assessment was completed on or after ██████████ following a telephone call from the facility social worker to indicate the Appellant likely overstated her ability at the initial assessment.
9. The second level of care assessment was completed ██████████. The Appellant scored 6 points at door 1 at this assessment.
10. Despite scoring 6 points at door 1 on the ██████████, LOC, the Waiver Agency sent a denial notice to the Appellant, again indicating she could be served by the Home Help Services offered through the Department of Human Services. (Page 1 of 7 of LOC dated "██████████", submitted by the Waiver Agency and Nursing facility transition notice and exception request dated ██████████)
11. An exception request was made by the waiver agency to the MDCH. This document indicates the Appellant meets LOC criteria through door 1.
12. The exception request was denied in an e-mail on or about ██████████, with comments written as "sounds like home help." (Waiver agency Exhibit, page 21)
13. The Appellant appealed her denial for nursing facility transition services through the MI Choice Waiver ██████████.

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 an Area Agency on Aging, 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)*

MI Choice Waiver waiting list procedure and priority categories

Policy Bulletin 09-47 issued by MDCH addresses wait list procedures and priority categories.

The following delineates the current waiting list priority categories and their associated definitions. They are listed in descending order of priority.

Persons No Longer Eligible for Children's Special Health Care Services (CSHCS) Because of Age This category includes only persons who continue to need Private Duty Nursing care at the time coverage ended under CSHCS.

Nursing Facility Transition Participants A given number of program slots will be targeted by MDCH each year to accommodate nursing facility transfers. Nursing facility residents are a priority only until the enrollment target established by MDCH has been reached.

Current Adult Protective Services (APS) Clients When an applicant who has an active APS case requests services, priority should be given when critical needs can be addressed by MI Choice Program services. It is not

expected that MI Choice Program agents seek out and elicit APS cases, but make them a priority when appropriate.

Chronological Order By Date Services Were Requested

This category includes potential participants who do not meet any of the above priority categories and those for whom prioritizing information is not known.

Updates

Below are the two waiting list priority categories that have been updated. The updated categories will also be available on the MDCH website at www.michigan.gov/medicaidproviders >> Prior Authorization >> The Medicaid Nursing Facility Level of Care Determination >> MI Choice Eligibility and Admission Process.

Nursing Facility Transition Participants

Nursing facility residents who face barriers that exceed the capacity of the nursing facility routine discharge planning process qualify for this priority status. **Qualified persons who desire to transition to the community are eligible to receive assistance with supports coordination, transition activities, and transition costs.** (emphasis added by ALJ)

Current Adult Protective Services (APS) Clients and Diversion Applicants

When an applicant who has an active APS case requests services, priority is given when critical needs can be addressed by MI Choice Waiver services. It is not expected that MI Choice Waiver agents solicit APS cases, but priority should be given when appropriate.

An applicant is eligible for diversion status if they are living in the community or are being released from an acute care setting and are found to be at imminent risk of nursing facility admission. Imminent risk of placement in a nursing facility is determined using the Imminent Risk Assessment, an evaluation approved by MDCH. Supports coordinators administer the evaluation in person, and final approval of a diversion request is made by MDCH.

*Medical Services Administration Policy Bulletin 09-47,
October 2009, pages 1-2 of 3.*

Qualified persons referenced in the MDCH memos refers to those persons who have been determined to meet the Michigan Medicaid Level of Care criteria.

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.

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 did meet criteria at door 1 upon her second assessment ██████████. She scored 6 points because during the look back period she received limited

assistance with transfers (3 points); was independent with the remaining ADLs. Her total score for this door was therefore 6 points. This qualifies her medically to participate in the MI Choice Waiver service.

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."

There is no assertion from either party the Appellant qualified through this Door. As it is not contested by either party, no discussion of this criteria will be completed in this Decision and Order.

Door 3
Physician Involvement

The LOC indicates that to qualify under Door 3 the applicant must

... [M]eet either of the following to qualify under

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 is no assertion from either party the Appellant qualified through this Door. As it is not contested by either party, no discussion of this criteria will be completed in this Decision and Order.

Door 4
Treatments and Conditions

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

There is no assertion from either party the Appellant qualified through this Door. As it is not contested by either party, no discussion of this criteria will be completed in this Decision and Order.

Door 5
Skilled Rehabilitation Therapies

The level of care tool provides that the applicant must:

...[H]ave 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

The evidence presented about physical therapy is that the Appellant was participating in physical therapy as a resident of the nursing facility in the requisite number of minutes to medically qualify for services through this door.

Door 6
Behavior

In order to qualify under Door 6 the Appellant must meet one of the following two criteria:

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.

There is no assertion from either party the Appellant qualified through this Door. As it is not contested by either party, no discussion of this criteria will be completed in this Decision and Order.

Door 7
Service Dependency

LOC page 7 provides that the applicant could qualify under Door 7 if she is currently being served in a nursing facility (and for at least one year) or by the MI Choice or PACE program, and requires ongoing services to maintain her current functional status.

There is no assertion from either party the Appellant qualified through this Door. As it is not contested by either party, no discussion of this criteria will be completed in this.

Discussion

The Waiver Agency presented 2 separate assessments conducted of the Appellant. The result of each indicates she is medically eligible for MI Choice Waiver services. In ██████████ at the initial assessment it was indicated the Appellant was medically eligible as a person participating in the requisite amount of skilled rehabilitative therapy, specifically physical therapy. This evidence is uncontested. Despite her medical eligibility for the MI Choice Waiver services she was not placed in a priority category or offered nursing facility transition services. A second assessment ██████████, revealed she is eligible through Door 1, scoring 6 points at that door. She was again denied eligibility, despite medically qualifying. At hearing the waiver agency offered that because the Appellant could be served by the Home Help Services program offered by the Department of Human Services, she was not eligible for Waiver Services. Additionally it was offered that because her physical therapy would end upon release from the nursing facility, she would not meet LOC, thus it was proper to deny her transition services through the MI Choice Waiver.

The interpretation and application of the criteria by the waiver agency in this case is not supported by legal authority or the policy as written. There is no policy cited to support the position asserted that after determining an applicant meets LOC, she is ineligible for MI Choice Waiver services if she can be served by Home Help. It may be appropriate to transition to Home Help Services following transition from a nursing facility, however, transition services themselves are not a Home Help Service.

The Waiver Agency presented a second position that is not supported by policy or legal authority. It was asserted the Appellant will not likely continue to participate in physical therapy once released from the facility, thus she does not qualify for services based upon this criteria. This is a misapplication of policy. The level of care assessment has a look back period, not a look forward period. The scores are based upon the status of the resident at the time of the assessment and designated look back period for each of the qualifying criteria. If it is intended to be different for door 5 or any of the criteria, this intention is not spelled out in the policy or field guide.

It was further offered that the exception request was denied by the Michigan Department of Community Health. The exception request stated on it that the Appellant

meets criteria at Door 1. The evidence of the MDCH denial came in the form of a print out of an e-mail that states in its entirety, "Ruth Nortley's exception was denied on ██████████ by (worker's name omitted by ALJ) Comments: sounds like Adult Home Help." No criteria for approving an exception or denying an exception was presented in writing or via testimony at hearing. The e-mail presented cannot supplant the written policy or law in this case. It is not known why an exception request was necessitated given that the Appellant medically qualified for MI Choice Waiver Services entering through either Door 5, Door 1 or both, depending on which assessment is relied upon. It is not known how the Department determines whether to approve or deny an exception request. No policy was placed into evidence supporting the proposition that an otherwise medically qualified person cannot receive nursing facility transition services from the Waiver agency. Home Help Services does not provide nursing facility transition services, nor can it be in place on the day of transfer out of a facility given the procedures for its administration. The evaluation/functional assessment cannot take place until the applicant is in her home. Approval occurs sometime thereafter. This procedure does not address needs of people medically dependent upon release. Here it is undisputed the Appellant satisfies the medical criteria established in policy to participate in nursing facility transition services. This ALJ cannot find in favor of the Waiver Agency in this case due to the misapplication of medical eligibility criteria in evidence.

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 improperly denied the Appellant participation in the MI Choice Waiver nursing facility transition services after determining she met medical eligibility criteria.

IT IS THEREFORE ORDERED that:

The AAA's must establish the Appellant's eligibility for participation in nursing facility transition MI Choice Waiver services based upon the 2 Level of Care Assessments completed on behalf of the Appellant.

Jennifer Isiogu
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

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cc:



Date Mailed: 5/27/2011

***** 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.