

**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. 2011-4674 NHE

██████████

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 ██████████. ██████████ Appellant's ██████████ and ██████████, represented the Appellant. The Appellant's ██████████, appeared and gave testimony. ██████████ Appellant's ██████████, was also present. The Appellant was not present.

██████████, Michigan Department of Community Health (MDCH), ██████████ represented the Department. ██████████ or nursing facility) ██████████ and ██████████ and ██████████, appeared as witnesses for the Department. Several ██████████ staff were also present.

ISSUE

Did the Department properly determine that the Appellant does not require a Nursing Facility Level of Care?

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 ██████████ Medicaid beneficiary who currently resides in ██████████, a skilled nursing facility (██████████ or nursing facility).
2. The Appellant was admitted to the nursing facility on ██████████. A Michigan Medicaid Nursing Facility Level of Care Determination was completed in ██████████ and the Appellant was determined to meet criteria for Medicaid nursing facility coverage through Door 1. (Department (D) Exhibits A and C).

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3. In [REDACTED] the Appellant was prescribed 14 medications, vitamins or over-the-counter medications. The Appellant's mental health medications were prescribed for mild anxiety and mild depression. (D Exhibit C).
4. On [REDACTED], [REDACTED] completed a Michigan Medicaid Nursing Facility Level of Care Determination to determine if the Appellant met criteria for Medicaid nursing facility coverage. (D Exhibit B).
5. [REDACTED] and [REDACTED], completed the Michigan Medicaid Nursing Facility Level of Care Determination (LOC) and determined that the Appellant did not meet the nursing facility eligibility criteria for Doors 1 through 7. (D Exhibits B, G and H).
6. On [REDACTED], [REDACTED], through [REDACTED], requested that the Michigan Peer Review Organization (MPRO) review the ineligibility determination and that the exception process be performed for the Appellant. (D Exhibit C).
7. On [REDACTED], MPRO completed its review, applied the frailty exception process, and provided the Appellant written notice that she did not meet the criteria for Doors 1 through 7, nor an exception, and of her right to appeal the determination. (D Exhibits C, D and E).
8. The Appellant's [REDACTED] sent a request for hearing which was received by the State Office of Administrative Hearings and Rules for the Department of Community Health on [REDACTED]. (D Exhibits F, I and J).

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.

Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria. In accordance with the federal regulations the Michigan Department of Community Health (MDCH) implemented functional/medical eligibility criteria for Medicaid nursing facility, MI Choice, and PACE services. Nursing facility residents must also meet Pre-Admission Screening/Annual Resident Review requirements.

The Medicaid Provider Manual, Nursing Facilities Coverages Section, July 1, 2010, lists the policy for admission and continued eligibility process as well as outlines functional/medical criteria requirements for Medicaid-reimbursed nursing facility, MI Choice, and PACE services. (D Exhibits A, G and H).

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Section 5 of the Medicaid Provider Manual Nursing Facility Coverages Section references the use of an online Michigan Medicaid Nursing Facility Level of Care Determination tool. The LOC is mandated for all Medicaid-reimbursed admissions to nursing facilities or enrollments in MI Choice or PACE. A written form of the LOC, as well as field guidelines are found in the *MDCH Nursing Facility Eligibility Level of Care Determination, Pages 1 - 9, 3/07/05* and *MDCH Nursing Facility Eligibility Level of Care Determination Field Definition Guidelines, Pages 1 - 19, 3/15/05*. (D Exhibits G and H).

The Department provided evidence that on ██████████, ██████████ completed an online Michigan Medicaid Nursing Facility Level of Care Determination to determine whether the Appellant met criteria for Medicaid nursing facility coverage. (D Exhibits C, G and H).

The Department provided evidence that the Michigan Medicaid Nursing Facility Level of Care Determination demonstrated that the Appellant did not meet the nursing facility eligibility criteria for Doors 1 through 7. (D Exhibit B).

On ██████████, ██████████ requested that the Michigan Peer Review Organization (MPRO) review the ineligibility determination and that the exception process be performed for the Appellant. (D Exhibit C). On ██████████, MPRO completed its review and provided the Appellant written notice that she did not meet the criteria for Doors 1 through 7 and of her right to appeal the determination. (D Exhibits G and H).

The Level of Care Assessment Tool consists of seven service entry Doors. (D Exhibit G). 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 Appellant possesses the burden of proving by a preponderance of evidence that she meets the criteria for at least one of the LOC "Doors" and as such is eligible for Medicaid-funded nursing facility coverage. As such, Appellant bears the burden of proving by a preponderance of evidence that the Appellant did meet the LOC criteria for at least one door on ██████████.

Applying the evidence in the record to each of the LOC seven doors:

Door 1
Activities of Daily Living (ADLs)

██████████ testified that with regard to the Appellant's ADLs, the Appellant was independent in Bed Mobility, independent in Transfers, independent in Toileting Use, and independent in Eating. The documentary and testimony evidence presented supports the Department determination regarding the Appellant's independence with ADLs. (D Exhibits B, C and E). LOC page 3 of 9 provides that the Appellant must score at least six points to qualify under Door 1.

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 scored independent in the four areas of LOC ADLs and her point total was less than 6 points. (D Exhibit B). The Appellant did not meet eligibility through Door 1.

Toileting: ██████████ testified that upon admission the Appellant had a more active irritable bowel syndrome requiring more assistance with cleaning after a bout with diarrhea. ██████████ indicated that Appellant's irritable bowel syndrome had improved and in the 7 days prior to the LOCD the Appellant had performed all her toileting needs independently.

Bed Mobility: There is no dispute that the Appellant can get in and out of her bed independently.

Eating: ██████████ testified that the Appellant eats independently from her tray.

Transfers: ██████████ stated it takes the Appellant a longer time to perform her transfers, but she is able to walk to and from rooms in the facility and therefore was independent in transfers.

The Appellant did not establish by a preponderance of evidence that she was not independent in bed mobility, transfer, toilet use and eating in the seven days before the assessment and therefore the Department correctly concluded that the Appellant does not qualify under Door 1.

Door 2
Cognitive Performance

██████████ provided testimony that with regard to Cognitive Performance, the Appellant has some short-term memory problems, scored modified independent in cognitive skills, and is able to make herself understood. (D Exhibit B). The LOC pages 3-4 of 9 provides that to qualify under Door 2:

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's ██████████ testified that Appellant is impaired in decision-making. The Appellant's ██████████ gave the example that her ██████████ was admitted to the nursing facility for over-medicating herself with pain medication and was found wandering outside. The Appellant's ██████████ asserted that she needs to be in a nursing facility to monitor her administration of pain medications or the consequence might be drug abuse.

The Appellant's ██████ testified that the wandering incident occurred in the snow, that Appellant accidentally set fire to a senior facility she resided in prior to ██████████, and that removing Appellant from ██████████ would do Appellant harm.

The Appellant's ██████████ sought and was granted an opportunity to submit into evidence Appellant's Exhibits 1–7. This administrative law judge is limited to considering evidence that the Department had at the time it made its decision on ██████████. A review of Exhibits 1-7 demonstrates that none were provided to ██████████ or the Department prior to its ineligibility determination and none were dated within the seven to 14 day look-back period. Being that Exhibits 1-7 were not within the LOCD consideration timeframe they are assigned much less weight of credibility than the Departments exhibits.

The Appellant's ██████████ sought use of Exhibit 2 to show that an assessment of the Appellant subsequent to the ██████████ LOCD found Appellant to be moderately impaired for cognitive performance. The Department's ██████████ responded that she contacted the individual who assessed Appellant to inquire about the moderately impaired finding. ██████████ explained that HHS Options assessed Appellant in preparation for her discharge from ██████████ to assess community placement needs. ██████████ further explained that the HHS Options staff marked off the "moderately impaired" box on the assessment form because Appellant had a guardian.

First, the LOCD is performed for a different purpose than the HHS Options assessment. Second, there are many reasons why an individual may have a guardian, and there are many types of guardianships. Third, the ██████████ staff who performed Appellant's ██████████ LOCD is a registered nurse trained in performing a LOCD Door 2 assessment and experienced in determining a person's mental health status. For the preceding three reasons the Department's LOCD Door 2 determination is more credible than Appellant's testimony or document evidence as to her modified independent cognitive performance.

The Department correctly concluded that the Appellant does not qualify under Door 2.

Door 3
Physician Involvement

██████████ testified that the Appellant had one physician visit and two physician order changes within 14 days prior to the assessment. (Exhibit B). The LOC indicates that to qualify under Door 3 the Appellant must:

...[M]eet either of the following to qualify under Door 3

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

The Appellant meeting none of the above criteria, the Department correctly determined that the Appellant did not qualify under Door 3.

Door 4
Treatments and Conditions

The Department representative testified that in order for the Appellant to qualify under Door 4, the Appellant must meet the treatment and conditions requirements for Door 4. LOC page 5 indicates that in order to qualify under Door 4, the Appellant 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

The Department provided evidence that the Appellant did not receive treatment for nor demonstrate any of the health conditions required to qualify under Door 4 within 14 days of the assessment date. The evidence presented does not support a finding that the Appellant has any qualifying treatment or condition under Door 4.

Door 5
Skilled Rehabilitation Therapies

The Department representative stated that to qualify under Door 5 an applicant had to have medical documentation of receiving Speech, Occupational or Physical Therapy within seven days of assessment. LOC page 6 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 Department provided evidence that the Appellant had not received any Skilled Rehabilitation Therapy within 7 days of the date of the assessment. The Department properly concluded that the Appellant did not qualify under Door 5.

Door 6
Behavior

The Appellant may qualify under Door 6 if the Appellant displayed certain behaviors during the seven days before the assessment. LOC page 6 provides a listing of behaviors recognized under Door 6. The Department provided evidence that the Appellant did not exhibit any of the following behavior symptoms during the 7 days before the assessment: Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, Resists Care. The Department also established that the Appellant did not exhibit any of the following Problem Conditions during the 7 days before the assessment: Delusions and Hallucinations. LOC page 8 provides that the Appellant would qualify under Door 6 if the Appellant had a score under the following two options:

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.

The Department witness testified that the Appellant did not score under either of the two possible categories. The Department properly concluded that the Appellant did not qualify under Door 6.

Door 7
Service Dependency

The Department representative stated that the Appellant could qualify under Door 7 if there was evidence that she had been in a nursing facility for at least one year and

required on-going services to maintain her current functional status. The Appellant's ██████████ testified that because the estimated discharge date was just short of one year she considered the Appellant to have resided in the nursing facility for one year. The Department representative clarified that there are three criteria to be met in order to qualify through Door 7 and one year in a nursing facility was only one of the three. The Department representative explained that the Appellant also needed to demonstrate she needs on-going services and those services cannot be provided in any location than the more restrictive nursing facility setting. The evidence of record establishes that the Appellant needs on-going services but those services can be provided in the community. Because nursing facility service dependency was not established, the Appellant did not qualify under Door 7.

Exception Process

██████████ works for an independent review organization, MPRO. ██████████ stated when MPRO received the LOC Exception Process request from ██████████, who performed the ██████████ LOC assessment, the Appellant's ability to perform ADLs, her diagnoses, her medications, her cognitive performance and other aspects of her medical record were reviewed to determine whether the Appellant had a history of meeting frailty criteria in the prior six months.

The Michigan Department of Community Health policy related to LOCD exception eligibility for nursing facility 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.

██████████ said she applied the frailty exception criteria as details detailed in the Department's Exhibit D:

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.

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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 evidence as to how on October 22, 2010, the Appellant did not meet any of the frailty exception criteria. (D Exhibits C and D).

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

- The Appellant took one-to-two minutes to perform her ADLs.
- The Appellant told nursing facility staff she was in pain all the time, but staff reported the Appellant's pain did not cause her to be incapacitated.
- The Appellant had no weight loss, instead she had gained weight, from 89 pounds to 109 pounds during the look-back period.


██████████ said that the Appellant did not meet the criteria for any of the Doors 1 – 7 of the LOC assessment. (D Exhibits G and H). ██████████ stated that there was no medical documentation for Appellant that constituted a frailty exception, and Appellant was mailed an advance action notice. (D Exhibits C, D and E). The advance action notice included notice of rights to a hearing.

The Department based its decision on information it had on ██████████, and noting that no medical documentation established that the Appellant met the LOCD or any of the frailty exception criteria ascertained by an independent review organization. Based on medical documentation it had at the time, it is decided that the Department was proper when it found the Appellant did not meet the nursing home facility level of care and did not meet the frailty exception criteria. The Department is bound by policy. The Department provided sufficient information to show that the Appellant is not eligible for Medicaid nursing facility services.

The Appellant did not show by a preponderance of evidence that she requires a nursing facility level of care. The Appellant does not meet the requirements for any Door on the Medicaid Nursing Facility Level of Care Determination Tool, or an exception. Therefore, she is not eligible for Medicaid nursing facility services.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department correctly determined that the Appellant does not require a Medicaid Nursing Facility Level of Care.


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IT IS THEREFORE ORDERED that:

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

Lisa K. Gigliotti
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc:



Date Mailed: 1/18/2011

***** 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.