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) 373-4147

IN THE MATTER OF:

[redacted],

Appellant.
_____/

Docket No. 2013-27420 EDW
2013-34042 EDW

Case No. [redacted]

DECISION AND ORDER

These matters are before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200 *et seq*., and upon the Appellant's requests for hearing.

After due notice, a consolidated hearing was held on [redacted]. Appellant appeared and testified on her own behalf. [redacted], Director of Quality, represented the Department of Community Health's Waiver Agency, HHS, [redacted] ("Waiver Agency" or "HHS"). [redacted], registered nurse and Pacer Project Manager at the [redacted] (MPRO); [redacted], clinical manager at HHS; [redacted], registered nurse and case manager at HHS; and [redacted], social worker and case manager at HHS; also testified as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly decide to terminate Appellant's services through 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. Appellant is a [redacted] year-old female who has been diagnosed with diabetes and rheumatoid arthritis. (Testimony of Weesies).

2. HHS 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.

3. Appellant has been enrolled in and receiving MI Choice waiver services through HHS, including community living supports (CLS) and a personal emergency response system. (Testimony of [redacted]).

4. On [redacted], Appellant informed the Waiver Agency that she would be on vacation in [redacted], between [redacted] and [redacted], and would therefore not be requiring services during that time period. (Testimony of [redacted]).

5. Appellant was also in the process of switching the agency that provided her care at that time, and the plan was to have the new agency begin providing care upon Appellant's return. (Testimony of [redacted]).

6. Appellant does not recall when she returned from [redacted], but [redacted] attempted to telephone her a number of times after [redacted] without success. (Testimony of [redacted]).

7. The new agency that was approved to provide care to Appellant also reported to [redacted] that Appellant had not contacted them. (Testimony of [redacted]).

8. On [redacted], the Waiver Agency sent Appellant written notice that her services were being terminated because she had been out of the service area for over thirty (30) days. (Testimony of [redacted]).

9. The termination was effective immediately. (Testimony of [redacted]).

10. However, as acknowledged by the Waiver Agency's representative, the termination notice was improper and should have provided at least 12 days advance notice of the termination. (Testimony of [redacted]).

11. The Waiver Agency's representative also testified that the termination notice was improper because HHS should have kept Appellant's slot in the program open and just reassessed Appellant on her return. (Testimony of [redacted]).

12. On [redacted], Appellant telephoned the Waiver Agency and spoke with [redacted] regarding the termination letter she had received. (Testimony of Appellant; Testimony of [redacted]).

13. On [redacted], the Michigan Administrative Hearing System (MAHS) received a Request for Hearing filed by Appellant with respect to that termination. That appeal was docketed as 2013-27420 EDW and scheduled for hearing.

14. On [redacted], a HHS social worker performed an assessment and Nursing Facility Level of Care Determination (LOCD) in Appellant's home. (Testimony of Motter).

15. That social worker found that Appellant qualified through Door 7 of the LOCD and Appellant's services were reinstated that day. (Testimony of [redacted]).

16. However, because of questions [redacted] had about Door 7, another assessment and LOCD were performed in Appellant's home on [redacted]. (Testimony of [redacted]).

17. Following that determination, the Waiver Agency determined that Appellant did not pass through any of the seven doors of the LOCD and was therefore ineligible for the waiver program. (Testimony of [redacted]).

18. The Waiver Agency subsequently sent Appellant written notice that her services would be terminated because she did not meet the criteria for the waiver program. (Testimony of [redacted]).

19. On [redacted], the Michigan Administrative Hearing System (MAHS) received a Request for Hearing filed by Appellant with respect to the second termination. That appeal was docketed as 2013-34092 EDW and scheduled for hearing.

20. Due to the pending appeals, Appellant's services have remained in place since [redacted]. (Testimony of Appellant; Testimony of [redacted])

21. The hearing for Docket No. 2013-27420 EDW was scheduled for [redacted]. However, on that day, the parties agreed on the record that the two cases should be consolidated and heard together at a later date.

22. A hearing on the consolidated cases was held 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.

Appellant is claiming services through the Department's Home and Community Based Services for Elderly and Disabled. The waiver is called MI Choice in Michigan. The program is funded through the federal Centers for Medicare and Medicaid Services to the Michigan Department of Community Health (Department). Regional agencies, in this case HHS, 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. *See* 42 CFR 430.25(c)(2).

Types of services that may be offered include:

> 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).]

With respect to functional eligibility for the MI Choice waiver program, the Medicaid Provider Manual (MPM) provides:

> **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 the 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.

The applicant must also demonstrate a continuing need for and use of at least one covered MI Choice service. This need is originally established through the Initial Assessment using the process outlined in the Need For MI Choice Services subsection of this chapter.

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 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.
>
> Copies of the LOCD for participants must be retained by the waiver agency for a minimum period of six years. This information is also retained in the MDCH LOCD database for six years. [MPM, January 1, 2013 version, MI Choice Waiver Chapter, pages 1-2.]

Here, the Waiver Agency found that Appellant does not meet the criteria to pass through any of the seven doors and was therefore ineligible for the program.

Only the Waiver Agency's determination regarding Door 7 is disputed in this case. While Appellant requires assistance with certain tasks, none of that assistance relates to the tasks identified in Door 1. Similarly, while Appellant has medical problems, none of her conditions or their effects meets the criteria for passing through Doors 2, 4, or 6. Moreover, the medical treatment Appellant receives does not reach the levels required by Doors 3, 4, or 6.

In order to pass through Door 7: Service Dependency, the LOCD tool states:

> **Program participant for at least one year** and requires ongoing services to maintain current functional status. You may combine time the applicant received services across the three programs. No other community, residential or informal services are available to meet the applicant's needs.

Therefore, as provided in the LOCD, there are only two requirements that an applicant must meet to pass through Door 7: (1) be a program participant for at least one year and (2) require ongoing services to maintain current functional status.

Here, Respondent's representative expressly testified and agreed that Appellant requires the ongoing services to maintain her current functional status. Therefore, that requirement is not disputed in this case and Appellant clearly meets it.

The only issue disputed is whether Appellant has been a program participant for at least one year.

While Appellant was a program participant and receiving services since at least [redacted], Respondent argues that Appellant had not been a program participant for at least one year as of the date of the LOCD, *i.e.* [redacted], because of the gap in her services between [redacted] and [redacted]. As interpreted by Respondent, Door 7 requires that the Appellant have received services for 365 consecutive days prior to the LOCD. Appellant had not received services for 365 consecutive days prior to the LOCD and the Waiver Agency therefore decided to terminate her services.

However, this ALJ finds that Respondent's interpretation of the criteria of Door 7 to be incorrect. As an initial matter, the ALJ would note that Respondent's interpretation does not match language of the LOCD, which only provides that the beneficiary be a "program participant" for at least one year and not that he or she receive services for 365 consecutive days prior to the LOCD. Moreover, the Waiver Agency's interpretation is implausible given that not all participants require or are approved for services every single day, and that participants are allowed to take vacations, as was the case here, and have their services temporarily stopped. Such participants would not receive services 365 days in a row, but would still be consider program participants.

Given the plain language of the LOCD, the better interpretation of Door 7 is that the applicant only must have been program participant for at least one year in order to pass through Door 7, assuming the other requirement for eligibility is met. Here, it is undisputed that Appellant would have been a program participant approved for services for over one year at the time of the LOCD if her services had not been terminated on January 18, 2013.

However, as found above, that termination was improper given its failure to provide the required advance notice of the termination. As provided in the MPM[1] and acknowledged by Respondent's representative, an Advance Action Notice must be sent to MI Choice participants when action is being taken to terminate services a participant currently receives and that notice must be provided at least 12 days in advance of the intended action. No such notice was provided in this case and the termination took immediate effect.

[1] MPM, January 1, 2013 version, MI Choice Waiver Chapter, page 34.

Moreover, the Waiver Agency's representative also testified that the termination was improper because HHS should have kept Appellant's slot in the program open and just reassessed Appellant on her return. In light of the Waiver Agency's error, Appellant's services were subsequently) reinstated after she filed a request for hearing and the matter was further investigated.

Respondent cannot identify an improper termination as a gap in services or use it as a basis for a finding that Appellant has not been a program participant for a year. Appellant would have been a program participant approved for services for over one year at the time of the LOCD if not for Respondent's error. Thereafter, the Waiver Agency compounded that error by finding that Respondent had not been a program participant for over a year at the time of the LOCD.

The Waiver Agency's determination that Appellant had not been a program participant for at least one year was erroneously and solely based on the improper earlier termination of services, a termination that even the Waiver Agency now acknowledges as an error. Appellant has been a program participant for at least one year.

Given the initial improper termination and the subsequent error regarding program participation, in addition to Respondent's agreement that Appellant requires the ongoing services to maintain her current functional status, the Waiver Agency erred in determining that Appellant did not meet the criteria to pass through Door 7. Accordingly, Appellant is eligible for the waiver program through that door and the Waiver Agency's decision to terminate her services must be reversed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency improperly decided to terminate Appellant's services.

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision to terminate Appellant's services is **REVERSED**.

Steven Kibit

Steven J. Kibit
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

[redacted]

[redacted]
Docket No. 2013-27420 EDW; 2013-34092 EDW
Decision and Order

Date Signed: 6/11/13

Date Mailed: 6/11/2013

cc: [redacted]

***** 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.